

Brno, 16 December 2024

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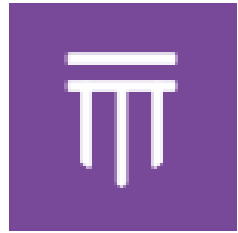
# Backsliding, Backlash, & Democratic Decay



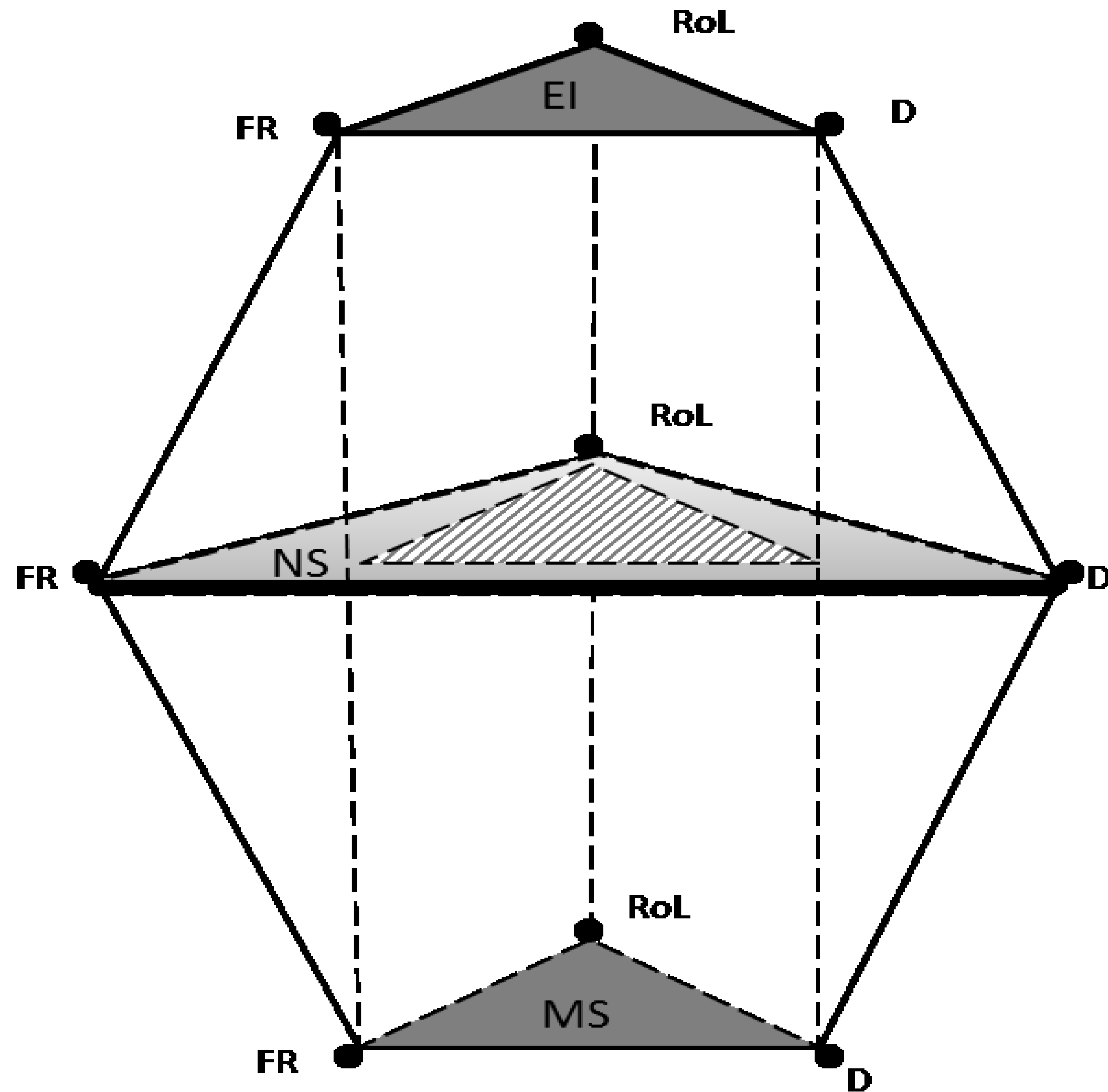
JUSTIN  
Judicial Studies Institute  
Masaryk University

