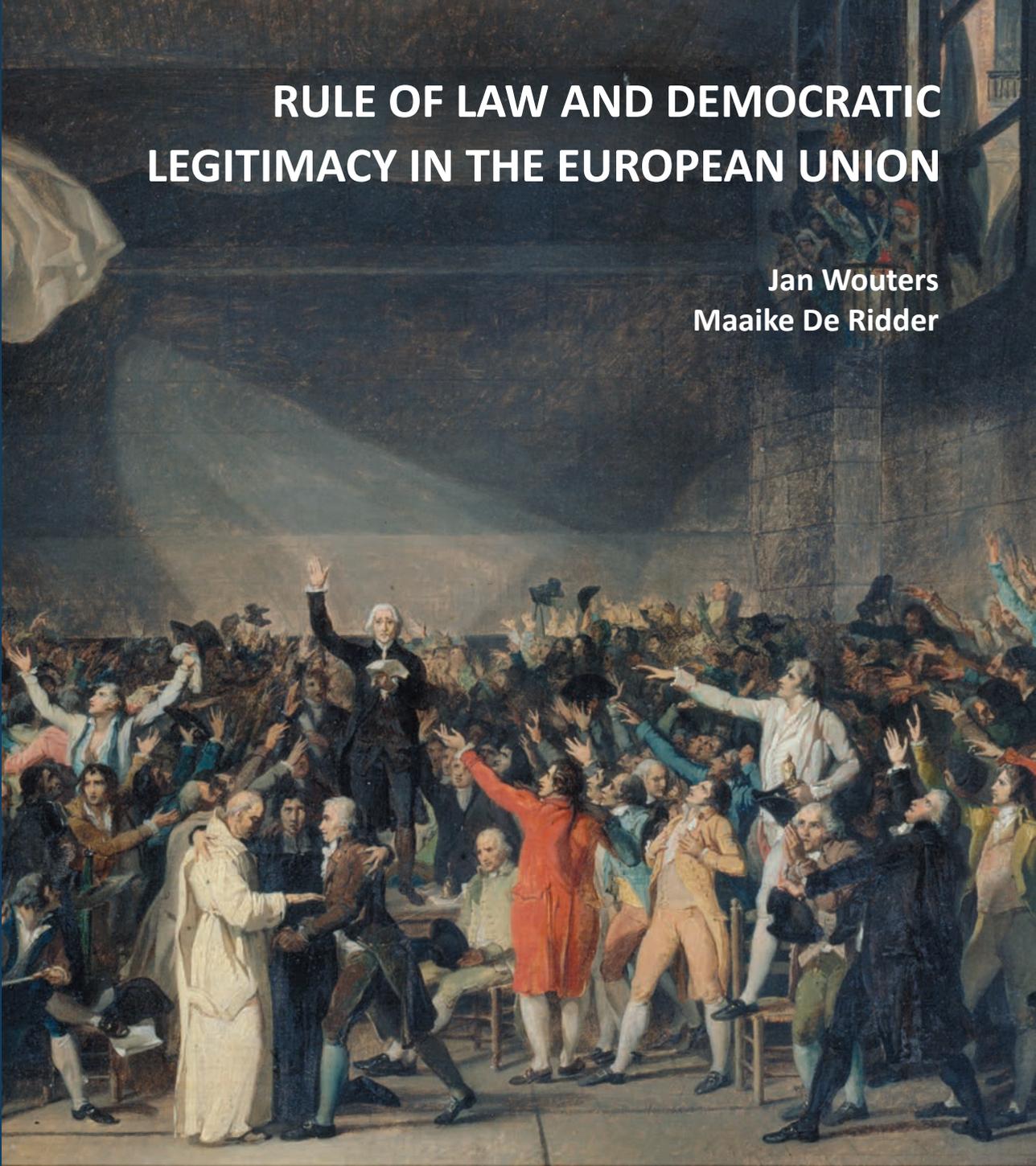


# RULE OF LAW AND DEMOCRATIC LEGITIMACY IN THE EUROPEAN UNION

Jan Wouters  
Maaïke De Ridder



**KVAB POSITION PAPERS**

73 b

Royal Flemish Academy of Belgium  
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### **73 b**

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# Rule of Law and Democratic Legitimacy in the European Union

## TABLE OF CONTENTS

Executive summary .....	6
Preface .....	9
I. The issue of democratic legitimacy and the rule of law in the European Union .....	10
A. A crisis of trust?.....	10
B. Reconnecting the EU with its citizens .....	13
II. RECONNECT findings on democracy .....	14
A. Global transformations and context .....	14
B. Transformations within the EU.....	15
C. Citizen participation and perception .....	16
1. Participation in elections .....	16
2. Citizen perceptions .....	17
III. RECONNECT findings on the rule of law .....	21
A. The rule of law in the EU .....	21
1. The concept of the rule of law .....	21
2. The rule of law's best practices .....	22
B. The EU's rule of law toolbox .....	24
1. Treaty-based instruments .....	24
2. Soft law instruments .....	27
C. COVID-19 as a RECONNECT case study .....	28
IV. Recommendations based on RECONNECT research .....	29
A. Recommendations for democracy .....	29
B. Recommendations for the rule of law .....	30
1. General rule of law recommendations.....	30
2. Rule of law and good governance recommendations for public emergencies (COVID-19) .....	31
V. Conclusion .....	33

## Executive summary

RECONNECT ('Reconciling Europe with its Citizens through Democracy and the Rule of Law') is a four-year multidisciplinary Horizon2020 research project which aims to understand and provide solutions to challenges faced by the European Union ('EU' or 'Union') with an explicit focus on strengthening the EU's legitimacy through democracy and the rule of law. The project was launched on 1 May 2018 and will run until the end of April 2022. It brings together 18 partner institutions from 14 different countries. The research proceeds on the premise that there is an existential crisis of trust between the EU and its citizens.

For several years now, the Union has found itself confronted by a number of challenges. Some of these challenges originate from a new global reality that is far less aligned with the EU's fundamental values and constitutional order than it once was: the influence of disruptions by both illustrations of this shift. Other challenges originate from developments within the borders of the Union: a renewed interest in national sovereignty and identity have shaken the EU to its foundations. In the midst of these new and changing circumstances, two of the Union's founding values have faced severe erosion in several EU Member States: democracy and the rule of law.

Democratic principles have come under increasing pressure in a number of Member States, mainly through a decline in the quality of public debate as well as through a fall in electoral turnout. These factors have resulted in a growing disconnect between the EU and its citizens. Similarly, rule-of-law standards have deteriorated: independence of the judiciary, equality before the law, political checks and balances, and other rule-of-law principles have all been affected. RECONNECT has performed conceptual and practical research on these values and the threats they face in the EU, and has done so in an effort to gain useful insights into the coherence between democracy and the rule of law, how these values are applied at the EU and Member State levels, and whether these values still resonate with EU citizens. The ultimate goal of the project is to formulate concrete policy recommendations and develop a new narrative for Europe, which consolidates the project's main findings but also expresses a collective vision for the future of Europe.

On democracy, RECONNECT concludes that public deliberation and citizen participation are crucial when it comes to strengthening democratic values and the EU's democratic legitimacy. The project recommends that national political campaigns need to have an increased focus on European matters. Additionally, citizens' understandings of EU competences and the issues at stake in European elections should be improved. Participation in European elections should also be enhanced by ensuring that multiple elections coincide.

One of RECONNECT's main conceptual findings is that there is now a general legal consensus on the core meaning of the rule of law in Europe. Yet, efforts to practically and effectively enforce and strengthen the rule of law at national and international level still present the primary challenge. The main recommendation on the rule of law concerns the prompt, vigorous, and coordinated use of existing instruments to enforce compliance with rule-of-law principles in the Member States.

This publication of the Royal Flemish Academy of Belgium discusses the fundamental crisis of trust that has arisen between the EU and its citizens. It explores RECONNECT's findings on democracy and the rule of law and concludes with the following concrete recommendations, which suggest how the EU should move forward.

Recommendation 1: *Public deliberation*. Public deliberation is a key factor in understanding democratic backsliding in the EU and its Member States. However, the EU does not appear to possess the tools that might help address this problem. Therefore, RECONNECT recommends that the EU should complement its focus on the rule of law with an explicit focus on the deterioration of public deliberation.

Recommendation 2: *Voter turnout*. RECONNECT research indicates that the increasingly low voter turnout in European Parliament elections should be addressed by the EU institutions and the Member States. The lower turnout can be addressed through parameters that are easily changeable, yet could have significant effects.

