

Politeja

No. 4(98), 2025, pp. 293-316

<https://doi.org/10.12797/Politeja.22.2025.98.16>

Licensing information: CC BY-NC-ND 4.0

Brygida KUŹNIAK 

Jagiellonian University

brygida.kuzniak@uj.edu.pl

Agata B. CAPIK

Research in EU Law, Luxembourg

abcapik@icloud.com

AREA OF FREEDOM, SECURITY AND JUSTICE IN CONFRONTATION WITH LEGAL POPULISM

THE POLISH EXAMPLE OF JUDICIARY CRISIS¹

ABSTRACT

Ensuring an Area of Freedom, Security, and Justice for EU citizens is one of the most important goals of the European Union. Achieving this goal constitutes a significant challenge, as according to the TFEU (Treaty on the Functioning of the European Union), it must be carried out with respect for the diverse legal systems and traditions of the Member States. Tensions arise between what is commonly recognised and what is defined by the individual systems and traditions of each country. Against this backdrop, populist tendencies come to the fore. This study addresses the issue of legal populism, which negatively affects the functioning of the justice systems in EU Member States. The example analysed is the judicial crisis in Poland.

Keywords: populism, legal populism, Area of Freedom, Security and Justice, Polish constitutional crisis, Conference on the Future of Europe

INTRODUCTION

In the European Union in its current architecture, i.e. since the entry into force of the Treaty of Lisbon,² the objective of ensuring its citizens an Area of Freedom, Security and Justice (AFSJ) appears to be one of the most important objectives and among the more difficult ones to achieve for this organization. It was formulated and assigned a prominent place among the provisions of Article 3 of the Treaty on European Union (TEU),³ which sets out the objectives of the EU. Noteworthy in this regard is the systemic structure of the above regulation. Namely, the provisions defining the key objectives of the EU today assign more importance to the task of creating the AFSJ than did previous regulations,⁴ as this objective is now listed even before that of establishing the internal market and right after the EU's fundamental objectives of promoting peace and ensuring prosperity for societies. In turn, in Article 67(1) of the Treaty on the Functioning of the European Union (TFEU),⁵ introducing a number of detailed treaty regulations relating to this area, it is clearly stated that such an area must be created *with respect for fundamental rights and the different legal systems and traditions of the Member States*. The juxtaposition of the above two provisions of EU primary law, being crucial to the Area of Freedom, Security and Justice, shows both the importance and significance of this area, as well as the complexity of the challenge facing both the EU as a whole and its individual member states.

In this context, particularly emphasis should be placed on the need to maintain a difficult balance between, on the one hand, the fundamental rights common to the entire EU as well as the objective of creating an Area of Freedom, Security and Justice, both of which enjoy the treaty status and, on the other, ensuring respect for the legal systems and traditions of individual member states. As long as there are no divergences and tensions between what is common to all members and what is based on common values, and what can be justified by the governments of individual member states with their systems and traditions, the implementation of the EU's objectives, including that of providing its citizens with an Area of Freedom, Security and Justice, runs smoothly. However, when such tensions and divergences arise, the Union as an entire community is harmed, and its citizens lose out. Admittedly, the Area of Freedom, Security and Justice originally did not fall within the domain of cooperation-based integration, but was only included in this domain as the Union developed. Consequently, some member states may be more resistant to its full implementation than they are to other EU objectives. Particularly when the instrumentalisation of the (national) law, serving populist

² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ EU C 306, 17.12.2007, p. 1.

³ Treaty on European Union, consolidated version, OJ EU C 202, 7.06.2016, p. 13.

⁴ Construction of the area of freedom, security and justice was initiated by the Treaty of Amsterdam, which itself amended the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ EC C 340, 10.11.1997, p. 1.

⁵ Treaty on the Functioning of the European Union, consolidated version, OJ EU C 202, 7.06.2016, p. 47.

purposes, is (mis)used to protect sovereignty, national authorities are more reluctant to implement EU measures, the latter being seen as a threat to that sovereignty. Set against this background, political populism including, especially, legal populism, seems to be a particularly dangerous trend. These tendencies are clearly gaining ground today on a global scale, and Europe itself is noticeably not immune to this phenomenon.⁶

The main purpose of this contribution is to demonstrate how major manifestations of legal populism constitute part of the broader tendency of political populism, as well as to present these manifestations in the context of building and implementing cooperation within the Area of Freedom, Security and Justice within the European Union. The complementary objective, on the other hand, is to establish the background for certain proposals formulated as a result of the Conference on the Future of Europe (CoFoE).

POPULISM *VERSUS* EUROPEAN UNION LAW

The European Communities, and later the European Union, were established through instruments of public international law. The foundation used for an integrative legal structure capable of producing extensive secondary law was the basic source of classical public international law, namely an international agreement. Most importantly, the fundamental aspects of this structure were settled at the treaty level. As a consequence, one could legitimately argue that populists would adopt the same approach towards primary European law (i.e. at the treaty level) that they have embraced in relation to public international law (which will be developed further below), with its main contemporary source being the law of the treaties. Moreover, it could also be legitimately concluded that this mindset will be further intensified in relation to EU secondary law, due to the specific features of the latter, with the principle of the primacy of EU law over the domestic law of the Member States and the principle of direct effect of EU law at the forefront of this clash.

Research demonstrates that populists approach law in general, and thus also international law, as one of their political resources – something that can be used on a discretionary basis, modified according to current needs, and treated as a means to an end.⁷ At the same time, however, populists do not negate the law *in genere*, but instead act *under cover of law*,⁸ presenting actions that conflict with the objectives of the law as consistent with it and based on it. *Legal populism is an action undertaken by political actors and/or other social, international actors, and legal entities, which involves the conscious and deliberate instrumental evaluation and treatment of law within the framework*

⁶ See, e.g. B. Kuźniak, P. Obacz, *Instrumentalizacja prawa międzynarodowego na przykładzie Polski jako strony konwencji stambulskiej*, Kraków 2020, pp. 29-31.

⁷ B.Z. Tamanaha, *Law as a Means to an End. Threat to the Rule of Law*, Cambridge 2019.

⁸ H. Krieger, "Populist Governments and International Law," *European Journal of International Law*, vol. 30, no. 3 (2019), p. 976.

of a political strategy, motivated by achieving political and/or other non-legal goals. This strategy is particularly based on such populist foundations as: the negation of the goals and values behind legal regulations; presenting the law as something other than it is – especially as a creation of the ‘élites’, and thus contrary to the supposed needs of the ‘people’ and the interests of the community (e.g., the nation); using legal arguments to justify actions that, although objectively do not correspond or conflict with the goals of the law, must be presented as lawful; using legal arguments aimed at discrediting the legal order or certain elements or institutions of it; relativizing the significance and role of law in society, the state, or the international community.⁹ With regard to public international law, the attitude

