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ARTICLES

THE EUROPEAN FORM OF FAMILY LIFE: THE CASE OF EU CITIZENSHIP

EDOUARD DUBOUT*

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ABSTRACT: Considering European Union law through the prism of the “form of life” is part of an effort to go beyond an analysis that most often adheres to the *institutional* foundations of law. The challenge is to show that the European legal discourse contains language that contributes to a re-configuration of the way we live and conceive our lives. Following this *existential* approach of the “form of life”, EU law can be seen as the place of a complex and subtle interaction between the lived and the imagined life. From this meeting comes the foundation as well as the transformation of our relationship to individual and collective life. The *Article* attempts to illustrate this interaction by unveiling how EU law and its interpretation express, often implicitly, a way of practicing and representing family life, its formation, functioning, and the values which drive it, thus giving birth to a European social imaginary in family matters.

KEYWORDS: form of life – family life – EU citizenship – free movement – functionalism – dependency.

I. FAMILY LIFE AS A EUROPEAN LEGAL FORM

The idea of family seems inseparable from the way we conceive human life. The family is probably one of the first mental frameworks which informs the intelligibility of all of life, we might call it “the evidence of all evidences”.¹ The first thing that a human being

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¹ G. RADICA, *Philosophie de la famille. Communauté, normes, pouvoirs*, Paris: Vrin, 2013, p. 316.



comprehends, before realizing that they live in a city, in a state, or even on a certain planet, is that others take care of them and they constitute a family. People perceive this primary link between individuals as so evident that it is on its model that the different collective and social memberships that shape the organization of the world have been progressively built: from the family, to the clan, to the city and then to the state.² The family bond consists not only of a biological, civil or educational dimension, but also of a profound moral significance, as the source of a special obligation, which sustains a perception of the origin of authority, solidarity, and more generally, justice. If a particular link can be established between individuals because they belong to the same family, then it could be thought to establish this type of special link in other circles, i.e. establishing special rights between members of the community, clan, city, or state, at the exclusion of those who are not members.³ Moreover, the idea of the “human family” allows us to include in one community the entirety of humanity.⁴

The link between family and society is not one way. The family idea is the result of a complex process of institutionalization, a “realized category”,⁵ which maintains and sometimes gives rise to what it is supposed to indicate, namely the existence of specific affective bonds presented as natural. It becomes extremely difficult to determine whether the family precedes society or *vice versa*.⁶ Without claiming to settle such a debate, it seems clear that the relationship between family and society is largely intertwined. Recourse to the law constitutes the main tool in the interaction between the family sphere and the social sphere at large, crystallizing a primary conception of what the family should be. Since the taboo against incest in primitive societies,⁷ the organization of family life by means of rules, now for the most part legal, determines family ties and the resulting consequences.⁸ In the European context, an important question

² ARISTOTLE, *Politique*, translated by J. Barthélemy-Saint-Hilaire, Paris: Ladrangé, 1874, I, II, pp. 6-9.

³ On the analogy with the family link justifying the distinction between nationals and foreigners, D. MILLER, *Reasonable Partiality towards Compatriots*, in *Ethical Theory and Moral Practice*, 2005, p. 67 *et seq.*

⁴ First sentence of the Preamble of the Universal Declaration of Human Rights.

⁵ P. BOURDIEU, *A propos de la famille comme catégorie réalisée*, in *Actes de la Recherche en Sciences Sociales*, 1993, p. 34.

⁶ For some, the family is a “natural” phenomenon, preceding any society and illustrated by its universalism; while for others, on the contrary, the family would be above all a social “construct”, which would explain its strongly relative nature depending on the different type of society. For the first thesis see Rousseau and Freud; for the second Aristotle and Hegel. This ambivalence is attested in the legal discourse in Art. 16, para. 1, of the Universal Declaration of Human Rights, according to which “the family is the fundamental natural element of society”.

⁷ E. DURKHEIM, *La prohibition de l'inceste et ses origines*, Paris: Petite Bibliothèque Payot, 2008.

⁸ The normative density that characterizes the legal organization of family life is easily explained by the multiplicity of its social functions which range from an economic function of production (the family business) and of consumption (that of “households”), to a function of cohesion (mutual aid, assistance), of responsibility (“civil” responsibility of parents) and education (early childhood, life in society), and on to

therefore arises. Since family and society seem so closely linked, what role can European Union law play in our way of conceiving the family?

1.1. FAMILY LIFE AND SOCIAL LIFE: THE IMPOTENCE OF EUROPEAN UNION LAW?

In the absence of a European society that thinks of itself as such, it is tempting to believe that EU law can claim to fulfil only a limited role in family matters, restricted by national traditions and cultures which have progressively forged a family model specific to their community. As a result, two types of answers will be given to the question of the influence that European Union law can have on our family lives.

The first approach relativizes the possible influence of EU law on national models of family life. In the absence of a sufficiently homogenous social base, EU law lacks a basis for expressing a shared European conception of the family. That is why there can be no real European family law. The ambition of European integration is limited to that of providing instruments for coordinating national orders in family matters with a functional perspective of resolving differences in legislation. With the intention of creating a European civil and judicial area of free movement of persons and acts relating to their state, Union law technically organizes the recognition of matrimonial and parental,⁹ marital,¹⁰ inheritance and estate decisions,¹¹ derived in particular from secondary legislation and related case-law. Mainly articulated around rules of competence and applicable law, EU law is content to link national family rights, without substituting its own values and representations. It should not be denied that coordination gradually brings together national family law that are intertwined with each other.¹² It also happens that through the empowerment of certain notions defining the scope of European coordination, the case law occasionally brings together internal standards relating to family life.¹³ But it is difficult to see the emergence of a real framework embodying the model of family organization peculiar to a European society.

the more individual function of emancipation, becoming oneself and founding a family. See, J. CARBONNIER, *Flexible droit*, Paris: LGDJ, 1995, pp. 241-242.

⁹ See, especially, Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, or Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

¹⁰ Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

¹¹ Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

¹² See H. FULCHIRON, *La famille au cœur de systèmes: renouvellement des sources et dynamique des normes*, in B. BONNET (dir.), *Traité des rapports entre ordres juridiques*, Paris: LGDJ, 2016, p. 1195 et seq.

¹³ For example, on the notion of "visitation rights", Court of Justice, judgment of 31 May 2018, case C-335/17, *Valcheva*.

The second approach recognizes that EU law has an influence on the balance of national family law, but considers it as essentially negating and destabilizing the family order. As a whole devoted to the attribution of subjective rights for the benefit of individuals and liberal ends, the law of the Union would accentuate a tendency towards individualism and the break-up of the family institution. In a sociological approach to the family, it is common to consider that according to the law of “progressive contraction” the family circle is reduced inversely proportionally to the enlargement of the social circle.¹⁴ Consequently, the extension of the European area beyond the national society would correspond to a further decrease in the family circle. However, the transformation seems this time deeper and more qualitative, as illustrated by the turn taken by the European legal discourse surrounding the right to a family life. To original individualism, understood as the reservation of a private sphere of intimacy to the individual to enjoy freely his family or his friends, European Union Law, like that of the European Convention of Human Rights, would replace the rise of a new individualism, purely ego-centric, rooted in the very heart of the family circle and which destroys in depth any civic sense and solidarity among the new generations. The “des-institutionalization” of the family by these subjective rights is created by an over-valuation of the interest of the person at the expense of the socially dominant conception of the family, as illustrated in particular by the issue of gay marriage. By establishing, as it does in *Coman and Others*, the right to have a legally concluded same-sex marriage in a Member State of the Union produce effects in a State which refuses to legalize that type of union¹⁵ the Court of Justice weakens the dominant conception of the family within societies that remain attached to a representation of marriage as the union of a man and a woman. Only a short step remains to deem that the protection of individual right prevails through Union law over the preservation of the family social model.

These approaches come together around the idea that family life and social life are inseparable. Without the power to incorporate a social body, European Law might expose itself to two critiques: either it will be reduced to a purely technical instrument of coordination of national laws without substantial meaning, or it will be led to become a mechanism of protection of subjective prerogatives at the cost of breaking up all phenomena of social belonging. Assigned this task of either coordinating state judicial orders or protecting individual prerogatives, European Union law will likely struggle to come up with its own social model of family life.

¹⁴ As E. Durkheim writes, “the family must necessarily contract as the social milieu with which each individual is in immediate contact extends further”, quoted by G. RADICA, *Philosophie de la famille*, cit., p. 131.

¹⁵ Court of Justice, judgment of 5 June 2018, case C-673/16, *Coman and Others* [GC]. See D. KOCHENOV, U. BELAVUSAU, *Same-Sex Spouses: More Free Movement, but What about Marriage?* Coman, in *Common Market Law Review*, 2020, p. 227 *et seq.*

I.2. THE FAMILY AS A “FORM OF LIFE”: AN EXISTENTIAL APPROACH TO EUROPEAN UNION LAW

Another way of looking at the relationship between European Union law and the idea of the family is to try to uncover in the European legal discourse the emergence of familial “forms of life”. A philosophic invention, the concept of “form of life” lends itself to many projections, especially as its use spreads in the different social sciences. Its principle message seems, at first, quite clear. The approach emphasizes the idea that life is not separable from its forms. Consequently, life becomes unthinkable without the forms in which it expresses itself, and, conversely, the forms of life participate in life itself. However, beyond this basic idea, the theme of the “form of life” lends itself to different declinations. In broad terms, it is possible to distinguish three main perceptions in the philosophical discourse, sometimes close to each other but nevertheless distinct, to which it is possible to match different approaches of law.

The first perception, coming from a critical or conflictual perspective, insists by the idea of “form of life” on the intrinsically ethical nature of social practices and ways of life.¹⁶ These ordinary practices must in fact be understood as the seat of equilibrium of values intended to resolve a conflict so as to make life possible. For example, the transition from a patriarchal form of life articulated around the figure of the family master (marriage as an agreement granted in an authoritarian way between two clan leaders) to a form of conjugal life based on the union of two beings (marriage as an agreement freely agreed by both spouses) illustrates a change in the social practices of which the form of family life is the receptacle. As a process of formalization of social practices, law entrenches, reconfigures and indeed rejects, forms of life in this way. It operates as a sort of filter of the ethical nature of social practices. The conflict at the heart of family life concerns whether it is important to focus on the interests of the family unit or the individual interest of its members.

The second perspective, more cultural, considers the “form of life” as the result of cultural formations which form the basis of a society. The cultural approach finds – in the ways that groups and individuals simply are – an argument maintaining that the perpetuation of certain habits, indeed certain rites, shapes a type of society which fits into the mental processes of each individual.¹⁷ Each type of civilization thus provides a frame of interpretation from which the individual builds their life. For example, the cultural conception of certain people, consisting of individuals living their entire life where they were born, gives rise to social institutions of “furtive” husbands or “visitors” who visit their spouse during the night and then return to their original family’s home.¹⁸ In this scheme, the law expresses and stabilizes ways of life. Rather classically, in a socio-

¹⁶ R. JAEGGI, *Towards an Immanent Critique of Forms of Life*, in *Raisons politiques*, 2015, p. 13 et seq.

¹⁷ R. BENEDICT, *Patterns of Culture*, 1934, Boston: Mariner Books, 2008.

¹⁸ The example is given by G. RADICA, *Philosophie de la famille*, cit., p. 15.

logical approach to law, this last example will only be a passive expression of a preexisting social consensus.¹⁹ More original and interesting for the discussion at hand, one can also envisage that the law actively participates in a cultural construction which confers its forms onto social habits²⁰. As a mental framework, the law itself elaborates a form of culture specifically in family matters.²¹

The third usage of the “form of life” theme, inspired by naturalists, highlights the specificity of human nature in supposing that the ways with which life expresses itself (touch, feel, love, speech, sight, etc...) conditions our conception of life itself while producing their own norms.²² These “ways of being human”, to take the title of P. Donatelli’s work, form a complex network of concepts underpinned by language which retroact on our behaviour.²³ This is the case for example in family matters, where the rather largely undefined concept of childhood (when does it begin and end?) which takes root in physical and mental states, leads us to idealize a form of happiness and innocence whose moral substance affects our ways of educating and treating children. The idea of “form of life” means to rewrite the processes of formation, but also of contestation, of our human representation of being human. This approach is probably the most difficult to integrate into the law. The human “form of life” is hardly replaceable in a positive approach of law and seems to call into question the marked framework of legal normativity.

From these different variations, there is a certain ambiguity in the use of the “form of life” theme, which struggles to place the analysis of legal discourse in an epistemological framework that is stable enough to deliver a fully coherent overall reading. It is, however, from this reflexive plasticity between life and the forms that it takes that the approach draws its interest, especially when considering the law of the Union. As has been said, EU law is regularly considered as devoid of a social base, merely a collection of subjective rights directed towards limited ends. However, in remaking our way of life, the “form of life” approach illustrates that in family matters Union law is probably more than that.

By not choosing between the factual reality of life and the normative dimension of the forms it takes, the “form of life” approach does not necessarily lean the concept of the norm on a homogeneous social body. At the same time “inert” and “moving”,²⁴ the form of life is permanently deconstructed and reformed under the influence of the evolution of human relationships and their incorporation into society. Therefore, despite the lack of a European society per se, it is conceivable that the construction of a Euro-

¹⁹ J. CARBONNIER, *Flexible droit*, cit., pp. 217-225.

²⁰ C. GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *Local Knowledge: Further Essays in Interpretive Anthropology*, London: Fontana Press, 1983, p. 167 *et seq.*

²¹ W. GEPHART, *Family Law as Culture*, in K. BOELE-WOELKI, N. DETHLOFF, & W. GEPHART (eds), *Family Law and Culture in Europe*, Cambridge: Intersentia, 2014, p. 347 *et seq.*

²² S. CAVELL, *Les voix de la raison*, Paris: Éditions du Seuil, 1996.

²³ P. DONATELLI, *Manières d'être humain*, Paris: Vrin, 2015.

²⁴ R. JAEGLI, *Towards an Immanent Critique of Forms of Life*, cit., p. 18.

pean area constitutes a place of observation the social imaginary's transformation in family matters. Moreover, while the social sciences face the classical difficulty between taking the individual or the group as the primary subject, choosing between the subjective or the objective, recourse to the concept of form of family life overcomes this problem. The concept of form of life does not choose an approach more individual than collective. Therefore, a family "form of life" must be understood at the same time as absolutely proper to a subjective life, but equally as necessarily shared with a given social group, indeed put in relation with other social groups and the forms which they take. As a result, it is no longer contradictory to envisage the emergence of a collective European imaginary through the protection of subjective rights intended to change the forms of collective life. Through the use of subjective rights conferred at the European level, the individual contributes to reforming new representations of social life which can progressively crystalize through the law and lead to a change in the social structure itself. The exercise of individual prerogatives linked to family life thereby contribute to forging a common representation of what is a "family" which itself is thought of within a larger whole. The individual and the collective find themselves inextricably mixed together. Ultimately, the "form of life" approach permits a realization of the complexity of the constitutive function of European Union law. Considering the family as a "form of life" makes it possible to depart from the too radical demarcation between the concrete and the abstract. In so far as it combines the abstract and the concrete, the concept of "form of life" allows us to overcome this divide. Living in a family is both a mode of life that is projected into the abstract idea of the family institution as well as the realization of a model of life that derives from social and legal norms. Thus, the performative dimension of the use of the law in the European context can be assumed.

It remains to be discovered in the European legal discourse what comes out of an approach to family life as being inseparable from certain forms, which EU law is reformulating, transforming or even deforming in its own way.

1.3. LAW AND FORMS OF EUROPEAN FAMILY LIFE: STARTING WITH CONCRETE LIVES. THE CASE OF CITIZENSHIP

The "forms of life" cannot easily be grasped, either because they hide behind the legal artifice of reconstructing the reality of life or because they seem so obvious to us that their presence in the legal discourse goes largely unnoticed. In EU law, their reality seems all the more hidden because the main concepts are shaped in a frequently functional or instrumental perspective, articulated around a search for full effectiveness of the law. The use of instrumental logic and its apparent neutrality can hide the ethical dimensions of European legal constructions behind technical and repetitive formulas. Nevertheless, it is possible to detect in the legal discourse scattered representations of the family life, which spring up here and there in texts and case law and which gradually give substance to a discourse on this form of life. These representations are the result

of tensions and contradictions, of which law is entirely shaped, which give rise to certain solutions whose meaning otherwise could not easily be explained. These representations in the legal discourse can be deemed as conservative or progressive, alienating or emancipatory, but they are most often used to bring into existence a European point of view on a situation which at first sight does not directly concern it.

