

BOOK REVIEW

The respect of the rule of law by the European Union in times of economic emergency – Apropos of Anna Zemskova’s brilliant Ph.D.

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1 INTRODUCTION

On April 26th Anna Zemskova obtained her PhD in Law from Lund University. She brilliantly defended a doctoral thesis titled *The Rule of Law in Economic Emergency in the European Union*. Her opponent was professor Takis Tridimas (King’s College London). I had the opportunity and the privilege of both attending such defense and being part of the assessment panel together with Prof. Helle Krunke (University of Copenhagen) and Assoc. Prof. Julian Nowag (Lund University). The thesis was supervised by Prof. Xavier Groussot and Prof. Jeffery Atik.

As its title indicates, the dissertation has tackled an extremely intricate legal topic. The concept of the rule of law has been one of the few ideas shaping Western legal thought and legal systems over the past two centuries. Most likely a second one is solving the conundrum of emergency law. However, far from being outdated, rule of law and emergency law remain crucial and pervasive issues in contemporary legal discourse, extending well beyond their traditional domains of legal theory and philosophy, constitutional law, and comparative law, and asserting themselves unapologetically in international law and European Union (EU) law.

It is precisely the twofold focus on the EU itself and economic emergencies, i.e., a nontraditional polity and a nontraditional type of emergency, which makes Anna Zemskova’s theoretical endeavour particularly remarkable.¹ This is especially opportune given that, as the author notes, recent attention has been almost entirely focused on the rule of law backsliding in some Member States, leaving the issue of how the EU itself abides by the rule of law somewhat overlooked.²

I fully agree with Zemskova that paying attention to this issue is crucial if we are to honour the foundational nature of the rule of law within the EU. This is particularly evident when observing the consequences of the response to the 2008 financial crisis that led to the sovereign debt crisis affecting several EU countries and caused the redesign of the Economic and Monetary Union (EMU), including the creation of a financial rescue mechanism for Member States.³

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¹ Anna Zemskova, *The Rule of Law in Economic Emergency in the European Union* (Lund: Lund University 2023).

² Pablo Martín Rodríguez, *El Estado de Derecho en la Unión Europea* (Madrid: Marcial Pons 2021) 22.

³ Pablo Martín Rodríguez, ‘Dialogical rule of law y respuesta europea a la crisis’ in Luis Miguel Hinojosa Martínez and Pablo Martín Rodríguez, *La regulación internacional de los mercados y la erosión del modelo político y social europeo* (Cizur Menor: Thomson Reuters Aranzadi 2019).

The dissertation approaches its topic with remarkable intellectual honesty. The language used is accurate, beautiful but unpretentious, and the reasoning is transparent and open. The author explicitly states her legal philosophical assumptions and premises and sticks to them throughout the book. The results and conclusions are gradually delivered, introducing the reader smoothly to complicated legal issues and EU policies involving a vast amount of legislation. The challenge of handling an enormous volume of scientific literature, even if only in English sources, is accomplished successfully.

2 OUTLINE OF THE DISSERTATION AND MAIN CONCLUSIONS

After the introductory chapter discussing hypotheses, research questions, methodology, and the state of the art, Chapters 2 and 3 present the theoretical framework of the dissertation. They adopt a concept of the rule of law applicable to the EU and identify EU economic emergency law and its gaps. The author then applies these categories to the EU's response to the financial and economic crises in three different areas: economic and fiscal governance, monetary policy, and financial assistance. Chapter 7 provides a comparison with the EU's response to the COVID-19 pandemic. The dissertation closes with a Concluding Chapter.

Regarding the notion of the rule of law, Zemskova reviews its origin and evolution in EU law, with a particular focus on the Court of Justice and recent legal instruments addressing Member States' compliance. Adopting a common approach found in scientific literature, she identifies the essence of the rule of law in countering arbitrariness (with a distinct Krygier resonance)⁴ while also emphasizing its sometimes-forgotten function of legitimizing the exercise of power. Based on these premises, the dissertation takes an *anatomical approach* which focuses less on finding a definition than on identifying rule of law components that are operational as general principles of EU law. Three facets emerge: a formal facet embracing principles of legality, legal certainty, and transparency; a substantive facet formed by fundamental rights; and a procedural facet ensuring individuals' access to justice, which enables the actualization of both formal and substantive aspects.

Chapter 3 aims to address the difficulties in finding an autonomous concept of economic emergency. The author argues that financial instability can be considered as a trigger for economic emergencies. Zemskova reviews the various provisions in EU primary and secondary law related to emergencies, highlighting that the principle of conferral leaves open the question of how to respond outside of specific provisions, especially considering that a state of economic emergency is rarely declared and the EU has no provision for it. Then, EU's approach oscillates between an extralegal model and a business-as-usual model. Following a neo-functionalistic rationale of the EU constitutional architecture, Zemskova claims that, in order to preserve the European project, extraordinary measures have been adopted, often involving centralization and technocratization of Member State competences, which implies a certain politicization of EU technocratic institutions. Those by no means business-as-usual measures have been imaginatively internalized into the system, changing it

⁴ See Martin Krygier and Adam Winchester, 'Arbitrary power and the ideal of the rule of law' in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Cheltenham: Elgar 2018).

but giving the impression that no resort to extralegal measures did exist. In her opinion, this approach cannot be easily reconciled with the rule of law *tout court*.

The following three chapters focus on the measures enacted in response to the 2007-2008 financial crisis, highlighting their controversial aspects in terms of the rule of law. Chapter 4 examines fiscal and economic policy which, as is well known, has undergone a formidable revision and legal reinforcement, in particular for Eurozone states. The author leads the reader beautifully through this true legal maze. She identifies weaknesses in terms of the principle of conferral, especially regarding specific country recommendations even if infringements thereof have not been pursued or sanctioned. She raises concerns about intertwining soft and hard law, as well as EU law and international law – which is a very common feature. Since the possibilities of individuals for challenging any of these measures before the Court of Justice are largely curtailed, the book gives a somber image of the procedural facet and its potential for actualization of the substantive facet, i.e., assuring respect for fundamental rights.