⁹ B. Kuźniak, P. Obacz, *Instrumentalizacja prawa międzynarodowego*, pp. 52-53. Furthermore, regarding the legal populism and an impact of populism on the law and the rule of law, see, e.g., V. Adamidis, “Democracy, Populism, and the Rule of Law. A Reconsideration of Their Interconnectedness,” *Politics*, vol. 44, no. 3 (2024), pp. 386-399; M. Anselmi, P. Blokker, O. Mazzoleni, “Populism and Law,” in P. Blokker (ed.), *Populism and Law. Handbook of Concepts, Questions and Strategies of Research*, Baden-Baden 2021, pp. 543-554; P. Blokker, “Populism as a Constitutional Project,” *International Journal of Constitutional Law*, vol. 17, no. 2 (2019), pp. 536-553; P. Blokker, “Response to ‘Public Law and Populism,’” *German Law Journal*, vol. 20, no. 2 (2019), pp. 284-290; E. Bodnár, J. Webber, O. Schmidtke (eds), *Hague Journal on the Rule of Law*, vol. 16, no. 2 (2024), at <https://link.springer.com/journal/40803/volumes-and-issues/16-2> (selected articles); S. Chikwendu, “The Global Crises of Legal Populism. Implications for Democracy and the Rule of Law,” 19 September 2024; J. Hudský, “Populizm a praworządność. Między władzą ludu a ‘regułami gry,’” *Studia nad Autorytaryzmem i Totalitaryzmem*, vol. 43, no. 2 (2021), pp. 281-293; A. Kyriacou, P. Trivin, “Populism and the Rule of Law. The Importance of Institutional Legacies,” *American Journal of Political Science*, paper no. 120343 (2024), pp. 1-37; N. Lacey, “Populism and the Rule of Law,” *Annual Reviews of Law and Social Science*, vol. 15 (2019), pp. 79-96; R. Mańko, A. Sulikowski, P. Tacik, C. Cercel (eds), *Law, Populism, and the Political in Central and Eastern Europe*, London 2023; M. Matczak, “The Language of Legal Populism. A Philosophical and Legal Perspective,” *Radca Prawny*, vol. 2, no. 31 (2022), pp. 239-260; S. Panov, “The Effect of Populism on the Rule of Law, Separation of Powers and Judicial Independence in Hungary and Poland,” in J. Vidmar (ed.), *European Populism and Human Rights*, Leiden 2020, pp. 256-288; European Center for Populist Studies, *Populist Legalism*, at <https://www.populismstudies.org/Vocabulary/populist-legalism/>, 19 July 2025; B.Z. Tamanaha, *Law as a Means to an End...* Regarding an impact of populism on the public international law, see e.g., P. Danchin, J. Farrall, J. Ford, Sh. Rana, I. Saunders, “International Law and the Rise of Populism,” *U of Maryland Legal Studies*, Research Paper no. 2024-24, *Virginia Journal of International Law* (forthcoming 2025), *ANU College of Law*, Research Paper no. 24.2, 7 October 2024; A. Fichtelberg, “Populist Paranoia and International Law,” *Netherlands Yearbook of International Law*, vol. 49 (2018), pp. 45-67; T. Hostovsky Brandes, “International Law in Domestic Courts in an Era of Populism,” *International Journal of Constitutional Law*, vol. 17, no. 2 (2019), pp. 576-596; K. Humble, “Populism and the Threat to International Law,” *Laws*, vol. 11, no. 3 (2022), pp. 1-12; M. Hunter-Henin, “The Legal Face of Populism. From the Classroom to the Courtroom,” 13 December 2017, *The Jean Monnet Working Paper Series*, no. 9 (2017); H. Krieger, “Populist Governments...”; E. Nijman, W.G. Werner, “Populism and International Law. What Backlash and which Rubicon?,” *Netherlands Yearbook of International Law*, vol. 49 (2018), pp. 3-17; A. Orford, “International Law and the Populist Moment. A Comment on Martti Koskenniemi’s Enchanted by the Tools? International Law and Enlightenment,” *American University International Law Journal*, vol. 35, no. 3 (2020), pp. 427-443; F.V. Perry, “The Assault on International Law. Populism and Entropy on the March,” *Syracuse Journal of International Law and Commerce*, vol. 46, no. 1 (2018), pp. 60-113; M. Prieto Rudolph, “Populist Governments and International Law. A Reply to Heike Krieger,” *European Journal of International Law*, vol. 30, no. 3 (2019), pp. 997-1008.

of populists towards this law should be undoubtedly underlined, comprising the following features, already inventoried by B. Kuźniak and P. Obacz:¹⁰

- a desire to set out and highlight the boundaries between what is 'internal' ('ours') and 'external' ('foreign')¹¹; and consequently – adopting a highly dualistic position regarding the relationship between public international law and domestic law;
- a critical attitude towards public international law, declaring the latter to be an *unauthorized intervention within the sovereignty of the state*;¹²
- arguing that international law is 'undemocratic', especially when it comes to creating norms,¹³ and is also 'less transparent' because it is created by institutions that are not legitimized by general elections;¹⁴
- questioning international law, going so far as to allege that it threatens 'national values';¹⁵
- denouncing those concepts of international law that make it something more than just the 'right to coordinate' international relations;¹⁶
- having limited trust in multilateral systems and international institutions;¹⁷
- promoting a policy of identity in opposition to the norms, principles and values of international law,¹⁸ as well as placing particular interests ahead of the interests of the international community resulting from international law.¹⁹

The attitude of populism towards the law, including public international law, is clear: the law is seen and treated as a tool for achieving political or other non-legal goals; it can be manipulated when necessary and changed to achieve these goals. Political and legal populism in relation to public international law has the following characteristics:²⁰

1. Constitutive characteristics:

- a perception of public international law as a technocratic creation of the international 'establishment';²¹

¹⁰ B. Kuźniak, P. Obacz, *Instrumentalizacja prawa międzynarodowego...*, pp. 58-59.

¹¹ T. Hostovsky Brandes, "International Law...", p. 578.

¹² *Ibid.*, p. 584.

¹³ *Ibid.*, p. 580.

¹⁴ *Ibid.*, pp. 580-581.

¹⁵ *Ibid.*, p. 581.

¹⁶ H. Krieger, "Populist Governments...", p. 978.

¹⁷ *Ibid.*, pp. 979-980.

¹⁸ *Ibid.*, pp. 984-985.

¹⁹ *Ibid.*, p. 985.

²⁰ B. Kuźniak, P. Obacz, *Instrumentalizacja prawa międzynarodowego...*, pp. 131-133.

²¹ H. Krieger, "Populist Governments...", p. 971; J.E. Nijman, W.G. Werner, "Populism and International Law...", p. 10; A. Fichtelberg, "Populist Paranoia...", p. 46, 50; Ch. Schwöbel-Patel, "Populism, International Law and the End of Keep Calm and Carry on Lawyering," *Netherlands Yearbook of International Law*, vol. 49 (2018), pp. 105-106; E. Posner, Liberal Internationalism and the Populist Backlash," *Arizona State Law Journal*, vol. 49, Special Issue (2017), pp. 796-797.

- as an implication of the above – anti-elitist and glorification of the nation, sovereignty and the will of the people;²²
 - a sceptical and conservative attitude towards international law; less occasionally open hostility is expressed as well as a specific form of ‘political paranoia’, manifested by suspicion and vigilance, centrality, megalomania and oversensitivity, a fear of losing autonomy, projection, false beliefs, separation;²³
 - legal instrumentalism (in particular, treating law as a political resource)²⁴ and instrumentalisation of law.
2. Distinguishing characteristics:
- resistance to international legal obligations and attempts to delegitimize public international law to the extent that it depends on political goals;²⁵
 - political opposition to multilateralism;²⁶
 - political aversion to progressive political integration (especially within the European Union);²⁷
 - political contestation of the competences of the international judiciary and other types of international institutions;²⁸
 - political opposition to the development of human rights law;²⁹
 - scepticism towards, or opposition to, the universalism of international law;
 - a populist narrative involving, *inter alia*, a specific understanding of democracy, sovereignty, autonomy, the will of the nation, and self-determination;³⁰
 - the use of arguments regarding national security, legitimacy, and democracy in the political narrative;³¹
 - the espousal of Manicheanism and dualism in general views on international law and political Machiavellianism and the policy of ‘dignity’.
3. Auxiliary features:
- a rejection of internationalism;³²

²² A. Rodiles, “Is There a ‘Populist’ International Law (in Latin America),” *Netherlands Yearbook of International Law*, vol. 49 (2018), p. 72.

²³ A. Fichtelberg, “Populist Paranoia...,” pp. 59-60.

²⁴ J. Frank, “Populism and Praxis,” in C.R. Kaltwasser, P. Taggart, P. Ochoa Espejo, P. Ostiguy (eds), *The Oxford Handbook of Populism*, Oxford 2017, p. 629.

²⁵ H. Krieger, “Populist Governments...,” p. 972.

²⁶ J.E. Nijman, W.G. Werner, “Populism and International Law...,” p. 8.

²⁷ A. Rodiles, “Is There a ‘Populist’...,” p. 70.

²⁸ J.E. Nijman, W.G. Werner, “Populism and International Law...,” p. 8.

²⁹ Ibid.; V. Bílková, “Populism and Human Rights,” *Netherlands Yearbook of International Law*, vol. 49 (2018), p. 145.

³⁰ See, eg. B. de Cleen, “Populism and Nationalism,” in C.R. Kaltwasser, P. Taggart, P. Ochoa Espejo, P. Ostiguy (eds), *The Oxford Handbook of Populism*, Oxford 2017, p. 353.

³¹ V. Bílková, “Populism and Human Rights...,” p. 145.

³² B. Moffitt, *Populism*, Cambridge 2020, p. 47; See also B. Verbeek, A. Zaslove, Populism and Foreign Policy, in C.R. Kaltwasser, P. Taggart, P. Ochoa Espejo, P. Ostiguy (eds), *The Oxford Handbook of Populism*, Oxford 2017, p. 384.

- political or cultural, or political and cultural, opposition to globalization entirely or to some dimensions of it;³³
- political or cultural, or political and cultural opposition to cultural changes, migration and progressive multiculturalism (especially in Poland and Europe);
- an ideological outlook (values and goals are embedded in a specific ideological concept) or a lack of connection with ideology (politicians do not refer to any specific and coherent ideology);³⁴
- populism as the aftermath of socio-political changes (significant public support for political actions that are in fact populist, although the groups supporting them do not consider them to be such) or a failure of the power elite alone.

Although in practice these features do not have to appear together at the same time, in a theoretical sense they form a syndrome that can be described as a populist syndrome – a syndrome comprising populist features concentrated around public international law. Since populism manifests itself in political action, the above features should be regarded as distinguishing characteristics of legal populism, founded on the basis of political populism.