Taking several paradigmatic examples, there is, in the often-considered surprising *Carpenter* judgment, a certain representation of family life which consolidates the traditional notion of the wife in the home. In the judgement, the protection of EU law runs counter to the expulsion of the undocumented applicant because, in taking care of the children of her husband, she facilitates his free movement in the European Union.²⁵ In the same vein, the *Zhu and Chen* decision, rendered while sitting as a full Court, recognized a temporary right of residence to the parent of an infant citizen of the EU. In this emblematic case, the Court of Justice openly departed from the political will of the European legislators who had intended a restricted definition of the notion of “family” and developed its own interpretation of what it means to be European for a newborn.²⁶ Finally, in the *Ruiz Zambrano* case, the decision to legalize the stay of parents of vulnerable European citizens can hardly be understood without an appreciation of family unity and of the link which indissolubly connects children to their parents. The radical conceptual shift that takes place from this last decision in the way of thinking about what it means to be a European citizen is materialized in a new famous formula according to which EU law “precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”.²⁷ The consequence of this shift is that it gives European citizenship access to a normative autonomy by detaching it, at least in practice, from the exercise of cross-border movement. Valuable in and of itself, belonging to the EU justifies the triggering of a specific protection which modifies our perception of what European integration is.

In all of these cases, it is remarkable that the family relation is the path which permits EU law to, under the guise of seeking effectiveness, to expand its field of application to situations which otherwise would escape its grasp, whether this be by characterizing an element of foreign transnationality (*Carpenter*) or by breaking from notions and updating what EU citizenship means (*Ruiz Zambrano*). To justify this, EU law must take into account relational links which forms knots between members of a family and set them up as parameters of an innovative, even unexpected, legal solution. They form the place of “the emergence of a European idea of the family”.²⁸ It has been shown that the concept of European citizenship, despite being presented as stable and almost inher-

²⁵ Court of Justice, judgment of 11 July 2002, case C-60/00, *Carpenter*.

²⁶ Court of Justice, judgment of 19 October 2004, case C-200/02, *Zhu and Chen*.

²⁷ Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC], para. 42.

²⁸ G. DAVIES, *The Right to Stay at Home: A Basis for Expanding European Family Rights*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, Cambridge: Cambridge University Press, 2017, p. 469.

ent, is in reality the result of ongoing case-law work involving implementation and adaptation that retroacts on the concept itself. This work of conceptualization is led by certain practices and representations, particularly in family matters, on the particular relationship that sentimentally and emotionally unites human beings. Once embedded, it is conceivable that the concept has an influence on its social environment, on how we live our lives and on how we represent our lives in the Union. In this way, a link has gradually been established between the status of European citizens – supposed to confer a sense of belonging to a larger transnational community – and the community family.

It is particularly striking to note that at the heart of the reasoning in the main decisions that precipitated the advent of transnational European citizenship is the recognition of family relationships. From the *Martinez Sala* judgment, which marks the first jurisprudential use of the concept, European citizenship was mobilized in order to extend the scope *ratione personae* of EU law and to allow it to oppose differential treatment between Member State nationals and Community citizens in granting a child-raising allowance.²⁹ Even more clearly, in the *Baumbast* case the Court of Justice explicitly recognized for the first time in EU citizenship an independent basis for European protection and belonging. The case recognized a right of residence for the applicant's children to continue their studies in the host State which then also applied to their parents to remain in the UK despite the termination of the father's economic activity.³⁰ Consequently, we can see the idea that the first and pivotal function of family life serves to support the development of a relationship between the Union's foundational right allowing the worker to move freely in the EU with their family, the correlative right of children to enter and continue their studies in the receiving State, and finally the right of parents to remain in the territory of that State to continue to be with their children as ordinary citizens of the Union.

It is difficult to say with certainty that in these pioneering decisions the family dimension played a decisive role in the extension of European jurisdiction and the creation of a status of social integration benefitting EU citizens. However, it is striking to note the propensity with which innovative solutions, which are decisive for the meaning of European integration, are adopted when the pursuit of family life at the European level is at stake. It is by identifying these diffuse structures of family life forms which span EU law and resolve certain tensions that one can more fully take stock of the change in the frameworks with which we represent life. The most visible illustration is certainly the way in which EU law modifies the main figures of family life.

²⁹ Court of Justice, judgment of 12 May 1998, case C-85/96, *Martinez Sala*.

³⁰ Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast and R.*, para. 75.

II. THE EUROPEAN DE-FORMATION OF FAMILY LIFE FIGURES: BIOLOGICAL LIFE AND EMOTIONAL LIFE

By dealing with family life forms in an autonomous way in relation to national rights, EU law is instrumental in reassigning everyone's roles in the particular relationship that makes up the family sphere. It does so, as is often the case in legal reasoning, by delineating the contours of the categories of actors in family life, so that in their definition there are already reconstructions of the concept of family and that which forms the basis of the family relationship. We will focus on the central figures of modern family life, namely the "spouse" and the "parent". Moreover, we will see that behind the parental figure lies a reflection of the figure of "the child".

II.1. THE "SPOUSE": THE CONJUGAL FORM OF LIFE

Continuing the legacy of Regulation 1612/68 as regards workers moving in the European Union,³¹ Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely, which defines the family members of the European citizen, begins with the "spouse".³² Without elaborating, the term invites us to identify what constitutes a "conjugal" relationship, with particular reference to its traditional form of existence in married life.

At first, the European approach remained relatively guarded and traditional. According to the *Reed* judgment, delivered under Regulation 1612/68, the concept of "spouse" is limited in principle, and "in the absence of any indication of a general social development" specifies that it "refers to a marital relationship only."³³ The marital bond thus plays a decisive role in the legal discourse, even supplanting other conflicting interests. Notably, as the case-law will later make clear, once married it does not matter whether the spouse is documented or not to claim the protection of family ties under Union law.³⁴ As powerful as the family bond is, it remains subject to a rather restricted conception. Though the social reality appears much more complex, "conjugal" life has assimilated into "marital" life alone, excluding other forms of union than marriage. However, in the same decision, the Court of Justice admitted, contrary to the Advocate General, that an unmarried partner could also benefit from a right to stay in the host State on the basis of Community law. The Court adopted a broad meaning of the concept of "social benefit", as including a residence permit, in order to judge that refusing

³¹ Art. 10, para. 1, let. a), of Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

³² Art. 2, para 2, let. a), of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

³³ Court of Justice, judgment of 17 April 1985, case 59/85, *Reed*, para. 15.

³⁴ Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock and Others* [GC].

such access to the unmarried partner could undermine the integration of the worker in the host country and would give rise to discrimination on grounds of nationality. A path of evolution was thus opened.³⁵ Since then, Directive 2004/38 has extended the concept of family to “partner”,³⁶ meaning “unmarried”, but on the condition that the partnership is recognized in the host State as equivalent to marriage. This condition – by making its protection aleatory – can be interpreted as the confirmation of a form of superiority of marital life over other forms of conjugal life.

Secondly, the perception of married life has evolved in the European legal discourse. Married life is no longer considered to be of a symbolic and legal superiority over other forms of union outside marriage.³⁷ There is, however, some uncertainty in the law of the Union, which is sheltered behind the reserved competence of States in this area. Departing from the suggestion of the Advocate General, the Court held in *Parris* that a regulation which prohibits the transfer of an allowance to the surviving partner where the partnership was concluded after a certain age does not constitute discrimination based on sexual orientation, even though homosexual partnership was not legally possible before the requisite age was reached. Refusing to express an opinion and to allow each State full latitude to regulate matters of homosexual union, the Court tends to use the language of national competence in conjugal matters.³⁸

Thirdly, the most sensitive question which the Court broached was whether the “married” spouse within the meaning of EU law includes same-sex marriage, which remains an important topic in the debate of opinion. In the rather specific context of the European civil service, the Court of Justice first considered on the basis of a comparative approach – reminiscent of the consensual interpretation technique of the European Court of Human Rights – that a homosexual partnership lawfully registered in a Member State could not be equivalent to a marriage within the meaning of EU law, finding incidentally that “according to the definition generally accepted by the Member States, the term ‘marriage’ means a union between two persons of the opposite sex”.³⁹ For its

³⁵ *Reed*, cit., para. 28. In fact, the relevant Dutch law recognized that the unmarried partner of a national could obtain a residence permit. To deny it to an unmarried partner of a community worker would have resulted in discrimination in this respect.

³⁶ Art. 2, para 2, let. b), of Directive 2004/38/CE, cit.

³⁷ European Court of Human Rights, judgment of 21 July 2015, no. 18766/11 and 36030/11, *Oliari and Others v. Italy*.

³⁸ Court of Justice, judgment of 24 November 2016, case C-443/15, *Parris*, paras 58-59. The Court emphasized “that marital status and the benefits flowing therefrom are matters which fall within the competence of the Member States and that EU law does not detract from that competence” before concluding that “the Member States are thus free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect”.

³⁹ Court of Justice, judgment of 31 May 2001, joined cases C-122/99 P and C-125/99 P, *D. and Sweden v. Council*, para. 34.

part, the European Court of Human Rights has not gone so far as to force the institution of same-sex marriage on the Member States.⁴⁰ The question of recognition in a Member State that has not legalized the effects of a same-sex marriage concluded in another Member State of freedom of movement is nonetheless distinct, and provides a gap in which the Court of Justice has stepped in to have a hand in the control of the exercise of state competence. In the *Coman and Others* case, the Court returned to the notion of “spouse” within the meaning of EU law, finding that the notion was to be understood as regardless of gender, “a person joined to another person by the bonds of marriage” further stating that “the term ‘spouse’ within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned”.⁴¹ Although the European judges are careful to specify in this case that the obligation of recognition of a homosexual marriage of an EU citizen in another State does not imply in any way that of legalizing in a general way this form of marital life in national law,⁴² many difficulties are sure to arise, including those of reverse discrimination, incentives to circumvent the law, or even lack of coherence of the law of the Union itself when the homosexual partnership could be not recognized while same-sex marriage can no longer not be... The American example shows that it is likely, in the long term, that the obligation of transnational recognition of same-sex marriage will lead to a full legalization of the right to marry for persons of the same sex throughout the common area due to a lack of actual effectiveness of national legislation.⁴³

It is possible to see in EU law a logical reconfiguration of what uniting one's life to another signifies. Behind such a reconstruction lies an ethical evolution of the different forms that human love can take between two beings. By gradually substituting for the biological nature of the difference of the sexes, which until now underpinned the marital institution, the affective nature of the human feeling, Union law reforms perceptions of the way of living a life.

II.2. THE PARENT: THE PARENTAL FORM OF LIFE

European law also redefines what being a “parent” means. It is through the controversial forms of parental life in the areas of adoption, medically assisted procreation, and gestational surrogacy, that European law has come to pronounce on parenthood, once again tackling the sensitive issue of whether legal parentage is a biological and “natural” link, or rather educational and emotional.

⁴⁰ European Court of Human Rights, judgment of 24 June 2010, no. 30141/04, *Schalk and Kopf v. Austria*; judgment of 23 February 2016, no. 68453/13, *Pajic v. Croatia*.

⁴¹ *Coman and Others* [GC], cit., paras 34-35.

⁴² *Ibid.*, para. 37.

⁴³ US Supreme Court, judgment of 26 June 2015, *Obergefell v. Hodges*.

The European Court of Human Rights has repeatedly confirmed that parenthood is independent of sexuality, believing that parental life cannot be denied solely because of the homosexuality of the natural parent⁴⁴ or the adopter.⁴⁵ Similarly, the Court admitted that parenthood was independent of conjugal family life.⁴⁶ However, such an extension of the parental life form to same-sex parenting and / or single-parenthood does not obscure a possible tension with a more traditional form of parental life. The same Court in *Gas and Dubois v. France* conceded that the homosexual spouse effectively responsible for the upbringing of a child could not from this sole fact be allowed to adopt it, since such an adoption would risk undermining the biological filiation favouring the biological parent and hence what is presumed to be the best interests of the child by national law.⁴⁷ This acknowledges that biological parenthood can continue to benefit from enhanced protection, as a dominant form of parental life, in relation to emotional or educational parenting.

Contrary to the law of the European Convention on Human Rights, European Union law has not yet openly invited itself to the debate on the legal place to be accorded to the form of same-sex parents and / or single-parent life, as opposed to a biological or natural parenthood. It cannot be excluded that it may do so, in particular in a transnational situation in which an applicant claiming recognition in one State of a form of parenthood lawfully constituted in another State in a hypothetical not yet protected by the law of Convention. The approach of EU law seems for the moment rather conservative, privileging classical parenthood over more atypical forms of procreation. In the *Z.* case, the Court of Justice ruled on the meaning of motherhood, and thus the status of “mother”, in the context of a refusal of leave against the sponsor mother of a surrogacy in a quite clearly restrictive sense.⁴⁸ The Court considered that it was not discriminatory, in terms of sex or disability, to grant maternity leave only to the birth mother or adoptive mother of a child, and not to the mother who sponsored a surrogacy carried out by another. The question implicitly raises the meaning to be attributed to maternity and the leave attached to it: is it a matter of producing a child and in that case, it must be concluded that the sponsor mother does not have to be legally protected (biological conception of maternity), or is it on the contrary to nurture and take care of, in which case it is questionable to deprive the sponsor of a surrogacy mother of any leave of “maternity” (affective conception of motherhood). By endorsing a distinction between different ways of becoming a mother, this solution amounts to considering that, legally, the mother-sponsor of a surrogate mother is not re-

⁴⁴ European Court of Human Rights, judgment of 21 December 1999, no. 33290/96, *Salgueiro Da Silva Mouta v. Portugal*.

⁴⁵ European Court of Human Rights, judgment of 22 January 2008, no. 43546/02, *E.B. v. France*.

⁴⁶ European Court of Human Rights, judgment of 28 June 2007, no. 76240/01, *Wagner and J.M.W.L. v. Luxembourg*.

⁴⁷ European Court of Human Rights, judgment of 15 March 2012, no. 25951/07, *Gas and Dubois v. France*.

⁴⁸ Court of Justice, judgment of 18 March 2014, case C-363/12, *Z.* [GC].

ally a “parent”, or at least not in the same way as natural parents, who are better protected than her. It appears that the form of parental life resulting from surrogacy is not as valued in terms of legal protection.

An evolution is starting to appear in the European legal discourse, though it still seems attached to a biological dimension of parenthood. In the cases of *Mennesson v. France*, the European Court of Human Rights ordered the national authorities to recognize the parentage of children born by surrogacy abroad, even though such procreation is prohibited in their State of residence. However, it did so only with regard to children's rights to privacy, and not from the perspective of parents who – taken alone – are not recognized as such. In addition, the right to have the parental relationship legally recognized applies only to the biological parent of the child born by gestational surrogacy, and not to the other parent.⁴⁹ In the absence of such a biological link, the protection of parental status is no longer ensured.⁵⁰ In this way, the parental figure is first and foremost constituted by a biological link, and incidentally by an emotional link, provided that the latter, unlike the first, enjoys a certain duration. This does not make biological parentage an imperative criterion of the parental life form. Nevertheless, it retains a dominant dimension in the representation of parenthood conveyed by the European legal discourse.

II.3. THE CHILD: THE “FILIAL” FORM OF LIFE

The child and the parent are two expressions of the same relational reality, such that the category of the parent reflects that of the child. However, it can happen that a certain autonomy characterizes the figure of the child compared to that of the parent.⁵¹ Contrary to parenthood, the biological parent-child relationship no longer seems as decisive for the child. Thus, a discrepancy is created in the legal discourse to understand the same situation according to whether one considers the situation of the parent or that of the child. This discrepancy can hardly be explained other than by a representation of what childhood is and the needs it gives rise to. The example of EU law's apprehension of the blended family illustrates this.

In the *Baumbast* judgment, the Court of Justice faced the situation of a “blended” family. Assessing the entirety of the situation, the Court did not make a distinction between the children based on their biological relationship with the applicants. As a result, the natural daughter of Ms. Baumbast, a Colombian citizen, was treated in the same way as the biological daughter of the Baumbast couple, the natural daughter's half-

⁴⁹ European Court of Human Rights, judgment of 26 June 2014, no. 65192/11, *Mennesson v. France*, para. 100.

⁵⁰ European Court of Human Rights, judgment of 26 July 2017, no. 25358/12, *Paradiso and Campanelli v. Italy*.

⁵¹ It is possible to identify several ways of defining what is a “child” in EU law, depending on whether one considers, for example, a criterion of age, of a biological link, or of dependence, see H. STALFORD, *Children and the European Union: Rights, Welfare and Accountability*, Oxford: Hart, 2012, pp. 21-25.

sister, of both German and Colombian nationality. Otherwise the right to free movement of the Union citizen and members of their family would have been infringed.⁵² Therefore, the concept of the family is not limited to the biological family but also includes step-children as part of a second union. Similarly, contrasting with the dominant biological approach to parenthood, EU law has provided an autonomous definition of who should be considered as "the child" of someone. In the *Depesme and Kerrou* case, rendered again in the framework of a "blended" family, it was recognized that under EU law the child of a spouse is also considered to be the child of the other member of the couple, even though there is no biological or even legal basis of parenthood within the meaning of national law. The litigation concerned blended families of border workers who were working in Luxembourg but residing in another State and who were requesting a study allowance from the Luxembourg authorities for their new spouse's child. The question was whether a scholarship could be awarded to the "child" of a worker, who is neither the natural or adopted father, but only the father-in-law as a spouse of the child's parent from a first union. Under national law, the child was not the legal child of the European worker thereby explaining the refusal of the national authorities to finance his studies. However, the child was "a child" in the autonomous sense of Union law on the ground that the worker is effectively bound to the child's parent and takes charge of their upbringing "and there is no need to determine the reasons for recourse to the worker's support".⁵³ The union of the blended family unit is thus privileged over the reality of the biological link. The effectiveness of the relationship gives shape to a form of life considered as "parental".