Recommendation 3: *Sovereignty*. The institutional balance between the European and national legal systems is rapidly changing. These changes have occurred in many different forms, including nationalist movements that have openly expressed their criticism of and aversion to the European project, national courts that have challenged the authority of the Court of Justice of the European Union (CJEU), as well as Member States' highly individual responses to the COVID-19 pandemic. Having taken all of these factors into account, RECONNECT argues that there is a need to rethink the concept of sovereignty within the multilevel dimension of the EU.

Recommendation 4: *Citizen knowledge of the EU*. The Union should invest more in efforts that increase citizens' knowledge of the EU. To achieve this, there needs to be a certain willingness exhibited in the Member States – education is a national or regional, not an EU, competence – to provide young European citizens with training on EU politics and competences, as part of the basic school curriculum. The position paper also addresses some concrete recommendations related to the current circumstances of the COVID-19 pandemic.

Recommendation 5: *Legal certainty and clarity in public communication*. A first recommendation in this regard concerns legal certainty and clarity in public communication. Rules and restrictions should be clear in their meaning, their application should be consistent, and any changes to the legal rules should be announced in advance, to allow enough time to prepare.

Recommendation 6: *Transparency in decision-making*. All matters related to decision-making bodies, such as membership and the decision-making process, should be made publicly available.

Recommendation 7: *International law and human rights standards*. In public health emergencies, it is necessary that governments only introduce measures that are necessary, proportionate, temporary, and respect human rights.

Recommendation 8: *Rapid, coordinated, and collective action*. The most beneficial way for States to tackle the COVID-19 crisis is through a rapid, systematic and cross-governmental strategic approach. Different action plans should be coordinated at all levels to ensure collective action.

Recommendation 9: *Measures targeted at resolving the health crisis*. RECONNECT argues that interventions and actions should be specifically tailored to respond to the pandemic and should not be targeted at achieving other policy goals.

Recommendation 10: *Oversight mechanisms*. Oversight mechanisms should be protected during public health emergencies, to ensure higher quality of law, policy, and compliance.

Recommendation 11: *External expertise, stakeholders, and international experience*. Governments should be open to following guidance from organisations such as the World Health Organization (WHO) and learning from international experience.

Recommendation 12: *Reform the law*. Legal provisions relating to declarations of a “state of emergency”, provisions in health legislation relating to pandemics, and actions taken by state actors during a pandemic, should all be properly reviewed.

## Preface

The Academy's Standpunten Series (Position Papers) contributes to a scientifically validated debate on current social and artistic topics. The authors, members and workgroups of the Academy write under their own name, independently and in full intellectual freedom. The quality of the published studies is guaranteed by the approval of one or several of the Academy's classes. This position paper was approved for publication by the meeting of the Class of Humanities On 25 September 2021.

## I. The issue of democratic legitimacy and the rule of law in the European Union

RECONNECT ('Reconciling Europe with its Citizens through Democracy and the Rule of Law') is a four-year multidisciplinary Horizon2020 research project which aims to understand and provide solutions to challenges faced by the European Union ('EU' or 'Union') with an explicit focus on strengthening the EU's legitimacy through democracy and the rule of law. The project was launched on 1 May 2018 and runs until the end of April 2022. It brings together 18 partner institutions from 14 different countries. It is led by the Leuven Centre for Global Governance Studies at KU Leuven and coordinated by the first author.

This position paper presents both the context that serves as the starting point of RECONNECT as well as the latest results of the research undertaken as part of the project.<sup>1</sup> At the centre of RECONNECT is the disconnect that exists between the EU and its citizens, and the so-called "crisis of trust" that has caused the values of democracy and the rule of law to suffer. This position paper will contextualise and explain this crisis, before moving on to discuss the profound challenges that currently face democracy and the rule of law in the EU. It will also touch on tools that the Union could use to strengthen its foundational values and regain the trust of its citizens. Furthermore, it will explain how and why these tools have failed to provide resilience against the trends of democratic and rule of law backsliding which occur in a number of Member States. The paper will conclude with a set of concrete recommendations for the future of the EU and its values, which are based on the conclusions of RECONNECT research.

### A. A crisis of trust?

The EU is founded on a number of fundamental values. These values are set out explicitly in Article 2 of the Treaty on European Union (TEU):<sup>2</sup>

*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

The commitment to respect and promote these values is a prerequisite for membership of the Union, as made clear in Article 49 TEU:

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<sup>1</sup> For more information on RECONNECT: <https://reconnect-europe.eu/>.

<sup>2</sup> See the consolidated texts of the Treaty on European Union and the Treaty on the Functioning of the European Union as published in the Official Journal of the EU, 2016 C202.

*Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.  
[...]*

It is on this basis that the European Court of Justice has held, including in its most recent judgement of 15 July 2021 concerning the disciplinary regime for judges in Poland, that

*the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them. In particular, it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in that article.<sup>3</sup>*

This case-law has been explicitly referred to by the EU legislator in the preamble of the recent Conditionality Regulation of 16 December 2020, which adds that “[t]he laws and practices of Member States should continue to comply with the common values on which the Union is founded.”<sup>4</sup>

However, given the current circumstances, one could ask the question: is the EU, and are its Member States, still sincerely and fully engaged in adhering to, and promoting, these values?

In recent years, the Union has faced a consistent trend of backsliding on democracy and the rule of law in a number of Member States: most notably Hungary, Poland and Romania. This has placed the EU’s foundational values under

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<sup>3</sup> Case C 791/19 *Commission v Poland* [2021] ECLI:EU:C:2021:596, para. 50. For earlier formulations, see inter alia *Opinion 2/13 EU Accession to the European Convention on Human Rights* [2014] ECLI:EU:C:2014:2454, para. 168; *Case C-284/16 Achmea* [2018] ECLI:EU:C:2018:158, para. 34; *Case C-64/16 Associação Sindical dos Juizes Portugueses* [2018] EU:C:2018:117, para. 30; *Case C-619/18 Commission v Poland* [2019] ECLI:EU:C:2019:531, paras 42-43 ; *Case C 195/20 PPU, Generalbundesanwalt beim Bundesgerichtshof* [2020] EU:C:2020:749, para. 30; *Case C-665/20 PPU, X* [2021] ECLI:EU:C:2021:339, para. 52; *Case C 896/19 Republika v II-Prim Ministru* [2021] ECLI:EU:C:2021:311, para. 62; *Joined Cases C 83/19, C 127/19, C 195/19, C 291/19, C 355/19 and C 397/19 Asociația ‘Forumul Judecătorilor din România’* [2021] ECLI:EU:C:2021:393, para. 160.

<sup>4</sup> Fifth recital of the preamble, 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, Official Journal of the European Union, L433I/1.

increasing threat.<sup>5</sup> Infringements of the rule of law and democratic standards have manifested and continue to manifest themselves in a number of ways. The most apparent infringements include: impairments of judicial independence, in terms of both national constitutional courts and other domestic courts and tribunals; open attacks on independent media, civil society, and independent universities; and increasing corruption and interference in public prosecutions in some Member States.<sup>6,7</sup> The Union has been criticised for its lack of willpower to adequately use the tools available to its institutions in order to tackle these forms of democratic and rule-of-law backsliding. It has been said that, if the EU had used its current tools forcefully, it might have been able to enforce compliance with democracy and the rule of law in Member States a long time ago.<sup>8</sup>

However, there are also challenges at the level of the Union itself. The EU has long been criticised for its own democratic deficit, a phenomenon which persists in some of its decision-making processes.<sup>9</sup> The Commission's insufficient accountability, the lack of transparency on the part of the European Council and the Council, the erosion of the role of national parliaments, and the non-transparent nature of trade agreement negotiations, further contribute to the EU's poor democratic legitimacy track record.

To add to this, successive crises, such as the financial crisis since 2008, the ensuing sovereign debt crisis in Eurozone countries, the migration crisis, the security crisis relating to terrorist attacks, Brexit, and COVID-19, have severely eroded the legitimacy of the Union and, by association, the trust of its citizens.<sup>10</sup> The essential question arises: how can the EU 'reconnect' with its citizens?

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<sup>5</sup> 'RECONNECT Policy Brief: Fundamental Principles in Times of Crises - Democracy and Rule of Law in the European Union' (31 August 2020) <[https://reconnect-europe.eu/wp-content/uploads/2020/09/RECONNECT\\_PB2.pdf](https://reconnect-europe.eu/wp-content/uploads/2020/09/RECONNECT_PB2.pdf)> accessed 15 July 2021.