AREA OF FREEDOM, SECURITY AND JUSTICE

As an integral concept of the *acquis communautaire* the Area of Freedom, Security and Justice corresponds in meaning – in its simplified form – to two terms employed within domestic law, namely ‘justice’ and ‘internal affairs’.³⁵

Undoubtedly, ensuring internal security is one of the fundamental objectives of European integration. Furthermore, broadly understood security in conditions of freedom has certainly been one of the main objectives underlying integration processes from the very beginning. As a consequence, at the EU level a number of changes have been observed within the area of internal security while many initiatives, political programmes and legal instruments have been developed. On the other hand, however, in

³³ J.E. Nijman, W.G. Werner, “Populism and International Law...,” p. 8.

³⁴ A. Fichtelberg, “Populist Paranoia...,” p. 46; A. Kotowski, “Instrumentalizacja prawa i instrumentalne użycie prawa a jego wykładnia,” *Studia Prawnicze The Legal Studies*, vol. 4, no. 208 (2016), pp. 39-40, pp. 45-46, pp. 49-52; K.W. Abbott, D. Snidal, “Law, Legalization, and Politics. An Agenda for the Next Generation of IL/IR scholars,” in J.L. Dunoff, M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations. The State of Art*, Cambridge 2013, p. 41; J. Novkov, “Law and Political Ideologies,” in K.E. Whittington, R.D. Kelemen, G.A. Caldeira (eds), *The Oxford Handbook of Law and Politics*, New York 2013, p. 626 et seq.

³⁵ These concepts were also adopted at the EU level before the changes introduced into the Treaties by the Amsterdam Treaty came into force. See: eg. B. Kuźniak, A. Capik, *Traktat Amsterdamski. Komentarz*, vol. 2, Warszawa 2001, p. 33. Por. F. Geyer, S. Carrera, “The Reform Treaty & Justice and Home Affairs. Implications for the Common Area of Freedom,” *Security & Justice*, 17 August 2007, CEPS Policy Brief, no. 141, August 2007; J. Kociubiński, “Przestrzeń wolności, bezpieczeństwa i sprawiedliwości. Powstanie, ewolucja, perspektywy. Wybrane zagadnienia reformy wprowadzonej Traktatem lizbońskim,” *Nowa Kodyfikacja Prawa Karnego*, vol. 26 (2010), pp. 77-94.

many respects the past decade has undoubtedly been a very turbulent period in the history of Europe, characterised by the rapid development of populist movements, as well as increasing anti-European sentiments and grassroots protests covering a broad spectrum of issues (including those generated populistically) – ranging from various forms of racism and discrimination against certain social groups to significant economic disparities. This obviously has an impact on the functioning of justice systems in individual Member States, which in turn affects the common Area of Freedom, Security and Justice.

In its current form, the AFSJ was established under the provisions of the Lisbon Treaty, which came into force on 1 December 2009. The legal basis of the AFSJ, as indicated above, is provided by the provisions of Article 3 of the TEU, defining the key objectives of the European Union, as well as the provisions of Title V – Articles 67-89 – of the TFEU.

However, to provide a comprehensive depiction of the matter at hand, it is imperative to mention at this point other treaty provisions of a somewhat consolidating character, i.e., provisions inseparably linked to the creation and the proper and effective functioning of the Area of Freedom, Security and Justice. In this context, one should name in particular the provisions of Article 6 TEU regarding the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights and Fundamental Freedoms,³⁶ the provisions of Article 8 TFEU regarding the elimination of inequalities, the provisions of Article 15(3) TFEU regarding the right of access to the documents of EU institutions, the provisions of Article 16 TFEU regarding the protection of personal data as well as the provisions of Articles 18-25 TFEU regarding non-discrimination and citizenship of the Union.

Having said this, it is also worth recalling that the TFEU also introduced the so-called ‘safety brakes’,³⁷ applicable whenever a Member State believes that draft legislation would affect fundamental aspects of its criminal justice system.³⁸ These braking mechanisms can be also applied within operational police cooperation,³⁹ as well as when adopting legal measures concerning the European Public Prosecutor’s Office.⁴⁰

Undoubtedly, the emphasis should be placed in this context on the currently applicable procedural arrangements. The provisions of the Treaty of Lisbon abolished

³⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘ECHR’).

³⁷ See C. Herma, “Konferencja Międzyrządowa w sprawie Traktatu z Lizbony,” *Biuletyn Analiz UKIE*, no. 20 (2008), p. 53, p. 54; J. Kociubiński, “Przestrzeń wolności, bezpieczeństwa i sprawiedliwości...,” pp. 78-80.

³⁸ See Art. 82 para. 2 and para. 3 and art. 83(1) 3 of the TFUE.

³⁹ See art. 87 TFEU.

⁴⁰ Article 86 para. 2, para. 3, and para. 4 of the TFEU. The European Public Prosecutor’s Office, which began to function on 1 June 2021, is an independent EU body responsible for investigating, charging, prosecuting and conducting legal proceedings against perpetrators of crimes against the financial interests of the EU, see Council Regulation (EU) 2017/1939 of 12 October 2017 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor’s Office (‘the EPPO’), OJ EU L 283, 31.10.2017, p. 1.

the third pillar based on intergovernmental cooperation, thereby disseminating the application of the Community method across the Area of Freedom, Security and Justice. The adoption of legal acts within the AFSJ is, thus, now generally carried out in accordance with ordinary legislative procedure, governed by the provisions of Article 294 TFEU. The decisions of the Council of the EU are based on a qualified majority, while the European Parliament, as co-legislator at the EU level, takes a position in the joint decision-making procedure. In addition, the European Parliament contributes to legislation in the areas of border control, asylum and migration policy,⁴¹ as well as influences the functioning of Eurojust. It is also worth mentioning in this regard that the provisions of the Lisbon Treaty significantly strengthened the role of national parliaments, as provided for by the provisions of Article 12, TEU and Protocols 1 and 2.⁴² Namely, national parliaments currently have eight weeks to scrutinize any draft legislation from the perspective of the principle of subsidiarity before any decision on such a draft can be taken at the EU level. It should be pointed out here that – in accordance with the provisions of the Protocols – within the AFSJ a draft must be reconsidered if such a measure is requested by a quarter of all national parliaments.⁴³ An action can be brought before the Court of Justice of the EU for the annulment of a legislative act if it breaches the principle of subsidiarity. National Parliaments are, furthermore, involved in the evaluation of Eurojust and Europol.⁴⁴

Furthermore, one of the most considerable developments has been the significant extension of the jurisdiction of the Court of Justice of the European Union (CJEU) to encompass the Area of Freedom, Security and Justice through the preliminary ruling procedure. Notably, since the provisions of the Treaty of Lisbon became operational, the Court may, without any restrictions,⁴⁵ also rule on all aspects of the Area of Freedom, Security and Justice through the preliminary ruling procedure.⁴⁶ Moreover, after

⁴¹ See the provisions of art. 77-79 TFEU.

⁴² Protocol No 1 on the Role of National Parliaments in the European Union, consolidated version OJ EU C 202, 7.06.2016, p. 203, and Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, consolidated version OJ EU C 202, 7.06.2016, p. 206.

⁴³ Art. 7 para 2 Protocol (No 2) considering art. 6 Protocol (No 2).

⁴⁴ Art. 85 and art. 88 TFEU.

⁴⁵ For a discussion of earlier restrictions on the possibility of submitting a request for a preliminary ruling in the field of AFSJ, see among others A.B. Capik, "Changes and Challenges Go Hand in Hand. Accessibility of the Preliminary Ruling Procedure before an Overloaded Court within the Area of Freedom, Security and Justice Post-Lisbon," in N. Ferreira, D. Kostakopoulou (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?*, Oxford 2016, pp. 137-141.

⁴⁶ Notably, the Court of Justice retains its jurisdiction in adjudication on requests for a preliminary ruling within the area of freedom, security and justice also after the reform on the judicial framework of the European Union of August 2024, transferring to the General Court of part of the jurisdiction to give preliminary rulings in six specific areas. For further information see Court of Justice of the European Union, *Jurisdiction to Hear and Determine Questions Referred for a Preliminary Ruling Is Conferred on the General Court of the European Union in Six Specific Areas*, press release no. 125/24, 12 of August 2024, at https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-08/cp_240125en.pdf, 4 May 2025.

a five-year transitional period following the entry into force of the Lisbon Treaty,⁴⁷ acts regulating police and judicial cooperation in criminal matters adopted on the basis of previously applicable treaty regulations may also now be subject to a preliminary ruling. Last but not least, faced with the naturally growing number of cases referred to by national courts for a preliminary ruling within the Area of Freedom, Security and Justice, the CJEU has attuned itself to this challenge. Already in 2011 it submitted to the Council draft amendments to the Rules of Procedure, aimed at improving efficiency, i.e. reducing the duration of proceedings, while providing a number of simplification measures, and achieving its key objective of dealing with a growing caseload within a reasonable period of time both swiftly and efficiently.⁴⁸

All these innovations, in their complexity and comprehensiveness, constitute beyond any doubt a significant step towards bolstering the efficient and coherent functioning of the Area of Freedom, Security and Justice, strengthening – in one way or another – its resistance to populist (mis)uses of law. Nonetheless, further deliberations are needed.