However, the evaluation of the kinship bond has also been interpreted in a more restrictive sense. In the case of *O. and S.*, the Court of Justice was seized of the question of whether the *Ruiz Zambrano* case law was applicable to the situation of a "stepfamily" in which a child was born from a first union with an EU citizen before their other parent returned to married life with an undocumented third-country national. Finding that the stepfather of the child, who is a citizen of the Union, enjoys a more limited protection than that of the biological parent, the Court of Justice sought to characterize the degree of "legal, financial or emotional" care the stepfather took over the child in order to know whether a relationship of "dependence" united them to the point that the removal of the latter would risk depriving the child of the essential rights attached to being an EU citizen.⁵⁴ Since such a condition of close dependence between the child and the step-parent was not, in the Court's view, sufficiently established in this case, the child's European citizenship could not prevent the child from being removed from the spouse of their parent.

⁵² *Baumbast and R.*, cit., para. 57.

⁵³ Court of Justice, judgment of 15 December 2016, joined cases C-401/15 to C-403/15, *Depesme and Kerrou*, para. 58.

⁵⁴ Court of Justice, judgment of 6 December 2012, joined cases C-356/11 and C-357/11, *O. and S.*, para. 56.

This solution raises the delicate question of maintaining the unity of a stepfamily, especially if the couple in the blended family have themselves had children who would be forced to be separated from one of their biological parents. In such a case, the citizenship approach would probably be unable to account for the complexity of blended-children families in favour of national flexibility in immigration and public security.

Despite the autonomous qualification of the filiation by EU law, the reference to national law and institution does not disappear totally. Traces of attachment to a biological conception by national law can be noted in the *SM* case, related to the *kafala* institution. At stake was the right of residence of a child who is a third-country national in respect of whom the parents, who are citizens of the Union, exercised guardianship and parental authority under the Algerian *kafala* regime. The Court of justice initially favoured an autonomous approach to the establishment of parentage, holding that, in the absence of any reference by Directive 2004/38, in Art. 2, para. 2, let. c), to the law of the Member States, it was for the Court itself to define the concept of “direct descendant”.⁵⁵ While the Court concludes that the concept of direct descendant covers “both the biological and the adopted child of such a citizen, since it is established that adoption creates a legal parent-child relationship between the child and the citizen of the Union concerned”,⁵⁶ it excludes the interpretation suggested by the Commission consisting in extending protection to any legal “guardian” of a child. The main reason is the attachment of the formal qualification of the foreigner law: “the Algerian *kafala* system does not create a parent-child relationship between the child and its guardian”.⁵⁷ Without saying so openly, it would seem that the Court of Justice is sensitive to the fact that it does not call into question national family law, in particular those refusing to treat *kafala* as a true filiation, in lack of a biological link with the child. However, a child brought up under the *kafala* system is not deprived of any protection, the Court of Justice examining his situation from the point of view of Art. 3, para. 2, of the Directive under the heading of “other” family members not covered by Art. 2, para. 2, of the Directive.

In sum, if EU law reconfigures the roles of the main actors in family life, it does so in a particular context and according to its own reasoning methods, largely linked to the idea of European unity, and thus leading to a European approach to family life being biased by a specific logic. This raises the question to determine what the mindset is behind this reshaping of family life in which EU law operates.

⁵⁵ Court of Justice, judgment of 26 March 2019, case C-129/18, *SM* [GC], para. 50.

⁵⁶ *Ibid.*, para. 54.

⁵⁷ *Ibid.*, para. 56.

III. FUNCTIONALISM AND ESSENTIALISM IN THE EUROPEAN FORM OF FAMILY LIFE: JURIDICAL LIFE AND ETHICAL LIFE

From Union law one can extract two distinct, although sometimes complementary ways to understand family life. The first, and most common, is functional. It is linked to the achievement of the primary goal of open borders and free movement, and shapes the practical or legal reality in accordance with this objective. There is, however, a less explicit and more ethical second approach to family life that makes a judgment on the right way to live as a family, including being a parent. In the European legal discourse, this more essentialist form of family life has emerged.

III.1. THE FUNCTIONALIST FORM OF FAMILY LIFE: FROM PRAGMATISM TO FORMALISM

It is common in Union law for the family member to be considered only as a subject derived from the transnational citizen, in a way as an accessory. As soon as he or she ceases to be a factor facilitating free movement, the citizen's family member leaves the scope of European Union law, which ceases to take into account the reality of social life and focuses solely on intra-European mobility.

a) The emergence of the functional approach to family life.

The main secondary legislation introducing consideration of family life does so in connection with freedom of movement, but by giving family protection its own, autonomous value, based on broader requirements relating to the freedom and dignity of the person. This is particularly the case for the founding Regulation 1612/68, which views freedom of movement as a "fundamental right" for workers and their families which must "be exercised, by objective standards, in freedom and dignity" and implies "the worker's right to be joined by his family" and guarantees "the integration of that family into the host country".⁵⁸ Additionally, the preamble of Directive 2004/38 which expressly provides that "[t]he right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality".⁵⁹ There is no indication in these statements that the Union legislator intended to reduce family life to a mere accessory to transnational mobility. However, the case law has been oriented towards a much more instrumental and functional approach to family life, according to which the person invoking it is seen first and foremost as an agent of European integration and not as a mere person.

⁵⁸ Regulation 1612/68, cit., recital 5.

⁵⁹ Directive 2004/38, cit., recital 5.

Among numerous others, the *Iida* case illustrates the instrumental approach to family life, entirely oriented towards the objective of free movement.⁶⁰ As soon as freedom of movement is no longer threatened, Union law seems to lose interest in the nature of the family relationships that have been established. In *Iida*, a Japanese family father, married to a German national and a parent of a young European citizen girl, was denied a right of residence based on his status as a family member of a Union citizen, on the ground that he had ceased to accompany his spouse in the exercise of her freedom of movement and could no longer claim the derived European protection resulting therefrom. This means that the continuation of family life is only guaranteed by Union law as long as the transnational movement of the European citizen is used. If this ceases the law's consideration of the family relationship established with the child will be erased. In the same spirit, in the *S. and G.* case, one of the two applicants invoked an extension of the *Carpenter* jurisprudence to request the recognition of her mother-in-law's right of residence on Dutch national territory, on the grounds that by caring for her small child she facilitated the exercise of her freedom of movement by the cross-border worker.⁶¹ While the AG proposed that the granting of the right of residence should depend both on the "closeness of the family connection" between the grandmother and the child on the one hand and on the degree of facilitation of free movement on the other,⁶² the Court of Justice adopts only the second criterion, considering that only the deterrent nature for the exercise of the worker's freedom of movement determines the benefit of the derived right of residence for the relative. Family life is then only understood in a purely instrumental way.

Even where the citizen does not move within the Union, the Court paradoxically links the protection of family members to the exercise of free movement by pointing out that the rights of parents of European citizens are conceived as "derived" rights and that the justification for granting them must be found in the risk of "[interfering], in particular, with the Union citizen's freedom of movement".⁶³ This would in a way protect a future use of intra-European free movement by the citizen, which would be severely compromised in the event of departure from European territory. However, it should be noted that the reference to "in particular" opens up a possible alternative to a strictly functional basis for protection in a purely internal context without a clear definition. The question remains open as to whether family life as such would justify the extension of European protection, regardless of any preservation of the future and possible exercise of transnational movement by the citizen. As a result, the functional approach to family life as an accessory to transnational mobility creates a risk of inconsistency in the un-

⁶⁰ Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida*.

⁶¹ Court of Justice, judgment of 12 March 2014, case C-457/12, *S. and G.* [GC].

⁶² Opinion of AG Sharpston delivered on 12 December 2013, case C-457/12, *S. and G.*, para. 123.

⁶³ See for example Court of Justice, judgments of 13 September 2016: case C-165/14, *Rendón Marín* [GC], paras 72-73; case C-304/14, *C.S.* [GC], paras 27-28.

derstanding of the same family unit. In the *Rendón Marín* case, the two European citizen children whose father was the subject of a removal order outside the Union were not born in the same State and therefore did not have the same nationality: one had Polish nationality, the other Spanish nationality.⁶⁴ As the expulsion of their father, convicted of a criminal offence, was decided in Spain, only the eldest daughter of Polish nationality was in a transnational situation of free movement and was therefore able to transmit to her father the protection of Union law resulting from her mobility on the basis of Art. 21 TFEU (in accordance with the *Zhu and Chen* case law).⁶⁵ On the other hand, the second child who was a Spanish national, could not appeal to the exceptional protection of Art. 20 TFEU in an internal situation derived from the *Ruiz Zambrano* jurisprudence and which required to show a sufficient risk of deprivation of the effective enjoyment of essential rights attached to the status of Union citizen. Under the functional lens linked to the value of free movement, a difference in the applicable regime and degree of protection within the same family is apparent, even though the nature of the family ties towards the father is the same. In this particular situation, Union law fragments more than it brings together the different elements of the same family life in an approach that has become formalistic.

b) Assessment of the functional link between family life and free movement: the case of marital life.

Initially the relationship between family life and free movement was established in a pragmatic way rather than by extensive reasoning. It was not necessary for a formal family link to unite the European citizen with a family member who claimed European protection. Thus, in the *Surinder Singh* case, the spouse of the Community worker was deemed as continuing to enjoy the protection of EU law, despite the fact that the movement ceased.⁶⁶ In this respect, it was of little importance that the couple was in the process of divorce in the EU citizen's State of origin to which they had returned together. First and foremost, it was necessary to avoid a situation wherein a worker would be dissuaded from exercising their freedom of movement, which could be the case if they were not sure of being guaranteed upon their return to "at least equivalent conditions" of stay to those that they and their family got when going to another Member State.⁶⁷ Nevertheless, the case law has since moved towards a more strict approach, more closely attached to the formal status of the married couple. In the nearly identical case of *Kudlip Singh and Others*, the Court of Justice clarified that a separated spouse of a Union citizen can no longer benefit from EU protection since the divorce proceedings were initiated after the use of free movement rather than during its exercise.⁶⁸ Conse-

⁶⁴ *Rendón Marín* [GC], cit., paras 72-73.

⁶⁵ *Zhu and Chen*, cit.

⁶⁶ Court of Justice, judgment of 7 July 1992, case C-370/90, *Surinder Singh*, para. 20.

⁶⁷ *Ibid.*

⁶⁸ Court of Justice, judgment of 16 July 2015, case C-218/14, *Kudlip Singh and Others* [GC].

quently, if the European citizen returns alone to their country of origin and the divorce is subsequently pronounced, then the former spouse is deprived of any European protection. This difference of treatment is established according to the timing of the divorce, though the reality of the conjugal bond and its cessation is exactly the same. The justification for this difference is difficult to understand and is closely linked to free movement. Family life is only incidental. The Advocate General's opinion considered that depriving the former spouse of the right of residence as soon as the divorce was granted and after the movement in the EU would pose no threat to the "effectiveness" of free movement. The AG held this view despite the possible creation of "unfair situations" depending on the aleatory circumstances of whether the divorce was pronounced before or after the departure of the European citizen of the host State in which they resided with their spouse.⁶⁹ One can see a certain indifference to the social reality towards people who have been married and have legally lived for several years with a European citizen in a State in which they are firmly established without any effect being conferred by Union law to their social integration.

This formalistic tendency in the assessment of the functional link between family life and free movement is reinforced by the *O. and B.* judgment, concerning the refusal of recognition in the State of origin of conjugal relations established by a European citizen in another Member State of the Union. The Court of Justice deepened its earlier case-law on the barriers to "exit" and "return" of workers and their family members. The Court began by recalling the instrumental nature of the European protection of family life which is justified on the basis of Art. 21 TFEU by the fact that in the absence of such protection, "a worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able to continue, on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a result of marriage or family reunification".⁷⁰ It thus brings about a remarkable alignment in the State of nationality of the protection of family life offered by secondary legislation in the host State. The condition for such protection to be invoked against the home State appears simply pragmatic. It is based on the requirement of "sufficient effectiveness" of family life outside the State to enable the applicant to claim and consolidate it in their own State.⁷¹ However, the Court clarifies its assessment by distinguishing thereafter two more cases submitted to its assessment. Whereas in the case of *O.* the applicants were married in France before living together in Spain and claiming a right to stay in the Netherlands; this was not the case of the couple *B.* who had married in Morocco after having made a family life in Belgium

⁶⁹ Opinion of AG Kokott delivered on 7 May 2015, case C-218/14, *Kudlip Singh and Others*, para. 38.

⁷⁰ Court of Justice, judgment of 12 March 2014, case C-456/12, *O. and B.* [GC], para. 46.

⁷¹ *Ibid.*, para. 51.

and then asked for its recognition in the Netherlands. For the Court of Justice, the date of the marriage, more than the actual effectiveness of family life, serves to determine whether the condition of “sufficient effectiveness” is met with the consequence that only the former couple could rely on it and not the latter. The justification for such reasoning is the aforementioned quality of “spouse” of the European national who, according to the interpretation of Directive 2004/38, is reserved for the “married” spouse.⁷² A different solution is thus reached in the two joined cases for the sole reason that the marriage in one case precedes conjugal life while in the second it comes after. Formalism prevails over realism, revealing an attachment to the marital life which benefits from a reinforced protection compared to conjugal life out of wedlock.

Lastly, in *Ogieriakhi*, the artificial maintenance of the marital bond, even though the spouses lived apart and each had a different family life, allowed the applicant to continue to benefit from the derived protection which they benefited as spouse of a Community worker circulating in the Union. Despite the absence of “true sharing of married life together”,⁷³ the Court favoured a formalistic approach in which the marital bond existed administratively and that it could not “be regarded as dissolved as long as it has not been terminated by the competent authority”.⁷⁴ The legal existence of marriage then prevails over the effectiveness of conjugal life. The justification put forward by the Court lies in the desire not to unbalance the situation of third-country nationals and to protect, indirectly, the mobility of Union citizens who might otherwise be exposed to a form of extortion by threat of de facto separation, as divorce in principle requires the agreement of both parties.⁷⁵ Accordingly, the third-party national cannot be required to continue to share the same dwelling as their spouse, from the moment that that was the case at the beginning of their conjugal relationship.

In short, it appears that the European re-composition of family life in a functional perspective of transnational mobility confers a certain artificiality on the European legal construction. At times dictated by the institutional complexity of the European area, it is sometimes necessary to replenish the critique of a law detached from reality and the behaviours it intends to regulate. Taking the idea of life form seriously thus implies seeking in the legal discourse a more ethical approach to the ways of living our lives.

III.2. THE ESSENTIALISM OF FAMILY LIFE: FROM THE SUPERIOR INTEREST OF THE CHILD TO THE “GOOD” AND “BAD” PARENTS

To bring forth the superior interest of the child as an argument in family law litigation has become quite frequent, even in European Union law. To illustrate, let us look at two areas

⁷² *Ibid.*, para. 63.

⁷³ Court of Justice, judgment of 10 July 2014, case C-244/13, *Ogieriakhi*, para. 36.

⁷⁴ *Ibid.*, para. 37.

⁷⁵ *Ibid.*, para. 40.

where Union law departs from the logic of free movement in order to enforce the existence of a particular link between members of a family, and without which there is any possible legal explanation. Namely, the question of removing a child away from his home on one hand, and the expulsion of a parent to a third country on the other. For the latter, the legal discourse brings forth a concept of dependence which will be delved into later.

a) The abduction or placement of the child.

