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Fundamental Change Beneath the Surface: The Supranationalisation of Rule of Law Protection in the European Union

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Abstract

Whereas most studies on the European Union's (EU) responses to the rule of law crisis stress the underenforcement of EU law, this article offers a different perspective. Focusing on the long-term dynamics concerning rule of law protection, we detect a gradual trend towards supranationalism. The Rule of Law Conditionality mechanism adopted in 2020 is the first instance of 'effective supranationalism', that is, a rule of law tool that combines supranational decision-making procedures with binding and enforceable consequences. To explain this development in an area that has been marked by considerable resistance to efforts to strengthen supranational oversight, we draw on the agent-centric historical institutionalist approach. Our qualitative study shows that supranationalisation has become possible through two interrelated factors: the joint strategies of community bodies, which have promoted competence transfer to the EU level, and the increasing marginalisation of sovereigntist positions within the Council, given the escalating conflicts with Hungary and Poland.

Keywords: agent-centric historical institutionalism; European Commission; rule of law; supranationalisation

Introduction

The scholarly assessment of the European Union's (EU) approach to tackling the rule of law crisis in Hungary and Poland has been predominantly negative. Observers consider the EU's rule of law toolbox 'a rickety and redundant assemblage of instruments, more designed for show than for efficacy' (Kelemen, 2022, p. 4), criticising the deliberate underenforcement of EU law (Closa, 2019; Emmons and Pavone, 2021; Kelemen, 2022; Kelemen and Pavone, 2021). This criticism has not ceased following the introduction of the so-called Rule of Law Conditionality in December 2020. Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, which allows the EU to withdraw or reduce funds 'in the case of breaches of the principles of the rule of law in the Member States', has been judged superfluous by some, whereas others have instantly criticised the mechanism's obvious compromise character, resulting in a substantial watering down of the Commission's original proposal (e.g., Scheppele et al., 2020).

In this article, we offer a different perspective by considering the Rule of Law Conditionality mechanism a step towards what we call 'effective supranationalism' in rule of law protection. As we will show, it can be considered the first effective supranational rule of law tool because it combines a supranational decision-making procedure with legally binding decisions. Due to its compromise character, the mechanism has some intergovernmental features; nevertheless, it represents a qualitative change in the relationship

between the EU and its member states (Bos and Kurze, 2021, p. 24) that could push the EU towards a ‘genuinely “constitutional” transformation’ (Lindseth and Fasone, 2020), allowing the enforcement instead of the management of the rule of law (Priebus, 2022a). As we argue, it represents a major development concerning the EU’s rule of law toolbox compared with its formerly established tools and is thus the manifestation of a fundamental change, beneath the surface.

This shift towards effective supranationalism is puzzling. The rule of law is one of the EU’s core fundamental values and a prerequisite for the functioning of the EU as a polity. However, rule of law issues touch on core state powers, and debates surrounding the creation of EU-level oversight mechanisms have been shaped by member states’ longstanding resistance to supranational interference in rule of law issues and by sovereignty conflicts (Brack et al., 2019).

To explain why we are nevertheless witnessing supranationalisation, we draw on agent-centric historical institutionalism and conduct a qualitative study based on official statements, publicly accessible documents and secondary sources. Tracing developments in the last decade and focusing on long-term dynamics, we show that the gradual shift towards effective supranationalism is the result of two interrelated factors. On the one hand, a strong initial coalition of pro-supranationalisation actors consisting of the Commission and the European Parliament (EP) – indirectly empowered by the Court of Justice (ECJ) – took the lead in the discourse about the EU’s rule of law crisis. These actors fostered the idea that the competence for rule of law protection lies at the EU level and pushed for supranationalisation, even though their capacities were limited by institutional and political contexts. On the other hand, the escalating rule of law conflicts with Hungary and Poland have led to a marginalisation of sovereigntist positions amongst EU governments, contributing to the emergence of a pro-supranationalisation coalition within the intergovernmental bodies. Paradoxically, the more the Hungarian and Polish governments – the actors prominently opposing transfers of oversight competences to the EU level – blocked rule of law-related decisions in the Council and European Council, the more they actually encouraged supranational solutions for the rule of law crisis.