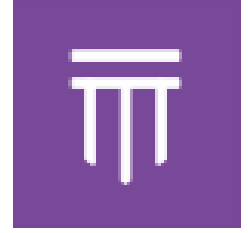
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Katarína Šipulová



# A2 triangular protection





# What is the Rule of Law?

- Article 2 TEU:
  - Fundamental rights
  - Democracy
  - Rule of Law



# What is the Rule of Law?

= principle conferring individuals the right to challenge acts of public authorities before the court (**in the fields covered by the EU**)

= all individuals and authorities are bound and entitled to the benefit of law of certain quality

= it protects individual against **arbitrary** interferences by public authorities in the rights – **within the scope of EU law or including domestic level?**

-> the courts must be independent.

-> what does it mean?

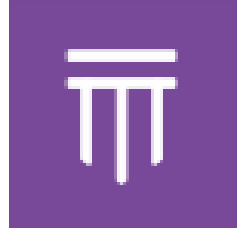
-> is the principle justiciable?



# Venice Commission RoL Checklist

Benchmarks:

1. Legality
2. Legal certainty
3. Prevention of abuse (misuse) of power
4. Equality before the law and non-discrimination
5. Access to Justice



# Venice Commission RoL Checklist

Benchmarks:

## 1. Legality

- Supremacy of law, compliance with law, law-making

## 2. Legal certainty

- Accessibility of law, foreseeability, stability and consistency, legitimate expectations, non-retroactivity, nullum crimen sine lege, res judicata

## 3. Prevention of abuse (misuse) of power

## 4. Equality before the law and non-discrimination

- Equality in law and before law

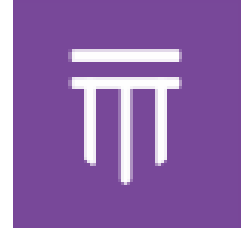
## 5. Access to Justice

- Independence and impartiality
- Fair trial
- Constitutional justice



# What is the Rule of Law and Do We Still Care?

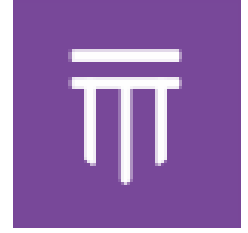
- Excuse me, may I perhaps very briefly bring up the subject of Viktor Orbán and the crisis of democracy and the rule of law in the EU? No? Not interested at all? Can't be bothered any more? Totally fed up with this nonsense? Stop whining, you say let the guy have his billions, get over it already?
- [Maximilian Steinbeis. We are Viktor Orbán. Verfassungsblog.de, 2 December 2022]



# Democratic Backsliding

- Poland, Hungary, Romania, **Slovakia, Spain** – which rights are at stake?





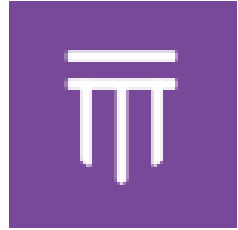
# Democratic Backsliding

- **Media freedoms**
- **Minority rights**
- **Judicial independence**
  - Judges
  - Prosecutors
- **Independence of police**
- **Electoral rights**
- **Asylum rights**
- **Freedoms related to NGO sector**
- **LGBTQI rights**



# EU Rule of Law Toolbox

	<b>TOOL</b>	<b>AIM</b>	<b>ECOMM</b>	<b>ENFORCEMENT</b>
<b>LEGAL</b>	Infringements	MS compliance with EU law	Initiates all stages, present in monitoring & compliance	Monitoring & Coercion
	EU-Pilot	Pre-infringement stage to alleviate formal reputational costs	Sole competence	Monitoring & Coercion
	Preliminary ruling proceedings	Uniform application and interpretation of EU law	COMM's Legal Service often acts as a third party	Monitoring
	Conditionality Regulation	Protection of EU Budget in cases of EU values violation or a risk of thereof	Collects information and evaluates risks to the EU budget. Proposes measures to the Council	Monitoring