The question of the wrongful removal of a child is a major issue at European level, on which the Union's duty is in principle limited to organizing the coordination of national courts and laws mainly on the basis of the so-called Brussels II *bis* Regulation, which is itself largely inspired by the Hague Convention on the Civil Aspects of International Child Abduction. The basic principle of European coordination remains that it is for the court of the child's "habitual" place of residence to have jurisdiction to resolve the question of custody of the child in a way that is understandable enough to avoid encouraging international displacement. The aim is rather to preserve a certain stability in family life, than that of free movement. Consequently, the jurisdiction of the State in which the child is present after his or her removal is most frequently asked to declare that the child should be returned to the State of departure without having to decide on the merits of the case, namely whether it is better for the child to remain within its jurisdiction along with the parent who removed him or her. However, sometimes, behind the objectivity and apparent technicality of the question of where a child's "habitual" residence is located, the question of preserving the best interests of the child may interfere to the extent of modifying the distribution of roles and the resolution of the dispute. This is particularly the case for very young children, to whom it is difficult to assign a habitual place of residence other than by proxy through their parents. In such circumstances, the legal discourse is partially less instrumental in favour of an assessment of the quality of family life. For example, in the *Mercredi* case, which involved the abduction of an infant by his mother, the Court of Justice pointed out that in order to determine the child's "habitual" residence, it must be taken into account that "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of".⁷⁶ The affective criterion then becomes more important than other more objective criteria such as the couple's previous residence or the duration of their presence in a territory. This does not prejudge the award of custody of the child, but once such elements are put forward to determine the competent jurisdiction, it seems difficult to ignore them later. Similarly, with regard to a mother's refusal to return to the previous State of residence after childbirth, contrary to what the couple had previously decided, the Court of Justice makes the first months of the infant's concrete life in the State of

⁷⁶ Court of Justice, judgment of 22 December 2010, case C-497/10 PPU, *Mercredi*, para. 54.

childbirth, as well as the social and family environment prevail, in order to avoid abstract respect for the prior joint decision to return to the former State of residence.⁷⁷

For the same reason that Union law in family matters aims rather at coordinating national laws than harmonizing them, the Court of Justice does not in principle rule directly on the advisability of placing a child in foster care, but only on the question on competent jurisdiction eventually on the applicable law. However, as soon as the competent court or applicable law is designated, account is taken of the child's situation and what constitutes his or her "best interest", which already suggests that an assessment of the quality of the education received from his or her parents will be expressed. In case A., the Court of Justice openly specified that in order to determine a child's "habitual" residence, which allows by deduction to designate the court competent to hear his or her situation, a specific reasoning, distinct from that traditionally applicable in civil matters, should be applied in order to ensure that a child's physical presence in a Member State "is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment".⁷⁸ For the Court, there are a number of factual indications of what constitutes a "habitual" residence such as "the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State".⁷⁹ But sometimes the assessment is less factual, especially when it is difficult to determine a "habitual" place of residence, as was the case in this case, since the children were initially educated in Finland, then after four years of domestic violence in Sweden, before returning to Finland in a precarious situation, without a fixed address and without schooling. European judges therefore accept that it is in the best interest of the child for a national authority to be able to enforce a provisional placement measure, while at the same time notifying a court in another Member State of its decision if necessary in order to obtain more information on the child's family situation. The role of Union law is no longer only functional, or even institutional, in bringing national authorities into contact with each other, but also takes on a truly substantial dimension of what is meant by decent education.

b) The removal of a parent.

The *Rendón Marín* case is an illustration of a refinement of the reasoning behind the protection offered by Union law to the foreign parent, in this case Colombian, who has sole custody of a European citizen according to the degree of attention he devotes to his educational task. In order to consider that it would be disproportionate to automatically expel the applicant, despite his criminal conviction, and to risk infringing the rights

⁷⁷ Court of Justice, judgment of 8 June 2017, case C-111/17, O.L.

⁷⁸ Court of Justice, judgment of 2 April 2009, case C-523/07, A., para. 38.

⁷⁹ *Ibid.*, para. 39.

of children who are Union citizens, the Court of Justice points out that such an expulsion decision “cannot be drawn automatically on the basis solely of the criminal record of the person concerned”.⁸⁰ On the contrary, European citizenship requires that the decision to expel a parent is not an automatic and abstract sanction, but “from a specific assessment by the referring court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child’s best interests and of the fundamental rights whose observance the Court ensures”.⁸¹ Without directly deciding the matter, the Court of Justice suggests that the father was taking good care of his children, as they were “receiving appropriate care and schooling”.⁸² The assessment is no longer only factual or technical, it takes on a strictly ethical dimension of what constitutes a “good” education. A link is characterized between the parent and his children which opens up the protection of Union law, and which itself results from the quality of the exercise of the parental function. Whether or not to be a good parent becomes the cornerstone of European legal reasoning. Thus, the quality of education shows a real dependence of the child on the parent, and a reinforced protection of the latter in the name of the best interests of the former. The quality and closeness of the family relationship shall be established as a determining criterion for the protection offered by European law, despite national legislation to the contrary.

Similarly, a distinction has been made in case law with regard to the ability of the parent remaining in the territory of the Union to properly care for his or her child in the future. The situation concerned the case, which is frequent in practice, of children who are citizens of the Union, one of whose parents is also a European citizen but whose other parent is a third-country national and is the subject of a removal order. In the *Chavez-Vilchez and Others* case the question arose as to the applicability of the *Ruiz Zambrano* case law to the hypothesis that the only third-country national parent who has effective custody of the child who is a Union citizen is removed, so that the latter would not necessarily be exposed to the dilemma of choosing between family life and the “territory” of the Union since he could remain there with his other parent, himself a European citizen.⁸³ However, as the parent remaining in the territory of the Union does not take care of the child, there is a certain deterioration in the quality of family life for the child, as well as a painful separation from the parent who actually has custody of the child. In an attempt to distinguish whether the family life of the European citizen child would be so deeply affected by the removal of one of his or her parents that most of his or her rights would be affected, the Advocate General chose to distinguish between the ability of the parent remaining to take proper care of the child and the ability

⁸⁰ *Rendón Marín* [GC], cit., para. 85.

⁸¹ *Ibid.*

⁸² *Ibid.*, para 15.

⁸³ Court of Justice, judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez and Others* [GC].

of the parent remaining to take care of the child.⁸⁴ The Court of Justice adopted the main point of the Advocate General's reasoning, namely to consider the best interests of the child. While the national authorities intended to reduce the parent's right of residence to the sole hypothesis that the other parent was absolutely unable to care for the child (detention, internment, hospitalization, or contrary opinion of the administrative or police authorities), the judges considered that Union law offered additional protection for the family life of the European citizen child in the event of "effective dependence" between the child and the parent who is a third-country national by focusing on respect for fundamental rights and the best interests of the child.⁸⁵ Until now, case law had remained relatively deaf to the welfare of the child, preferring the argument of immigration control, as in the case *Dereci and Others*, where it had not been considered contrary to the right of the Union to expel one of the two parents who were third-country nationals at the risk of breaking the unity of the family and referring the question of whether or not such a situation fell within the protection of the Charter of Fundamental Rights to the discretion of the national judge.⁸⁶ At no time was the child's interest mentioned. Only the consideration of the latter element thus justifies a shift in case law in favour of keeping the parent with whom the child has established an effective dependency relationship in the territory of the Union.

Attention to the interests of the child also prompted AG Wathelet to propose a more concrete approach to the criterion of depriving the essential rights attached to European citizenship to the Court in the *N.A.* case, concerning the right of residence of a third-country national after divorce from a Union citizen. Although it was not followed by the Court of Justice, his position is interesting in that it suggests that the legal reasoning should take into account the reality of children's social life in order to extend the protection of Union law to guarantee the maintenance of the parent in a given State, and no longer on the territory of the Union as a whole. The objective of the proposal was to review the *Alokpa* case law, which considered that Union citizens were not deprived of most of these rights if the child and his or her parent could find refuge in a Member State other than the one in which they are living. To justify this evolution in the case law, the Advocate General states that "EU law may flesh out the concept of citizenship of the Union only on condition that it links the protection of citizenship to attachment to a place, to the fact of being settled in a territory and of being integrated not only into the administrative and economic life of the host country but also into its social and cultural life".⁸⁷ The argument is aimed for those who want to take seriously the quality of life of children, which is not only due to the presence of the caring parent, but

⁸⁴ Opinion of AG Szpunar delivered on 8 September 2016, case C-133/15, *Chavez-Vilchez and Others*, para. 97.

⁸⁵ *Chavez-Vilchez and Others* [GC], cit., para. 70.

⁸⁶ Court of Justice, judgment of 15 November 2011, case C-256/11, *Dereci*.

⁸⁷ Opinion of AG Wathelet delivered on 14 April 2016, case C-115/15, *N.A.*, para. 113.

also to the social context in which this attention is given and in which they have built their identity. If the case law engages in a qualitative assessment of the educational relationship, it will be difficult for it to avoid reopening this debate for a long time.

Underlying the European legal discourse is the emergence of a more essentialist form of family life that would reflect an inherent representation in Union law of what a “good” family relationship should be. It emerges from the legal concept of dependence. In its light, we can consider a reformation of what it means to live a family life on a European level.

IV. THE EUROPEAN RE-FORMATION OF FAMILY LIFE: THE EMERGENCE OF THE CONCEPT OF “DEPENDENCY”

By claiming that the European citizen “dependent” on an undocumented family member has the right to remain in the Union with the latter, the case law ventures into a strictly existential field. The significance of dependence involves a number of philosophical theories of care, which no longer consider it as a problematic or transitory state, to which it would be desirable to put an end in an autonomist conception of the individual, but on the contrary as a quality common to all human beings and valuable in that it makes our lives liveable. By integrating the legal discourse, the value of dependency as a relationship that is worthy of protection endorses and conveys the idea that there is a moral but also a social foundation, positively rooted in our practices and ways of thinking about life as well as in the intimacy of human relationships. Despite what its wording might suggest, the dependence test gradually developed by European legal discourse does not consist of an assessment – in a counterfactual way – of whether or not a parent’s choice to leave their family member on the territory of the Union is reasonable in order to avoid certain probable and objectively measurable suffering in another State.⁸⁸ The European legal approach to dependency⁸⁹ is rather to attempt to probe the deep nature of a family relationship in order to infer decisive consequences for the pursuit of a decent existence. The re-formation of family life in the legal discourse consists firstly of a qualification of what dependence is, and secondly of an attempt to classify the different forms of dependence within the family unit, or even, ultimately, to recompose their meaning. Living a family life in the sense of Union law then implies a particular representation of this relationship which contributes to the evolution of an existential imagination on how to lead our lives.

IV.1. THE QUALIFICATION OF DEPENDENCY

Union law seems to pay particular attention to the relationship of material dependence which unites the members of a family, particularly in financial and other material matters.

⁸⁸ G. DAVIES, *The Right to Stay at Home*, cit., p. 476.

⁸⁹ See also, K. HYLÉN-CAVALLIUS, *Who Cares? Caregivers’ Derived Residence Rights from Children in EU Free Movement Law*, in *Common Market Law Review*, 2020, p. 399 et seq.

Nevertheless, the consideration of an affectionate, or rather emotional, dependence is also present. What is then valued by law is the existence of a deep sense of affection between people as a determining factor in the legal solution to be given. Clearly, this second form of emotional dependence is more fragile as a basis for the emergence of real rights. It gives rise to the protection of a relationship whose foundation is more subjective than objective.

a) The (principally) material dependency.

The relationship of material dependence was first highlighted with regard to the relationship between a parent and a child considered to be “dependent” on him or her. In the *Teixeira* case, the Court of Justice deepened its *Baumbast* case law on Art. 12 of Regulation 1612/68 providing for a right of the migrant worker's children to undertake studies in the host State without discrimination.⁹⁰ The Court extended the right of residence of the parent who actually has custody of a child who is legally pursuing such studies, even though that parent is not economically active, does not have sufficient resources, and that the child has reached the age of majority.⁹¹ The Court of Justice stated in the *Alarape and Tijani* judgment that the parent's right of residence is based on the dependence of the child who is studying with regard to the parent, and more specifically on the fact that “that child remains in need of the presence and care of that parent in order to be able to continue and to complete his or her education”.⁹² In his opinion, the Advocate General identifies three main forms of dependence of the adult student on his or her undocumented parent: financial, emotional, and residential. According to him, it is mainly the “financial” dependence of the student that must justify the necessity of remaining in the parent's country, for the reason that if the parent were to be sent back to his country of origin, in this case Niger, he could no longer provide for his child, which would affect the child's ability to pursue higher studies in peace and serenity. When it comes to the criteria of emotional dependence, the Advocate General does not deem it necessary “that the emotional support should assume a particular quality, proximity or intensity”.⁹³ As a result, the affection between parent and child, even if the latter is of age, is both presupposed and standardized: no evaluation or grading is carried out. Similarly, the common residence requirement between the departing parent and the child, referred to in the *Baumbast* judgment, is diminished by the Advocate General when the “care” that the student can expect to receive from his parent can be provided even though he no longer shares the same domicile. Consequently, it is sufficient for the parent to participate in the financing of the life of his child for the relationship of dependence to be characterized, justifying the triggering of European protection against the parent's removal.

⁹⁰ Article 12 of Regulation 1612/68, cit.

⁹¹ Court of Justice, judgment of 23 February 2010, case C-480/08, *Teixeira*.

⁹² Court of Justice, judgment of 8 May 2013, case C-529/11, *Alarape and Tijani*.

⁹³ Opinion of AG Bot delivered on 15 January 2013, case C-529/11, *Alarape and Tijani*, para. 40.

With some nuances, these dimensions of dependency was subsequently taken up by the Court of Justice in the case of minor children, this time without clearly specifying their articulation and assessment. In the *O. and S.* case, already mentioned, the question was whether the *Ruiz Zambrano* case law opposing the removal from the Union of undocumented parents of European minors would be transposable to the hypothesis of the removal of their mother's new spouse in the event of a "reconstituted" family. Once again, the decisive criterion for deciding the question is based on the relationship of dependence between the Union citizen at an early age and the third-country national who is refused the right of residence. In the Court's view, such dependence is characterised by the "legal, financial or emotional" care of the child.⁹⁴ Dimensions are not cumulative. However, it does not venture to assess it itself, merely doubting the existence of such dependence and referring the matter back to the national court, without distinguishing between the three different dimensions mentioned. The AG is more explicit on the first two aspects, legal and financial, of dependency, which he considers unfulfilled when parents far from the territory of the Union "exercise no parental authority over those children and do not provide for them".⁹⁵ In his view, the lack of European protection is justified by the fact that if the child's mother decided to leave the territory of the Union to maintain the unity of the second family home, she would do so "freely", without being forced by national legislation or by a child support obligation.⁹⁶ *A contrario*, one may ask whether a different solution would have been preferred in the event that the remote step-parent would provide for the child's subsistence. There is no mention of the emotional dimension of the child's dependence on the distant parent. Thus, the question remains as to whether this is really taken into account, since the simple mutual affection that could have been established appears to be indifferent in the absence of any legal and financial link.

This mainly material approach to dependency does not always lead to fully consistent results. In the *Reyes* case, the Court of Justice generously considered that a third-country national, with a diploma and of working age, should be considered as dependent on a Union citizen, and therefore "dependent" on her for a right of residence under Directive 2004/38, since this joint citizen of her mother had regularly paid her money for many years.⁹⁷ The intention is laudable and was intended to enable the applicant of Philippine origin to join her mother who had lived for a long time in the Union and had finally settled in Sweden with the citizen in question, so that the applicant could be considered as the "dependent" descendant of the spouse of a European citizen under Art. 2, para. 2, let. c), of the Directive on the right of residence. Nevertheless, with such a

⁹⁴ Court of Justice, judgment of 6 December 2012, joined cases C-356/11 and C-357/11, *O. and S.*, para. 56.

⁹⁵ Opinion of AG Bot delivered on 27 September 2012, joined cases C-356/11 and C-357/11, *O. and S.*, para. 40.

⁹⁶ *Ibid.*, para. 42.

⁹⁷ Court of Justice, judgment of 16 January 2014, case C-423/12, *Reyes*.

predominantly financial approach to dependency, it is clear that dependency ceases as soon as the beneficiary finds paid employment in the host country and is no longer dependent on the financial support of the citizen. By effectively forcing the applicant not to work in order to be able to stay with her family, the approach chosen by Union law creates a dilemma rather than protecting a dependency which is above all emotional, and not strictly material. As a result, alongside the supposedly objective material approach to dependence, a more emotional, or subjective, approach is developing in the European legal discourse.

b) The (principally) affective dependency.

The mainly materialistic approach to the assessment of dependency clearly shifted in favour of taking into account an emotional dimension with the *Chavez-Vilchez and others* case concerning the removal of the parent who had sole custody of a child whose other parent is a Union citizen. In order to determine whether the mother of a child who is a Union citizen may be expelled if the child is likely to remain in the territory of the Union with his father, the Court of Justice does not merely consider whether the father is in a position to ensure the effective material, legal and financial care of the child. The Court openly raises the question of the appropriateness of separating the child from the sole custodial parent in terms of “the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child’s equilibrium”.⁹⁸ The sentimental dimension given to the assessment of dependency is evident. It explains why the Court of Justice protects the family relationship constituted on the territory of the Union, despite national legislation to the contrary and even though on a strictly material level the child could, at least in some of the cases in question, have continued his life in the care of his other parent. Emotional dependence takes priority over material dependence, and invites us to take into account the subjective situation of the child’s emotional well-being.

The Court of Justice confirmed this approach in the *K.A. and Others* case, concerning refusals of family reunification under Directive 2008/115, known as the “Return Directive”, which concerns undocumented migrants and in this case those who have been the subject of a decision prohibiting their entry into the territory. This is the situation of the claimants, all family members of Union citizens who highlight the relationship of dependence between them and their families in order to challenge the impossibility of their legal residence in Belgium. The Court of Justice begins by dismissing the argument that mere financial dependence between adults in the same family may be sufficient to trigger the protection of European Union law in this case. Indeed, in the case of adults, the preservation of the family bond against expulsion can only be invoked “in exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separa-

⁹⁸ *Chavez-Vilchez and Others* [GC], cit., para. 71.

tion of the individual concerned from the member of his family on whom he is dependent".⁹⁹ This would not be the case for a "purely financial dependency".¹⁰⁰ The approach is clearly different, if not opposite, to that adopted for the extension of the stay of a student's parent mentioned above. The affective dependence forms a decisive argument for triggering the protection of the relationship between the underage child, especially at an early age, and the distant parent. While reiterating all the parameters to be taken into account in establishing the dependency relationship (age, degree of development, degree of affection, and emotional balance), the Court of Justice considers that certain arguments are ineffective in challenging the existence of such dependency, thus suggesting that such a relationship must be presumed effective. This applies in particular to the absence of cohabitation between parent and child, which must not be established as a necessary condition for establishing the relationship of dependence.¹⁰¹ Indeed, it is clear that an emotional relationship can be established in the absence of permanent contact and cohabitation, as in the case of divorce. Similarly, the fact that the relationship of dependence arose after the decision to expel and prohibit residence was adopted is not considered relevant by the Court of Justice.¹⁰² In doing so, the Court is stating that the choice to become a parent is an intimate decision that does not have to be subordinated to a strictly rational logic, such as a condition of regularity of residence. What is decisive in the judgment is the way in which the legal discourse of the child's relationship with his or her parent is represented in our way of conceiving our lives.