We contribute to the literature on the EU’s rule of law protection in two ways. First, although there is a considerable body of research on individual rule of law instruments (e.g., Batory, 2016; Bugarič, 2016; Halmi, 2019), the EU institution’s individual approaches (Oleart and Theuns, 2022; Oliver and Stefanelli, 2016) and the technical and judicial intricacies of EU rule of law enforcement (Blauberger and Kelemen, 2016), the full picture is still missing.¹ By analysing developments concerning the protection of the rule of law since 2010, we adopt a bird’s-eye view that allows us to detect underlying dynamics previously overlooked. In doing so, we, second, redress the widespread assumption of the EU’s inaction. Although the EU and especially the Commission may not have made the most of the available instruments and their actions have not reversed the backsliding in Hungary and Poland, we can nevertheless detect a gradual institutional change that has laid the foundations for a more supranationalised rule of law enforcement. Whether the conditionality mechanism will translate into robust action against member states and prove effective in combating backsliding depends, however, on whether and how EU-level actors will use it.

¹See, for an exception, Coman (2022).

The article is structured as follows: In the following section, we introduce our theoretical approach. Next, we briefly conceptualise supranationalism and trace the development of rule of law protection from intergovernmental tools to constrained and then effective supranationalism. Finally, we explain this puzzling development and conclude by summarising and discussing the implications of our results.

I. Agent-centric Historical Institutionalism as a Theoretical Framework

Given the delicate nature of domestic rule of law protection as well as the Hungarian and Polish governments' fierce opposition to supranational oversight, the establishment of the Rule of Law Conditionality mechanism represents a puzzle. To make sense of this, we adopt the agent-centric historical institutionalist approach, which combines the core tenets of rational choice and historical institutionalism. Starting from the assumption that 'institutional change requires agency' (Büthe, 2016b, p. 489), this approach directs our attention to key change agents and their (first- and second-order) interests. Moreover, by underlining that 'institutions have feedback effects' (Büthe, 2016a, p. 41), it suggests examining how these actors are affected by the 'broader institutional configuration and (...) institutional feedback' when strategically pursuing their interests (Büthe, 2016b, p. 489). By emphasising the embeddedness of actors in historically grown institutional structures, this approach directs our attention to both long-term developments and the role of particular actors in these developments. It thus serves as a fruitful heuristic for our empirical analysis.

Concerning the evolution of the rule of law toolbox, the three key actors are the Commission and the EP, representing, first and foremost, the Union's interests, as well as the Council as a representative of member states.² Moreover, the ECJ plays an important role. Although it cannot actively shape rule of law initiatives, it has acted as a driver of integration. Based on their shared first-order interests (self-preservation power and plenty), we can expect these actors to have an interest in increasing their influence vis-à-vis each other (Farrell and Héritier, 2007). Consequently, they differ in their preferences regarding supranationalisation. Striving for 'more interesting and more substantively important work and hence influence' (Büthe, 2016b, p. 490), the Commission and the EP are likely to support the transfer of competences to the EU level. Member state governments, in contrast, can in general be expected to maintain a strong 'preference for preserving autonomy' and are thus likely to oppose supranationalisation efforts (Büthe, 2016b, p. 490).

This does not render supranationalisation impossible but implies that 'member-state driven supranationalism will only happen under very restrictive conditions' (Büthe, 2016b, p. 491). In accordance with the crisis literature (Brack and Gürkan, 2020; Riddervold et al., 2021), we can expect that crises threatening the survival of the EU and potentially leading to disintegration are situations where member states recognise the need for more supranationalisation, even if they do not actively push it forward or opt for limited forms of supranational integration, such as national control of supranational capacity building (Freudlsperger and Jachtenfuchs, 2021).

²Unlike Büthe, we do not focus on subnational private actors, as we do not consider them decisive change agents regarding the EU's rule of law toolbox.

The broader EU institutional configuration endows these actors with different formal and informal capacities to stir institutional change. Although the Commission can initiate legislation, it is ‘dependent on the decisions of the Council and the EP in legislation and budgetary matters’ (Tömmel, 2014, p. 113). Moreover, it needs the approval of member states for any institutional change (Büthe, 2016b, p. 490). Similarly, the EP cannot initiate legislation itself, and although it is one of the two co-legislators in the ordinary legislative process, it cannot adopt legislative acts without the Council’s consent. National governments in the Council, in contrast, can act as powerful institutional change actors if they agree on their goals. A constraining factor here is diverging preferences amongst member state governments, which often leads the Council to be ‘internally divided and constrained in the effective exercise of its functions’ (Tömmel, 2014, p. 113). In addition, all these actors can try to stir change indirectly, for instance, by fostering ideas and social conventions (Büthe, 2016b, p. 490) or by establishing informal practices that help legitimise certain ideas and pave the way for formal changes (Héritier et al., 2019).

