



Introduction

How to Save the EU's Rule of Law and Should One Bother?

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I Point of Agreement: There Is a Problem and Something Needs to be Done

This book is rooted in the shared sense of urgency among the editors and the contributors alike that the very core of the constitutional system of the European Union is being put to the test through some of the Member States' non-compliance with the basic principles and values of the Union.¹ The Union is learning the hard way that it is not at all as powerful and well equipped as one would like to deal with the most fundamental constitutional problems which ultimately affect all of its members: the failure of its Member States to adhere to the values of democracy, the Rule of Law and the protection of human rights on which the legal systems of the Union and its Member States alike are presumed to be founded.² There is a growing array of Member States providing abundant examples of such deviations³ and the EU, faced with this new

¹ For a normative analysis of the context necessitating intervention, see, for example, A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', 51 (2014) *CMLRev.* 59; C. Closa in this volume.

² Art. 2 TEU.

³ J.-W. Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order', Working Paper No. 3 (Washington DC: Transatlantic Academy, 2013); V. Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis', 13 (2015) *International Journal of Constitutional Law* 246; L. Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary', in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015); M. Bánkuti, G. Halmai, and K. L. Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution', 23 (2012) *Journal of Democracy* 138. See also the chapter by Paul Blokker in this volume.

problem of fundamental importance in turbulent times,⁴ has not been particularly successful in taming its deviant members.⁵

The problems stemming from this situation are far-reaching indeed. This crisis of constitutionality entirely derails the traditional picture of the Union as an entity based on the Rule of Law.⁶ Consequently, mutual trust, on which the Union is constructed,⁷ does not work as smoothly as it should⁸: being a Member State of the Union does not automatically imply living by the book of principles and values of which the Rule of Law is the key component. The presumptions made in the past⁹ – and seemingly valid in the past¹⁰ – must now be laid to rest: mutual trust

⁴ On the crisis of values, see, for example, A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law', 29 (2009) *OJLS*. See also J. H. H. Weiler's unpublished paper 'On the Distinction between Values and Virtues in the Process of European Integration' (2010). www.iilj.org/courses/documents/2010Colloquium.Weiler.pdf. On the crisis of justice: D. Kochenov, G. de Búrca, and A. Williams (eds.), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015). On the economic side of the crisis: A. J. Menéndez, 'The Existential Crisis of the European Union', 14 (2013) *German Law Journal*; M. Adams, F. Fabbrini and P. Larouche (eds.), *The Constitutionalisation of European Budgetary Constraints* (Oxford: Hart Publishing, 2014).

⁵ Cf. Bogdandy and Sonnevend, *Constitutional Crisis in the European Constitutional Area*; Müller, 'Safeguarding Democracy inside the EU'.

⁶ M. L. Fernández Esteban, *The Rule of Law in the European Constitution* (The Hague: Kluwer Law International, 1999); L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) *Jean Monnet Working Paper* No. 04/09 (NYU Law School) and the literature cited therein. For the EU as a constitutional system, see J. Larik, 'From Speciality to Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union', 63 (2014) *I-CON* 935.

⁷ For the latest forceful restatement by the ECJ see Opinion 2/13 (*ECHR Accession II*) ECLI:EU:C:2014:2454, para. 192.

⁸ D. Halberstam, "'It's the Autonomy, Stupid!'" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward', 16 (2015) *German Law Journal* 105; P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?', 38 (2015) *Fordham International Law Journal* 955; M. Poiars Maduro, 'So Close yet so far: The Paradoxes of Mutual Recognition', 14 (2007) *Journal of European Public Policy* 814; K. Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition', 14 (2007) *Journal of European Public Policy* 682; V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual', 31 (2012) *Yearbook of European Law* 319.

⁹ Every Member State admitted was presumed to be compliant. Far-reaching pre-accession Rule of Law and democracy promotion engagement would thus stop on the day of accession: D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Alphen aan den Rijn: Kluwer Law International, 2008), chapters 1 and 2.