Moreover, this does not appear at any time in the Court of Justice's argument developed in the *Coman and Others* case concerning the recognition of the effects of same-sex marriage of Union citizen.¹⁰³ However, it is possible to wonder whether the basis of the right not to be separated from one's spouse reveals a perception of marriage and the feeling of love that it is supposed to embody as an expression of a relationship of emotional dependence between beings. It is difficult, as the Court of Justice apparently does, to link the right to lead a conjugal life to a simple individual freedom to live with the person one has chosen. In the way we represent our lives, it would be simplistic to reduce the act of marrying to a free and rational will. If marriage were a simple matter of private life and individual freedom, then it should be considered that the choice to marry does not have to be institutionalized and that it should be detached from any form of recognition by the State or society, thus guaranteeing their neutrality vis-à-vis the individual freedom to lead the desired form of married life. However, this is not the case seeing as marriage continues to be viewed as an institution and a publicly recognized union, one must conclude that it is not a defence of a pure individual liberty

⁹⁹ Court of Justice, judgment of 8 May 2018, case C-82/16, *K.A. and Others* [GC], para. 65.

¹⁰⁰ *Ibid.*, para. 68.

¹⁰¹ But it may be taken into account, *ibid.*, para. 73.

¹⁰² *Ibid.*, para. 79.

¹⁰³ *Coman and Others* [GC], cit.

which constitutes the primary objective, but rather the valorisation of a loving bond between two people. Some will say that the initial objective of the institution is rather another natural phenomenon, namely procreation, but it is nowadays perfectly accepted to get married without procreating, by constraint or by choice. This is why, in a sense, it is possible to understand the Court of Justice's recognition of the transnational effects of same-sex marriage as a first step towards the clarification in legal discourse that marriage is the form we give to the expression of emotional dependence of two beings, and not just a matter of freedom.

IV.2. THE GRADATION OF DEPENDENCY

With the ambition being to reduce the complexity of an otherwise unintelligible reality, the law proceeds by categorization and generalization. Over time, several levels of dependency emerge from the case law in relation to family structure, thus maintaining the prevalence of a mainly conjugal and parental form of life to the detriment of other forms of family life.

a) "Principal" and "other" members of the family.

Sometimes, Union law does not provide the same solution depending on the type of family relationship in question. As a result, some relationships are legally better protected than others within the family unit itself. Directive 2004/38 openly distinguishes between family members who are fully protected by a residence permit (Art. 2, para. 2) and "other" members for whom Union law only mandates national authority to "facilitate" the support of the citizen (Art. 3, para. 2). This can be a problem when an increased dependency relationship unites the Union citizen with the least protected category of family member. Admittedly, the Directive emphasizes the dependency relationship between a European citizen and a member of his family whose stay must be "favoured", whether because he is "dependent" on the citizen (in a financial dependency) or because the citizen must take care of him for health reasons (physical dependency), but the fact remains that protection is still less. In the *Rahman and Others* case, the Court of Justice confirmed the difference of treatment between "principal" members of a citizen's family whose right of residency is automatically granted, and the "other" dependent members of a citizen's family whose right of residency is merely "facilitated" by the national authorities. However, the Court limited the national authorities' margin of appreciation by requiring them to take into account the personal situation of each applicant with regard to "the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join".¹⁰⁴ Despite the vague and imprecise character of the obligation to "favour" the res-

¹⁰⁴ Court of Justice, judgment of 5 September 2012, case C-83/11, *Rahman and Others* [GC], para. 23. See also, judgment of 12 July 2018, case C-89/17, *Banger*.

idence of the dependent family member, the judges deduced from this an obligation to grant “a certain advantage” to “other” members of the family than the “principal” family members according to the degree of dependency observed.¹⁰⁵ To the extent that it is conceivable that an “other” member of the family who is particularly dependent may end up being as well protected as a “main” member. It could be understood as a gradation of dependence between members of the same family, presumed in the case of principal members and to be demonstrated in the case of “other” members.

b) Among “principal” members of the family.

Beyond this first discussion dictated by the European legislative choice, the jurisprudence has surprisingly introduced the case law has introduced more surprisingly sub-distinctions within what Union law considers to be the hard core of the family unit composed of spouses, relative in the ascendant line and dependent descendants. One can deduce a form of implicit valorisation of certain dependency which Union law considers more close-knitted than others, notably when a child is involved.

First, a distinction is made between parental life and conjugal life, to the benefit of the former. It is known that the Court of Justice has not extended the *Ruiz Zambrano* case law, which protects the link between the parent and the child who is a Union citizen, to the relationship between two spouses. From this point of view, the *McCarthy* judgment represents a clearly restrictive shift, since the applicant too was faced with the dilemma of relinquishing either the right to remain in the European Union or to continue her conjugal life with her undocumented spouse.¹⁰⁶ In both cases, be it the removal of the parent or the spouse, the family life of the European citizen is threatened, but in a situation purely internal to a State, Union law only grants its protection when it comes to protecting the parental relationship as opposed to the conjugal relationship. It can only be understood as meaning that, in the eyes of the Court of Justice, only the child is in a situation of real dependence on his parent, and not the spouse, establishing a scale of dependence which would be less proven in the case of adults. In a way, parental life would be more worthy of protection than conjugal life, in that, in the case of adults, they would be offered a choice as to whether or not to leave the European Union with the family member, whereas a child could not make such a decision. Although the Court of Justice does not expressly state this, the higher degree of vulnerability of children compared to adults is certainly at the heart of the difference in protection. This distinction is nevertheless questionable, or at the very least insufficiently substantiated.

Second, European jurisprudence provides another distinction between parental life and “grandparental” life. While in *Carpenter*, the Court of Justice had accepted without further explanation that the mother's presence was necessary to take care of the children so that she could facilitate their free movement within the European Union, it adopted a

¹⁰⁵ *Ibid.*, para. 21.

¹⁰⁶ Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*.

more nuanced position in the *S. and G.* case, which concerned a Peruvian national married to a cross-border worker and mother of two children (hypothesis G.), and a Ukrainian national who is the mother-in-law of a cross-border worker and the grandmother of the latter's child (hypothesis S.) Both of these are "principal" members of the citizen's family in accordance with Directive 2004/38 as "spouse" in one case and "dependent relatives in the ascendant line" in the other. Furthermore, they invoked the right to reside in the European Union in order to take care of children of European nationals in order to allow the exercise of their freedom of movement in accordance with *Carpenter*. They nevertheless received different responses. Following the Court of Justice, a distinction must be made according to whether the child is cared for by the spouse himself, namely the mother, or by the relative in the ascendant line of the worker's spouse, in this case the grandmother.¹⁰⁷ While the interest in having the child cared for by his mother is presumed, when it comes to the grandmother, additional evidence, which is potentially difficult to provide, is required because it must be demonstrated that the absence of such a presence to care for the child would really have a dissuasive effect on the mobility of the cross-border worker. Such a difference in solution between the status of the mother and that of the grandmother can hardly be explained without an abstract hierarchy of the parental relationship as being worthier of respect and protection than the grandparental relationship. This distinction is open to criticism in that it is perfectly possible that a grandparental relationship may in practice develop as strong and close ties, emotionally, as a parental relationship. The legal discourse maintains the idea that the mother-child relationship is presumed to be the closest within the purview of family life.

IV.3. THE RECOMPOSITION OF DEPENDENCY

By picking up the dependency relationships which structure the family life's representation, the Union law may act in two opposite directions: whether in aggravating or in inverting them.

a) An "aggravated" dependency relationship.

The functional approach to family life, which is entirely geared towards the free movement of the agent or Union citizen, is likely to accentuate certain phenomena of imbalance, or even the risk of domination, within the family unit, in particular between the European citizen and his foreign spouse on the one hand, and between men and women on the other hand.

There is no doubt that the foreign spouse is frequently in a vulnerable situation in relation to the national citizen: either because they are undocumented or because they would risk being so in the event of separation. Union law is perfectly conscious of this and Directive 2004/38 explicitly anticipates that "[f]amily members should be legally

¹⁰⁷ *S. and G.* [GC], cit., para. 43.

safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership”.¹⁰⁸ The aim is to make the protection of the spouse, particularly a foreigner, autonomous in order to free him from his dependence on the Union citizen from whom he indirectly derives his right of residence. For instance, in the *Ogieriakhi* judgment, the Court of Justice relied on this objective of non-dependence of the foreigner to consider that his stay was legal, even though he was living separate and apart from his wife, a European citizen, and that their married life was no longer in effect. The rationale for this approach lies in the desire not to force a third-country national to live in a conjugal relationship and to artificially maintain a conjugal bond, under threat of being considered undocumented. In the Court’s view, a different solution would result in “a third-country national [being] vulnerable because of unilateral measures taken by his spouse”.¹⁰⁹ It can be understood as a desire to avoid a form of “blackmail accompanied by threats of divorce” on the part of the citizen towards his or her foreign spouse.¹¹⁰

However, as seen in the *Kudlip Singh and Others* judgment, the Court of Justice adopted a purely instrumental approach, and at least in part contradictory to the previous one, according to which, once the divorce proceedings ordering the separation of spouses were initiated after the departure of the citizen from the State in which he resided with his foreign spouse, the latter is no longer entitled to reside legally in the territory of that State. On the other hand, as provided for in Art. 13, para. 2, of Directive 2004/38, if the divorce had been initiated before the European citizen’s return to his State of origin, and therefore during the exercise of free movement, then the foreign spouse would have continued to enjoy the protection triggered by family life.¹¹¹ This results in a paradoxical situation in which, certainly, the third-country national is protected against “blackmail accompanied by threats of divorce” in the State of cohabitation, since if the divorce is pronounced there he can continue to reside legally as an individual. However, this would lead to his exposure to “non-divorce” blackmail in that State, since if the divorce is pronounced after the end of the exercise of the European citizen’s free movement, the individual would lose all right of residence in the Union. He is thus particularly vulnerable since the only alternative available to him in the event of a refusal to divorce is to continue to accompany his spouse until the divorce is granted, if necessary in a State he does not know and in which he has no ties. This configuration is even more unbalanced in favour of the European citizen because it is easier not to divorce than to divorce... The foreign spouse’s dependence on the European citizen is aggravated by Union law.

¹⁰⁸ Directive 2004/38, cit., recital 15 and Art. 13.

¹⁰⁹ *Ogieriakhi*, cit., para. 40.

¹¹⁰ The expression is used in Court of Justice, judgment of 30 June 2016, case C-115/15, *N.A.*, para. 47.

¹¹¹ *Kudlip Singh and Others* [GC], cit., para. 61.

Directive 2004/38 also refers, in Art. 13, para. 2, to domestic violence as typical cases of “particularly difficult circumstances”, justifying protection of the spouse regardless of the continuation of the family relationship with the European citizen. However, the Court of Justice’s restrictive interpretation aggravates, rather than compensates, a relationship of dependence of an abused woman towards her husband. Extending the *Kudlip Singh and Others* case, the Court of Justice reiterated its position in *N.A.* that no residence protection is offered to the citizen’s spouse if the divorce is initiated after his departure from the host Member State. Even more questionably, the Court does not see the fact that the spouse has suffered domestic violence as a circumstance likely to influence this solution,¹¹² unlike its Advocate General.¹¹³ As a result, the abused spouse is exposed to the choice of either persuading the citizen to immediately divorce, which seems difficult in their position, or to remain with the spouse in his or her State of origin and risk the continuation of abuse. Through this approach, the Court of Justice aggravates the dependence of the abused spouse, most commonly women, by offering no guarantee that they will be able to continue to remain in a State after the reporting of such violence, which even helps to dissuade them from doing so. In *N.A.*, the Court of Justice finally recognized the battered wife’s right of residence, but not on the basis of her status as a wife, but rather on the basis of her status as a mother of Union citizens studying in the host country. It was therefore thanks to her children, and not because of her suffering, that the applicant was finally able to claim a right of residence. To an increase in dependency, Union law has responded with an opposite trend of reversal of dependence.

b) A “reversed” dependency relationship.

Sometimes Union law takes into account, or even provokes, a form of “reverse dependence” to take the expression of Advocate General Sharpston,¹¹⁴ between family members, in the sense that the one who is dependent or rendered dependent is not the one who is spontaneously thought of or designated by national law.

The reversal of the classic parent-child dependency ratio in EU law can be seen in the *Baumbast* and *Zhu and Chen* judgments. On reading them, it is clear that the parent who “effectively ensures the custody of the child” derives the protection of the right of residence only from the status of the child, whether the child is a student or even a simple citizen of the Union.¹¹⁵ The child is thus recognised as dependent on the parent who cares for him or her in accordance with a traditional vision of the family relationship, but more surprisingly, the parent is also made dependent on his or her child through Union law since it is through the presence of the latter that rights can be claimed for the benefit of the parent. The existence of a reverse dependency relation-

¹¹² *N.A.*, cit., para. 38.

¹¹³ Opinion of AG Wathelet, *N.A.*, cit., para. 76.

¹¹⁴ Opinion of AG Sharpston delivered on 12 December 2013, case C-456/12, *O.*, para. 48.

¹¹⁵ *Baumbast and R.*, cit., para. 73; *Zhu and Chen*, cit. para. 44.

ship between a parent and a child was confirmed in the *Ibrahim* judgment, in which the Court held that the right of children to benefit from Art. 12 of Regulation 1612/68 is not subject to their parents' right of residence in the host Member State, which requires only that the child has lived with one or both parents in a Member State while at least one parent resides there as a worker.¹¹⁶ Consequently, the right of access to education implies, on the one hand, an autonomous right of residence for the child of a former or present migrant worker, when that child wishes to pursue his or her studies in the host Member State. On the other hand, it also implies a corresponding right of residence in favour of the parent who actually has custody of that child, as the Court of Justice clearly confirms in the *N.A.* judgment, thus compensating, as has been indicated, his or her indifference to the domestic violence suffered by the applicant.¹¹⁷ What is most often perceived as a one-way dependency is thus reformulated in the European legal discourse as an interdependence between family members.

More specifically, the Court of Justice carried out a reverse dependency relationship in the processing of asylum applications. In the *K.* case, it held that a State not responsible for an asylum application within the meaning of Regulation 343/2003 (known as "Dublin II") should nevertheless declare itself competent to hear it,¹¹⁸ if the asylum application was made by a person with whom a legally residing family member was in a situation of dependence.¹¹⁹ In this case, it was a mother-in-law who was taking care of her daughter-in-law, traumatized by a painful event that she had to keep secret and unable to take care of her children alone. However, Art. 15, para. 2, of the Regulation seemed to provide for an obligation to bring members of the same family together only in the event that the person seeking asylum was dependent on the assistance of another, who was also a family member, thereby justifying reunification. Consequently, the situation in which the dependent person was not the asylum seeker but a dependent member of her family was not covered by the text. However, the Court of Justice extended the consideration of the dependency relationship to the opposite hypothesis to that provided for in the Regulation where a family member is dependent on the asylum seeker, as was the case here. Consequently, the asylum seeker is no longer the one who requests assistance but the one who provides it, legitimizing that his application be examined in the State in which a member of his family is closely dependent on it. As a result, the asylum seeker is dependent on the legal residence of the family member, while in return the family member is dependent on the care of the asylum seeker. In Art. 16 of Regulation 604/2013, known as "Dublin III", the Union legislator took into account this

¹¹⁶ Court of Justice, judgment of 23 February 2010, case C-310/08, *Ibrahim* [GC], para. 40.

¹¹⁷ *N.A.*, cit., para. 64.

¹¹⁸ Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

¹¹⁹ Court of Justice, judgment of 6 November 2012, case C-245/11, *K.* [GC].

possible reversal of dependence, but limited it to “direct” family members (child, father or mother, brother or sister), thus creating a distinction that is inconsistent with the initial spirit of taking dependence into account.¹²⁰

Finally, by reversing the situation that gave rise to the *Ruiz Zambrano* judgment, what would be the situation of a Union citizen’s dependent relative? The Court of Justice considered the possibility of adult dependence very unlikely, but it did not completely rule out the possibility.¹²¹ This would be the case, for example, if a disabled relative of a citizen of the Union on whose care he or she is closely dependent were subject to a removal order. Should we not consider that, with regard to the parent’s dependence on the citizen (and not the other way around), the citizen would be forced to accompany the disabled person because he or she would otherwise have to assume the idea that the disabled person would have been left unable to live decently? To offer protection in such a situation would be to admit that exposing a citizen to the dilemma of leaving the Union or leaving his or her dependent relative would be an unbearable situation. The legal discourse would thus attach importance to the moral duty of the citizen to assist a dependent parent by avoiding such a dilemma. In such a case, one could consider that the perception maintained by the law would be that of dependence not only on the person who needs care, but also on the family member who provides it, in that he or she appears morally inseparable from the former. This would mean recognizing that the citizen too is totally dependent on the parent by force alone on the emotional family bond.