FACING POPULISM WITHIN THE AREA OF FREEDOM, SECURITY AND JUSTICE

According to the provisions of Article 67 of the TFUE, the Union shall endeavour to ensure a high level of security through measures aimed at preventing and combating crime, racism and xenophobia, and also measures ensuring coordination and co-operation between police, judicial systems and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the harmonisation of criminal laws.

Given such a broad and ambitiously outlined spectrum envisaged for the AFSJ, a natural focus of concern is its sensitivity or susceptibility to political influence – including from populist sources – in the various aspects constituting this area, and therefore the resulting complexity of both enacting and applying laws within its scope. Having said this, it should be underlined at this point, that the increase in support for populism can be attributed to the combined influence of relevant social and economic factors,⁴⁹ along with local culture and politics.⁵⁰ Thus, Hungary under Orbán is described as an example of a neo-feudal system in which economic activity is closely

⁴⁷ i.e. from 1 December 2014.

⁴⁸ A.B. Capik, “Changes and Challenges...,” pp. 142-143, pp. 148-149, pp. 152-154.

⁴⁹ European Commission (CORDIS), *Populist Rebellion against Modernity in 21st-century Eastern Europe. Neo-Traditionalism and Neo-Feudalism*, at <https://cordis.europa.eu/article/id/434333-populism-s-threat-to-democracy-in-the-eu/pl>, 4 May 2025.

⁵⁰ See European Commission (CORDIS), Programm POREBEL, *Periodic Reporting for period 2. POP-REBEL (Populist Rebellion against Modernity in 21st-century Eastern Europe. Neo-Traditionalism and Neo-Feudalism)*, <https://cordis.europa.eu/project/id/822682/reporting/pl>, 4 May 2025, and also POREBEL- Final Report (2022).

intertwined with politics, while manifestations of populism in Poland remain under the influence of a nationalist Catholic identity. In contrast, in the Czech Republic a tendency towards technocratic populism is, for the most part, less burdened by myth and symbolism than in the other cases mentioned. Consequently, all these factors have an impact, to a greater or lesser extent, on both enacting and applying the law. The historical, cultural and economic division between Western and Eastern Europe appears to be useful for observing and explaining this phenomenon. Considering the aforementioned, although in Western Europe populism is undoubtedly detrimental to political culture, nevertheless it has not – at least not yet – destroyed democratic institutions, and, thus, so far has had less impact on the quality of the laws passed, including laws implemented at the EU level. What is dangerous, however, is that, once again in Western Europe anti-European and Eurosceptic parties are gradually moving from the political margins into the political mainstream in certain Member States. Support for them is steadily growing, as evidenced by the results of parliamentary elections in many countries in recent years.

The populism observed in Central and Eastern Europe involves an overt and relatively clear misinterpretation of the principle of social justice as well as violations of the fundamentals of the rule of law, and, therefore, a serious violation of constitutional standards. Consequently, this kind of populism destroys the underlying structures of the rule of law. Theoretically, citizens can certainly exercise their freedoms – they have the right to take part in public demonstrations, the right to assemble, the right to create non-governmental organizations, and the right to publish critical texts, as well as the right to freedom of opinion and expression. However, while citizens actually try to exercise these constitutionally guaranteed rights and freedoms, they may face police harassment and prosecution, lawsuits, attacks by government-dependent media, and discrimination at work.⁵¹

Undoubtedly, one rather infamous example of these circumstances referred to above is the constitutional crisis in Poland, rooted in populism, under the previous government(s).⁵² New regulations and amendments to existing legal provisions have been introduced, and although they are conflicting with constitutional standards, they are justified by the often misinterpreted principle of social justice, or by values equally prone to overinterpretation or exaggeration such as sovereignty, independence or the public good. In this way, *the law has been rediscovered as a weapon in the hands of political forces*,⁵³ becoming a factor contributing to the erosion of democratic constitutional institutions and the restriction of fundamental civil liberties. As a consequence, the constitutional crisis in Poland, manifesting itself within divergent spheres of the functioning of the state, as well as within state-citizen relations, inevitably affected the

⁵¹ See B. Klich, *Głosno wolajmy – jeszcze więcej Europy*, Opinie Instytutu Obywatelskiego, at <https://instytutobywatelski.pl/opinie/350-glosno-wolajmy-wiecej-europy>, 4 May 2025.

⁵² I.e. legislative periods 2015-2019 and 2019-2023.

⁵³ E. Łętowska, *II Kongres Praw Obywatelskich. My jesteŃmy Konstytucją*, 2018, at <https://bip.brpo.gov.pl/sites/default/files/relacje%20KPO%20druk.pdf>, 4 May 2025.

functioning of the Area of Freedom, Security and Justice of the EU, of which Poland is a member.

In this context, attention should be drawn to the reforms of the Polish judiciary, in particular those affecting the guarantees of independence and impartiality of judges and the effectiveness of ordinary courts in Poland.⁵⁴ It goes without saying that because of Poland's membership in the EU, to which it transferred sovereignty in many areas, the country's domestic courts have at the same time become EU courts – through their application of EU law – thereby creating a complete and coherent EU judicial system. Unsurprisingly, therefore, both the EU institutions and the domestic courts of other Member States⁵⁵ are not only monitoring the reforms of the judiciary introduced in Poland but are also reacting to them, e.g. questioning the criteria of independence or whether a court or tribunal has been established by law. Nevertheless, while the EU's authorities have responded to the violation of judicial independence by bringing numerous proceedings – completed⁵⁶ or still pending⁵⁷ – before the CJEU, there are in-

⁵⁴ Ustawa z dnia 12 maja 2011 r. o Krajowej Radzie Sądownictwa, Dz.U. z 2011 r. Nr 126, poz. 714 (Act of 12 May 2011 on the National Council of the Judiciary, Journal of Laws No 126 of 2011, item 714); ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym, Dz.U. z 2018 r. poz. 5 (the Supreme Court Act of 8 December 2017, Journal of Laws of 2018, item 5); ustawa z dnia 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, Dz.U. z 2017 r. poz. 1452 (Law of 12 of July 2017 amending the Act on the system of ordinary courts and certain other laws, Journal of Laws 2017, item 1452).

⁵⁵ e.g. Request for a preliminary ruling from High Court (Ireland), Judgement of the Court (Grand Chamber) of 25 July 2018 in case LM (C-216/18 PPU), ECLI:EU:C:2018:586; Request for a preliminary ruling from the Rechtbank Amsterdam, Judgement of the Court (Grand Chamber) of 17 December 2020, Joined Cases (C-354/20 PPU and C-412/20 PPU), L and P, ECLI:EU:C:2020:1033.

⁵⁶ e.g. Judgment of the Court (Grand Chamber) of 5 November 2019, in case (C-192/18) Commission v Poland, ECLI:EU:C:2019:924; Judgment of the Court (Grand Chamber) of 19 November 2019, in joined Cases (C-585/18, C-624/18 and C-625/18) A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, ECLI:EU:C:2019:982; Judgment of the Court (Grand Chamber) of 24 June 2019 in the case (C-619/18) Commission v Poland, ECLI:EU:C:2019:531, Rectification order of the Court (Grand Chamber) of 11 July 2019 in the case (C-619/18) Commission v Poland, ECLI:EU:C:2019:615; Judgment of the Court (Grand Chamber) of 15 July 2021 in the case (C-791/19) Commission v Poland, ECLI:EU:C:2021:596 and the entire saga in Case C-204/21, Commission v Poland, order of the Vice-President of the Court of interim relief of 4 July 2021, Commission v Poland, ECLI: EU:C:2021:593 and Order of the Vice-President of the Court of interim relief of 27 October 2021 in the same case (C-204/21) Commission v Poland, ECLI:EU:C:2021:878 and Order of the Vice-President of the Court of 21 April 2023 in the same case (C-204/21) Commission v Poland, ECLI:EU:C:2023:334; finally Judgment of the Court of 5 June 2023, in case 204/21, Commission v Poland ECLI:EU:C:2023:442. Regarding a potential impact of the rulings of the CJEU on the functioning of the complete and coherent EU judicial system see, *inter alia*, C. Martero-Martinez, "Is There a Future for the EU's Area of Freedom, Security and Justice? A Plan to Build Back Trust", Policy Brief, 26 January 2022, pp. 6-7, at <https://www.cer.eu/publications/archive/policy-brief/2022/there-future-eus-area-freedom-security-and-justice>, 6 May 2025; European Parliament: Directorate-General for Internal Policies of the Union, J. Morijn, "Enforcement of EU Law in the Area of Freedom, Security and Justice," Publications Office of the European Union, 2024, pp. 45-46 and 62-63.