Considering the monetary policy *volet*, Zemskova discusses the controversial measures put in place by the European Central Bank (ECB). She convincingly outlines the insufficiencies in terms of the rule of law, such as the *chiaroscuro* related to conferral, compliance with Article 123 TFEU, and the wide discretion and secrecy endorsed by the Court of Justice. The conclusions drawn from this analysis are highly relevant for the rule of law, extending the mere role of the ECB in swiftly responding to economic emergencies.

Chapter 6 focuses on the most prominent manifestation of exceptionality in the European reaction to the crisis: granting financial assistance to Member States. This assistance has taken the form of bilateral loans or EU funds (Article 122 TFEU), but also instruments remaining formally outside EU law, such as the European Financial Stability Facility and the European Stability Mechanism. The book highlights the questionable legality of this financial assistance and its often intergovernmental or hybrid legal nature, but it rightly assigns utmost importance to the meager respect of the procedural facet of access to justice. Thus, despite certain improvements in *Ledra Advertising* or *Florescu*, other cases such as *Mallis*, *Associação Sindical dos Juizes Portugueses*, *Chrysostomides* or *Brinkmann* prove that the Court of Justice is still far away from providing individuals an adequate level of effective judicial protection.

Chapter 7 provides a brief comparison with the EU's response to the COVID-19 pandemic and its economic dimension. According to Zemskova, although there are similarities in terms of swiftness and creative legal mechanisms, the response to the pandemic is more rule of law-oriented, following a 'business-as-usual' model. This is facilitated by the higher sophistication of the EU's economic emergency constitutional architecture that has already been achieved, as well as the symmetric impact of a non-economic-originated emergency across the Union. This contrast reveals, in her opinion, a novel rebalancing of the Economic and Monetary Union (EMU) with a new understanding of conditionality and solidarity between Member States.

Through her profound analysis, Zemskova reaches a central conclusion. She argues that due to the specific features of economic emergencies, they tend to lead to constitutional mutations or transformations. Even without formal declarations or primary law amendments, the requirements of the rule of law are not only softened but also extended well beyond the actual economic emergency, gradually becoming part of the legal normalcy.

As a result, these changes become ‘embedded in the principle, which is, henceforth, perceived and applied in its modified version’.⁵

This succinct description of the thesis highlights the interest and relevance of Anna Zemskova’s analysis. In my view, her approach combines a canonical constitutional perspective with a strong autonomous legal conception of the EU. Nonetheless, as someone with a background in international law, I hold a different and more nuanced concept of the EU’s autonomy as both a legal system and a political entity. This likely extends to my perspective on emergency law as well. Additionally, my 20th century academic upbringing in a linguistically diverse environment leads me to resist the notion that everything interesting is written in English or its associated implications.

Despite these differences, I agree with the majority of the book’s conclusions. This convergence of viewpoints is noteworthy, and it could be valuable to engage in a brief dialogue from an alternative perspective on two key topics: the legal articulation of the rule of law and the mixed nature of EU emergency law.

3 ON THE LEGAL ARTICULATION OF THE RULE OF LAW WITHIN THE EU

3.1 ON SOME THEORETICAL ASSUMPTIONS AND DILEMMAS

Addressing the concept of the rule of law in the EU entails considering four theoretical positions that are often left unspoken. These issues pertain to the uniqueness and binding nature of the rule of law within the EU’s legal system, as well as the components it encompasses and how they are legally articulated and operationalized.

Often rooted in orthodox constitutional approaches, the notion of the rule of law has been understood as the practical outcome of other constitutional rules and principles. Consequently, the rule of law is viewed as an aspirational ideal embedded in the constitution but lacking the inherent ability to produce concrete legal consequences. This aligns with the legal theory common assertion that ‘the rule of law is not *a* rule of law’.

This ethereal understanding of the rule of law conveniently accommodates the theoretical debate on its formal or substantive interpretation (referred to as thin or thick versions). It also appears to be consistent with its historical development in EU law, primarily shaped by the case law of the Court of Justice, which has predominantly focused on access to justice or judicial scrutiny since the seminal *Les Verts* case.⁶ Additionally, it aligns with the recognition of the rule of law as a foundational European *value* common to its Member States.

However, this framework has been challenged as instances of rule of law backsliding in certain Member States necessitated the operationalization of the rule of law as a legal concept beyond its theoretical or speculative dimension. These challenges compelled the EU to define the legal parameters of the rule of law, i.e., how it has been effectively translated into the EU legal system, giving rise to enforceable legal standards. This has sparked familiar debates in EU law literature, such as the legal effects of Article 2 of the Treaty on European Union (TEU), the autonomous binding nature of the rule of law, the specific obligations it

⁵ Zemskova (n 1) 330.

⁶ Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* EU:C:1986:166 para 23.

encompasses, the mechanisms for enforcement, and the scope and content of these obligations concerning the EU and the Member States.

There have been, indeed, some advancements in EU legislation and case law that shed light on some of these questions. For example, when examining the value enshrined in Article 2 TEU in relation to other Treaty provisions such as Articles 19 or 49 TEU, it becomes apparent that the concept of the rule of law may entail legal obligations that go beyond the traditional scope of EU law.⁷ Precisely the Court of Justice is currently being called upon to clarify the autonomous binding effects of Article 2 TEU.⁸ An important development in this regard is the inclusion of a definition of the rule of law in a legally binding act, namely Article 2 of Regulation 2020/2092 on financial conditionality.⁹

However, it seems that these developments towards a stronger binding nature and specificity of the rule of law have primarily affected Member States. This has led many authors to interpret (not always openly) that the rule of law may have a different content when applied to the EU as an entity compared to its application to the Member States.¹⁰

It is submitted here that the *effet utile* and consistency of Article 2 TEU are against those conclusions. In my view, Article 2 TEU ought to be understood as the posited translation of the rule of law in the EU legal order. Nothing different would imply the foundational nature of these values, former principles.¹¹ Conceiving the rule of law as the mere result of other principles and rules only intellectually connected by the speculative notion of the rule of law would deprive Article 2 TEU of any legal effect, degrading it to less than a programmatic provision.