¹⁰ The only time the EU harboured some doubts and extended the validity of the pre-accession values-promotion machinery is the mechanism applicable to Bulgaria and Romania in force even after they became full members: M. A. Vachudova and A.

among the Member States in the checks and balances of each other's constitutional systems cannot simply be mandated, which has always been the traditional view: enforcing trust in each other without enforcing adherence by the Member States to the essential principles which would justify such trust in the first place cannot produce a lasting constitutional edifice.¹¹ The departures from what Article 2 TEU simultaneously proclaims and requires are too obvious¹² and the legal-political tools to deal with this situation¹³ (no matter, however, much such tools have recently been upgraded)¹⁴ are still left unused, even though we could argue that the current enforcement *acquis* potentially does offer important space for an effective Union response to at least some of the outstanding problems it is facing.¹⁵ The adherence to the key values and principles needs to be enforced both in theory and practice. This book substantiates the theoretical arguments in favour of this and shows how such enforcement can come about in practice.

The acuteness of the problem this volume investigates is such that it occupies a host of the leading legal minds in the academia and in practice alike. The conclusion from the literature so far has been, with a handful of exceptions,¹⁶ mostly pessimistic: little can be done. It almost seems as if the law is on the 'bad guys' side. If the Union is to have a bright future, this definitely should not be the case. The key ambition of this volume is thus to send a more optimistic signal: Reinforcing of the Rule of Law Oversight

Spendzharova, 'The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession', 1 (2012) *SIEPS European Policy Analysis*.

¹¹ D. Kochenov, 'Self-Constitution through Unenforceable Promises', in J. Přibáň (ed.) *Self-Constitution of European Society* (Adingdon: Routledge, 2016).

¹² See, Paul Blokker's chapter in this volume, taking Hungary as an example; Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary'.

¹³ See most notably Art. 7 TEU, analysed by B. Bugarič in this volume. Compare, most importantly, W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', 16 (2010) *Columbia Journal of European Law* 385; L. F. M. Besselink, 'The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives', in A. Jakab and D. Kochenov (ed.), *The Enforcement of EU Law and Values: Methods against Defiance* (Oxford: Oxford University Press, 2017, forthcoming).

¹⁴ Some of the recent upgrades are analysed, for example, in D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' 11 (2015) *EUConst* 512. See also the analysis in Carlos Closa's chapter in this collection.

¹⁵ This is the focus of Christophe Hillion's contribution to this volume.

¹⁶ For example, Bogdandy and Sonnevend, *Constitutional Crisis in the European Constitutional Area*; C. Closa, D. Kochenov and J. H. H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union', EUI Working Paper No. 2014/25, RSCAS, 25. See also Jakab and Kochenov, *The Enforcement of EU Law and Values*.

in the EU is possible.¹⁷ Moreover, it could also be achieved without Treaty change. To this end, the scholars invited to contribute chapters – each an unrivalled expert in a particular field – investigate new ways of thinking about the concrete tools to deal with the current situation. This tackles two fundamental issues. The first is repairing the damage already done to the Union by deviant Member States failing to heed the EU's ideal of the Rule of Law. The second is guaranteeing that deviations from the promise to uphold the Rule of Law of Article 2 TEU are not tolerated in the future either.

Innovative proposals aiming at solving the outstanding problems with respect to the Rule of Law lie at the core of this work and form a varied palette of possible scenarios to consider, embedded in the rich analysis of the legal–political context we are dealing with: the core focus of those contributions, which are not directly engaged with promoting clear-cut 'how to' packages, nevertheless contributing to the understanding of the current problems' causes, contexts and implications. To this end, while the core of the book concentrates on the issue of solutions, the story of solutions is not the only story this volume tells.