⁵⁷ See e.g. proceedings in case (C-448/23) Commission v Poland, application of 17 July 2023, OJ C 304, 28.08.2023, p. 17; European Commission, Press Release of 15 February 2023 regarding a new

creasingly vociferous arguments being made on this matter in the public debate that such an approach constitutes an interference in Poland's internal affairs and, therefore, is in violation of Poland's sovereignty. Additionally, even the jurisdiction of the Court of Justice over the organisation of the judiciary in Member States, which constitutes—as mentioned above—part of the complete and coherent judicial system of the EU, has been called into question.⁵⁸ This viewpoint has been adopted in Poland, despite the fact that the prospect of leaving the European Union is not popular with the Polish public.⁵⁹

One might, therefore, argue that due to such an erosion of constitutional standards—resulting from the influence of populism—within the organisation of the judiciary in Poland, the effectiveness of EU regulations in the field of AFSJ, including, in particular, access to justice (the latter being one of the main objectives of AFSJ), appears rather incomplete. This was highlighted, for example, by the decision of the CJEU—in response to the Act on the Supreme Court⁶⁰—to apply interim measures with the aim of preventing further attempts to restrict the independence of the Supreme Court. However, the Polish Constitutional Court challenged the legality of applying such interim measures in relation to the judiciary, and also declared the primacy of the Polish Constitution over the EU Treaties.⁶¹ In response to these rulings, the European Commission launched an infringement procedure,⁶² asserting that the Constitutional Tribunal violated the general principles of the autonomy, primacy, effectiveness and uniform

infringement procedure (Brussels 2023) *The European Commission Decides to refer Poland to the Court of Justice of the European Union for Violations of EU Law by its Constitutional Tribunal*, IP 23/842, opinion of AG Spielmann of 11 March 2025 in Case 448/23, European Commission v Republic of Poland, ECLI:EU:C:2025:165; Request for the preliminary ruling in case C-521/21, Rzecznik Praw Obywatelskich, opinion of AG Spielmann of 29 April 2025 in case C-521/21, Rzecznik Praw Obywatelskich, ECLI:EU:C:2025:286.

⁵⁸ Constitutional Tribunal, Judgment of 14 July 2021, P 7/20, OTK ZU A/2021, item 49 (Journal of Laws 2021, item 1309).

⁵⁹ For example, according to the EP Eurobarometer for November–December 2021, 82% of Poles were in favour of the European Union, while according to a CBOS survey from June 2022, as many as 92% of respondents supported Poland's membership of the EU, while only 5% of respondents were opposed and 3% had no opinion. For more current data regarding the citizens' approach and/or expectations towards the European Union, see European Union, *EP Special Eurobarometer Winter 2025*, at <https://europa.eu/eurobarometer/surveys/detail/3492>, 4 May 2025.

⁶⁰ Order of the Vice-President of the Court of interim relief of 4 July 2021 in the case (C-204/21 R) European Commission v Republic of Poland, ECLI: EU:C:2021:593 and Order of the Vice-President of the Court of 27 October 2021 in the same case (C-204/21 R) European Commission v Republic of Poland, ECLI:EU:C:2021:878, and Order of the Vice-President of the Court of 21 April 2023 in the same case (C-204/21) European Commission v Republic of Poland, ECLI:EU:C:2023:334; Judgment of the Court of 5 June 2023, in case 204/21, European Commission v Republic of Poland ECLI:EU:C:2023:442.

⁶¹ Constitutional Tribunal, Judgment of 14 July 2021, P 7/20, OTK ZU A/2021, item 49 (Journal of Laws 2021 item 1309), Constitutional Tribunal, Judgment of 7 October 2021, K 3/21, OTK ZU A/2022, item 65 (Journal of Laws 2021 item 1852).

⁶² Art. 258 TFUE.

application of EU law as well as the principle that judgments of the Court of Justice of the European Union are binding.⁶³

The action taken by the EU clearly indicates that the above events in Poland are of significant importance for Europe as a community. Given that anti-European parties are now on the rise in Europe, there is no doubt that the European Union must protect the rule of law and the courts, which has once again been underlined *expressis verbis* at the EU level, by the Council of the European Union in the strategic guidelines on AFSJ⁶⁴, with a view, *inter alia*, to ensuring access to justice before independent courts, legal certainty and a people-centred approach in justice systems.⁶⁵ Consequently, a strong and efficient Court of Justice is needed by both the EU and its Member States. Moreover, there should also be no doubt that the rulings of the CJEU on fundamental treaty obligations do not constitute interference in Poland's internal affairs nor violate the sovereignty of the Member States, including Poland. On the contrary, it should be borne in mind that the legitimacy of procedures initiated within the EU is justified by the international commitments entered into by Poland, which are anchored, *inter alia*, in the Treaties constituting the foundations of the EU. As a result, whenever a Member State breaches its commitments, the procedures provided for in the Treaties are triggered.

However, the question arises as to whether, within the EU's Area of Freedom, Security and Justice, these procedures are sufficiently robust to prevent any abuse or non-compliance, justified by a dubious interpretation of sovereignty, potentially leading to the clear detriment of integration processes and the functioning of EU institutions. Of particular relevance in this context is the long-term process shaping the decisions and relatively recent establishment of the European Public Prosecutor's Office, an independent body whose function is to combat abuses⁶⁶ of EU finances.⁶⁷ As it is commonly known, the European Commission first submitted a draft proposal for creating this body a decade ago. However, the adoption of this draft required a unanimous vote of the Council and the approval of the European Parliament. In

⁶³ European Commission (Brussels 2023), IP 23/842..., proceedings in case (C-448/23) European Commission v Republic of Poland, application of 17 July 2023, OJ C 304, 28.08.2023, p. 17. Case 448/23, European Commission v Republic of Poland.

⁶⁴ See point 23, stating that *EU institutions and Member States have a common responsibility to promote and safeguard the rule of law in the framework of EU law, which is fundamental and a prerequisite for efficient efforts to tackle the challenges facing the Union, including in the area of freedom, security and justice. Therefore, we commit to the joint effort in upholding the rule of law within the EU by all available tools in accordance with the Treaties*. Council of the European Union, Document 16343/24 LIMITE JAI 1782 of 28 November 2024, approved 12.12.2024, Strategic Guidelines for Legislative and Operational Planning within the Area of Freedom, Security and Justice, p. 10, at <https://data.consilium.europa.eu/doc/document/ST-16343-2024-INIT/en/pdf>, 6 May 2025.

⁶⁵ See point 24, *ibid.*, p. 10.

⁶⁶ *Inter alia*, corruption, fraud, money laundering and cross-border VAT fraud.

⁶⁷ Council Regulation (EU) 2017/1939 of 12 October 2017 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1, consolidated version OJ C 22, 21.1.2021, p. 3.

April 2017, after the Council had failed to reach a unanimous decision on this matter for over three years, it was decided, in accordance with the Treaty's requirements, to implement the mechanism of enhanced cooperation in this regard. Initially, 20 countries joined the enhanced cooperation mechanism for the establishment of the European Public Prosecutor's Office,⁶⁸ and as of today 24 Member States are collaborating within this body,⁶⁹ with Poland and Sweden having joined most recently by the end of 2024.⁷⁰

Considering the above-mentioned developments, one issue that needs to be addressed is whether legal institutions such as the enhanced cooperation mechanism are actually effective in crucial matters associated with general security in conditions of freedom and with the functioning of justice.⁷¹ On the one hand, EU Member States have the right to choose whether they wish to participate in this mechanism or not, while on the other hand, the situation creates the legal foundations for the formation of a 'two-speed Europe', the latter being controversial in itself.

AREA OF FREEDOM, SECURITY AND JUSTICE AFTER THE CONFERENCE ON THE FUTURE OF EUROPE

In light of the foregoing considerations, it is also worth paying attention to the recently proposed reform of the EU and the latest Strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice, which constitute an important instrument for shaping the direction of EU policy in that area.⁷²

⁶⁸ Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, Finland, France, Greece, Germany, Italy, Lithuania, Luxembourg, Latvia, Portugal, Romania, Slovakia, Slovenia and Spain.

⁶⁹ In 2018, the Netherlands joined the enhanced cooperation mechanism on the establishment of the European Public Prosecutor's Office, followed, in turn, by Malta. Five other EU Member States, namely Denmark, Ireland (both having opt-out regarding the area of freedom, security and justice), Poland, Sweden and Hungary, did not join, for various reasons. Detailed information available at European Public Prosecutor's Office, *Participating EU Member States*, at <https://www.eppo.europa.eu/en/members>, 4 May 2025. After the Polish parliamentary elections 15 October 2023 the accession to EPPO became an important step. Poland's new Minister of Justice on his first day in office signed a motion for the country to join this institution, this process has been completed 13 December 2024, see in this context, *inter alia*, A. Schultz, K. Schultz, "Why Poland Should Join the European Public Prosecutor," VerfassungsBlog on Matters Constitutional, 12 December 2023, at <https://verfassungsblog.de/why-poland-should-join-the-european-public-prosecutor/>, 5 May 2025.