According to the above approach, supranationalisation is thus the product of political conflict between proponents and opponents of change. Although supranational actors might prefer more supranationalism, the specific EU decision-making setting with a crucial role for member states may have a constraining effect, leading to hybrid forms of institutional change (Coman, 2018, 2022). If supranationalisation takes place, however, agent-centric historical institutionalism expects a reversal by opposing member states to be unlikely because they are also constrained by their broader institutional configuration (Büthe, 2016b, p. 493). In other words, a movement towards supranationalism creates a path-dependent development that becomes increasingly difficult to reverse, even though it does not necessarily result in a linear development towards supranationalism.

II. The Evolution of Rule of Law Protection Since 2010: From Intergovernmentalism to Effective Supranationalism

Since 2010, we have seen an increase in new instruments for rule of law protection in member states. The Commission has developed several instruments in its own right. In 2014, it established the Rule of Law Framework as a pre-Article 7 early warning tool, prompting the Council to establish the Annual Rule of Law Dialogue. In 2019, the Commission announced its Annual Rule of Law Review Cycle, later rebranded the Rule of Law Mechanism, culminating in the publication and joint discussion of an Annual Rule of Law Report. In 2018, it proposed a new regulation that would allow for the freezing of or reduction in funds in case of rule of law violations – the basis for the subsequent conditionality regulation. As we demonstrate, the establishment of the conditionality mechanism constitutes a qualitative leap because it represents the first effective supranational rule of law tool.

We generally speak of supranationalism when decision-making authority is delegated to actors above the national level. This delegation goes beyond the mere pooling of authority in collective decision-making bodies, as it also entails the capability to make binding decisions, even against the will of member states (Nugent, 2010, p. 428). Based on this definition, we assess the degree of supranationalisation (i.e., the process leading towards supranationalism) of the above enumerated rule of law instruments along three dimensions.

The first dimension concerns the involvement of *community bodies* in decision-making processes at the level above the nation-state and the mode of decision-making. The EU's supranational bodies, the Commission and the EP, can (1) decide autonomously; (2) play a decisive role in the decision-making process; (3) play a marginal role; or (4) play no role at all, with the Council (and the European Council) remaining the key decision-makers (Börzel, 2005). To assess their actual role, we explore the right to initiate procedures, the capability to control the course of the process, that is, the capacity to advance or slow down procedures, and determine who must agree for a decision to be reached.

The second and equally important dimension is the involvement of *individual member states* in decision-making, that is, whether they have veto power. To assess the role of individual member states, we evaluate the decision-making rule used within the Council, that is, whether decisions are made unanimously, with a qualified majority or other majorities. Based on the above definition of supranationalism, we consider decision-making requirements below the threshold of unanimity supranational because they do not allow individual member states to block decisions.

Third, we consider the potential *effect* of decisions reached via supranational decision-making. We expect their effects to be comparatively low if member states can freely decide whether they comply. Arguably, states will not comply when decisions go against their interests. This is particularly true for rule of law conflicts that result from a government's deliberate choice not to comply (Jakab and Kochenov, 2017). In these cases, non-binding suggestions are unlikely to have the intended effect, that is, a change in the rule of law situation (Kochenov and Pech, 2016, p. 1066); instead, decisions must be binding (and, ideally, combined with sanctions) on the targeted states to induce compliance. To measure the potential effect of EU-level decisions, we analyse their binding character, that is, whether they have to be enforced and whether they entail actual consequences, such as financial penalties.

Based on these three dimensions, summarised in Table 1, we distinguish *constrained* from *effective supranationalism*. We speak of constrained supranationalism if community bodies dominate the decision-making process OR if individual member states can be overruled AND decisions are not binding. We speak of effective supranationalism if community bodies dominate the decision-making process OR if individual member states can be overruled AND decisions are binding.³ If member states dominate and cannot be overruled, we are dealing with intergovernmentalism. Applying our framework to all instruments explicitly designed to counter the rule of law or, more generally, EU foundational value breaches,⁴ we can thus detect a trend from a pure intergovernmental to a constrained supranational and finally to an effective supranational procedure (see Table 2).

As emphasised in previous studies, Article 7 procedures are mainly intergovernmental with only a few supranational features (Closa, 2021; Pech, 2020). Although both procedures can be initiated by one of the community organs, the procedures are controlled

³With this label of effective supranationalism, we do not want to imply that nonbinding decisions never lead to change at the national level nor that binding supranational decisions automatically induce the intended effects. Our key point is that binding decisions are likelier to induce changes in recalcitrant member states than completely nonbinding ones.