II The Complexity of the Problem

Laying stress on the possible solutions and approaches which could bring an effective end to the current problems, the work does not stop there. Instead, it starts with a clear line-up of the normative foundations behind the swift deployment of the proposed ways to deal with the outstanding problems, that is, taking Rule of Law seriously.¹⁸ Hesitant voices are equally invited and heard. Indeed, solving problems in the most pragmatic sense could raise even more far-reaching issues than the ones occupying the majority of our contributors. Delving deeper into the possible dangers in the context of the EU's democratic deficit¹⁹ and its traditional understanding of the Rule of Law,²⁰ the volume broadens the picture beyond the problem of Rule of Law oversight and its numerous proposed solutions, charting a landscape more complex than the one which a proverbial action–reaction world-view would imply. Like a baby azure whale on a

¹⁷ For a precursor of the volume coming to the same conclusion, see Closa et al., 'Reinforcing Rule of Law Oversight in the European Union'.

¹⁸ Carlos Closa's contribution in this volume.

¹⁹ See Joseph Weiler's 'Epilogue' in this volume.

²⁰ See the contributions by Gianluigi Palombella and Dimitry Kochenov in this volume.

bicycle wheel,²¹ the fabric of European constitutionalism is much more complex at this stage than any two-dimensional representation of it would presuppose. To be absolutely clear: adding doubt is not done to undermine the potential workability of the proposals for dealing with the Rule of Law disease which ails the EU. Rather, the goal is to provide the tint of complexity which necessarily marks the background of the on-going Rule of Law debate.

While plenty of possible ways to enforce the Rule of Law have been proposed so far²² – some more likely to be effective than others²³ – this volume aims at bringing the majority of the key proposals under one roof as it were, to empower the reader – either scholar or policymaker – to make her own choices from among the options the volume offers. The majority of the proposals formulated in the literature overwhelmingly focus on institutional action both within and outside the Union context. The former proposals include actions by the existing institutions – the Council,²⁴ the European Parliament,²⁵ the European Commission,²⁶ the Fundamental Rights Agency of the EU (FRA)²⁷ – and actions by institutions yet to be created, such as the Copenhagen Commission.²⁸ The latter, focusing on what can be done outside the EU context, include

²¹ Similar to the one commissioned by the editors to represent the EU with its challenging Rule of Law dilemmas for the cover of this collection and painted by Grisha Kochenov.

²² For a brief overview, see Closa et al., ‘Reinforcing Rule of Law Oversight in the European Union’.

²³ For comparative analyses, see *Ibid.* See also D. Kochenov, ‘On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed’, 33 (2014) *Polish Yearbook of International Law* 145.

²⁴ Council of the EU, press release no. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20–21; See also E. Hirsch Ballin’s contribution to this volume.

²⁵ A detailed analysis is offered in the special issue of the *Journal of Common Market Studies*, co-edited by D. Kochenov, A. Magen, and L. Pech, forthcoming in 2016.

²⁶ European Commission, ‘A New EU Framework to Strengthen the Rule of Law’, Strasbourg, 11 March 2014, COM(2014) 158 final. For an analysis, see Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the European Union’. See also, crucially, K. L. Scheppele’s contribution to this volume (outlining the way to empower the Commission to intervene in the cases related to the breach of Art. 2 TEU based on a so-called ‘systemic infringement procedure’, allowing for a more effective deployment of Art. 258 TFEU).

²⁷ See, for example, the chapter by G. N. Toggenburg and J. Grimheden in this volume.