<sup>6</sup> Laurent Pech and Dimitry Kochenov, 'RECONNECT Policy Brief - Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' (2019) <<https://reconnect-europe.eu/wp-content/uploads/2019/06/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf>> accessed 15 July 2021.

<sup>7</sup> Dimitry Kochenov and Petra Bárd, 'Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement' (2018) 8–17 <[https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP\\_27072018b.pdf](https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf)> accessed 15 July 2021.

<sup>8</sup> Laurent Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' (2020) 32 <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)> accessed 15 July 2021.

<sup>9</sup> Raffaele Bifulco and Alessandro Nato, 'The Concept of Sovereignty in the EU-Past, Present and the Future' (2020) 35–36 <<https://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf>> accessed 15 July 2021.

<sup>10</sup> 'RECONNECT Policy Brief: Fundamental Principles in Times of Crises - Democracy and Rule of Law in the European Union' (n 5) 9.

As will be seen below, democracy and the rule of law in Europe face both external and internal threats. Global political realities are changing rapidly, and have frequently left the Union's values at odds with new and evolving external trends and factors.<sup>11</sup> Specific internal threats have also surfaced, and are linked to challenges posed by European integration, public discourses in Member States, and the disconnect that has emerged between the Union and its citizens.<sup>12</sup>

### *B. Reconnecting the EU with its citizens*

The RECONNECT project is structured around the following research questions: (i) How can European governance be democratically underpinned and regain authority and legitimacy? (ii) How can European policies be more securely anchored in justice and solidarity? And lastly, (iii) How can the EU renew and regain the trust and recognition of its citizens?

The aim of the project is to obtain a thorough and integrated understanding of the principles, practices, and perceptions of the rule of law and democracy in both the EU and its Member States, in order to make policy and legal recommendations, which can, in turn, help develop a new narrative for the EU. The project also focusses on these topics within the context of five specific case studies: Economic and Monetary Union (EMU), trade, migration, counterterrorism and COVID-19.<sup>13</sup>

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<sup>11</sup> Asif Efrat and others, 'Working Paper on Structural Factors, Actors, and Dynamics Strengthening or Undermining Intra-EU Commitment to Democratic Governance' (2020) 5–9 <<https://reconnect-europe.eu/wp-content/uploads/2020/05/D3.2.pdf>> accessed 15 July 2021.

<sup>12</sup> 'RECONNECT Policy Brief: Fundamental Principles in Times of Crises - Democracy and Rule of Law in the European Union' (n 5).

<sup>13</sup> 'Work Packages – RECONNECT' <<https://reconnect-europe.eu/project-info/work-packages/>> accessed 15 July 2021.

## II. RECONNECT findings on democracy

### A. *Global transformations and context*

As indicated above, the dynamics of democratic and rule-of-law backsliding are not confined to the borders of the EU; indeed, they reach far beyond.<sup>14</sup> The Union is situated in a larger international environment, which is increasingly characterised by rapid change, instability, and complex interactions. This new global reality is increasingly less aligned with the EU's foundational values and constitutional order, which forces the Union to find ways and means of mitigating the impact of these factors on its own internal organisation. External threats to European democracy have accompanied these global transformations and have taken multiple forms. Examples include the deliberate disruptions, conducted by third states and/or non-state actors against EU targets, which are aimed at influencing political systems, processes, and institutions, at EU or Member State level, and increasing political influence on and over the fragmentation, disunity, and distrust that is already present within the EU.<sup>15</sup> Another external factor that has influenced the intra-EU conditions of democratic governance are cross-border flows of migrants and asylum seekers.<sup>16</sup> These flows can be caused by external actors, but often represent the consequence of regional and/or global instabilities. Two broader global factors are: the general contestation of the liberal order, as a result of the resurgence in authoritarianism and/or populism; and the great transformation-induced anxiety that has resulted from worldwide issues, such as climate change, demographic decline, technological revolutions, etc., that result in a subversion of trust in political institutions.<sup>17</sup>

As a consequence of the diminishing public trust in the ability of democracies to govern efficiently and effectively, populist parties have been on a steady pathway to success, and have gained popular attention from voters on a global scale.<sup>18</sup> While populism can pose a serious threat to democratic values, two of the main findings of RECONNECT research are that caution should be exercised in making definitive judgements about the effect of populist parties on democracy, and that not all populist parties should be deemed anti-democratic.<sup>19</sup> Populism in political parties can be defined as 'an ideology seeking to mobilise the people against the established elites', but this does not mean that a populist party is

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<sup>14</sup> Efrat and others (n 11) 5–9.

<sup>15</sup> *ibid* 13–18.

<sup>16</sup> *ibid* 21–26.

<sup>17</sup> *ibid* 9.

<sup>18</sup> Ben Crum, Alvaro Oleart and Patrick Overeem, 'Renewing or Undermining Democratic Pluralism? The Conditioning of Populist Parties across EU Member States' (2020) 7–8 <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)> accessed 15 July 2021.

<sup>19</sup> *ibid* 23.

by default anti-democratic. RECONNECT research has shown that they can even advance the level of democratic pluralism by raising new voices and reanimating political debate.<sup>20</sup> However, when these parties aim to undermine liberal values and democratic processes, and do not adapt to the democratic system as they evolve over time, vigilance remains necessary. RECONNECT has developed a framework to identify the conditions under which populist parties are most likely to become anti-pluralist.<sup>21</sup> There are three primary factors: (i) the responses of the established parties and whether they repress, isolate or accommodate the emergence of the populist party; (ii) the institutional conditions (Are there bans on the participation of certain parties in the democratic process? Does the electoral system include proportional representation? Are there electoral thresholds?); and (iii) the reception of the populist party by the media (Are they ignored and/or exposed for their potentially threatening nature or are they treated as any other political party?).<sup>22</sup>

### *B. Transformations within the EU*

Apart from the global context and transformations that have influenced intra-EU democracy, some challenges are entirely inherent to the nature of the EU as a union of multiple Member States. While democracy is one of the fundamental values of the EU, RECONNECT research has shown that there are significant variations in the quality of national democracies within the Union.<sup>23</sup> Particularly in Hungary, Poland, and Romania, democracy has been on a steep downward trend for several years.

The transfer of ever broader powers to the Union has resulted in multiple countries openly expressing their proclivity towards regaining and strengthening their national sovereignty and identity.<sup>24</sup> This impulse reached boiling point with the finalisation of Brexit in January 2020, through which the UK withdrew itself from the EU, to reclaim some of the powers it had transferred to the Union during its years of membership. Similarly, during crises such as the migration crisis or COVID-19, the Member States' inclination to favour sovereign and national approaches, as opposed to common solutions, has been amplified.<sup>25</sup> This call for

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<sup>20</sup> *ibid* 11–12.

<sup>21</sup> *ibid* 8.

<sup>22</sup> Ben Crum and Alvaro Oleart (eds.), 'Democratic Systems and Populist Challenges in Europe' (2020) 19 <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)> accessed 15 July 2021.

<sup>23</sup> Anna Gora and Pieter De Wilde, 'Mapping Democratic Systems in EU Member States' (2020) 23 <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)> accessed 15 July 2021.

<sup>24</sup> Paul Blokker and others, 'The Democracy and Rule of Law Crises in the European Union and Its Member States' (2021) <<https://reconnect-europe.eu/wp-content/uploads/2021/04/D14.1.pdf>> accessed 15 July 2021.