⁷⁰ See the information of the Ministry of Justice of Republic of Poland, *Poland's Membership in the European Public Prosecutor's Office Becomes a Fact*, 13 December 2024, at <https://www.gov.pl/web/justice/polands-membership-in-the-european-public-prosecutors-office-becomes-a-fact>, 4 May 2025.

⁷¹ For an extensive critical analysis of the enforcement of EU law within the area of freedom, security and justice see, *inter alia*, European Parliament: Directorate-General for Internal Policies of the Union, J. Morijn, "Enforcement of EU Law...", pp. 15-30.

⁷² Cf. Council of the European Union, Document 16343/24 LIMITE JAI 1782 of 28 November 2024, approved 12.12.2024.

Organised as a joint undertaking of the European Parliament, the Council and the European Commission, the Conference on the Future of Europe (CoFoE)⁷³ was undoubtedly an unprecedented initiative in the history of integration processes due to the innovative practice of supranational deliberative democracy.⁷⁴ Giving a voice to the citizens of the European Union, creating a genuine dialogue between its citizens and its institutions, was intended to *increase the democratic legitimacy of the European project and sustain citizens' support for common goals and values*.⁷⁵ The general idea was to prepare the European Union for both current and future challenges by allowing citizens to express their concerns and ambitions as well as to prepare, together with the EU and national institutions and other stakeholders, recommendations for the future. The conference was therefore a citizen-centred project, creating a broad field for articulating critical ideas about the European project itself, including populist ones.⁷⁶

With regard to the present analysis, it should be underlined that the conference did not come up with any recommendations for the AFSJ in its entirety, but only put forward fragmentary proposals⁷⁷ dealing with certain aspects, such as migration and asylum policy, fundamental rights, including the application of the EU Charter of Fun-

⁷³ Launched on March 10, 2021, and concluded on May 9, 2022, with a final report containing 49 proposals presented to three EU institutions, i.e. the European Commission, the European Parliament and the Council. For an academic analytical appraisal, see, *inter alia*, F. Fabbrini, "Reforming the EU Outside the EU? The Conference on the Future of Europe and Its Options," *European Papers*, vol. 5, no. 2 (2020), pp. 963-982.

⁷⁴ For a detailed analysis see e.g. OECD, *Innovative Citizen Participation and New Democratic Institutions. Catching the Deliberative Wave. Highlights 2020*, 10 June 2020, at https://www.oecd.org/en/publications/innovative-citizen-participation-and-new-democratic-institutions_339306da-en.html, 19 July 2025. To enable individuals across the Union to form their own expectations of the EU and to play a greater role in shaping its future, a transnational, multilingual and inter-institutional deliberative democracy initiative was organized for the first time ever, aimed at creating a multilingual digital platform for citizens' comments in 24 EU languages, and organizing European and national Citizens' Panels, plenary sessions as well as thousands of national and local events. For more detailed information on this subject matter, see Council of the European Union: General Secretariat of the Council, *Conference on the Future of Europe. Report on the Final Outcome*, May 2022, Publications Office of the European Union, 2022, p. 5.

⁷⁵ *Ibid.*, p. 6.

⁷⁶ See, among others, P. Świątkowski, "K. Złotowski: Konferencja w sprawie przyszłości Europy była ewidentnie jednostronna" ("The Conference on the Future of Europe was Clearly One-Sided"), 28 May 2022, at <https://www.euractiv.pl/section/polityka-wewnetrzna-ue/interview/konferencja-w-sprawie-przyszlosci-europy-kosma-zlotowski-pis-ue-unia-europejska-prawo-i-sprawiedliwosc-parlament-europejski/>, 5 May 2025, and also a regular approach presented by European Federalists, "The Time is Now – your Newsletter on the Conference on the Future of Europe," (2022), (14) (15) and (16), Newsletter of Union of European Federalists, at <https://www.federalists.eu/conference-on-the-future-of-europe/newletter-on-the-conference-on-the-future-of-europe>, 5 May 2025, for more general comments see, *inter alia*, Dossier at EUROACTIV.com, at <https://www.euractiv.com/topics/conference-on-the-future-of-europe/>, 8 May 2025.

⁷⁷ See, among others, A. Pingen, "Key Proposals from the Conference on the Future of Europe in the Area of Values, Rule of Law & Security," *eu crim. The European Criminal Law Associations' Forum*, vol. 2 (2022),), pp. 84-86, as well as the E. Maurice, Conference on the Future of Europe. The Complex Implementation of Great Ambitions," *European Issues*, no. 636, 21 June 2022, at <https://www.>

damental Rights, personal data protection and cybersecurity. Moreover, these recommendations, prepared for specific elements making up The Area of Freedom, Security and Justice, are so general that it is difficult to predict at this stage the course or direction of future changes in the regulations currently in force. This issue has been, to certain extent, addressed recently in the aforementioned Strategic Guidelines for legislative and operational planning within the Area of Freedom, Security and Justice.⁷⁸

Regarding the existing possibilities provided for in the Treaty to use the enhanced cooperation mechanism in the Area of Freedom, Security and Justice in matters requiring a unanimous decision of the Council, attention should undoubtedly be drawn to the recommendations regarding decision-making processes at the European level.⁷⁹ These recommendations call for improvements in these processes so as to give the EU the capacity to act, taking into account the interests of all Member States and guaranteeing transparency and clarity to its citizens. One not necessarily innovative proposal⁸⁰ (although nevertheless an interesting one, because it was put forward by a broad and diverse body) is the one advocating the introduction of qualified majority voting within decision-making, with the exception of decisions regarding the accession of new member states and amendments to the fundamental principles of the European Union, provided for by the provisions of Article 2 of the TEU and the Charter of Fundamental Rights.⁸¹ It should nevertheless be underlined that, in the opinion of the Council,⁸² this proposal is not in line with the adopted methodology as, again according to the Council, it does not come from the people. Therefore, the chances of success for this reform, which would certainly and considerably further reinforce the Area of Freedom, Security and Justice, ensuring its more coherent functioning at the European level, appear negligible.

What seems interesting and innovative, however, is the linking of compliance with the law to measures aimed at shaping a European identity, including fundamentally strengthening European citizenship, *for example, through a European citizenship statute providing rights and freedoms specific to citizens*.⁸³ Although obviously calling for further developments, it seems that the actual strengthening of the status of a European citizen could, to certain extent, contribute to the resistance of the Area of Freedom, Security and Justice to populist actions by considerably blurring the dichotomy between 'ours' and 'foreign'.

robert-schuman.eu/en/european-issues/0636-conference-on-the-future-of-europe-the-complex-implementation-of-great-ambitions, 8 May 2025.

⁷⁸ See Council of the European Union, Document 16343/24 LIMITE JAI 1782 of 28 November 2024, approved 12.12.2024, *Strategic Guidelines*....

⁷⁹ 39. Proposal: EU decision making process, Council of the European Union: General Secretariat of the Council, *Conference on the Future of Europe*, p. 83.

⁸⁰ This trend has been evident for decades and is reflected in successive reform treaties.

⁸¹ See Council of the European Union: General Secretariat of the Council, *Conference on the Future of Europe*, p. 83.

⁸² This was explicitly stated in the final report, albeit without justification. *Ibid.*, p. 83.

⁸³ Measure 2; *ibid.*, p. 83.

It goes without saying that the efficient and effective functioning of the European Union, including the functioning of the Area of Freedom, Security and Justice, is predominantly based on the principle of subsidiarity.⁸⁴ Having said this, the Conference's proposal on this matter is worth noting, as it envisages – in addition to revising the mechanism enabling national parliaments to assess whether or not new draft European regulations interfere with their competences – a broader scope of application of the subsidiarity principle by granting both national and regional parliaments in the EU legislative powers and opportunities to suggest legislative initiatives at the European level.⁸⁵ Arguably one should consider, nonetheless, that this proposal appears quite risky since, in light of growing anti-European sentiment and the increasing popularity of populist political parties, granting such a wide range of entities the *de facto* possibility of legislative initiative at the European level may lead to an undesirable increase in populism and a significant grassroots weakening of the European Union as a whole entity and as a community. In the given context, it might be, therefore, important to point out the following proposal: *reflect on how to counter disinformation and propaganda in an objective and factual way*,⁸⁶ which, admittedly, was originally formulated with regard to security policy, but certainly seems worth extending to all activities of the European Union, in particular in areas that are highly sensitive and naturally susceptible to legal populism. This seems to have been considered by the recent steps taken at the EU level, expressed in a new strategic agenda shaping the future direction of EU policy in the Area of Freedom, Security and Justice (AFSJ) and calling the institutions *to put these priorities into action during the next legislative cycle*.⁸⁷

CONCLUDING REMARKS

Legal populism, constituting one aspect of political populism in general, poses a significant threat to legal systems, both national and international, while remaining in a highly confrontational relationship with the latter. The primary law of the European Union, is international public law, and thus the attitude of populists towards this law is the same as it is towards contemporary *ius gentium*. EU secondary law, by its very nature – particular as it results from the partial transfer of the exercise of sovereignty, a concept glorified by populists who hold an archaic, misguided view of this notion – is

⁸⁴ What is also underlined in the Strategic Guidelines, p. 2 (introductory remarks), p. 9 (point 22, regarding cross-sectoral and cross-border crises, including large scale natural and man-made disasters), p. 15 (point 39, regarding the efficiency of the legislative process), see Council of the European Union, Document 16343/24 LIMITE JAI 1782 of 28 November 2024, approved 12.12.2024.