# EU Rule of Law Toolbox

<b>POLITICAL</b>	Article 7	Enforcement of A2 fundamental values	Initiates the procedure (determination of a clear risk and at second stage its persistent nature)	Monitoring
	RoL Framework	Monitors systemic threats before they reach A7 stage	Evaluates threats, provides recommendations to MS, monitors compliance with recommendations	Monitoring
	RoL Mechanism	Promotion and monitoring of RoL	Creates annual reports, communicates them to MS	Monitoring
	EU Justice Scoreboard	Annual monitoring of quality of legal and judicial systems	Annual Reports Provides country specific recommendations	Monitoring & Coercion
	RoL Dialogue	Promotion of RoL	No formal involvement, but COMM may indirectly set an agenda by RoL report	Indirect monitoring
	National RoL Dialogues	Discussion of changes implemented by MS	Co-organises with FRA and Commission representation in MS	Monitoring & Coercion



# EC Rule of Law Report

- RoL is an integral part of the democratic identity of the EU and MS
- It is essential for the functioning of the EU, and for citizens and business to trust public institutions
- Scope:
  - Justice system
  - Anti-corruption framework
  - Media pluralism
  - Media freedom
  - Institutional Ch&B



# Council's Annual Rule of Law Dialogue

- Another soft law mechanism
- 2014, response to Commission's Framework
- in July 2023 the Spanish Presidency of the Council sent out a "[questionnaire for the Member States on the evaluation of the Council's annual rule of law dialogue.](#)"
- Voluntary reporting, but since 2020, also annual session for horizontal level
- Laurent Pech requested Council to be sent a questionnaire and replies
- Anonymous, confidentiality
- What is the purpose?
- [Greece: let's financially support best performers!](#)



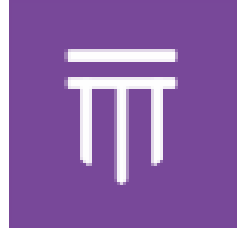
# EP Rule of Law Mechanism (Comm Framework)

- Brazen attacks against Union values (article 2) – EP is calling for a comprehensive, preventive and evidence-based monitoring in the field via an EU mechanism on democracy, the rule of law and fundamental rights
- Recalls that the Union remains structurally ill-equipped to tackle democratic, fundamental rights and rule of law violations and backsliding
- notes that the Council's failure to apply Article 7 TEU effectively is in fact enabling continued divergence from the values provided for in Article 2 TEU
- 3 step process
  - Commission's assessment
  - Commission's recommendations
  - Monitoring -> might lead to A7



# Protection of budget in case of RoL deficiencies

- **Conditionality Regulation 20/2092**
- into force from 1 January 2021.
- On 11 March 2021 Poland and Hungary lodged actions before the European Court of Justice against this Regulation
  - CJEU C-156/21, C-157/21: values in A2 TEU “define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.”
  - BUT
    - It cannot be a parallel procedure duplicating Article 7 TEU
    - It is not a general rule of law mechanism, and did not even have a sanctioning objective, instead it attached legal consequences to rule of law decline
    - Can a similar logic be now used with postponing the Hungarian presidency, e.g. claiming that it is not a sanction but a natural consequence of rule of law decline which made Hungary ill-suited to become an ‘[honest broker](#)’ ?



# Conditionality Regulation

The CJEU emphatically stated that the values entrenched in Article 2 TEU “define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.”