The dissociation of the rule of law in its application to Member States and to the EU is not persuasive enough either. The wording of Article 2 TEU makes no difference among the values mentioned, and no such idea has been raised regarding other EU foundational values, such as fundamental rights or human dignity. In addition, given the decentralized nature of the implementation of EU law, the essentiality of Member State compliance with the rule of law should be taken into account. The only path for EU law to ensure the respect for the rule of law is by demanding Member States to comply with it when applying EU law. Therefore, it is not merely a situation of interconnected elements ('communicating vessels'), but rather an inherent link that necessitates a consistent and uniform understanding of the rule of law.¹² Differentiating between both levels, namely, demanding Member States to

⁷ In the *judicial independence in Poland* saga, the Court of Justice has acknowledged that subparagraph (2) of paragraph (1) of Article 19 TEU *gives concrete expression to the value of the rule of law* as outlined in Article 2 TEU, according to which Member States are obligated to ensure effective legal protection including independence of the judiciary in those areas covered by EU law (e.g. Case C-192/18 *Commission v Poland (Independence of ordinary courts)* EU:C:2019:924 para 98). In *Repubblica*, the Court made a connection between Articles 2 and 49 TEU to deduce a non-regression principle. This principle requires Member States not to lower the level of protection of the rule of law, including the independence of the judiciary, that was in place at the time of accession (Case C-896/19 *Repubblica v Il-Prim Ministru* EU:C:2021:311).

⁸ See Case C-769/22 Action brought on 19 December 2022 — *European Commission v Hungary* (pending).

⁹ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1.

¹⁰ See e.g., *Zemskova* (n 1) 57-58.

¹¹ I agree with those who contend that the Lisbon Treaty cannot be interpreted as demoting the legal nature of these principles (See Armin von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57(3) *Common Market Law Review* 705, 716-717).

¹² Advocate General Campos Sánchez-Bordona accurately contends that '[t]he concept of the rule of law has an autonomous meaning within the EU legal system. It cannot be left to the national law of the Member

comply with certain principles that the EU does not, would necessitate a specific normative foundation that is lacking. The inherent challenge lies in elucidating why the content of the rule of law may vary in its application. My contention is that this divergence can be attributed to the nuances and sophistication of its legal articulation in the EU. A previous thorny issue on the definition of the rule of law is briefly tackled.

3.2 RULE OF LAW DEFINITION V RULE OF LAW COMPONENTS

It is a common place to note that the Treaties do not contain a definition of the rule of law. Most constitutions do not either, but states have historical legal traditions where the notion has emerged and evolved. Unlike states, the Union not only lacks this tradition but presents itself as a different political-legal entity of an international nature, where the translation of the rule of law concept is not straightforward.¹³

As Burgess points out, the rule of law is a historical category¹⁴ and I think that a dual European consensus on the rule of law can be found in contemporary Europe which pleads for a *thickened version*.¹⁵ This consensus concurs on a core set of formal requirements or contents, but also on the recognition of the necessary complementarity of the rule of law with a democratic system and the respect for fundamental rights.¹⁶

This approach has been codified in Article 2(a) of Regulation 2020/2092 on financial conditionality which reads as follows:

‘the rule of law’ refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

States to determine its parameters, because of the risk this would pose to its uniform application’ (Opinion of AG Campos Sánchez-Bordona in Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:2021:974 para 273).

¹³ Diego J Liñán Noguera, ‘La internacionalización del Estado del derecho y la Unión Europea: una traslación categorial imperfecta’ in Diego J Liñán Noguera and Pablo Martín Rodríguez (eds), *Estado de Derecho y Unión Europea* (Madrid: Tecnos 2018).

¹⁴ Paul Burgess, ‘Neglecting the History of the Rule of Law: (Unintended) Conceptual Eugenics’ (2017) 9(2) *Hague Journal on the Rule of Law* 195.

¹⁵ Martín Rodríguez, *El Estado de Derecho* (n 2) 27.

¹⁶ This approach is followed by the Council of Europe and the EU (see Commission européenne pour la démocratie par le droit (Commission of Venice), Report on the Rule of Law, Venice, 25-26 March 2011, CDL-AD (2011) 003 rev and Rule of Law Checklist, Venice, 11-12 March 2016, CDL-AD (2016) 007; and European Commission, ‘Communication A New EU Framework to Strengthen the Rule of Law’ COM (2014) 158 final; Commission, ‘Report on the Rule of Law in 2020 - The Rule of Law Situation in the European Union’ COM (2020) 580 final). But it can also be linked to the evolution of national manifestations within European states (Laurent Pech and Joelle Grogan (dirs), ‘Unity and Diversity in National Understandings of the Rule of Law in the EU’, EU Project RECONNECT, Deliverable 7.1, 30.04.2020 and ‘Meaning and Scope of the EU Rule of Law’, EU Project RECONNECT, Deliverable 7.2, 30.04.2020, <<https://reconnect-europe.eu/publications/deliverables/>> accessed 1 October 2023).

Without endorsing it conceptually, the Court of Justice has functionally embraced this definition in the conditionality regulation cases.¹⁷ It is worth noting that this definition affirms the two central features of the European consensus mentioned above. The first feature is the *interconnectedness of the rule of law with other values* inherent to the thickened version. This interpretative interdependence has an unquestionable legal foundation at the European level. Article 2 TEU explicitly declares democracy, respect for fundamental rights, and human dignity also as EU foundational values common to the Member States,¹⁸ but they still retain their autonomy.¹⁹

The second feature is the *subtle shift from the definition towards the components* of the rule of law. Although the definition issue is not irrelevant, I agree with those authors, such as Zemskova who opts for an anatomical approach. As long as there is consensus that the rule of law encompasses certain principial contents and there exist legal mechanisms to make them operational, the repercussion of the absence of a definition does not disappear, but it is substantially diminished.