<sup>25</sup> Bifulco and Nato (n 9) 81.

sovereignty has highlighted the delicacy of the EU's institutional balance and has negatively affected the public's trust in the EU and its institutions.<sup>26</sup>

One of the most concerning aspects of the decline in democracy in the EU is the deterioration in the quality of public discourse.<sup>27</sup> The development of other key components of democracy, such as free and fair elections, the separation of powers, citizen participation, rule of law, freedom of speech, and equality, have also been mapped and compared by RECONNECT research. However, none of these components have declined as sharply, over the past years, as the quality and civility of deliberation.<sup>28</sup> The quality of public discourse in the EU is specifically influenced by failures to adequately explain actions to citizens as well as by the way in which political opponents are portrayed, not as democratic competitors but as enemies or illegitimate rivals.<sup>29</sup>

### *C. Citizen participation and perception*

#### **1. Participation in elections**

The crisis of trust that has emerged between the EU and its citizens has manifested itself in multiple ways. One of these, and arguably the most worrying, is the withdrawal from public participation. RECONNECT research has analysed factors that affect electoral turnout both at national and Union level. When both levels were compared, two patterns became visible. The research established that, on the one hand, electoral turnout in European elections is always lower than turnout in national legislative elections. On the other hand, the lines for both types of elections run parallel, confirming the idea that European Parliament elections remain second rank to national elections.<sup>30</sup> Although the 2019 elections had a record electoral turnout, all previous EU elections, since 1979, had displayed a lower turnout in comparison to the previous election.<sup>31</sup>

According to RECONNECT research findings, electoral turnout can be the consequence of a wide range of possible factors.<sup>32</sup> Factors such as the day of the week on which an election is held, the number of elections that succeed one another, and the proximity of the elections might all influence the potential turnout. Holding an election during the weekend, compulsory voting, and holding national

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<sup>26</sup> *ibid.*

<sup>27</sup> Gora and De Wilde (n 23) 23.

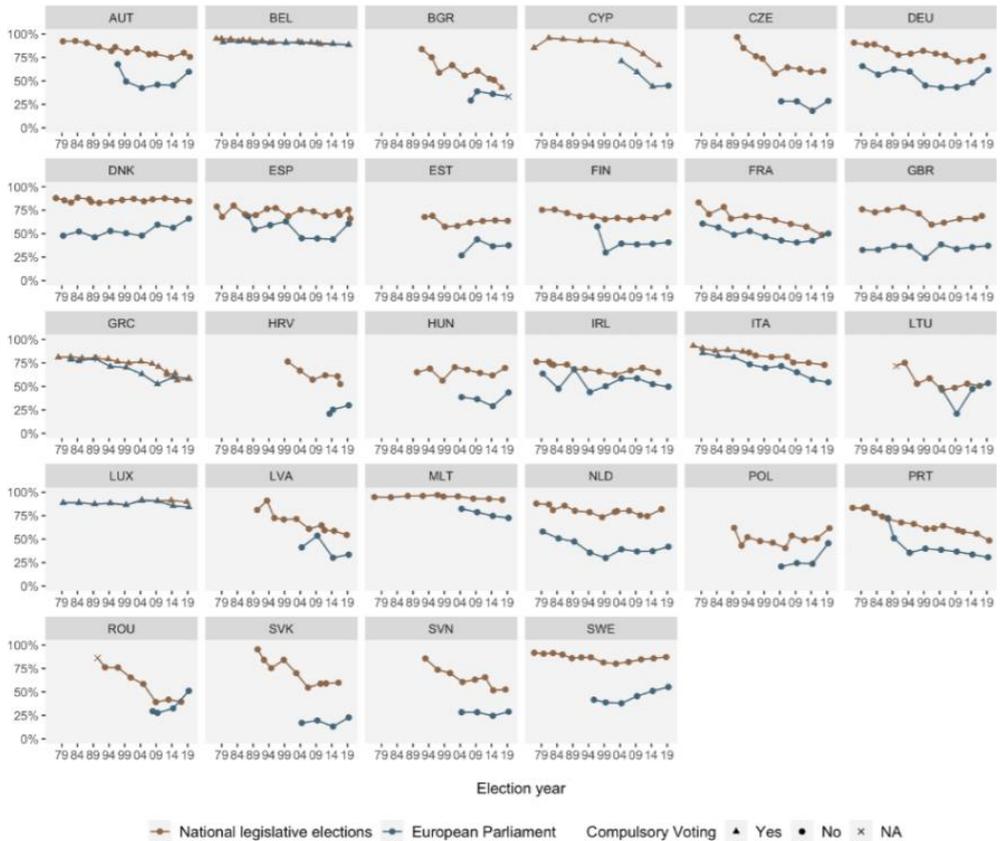
<sup>28</sup> 'RECONNECT Policy Brief: Fundamental Principles in Times of Crises - Democracy and Rule of Law in the European Union' (n 5).

<sup>29</sup> Gora and De Wilde (n 23) 7.

<sup>30</sup> François Briatte and others, 'Working Paper on Citizens' Participation and Electoral Linkages' (2020) 15 <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)> accessed 15 July 2021.

<sup>31</sup> *ibid* 13–15.

<sup>32</sup> *ibid* 16.



and EU elections concurrently tend to increase citizen participation in elections, while weekday elections and separately held national elections negatively affect voter turnout.<sup>33</sup> The research shows that, in many ways, European Parliament elections are still second-rank elections in the eyes of many citizens and that the higher turnout of 2019 appears to be related to the positioning of European Parliament elections within national election cycles.<sup>34</sup>

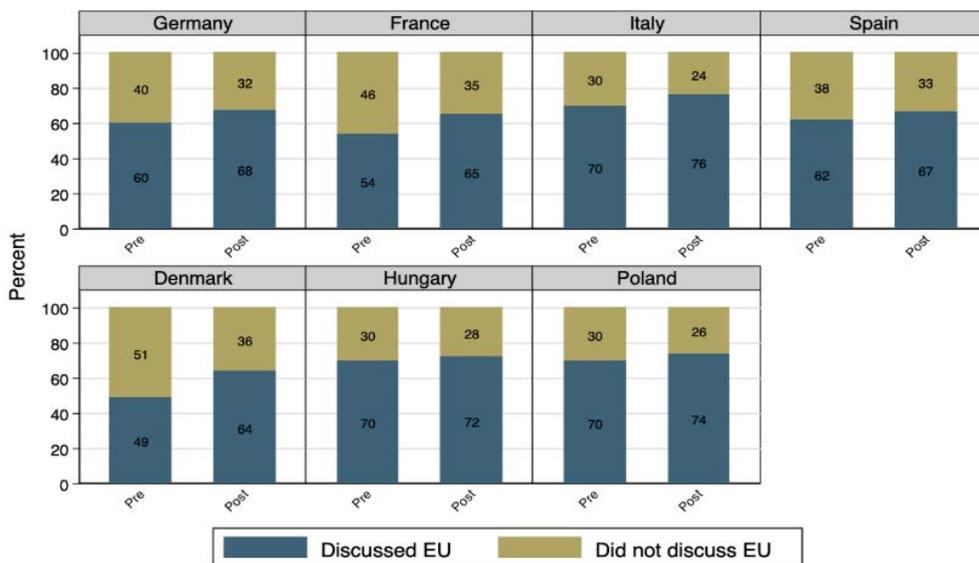
## 2. Citizen perceptions

RECONNECT has also conducted research on discussions about the Union among its citizens, by organising citizen surveys before and after the 2019 elections, in

<sup>33</sup> *ibid* 22–24.

<sup>34</sup> James Wilhelm, Sylvia Kritzing, Carolina Plescia, Kolja Raube and Jan Wouters, 'From Second-Order towards First-Order Elections: Some Concluding Observations', in Carolina Plescia, James Wilhelm, Sylvia Kritzing, Kolja Raube and Jan Wouters (eds.), *Assessing the 2019 European Parliament Elections*, London, Routledge, 2020, 235, at 238.

seven different Member States.<sup>35</sup> The findings revealed that citizens do talk about the EU, but differences exist across time and countries. Discussions about the EU increased after the campaigns for the European elections began in 2019. However, the survey results show that, rather than consisting of substantive policy debates about the EU, these discussions mostly concerned the election as an event in itself. Citizens also indicated that their most important political issues are still concentrated at the national level.<sup>36</sup> Surprisingly, 20-50% of EU citizens did not discuss any EU topics at all, either before or after the European elections.<sup>37</sup>



Another citizen survey was performed by RECONNECT researchers in September and October 2020. The survey consulted 12,000 citizens, in six EU Member States,<sup>38</sup> considered the ideal setting of the EU in the mind of European citizens, and addressed how citizens think about the following: a further transfer of authority to the EU; the redistribution of wealth from richer to poorer Member States; the policy areas in which they would like the EU to take decisions; and the way in which EU institutional characteristics affect their support for Union decisions.

<sup>35</sup> Sylvia Kritzingner and others, 'Discussions About the European Union Among Its Citizens' (2021) 12–13 <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)> accessed 15 July 2021.

<sup>36</sup> Wilhelm, Kritzingner, Plescia, Raube and Wouters (n 34) 239.

<sup>37</sup> Kritzingner and others (n 35) 14–16.