*(CJEU, Case C-156/21 Hungary v Parliament and Council, para. 127, Case C-157/21 Poland v Parliament and Council, para. 145.)*

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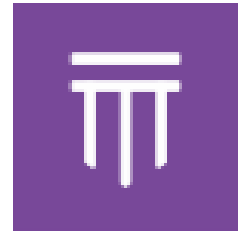
# HUNGARY

- EComm, 30 November 2022: [Hungary has not progressed enough in its \(anticorruption\) reforms and must meet essential milestones for the Recovery and Resilience funds](#)
  - 18/9/2022 decision to suspend 65% of commitments for 3 operational programmes are staying in place (7.5 billion EUR)
  - Hungarian's anti-corruption policies are merely a clever window-dressing, going as far as the authoritarian regime will allow. Council knows it at this point, this corruption is not personal flaws of officials, this is a characteristic of an authoritarian regime, buying individual sectors of society by offering it public money (mostly coming from the EU)
  - Council (ECOFIN) : the suspension requires QMV
  - Who was blocking the voting in the Council?
    - Germany
    - Why? Orbán is blocking the aid package for Ukraine and the minimum taxation for multinationals = to be decided this Tuesday
  - Freezing decision adopted on 15/12/2022 (6.3 billion of funds)



# HUNGARY

- July 2023 – completely new reform of the judiciary
  - Aim is to free 28 billion frozen in recovery funds
- 10.2 bill released in December 2023
- Hungary now has until 31.12.2024 to carry out 17 measures indicated by the Commission (still around 20 bill frozen)



# ROMANIA - AFJR case: 18 May 2021

- The Advocate General Michal Bobek made clear in his [opinion](#) that, while Decision 2006/928/EC and the mechanism of cooperation and verification is compulsory for Romanian authorities, the reports and the recommendations therein do not enjoy binding value although “they are to be duly taken into consideration by that Member State”.
- Thus, national judges should not rely on the recommendations contained in CVM reports in order to set aside the application of national legislation that they deem contrary to such recommendations
- CJEU: CVM is binding, as long as the objectives are formulated in a clear and precise way
- i.e. clarified nature and legal effects and direct effect!



# ROMANIA - Dissonance

- A hope that the judgment would be a guide for national courts how to apply primacy of the EU law
- Response: 8 June 2021: decision of the Romanian Constitutional Court
  - “a hallucinating succession of legal nonsense”
  - Renders ECJ judgment devoid of any effect
  - Forbids national courts to apply EU law: EU law has no primacy over the Constitution. A national court does not have the power to analyse the conformity of a disposition of internal law declared constitutional by the CC, with European law provision.



# The Polish case

- 2015 PiS wins the election
- Constitutional Tribunal crises
  - Preemptive selection of 2 constitutional justices by Tusk
  - New government thwarts the whole process and reelects all 5 justices
  - Benching and golden parachutes
- Reform of the Judicial Council
- Reform of the Supreme Court
  - New disciplinary chamber
  - Disciplinary sanctions for dishonorable behavior of judges (camping, constitution T-shirt)
  - Disciplinary sanctions against judges who ask the CJEU whether their colleagues are independent (muzzle law)
- The Caste TV series  
([https://www.youtube.com/watch?v=5uPAeBCAbIc&ab\\_channel=TVPIInfo](https://www.youtube.com/watch?v=5uPAeBCAbIc&ab_channel=TVPIInfo))



# The Polish case

- Cases

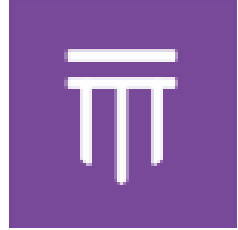
- C-192/18 Independence of Ordinary courts (retirement age rules incompatible with EU law and principles of JI and irremovability)
- C-619/18 Independence of the Supreme Court (retirement age of SC judges)
- Independence of the Disciplinary chamber of the SC: C-585/18, C-624/18 and C-625/18: EU law precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is neither independent nor an impartial tribunal.
- Muzzle law
- C-791/19 Disciplinary chamber: injunction to immediately suspend the Chamber
- Polish SC (December 2019 and January 2020): The NCJ cannot be considered an independent tribunal
- 14 February 2020: Amendment of the Law on the organisation of ordinary courts, Supreme Court and other laws
  
- Commission brought another action for failure to fulfil obligations (1. April 2021) C-204/21 Independence of the Disciplinary chamber (amending law prohibits national courts from reviewing compliance with EU law requirements relating to an independent and impartial tribunal)