⁴Although infringement procedures are now regarded a standard tool in the EU's rule of law toolbox, these are not included in the analysis because they were not explicitly designed to address rule of law issues. However, as we argue below, there are also signs of a shift towards an effective supranationalism in the usage of infringement procedures.

Table 1: Dimensions and Types of Supranationalism.

Dimensions	<i>Supranational and intergovernmental poles and types of decisions</i>	<i>Constrained supranationalism</i>	<i>Effective supranationalism</i>
Involvement of community bodies	Supranational actors initiate and make decisions autonomously or have a veto right ↓ Council/European Council initiate and make decisions autonomously or have a central role in the process	Supranational actors play a decisive role	Supranational actors play a decisive role
Involvement of individual member states	Due to QM in Council, individual member states can be overruled ↓ Unanimity rule in Council, individual member states retain veto power	OR Individual member states can be overruled	OR Individual member states can be overruled
Types of decisions	Binding decision ↓ Nonbinding decision	AND Nonbinding decisions	AND Binding decisions

Source: Own compilation.
Abbreviation: QM, qualified majority.

by the member states in the (European) Council. This is particularly true for the preventive mechanism, where the Council has complete discretion over the hearings and can hamper or even halt the procedure (Priebus, 2022b). Therefore, even though decision-making only requires a four-fifths majority, its control over the procedure allows the Council to block the tabling of a decision altogether. The intergovernmental character of Article 7 (2) is demonstrated by the fact that decisions require unanimity, thus granting individual member states a veto in the European Council. This means that the Council and the European Council retain control in both procedures; however, the Commission and the EP are only selectively involved in different stages and cannot control them. What differs, then, is their binding character: The preventive arm can only result in nonbinding recommendations, whereas the sanctioning mechanism might lead to sanctions that must be enforced. Nevertheless, because the imposition of sanctions requires a unanimous vote in the European Council first, the chances of the procedure resulting in sanctions are rather low.

The four instruments introduced since 2010 represent different types of supranationalism or intergovernmentalism. First, the Council’s Annual Rule of Law Dialogue represents a completely nonbinding and intergovernmental procedure. Second, the two instruments created autonomously by the Commission, the Rule of Law Framework and the Annual Rule of Law Report, combine procedural supranationalism with legally nonbinding decisions. Third, there is the recently established Rule of Law Conditionality mechanism. Although the Commission, as initiator, cannot control the process, the Council is bound by clear rules and a clear timeline and thus cannot delay procedures indefinitely, as is the case with the Article 7 (1) procedure. Moreover, because a qualified majority

Table 2: The EU's Rule of Law Toolbox.

Instrument	<i>Procedures and types of decisions</i>	<i>Type of supranationalism</i>
Article 7 (1) TEU preventive mechanism	EP, Commission or 1/3 of member states can initiate procedure; Course of decision-making controlled by the member states; Council decides after consent of EP with 4/5 majority; Nonbinding recommendations	None (intergovernmentalism)
Article 7 (2) sanctioning mechanism	Commission or 1/3 of member states can initiate the procedure; (1) European Council after consent of EP determines unanimously the existence of breach of TEU 2 values; (2) after identification of breach of TEU 2 values by European Council, Council decides with qualified majority rule on rights suspension; Binding suspension of rights	None (intergovernmentalism)
Rule of Law Framework	Initiated by Commission, Commission controls course of decision-making and decides autonomously on possible consequences (e.g., activation of Article 7 procedures); Member states cannot influence decision on follow-up measures, incl. activation of other instruments; Nonbinding recommendations to member states	Constrained
Council's Annual Rule of Law Dialogue	Initiated by the Council, simple exchange between member states; No decision-making; Exchange without recommendations	None (intergovernmentalism)
Annual Rule of Law Report	Initiated by Commission, no proper decision-making (Commission simply publishes results); Member states not involved, cannot prevent publication; Nonbinding recommendations to member states	Constrained
Rule of Law Conditionality	Initiated by Commission, procedure follows a clear timeline; Council decides with qualified majority; Suspension or reduction of EU payments	Effective

Source: Own compilation.

Abbreviations: EP, European Parliament; EU, European Union; TEU, Treaty on European Union.

is needed, decision-making follows the typical community method and allows a suspension of or reduction in EU payments. Hence, despite some intergovernmental features resulting from the conflictual negotiation process between the EP and the Council/European Council,⁵ the conditionality mechanism combines supranational decision-making with the possibility of imposing legally binding payment reductions. It is therefore the first instance of an effective supranational instrument, even though its actual impact crucially depends on actors' willingness to use the tool.