This occurs in Union law, where the components of legality, legal certainty and prohibition of arbitrariness, effective judicial protection (including the right to a judicial remedy), separation of powers, and equality before the law have been judicially recognized as general principles.²⁰ The Court of Justice has unequivocally recognized and developed them in its case law, often intertwined with each other.²¹

Thus, general principles of EU law appear as the first channel through which the value rule of law treads the path from axiological to deontic.²² It is indeed an appropriate channel, since general principles are, according to Alexy,²³ legal norms imposing an optimization command that mirrors the axiological nature of values.

¹⁷ Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97 para 227.

¹⁸ It can be argued that this is also an inherent consequence of the instrumental nature of the rule of law. Once embedded in a democratic constitutional system, the rule of law becomes instrumental, serving as a guarantee for preserving the democratic system itself. Therefore, it is inevitable to recognize a certain ‘cross-fertilization’, which is not an ideological use – as certain States have sometimes denounced – but rather the consequence of being such a *vehicular principle* (Diego J. Liñán Noguerras, ‘Valores y Derecho: la tiranía del método’ in Pablo Martín Rodríguez, *Nuevo mundo, nueva Europa. La redefinición de la Unión Europea en la era del Brexit* (Valencia: Tirant lo Blanch 2020) 28).

¹⁹ See the interpretation of the expression ‘also as regards fundamental rights’ as not being part of the rule of law but only ‘an illustration’ (Case C-156/21 *Hungary v Parliament and Council* (n 17) para 229).

²⁰ It is rather quite significant that the rule of law materializes through general principles, the sort of legal norm whose control is retained by judicial organs. In fact, over time general principles have received different types of legal recognition, demonstrating the interesting dynamic between case law and legislation, between *jurisdictio* and *gubernaculum* (Gianluigi Palombella, ‘The Rule of Law at Home and Abroad’ (2016) 8(1) *Hague Journal on the Rule of Law* 1).

²¹ Case C-157/21 *Poland v European Parliament and Council of the European Union* EU:C:2022:98 paras 290-292.

²² A second channel is the use of the rule of law as a mere *parameter of control* for Member States. I cannot expand on this issue linked to Article 2 TEU and its enforceability towards Member States, the failure of Article 7 TEU procedure and the subsequent jurisdictional response. Let us just say that there is a crucial difference between both channels in terms of the principle of conferral (Martín Rodríguez, *El Estado de Derecho* (n 2) 33-44).

²³ Robert Alexy, *Teoría de los derechos fundamentales* (2nd edn, Madrid: Centro de Estudios Políticos y Constitucionales 2012).

3.3 RULE OF LAW COMPONENTS AS GENERAL PRINCIPLES OF EU LAW: CONCEPTUAL STRETCHING

By recognizing its components as general principles, EU law has substantially incorporated the value of the rule of law. However, this mere legal qualification does not suffice to illustrate the characteristics of this incorporation. When applied in an international setting, it is impossible not to notice a *conceptual stretching*, as explained by Konstadinides.²⁴ This sort of essentialism seems the only means of acquiring a necessary autonomous content. Nevertheless, this conceptual stretching that occurs in non-state political entities is connected or determined by the establishment of legal equivalences and/or presumptions, impacting on each component or general principle in a specific way.

The EU supranational framework requires the search for similarities for the components of the rule of law that, being halfway between their functional and substantive character, remain *unfinished* to a variable extent.²⁵ The principle of legality may illustrate this. If one looks at the formal core of legality (public authorities may only act through law and only to the extent authorized by the law), its incorporation into the EU legal system is evident, even unchanged, within the principle of conferral (Article 5 TEU).

However, as the principle of legality moves away from the formal aspect and delves into a substantive approach linked to the separation of powers and democratic legitimacy (which focuses, among other aspects, on parliamentary act supremacy, its making-process, or the connection to a representative institution), the introduction of this component requires establishing some equivalences, such as taking separation of powers and institutional balance as equivalent.²⁶ The category of legislative acts introduced by the Lisbon Treaty clearly proves this unfinished equivalence and suggests that the ‘stretched legality’ in EU law seeks to preserve the agreed procedure as a manifestation of the institutional balance (i.e., that original separation of powers) rather than shaping a qualified superior legal act, due to their complicated democratic pedigree as they emanate from an already atypical ‘legislator’.²⁷

The incorporation of rule of law components also resorts to legal fictions or presumptions, as illustrated by access to justice. This is a key component historically developed in the case law, and now understood in light of the fundamental right to effective judicial protection enshrined in Article 47 of the Charter. However, it should be borne in mind that this general principle works on the presumption that the EU legal system provides

²⁴ Theodore Konstadinides, *The Rule of Law in the European Union. The Internal Dimension* (Oxford: Hart Publishing 2016) 38.

²⁵ These unfinished equivalences constitute, in my opinion, *non-univocal normative foundations*, and their immediate effect is to foster or project an open spectrum of legal evolution, thereby incorporating the rule of law to the Union legal system with the capacity for renewal and adaptation. They possess the ability to generate new responses within the system itself, whose evolution is also open due to the functional model of conferral and its articulation through general principles of law (Martín Rodríguez, *El Estado de Derecho* (n 2) 48).

²⁶ An equivalence less perfect than it may look (See Paz Andrés Sáenz De Santa María, ‘El estado de derecho en el sistema institucional de la Unión Europea: realidades y desafíos’ in Diego J Liñán Nogueras and Pablo Martín Rodríguez (eds), *Estado de Derecho y Unión Europea* (Madrid: Tecnos 2018)).