# PolExit?

- Poland: Constitutional Tribunal decision of 7 October 2021
- Argues that questioning of EU institutions of the breach of Polish statutes goes beyond competences conferred to EU (organisation of the judiciary)
  - BUT: the scope of competences transferred to EU includes the obligation of MS to establish remedies sufficient to ensure effective legal protection of the EU law application (a.19.1)
  - Also, everyone, whose RandF guaranteed by EU law are violated has the right to effective remedy before a tribunal (meaning domestic one, not CJEU)
- Independence of judges is prerequisite of this



# The Polish case

- 27 October 2021 ECJ (decision of its Vice President Lars Bay Larsen) imposes a fine of 1 mil EUR per day on Poland, for **consistent refusal to comply with interim measures in most recent infringement proceedings**
- The punitive measures will be in place until Warsaw agrees to comply with an ECJ ruling issued back in July that ordered the immediate suspension of the disciplinary chamber of judges of the Supreme Court
- Controversies: single order of the Vice-President, it is the Vice-president who reviews how the interim measures have been implemented
- 2 November 2021: Norwegian court suggests that surrenders according to EAW to Poland may be suspended due to **significant greater danger and probability** of HR violations





# The Polish case

- Other EU institutions keep arguing on the admissibility of financial sanctions to safeguard the RoL
- EC was withholding 36 billion EURO Covid recovery fund
- EP also asked the Commission to activate a conditionality mechanism and freeze EU funds: The Commission missed the deadline in 2021, triggered it in 2022 -> **decision to freeze 110 billion EURO, freed after the consolidation of Tusk's government**
- Commission: this can only be a final resort
- EP not convinced, considers infringement against the Commission for non-activity



# What is Article 19 TEU?

- **A 19.1. = a building block of the EU's constitutional order?**
- How did the CJEU get there?
  - Shift from na obligation of MS to establish a system of remedies ensuring Effective JR to na obligation to respect JI
- Does it trigger the application of the Charter?
- Door to enforcement of the Charter outside of its scope of application?



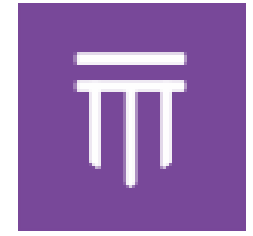
# What is Article 19 TEU?

- But what about the procedural autonomy of MS?
- Charter: A 47 = right to an effective remedy and a fair trial
- A 19.1 also a vehicle for limitation of the mutual trust principle
- Obligation from A 19.1 – in the fields covered by Union law
  - Portugues Judges: not implementation of Union law (A 51.1 Charter). I.e. A 19 might apply even if the Charter does not apply
  - Allocation of competences v scope of application of EU law
  - The organization of justice falls within the competences of the MS, but MS must comply with the obligations deriving from EU law when exercising that competence



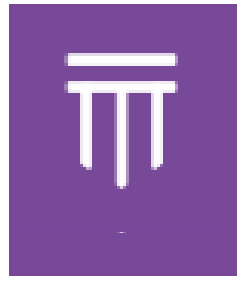
# What is Article 19 TEU?

- Hence, the fact that courts may potentially rule on questions concerning the application or interpretation of EU law is enough to bring them into the field covered by EU law
- Charter?
  - No because of competences
  - But Akerberg Fransson: once A 19.1 applies, then we are within the field of EU law and the Charter applies
    - Implementation is not limited to responding to directives or applying regulations, but includes more general measures within the scope of EU law
  - Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter



# What is Article 19 TEU?

- What has remained of the system?
- Is there a subjective right to judicial independence?