⁵One intergovernmental feature is Article 26 of the regulation that allows the possibility for delegating the matter to the European Council. This clause was introduced at the very last moment because otherwise Hungary and Poland would have blocked the whole Multi-Annual Framework, which was jointly negotiated with the conditionality mechanism.

This analysis highlights two phenomena. First, although the Rule of Law Framework and the Rule of Law Mechanism are instruments developed and managed autonomously by the Commission, they lack legally binding consequences and are, as such, instances of constrained supranationalism. Second, we can observe a cautious development towards effective supranationalism over time. To supplement the intergovernmental Article 7 procedures, the Commission first developed constrained supranational instruments that rendered it the central decision-maker but had no binding effects. With its 2018 proposal to link the disbursement of funds to respect for the rule of law, it went one step further, initiating an effective supranational instrument that combines a supranational decision-making procedure with legally binding decisions. Thus, despite criticism for inaction and initially constrained supranational instruments, there has been a development towards more effective supranational rule of law protection. As a result, we now see a level of supranationalism that treaty-makers have traditionally refrained from.

III. Understanding Supranationalisation in Rule of Law Protection Since 2010

The EU's focus has traditionally been on the external promotion of democracy and good governance in third and especially candidate countries. Rule of law and democracy protection within member states, in contrast, have played a subordinate role; these have been taken for granted, whereas national dedemocratisation processes have been deemed unlikely. Initial concerns that the 2004 Eastern enlargement would entail compliance problems were soon dispersed by studies showing that new member states actually outperformed existing ones (Sedelmeier, 2008) and that there was no postaccession decline in democratic performance (Merkel, 2010). Although the question of supranational democracy or rule of law protection occasionally reappeared in treaty negotiations, efforts to transfer oversight competences to the EU level faced severe resistance from member state governments, as these would have affected state core powers. As a result, rule of law and democracy protection remained incompletely regulated until 2010, with the two cumbersome Article 7 procedures the only mechanisms explicitly designed to sanction breaches of the EU's foundational values.

The 'rule of law crisis' (Reding, 2013) caused by developments in Hungary and Poland led to a reconsideration of the EU's powers to protect the rule of law. As expected, the key players maintained different positions and thus pursued different strategies.

The Key Actors and Their Positions Towards Supranational Rule of Law Protection

From the very beginning, the Council was divided on the focal issue (Coman, 2022, pp. 173f.), with those preferring the creation of stronger oversight mechanisms remaining a minority. In 2013, the foreign ministers of Denmark, Finland, the Netherlands and Germany called for a 'new and more effective mechanism to safeguard fundamental values in Member States' (cited in Hillion, 2016, p. 59). Other member states with a more sovereigntist position on EU integration, such as the United Kingdom or several Central European countries, opposed such attempts. Due to these differing positions, the Council initially adopted a neutral stance on these rule of law issues and, by emphasising respect for national constitutional structures (Council of the European Union, 2014a), implicitly stated that it continued to consider the rule of law a domestic matter. As a result, it opted

for dialogue-based formats over coercive instruments. It furthermore stressed that debates about fundamental rights and the rule of law ‘should be given sufficient time’ and be crafted ‘in a way that is respectful of the different legal traditions of member states and of the division of competencies between the Union and Member States’ (Council of the European Union, 2013). The governments thereby signalled that they had no intention of redistributing competences concerning rule of law protection, even though they had invited the Commission to move the debate on rule of law issues forward. When the Commission introduced the Rule of Law Framework 1 year later, the majority of member states reiterated their opposition to any rule of law-related transfer of authority. Following the narrow reading of the principle of conferral presented by the Legal Service of the Council and its suggestion to establish an intergovernmental peer review system (Council of the European Union, 2014b), they refused to wield the Rule of Law Framework against Hungary (Kelemen, 2017, p. 224). Instead, and in line with the sovereignty-oriented approach of its majority, the Council introduced the purely intergovernmental and toothless Annual Rule of Law Dialogue (Closa, 2016, pp. 32f.).

The Commission’s position was marked by a clear rhetorical commitment to a supranational approach and included a central role for itself.⁶ It argued, for example, that the ‘Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded’ (European Commission, 2014, p. 2). It thus clearly implied that it had the competence to secure the rule of law in member states. In addition, some commissioners even demanded treaty amendment to ‘anchor a strong basis for a more far-reaching rule of law mechanism, which would include more detailed monitoring and sanctioning powers for the Commission’ (Reding, 2013). Although the Commission thus expressed its ambition to play a key role in EU rule of law protection, it pursued a more cautious approach with respect to its actual deeds, careful to prevent the impression of competence creep.