²⁷ Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* EU:C:2017:631.

a complete system of remedies that fully guarantees effective judicial protection.²⁸ This is a complex legal fiction, as there is no European judicial system as such. With only a system of judicial cooperation in place, this presumption entails, as we know, interpretative and even law-creating effects,²⁹ but mostly it heavily relies on the requirement for national legal systems to ensure full compliance with the principle, as set forth in Article 19 (1) and (2) TEU.³⁰ Thus, examining the procedural facet of the rule of law needs including both EU courts and national courts.

3.4 RULE OF LAW COMPONENTS AS GENERAL PRINCIPLES OF EU LAW: OPERATIONAL CONTEXTUALITY

Although this incorporation through general principles of Union law may produce some grey areas,³¹ it should be underlined that it ensures its maximum protection as primary law requirements binding on EU institutions and Member States when they apply Union law, thus becoming inviolable benchmarks for the validity of rules and legal acts.³² This is reinforced because individuals can invoke them in courts.³³

However, applying a general principle is inseparably linked to another operation that could be termed as *normative refinement* which ‘essentially consists in ascertaining a concrete legal context where the general principle gets normatively enriched to the point of being actionable (i.e., to acquire judicially manageable standards)’.³⁴ The refinement is of course influenced by the ‘normative contours’ namely the positive rules surrounding the general principle. These may entail its partial codification in primary law (including the Charter) or a specification of the optimization criterion in secondary law that the Court tends to valorise; it is somehow a *shift to legislation* that is partly justified because general principles’ direct effect

²⁸ Among others, Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* EU:C:2007:163 paras. 37-44.

²⁹ This frequent assertion since Case 294/83 *Les Verts* (n 6) has sometimes resulted in wide interpretations broadening the jurisdiction of the Court of Justice (Case C-354/04 P *Gestoras Pro Amnistía, Juan Mari Olano Olano and Julen Zelarain Errasti v Council of the European Union* EU:C:2007:115; Case C-72/15 P *AO Rosneft Oil Company and Others v Council of the European Union* EU:C:2017:236; Case C-134/19 P *Bank Refah Kargaran v Council of the European Union* EU:C:2020:793; and more recently, Case C-872/19 P *République bolivarienne du Venezuela v Council of the European Union* EU:C:2021:507).

³⁰ Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* EU:C:2020:367. From the point of view of the rule of law, this is a compulsory complement acknowledged long time ago to the existence of subjective rights conferred by EU law (Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206 paras 16-17).

³¹ I cannot expand on these issues such as double standards and indirect legislation, which are referred to the intermediation of Member States in guaranteeing the respect of the rule of law (Martín Rodríguez, *El Estado de Derecho* (n 2) 60-68).

³² Opinion of AG Bobek in Joined cases C-83/19, C-127/19, and C-195/19 *Asociația Forumul Judecătorilor Din România* EU:C:2020:746 para. 200

³³ Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) 04/09 Jean Monnet Working Paper NYU School of Law, 20-21 < <https://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf> > accessed 1 October 2023.

³⁴ Pablo Martín Rodríguez, ‘The principle of legal certainty and the limits to the applicability of EU law’ (2016) 50 *Cahiers de droit européen* 115, 121. This refinement impacts in umbrella principles lowering its applicability vis-à-vis its sub-principles, which are actionable and become artificially enlarged. A good example is the relationship between legal certainty and legitimate expectations in Union law, where the latter has already largely devoured acquired rights, revocation of administrative decisions, retroactivity, normative changes, or the obligation to act within a reasonable time frame.

is closely connected with the vertical and horizontal allocation of competences (i.e., due respect to the competences of the EU legislature and Member States).³⁵

This operational contextuality (and sensibility to legal rules surrounding their application) become key in explaining why general principles may accommodate different intensities of legal standards in their application to Member States and EU institutions. The publicity of norms is a good example.³⁶ So is also judicial independence, whose normative contours are necessarily different in international and national jurisdictions.³⁷ The Court of Justice has confirmed, in my view, this contextuality when it dismissed the claim made by Hungary and Poland based on Article 4(2) TEU against the conditionality regulation. Both states argued that the obligation to respect the national identity inherent in their constitutional structures, as provided in that provision, prevented a uniform interpretation of the concept of the rule of law. Although, as it could not be otherwise, the Court has upheld the autonomous nature of the value (and the general principles that compose it), it has not failed to acknowledge that it is necessary ‘taking due account of the specific circumstances and contexts of each procedure conducted under the contested regulation and, in particular, taking into account the particular features of the legal system of the Member State in question and the discretion which that Member State enjoys in implementing the principles of the rule of law’.³⁸

This operational contextuality lies, in my opinion, behind the limited effectiveness of these general principles as components of the rule of law during the emergency, exactly as it has happened with fundamental rights. But maybe a more determining factor comes from the hybrid nature of EU emergency law and the unfinished court reaction.

4 ON THE RULE OF LAW IMPACT OF EU RESPONSE TO THE EMERGENCY

4.1 ON THE HYBRID NATURE OF EU EMERGENCY LAW

I have contended that EU emergency law possesses a hybrid nature between international and constitutional law. Some provisions in the Treaties

envisage, so to speak ‘restricted emergencies’ and, in a very modest way, they follow a constitutional approach by providing the institutions with exceptional powers to face an exceptional situation. Contrarily and rather naturally, the common EU law approach to emergencies is international in spirit, allowing a Member State to

³⁵ Koen Lenaerts and José A Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47(6) *Common Market Law Review* 1629; Sacha Prechal, ‘Competence Creep and General Principles of Law’ (2010) 3(1) *Review of European Administrative Law* 5.

³⁶ Martín Rodríguez, ‘The principle of legal certainty’ (n 34) 131-132.