# Spain

- Situation
  - Strong political polarization, partisan takeover of institutions
  - President Sánchez: makes investiture agreement with pro-independence parties -> leads to a proposal for amnesties in Parliament for crimes committed in connection with secessionists
  - Moreover, call for the establishment of parliamentary investigation commission to examine lawfare, with potential actions against judges
- SoP problem
- Legality and illegality of acts of secession adopted by leaders of Catalan process
- Problem with amnesty? Equality before the law

# **New Backslider: Slovakia between two assassinations**

Key areas:

1. Police and prosecutors
2. Decriminalisation of corruption
3. Chilling effect on JI
4. Removal of media freedoms
5. Limitation at the NGO sector

# European Commission – Toolbox in Practice

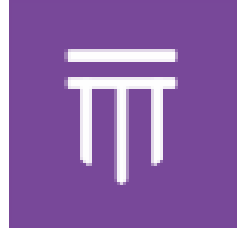
	TOOL	POLICE AN PROSECUTORS	PENAL CODE (Decriminalisation of corruption)	JUDICIAL INDEPENENCE	MEDIA FREEDOMS	NGO SECTOR
<b>LEGAL</b>	Infringments	Not initiated. ECOMM however points out two potential violations of EU Law in informal letter	X	X	x	X
	EU-Pilot	X			x	X
	Preliminary ruling proceedings	X	X	X	x	X
	Conditionality Regulation	X	X	X	x	X
	Article 7	X	X	X	X	X
<b>POLITICAL</b>	RoL Framework	Finds a risk of violation of EPPO	Letter warning SVK government not to use fast-track legislating	X	X	X
	RoL Mechanism	report pointing to extensive powers of GP	Aknowledges risk of arbitrary disciplining of judges for abuse of power	X	Calls for more security for journalists	X
	EU Justice Scoreboard	X	X	X	X	X



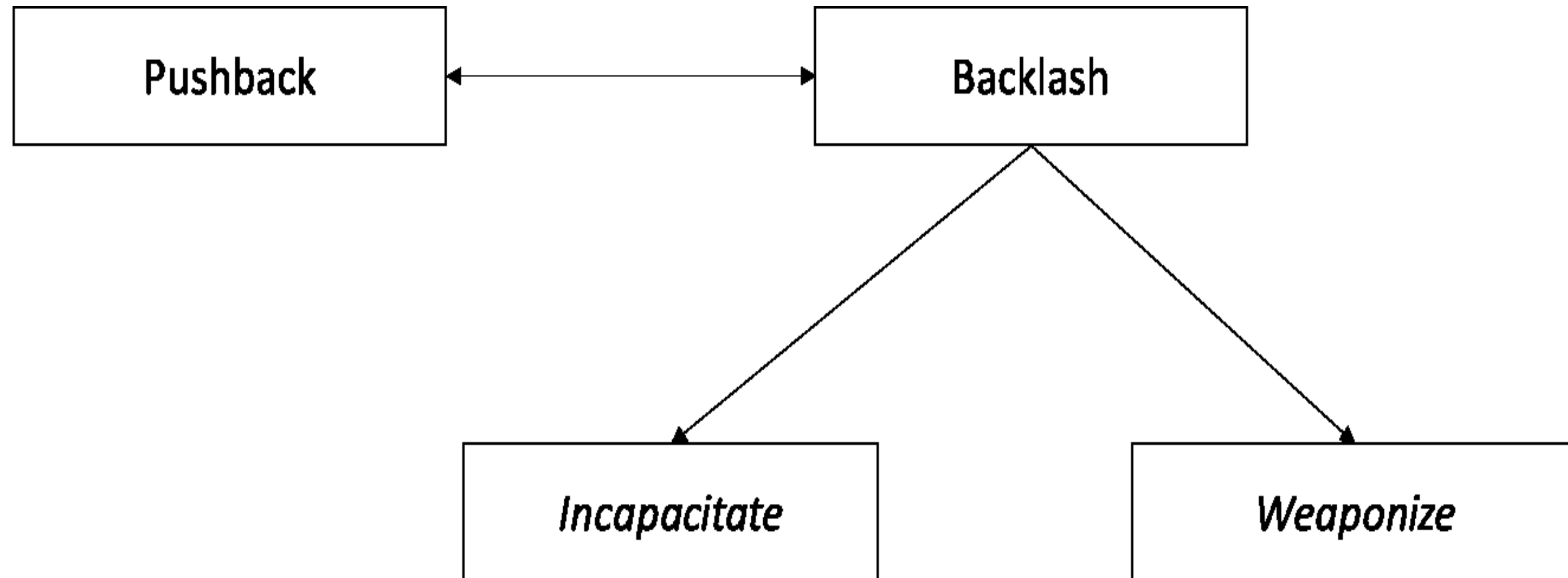


# Preliminary findings

- Framing of de-democratisation as RoL issue has perks but also limitations;
- Preference of ECOMM towards soft tools, dialogue-based, less formalised tools
- Political vs Legal tools: *political*
- Conflicted role of ECOMM
- Relatively weak impact of EP
- Transfer of judicial independence coercion into other areas?
- The role of networking, social capital...
  