Similarly, the EP has also advocated the supranationalisation of rule of law protection, and even more forcefully and visibly than the Commission. Due to party politics, it has not acted uniformly – the members of the European People’s Party have blocked determined EU action against the Hungarian government (Kelemen, 2017), and Eurosceptic party groups have refused competence transfers – but the majority of members of the EP (MEPs) has nonetheless adopted various reports and nonbinding resolutions that strongly signalled support for a more supranational rule of law protection (see below).

In short, the focal actors’ positions at the beginning of the rule of law crisis match the above expectations. Whereas supranational actors advocated supranational rule of law protection, most Council members stressed national sovereignty and suggested intergovernmental solutions to retain their veto powers in rule of law-related questions.

Strategies to Foster Supranational Rule of Law Protection

To explain supranationalisation despite these different positions, we look at actors’ strategies. Notwithstanding their differing approaches to addressing the rule of law crisis, both the Council and the EP have called on the Commission to move the discussion forward.

⁶For the sake of simplicity, we treat the Commission as a unitary actor. Even though the preferences within the Commission and approaches taken by different Commission Presidents can diverge (Kassim, 2021), it operates on the principle of collegiality.

The Commission has followed suit but has acted rather cautiously and failed to meet the EP's expectations, whereby three factors seem to have been crucial. First, the Commission has often drawn parallels to the 'Haider affair' of 2000/2001, when bilateral sanctions against Austria failed (Merlingen et al., 2001); therefore, it opted for dialogue instead of sanctions, at least initially. Second, it has been careful to present itself as a nonpolitical actor, thereby adopting a technocratic and legalistic discourse with regard to rule of law protection (Oleart and Theuns, 2022). Third, and most importantly, the Commission was initially constrained by the lack of Council support needed to establish coercive rule of law tools (Closa, 2019). As a result, it established new tools in its own right that did not require Council support. Although the Council's Legal Service contested the Commission's right to establish even such a legally nonbinding mechanism outside the treaties (Council of the European Union, 2014b), this legal opinion did not have any consequences and might have served as an important case of precedence, encouraging the Commission to create more constrained supranational instruments.

Taken together, these factors demonstrate that although these tools secured the Commission a prominent role in rule of law protection, they lacked any binding decisions. Anticipating the Council's opposition to far-reaching attempts whilst learning that it had nevertheless tacitly accepted the establishment of the Rule of Law Framework, the Commission continued to establish constrained supranational tools. In this way, although the question of competence redistribution in rule of law matters remained untouched, it still allowed a supranational response to the rule of law crisis.

The EP strongly supported the Commission's efforts to strengthen supranational rule of law protection and advocated the establishment of sanctions. Constrained by the lack of formal initiation powers and thus the legal opportunity to initiate new instruments itself, it resorted to issuing resolutions. Through these nonbinding documents, it proposed EU-wide protection mechanisms and invited the Commission to use new supranational instruments to strengthen the rule of law in member states (EP, 2013, 2016, 2018). In its 2013 Tavares Report on Hungary, it proposed a structured political dialogue between member states and EU institutions as well as a Copenhagen Commission (EP, 2013). In 2016, it called on the Commission to establish an 'EU mechanism on democracy, the rule of law and fundamental rights' (EP, 2016). With this strategy, it highlighted the severity of the problem, kept the issue on the agenda and pressured the Commission to act. Hence, the EP indirectly contributed to the supranational turn by fostering ideas, some of which later influenced the Commission's responses.

The ECJ has been invoked by change agents pushing for supranationalisation and – within the scope of its legal possibilities – has acted as a driver of supranationalisation itself. Through several rulings that further clarified the EU's legal competences concerning the rule of law, it paved the Commission's way for more robust legal action (Pech and Kochenov, 2021). The Associação Sindical dos Juizes Portugueses judgement, for instance, held that the organisation of national judiciaries does not fall 'entirely outside EU competence', as EU law [particularly Articles 2 and 19 Treaty on European Union (TEU)] 'essentially establishes a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals' (Pech and Platon, 2018, p. 1828). As clearly noted by the Commission, the Court also acknowledged the Rule of Law Framework (European Commission, 2019a) and thus the Commission's competence to enforce EU values through this instrument previously challenged by the Council.