²⁸ See, J.-W. Müller’s contribution to this volume. See also J.-W. Müller, ‘Should the European Union Protect Democracy and the Rule of Law in Its Member States’, 21 (2015) *ELJ* 141; J.-W. Müller, ‘The EU as a Militant Democracy’, 165 (2014) *Revista de Estudios Políticos* 141.

the involvement of the Venice Commission for instance,²⁹ or proposals to draw on the lessons stemming from the operation of universally respected international actors, including the UN.³⁰ Perusal of the literature reveals that reliance on Member State courts³¹ and the potential fine-tuning of the powers of the EU through a broad interpretation by the Court of Justice of the European Union (ECJ) of the Charter of Fundamental Rights of the EU (CFR)³² have also been advocated. Last but not least, Member State action either through ‘soft law’ via mutual monitoring³³ or through their direct involvement in infringement proceedings before the ECJ – while going against the Member States seen as the cause of the problem³⁴ – have also been defended as potentially viable approaches to solve the Article 2 TEU compliance problems the EU confronts. The majority of the proposals outlined are discussed by the scholars contributing to this volume. While dedicating a chapter to each would be impossible due to the obvious physical limitations of a book format, all the key ideas flowing from each and every leading proposal on the table appear recurrently in the

²⁹ Kaarlo Tuori’s chapter in this volume; J. Nergelius, ‘The Role of the Venice Commission in Maintaining the Rule of Law’, in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015).

³⁰ See, for example, the chapter by Martin Scheinin in this volume.

³¹ A. von Bogdandy et al., ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ 49 (2012) *CMLRev.* 489. For analyses, see J. Croon-Gestefeld, ‘Reverse Solange – Union Citizenship as a Detour on the Route to European Rights Protection against National Infringements’, in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2016); Kochenov, ‘On Policing Article 2 TEU Compliance’. See also the improved versions of the proposal: A. von Bogdandy et al., ‘A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine’, in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015); A. von Bogdandy, C. Antpöller and M. Ioannidis, ‘Enforcing European Values’, in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford: Oxford University Press, 2017, forthcoming).

³² András Jakab’s chapter in this volume. The Charter’s potential is as far-reaching as it is unused: F. Hoffmeier, ‘Enforcing the EU Charter of Fundamental Rights in Member States: How Far Are Rome, Budapest and Bucharest from Brussels?’, in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart, 2015); A. Łazowski, ‘Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings’, 14 (2013) *ERA Forum* 573. See also P. Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’, 39 (2002) *CMLRev.* 945.

³³ See also E. Hirsch Ballin’s contribution to this volume.

³⁴ D. Kochenov, ‘Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool’ 7 (2015) *The Hague Journal of the Rule of Law* 153.

book and are discussed by the contributing scholars in abundant detail,³⁵ elaborating a complex web of strong and weak features for each proposed solution, helping move our thinking further.

This edited volume is directly rooted in the concerns about the quality of national-level compliance with the fundamental values of the Union as expressed in Article 2 TEU and in particular with the Rule of Law as one of the core values mentioned in that provision, which the constitutional and legal changes in a growing number of the Member States of the European Union (in particular in Hungary and, though less so, in Romania, Greece and others) have caused across the continent. These developments have engendered the perception that whilst the EU is well equipped with the means to shape the democratic systems of candidate countries,³⁶ aspires to do the same with the European Neighbourhood Policy partners,³⁷ and is even able to shape third states' legal systems via cooperation and other agreements, the EU is poorly equipped to deal with similar issues concerning actual Member States.³⁸ The key issue is that the promise contained in the values the EU embraces in public might not be enforceable in practice,³⁹ throwing a shadow on the self-constitution of the Union as a constitutional system.⁴⁰

It is thus not surprising at all that these concerns – crucially important as they are – resulted in the plethora of (at times vocal) responses from governments, institutions and academics mentioned above. It is clear, however, that the whole debate – however rich some elements of it might seem to the participants at the moment – is, but at its starting point, amounting to little more than a tip of the iceberg on a long road of

³⁵ With the sole exception, probably of the Article 259 one, which is the newest addition to the toolkit menu, only published around the time when the manuscript of this book went to print.

³⁶ M. A. Vachudova, *Europe Undivided* (Oxford: Oxford University Press, 2004); but see Kochenov, *EU Enlargement and the Failure of Conditionality*.