<sup>38</sup> Constantin Schäfer, Bernd Schlipphak and Oliver Treib, 'The Ideal Setting of the EU in the Mind of European Citizens' (2021) <<https://reconnect-europe.eu/wp-content/uploads/2021/04/D9.2.pdf>> accessed 15 July 2021.

Seven main insights emerged from the study<sup>39</sup> :

1. Citizens are divided over the prospects of transferring additional powers to the European level or repatriating sovereignty back to the national level. The option that seems most acceptable to a majority of citizens is a distribution of competencies close to the current status quo.

2. Citizens are equally ambivalent regarding the idea of European solidarity in the form of redistributing wealth from richer to poorer Member States. There are considerable country differences on this question, and they run along the familiar division between richer net contributors and poorer net beneficiaries. Far-reaching reforms in the direction of more or less intra-EU redistribution are thus likely to meet with public opposition in the respective countries.

3. People's preferences on which policy fields should primarily be tackled by the EU reveal that areas with a clear transnational character are prioritised. There are also indications that many policy areas favoured by citizens are related to perceptions of global threats, suggesting that EU action could be framed successfully along the lines of Emmanuel Macron's slogan 'une Europe qui protège'.

4. When it comes to the institutional parameters that could improve citizens' acceptance of EU decisions, the survey also reveals a relatively strong status-quo orientation, especially in areas that touch upon the distribution of powers between the EU and its Member States. Reforms that change this balance of powers are thus likely to meet with public opposition.

5. There is still room for improving people's acceptance of EU decisions. The data reveal widespread support for more citizen participation and more transparency of EU decision-making processes. Citizens also place a great deal of importance on the capacity of EU policies to solve problems, and they appreciate the equal distribution of benefits among all Member States. Distributive fairness trumps national self-interest.

6. The empirical analysis shows differences between winners and losers of recent societal transformations, but these are primarily relevant for the vertical distribution of powers between the EU and the Member States. Older, less educated citizens with low socio-economic status and a high level of perceived societal marginalisation are significantly less enthusiastic about increasing European integration. At the same time, many other aspects of the EU's decision-making set-up, such as the support for more citizen participation, more transparency, and more effective policies, are shared across the different groups in society.

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<sup>39</sup> *ibid* 26–28.

7. The survey has several implications for future EU reform. Policymakers who want to cater to the wishes of European citizens should strive to grant the latter more channels of participation and improve their ability to monitor political processes at the European level. Moreover, framing the nature of the EU as a protective force against external threats is likely to resonate well with many citizens. Lastly, since citizens are divided over the balance of power between the EU and its Member States, policymakers should be cautious about trying to change the vertical distribution of power in the EU. The Conference on the Future of Europe could explore to what extent Eurosceptics and Europhiles attach different levels of salience to their preferences, which may suggest that reforms increasing the autonomy of Member States might be less controversial than reforms tilting the balance of power further towards the supranational level.

### III. RECONNECT findings on the rule of law

Much like democracy, respect for the rule of law has been deteriorating in some Member States for several years, and, so far, the EU has not been able to effectively remedy this issue. Rule-of-law backsliding has been defined in RECONNECT research as ‘the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party’.<sup>40</sup> Recent research has focused on both the scope and meaning of the concept of the rule of law in the EU, as well as the best practices that should be adhered to by the Union and its Member States.<sup>41</sup>

#### A. *The rule of law in the EU*

##### 1. **The concept of the rule of law**

The concept of the rule of law has often been criticised for its vague and arbitrary nature. There exists a stark contrast between the perspective of the backsliding Member States, which contend that the rule of law has no consensual meaning, and the European Commission, which argues that the rule of law is a well-established principle.<sup>42</sup> RECONNECT has addressed the key questions surrounding the meaning and scope of the EU rule of law and has come to the conclusion that the rule of law should be considered “a core and consensual element of Europe’s legal space”.<sup>43</sup> Stronger still, the rule of law is one of the few overarching constitutional principles at the basis of all legal systems in Europe.<sup>44</sup> Although shared traits do not imply uniformity, and although the concept can still be interpreted in diverse ways, RECONNECT research indicates that the rule of law can ultimately be regarded as “(i) a posited legal principle of constitutional value inherently linked with democracy and respect for human rights; (ii) an umbrella principle with formal and substantive components; (iii) a primary principle of judicial interpretation; and (iv) a source from which standards of judicial review may be derived”.<sup>45</sup> These findings confirm that the biggest issues concerning the rule of law today are practical and not conceptual in their nature.

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<sup>40</sup> Pech and Kochenov (n 6).

<sup>41</sup> ‘RECONNECT Policy Brief: Fundamental Principles in Times of Crises - Democracy and Rule of Law in the European Union’ (n 5) 5.

<sup>42</sup> Laurent Pech and others, ‘Meaning and Scope of the EU Rule of Law’ 5 <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)> accessed 15 July 2021.

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid* 5–6.

<sup>45</sup> ‘RECONNECT Policy Brief: Fundamental Principles in Times of Crises - Democracy and Rule of Law in the European Union’ (n 5) 5.

Nevertheless, a critical issue that persists is the alleged lack of a definition of the rule of law. Indeed, this issue still appears to be a source of critique in the literature.<sup>46</sup> A main point of reference for the definitional aspect of the rule of law is the Venice Commission's Rule of Law Checklist.<sup>47</sup> This list provides five main benchmarks for the rule of law: legality, legal certainty, prevention of abuse of power, equality before the law and non-discrimination, and, lastly, access to justice. Based on these criteria, the European Commission developed the "Rule of Law Framework" (see *infra*), but added a broad requirement of respect for both fundamental rights and the separation of powers as an important element.<sup>48</sup>

## 2. The rule of law's best practices

Exploring the best practices of the rule of law is of primary importance for the protection of the rule of law in EU Member States, as many of them often claim to respect and uphold the basic principles of the rule of law, while simultaneously conducting contradictory practices.<sup>49</sup> According to RECONNECT research, the best practice elements of the rule of law can be divided into three categories: institutional elements, procedural elements, and political elements.<sup>50</sup> It is important to note that the rule of law is not a one-size-fits-all institutional model, and that contextual differences do apply as a consequence of this fact. However, the rule of law contains clear limits as to how principles and practices should be assessed.<sup>51</sup>

Institutional elements concern the institutional arrangements that aim at ensuring the practical application of the rule of law.<sup>52</sup> The institutional ideal of the rule of law entails that legal institutions are adequate, in terms of preventing the abuse of power and guaranteeing the correct adoption and application of the law. The rule of law practices in a Member State should aim to achieve these objectives, but contextual influences should always be taken into account. Ignorance about legal, political and cultural contexts might result in a situation of perceived adherence to the principles of the rule of law on paper and no respect for the practices that accompany the concept.<sup>53</sup> Contextual differences in terms of constitutional

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<sup>46</sup> Pech and others (n 42) 6.

<sup>47</sup> 'European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist' (2016) <[https://www.venice.coe.int/images/SITE\\_IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](https://www.venice.coe.int/images/SITE_IMAGES/Publications/Rule_of_Law_Check_List.pdf)> accessed 15 July 2021.

<sup>48</sup> 'Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law' (2014) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN>> accessed 15 July 2021.

<sup>49</sup> Barbara Grabowska-Moroz, 'Understanding the Best Practices in the Area of the Rule of Law' (2020) <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)> accessed 15 July 2021.

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.* 10.

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.* 11.

systems and traditions cannot result in different standards for applying the rule of law. Instead, the practices should be considered as 'sharing significant traits' that can be implemented in diverse modes through different contexts.<sup>54</sup> The guardian institutions of the rule of law should aim to ensure legality in both the Member States and the EU. However, the debate should not be limited to legality alone. The separation of powers is a second 'best practice' aspect of the institutional elements of the rule of law: where properly designed and safeguarded, the separation of powers will ensure that powers are distributed between different State institutions, with an adjusted system of checks and balances.<sup>55</sup> Independence of the judiciary is an integral part of this principle.<sup>56</sup>

The procedural elements concern 'the elements of the rule of law, which guarantee fair procedural commitments relevant when the law is about to be applied to individual cases'.<sup>57</sup> These include the right to a fair trial, the rights of defence, the right to be heard, etc., and are closely linked to institutional arrangements such as independent courts. These elements allow the law to fulfil its true function; after all, independent institutions and adequate procedures are essential for ensuring effective judicial review and respect for fundamental rights.<sup>58</sup>

The political elements relating to the rule of law are linked to the political culture of a legal system, within which the adoption, enforcement, and implementation of the law occur.<sup>59</sup> The idea of a political culture relevant to the rule of law places discussions about the rule of law outside the purely institutional context and instead pays attention to the broader socio-political context within a particular Member State. Actions taken by political actors can help strengthen the rule of law and enhance the law's legitimacy, but their actions can also undermine the rule of law. Tempering public power is one of the main aims of the rule of law, so political elements can be at odds with the institutional and procedural side of the rule of law. Adequate procedures and competent institutions are thus present to both avoid the abuse of the law and prevent the rule of politics.<sup>60</sup>

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<sup>54</sup> *ibid*; Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (28 April 2009) Jean Monnet Working Paper Series No. 4/2009, 70; Gianluigi Palombella, 'The Rule of Law as an Institutional Ideal' in Gianluigi Palombella and Leonardo Morlino (eds), *Rule of Law and Democracy: Inquiries Into Internal and External Issues* (Brill 2010) 28.