Aware of the profound effects of such rulings, the Commission announced plans to refer more rule of law-related infringements to the ECJ to strengthen the legal basis of supranational rule of law protection through case law (European Commission, 2019b, p. 13).

Although the community bodies were constantly advocating a supranationalisation of rule of law protection, the establishment of effective supranational instruments became possible only once a growing number of Council members began supporting this coalition as a result of Hungary's and Poland's increasingly hostile stance. Both governments fiercely opposed measures designed to protect the rule of law and adopted an increasingly confrontational stance towards Brussels (Anders and Priebus, 2020; Csehi and Zgut, 2021), repeatedly accusing the EU of curtailing national sovereignty (Morawiecki, 2021). The more they dismantled liberal democratic institutions and lashed out against the EU's attempts to rein in these developments, the more the willingness to transfer competences in rule of law matters within the Council increased. Whilst, altogether, the Council was still divided on the issue, an increasing number of members reconsidered its position and signalled support for more decisive action. Importantly, Germany and France, as two political heavyweights that had already welcomed the Commission's Rule of Law Framework (Hegedűs, 2019, p. 6) and the triggering of the Article 7 procedure (Closa, 2019, p. 708; Rettman, 2017), were amongst them. Moreover, from 2016 onwards, leading European politicians and governments started to openly contemplate the idea of financial sanctions in case of breaches of the EU's values (Halmai, 2019, p. 180) and thus backed a more robust approach.

This increasing member state support opened a window of opportunity for the Commission's supranationalisation efforts, which it seized. In 2017, Commissioner Vera Jourová suggested a link between the rule of law and EU subsidies (Jourová, 2017). The Commission justified this idea by arguing that the rule of law is a precondition for the 'efficient implementation of the private and public investments supported by the EU budget' (European Commission, DG for Communication, 2017, p. 22). It thereby provided an additional reason for why community institutions have the right to take measures to protect the rule of law. In May 2018, the Commission, in tandem with its proposal for the next Multiannual Financial Framework, presented its proposal to link the disbursement of EU funds to respect for the rule of law. Initially, the proposal was a nonstarter: Whereas the EP endorsed the proposal as early as April 2019, the Council was more hesitant, mainly due to its Legal Service's opinion, which questioned the compatibility of such a mechanism with EU law (Baraggia and Bonelli, 2022, p. 135).

Due to the upcoming negotiations on the Multiannual Financial Framework in late 2019, the proposal gained traction again. Given the political link between the next EU budget and the conditionality scheme, the positions of governments were shaped by both financial considerations and their positions with respect to competence transfers in rule of law matters. In addition, member states negotiated on the Recovery and Resilience Facility, which turned out to be an important asset for the German Council presidency.

The final phase of negotiations was marked by a high degree of conflict, as positions differed significantly not only between the EU's supranational and intergovernmental institutions but also within them, especially the Council. Whereas some governments rejected such a conditionality altogether, it did not go far enough for others (Coman, 2022, pp. 28f.). Moreover, as the Commission had become rather passive, the EP replaced it as the primary advocate for the more supranational features of the mechanism (Coman, 2022,

p. 228). Although the EP failed in some of its central demands concerning the mechanism's design, the fact that the Commission introduced the mechanism as a regular legislative proposal subject to codecision allowed the EP to exert considerable influence and to press for a more supranational outlook. Finally, after several rounds of negotiations plus a veto by the Hungarian and Polish governments, the European Council struck a compromise that resulted in Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget. Although this compromise turned the Commission's original proposal from a tool for protecting the rule of law into one for protecting the budget (Dimitrovs and Droste, 2020), it nonetheless represented a milestone in the supranationalisation of rule of law protection. This new mechanism allows the suspension or withdrawal of funds if 'breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'.

Overall, then, this analysis shows that the joint promotion of a supranationalisation of rule of law protection by the three focal community bodies played a crucial role. The Commission – pressured by the EP – promoted the idea that the competence to address rule of law backsliding ought to reside at the supranational level and introduced constrained supranational rule of law instruments, whereas the ECJ endorsed this development through several rulings and thus created a more robust legal basis for such action. These actors' success, despite their institutional constraints, can be attributed to the Council. In the beginning, its internal divisions, resulting in a rather passive or inactive stance, allowed the supranational actors to dominate the discourse on rule of law protection. This also explains why the Commission initially resorted to constrained supranational tools. Later, the support of the growing coalition within the Council for more supranational responses became the key. Without their support, the establishment of the conditionality mechanism as the first example of an effective supranational instrument would not have been possible. Thus, over time, a coalition of supranational bodies and governments favouring supranationalisation increasingly marginalised sovereigntist positions within the Council and allowed the EU to enhance the supranationalisation of its rule of law toolbox.