V. CONCLUSION

The aim of the “form of life” approach is to examine the law in a different manner. This is not to deny that Union law is the institutional result of power relations, multiple dominations, as well as competing authorities and normativities. But it is also the site of a reconfiguration of the perception of our lives and the ways we live them. Beyond the raw, and sometimes abrupt, solutions that it is asked to produce, Union law is based on mental constructions and representations that are rooted in the way we think and live our lives. By formalizing them in its own language, according to its own techniques, and in the light of the specific constraints weighing on it, the European legal discourse contributes to the formation of a conceptual space that serves as a framework of meaning for our lives, in particular, as we have heard, with regard to the elementary form of hu-

¹²⁰ Art. 16 of Regulation 604/2013, cit.

¹²¹ *K.A. and Others* [GC], cit., para. 65. In the *Subdelegación del Gobierno en Ciudad Real* judgment, the Court of Justice held that a national measure refusing family reunification which prevents account from being taken of any dependency relationship between a Union citizen and his spouse is incompatible with Art. 20 TFEU. However, in the present case, the mere fact that the spouses are subject to an obligation to live together is not sufficient to characterise such dependence (judgment of 27 February 2020, case C-836/18, *Subdelegación del Gobierno en Ciudad Real*).

man life that is family life. Updating these conceptual resources, understanding their balances and tensions, even inconsistencies, offers another way of looking at European integration and, possibly, of nuancing the criticisms that see it as nothing more than an artificial, purely functional, and totally disembodied structure.

It must be admitted that these constructions of European legal discourse, which elaborate a conceptual space that values freedom and affectivity in human relations, are often still part of a functionalist approach, emphasizing the instrumental nature of the law in achieving the objectives assigned to it. It is certain that the functionalist approach sometimes leads to certain forms of questionable imbalances and distinctions in the law, whether between citizens and foreigners, within citizens according to their sedentary lifestyle or mobility, between different types of families, or even within the family relationship itself. However, it is also possible to detect a more essentialist discourse on what it means to lead a family life worthy of being lived in the European area. At a time when the precise aims of the European project are fading, a European imagination is emerging through the language of law, which is part of the formation of a certain European culture.

As this *Article* has attempted to show, the de-forming and re-forming by Union law of the representations underlying what it means to lead a family life in the European area reveals the influence of legal discourse in the construction of a social imaginary. It is nevertheless difficult to extract at this stage a clear guideline in this recomposition of our intellectual structure. This nascent European legal discourse is developing in multiple and complex directions, sometimes even opposing. On the surface, it would be possible to detect in the recognition of certain forms of procreation and conjugal union the insinuation in our conceptual apparatus that family life has become a matter of choice rather than a natural process imposed on human beings, fuelling the perception of Union law as mainly liberal, emancipatory and even individualistic. But, in reality, this *Article* has tried to show that most European legal developments relating to family life insist on relationships of sentimentality, affectivity, solidarity or vulnerability that are conceived as specific to the very nature of the human being as fragile, evolving and capable of intense emotions. This is the case, in particular, when it comes to the concept of dependence, the interpretation of which conditions a protection of the individual's own belonging to the European Union.

The question also arises as to how the European approach to family life should relate to the diversity of national models and imaginaries. While transnational situations remain the focus of attention in Union law, it is clear that significant tensions could emerge between Member States in a context of increasing identity claims. The form of family life will be an important issue for transnational democracy, or for the confrontation of democratic choices by Member States on the European way of life.



ARTICLES

TRANSNATIONAL JUDICIAL REVIEW IN HORIZONTAL COMPOSITE PROCEDURES: *BERLIOZ, DONNELLAN,* AND THE CONSTITUTIONAL LAW OF THE UNION

PAOLO MAZZOTTI* AND MARIOLINA ELIANTONIO**

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ABSTRACT: The policy area of cooperation between fiscal authorities of Member States of the EU has historically been characterised by advanced patterns of administrative integration which, coupled with the sensitivity of the subject-matter in terms of potential impingement on taxpayers' rights, have made all the more problematic the gaps in effective judicial protection generally to be found in composite procedures set up by EU administrative law. This *Article* analyses two recent rulings delivered by the Court of Justice where what might be labelled as transnational judicial review has for the first time been accepted by the Court: the possibility that, in so-called horizontal composite procedures, the judiciary of the State to which the authority adopting the final act of the procedure belongs review, along with such latter act, preparatory acts adopted in earlier stages of the procedure by authorities of a different Member State. It strives to read the rulings against the broader background of the judicial dialogue currently engaged into by the European Court of Human Rights and the Court of Justice on the principle of mutual trust, and it argues that the progressive solution reached by the Court of Justice in those cases can be applied across all areas of EU administrative law, pivoting on the right to an effective judicial remedy, but also on other general principles of EU constitutional law (and, in particular, the principles of autonomy and uniformity of EU law).

KEYWORDS: transnational judicial review – right to an effective judicial remedy – composite procedures – cooperation in fiscal matters – autonomy of EU law – uniformity of EU law.

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I. INTRODUCTION

As is now almost a commonplace to point out,¹ the evolution of the EU towards the creation of a “European administrative space” has given rise to a striking paradox. On the one hand, according to a convincing periodisation,² it led to the setting up, from the 1990s onwards, of an “integrated administration”,³ whereby administrative authorities from the EU and the Member States (hereinafter: MS) have come to act in a regime of ever growing, close co-operation, involving not only the joint execution of EU law, but also a continuous and informal exchange of information, ideas, and best practices. On the other hand, the judiciary meant to review the acts emanating therefrom has remained strongly fragmented. A strict adherence to the traditional doctrine of executive federalism, under which the judicial authority competent for reviewing administrative acts is, in procedures where integration takes the shape of a procedural link between EU and MS’ authorities (so-called “vertical composite procedures”),⁴ that of the system to which the final act of the proce-

¹ See, for instance, B. MARCHETTI, *Il sistema integrato di tutela*, in B. MARCHETTI, L. DE LUCIA (eds), *L'amministrazione europea e le sue regole*, Bologna: Società Editrice Il Mulino, 2015, p. 197 *et seq.* (in particular, pp. 197-200).

² Both the concept of “European administrative space” and the periodisation referred to have been developed in H.C.H. HOFMANN, *European Administration: Nature and Developments of a Legal and Political Space*, in G. DELLA CANANEA, C. HARLOW, P. LEINO (eds), *Research Handbook on EU Administrative Law*, Cheltenham – Northampton: Edward Elgar Publishing, 2017, p. 21 *et seq.* (in particular, pp. 23-28). According to Hofmann, the “European administrative space” amounts to “the phenomenon of the coordinated formation of policies and subsequent implementation of EU law which is marked by a high degree of close cooperation between MS’ administrations on various levels, EU institutions and bodies as well as private, semi-private and public standard-setting bodies” (*Ibid.*, p. 23). In the author’s account, such phenomenon, closely linked with “his” concept of “integrated administration” (see below, note 3), is the outcome of an evolution which, starting in the 60s with a “vertical” integration of the MS’ legal systems, opened the latter to rules on administrative action stemming from the Community, passed through a further stage of “horizontal” integration from the 70s onwards, where the mutual recognition obligation imposed on MS by the *Cassis de Dijon* jurisprudence (Court of Justice, judgment of 20 February 1979, case 120/78, *Rewe Central Ag v. Bundesmonopolverwaltung für Branntwein*) opened each State’s legal systems to extra-territorial legal effects produced by other States’ authorities. The third stage – in fact, the emergence of the “integrated administration” – was, in such construction, (also) a response elaborated by the legal systems concerned to the hurdles posed by horizontal integration, in terms of risks of substantial deprivation of the protection offered by regulatory standards implicit therein.

³ The notion has, as is well known, first been powerfully developed in H.C.H. HOFMANN, A.H. TÜRK, *Conclusions: Europe’s Integrated Administration*, in H.C.H. HOFMANN, A.H. TÜRK (eds), *EU Administrative Governance*, Cheltenham – Northampton: Edward Elgar Publishing, 2006, p. 573 *et seq.* (in particular, pp. 580-591). In its most synthetic and effective expression, the concept was used to address “the idea that EU administrative governance takes place within a framework, where supranational and national bodies are linked together in the performance of the tasks entrusted to the European Union” (*Ibid.*, p. 583).

⁴ For this terminology, see, *inter alios*, H.C.H. HOFMANN, *Decisionmaking in EU Administrative Law – The Problem of Composite Procedures*, in *Administrative Law Review*, 2009, p. 199 *et seq.* (in particular, pp. 202-203).

procedure belongs, has given rise to significant gaps in judicial protection, upon which most publications problematizing the issues of integrated administration have focused.⁵

On the contrary, scholars have not paid an equal attention to the similar concerns raised by so-called “horizontal composite procedures”,⁶ whereby the authorities being procedurally integrated are those belonging to different MS. Yet, the core conundrum of integrated administration is here to be found as well: the review performed by the judiciary of the legal system to which the “final” act belongs (let us call it judge in State A), vested with competence for hearing claims against such act (which, in turn, is most often the only reviewable one),⁷ is hindered by the lack of competence, as a matter of principle, to review the acts adopted in earlier stages of the procedure by authorities of another MS (we can call it State B). This allocation of competence and these limits on judicial review are, essentially and historically, concerned with considerations of sovereignty: since in these cases acts other than the final one are attributable to authorities of State B, sovereignly equal to State A, reviewing the act adopted by the former would amount to an unacceptable intrusion on its sovereignty. Hence, in most cases the “final” judiciary will refrain from reviewing earlier stages of the procedure, declining jurisdiction to do so.⁸ It can also be added that the opposite solution would entail significant practical hurdles, in terms of the judge of State A having to apply standards of legality set by the legal system of State B, which the judge does not most likely know, or does not even have access to.

Whether these assumptions are tenable in the context of the European administrative space will be assessed in this *Article*. What is important to underline here is that declining jurisdiction to assess the legality of preparatory acts adopted by administrative authorities of the “first” State in the procedure undermines the effectiveness of the judicial review carried out on the final act, because earlier acts contribute in determining, to a degree which varies depending on the features of the procedure at stake, the outcome of the procedure as a whole. The most obvious case is that of procedures where the “final” authority enjoys no discretion and merely formalises a decision the substantive content of which is determined elsewhere, but instances where another authority’s

⁵ See, *ex multis*, G. DELLA CANANEA, *The European Union’s Mixed Administrative Proceedings*, in *Law and Contemporary Problems*, 2004, p. 197 *et seq.* (in particular, pp. 201-203 and pp. 213-214); B.G. MATTARELLA, *Procedimenti e atti amministrativi*, in M.P. CHITI (ed.), *Diritto amministrativo europeo*, Milan: Giuffrè Editore, 2013, p. 327 *et seq.* (in particular, pp. 336-338); M. ELIANTONIO, *Judicial Review in an Integrated Administration: the Case of ‘Composite Procedures’*, in *Review of European Administrative Law*, 2014, p. 65 *et seq.* (in particular, pp. 96-102).

⁶ See H.C.H. HOFMANN, *Decisionmaking in EU Administrative Law*, cit., pp. 202-203.

⁷ In many cases this outcome, far from being a mere conclusion of legal logic (even though one might argue that this would be the case, in that it is more rational to challenge the procedure once it is over, and the legal situation is clearly settled), is mandated by rules on reviewable acts adopted by national legal systems. See, to that effect, M. ELIANTONIO, *Judicial Review in an Integrated Administration*, cit., pp. 82-83.

⁸ In the context of EU composite procedures, this is predicated to find a further, specific justification in the principle of mutual trust between MS (see *infra*, Section III).

impulse acts as a necessary trigger for the whole procedure are not less problematic. The non-reviewability of the earlier act entails, respectively, a risk that no redress is afforded against an arbitrary overstepping of the authority's discretion, and the possibility that an act is adopted without the conditions set forth by the European legislature for doing so having been fulfilled.

The present *Article* will try to assess whether, at the state of EU law, the traditional doctrine of non-reviewability of other States' acts in horizontal composite procedures can be overcome. It will do so by analyzing the case-study of administrative cooperation in fiscal matters, and, in particular the recent ruling delivered by the Court of Justice in the case of *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes* (hereinafter, *Berlioz*),⁹ where, in essence, the carrying out of this review was required of national judges (Section II). The argument deployed by the Court to this end will be assessed, and its interrelationship with other principles of EU constitutional law will be explored, in order to assess whether *Berlioz* could amount to an authority liable to be extended to horizontal composite procedures in general (Section III). The conclusion reached will then be tested against another recent case dealt with by the Court, *Donnellan*,¹⁰ to be used to explore what the currently prevailing attitude of the Court on the matter seems to be, as well as what prospective developments could be foreseen (Section IV). Some concluding remarks will finally be made (Section V).

II. THE CASE OF *BERLIOZ*: TOWARDS TRANSNATIONAL JUDICIAL REVIEW

Berlioz was a Luxembourgish joint stock company, which had established a French subsidiary which paid dividends to it. The French tax administration initiated proceedings in order to assess whether the relationship between the two companies complied with the requirements set forth by French tax laws for an exemption from withholding tax to be granted. It therefore addressed the Luxembourgish tax administration a request for exchange of information on *Berlioz*.

Such administration, being in principle bound by the request under Art. 5 of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC,¹¹ addressed *Berlioz* an order asking for certain information, which the company provided in whole, except for the names, addresses and capital detained by its shareholders. In *Berlioz's* opinion, the requirements

⁹ Court of Justice, judgment of 16 May 2017, case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes*.

¹⁰ Court of Justice, judgment of 26 April 2018, case C-34/17, *Donnellan*.

¹¹ "At the request of the requesting authority, the requested authority *shall* communicate to the requesting authority any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries" (emphasis added). See *infra* for the content of Art. 1, para. 1. Certain limitations on the obligation to provide information, as well as to carry out enquiries to obtain it where it is not immediately available, are to be found in Art. 17 of the Directive (which, nonetheless, is of no relevance here).

set forth in Art. 1, para. 1, of Directive 2011/16 for the exchange of information to be requested, namely that the information sought be “of foreseeable relevance” to the administration and enforcement of taxes covered by the Directive,¹² had not been fulfilled, so that the company could legitimately refuse to provide the Luxembourgish authority with such information.¹³

As a consequence, the Luxembourg tax authority imposed a fine upon Berlioz, which the company challenged before the Luxembourgish administrative judge. The ground for challenging the decision was the alleged ill-foundedness of the information order which the penalty aimed at enforcing: Berlioz argued that the French request, which amounted to a pre-condition for the information order to be issued, was ill-founded in turn,¹⁴ the information lacking foreseeable relevance. The court of first instance, while reducing the amount of the fine, refused to adjudicate on the issue of well-foundedness of the underlying order, and confirmed the existence of the penalty upon the company.¹⁵ Berlioz therefore claimed before the court of second instance an impairment of its right to an effective judicial remedy, as guaranteed by Art. 6, para. 1, of the European Convention for the Protection of Human Rights (ECHR), on the part of such refusal to adjudicate.¹⁶

The Luxembourgish *Cour administrative*, apparently on its own motion, speculated on the applicability of the analogous and broader provision of Art. 47 of the Charter of Fundamental Rights of the European Union (Charter), and referred to the Court of Justice a series of preliminary questions whereby it asked, in essence, whether, in the first place, the Charter applied at all to the controversy at issue. Were the Court to answer in the positive, the national court asked whether the Charter’s right to an effective remedy implied a power on the part of the national court to review, in the context of a claim brought against the decision imposing a penalty for the enforcement of an information order issued pursuant to an information request under Art. 5 of Directive 2011/16, both the information order and the information request upon which this was founded, and

¹² More precisely, Art. 1, para. 1, reads as follows: “This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2”.

¹³ *Berlioz*, cit., paras 21-24.

¹⁴ *Ibid.*, paras 25-26.

¹⁵ *Ibid.*, para. 27.

¹⁶ The resort to the ECHR, instead than to the Charter, can probably be explained by the fact that the falling of the controversy “within the scope of EU law” for the purposes of Arts 47 and 51 of the Charter was not so clear-cut, as, when the controversy involving *Berlioz* took place (2015), the controversial ruling in Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC], which allowed for such claims to be deemed as covered by the Charter, had only been rendered since a little time. Proof of this can be found in the fact that the Luxembourgish Court also referred a question on the applicability of the Charter (see *infra*).

to review the latter in the light of the aforementioned requirement of “foreseeable relevance” of the information sought. Lastly, the court asked whether, were such a power to be conferred upon it, the national court, taking account of the secrecy which Art. 16, para. 1, of the Directive attaches to the information request, should have access thereto in order to be able to carry out its review.¹⁷

The Court did not encounter many hurdles, recalling the doctrine developed in *Åkerberg Fransson*,¹⁸ in maintaining that the Charter was applicable in the case at stake.¹⁹ Nor did it find it difficult to uphold AG Wathelet’s conclusion that the right to an effective judicial remedy, as guaranteed by Art. 47 of the Charter, could subsequently be invoked.²⁰ Given that this right entails the power of the judge “to consider all the rel-

¹⁷ *Berlioz*, cit., paras 27-31.