<sup>55</sup> *ibid* 13.

<sup>56</sup> *ibid* 13; Venice Commission, *Rule of law checklist*, para 74.

<sup>57</sup> *ibid* 14.

<sup>58</sup> *ibid* 16.

<sup>59</sup> *ibid* 16–18.

<sup>60</sup> 'RECONNECT Policy Brief: Fundamental Principles in Times of Crises - Democracy and Rule of Law in the European Union' (n 5) 5.

## *B. The EU's rule-of-law toolbox*

### **1. Treaty-based instruments**

Apart from conceptual and practical research on the rule of law, RECONNECT has also taken a closer look at the EU's current rule-of-law apparatus. One of the primary conclusions is that there is no need to reinvent the wheel, and that existing instruments are adequate for upholding the rule of law in the EU and its Member States.<sup>61</sup> This conclusion is arrived at subject to the critical prerequisite that these instruments are used in a prompt, forceful, and coordinated manner, and this is precisely where the problem lies.<sup>62</sup>

A tool that was long missing in the toolbox, and which was regarded as such in RECONNECT research<sup>63</sup>, was a mechanism aimed at protecting the Union's budget against Member States that abuse EU funds to consolidate their backsliding practices. Such a mechanism was adopted on 16 December 2020, but only after a lengthy impasse, caused by vetoes from Hungary, Poland, and Slovenia.<sup>64</sup> The mechanism introduces the possibility of protecting the Union's budget in cases where the principles of the rule of law are breached by Member States (Article 1).<sup>65</sup> The regulation was eventually adopted following a number of concessions made by the EU, which prompted Poland and Hungary to unblock the EU budget and lift their respective vetoes. Part of the compromise was a provision stipulating that the Commission needs to put guidelines in place, to govern the use of the mechanism, before it can be used against any Member State.<sup>66</sup> Moreover, should an action for annulment of the regulation be launched before the Court of Justice (CJEU) – as of March 2021, Poland<sup>67</sup> and Hungary<sup>68</sup> had already launched cases – the Commission is required to finalise these guidelines after the judgement

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<sup>61</sup> Pech (n 10).

<sup>62</sup> Pech and Kochenov (n 6) 7.

<sup>63</sup> Laurent Pech and Dimitry Kochenov, 'RECONNECT Policy Brief: Strengthening the Rule of Law within the European Union: Diagnoses, Recommendation and What to Avoid' (June 2019) <<https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf>> accessed 15 July 2021.

<sup>64</sup> Julinda Beqiraj, 'The "Regulation on a General Regime of Conditionality for the Protection of the Union Budget" and Its Contested Implementation' (19 January 2021) <<https://reconnect-europe.eu/blog/the-regulation-on-a-general-regime-of-conditionality-for-the-protection-of-the-union-budget-and-its-contested-implementation/>> accessed 15 July 2021.

<sup>65</sup> '2018/0136(COD) PE-CONS 64/20 Regulation of the European Parliament and of the Council on a General Regime of Conditionality for the Protection of the Union Budget' <<https://data.consilium.europa.eu/doc/document/PE-64-2020-INIT/en/pdf>> accessed 15 July 2021.

<sup>66</sup> 'EUCO 22/20 CO EUR 17 CONCL 8 European Council Conclusions 10 and 11 December 2020' <<https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>> accessed 15 July 2021.

<sup>67</sup> Case C-157/21 Republic of Poland v European Parliament and Council of the European Union.

<sup>68</sup> Case C-156/21 Hungary v European Parliament and Council of the European Union.

of the CJEU. The Commission can, furthermore, not propose measures under the Regulation until the guidelines are finalised.<sup>69</sup> At the time of this writing, the mechanism had not yet been used by the Commission and the European Parliament was preparing to sue the Commission for failure to act.<sup>70</sup>

Besides this latest instrument, RECONNECT has also explored the other instruments that are available to the Union in its efforts to, at least, contain backsliding Member States and hopefully stop them in their tracks. The EU's current toolbox consists of: the infringement procedures of Articles 258-260 of the Treaty on the Functioning of the European Union (TFEU); the procedure of Article 7 TEU; the Cooperation and Verification Mechanism; and various soft law instruments, including the Rule of Law Framework and the EU's blueprint for action.

The Article 7 TEU procedures, which, in theory, are supposed to resolve breaches of the EU's fundamental values, have turned out to be difficult to implement in practice.<sup>71</sup> The preventive procedure under article 7(1) TEU was activated against both Poland and Hungary<sup>72</sup>, but to trigger any sanctions under the sanction procedure in this article (7(2) TEU), a unanimous vote of all Member States is required, apart from the State in question. While efforts have been made to commence the article 7(2) procedure against both Poland and Hungary, the procedure has been crippled by the fact that more than one Member State has gone down the 'wrong backsliding road'.<sup>73</sup> With Poland and Hungary backing each other and preventing a unanimous vote of the Member States, the article 7(2) TEU procedure has been left dead in the water, unable to bring a halt to backsliding practices relating to the rule of law and democracy.<sup>74</sup> RECONNECT research established that this article should be used to its full potential and that 'it

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<sup>69</sup> Beqiraj (n 64).

<sup>70</sup> European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP)), [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0287\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0287_EN.pdf) accessed 15 July 2021.

<sup>71</sup> Pech (n 10) 24–26.

<sup>72</sup> European Commission, 'Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law' [2017] (COM(2017) 835 final); European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

<sup>73</sup> Kim Lane Scheppele, Dmitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' [2020] *Yearbook of European Law* 1, 9.

<sup>74</sup> Kim Lane Scheppele and Laurent Pech, 'Is Article 7 Really the EU's "Nuclear Option"?' (Verfassungsblog, 6 March 2018) <<https://verfassungsblog.de/is-article-7-really-the-eus-nuclear-option/>> accessed 2 October 2020.

should not foresee the participation of a Member State that is already subjected to an article 7(1) TEU procedure to another article 7 procedure involving another Member State'.<sup>75</sup>

One of the tools the EU has consistently used is the infringement procedure laid down in Article 258 TFEU. This procedure can be triggered by the Commission against any Member State considered to have failed in the fulfilment of an obligation under the Treaties. The Commission has initiated proceedings under this article on multiple occasions, against both Hungary<sup>76</sup> and Poland.<sup>77</sup> However, there are important limitations to its use. The values under Article 2 TEU are not generally considered to be legal obligations that can serve as a direct basis for infringement proceedings. As a consequence, the Commission has had to use indirect legal arguments in order to protect the rule of law in the EU's Member States. Furthermore, the procedures were only designed to tackle one infringement of Treaty obligations at a time, while efforts to undermine the rule of law and democratic protections often involve multiple systematic infringements of the EU's fundamental values.<sup>78</sup> RECONNECT considers the infringement proceeding to be an important tool in the EU's legal resilience against backsliding practices. Nevertheless, the research suggests that the Commission should further explore the potential of launching interconnected infringement actions, which are based on multiple articles, including Articles 2 TEU and 4(3) TEU (the provision on sincere cooperation) and Article 19(1) TEU (on effective legal protection), to defend judicial independence.<sup>79</sup>

Much like Article 258 TFEU, Article 259 sets out the possibility of initiating infringement actions against a Member State. However, in contrast to Article 258, such an action is to be brought by another Member State. Although there is a great deal of potential in this tool, it has barely been used in the past, due to its political weight.<sup>80</sup> Political implications notwithstanding, there is no reason why the article cannot be usefully deployed in the context of rule-of-law backsliding, provided Member States refrain from using it too broadly in the future. RECONNECT research confirms that Member States should have an increased awareness of this provision and their ability to invoke it against other Member States. It is worth noting that, in February 2021, the Dutch Parliament approved a motion on the

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<sup>75</sup> Pech and Kochenov (n 6) 7.