³⁷ See by analogy the right to a tribunal established by law in Case C-542/18 RX *Erik Simpson v Council of the European Union* EU:C:2020:232 para 73.

³⁸ Case C-156/21 *Hungary v Parliament and Council* (n 17) para 235.

escape from its EU obligations under certain extraordinary circumstances under close control by EU institutions, including the Court of Justice.³⁹

There is a vast and enlightening tradition in the literature on European economic integration concerning these *clauses de sauvegarde*, which are unfortunately neglected by contemporary doctrine.⁴⁰ While many of these provisions were removed by the Treaty of Amsterdam, they still permeate now secondary legislation and remain relevant as they demonstrate that the seriousness of the situation is less significant (there is little sense in differentiating between crises and emergencies in international law) compared to the legal basis governing state behaviour, which allows for emergency measures.⁴¹ Counterintuitively, these clauses are not intended to protect the state itself, but rather the treaty.⁴² An example of this is seen in the European banks' rescue: 'the EU could neither have prevented a Member State from going Icelandic (or compelled it not to do so) nor could it have articulated a proper bank aid-saving scheme using European funds. Instead, the EU had to facilitate concerted action by Member States through the 'emergency clauses' that permit state aids that are deemed compatible with the internal market, allowing Member States to deviate from their obligations following the specific procedure outlined in the Treaties.⁴³

In constitutional approaches the legal basis for responding to an emergency is considered inherent (aimed at preserving the polity). Hence the issues are 'whether the legislative, the executive or a certain combination of both should rule this reaction *ex ante*; whether there are any uncrossable constitutional limits thereto and what is the appropriate role for the judiciary before, during and after emergency law obtains'.⁴⁴ Naturally, in the EU response to the crisis, 'restricted emergencies' clauses that grant exceptional powers to the EU have been utilized, sometimes in imaginative ways. It is worth reminding that this entire response has been carried out *à droit primaire constant*.

Nevertheless, the financial and sovereign debt crisis painfully revealed the limitations of EU emergency law and its mixed nature. The crisis went beyond a national emergency and posed a threat to the entire Eurozone. A single Member State recovering its powers to

³⁹ Pablo Martín Rodríguez, 'Legal Certainty after the Crisis. The Limits of European Legal Imagination' in Jessica Schmidt, Carlos Esplugues Mota, and Rafael Arenas García, *EU Law after the Financial Crisis* (Cambridge: Intersentia 2016) 287.

⁴⁰ See Klaus Gentschke, *Ausweich- und Katastrophenklauseln im internationalen Wirtschaftsrecht* (Göttingen: Institut für Völkerrecht der Universität Göttingen 1959); Paolo Gori, *Les clauses de sauvegarde dans les traités C.E.C.A. et C.E.E.* (Heule: UGA 1967); Till Müller-Heidelberg, *Schutzklauseln im Europäischen Gemeinschaftsrecht* (Hamburg: Stiftung Europa-Kolleg 1970); Marc A. Lejeune, *Un droit des temps de crises: les clauses de sauvegarde de la CEE* (Brussels: Bruylant 1975); Achille Accolti-Gil, 'Il sistema normativo del Trattato CEE per la tutela degli interessi nazionali dopo la fine del periodo transitorio' (1977) 17 *Rivista di Diritto Europeo* 111; Martín Seidel, 'Escape Clauses in European Community Law with special reference to capital movements' (1978) 15(3) *Common Market Law Review* 283; Christian Talgorn, 'Les mesures de sauvegarde dans le cadre des accords externes de la C.E.E.' (1978) 14(3) *Revue trimestrielle de droit européen* 694; Albrecht Weber, *Schutznormen und Wirtschaftsintegration* (Baden-Baden: Nomos Verlagsgesellschaft 1982); Sebastian Bohr, *Schutznormen im Recht der Europäischen Gemeinschaften* (Munich: Verlag von Florenz 1994).

⁴¹ Martín Rodríguez, 'Legal Certainty after the Crisis' (n 39) 286-287.

⁴² A Ph D casts a long shadow: on all sorts of escape clauses, see Pablo Martín Rodríguez, *Flexibilidad y tratados internacionales* (Madrid: Tecnos 2003) 187-208.

⁴³ Pablo Martín Rodríguez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) 12 *European Constitutional Law Review* 292.

⁴⁴ *ibid* 270. Zenskova's distinction between the extralegal and the business-as-usual models succeeds, in my view, in grasping the constitutional conundrum but not the international one. The extralegal model would be just a violation of the Treaty.

act freed from EU commitments could not possibly preserve the EMU. The EU, based on the principle of conferral, was unable to expand its powers to the extent required by the global threat. Therefore, international law became the only genuine means of resolving the legal basis and competence issues for the necessary coordinated action among Member States. International law proved to be incredibly useful and flexible in this regard, although it is important to acknowledge that it was not immaterial in terms of the rule of law.⁴⁵

However, it is important to differentiate these serious concerns regarding the rule of law from interpreting the solution as a mere disguise of EU factual conferral in international law. Such an interpretation would require an inverted piercing of the corporate veil, which I suspect in some EU law literature. Unless *Pringle* is disregarded,⁴⁶ the EU could not at that time, nor can it now (Article 48 TEU would prevent European Council Decision 2011/199/EU from having such effect) establish a permanent stability mechanism, unless Article 352 TFEU results usable and viable. The persistent reluctance of Member States to change the conferral *status quo* (as evident by the recent amendment of the EMS Treaty and the unfulfilled promise of Article 16 of the Fiscal Compact) should be taken into consideration when evaluating the EU's hybrid emergency law and its compliance with the rule of law. This also means that the rule of law equation needs to include Member States as well.