A similar shift towards effective supranationalism can be identified in the Commission's recent deployment of infringement procedures. In accordance with the scholarly assessment that values such as the rule of law and democracy are too vague, providing an insufficient basis for their enforcement (Blauberger and Kelemen, 2016, p. 325), for years, the Commission had launched infringement procedures in rule of law-related matters only when they had also constituted clear breaches of secondary law (Anders and Priebus, 2020). This changed in 2018, when the Commission challenged Poland's controversial judicial reform for the first time based on Article 19 (1) TEU in conjunction with Article 47 of the European Charter of Fundamental Rights, without referring to violations of secondary legislation (Pech and Kochenov, 2021, pp. 42–47). Lately, the Commission has been even bolder, challenging Hungary's so-called paedophile law not only on the basis of secondary law but, for the first time, also directly on the basis of Article 2 TEU (Case C-769/22) (Dresler, 2023). Apparently, the Commission is trying to turn infringement procedures into a tool for the direct enforcement of EU values. If the ECJ were to follow this reasoning, then the infringement procedure would become another effective supranational tool for protecting the rule of law.

Conclusions: All's Well That Ends Well?

The rule of law crisis has generated a plethora of scholarly contributions, stressing that the EU, and the Commission in particular, could have done more to protect the EU's values. By systematically analysing rule of law instruments with our concept of supranationalism, we have come to a different conclusion: Although the Commission has indeed not exhausted all its available instruments, a remarkable development, a shift from mostly intergovernmental tools with high decisional thresholds towards effective supranationalism, has taken place. The supranationalisation of rule of law protection, which seemed inconceivable a decade ago, has become a reality.

This development became possible through the strategic action of actors in favour of supranationalisation but constrained by their institutional and political environment. Lacking the formal power to change the treaties, they pursued alternative strategies. The Commission continuously advocated supranational solutions and gradually introduced constrained supranational instruments. This effort was supported by the EP and the ECJ, whose rulings endorsed the newly created instruments and paved the way for a more supranational enforcement approach to EU values. Collectively, the Commission and the EP managed to lead the discourse and to foster the idea that the competence for rule of law protection in member states lies at the European level. A crucial factor contributing to these strategies' success was the Council's initial passivity on the rule of law issue, caused by internal divisions, particularly Hungary's and Poland's opposition. Later, the increasing marginalisation of sovereigntist voices in the Council provided the Commission with sufficient member state support to push supranationalisation forward.

Our findings have two implications. First, when assessing the EU's reaction to the dismantling of the rule of law in its member states, we have to differentiate between the actual *application* of rule of law instruments and the *processes underlying their establishment*. This allows us to detect that even though these instruments have not always been applied to their full potential, the EU has gradually solidified the idea that the competence to protect the rule of law – traditionally considered a national matter – does reside at the European level, thereby laying the foundation for the first effective supranational instrument. This fundamental change, however, has flown under the radar of most commentators. Connected to this, our article also reminds us of the importance of considering longer time horizons. As we know from integration history, change within the EU has always been an incremental and piecemeal process unfolding over time. We therefore need to evaluate longer periods of time to detect fundamental changes occurring beneath the surface.

This perspective dovetails with the theoretical expectations derived from agent-centric historical institutionalism concerning the future development of rule of law protection: Although it does not suggest an automatic development towards supranationalism, it does lead us to expect that returning to the status quo ante is not a viable option and that supranational actors will continue to push for EU-level enforcement.

The introduction of legally binding instruments on paper does not necessarily remedy rule of law deficiencies in practice, however. Although the conditionality mechanism was deployed for the first time in 2022 against Hungary, when the Council finally decided to suspend 6.3 billion in Hungary's cohesion funds (Council of the European Union, 2022), studies on candidate Europeanisation have cast doubt on the effects of these measures.

First, they point out that the impact of conditionality crucially depends on the amount of money to be suspended (Sedelmeier, 2017, p. 338). Some observers have already criticised this, arguing that such ‘cuts are not big enough to inflict a serious blow on the Orbán government’ (Scheppele et al., 2022). Others are more optimistic, contending that these financial pressures will hurt Hungary (Nguyen, 2022). Second, these studies suggest that the more illiberal the targeted regime is, the less effective sanctions will become. Today, then, at least with respect to Hungary, the gradual supranationalisation of rule of law protection might have taken too long to actually pay dividends.

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