<sup>76</sup> Case C-78/18, *Commission v Hungary* (NGOs) ECLI:EU:C:2020:476.

<sup>77</sup> Case C-192/18 *Commission v Poland* ECLI:EU:C:2019:924; C619/18 *Commission v Poland* ECLI:EU:C:2019:531; Pech (n 50) 28-30.

<sup>78</sup> Scheppele, Kochenov and Grabowska-Moroz (n 73) 48–49.

<sup>79</sup> Pech and Kochenov (n 6) 7.

<sup>80</sup> Scheppele, Kochenov and Grabowska-Moroz (n 73) 105.

implementation of Article 259 TFEU against Poland.<sup>81</sup> In June 2021, a draft motion was also being introduced in the Belgian federal parliament as a response to the Hungarian anti-LGTBQI legislation.

## 2. Soft law instruments

In 2014, the Commission adopted its Rule of Law Framework as a tool which was viewed, at the time, as having the potential to act as a simplified, pre-Article 7 TEU infringement procedure.<sup>82</sup> It is not, however, the only soft law instrument in the domain of the Rule of Law: in 2013 the Commission had already launched the EU Justice Scoreboard, which provides comparable data on the independence, quality and efficiency of national justice systems. The Framework consists of a three-stage process, which, for the most part, involves dialogue between the Commission and the Member State in question. If the Commission identifies a systemic threat to the rule of law following a first assessment (the 1st stage), it may adopt a formal opinion. If the Member State fails to offer a satisfactory answer in response to the Commission's concerns, the Commission can then issue a formal rule-of-law recommendation (2nd stage), which can contain a specific deadline for implementation in the relevant Member State. The final stage of the procedure involves active monitoring of the Member State's compliance or non-compliance (3rd stage). If a Member State fails to implement the recommendation, the Commission may activate one of the procedures of article 7 TEU.<sup>83</sup>

The Rule of Law Framework was used for the first time against Poland, in 2016, and although the activation consisted of one formal opinion and four formal recommendations, it had little effect on backsliding practices in Poland. As a result, the Commission had no choice but to trigger article 7(1) TEU.<sup>84</sup>

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In 2019, the Commission issued a 'Blueprint of Action', in which it set out a new instrument called 'the Rule of Law Review Cycle'.<sup>85</sup> This review encompasses all Member States: not only those with ongoing rule of law concerns. The first review was published in September 2020. Regrettably, it employed only euphemistic

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<sup>81</sup> 'Motie van Het Lid Groothuizen c.s. over Onderzoek Om Polen Voor Het Europese Hof van Justitie Te Dagen Nr. 35570-VI-58' (2020) <file:///C:/Users/u0137080/Downloads/van\_het\_lid\_Groothuizen\_c.s.\_over\_onderzoek\_om\_Polen\_voor\_het\_Europese\_Hof\_van\_Justitie\_te\_dagen\_(2).pdf>.

<sup>82</sup> 'Communication from the Commission to the European Parliament and the Council. A New EU Framework to Strengthen the Rule of Law' (2014) <[http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm)> accessed 15 July 2021.

<sup>83</sup> Pech (n 10) 22.

<sup>84</sup> European Commission, Rule of Law: European Commission acts to defend judicial independence in Poland, IP/17/5367, 20 December 2017.

<sup>85</sup> European Commission, 'Communication from the Commission: Strengthening the rule of law within the Union, A blueprint for action' COM (2019) 343 final.

language in its report, thus understating the gravity of the situation unfolding in multiple Member States. The first Review Cycle report failed to recognise the pressing nature of the threats confronting the rule of law in the EU.<sup>86</sup>

### *C. COVID-19 as a RECONNECT case study*

As already mentioned, the RECONNECT project includes five case studies in its research on democracy and the rule of law: these concern the democratic legitimacy in EU macroeconomic and fiscal policy (EMU), transparency in EU trade policy, counterterrorism, migration policy, and the impact of the COVID-19 pandemic. As COVID-19 started to pose a considerable threat to the rule of law and democracy on a global scale, RECONNECT redirected much of its focus at researching the legal effects of the crisis and developing recommendations for governments to adhere to the rule of law as often as possible.

As COVID-19 entered European territories, Member States across the EU responded, declaring states of emergency as a means to stop the spread of the virus and diminish the negative social and economic effects of the pandemic. A number of governmental reactions have included the placing of far-reaching restrictions on human rights, individual freedoms and liberties, and limitations on democratic processes and the functioning of institutions.<sup>87</sup> As a result, many Member States have deviated from the principles and practices of the rule of law and good governance, which has further intensified the EU's rule-of-law crisis.<sup>88</sup>

A remarkable trend, observed across Member State pandemic responses, has been the tendency to prioritise national sovereignty, by adopting individual responses and closing borders, instead of opting for common and coordinated solutions at the EU level. As a consequence, the Union has been publicly perceived as absent and weak in its handling of the crisis. RECONNECT research reconfirms the need for good governance, respect for rule-of-law principles, and a coordinated approach with respect to human rights.<sup>89</sup>

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<sup>86</sup> Dan Kelemen, 'Op-Ed: "You Can't Fight Autocracy with Toothless Reports" by R. Daniel Kelemen - EU Law Live' (EU Law Live, 9 October 2020) <<https://eulawlive.com/op-ed-you-cant-fight-autocracy-with-toothless-reports-by-roger-daniel-kelemen/>> accessed 15 July 2021; Laurent Pech, 'Doing More Harm than Good? A Critical Assessment of the European Commission's First Rule of Law Report' (9 December 2020) <<https://reconnect-europe.eu/blog/doing-more-harm-than-good-a-critical-assessment-of-the-european-commissions-first-rule-of-law-report/>> accessed 15 July 2021.

<sup>87</sup> 'RECONNECT Policy Brief: Fundamental Principles in Times of Crises - Democracy and Rule of Law in the European Union' (n 5) 7.

<sup>88</sup> <https://verfassungsblog.de/category/debates/power-and-the-covid-19-pandemic-debates/>.

<sup>89</sup> Joelle Grogan and Nyasha Weinberg, 'Principles to Uphold the Rule of Law and Good Governance in Public Health Emergencies' (2020) <[www.reconnect-europe.eu](http://www.reconnect-europe.eu)> accessed 15 July 2021.

## IV. Recommendations based on RECONNECT research

The crisis of trust and threat to values that has been unfolding, and, indeed, continues to unfold, is one of the biggest challenges to the future of the Union. The RECONNECT project has synthesised its research findings into concrete policy recommendations for the EU; the main recommendations of the project, relating to both democracy and the rule of law, will be summarised below.<sup>90</sup> Given the current context and state of affairs, a particular emphasis has been placed on responses to the COVID-19 pandemic.

### *A. Recommendations for democracy*

Recommendation 1: Public deliberation. Public deliberation is a key factor in understanding democratic backsliding in the EU and the Union's Member States. However, the EU does not appear to have adequate tools that might be able to address the problem. Therefore, RECONNECT recommends that the Union should complement its focus on the rule of law with an explicit focus on the deterioration of public deliberation. Public deliberation is one of the main components of a liberal democracy, and has, over the past ten years, experienced a sharp decline in Eastern European Member States. An additional recommendation, which could be implemented in the more distant future, is the creation of an independent expert commission, tasked with observing the quality of public discourse in the EU. Special attention should be given to the degrees of justification and civility in plenary parliamentary debate and in the media.

Recommendation 2: Voter turnout. RECONNECT research indicates that increasingly low voter turnout in European Parliament elections should be addressed by the European institutions and the Member States. Lower turnouts can be addressed through parameters that are easily changeable, yet could have significant effects. These include an approach to elections that:

- avoids the holding of multiple elections (e.g., national, regional, local) close to European Parliament elections;
- organises European Parliament elections on the same day as other elections – ideally these elections should be held on a Sunday;
- increases communication efforts with Central and Eastern EU Member States, aimed at lowering the threshold for political participation in Member States that have a less developed participatory culture.

Furthermore, the creation of a European party list should be considered, as national parties are not easily motivated to organise their electoral campaigns based on European aspects.

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<sup>90</sup> 'RECONNECT Policy Brief: Fundamental Principles in Times of Crises - Democracy and Rule of Law in the European Union' (n 5); Pech and Kochenov (n 6).