4.2 ON THE EU RESPONSE DEFICIENCIES IN TERMS OF THE RULE OF LAW

There is no need to review all the measures undertaken by the EU in response to the Great Crisis and discuss their weaknesses in terms of the rule of law. Anna Zemskova's book has already thoroughly addressed these issues, particularly in the areas of fiscal and economic governance, monetary policy and financial assistance. While there are other areas of EU law, such as the banking union or state aids, that could be explored in greater depth, including them would not significantly strengthen the main argument but only provide additional examples.

Instead, we can identify three types of rule of law problems in the European response that are linked to the exhaustion of the legal bases and the utilization of international law by Member States.

(1) The response has demonstrated the possibilities that EU secondary law provides for dealing with emergencies, either by granting Member States derogations from EU commitments or endowing EU institutions with extensive powers. The latter may raise concerns regarding the principle of conferral unless a specific legal basis can be found and broadly interpreted in the Treaty. The expansion of powers of EU institutions and agencies is not only connected to the principle of institutional balance (ranging from reversed qualified majority to the modification of the *Meroni-Romano* doctrine by the *ESMA* case)⁴⁷ but also with the need to recalibrate the position of individuals in relation to these expanded powers, ensuring guarantees of legal certainty and prohibition of arbitrariness. For instance, this can be seen in the Commission's managerial power in the state aids regime or the substantial

⁴⁵ Martín Rodríguez, 'Legal Certainty after the Crisis' (n 39) 286-293.

⁴⁶ Case C-370/12 *Thomas Pringle v Government of Ireland and Others* EU:C:2012:756 para 168.

⁴⁷ Case C-270/12 *United Kingdom v European Parliament and Council of the European Union* EU:C:2014:18. See also Opinion of AG Jääskinen in Case C-270/12 EU:C:2013:562.

increase in power by the ECB within the banking union.⁴⁸ Let us remember that the Court has even approved the attribution of *tasks* to certain EU institutions outside EU law realm.

(2) Another significant issue arises from the distortion of EU competence in both branches of the EMU, which affects the institutional balance as well.⁴⁹ This distortion was endorsed by the Court of Justice in *Pringle* and *Gauweiler*,⁵⁰ but it has been further exacerbated by EU institutions legislative activity (e.g., the two-pack or the PSPP program). The interpretation of the Treaty's fiscal rules on sound public finances as mere mandates with no competence dimension at all has contributed to this disfigurement. Consequently, the EU's competence in coordinating Member States' economic policies, with new procedures and fines, raises concerns regarding the principles of conferral, subsidiarity and proportionality. Moreover, when overlapped with financial assistance conditionality formally decided outside the Union, the EU's competence becomes practically unrecognizable.

The issue of EU monetary policy, exemplified in the *Weiss* bitter confrontation with the *Bundesverfassungsgericht*, cannot be defined solely in instrumental and teleological terms. It necessitates a recalibration of the ECBs' democratic accountability credentials, especially concerning judicial scrutiny of the duty to state reasons and its subordinate role in supplementing the general economic policies in the Union.⁵¹ This matter is highly complex and has been extensively discussed in the literature, with Anna Zemskova's incisive criticisms providing a comprehensive account.

(3) Given the highly complex nature of the legal framework governing the emergency response within the EU, involving various formal and informal organs, cooperation with international institutions, and the utilization of both hard and soft law instruments, both international and European, the principle of legal certainty emerges as a crucial criterion for assessing the compatibility of these measures with the rule of law.⁵²

4.3 THE INCOMPLETENESS OF THE JUDICIAL SCRUTINY BY THE COURT OF JUSTICE

The different approaches of international and constitutional law regarding emergencies highlight a shared concern: the risk of normalizing emergency measures to the extent that they bring about a constitutional transformation. Both perspectives recognize the importance of safeguarding against this risk. In this regard, the judiciary plays a crucial role, particularly

⁴⁸ Including the issue of composite administrative procedure (See Manuel López Escudero, 'Le contrôle juridictionnel de la Cour de justice de l'Union européenne dans le domaine de l'union bancaire' (2020) 56(2/3) Cahiers de droit européen 549.

⁴⁹ See Andreu Olesti Rayo, 'El control democrático y la rendición de cuentas en el Pacto de Estabilidad y Crecimiento' (2018) 110-II Revista Vasca de Administración Pública 77; José M Porrás Ramírez, 'Intergubernamentalismo y tecnocracia en la gobernanza económica de la Unión Europea' in Francisco Jesús Carrera Hernández, *¿Hacia una nueva gobernanza económica europea?* (Cizur Menor: Thomson Reuters Aranzadi 2018).

⁵⁰ Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400.

⁵¹ Pablo Martín Rodríguez, 'Y sonaron las trompetas a las puertas de Jericó... en forma de sentencia del *Bundesverfassungsgericht*' (2020) 52 Revista General de Derecho Europeo 1.

⁵² See classic doctrinal contributions, Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 Oxford Journal of Legal Studies 325; Manuel López Escudero, 'La degradación de las exigencias del Estado de Derecho en el ámbito de la Unión Económica y Monetaria' in in Diego J Liñán Noguerras and Pablo Martín Rodríguez (eds), *Estado de Derecho y Unión Europea* (Madrid: Tecnos 2018). See also Martín Rodríguez (n 34) (n 39) (n 43).

after the crisis has subsided, which literature often describes as judicial or *court backlash*⁵³. So it clearly emerges *actualization effect* of the procedural facet of the rule of law underlined by A. Zemskova.

In terms of the judicial scrutiny of the EU's response to the crisis, we can identify two distinct stages. Initially, when faced with the European measures implemented to address the crisis, the Court of Justice responded with a jurisprudence that provided legal endorsement without explicitly justifying the application of emergency law or imposing temporal limitations on these measures, even though they often involved the exercise of expanded powers.⁵⁴ During this initial stage, the Court's approach was also evasive. It relied on formal arguments to avoid undertaking a rigorous examination of the substantive compatibility of the response with EU primary law, effectively refraining from delivering a ruling. Zemskova's book presents numerous examples of this withdrawn stance taken by the Court. It is important to note that this approach resulted in the majority of litigation being referred to national judges, effectively signalling to them that Union law was not of significant relevance in this particular context.⁵⁵ It was a powerful message.