³⁷ R. Petrov and P. Van Elsuwege (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (London: Routledge, 2014); L. Pech, 'The EU as a Global Rule of Law Promoter: The Consistency and Effectiveness Challenges' 14 (2016) *Asia Europe Journal* 7; L. Pech, 'Promoting the Rule of Law Abroad', in D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (Cambridge: Cambridge University Press, 2013), p. 108.

³⁸ While this problem has been known for decades as one of the curiosities of the legal context of EU enlargement regulation, the ongoing developments in Hungary, in particular, gave it a practical twist for the first time in its long career.

³⁹ It has been suggested that the new Member States were joining the Union partly attracted by the promise of the eventual enforcement of these key principles, should something go wrong in the national constitutional system: W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford: Oxford University Press, 2012).

⁴⁰ D. Kochenov, 'Self-Constitution through Unenforceable Promises'.

endowing the EU with adequate legal and political means to solve the outstanding issues caused by its inability to ensure that all of its Member States fully adhere to the basic principles – especially democracy and the Rule of Law – on which the Union is founded. A long process, which goes far beyond the rethinking of the actual modalities of operation of Article 7 TEU and the infringement procedures, possibly also confronting the atypical nature – if not deficiency – of the Rule of Law at the supranational as opposed to the Member State level,⁴¹ if not the democratic deficit of the EU, as Joseph Weiler warns in the Epilogue.⁴²

It thus becomes clear in this context that the focus on enforcement should not distract the vigilant observer of the Rule of Law from the problems of understanding and interpreting this very notion at the supranational level: while numerous necessary elements of EU Rule of Law have been outlined by academics and the institutions alike,⁴³ problems still abound, caused the mechanical and uncritical approach to the Rule of Law,⁴⁴ where tautologies in the vein of ‘Rule of Law means being bound by the law’ seem not infrequent guests.⁴⁵ This is precisely why a focus only on the modalities of the normative necessity for the enforcement of the Rule of Law or, which is the flipside of the same coin, on the practical tools of such enforcement, however innovative, is bound to be insufficient in the eyes of those theorists who are rightly sceptical, including Joseph Weiler, Gianluigi Palombella and Dmitry Kochenov in this volume. The differences in the vectors of such scepticism – whether they come from the quarters of democracy,⁴⁶ ‘pure’ Rule of Law⁴⁷ or even justice considerations⁴⁸ – are less important in the context of the discussion carried out in this collection than the conclusions reached: the substance is as important – if not more important – than the tools.

⁴¹ See the contribution by Dmitry Kochenov in this volume.

⁴² See Joseph Weiler’s contribution to this volume.

⁴³ See, most importantly, Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’. The Commission, to look at the institutional side, supplied its vision of the Rule of Law in the Pre-Article 7 Mechanism: COM(2014) 158 final. See also D. Kochenov and L. Pech, ‘Better Late than Never?’ 54 (2016) *JCMS*.

⁴⁴ The crucial problems are brilliantly analysed by Gianluigi Palombella in his contribution to this volume.

⁴⁵ *Ibid.* See also Dmitry Kochenov’s chapter in this collection.

⁴⁶ J. H. H. Weiler, ‘Europa: “Nous coalisons des Etats nous n’unissons pas des homes”’, in M. Cartabia and A. Simoncini (eds.), *La sostenibilità della democrazia nel XXI secolo* (Bologna: Il Mulino, 2009).

⁴⁷ G. Palombella, *È possibile la legalità globale?* (Bologna: Il Mulino, 2012); G. Palombella, ‘The Rule of Law and Its Core’, in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009).