⁸⁵ 40. Proposal: Subsidiarity, measure 2; Council of the European Union: General Secretariat of the Council, *Conference on the Future of Europe*, p. 84.

⁸⁶ Measure 5 within 23. Proposal: The EU as a strong actor on the world scene in peace and security; *ibid.*, p. 66.

⁸⁷ Cf. Council of the European Union, Document 16343/24 LIMITE JAI 1782 of 28 November 2024, approved 12.12.2024, *Strategic Guidelines*...

even more unacceptable to them. On the other hand, the Area of Freedom, Security and Justice of the EU, due to its subject matter – including ‘politically sensitive’ issues such as asylum policy, migration policy, the management of external borders, and police and judicial cooperation – is particularly exposed to the legal manoeuvring and confrontational actions of populists. The situation is aggravated by two different factors: first, that we are living in times of an intense rise in political populism; and second, that during the long-term process of building and developing European integration, the Area of Freedom, Security and Justice has shifted away from intergovernmental cooperation towards a community regime. This means that transnational cooperation is not yet firmly established, nor self-evident, in this area. Moreover, through the application of ‘security brakes’, enhanced cooperation mechanisms, the communitarisation of this inherently sensitive issue still remains a relatively open matter. This furthermore means that the proper and effective functioning of the Area of Freedom, Security and Justice risks being undermined as a result of populist understandings of the law.

For all the reasons outlined above, the Conference on the Future of Europe should be both aware of populist threats and equipped to counter them, in particular, with regard to the Area of Freedom, Security and Justice. So far, however, there seems to be a sense of inadequacy on this matter. Nonetheless, the recently approved guidelines for legislative and operational planning within the Area of Freedom, Security and Justice bring some hope in this regard.

BIBLIOGRAPHY

- Abbott K.W., Snidal D., “Law, Legalization, and Politics. An Agenda for the Next Generation of IL/IR Scholars,” in J.L. Dunoff, M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations. The State of Art*, Cambridge 2013, pp. 33-56.
- Adamidis V., “Democracy, Populism, and the Rule of Law. A Reconsideration of Their Interconnectedness,” *Politics*, vol. 44, no. 3 (2024), pp. 386-399, <https://doi.org/10.1177/02633957211041444>.
- Anselmi M., Blokker P., Mazzoleni O., “Populism and Law,” in P. Blokker (ed.), *Populism and Law. Handbook of Concepts, Questions and Strategies of Research*, Baden-Baden 2021, pp. 543-554.
- Bílková V., “Populism and Human Rights,” *Netherlands Yearbook of International Law*, vol. 49 (2018), pp. 143-174, https://doi.org/10.1007/978-94-6265-331-3_7.
- Blokker P., “Populism as a Constitutional Project,” *International Journal of Constitutional Law*, vol. 17, no. 2 (2019), pp. 536-553, <https://doi.org/10.1093/icon/moz028>.
- Blokker P., “Response to ‘Public Law and Populism,’” *German Law Journal*, vol. 20, no. 2 (2019), pp. 284-290, <https://doi.org/10.1017/glj.2019.17>.
- Bodnár E., Webber J., Schmidtke O. (eds), *Hague Journal on the Rule of Law*, vol. 16, no. 2, (2024), at <https://link.springer.com/journal/40803/volumes-and-issues/16-2>.
- Capik A. B., “Changes and Challenges Go Hand in Hand. Accessibility of the Preliminary Ruling Procedure before an Overloaded Court within the Area of Freedom, Security and Justice

- post-Lisbon,” in N. Ferreira, D. Kostakopoulou (eds), *The Human Face of the European Union. Are EU Law and Policy Humane Enough?*, Oxford 2016, pp. 133-154.
- Chikwendu S., “The Global Crises of Legal Populism. Implications for Democracy and the Rule of Law,” 19 September 2024, <http://dx.doi.org/10.2139/ssrn.4992120>.
- Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
- Council of the European Union, General Secretariat of the Council, *Conference on the Future of Europe. Report on the Final Outcome*, May 2022, at <https://data.europa.eu/doi/10.2861/607246>.
- Council of the European Union, Document 16343/24 LIMITE JAI 1782 of 28 November 2024, approved 12.12.2024, Strategic Guidelines for Legislative and Operational Planning within the Area of Freedom, Security and Justice, at <https://data.consilium.europa.eu/doc/document/ST-16343-2024-INIT/en/pdf>.
- Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), OJ L 283, 31.10.2017, p. 1.
- Court of Justice of the European Union, *Jurisdiction to Hear and Determine Questions Referred for a Preliminary Ruling Is Conferred on the General Court of the European Union in Six Specific Areas*, press release no. 125/24, 12 of August 2024, at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-08/cp240125en.pdf>.
- Court of Justice of the European Union, Amendments to the Rules of Procedure of the Court of Justice [2024/2094], OJ EU L, 2024/2094, 12.8.2024.
- Court of Justice of the European Union, Statute of the Court of Justice of the European Union, OJ EU C 202, 7.06.2016.
- Court of Justice of the European Union, Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.09.2012, p. 1), as amended on 18 June 2013 (OJ L 173, 26.06.2013, p.65), on 19 July 2016 (OJ L 217, 12.08.2016, p. 69), on 9 April 2019 (OJ L 111, 25.04.2019, p. 73) and on 26 November 2019 (OJ L 316, 6.12.2019, p. 103).
- Danchin P., Farrall J., Ford J., Rana Sh., Saunders I., “International Law and the Rise of Populism,” *U of Maryland Legal Studies*, Research Paper no. 2024-24, *Virginia Journal of International Law* (forthcoming 2025), *ANU College of Law Research Paper* no. 24.2, 7 October 2024, <http://dx.doi.org/10.2139/ssrn>.
- de Cleen B., “Populism and Nationalism,” in C.R. Kaltwasser, P. Taggart, P. Ochoa Espejo, P. Ostiguy (eds), *The Oxford Handbook of Populism*, Oxford 2017, pp. 342-362.
- European Center for Populist Studies, *Populist Legalism*, at <https://www.populismstudies.org/Vocabulary/populist-legalism/>.
- European Commission (CORDIS), *Populist Rebellion against Modernity in 21st-century Eastern Europe. Neo-Traditionalism and Neo-Feudalism*, at <https://cordis.europa.eu/article/id/434333-populism-s-threat-to-democracy-in-the-eu/pl>.
- European Commission (CORDIS), Programm POREBEL, *Periodic Reporting for Period 2. POPREBEL (Populist Rebellion against Modernity in 21st-Century Eastern Europe. Neo-Traditionalism and Neo-Feudalism)*, at <https://cordis.europa.eu/project/id/822682/reporting/pl>.