Recommendation 3: Sovereignty. The institutional balance between the European legal system and its national Member State counterparts is changing rapidly. These changes have been caused by a number of different factors, including nationalist movements that have openly expressed their criticism of and aversion to the European project, national courts that have challenged the authority of the Court of Justice of the European Union (CJEU), and Member States' highly individual responses to the COVID-19 pandemic. Having taken all of these factors into account, RECONNECT argues that there is a need to rethink the concept of sovereignty within the multilevel dimension of the EU. To achieve this, democratic participation channels in the European decision-making process need to be strengthened and further explored. Additionally, sovereign power should rest at the level of EU citizens: this can only occur through the development of genuinely representative systems.

Recommendation 4: Citizen knowledge of the EU. The Union should invest more in efforts that increase citizens' knowledge of the EU. At present, many citizens lack a broad understanding of the Union's competences, as well as how they interact with and relate to the competences of Member States; this results in citizens not realising what is at stake in European elections. To achieve this, there needs to be a certain willingness exhibited in Member States (education is a national or regional, but not an EU, competence) to provide young European citizens with training on EU politics and competences, as part of the basic school curriculum.

## *B. Recommendations for the rule of law*

### **1. General rule of law recommendations**

Recommendation 1: Rule-of-law toolbox. The Union should not be looking to revamp or reinvent its rule-of-law toolbox. Instead, it should focus on using existing instruments promptly, forcefully, and in a coordinated manner.

Recommendation 2: Improvements to existing instruments. The European Commission should focus on improving the current instruments and processes relating to the EU Rule of Law Framework.

- Following the activation of the Rule of Law Framework there should be a period of 'dialogue', which lasts a maximum of six months, before a Rule of Law Opinion is published;
- A maximum of one Rule of Law Recommendation is to be issued within the next two months following the dialogue period;
- Within two months of the issuance of a Recommendation, full compliance will be required by all EU Member States in question;
- The activation of Article 7 should be made the official default position in any case of Member State non-compliance with specific recommendations made by the Commission;

- The Commission should formally welcome and invite submissions from interested parties, including civil society organisations, and should make them available online.

Recommendation 3: EU Justice Scoreboard. The EU Justice Scoreboard should be improved, by making data gaps explicit when and where they result from the unwillingness of national authorities to contribute to the Scoreboard. Moreover, the Commission should take into account information that is gathered by professional organisations, such as the Venice Commission, etc.

Recommendation 4: The European legal ecosystem. Mechanisms and mandates that can sanction rule-of-law or democratic backsliding should be enforced by the European institutions, to uphold the fundamental values upon which the Union is founded. For example, RECONNECT argues that the EU could create a network of independent experts, which could be attached to the EU Fundamental Rights Agency or the European Commission. Other examples include the introduction of a rule-of-law stress test, ensuring the more systematic involvement of the Venice Commission and national actors, demanding that national governments initiate Article 259 TFEU procedures,...

## **2. Rule-of-law and good governance recommendations for public health emergencies (COVID-19)**

Recommendation 5: Legal certainty and clarity in public communication. RECONNECT argues that respect for the rule-of-law standards and principles of good governance can advance outcomes during public health emergencies. A first recommendation in this regard concerns legal certainty and clarity in public communication: rules and restrictions should be clear in their meaning, their application should be consistent, and any changes to legal rules should be announced in advance, to allow enough time to prepare. Additionally, public communication on the pandemic should always be clear, accessible, and consistent, and regular updates should be provided on new developments, policies, and actions. Ideally, governments should implement a sequenced response plan, indicating what is and what is not allowed, and when. This plan should then be updated, as necessary, in light of new developments and information.

Recommendation 6: Transparency in decision-making. All matters related to decision-making bodies, such as membership and the decision-making process, should be made publicly available. Similarly, all scientific evidence and underlying motivations of public policy should be available: both in full and in the form of executive summary, and on easily accessible public websites.

Recommendation 7: International law and human rights standards. In public health emergencies, it is necessary that governments only introduce measures

that are necessary, proportionate, temporary, and respect human rights. It is essential that governments aim to respond to the crisis within the constraints of their usual powers, as often as possible. Moreover, disproportionate use of force and penalties for breaches of COVID-19 measures should be avoided, in order to guard citizens against arbitrary and discriminatory application of the rules. In the same spirit, governments should pay particular attention to vulnerable groups, and should make sure that measures do not disproportionately affect such groups. There are two additional factors that governments should remain mindful of: responses should neither limit media freedoms nor entail the introduction of data-driven technologies that extend state surveillance unrelated to the pandemic.

**Recommendation 8: Rapid, coordinated, and collective action.** The most beneficial way for States to tackle the COVID-19 crisis is through a rapid, systematic, and cross-governmental strategic approach. Different action plans should be coordinated at all levels to ensure collective action.

**Recommendation 9: Measures targeted at resolving the health crisis.** RECONNECT argues that interventions and actions should be specifically tailored to respond to the pandemic and should not be targeted at achieving other policy goals. Similarly, equal, correct, and consistent application of all rules should be ensured: differentiation in treatment should only be permitted where reasons behind the variation are objectively justified and health-based.

**Recommendation 10: Oversight mechanisms.** Oversight mechanisms should be protected during public health emergencies, to ensure higher quality of law, policy, and compliance. It is essential that the legislature, and courts and tribunals can continue their ordinary functions, with the necessary adjustments. Processes to challenge the application of emergency measures should be maintained, or should be made available to the public and public scrutiny, through open media access.

**Recommendation 11: External expertise, stakeholders and international experience.** Governments should be open to following guidance from organisations, such as the World Health Organization (WHO), and learning from international experience. RECONNECT further suggests that governments should invite input from a broad range of stakeholders in the drafting of legal measures (e.g. civil society, NGOs). Constructive feedback from multiple external experts, from a variety of different fields, should also be invited.

**Recommendation 12: Law reform.** Good governance should include the possibility of reforming the law, following the identification and analysis of best practices at the domestic and international levels. Legal provisions relating to declarations of a 'state of emergency', provisions in health legislation relating to pandemics, and actions taken by state actors during a pandemic, should all be properly reviewed.

## V. Conclusion

This Position Paper set out the most recent findings of the RECONNECT project on democracy and the rule of law in the EU. On democracy, RECONNECT research has concluded that the dynamics of democratic backsliding are not confined to the borders of the EU, but instead can be found at the global level. RECONNECT has also widely examined populism in the EU and has concluded that populist parties do not necessarily undermine democratic values and may even adapt to the democratic system over time. Additionally, RECONNECT research confirms that the EU is faced with an continuously decreasing electoral turnout and that multiple factors, such as the day of the week or concurrent elections, can have an impact on democratic participation. Moreover, the research also suggests that a large number of citizens rarely or never discuss the EU and that the European Parliament elections still remain second-rank elections in the minds of many citizens. On the rule of law, RECONNECT has found the concept to be a consensual element of Europe's legal practice and, through this finding, has refuted the claims that the rule of law is too vague and arbitrary to enforce. Consequently, the biggest challenges for the rule of law are of a practical nature. RECONNECT has explored the rule of law's best practices in terms of institutional elements, procedural elements and political elements. To enforce these best practices in the Member States, the EU's current rule-of-law toolbox, although deemed sufficient according to RECONNECT research, should be used more promptly and forcefully. The position paper also discussed how RECONNECT provided good governance recommendations in light of the COVID-19 pandemic to complement the general recommendations that were made on democracy and the rule of law based on research findings.

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Respect for democracy and the rule of law have come under threat in recent years in various member states of the European Union. The reason is twofold. On the one hand the European Union is facing a new global reality that is increasingly far removed from its basic values. On the other hand we are witnessing a rebirth in some member states of the push for more national sovereignty and of a feeling of identity. Both factors result in a Union that is resonating less and less with its citizens. Residents of the EU are increasingly losing confidence in European institutions and are becoming more sensitive to the populist storm that has been raging through Europe in recent years. The combination of distrust among citizens and the erosion of its fundamental values in a number of member states creates a huge challenge for the European Union in relation to its authority and legitimacy.

The Horizon2020 research project RECONNECT ('Reconciling Europe with its Citizens through Democracy and the Rule of Law') is a four-year interdisciplinary project focusing on this issue. This Position Paper offers an overview of the key findings from the research conducted by RECONNECT and outlines the concrete recommendations presented by RECONNECT in order to improve the future narrative of the Union and to safeguard the values of democracy and the rule of law.

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