¹⁸ *Åkerberg Fransson*, cit. This was the famous case where the Court developed the doctrine that measures of fiscal enforcement, such as criminal proceedings brought against tax evaders or punitive surcharges imposed upon the latter, would amount to measures of “implementation of Union law” for the purposes of Art. 51 the Charter, the provisions of which the MS would therefore be bound to comply with, in that they amounted to a way for States to abide by the obligation to set forth measures for the protection of the Union’s financial interests stemming from Art. 325 TFEU (*Åkerberg Fransson*, cit., paras 25-26). The Court also noted, in this respect, that, as long as a relationship of a means (the enforcement measure) to an end (the protection of the Union’s interests) could be found, it was immaterial whether the measure had been enacted with the purpose of complying with Art. 325, or not (*Åkerberg Fransson*, cit., para. 28). See, for a brief discussion of the possible systemic implications and limits of this doctrine, J.E. VAN DEN BRINK, W. DEN OUDEN, S. PRECHAL, R.J.G.M. WIDDERSHOVEN, *General Principles of Law*, in J.H. JANS, S. PRECHAL, R.J.G.M. WIDDERSHOVEN (eds.), *Europeanisation of Public Law*, Amsterdam: Europa Law Publishing, 2015, p. 115 *et seq.* (in particular, p. 152 *et seq.*).

¹⁹ *Berlioz*, cit., paras 32-42.

²⁰ The issue of what the limits of the right enshrined in Art. 47 of the Charter are, given that its wording requires that “rights and freedoms guaranteed by the law of the Union” be at stake, is indeed debated. This is particularly so in cases, such as *Berlioz*, where this condition is not satisfied; here, given that the main object of dispute was the well-foundedness of the penalty, which was not directly governed by EU law. The Court, in para. 49 of the judgment, simply maintained that “fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter”. On the other hand, and more persuasively, AG Wathelet opted, in his Opinion delivered on 10 January 2017, case C-682/15, *Berlioz Investment Fund SA v. Directeur de l’administration des Contributions directes*, paras 50-68, for construing Art. 47 in the light of its historical development as an unwritten general principle, essentially upholding the rule of law, and of the intention, on the part of the drafters of the Charter, to broaden the scope of protection when compared with Arts. 6 and 13 of the ECHR, thereby finding that “Article 47 of the Charter necessarily entails the right of access to justice, that is to say, the possibility for an individual to secure a rigorous judicial review of any act capable of *adversely affecting his interests*.” (para. 67 of the Opinion; emphasis added). The other option available to the Court would have been that of further drawing towards a generalisation of the principle underlying the finding made in the earlier case of Court of Justice, judgment of 5 November 2014, case C-166/13, *Mukarubega*. In this judgment the Court held that general principles, as they emerge from the case-law, are a different legal institution than fundamental rights enshrined in the Charter, even when there is apparent correspondence between the two, to the effect that the unwritten principle can be used to overcome restrictions placed by the drafter of the Charter upon the scope of the written provision. This would have meant, in the case at stake, to apply directly

evant issues”, the Court further inferred that “the national court hearing an action against the pecuniary administrative penalty imposed for failure to comply with an information order must be able to examine the legality of that information order”.²¹

Given the strict interrelation of such order (in this case, the Luxembourgish one) with the information request (the French one), though, the Court was soon faced with the question whether this review would entail also a power to review such underlying request, its emanation from a different MS notwithstanding. Finding that, in the context of the procedure under Directive 2011/16, “characterization of the requested information as being of ‘foreseeable relevance’ is a condition of the request relating to that information”,²² the Court held, in a potentially landmark decision, that the court of the requested State was to review this aspect of the information request’s legality, though limiting to satisfying itself that the information not be “manifestly devoid of any foreseeable relevance”.²³ As a corollary, the last question was answered in the sense that, where this is necessary for such review to be carried out, the national judge must be given access to the information request, its secrecy in principle notwithstanding.²⁴

III. TRANSNATIONAL JUDICIAL REVIEW AND THE CONSTITUTIONAL LAW OF THE UNION

The core of the judgment appears to be the Court of Justice’s recognition of the admissibility, and, indeed, of the mandatory character in the light of Art. 47 of the Charter, of what might be labelled as “transnational judicial review”: that is, of the carrying out, on the part of the judge of the legal system to which the final act of a composite procedure belongs, of judicial review over the preparatory acts issued by an administrative authority belonging to the legal system of a different MS.²⁵

the general principle alluded to by AG Wathelet, without unduly stretching the wording of Art. 47. See, in this respect, J.E. VAN DEN BRINK, W. DEN OUDEN, S. PRECHAL, R.J.G.M. WIDDERSHOVEN, *General Principles of Law*, cit., p. 141 *et seq.*

²¹ *Berlioz*, cit., paras 55-56.

²² *Ibid.*, para. 64.

²³ *Ibid.*, paras 82-86.

²⁴ *Ibid.*, paras 90-101.

²⁵ In this context, “preparatory act” must be understood in a broad sense, encompassing all those acts which, irrespective of their precise function in a composite procedure, are set forth in the applicable Union legislation as necessarily preceding the issuance of the “final act” – namely, the act which produces legal effects outside of the administration. The most obvious case is when the preparatory act is adopted as the basis for determining the discretionary content of a legally binding act (e.g., in the centralised procedure leading to the marketing authorisation of medicinal products pursuant to Arts 5-10 of Regulation (EC) 726/2004, the opinion issued by the European Medicines Agency is used as a basis by the Commission in adopting the decision as to whether or not to grant the marketing authorisation). In *Berlioz*, while not displaying any influence on the discretion of the Luxembourgish administration as regards the content of a legally binding act (that is, the information order), the French information request issued under Art. 5 of Directive 2011/16 is the necessary antecedent of the “administrative enquiry” carried out by the

Such a possibility has historically been deemed problematic, in the first place owing to considerations of sovereign equality between States, and in the second place owing to the practical difficulties it could have entailed.²⁶ In the particular context of the EU legal system, it has been ruled out in general under the principle of mutual trust informing the relationship between the MS. As the Court famously put it in the landmark Opinion 2/13,²⁷ this principle “requires [...] each of those States, save in *exceptional circumstances*, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law”.²⁸ As clarified by Judge Lenaerts,²⁹ more carefully elaborating in a personal capacity on a hint contained in Opinion 2/13 itself,³⁰ mutual trust is a fundamental principle of the Union’s constitutional law, which finds a basis in the principle of equality of the MS before the treaties,³¹ and a specific justification in the common set of values which all MS commit to abide by under Art. 2 TEU.³² Under this approach, mutual trust, while being of relevance first and foremost in the context of the area of freedom, security and justice (Arts 67-89 TFEU), in the context of which it was first developed, is to shed light on, and to be applied in, all policy areas of the EU.

While not expressly mentioning Opinion 2/13, the Court made reference to this problem in *Berlioz*, where it stated that, Directive 2011/16 being “founded on rules intended to create *confidence between Member States*”, the authorities of the MS requested to provide

Luxemburgish authority pursuant to Art. 6 of the Directive, and can therefore qualify as a “preparatory act” for the purposes of the present analysis.

²⁶ See *supra*, section I.

²⁷ Court of Justice, opinion 2/13 of 18 December 2014.

²⁸ *Ibid.*, para. 191 (emphasis added).

²⁹ K. LENAERTS, *La Vie Après l’Avis: Exploring the Principle of Mutual (yet not Blind) Trust*, in *Common Market Law Review*, 2017, p. 805 *et seq.*

³⁰ See Opinion 2/13, cit., para. 168: “This legal structure [the constitutional system of the EU, including its institutional structure and the principles of primacy and direct effect of EU law] is based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, asset of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore that the law of the EU that implements them will be respected” (emphasis added). This reasoning has been recently reasserted by the Court of Justice, quoting Opinion 2/13, in another seminal case such as Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea* [GC], para. 34. It is interesting to notice that, in both cases, Judge Lenaerts sat in the Court, in the former as vice-president, and in the latter as president.

³¹ As it is to be found in Art. 4, para. 2, TFEU, which, in the relevant part, reads: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”

³² K. LENAERTS, *La Vie Après l’Avis*, cit., pp. 807-812. Art. 2 TEU, in turn, reads: “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.”

information “must, *in principle*, trust the requesting authority and *assume that the request for information [...] is necessary* for the purposes of its investigation”.³³ The traditional inference from this finding would have been to deny the national court’s jurisdiction to carry out an autonomous review in this respect. Yet, the Court of Justice allowed the *Cour administrative* to review the French decision, essentially referring to Art. 47 of the Charter. What follows is an analysis of the reasoning behind this choice, coupled with a discussion of whether other principles of EU constitutional law might bolster it, in order to inquire into whether the Court’s conclusion is liable to be generalised to other horizontal composite procedures, beyond Directive 2011/16.

III.1. THE RIGHT TO AN EFFECTIVE JUDICIAL REMEDY

That, as noted above, the right to an effective judicial remedy implies that the national judge be able to assess “all relevant issues” to decide on the legality of a contested measure is by no means a novelty of this judgment.³⁴ Still, so far, the Court of Justice had been reluctant to allow a review of those “relevant issues” amounting to administrative acts emanating from other MS on two main grounds. One of these was the second of what Judge Lenaerts has named “the two negative obligations placed on the MS by the principle of mutual trust”:³⁵ in the words of Opinion 2/13, Member States, “save in exceptional cases, may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”,³⁶ and this conclusion seems to be valid, *a fortiori*, for cases where the application of EU law does not entail an impingement on fundamental rights. Further, the Court has repeatedly stated, albeit in a somehow simplistic manner, that preparatory measures in horizontal composite procedures are, in general, to be reviewed by the judges of the legal system they emanate from, as the authorities “best placed to judge the legality of the measure according to [their] national law”.³⁷

The reason why the Court decided to depart from its traditional stance should be viewed precisely in the light of the “exceptional cases” quoted in the aforementioned excerpt of Opinion 2/13. One bare year before the judgment in *Berliož*, the European Court of Human Rights delivered a judgment in *Avotiņš v. Latvia*,³⁸ where it held, in the

³³ *Berliož*, cit., para. 77 (emphasis added).

³⁴ The precedent most often quoted in this respect is Court of Justice, judgment of 4 June 2013, case C-300/11, *ZZ*, where, at para. 59, the Court held that the review of the legality of the decision at stake in the main proceedings (a refusal to grant entry into the territory of the UK based on national security grounds) should cover “all the grounds and the related evidence on the basis of which the decision was taken”.

³⁵ K. LENAERTS, *La Vie Après l’Avis*, cit., p. 813.

³⁶ Opinion 2/13, cit., para. 193.

³⁷ See, though in a different context which, nonetheless, involves fiscal cooperation issues, and is thereby of interest, Court of Justice, judgment of 14 January 2010, case C-233/08, *Kyrian*, para. 40. The case will be addressed in more detail *infra*, section IV.

³⁸ European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia*.

context of the limits of the so-called “*Bosphorus* presumption”,³⁹ that “if a serious and substantiated complaint is raised before [the judge of a MS of the EU] to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, [that judge] cannot refrain from examining that complaint on the sole ground that [it is] applying EU law”.⁴⁰ In *Avotiņš*, the EU law being complained of was precisely the system of mutual recognition of judgments envisaged by the so-called “Brussels I Regulation”, one of the most prominent examples of the principle of mutual trust, explicitly quoted by Opinion 2/13 itself.⁴¹

Many scholars have seen in *Avotiņš v. Latvia* a reaction on the part of the European Court against Opinion 2/13, and a call upon the placement of limitations on the principle of mutual trust, when it could interfere with the enjoyment of fundamental rights.⁴² In the contribution published in a personal capacity already referred to above, Judge Lenaerts argued that the acceptable exceptions to the principle of mutual trust under Opinion 2/13 should be read precisely in the light of *Avotiņš*.⁴³ That is, in his account, the “exceptional circumstances” mentioned in Opinion 2/13, allowing MS to deviate from the obligation to refrain from double-checking other MS’ compliance with EU law, should be deemed to prevail when, as requested by the European Court of Human rights in *Avotiņš*, “substantial grounds” are found for believing, in individual cases, that an application of such principle would entail a “real risk” of breaching fundamental rights. This appears to be precisely what the Court of Justice did, shortly after the publication of Judge Lenaerts’ article, in *Berliož*, and it is arguably by no means an accident that Judge Lenaerts himself sat in the Grand Chamber in his capacity of president of the Court.⁴⁴ Though not explicitly quoted, *Avotiņš v. Latvia* indeed seems to permeate the AG’s and the Court’s reasoning in *Berliož*.⁴⁵

³⁹ Reference is made here to the well-known doctrine, developed in European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v. Ireland*, under which the European Court would refrain, as a rule, from examining claims brought against State Parties to the ECHR for conduct amounting to a mere implementation, lacking any degree of discretion, of obligations stemming from membership in an international organisation, such as the EU, offering a system of protection of human rights comparable, from both the substantive and the procedural point of view, with that under the ECHR.

⁴⁰ *Avotiņš v. Latvia*, cit., para. 116.

⁴¹ Opinion 2/13, cit., para. 192, where the Court underlined the importance of the principle of mutual trust “particularly with regard to the area of freedom, security and justice”.

⁴² See P. GRAGL, *An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights’ Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case*, in *European Constitutional Law Review*, 2017, p. 551 et seq.

⁴³ K. LENAERTS, *La Vie Après l’Avis*, cit., pp. 828-837.

⁴⁴ The issue of the *Common Market Law Review* containing Judge Lenaerts’ article was published in April 2017, whereas the judgment in *Berliož* was delivered in May 2017. Overall, it seems to be fair to assume that Judge Lenaerts played a key role in the theoretical justification and judicial operation of the

AG Wathelet grounded his finding that the Luxemburgish court should be able to review the French information request on a reading of Art. 47 of the Charter, pursuant to Art. 52, para. 3, thereof,⁴⁶ in the light of the European Court of Human Rights' case-law. As involving a penalty, the main proceedings amounted to "the determination of a criminal charge", thereby triggering the applicability of Art. 6, para. 1, of the ECHR and requiring that an "independent and impartial tribunal" could review the legality of the decision imposing that penalty.⁴⁷ Given that Berlioz was submitting "substantial grounds" that such aspect of Art. 6 had been violated, in that the Luxembourgish court of first instance had refused to review the legality of the information order on which the penalty depended (that is, the fulfilment of the condition of "foreseeable relevance" of the information sought by the French tax authorities, on which the information order further depended), if the case had ended up to Strasbourg it could have led, under *Avotiņš*, to the first rebuttal ever of the *Bosphorus* presumption. That the AG's Opinion was of the outmost relevance to the Court's reasoning is, in turn, shown by the fact that the conclusion on the obligation on the part of the Luxembourgish court to review the legality of the information order is grounded on a recall of the AG's analysis,⁴⁸ and that the limits on the subsequent review of the information request are the same as those advocated by AG Wathelet.⁴⁹

The implications of this finding might extend well beyond the limited scope of Directive 2011/16, as Art. 47 of the Charter and the principle of mutual trust are institutions of a general application in the context of EU (administrative) law. The reasoning deployed in *Berlioz* is thus capable of being generalised, first and foremost, to all cases where a national measure, qualifying as "criminal" in the aforementioned sense, of enforcement of a decision reached at the outcome of a horizontal composite procedure is

principle of mutual trust in the "modern" version which seems to be emerging in the recent case law of the Court of Justice referred to in this paper.

⁴⁵ That *Avotiņš v. Latvia* is of general concern to the EU institutions can be inferred not only from the circumstances referred to *sub* note 44, but also from the submissions issued by the Commission to the Court of Justice in the later, and in many respects analogous, case of *Donnellan* (see *infra*, Section IV).

⁴⁶ "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

⁴⁷ Opinion of AG Wathelet, *Berlioz*, cit., paras 73-80. The qualification of the penalty at stake as "criminal" for the purposes of Art. 6 of the ECHR is, in turn, grounded on the jurisprudence first developed in European Court of Human Rights, judgment of 8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, *Engel and others v. the Netherlands* [GC], where it was held that also measures qualifying as "administrative" under national law (such as the penalty imposed on Berlioz) can be deemed "criminal" for the purposes of Art. 6, taking into account, in particular, the nature of the offence for which they are applied and the nature and severity of the penalty itself.

⁴⁸ *Berlioz*, cit., para. 56.