- European Federalists, "The Time is Now – your Newsletter on the Conference on the Future of Europe", (2022) (14) (15) and (16), Newsletter of Union of European Federalists, at <https://www.federalists.eu/conference-on-the-future-of-europe/newletter-on-the-conference-on-the-future-of-europe>.
- European Parliament: Directorate-General for Internal Policies of the Union, J. Morijn, "Enforcement of EU Law in the Area of Freedom, Security and Justice," Publications Office of the European Union, 2024, <https://data.europa.eu/doi/10.2861/283630>.
- European Public Prosecutor's Office, *Participating EU Member States*, at <https://www.eppo.europa.eu/en/membershttps://www.eppo.europa.eu/en/members>.
- European Union, *EP Special Eurobarometer Winter 2025*, at <https://europa.eu/eurobarometer/surveys/detail/3492https://europa.eu/eurobarometer/surveys/detail/3492>.
- Fabbrini F., "Reforming the EU Outside the EU? The Conference on the Future of Europe and Its Options," *European Papers*, vol. 5, no. 2 (2020), pp. 963-982, <https://doi.org/10.15166/2499-8249/407>.
- Fichtelberg A., "Populist Paranoia and International Law," *Netherlands Yearbook of International Law*, vol. 49 (2018), pp. 45-67, https://doi.org/10.1007/978-94-6265-331-3_3.
- Frank J., "Populism and Praxis," in C.R. Kaltwasser, P. Taggart, P. Ochoa Espejo, P. Ostiguy (eds), *The Oxford Handbook of Populism*, Oxford 2017, pp. 629-643.
- Geyer F., Carrera S., "The Reform Treaty & Justice and Home Affairs. Implications for the common Area of Freedom," *Security and Justice*, 17 August 2007, CEPS Policy Brief, no. 141, August 2007, at <https://ssrn.com/abstract=1334111>.
- Herma C., "Konferencja Międzyrządowa w sprawie Traktatu z Lizbony," *Biuletyn Analiz UKIE*, no. 20 (2008).
- Hostovsky Brandes T., "International Law in Domestic Courts in an Era of Populism," *International Journal of Constitutional Law*, vol. 17, no. 2 (2019), pp. 576-596, <https://doi.org/10.1093/icon/moz031>.
- Hudský J., "Populizm a praworządność. Między władzą ludu a 'regułami gry'," *Studia nad Autorytaryzmem i Totalitaryzmem*, vol. 43, no. 2 (2021), pp. 281-293, <https://doi.org/10.19195/2300-7249.43.2.18>.
- Humble K., "Populism and the Threat to International Law," *Laws*, vol. 11, no. 3 (2022), pp. 1-12, <https://doi.org/10.3390/laws11030050>.
- Hunter-Henin M., "The Legal Face of Populism. From the Classroom to the Courtroom," 13 December 2017, *The Jean Monnet Working Paper Series*, no. 9 (2017), <http://dx.doi.org/10.2139/ssrn.3162326>.
- Klich B., "Głośno wołajmy – jeszcze więcej Europy," *Opinie Instytutu Obywatelskiego*, at <https://instytutobywatelski.pl/opinie/350-glosno-wołajmy-wiecej-europy>.
- Kociubiński J., "Przestrzeń wolności, bezpieczeństwa i sprawiedliwości. Powstanie, ewolucja, perspektywy. Wybrane zagadnienia reformy wprowadzonej Traktatem lizbońskim," *Nowa Kodyfikacja Prawa Karnego*, vol. 26 (2010), pp. 77-94.
- Kotowski A., "Instrumentalizacja prawa i instrumentalne użycie prawa a jego wykładnia," *Studia Prawnicze The Legal Studies*, vol. 4, no. 208 (2016), pp. 39-67, <https://doi.org/10.37232/sp.2016.4.2>.

- Krieger H., "Populist Governments and International Law," *European Journal of International Law*, vol. 30, no. 3 (2019), pp. 971-996, <https://doi.org/10.1093/ejil/chz046>.
- Kuźniak B., Obacz P., *Instrumentalizacja prawa międzynarodowego na przykładzie Polski jako strony konwencji stambulskiej*, Kraków 2020.
- Kuźniak B., Capik A., *Traktat Amsterdamski. Komentarz*, vol. 2, Warszawa 2001.
- Kyriacou A., Trivin P., "Populism and the Rule of Law. The Importance of Institutional Legacies," *American Journal of Political Science*, paper no. 120343 (2024), pp. 1-37, <https://doi.org/10.1111/ajps.12935>.
- Lacey N., "Populism and the Rule of Law," *Annual Reviews of Law and Social Science*, vol. 15 (2019), pp. 79-96, <https://doi.org/10.1146/annurev-lawsocsci-101518-042919>.
- Łętowska E., *II Kongres Praw Obywatelskich. My jesteśmy Konstytucją*, 2018, at <https://bip.brpo.gov.pl/sites/default/files/relacje%20KPO%20druk.pdf>.
- Mańko R., Sulikowski A., Tacik P., Cercel C. (eds), *Law, Populism, and the Political in Central and Eastern Europe*, London 2023.
- Matczak M., "The Language of Legal Populism. A Philosophical and Legal Perspective," *Radca Prawny*, vol. 2, no. 31 (2022), pp. 239-260, <https://doi.org/10.4467/23921943RP.22.031.16894>.
- Martero-Martines C., "Is There a Future for the EU's Area of Freedom, Security and Justice? A Plan to Build Back Trust," Policy Brief, 26 January 2022, at <https://www.cer.eu/publications/archive/policy-brief/2022/there-future-eus-area-freedom-security-and-justice>.
- Maurice E., "Conference on the Future of Europe. The Complex Implementation of Great Ambitions," *European Issues*, no. 636, 21 June 2022, at <https://www.robert-schuman.eu/en/european-issues/0636-conference-on-the-future-of-europe-the-complex-implementation-of-great-ambitions>.
- Ministry of Justice of Republic of Poland, *Poland's Membership in the European Public Prosecutor's Office Becomes a Fact*, 13 December 2024, at <https://www.gov.pl/web/justice/polands-membership-in-the-european-public-prosecutors-office-becomes-a-fact>.
- Moffitt B., *Populism*, Cambridge 2020.
- Nijman E., Werner W.G., "Populism and International Law. What Backlash and which Rubicon?," *Netherlands Yearbook of International Law*, vol. 49 (2018), pp. 3-17, https://doi.org/10.1007/978-94-6265-331-3_1.
- Novkov J., "Law and Political Ideologies," in K.E. Whittington, R.D. Kelemen, G.A. Caldeira (eds), *The Oxford Handbook of Law and Politics*, New York 2013, pp. 626-643.
- OECD, *Innovative Citizen Participation and New Democratic Institutions. Catching the Deliberative Wave. Highlights 2020*, 10 June 2020, at https://www.oecd.org/en/publications/innovative-citizen-participation-and-new-democratic-institutions_339306da-en.html.
- Orford A., "International Law and the Populist Moment. A Comment on Martti Koskenniemi's Enchanted by the Tools? International Law and Enlightenment," *American University International Law Journal*, vol. 35, no. 3 (2020), pp. 427-443, at <https://digitalcommons.wcl.american.edu/auilr/vol35/iss3/2>.
- Panov S., "The Effect of Populism on the Rule of Law, Separation of Powers and Judicial Independence in Hungary and Poland," in J. Vidmar (ed.), *European Populism and Human Rights*, Leiden 2020, pp. 256-288.

- Perry F.V., "The Assault on International Law. Populism and Entropy on the March," *Syracuse Journal of International Law and Commerce*, vol. 46, no. 1 (2018), pp. 60-113.
- Pingen A., "Key Proposals from the Conference on the Future of Europe in the Area of Values, Rule of Law & Security", *eu crim. The European Criminal Law Associations' Forum*, vol. 2 (2022), pp. 84-86.
- Posner E., "Liberal Internationalism and the Populist Backlash," *Arizona State Law Journal*, vol. 49, Special Issue (2017), pp. 795-819.
- Prieto Rudolph M., "Populist Governments and International Law. A Reply to Heike Krieger," *European Journal of International Law*, vol. 30, no. 3 (2019), pp. 997-1008, <https://doi.org/10.1093/ejil/chz058>.
- Protocol No 1 on the role of national parliaments in the European Union, consolidated version OJ EU C 202, 7.06.2016.
- Protocol (No 2) on the application of the principles of subsidiarity and proportionality, consolidated version OJ EU C 202, 7.06.2016.
- Protocol (No 36) on Transitional Provisions, consolidated version OJ EU C 202, 26.10.2016.
- Rodiles A., "Is There a 'Populist' International Law (in Latin America)," *Netherlands Yearbook of International Law*, vol. 49 (2018), pp. 69-95, https://doi.org/10.1007/978-94-6265-331-3_4.
- Schultz A., Schultz K., "Why Poland Should Join the European Public Prosecutor," *VerfassungsBlog on Matters Constitutional*, 12 December 2023, at <https://verfassungsblog.de/why-poland-should-join-the-european-public-prosecutor/>.
- Schwöbel-Patel Ch., "Populism, International Law and the End of Keep Calm and Carry on Lawyering," *Netherlands Yearbook of International Law*, vol. 49 (2018), pp. 97-121, https://doi.org/10.1007/978-94-6265-331-3_5.
- Świątkowski P., "K. Złotowski: Konferencja w sprawie przyszłości Europy była ewidentnie jednostronna," *EUROACTIV.pl*, 28 May 2022, at <https://www.euractiv.pl/section/polityka-wewnetrzna-ue/interview/konferencja-w-sprawie-przyszlosci-europy-kosma-zlotowski-pisue-unia-europejska-prawo-i-sprawiedliwosc-parlament-europejski/>.
- Tamanaha B.Z., *Law as a Means to an End. Threat to the Rule of Law*, Cambridge 2019.
- Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10.11.1997.
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ EU C 306, 17.12.2007.
- Treaty on European Union, consolidated version, OJ EU C 202, 7.06.2016.
- Treaty on the Functioning of the European Union, consolidated version, OJ EU C 202, 7.06.2016.
- Ustawa z dnia 12 maja 2011 r. o Krajowej Radzie Sądownictwa, Dz.U. z 2011 r. Nr 126, poz. 714 (Act of 12 May 2011 on the National Council of the Judiciary, Journal of Laws No 126 of 2011, item 714).
- Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, Dz.U. z 2017 r. poz. 1452 (Law of 12 of July 2017 amending the Act on the system of ordinary courts and certain other laws, Journal of Laws 2017, item 1452).