Since 2016, the Court has entered a second stage in which it openly acknowledges the legal context of emergency and evaluates the actions of EU institutions accordingly. Gradually, albeit in a limited manner, the Court has begun to restore EU primary law as a criterion for assessing the validity of measures taken during the emergency. Advocate General Wahl's Opinions in cases, such as *Kotnik* and *Dowling*, maybe signals a turning point by constructing more robust arguments related to emergency law.⁵⁶ Subsequent cases, such as *Ledra* and *Florescu* have further reinforced the use of the Charter as a binding framework for EU institutions acting outside the scope of EU law and brought MoUs back within the realm of EU law in cases involving purely EU financial assistance.⁵⁷ These developments have compelled the EU courts to elaborate more thorough legal reasonings in other cases, including *Sotiropoulou* or *Chrysostomides*, even though the rulings have not favoured individuals or claimants.⁵⁸

⁵³ David Dyzenhaus, 'Introduction: Legality in a Time of Emergency' (2008) 24 Windsor Review of Legal and Social Issues 1.

⁵⁴ Both Case C-370/12 *Pringle* (n 46) and Case C-62/14 *Gauweiler* (n 50) are illustrative examples of this business-as-usual legal reasonings where the Court avoids any legal sense of emergency (see Martín Rodríguez, 'Dialogical rule of law y respuesta europea a la crisis' (n 3) 316-317).

⁵⁵ Considering the political sensitivity of the matter and the tenuous grounds for a 'constitutional' approach to EU emergency law, the Court of Justice opted for remitting substantive judicial review to Member States' constitutional courts, whose institutional and legal positions are more firmly rooted. While this choice could be seen as a rational one, it effectively eliminates EU primary law as a legality criterion and confines such litigation exclusively within the national legal framework with far-reaching consequences in terms of rule of law respect (see Martín Rodríguez (n 43) 291-293).

⁵⁶ Opinion of AG Wahl in Case C-526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenije* EU:C:2016:102; and Opinion of AG Wahl in Case C-41/15 *Gerard Dowling and Others v Minister for Finance* EU:C:2016:473.

⁵⁷ Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank* EU:C:2016:701; Case C-258/14 *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others* EU:C:2017:448.

⁵⁸ Case T-531/14 *Leimonía Sotiropoulou and Others v Council of the European Union* EU:T:2017:297; Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* EU:C:2020:1028.

However important this case law from Luxembourg may be at an abstract level,⁵⁹ it is true that significant uncertainties still persist in the current assessment of the economic governance of the EU. Firstly, the Court has not yet reached a point where it attributes acts of informal European instances (such as the Eurogroup or Euro Summits) or formally external entities (such as the ESM) to the Union. Secondly, the applicability of the Charter of Fundamental Rights to measures adopted by a Member State within the framework of a non-purely Community rescue (e.g., by the ESM or the European Financial Stabilization Facility) has not been unequivocally affirmed by the Court.⁶⁰ Lastly, as mentioned earlier, it is my belief that the Court still needs to recalibrate the profound reshaping of the economic and monetary governance architecture resulting from the crisis from the perspective of the rule of law.

5 CONCLUDING REMARK

It is indeed true that the examination of the European response to the economic and financial crisis has not only tested the resilience of the rule of law within the EU but has also revealed previously unexplored aspects of its emergency law. This scrutiny has brought to light the intricate legal framework resulting from the hybrid nature of the EU's emergency measures. Addressing judicial oversight cannot be resolved simply by retreating to the validity parameter of EU primary law and referring cases to constitutional jurisdictions, even though such an approach may initially appear understandable. However, the incomplete nature of the judicial backlash indicates the existence of significantly more complex factors related to the ambiguous definition of competences and the necessity of developing a nuanced European judicial discourse on emergency law that goes beyond a literal interpretation of specific safeguard clauses outlined in the Treaties.

Without a recalibration of these issues, it is difficult to reach any other conclusion than the one put forward by Anna Zemskova regarding the constitutional transformation occurring within the EU. While it is true that the general principles encompassed within the rule of law are influenced by legislation due to their contextual operational nature, the gradual slide towards legal normalcy can be explained, and the EU legislature should accordingly be deemed responsible. However, completely depriving these components of the ability to autonomously generate EU validity standards that can be enforced would reduce the rule of law to a mere formal and empty guarantee. Reducing the rule of law to this formal dimension would be inconsistent with the substantive level it has achieved within the constitutional

⁵⁹ It is important to acknowledge the limited practical impact of this case law. The Court recognizes that both institutions and Member States possess a wide margin of discretion when determining relevant measures, particularly when they need to be balanced with the overarching public interest of preserving financial stability in the Union, particularly in exceptional or emergency circumstances (Manuel Campos Sánchez-Bordona and Manuel López Escudero, 'Le contrôle de la Cour de justice sur les mesures contre la crise économique', in *L'Europe au présent! Liber amicorum Melchior Watbelet* (Brussels: Bruylant 2018) 249-286.

⁶⁰ Such a development would be facilitated by the alignment often observed between this external conditionality and European norms of economic governance. Progress in this regard would undoubtedly have a significant impact, as it would strengthen the preliminary reference procedure as a procedural avenue through which the Court of Justice could render judgments, thus bypassing the stringent requirements that direct actions impose on the standing of individuals. This is particularly important considering that the experience has shown that the legality control of the European response to the crisis has been primarily driven by individuals who face higher costs in accessing the Court of Justice, while privileged plaintiffs, such as Member States and institutions, have seldom challenged any of these measures.

frameworks of Member States, potentially jeopardizing their compatibility with the European project. Ensuring this compatibility has been, continues to be, and should remain the primary and most crucial legitimizing effect of upholding the rule of law in the European Union.