⁴⁸ Kochenov et al. (eds.), *Europe’s Justice Deficit?*

III The Structure of the Collection

This collection constitutes a creative attempt to bring the discussion of precisely such tools forward, while keeping an eye on the bigger picture. This is done through a detailed analysis of the concrete ways of dealing with the current state of affairs, which the editors and all the authors alike consider as profoundly problematic. The project adopts a clear starting assumption, discussed and developed throughout all the contributions, that a strengthened role for the EU in dealing with the problems of democracy and the Rule of Law is both *possible* and *desirable*. This position flows from a combination of the factual environment, which encouraged these reflections, but also from a detailed examination of the legal structure of the EU with a special emphasis on the position occupied by the principle of the Rule of Law at its very core.⁴⁹

The work splits into three parts. The first, *Establishing Normative Foundations* restates the normative foundations on which the volume builds (Closa), also looking at the legal–philosophical core of the Rule of Law, creating an innovative and for some uneasy picture (Palombella). Crucially, however, the first part makes clear that the EU is potentially empowered to intervene to defend the Rule of Law *already* under the Treaties in force (Hillion), particularly with the constructive potential of the much criticised Article 7 TEU in mind (Bugarič), thus setting the stage for the concrete proposals for how to do this.

The second part of this collection, entitled *Proposing New Approaches*, focuses on the most important among the proposals on the table, many of which were also discussed by the EU institutions and by the organs of other European international organisations, including in the context of the Council of Europe.⁵⁰ These include the Copenhagen Commission (Müller), systemic infringement action (Scheppelle), EU’s internal strategy for fundamental rights (Toggenburg and Grimheden) and the reliance on checklists as a prevention mechanism (Scheinin), as well as reassessing the scope of the EU Charter of Fundamental Rights (Jakab) and granting a larger role to the Venice Commission for Democracy through Law of the Council of Europe (Tuori). Peer review by the Member States is also discussed in detail (Hirsch Ballin).

The third part, *Identifying Deeper Problems*, provides a broader critical assessment of the issues we are dealing with, looking at the difficulties with probing deeply enough into the domestic constitutional context (Blokker), problematic post-accession legacies (Vachudova) and the

⁴⁹ Palombella in this volume.

⁵⁰ See Kaarlo Tuori’s contribution to this collection.

possibly deficient framing of the Rule of Law at the supranational context – which is potentially concerned with two things. The first aspect outlined in this volume relates to the departure by the EU from what Gianluigi Palombella calls ‘the Rule of Law as an Institutional Ideal’,⁵¹ thus establishing a direct connection with the first part of this book (Kochenov). The second aspect of the problem concerns the necessary interplay between the Rule of Law and democracy in the EU in a context where the unconventional character of the EU’s democracy is something we can all agree upon. The Epilogue thus provides a cautionary tale of why, when going about with the starting assumptions on the Rule of Law adopted in the EU, one has to tread extremely carefully, as the EU itself is liable to criticism on many grounds when viewed through a lens of democracy and legitimacy. The implications of this legitimate criticism are far-reaching (Weiler).

IV Pending Decisions for the Future

This volume does not take a definitive stance on any of the possible courses of action it offers, rather inviting the reader to extract her own conclusions. The volume does nonetheless call for including a critical stance on the definition and elaboration of the ontological character of the notion of ‘Rule of Law’ as a preliminary step before deciding how the EU should deal with the potential breaches of this principle. In this sense, both the editors and the majority of the contributors concur in not assuming that these complex issues will be solved once the (institutional) alternatives are identified. Rather, academic debate should become the trigger of a richer institutional debate which bridges into the ontological dimension: what the Rule of Law is, especially for the EU. A permanent critical stance toward the constitutional structure of the Rule of Law in the EU will definitely not solve the challenges and issues raised here but it will no doubt help avoid outright bluffing and assumptions of empowerment based precisely on the situations where change is unquestionably required, such as in instances of institutional capture.⁵²

This critically reflective stance not only refers to ‘Rule of Law’ but to the whole ensemble of values enshrined in Article 2 TEU. One of its key normative proposals is therefore a comprehensive reading of the set of values comprised therein. Human rights, democracy, dignity, equality

⁵¹ Gianluigi Palombella’s chapter in this volume, p. 36.

⁵² As discussed *inter alia* by Jan-Werner Müller: Müller, ‘The EU as a Militant Democracy’.