- Language of ECOMM
- Not only SVK is missing from infringements
- Why?
- Reputational costs
- Opaqueness, lack of public control



# Backlash & Pushback and their repercussions





# Backlash & Pushback and their repercussions

<b>FORMS OF POLITICAL BACKLASH</b>	
<b>Court-packing<sup>1</sup></b>	Changing the composition of the court
<b>Contained selection</b>	Monopolising the selection and appointment process
<b>Delegated control</b>	Control of courts via court presidents
<b>Jurisdiction stripping</b>	Removal of policy arenas, restricting guidelines for review and legal interpretation, limitation of access to courts
<b>Direct politicisation</b>	Exerting pressure on the result of individual decisions (telephone justice, street protests, rhetorical signalling)
<b>Further limits on court's authority</b>	Disregarding the decision, questioning the authority of the court, limiting career options of judges after leaving the bench



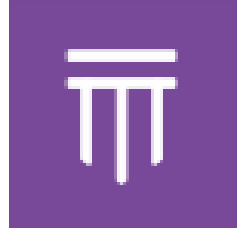
# Backlash & Pushback and their repercussions

- Caserta&Cebulak: ICs need to use resilience techniques beyond their judicial function
- International courts more fragile than domestic ones
  - They do not control their docket
  - Address frequently RoL and democratic values
  - Weaker authority – implementation relies on political institutions at the national level
- Judicial and Extra-Judicial techniques of resilience
  - Judicial = avoidance, judicial retreat, pivoting, legal diplomacy
  - Extra-Judicial = engaging relevant audience



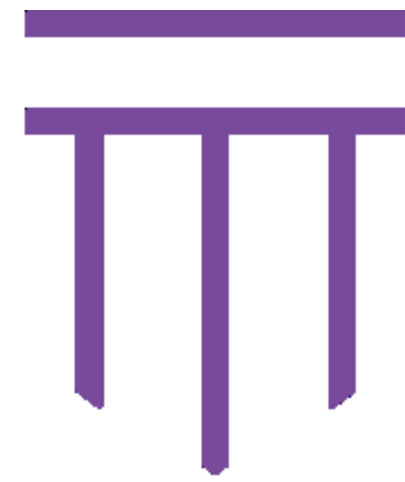
# Backlash & Pushback and their repercussions

- CJEU and legal diplomacy
  - Karen Alter: early case-law of CJEU shows signs of caution in politically loaded cases; CJEU made sure that the political impact (financial and political consequences) was minimal
- Mayoral&Wind: Captured dialogue
  - National higher courts that are less constrained by political power make more PR
  - In last decades, NHCs cooperation with CJEU skyrocketed, replacing lower courts as main interlocutors
  - NHC = powerful allies – which further spurs their politicisation
- Courts under pressure will forward preliminary questions to CJEU as a last resort only when they are not packed with majority of judges favourable to the government



# Backlash & Pushback and their repercussions

- Gonzales-Ocantos&Sandholtz
  - To build their resilience, ICs need to be embedded
    - Incorporation of treaties into domestic law
    - Independent domestic courts
    - Acceptance and use of IC jurisprudence by domestic judiciaries
    - Strong national HR institutions
    - Incorporation of IL into legal training and research
    - Presence of NGOs that rely on Ics
- ECtHR: cautious approach, high degree of statesmanship, only slow entrenchment, but after Brighton: ECtHR has reduced the rates of found violations by consolidated democracies
- Stiansen&Voeten: found evidence that ECtHR is exercising restraint towards consolidated democracies that criticize it



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