⁴⁹ *Berlioz*, cit., paras 79-85. Space precludes here an in-depth analysis of this aspect of the judgment, as this paper is focused on the admissibility of transnational judicial review as a matter of principle.

challenged before a national court: in all such cases, Art. 47 of the Charter and Art. 6 of the ECHR would be breached, in the same way as they would have been in *Berlio*, if the national judge refused to examine the legality of the decision underlying the enforcement measure. The reach of *Berlio* might be even broader, though. As pointed out above,⁵⁰ in the Court's reasoning, Art. 47 of the Charter is, unlike Art. 6, para. 1, of the ECHR, applicable "in all situations governed by EU law", irrespective of whether a "civil right or obligation" or a "criminal charge" is at stake.⁵¹ Therefore, *Berlio*'s reasoning can be used to find a right to bring a claim against *any* alleged violation of EU law committed in the context of a horizontal composite procedure, without having to wait, as in *Berlio*, that an enforcement measure is enacted, for the case to involve a "criminal charge" and thereby to trigger the narrower protection offered under the ECHR.

This latter aspect is, further, strictly intertwined with the overcoming of the Court's second stance recalled above – namely, that transnational judicial review ought not to be carried out, given that the judges of the MS in which the preparatory act is adopted are the ones best placed to assess the legality of that act itself in the light of "their" national law. As is apparent from the case at stake, the very fact that a procedural link between authorities from different MS exists implies that, to a certain extent, an EU norm is applied in the procedure. In the case of *Berlio*, this was the conditioning of France's power to request Luxembourg for information on the requirement that the information sought be "of foreseeable relevance", and the assessment of whether such condition was fulfilled was the ambit of the information request's legality which the Court of Justice urged the *Cour administrative* to review. Thus the Court implicitly recognised, as some scholars had already hinted at,⁵² that there appears to be no reason why, in principle, the judges of a MS

⁵⁰ See note 20.

⁵¹ These are, indeed, the conditions under which Art. 6, para. 1, of the ECHR is applicable. The concept of "civil right or obligation" is particularly controversial, and appears not to have been fleshed out with precise contours by the European Court of Human Rights, which rather seems to approach on a somehow casuistic basis the most controversial, and most interesting for the purposes of the present research, case where the provision could be invoked – i.e., the bringing of claims against alleged violations of public law provisions. Nonetheless, a wide range of administrative law situations has been accepted by the Court to fall under the notion of "civil right and obligation", to the effect that the ECHR's provision itself would be liable to be applied in many other cases of horizontal composite procedures. See, in this respect, C. OVEY, B. RAINEY, E. WICKS, *The Right to a Fair Trial*, in F.G. JACOBS, C. OVEY, R.C.A. WHITE (eds), *The European Convention on Human Rights*, Oxford: Oxford University Press, 2017, p. 274 *et seq.* (in particular, pp. 278-284).

⁵² See H.C.H. HOFMANN, A. TÜRK, *Legal Challenges in EU Administrative Law by the Move to an Integrated Administration*, in H.C.H. HOFMANN, A. TÜRK (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Cheltenham – Northampton: Edward Elgar Publishing, 2009, p. 355 *et seq.* (in particular, pp. 375-376). The argument was advanced in the context of vertical composite procedures and with regard to the jurisdiction of EU Courts to review preparatory acts issued by national administrative authorities, but it applies *a fortiori* in horizontal procedures, given that the strongest argument for excluding such a "top-down" review, namely the limits placed on EU Courts' jurisdiction in the light of the principles of conferral (Arts 263-281 only envisage EU acts as possible object of review in the context of the various actions liable to

should not be allowed to review the compliance of the administrative authorities of another MS with EU law, to which both MS are bound, and, as recalled by Judge Lenaerts in the passage quoted above, in respect of which both MS are equal. On the contrary, the admissibility of transnational judicial review in this context is in line, from the political point of view, with the argument that, in the context of the EU and of its “shared sovereignty”, the executive authorities of each MS are accountable not only before “their own” people, but also before those of other MS, to the effect that the “old” doctrine of sovereign equality as a factor preventing such review⁵³ loses much of its appeal.⁵⁴ From the legal point of view, this fits well with the notion of “national judges as [Union] courts of general jurisdiction”,⁵⁵ whereby national courts are considered as the ordinary fora where Union law should find judicial enforcement and redress against any breach thereof – an aspect which also leads us to the broader horizon of EU constitutional law.

III.2. OTHER PRINCIPLES OF CONSTITUTIONAL LAW OF THE UNION

Brito Bastos⁵⁶ has noticed that, in the context of “bottom-up” vertical composite procedures, where the final act is adopted by EU authorities on the basis of preparatory acts issued by national authorities, a number of fundamental principles of the EU constitutional order clash with each other as regards the question of whether the Court of Justice should be able to review the legality of the acts issued in the national steps of the procedure. On the one hand, one would conclude in the affirmative, in order to grant an effective judicial protection and the upholding of the “objective aspect of the rule of law” – namely, the need for executive authorities’ activity to be guided by the norms laid down by democratically legitimised rule-makers.⁵⁷ On the other hand, opening to such a possibility would risk to overstep the limits placed on the jurisdiction of the CJEU, as this is not competent to review acts emanating from national authorities.⁵⁸ Similarly, this would risk to hinder the principles of autonomy of EU law, given that the lawfulness of EU acts would be assessed in the light of norms of national law,⁵⁹ and of uniformity thereof, as the validity of such acts would depend on whether different national authorities executing the same EU law provisions comply with the respective national laws or not.⁶⁰

be triggered before the judiciary of the Union) and of subsidiarity, does not apply in this form of composite administrative cooperation (also see, in this latter respect, *infra*, section III.2).

⁵³ See note 8 and corresponding text in the main body.

⁵⁴ See S. CASSESE, *La Democrazia e i Suoi Limiti*, Milan: Arnoldo Mondadori Editore, 2017, p. 86.

⁵⁵ This is the formula first deployed in Court of First Instance, judgment of 10 July 1990, case T-51/89, *Tetra Pak Rausing SA v. Commission*, para. 42.

⁵⁶ F. BRITO BASTOS, *Derivative Illegality in European Composite Administrative Procedures*, in *Common Market Law Review*, 2018, p. 101 *et seq.*

⁵⁷ *Ibid.*, p. 102 and pp. 112-113.

⁵⁸ *Ibid.*, p. 111. Also see note 53.

⁵⁹ *Ibid.*, p. 111.

⁶⁰ *Ibid.*, p. 112.

The point made here is that, when it comes to horizontal composite procedures, one would find no such conflict between equally overarching principles, capable of preventing the judge of the “final” MS from reviewing the acts adopted by the authorities of the MS involved in the earlier stages of the procedure. As far as the reasons for allowing a broadened (i.e. transnational) judicial review are concerned, the situation is indeed comparable with the one prevailing in the context of vertical, “bottom-up” procedures. It is *Berlioz* itself which shows how ineffective the judicial protection afforded to the citizens would be, were violations of EU law committed at the stage of preparatory acts not to be open to judicial scrutiny in the context of a review carried out on the final act of the procedure: in fact, *Berlioz* would have been subjected to a fine imposed on it for non-compliance with an order, the legislative requirements for the issuance of which were lacking, with no judge vested with the power to redress such breach of the applicable legal provisions. Moreover, the “objective aspect of the rule of law” identified by Brito Bastos definitely seems worthy of being safeguarded in the context of horizontal composite procedures as well, the administrative authorities involved being bound to execute the will of the EU democratically legitimised legislature, just as much as they do when they co-operate with EU authorities.

Yet, no further comparison is to be drawn. Quite the contrary, one could even argue that those very same principles which, in the context of vertical, “bottom-up” procedures, prevent EU final acts from being affected by derivative illegality on account of breaches of the applicable provisions committed in the national stages of the procedure, not only do not place a similar brake on judges from the “final” legal system involved in a horizontal procedure, but do even require them to perform the transnational judicial review sketched above. On the one hand, the principle of strict separation between EU and national courts does not have a corresponding tenet as to the relationship between MS, save for the principle of mutual trust, which has been held liable to be set aside by *Berlioz*, and for that of sovereign equality which, though, does not match with the reality of the EU’s shared sovereignty and “horizontal accountability”.⁶¹ On the other hand, the uniformity of EU law would benefit from the possibility to carry out transnational judicial review: given that most often preparatory acts are not reviewable independently of the final decision,⁶² were it not possible to scrutinise them on the part of the national court competent on the basis of the final act of the procedure, a serious risk of leaving the interpretation of the norms on which they are based at the discretion of the national administrative authority adopting them would arise.⁶³ Therefore, the argument which one could develop to restrict judicial protection in the context of “bot-

⁶¹ This is the term deployed by Cassese in the work quoted *sub* note 54.

⁶² See note 7.

⁶³ This would have indeed been the case if the Court had reached a different conclusion in *Berlioz*, as the concept of “foreseeable relevance” of the information sought would have been left at the discretion of the interpretive autonomy of the French fiscal administration.

tom-up” vertical composite procedures cannot be simply transposed to the same effect in horizontal procedures: indeed, it could lead to the opposite finding.

IV. THE CASE OF *DONNELLAN*: ONE STEP FORWARD?

IV.1. DIRECTIVE 2010/24 AND THE CASE OF *DONNELLAN*

One bare year after *Berlioz*, the Court of Justice was confronted with another case involving cooperation in fiscal matters, the hurdles posed by which make it an interesting yardstick to measure the extent to which *Berlioz* might be deemed to embody a new sensitivity of the Court towards the problems surrounding gaps in judicial protection in horizontal composite procedures. *Donnellan*⁶⁴ involved the different, yet in many respects analogous system for cross-border collection of taxes set up by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.⁶⁵ Under this Directive, a number of arrangements are made available to European fiscal authorities, with the purpose of allowing for “mutual assistance between the Member States for the recovery of each others’ claims and those of the Union with respect to certain taxes and other measures”⁶⁶ to be provided. As made clear by Art. 1 of the Directive, such assistance is to be provided in cases where the recovery of one of the claims encompassed by the scope of the Directive arisen in State A is to be effected in State B, e.g. because the taxpayer has their assets or their residence in such latter State.

The most important, and strictly interrelated with each other, devices in such system of mutual assistance are the arrangements for assistance in the notification of documents relating to a claim and in respect of recovery of the claim itself. Under the former, the authority of the State in which the claim has arisen (“the applicant authority”) can ask for the authority of the State in which the notification is to take place (“the requested authority”) to notify to the addressee of a claim all documents emanating from the applicant MS, when the applicant authority is unable to notify them directly or could do so only encountering disproportionate difficulties.⁶⁷ However, assistance regarding recovery of the claim can be provided where an enforceable instrument permitting the recovery of one of the claims covered by the Directive in the applicant MS is available, and such recovery needs to be effected in the requested MS. In such a case, and as long as such instrument and the underlying claim are not contested in the applicant MS and all available procedures

⁶⁴ *Donnellan*, cit.

⁶⁵ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. For an early overview of the system set up therein, see B. TERRA, P. WATTEL, *European Tax Law*, Deventer: Kluwer, 2012, p. 845 *et seq.*

⁶⁶ Directive 2010/24/EU, Recital 1.

⁶⁷ *Ibid.*, Art. 8.

for the recovery to be carried out in the applicant MS have been undergone,⁶⁸ fiscal authorities in the applicant MS can request to the authorities of the requested MS to proceed with the recovery themselves.⁶⁹ In doing so, they are to submit a “uniform instrument permitting enforcement in the requested MS”, the content of which is standardised by the Directive itself, and which is directly and *per se* enforceable in the requested MS, without being subject to any act of recognition, supplementing or replacement.⁷⁰ The expeditious and proficient processing of the recovery request is ensured by an obligation placed on the requested authority to treat the claim “as if it was a claim of the requested MS”.⁷¹ As a matter of principle, the requested authority is bound to comply with any request of assistance, of notification as well as of recovery, provided the respective conditions briefly outlined above are fulfilled.⁷²

Given the complexity of the resulting system and the involvement of substantive tax claims on its part, which is obviously liable to give rise to an exceptional load of litigation initiated by taxpayers contesting the duty levied on them, the EU legislature introduced a provision for the apportionment of competence to hear judicial claims brought against the various acts through which the assistance arrangements are to unfold. Therefore, pursuant to Art. 14, the judiciary of the MS to which the applicant authority belongs is vested with jurisdiction as regards disputes concerning *a)* the substantive tax claim, *b)* the validity of the initial instrument permitting enforcement in the applicant State, *c)* the uniform instrument permitting enforcement in the requested State and *d)* the validity of a notification made by a competent authority of the applicant State. Conversely, judges in the requested MS can hear pleas challenging *a)* the measures of enforcement taken in such State pursuant to the request for assistance, as well as *b)* a notification made by a competent authority of the requested MS itself. Such allocation of jurisdiction is conceived by the legislature in rather strict terms, and appears to rest on the assumption that judges in each of the MS concerned are those best placed to assess the lawfulness of claims originating in “their own” legal system, also taking into account the only limited harmonisation of national provisions prevailing in the fiscal field. In this connection, no exception from such allocation of jurisdiction is provided for in Art. 14.

It was precisely this rigid division of judicial competences which was questioned in *Donnellan*. The case concerned the imposition, on the part of the Greek authorities in April 2009, of an administrative penalty over Mr. Donnellan, an Irish citizen, in relation with his alleged involvement in a case of cigarettes smuggling and issuance of fictitious

⁶⁸ *Ibid.*, Art. 11, para. 2, of which also lays down some limited exceptions for the need for all available recovery procedures to have been undergone in the applicant MS.

⁶⁹ *Ibid.*, Art. 10.

⁷⁰ *Ibid.*, Art. 12.

⁷¹ *Ibid.*, Art. 13.

⁷² A number of exceptions to the obligation for the requested authority to provide the requested assistance are spelled out by Art. 18 of Directive 2010/24/EU.

tax data. The contested facts, though, had taken place in July 2002, and Mr. Donnellan had been acquitted of all charges on appeal as early as in October that same year.⁷³ What was more, Mr. Donnellan was not made aware of the existence of the fine any earlier than in November 2012, when he was reached by an order, issued by the Irish fiscal administration, reclaiming the payment of the fine pursuant to the request for recovery assistance issued, under Art. 10 of Directive 2010/24, by the Greek authorities, the claim amounting to an administrative penalty connected with a tax claim and thereby falling within the scope of application of the Directive pursuant to Art. 2 thereof. By the time he was reached by such communication, to which a uniform instrument permitting enforcement in Ireland was attached, Mr. Donnellan had been barred from challenging the decision before Greek courts, the relevant limitation period having already elapsed.⁷⁴ In the ensuing litigation which Mr. Donnellan brought before the Irish judge, seeking relief from the enforceability of the order, it emerged that the Greek embassy had addressed a letter to him in June 2009, “inviting him to make contact with the embassy’s services”, without any further specification; still, such letter was never received by Mr. Donnellan, and the Greek authorities had satisfied themselves with publishing the fine on the *Official Journal of the Hellenic Republic*.⁷⁵ Moreover, the very same communication issued in November 2012 by the Irish authorities only referred to the claim as “multiple duties for illegal cigarette trading”, and Mr. Donnellan was not made aware of the grounds underlying the decision until December 2015, when the last of a series of letters elaborating on the matter was delivered to him.⁷⁶

The Irish judge was willing to grant relief to Mr. Donnellan, on account of both the failure on the part of the authorities involved to properly notify to him the instruments relevant to his possibilities of defence, and of the earlier acquittal in respect of the contested facts, fearing that allowing for the decision to be enforced in such circumstances would have contravened Irish public policy. Still, it found the path to so doing barred by Art. 14 of Directive 2010/24: such a refusal to enforce the order would have entailed an assessment of the legality “of a notification made by a competent authority in the applicant MS” (as regards the lack of notification) and of “the initial instrument permitting enforcement in the applicant MS” (as regards the *ne bis in idem* aspect of the dispute) – both appraisals which Art. 14 of the Directive, as seen above, attributes to the remit of the jurisdiction of the judges in the applicant MS. The Irish judge therefore decided to stay the proceedings, issuing a preliminary reference to the Court of Justice whereby it

⁷³ *Donnellan*, cit., paras 16-21. Still, the possible (likely?) problems to be found as regards compliance with the principle of *ne bis in idem*, enshrined in Art. 50 of the Charter, is not touched upon by the ruling.

⁷⁴ *Ibid.*, para. 34.

⁷⁵ *Ibid.*, paras 22-30.

⁷⁶ *Donnellan*, cit., para. 35.

asked, in essence, whether such an impossibility to refuse the enforcement of the decision was compatible with Art. 47 of the Charter.⁷⁷

The Court began its reasoning by apparently ruling out the possibility for transnational judicial review to be carried out in the context of a request for recovery assistance. It recalled Opinion 2/13 and the principle of mutual trust to which the relationship between fiscal authorities under Directive 2010/24 must be informed,⁷⁸ and held that, in view of the explicit wording of Art. 14, the Irish judge was barred from reviewing the legality of the conduct engaged into by the Greek authorities.⁷⁹ However, it went on to find that, pursuant to the ruling delivered in *Kyrian*,⁸⁰ “the requested authority may, exceptionally, decide not to grant its assistance to the applicant authority, [...] *inter alia* if it is shown that such enforcement is liable to be contrary to the public policy of [the requested MS]”.⁸¹ Thus, explicitly conceiving such a refusal of assistance as an exception to the principle of mutual trust, thereby mandating for a narrow construction, it struggled to identify under which circumstances such an option would be available to the requested authority.

Essentially restating the view articulated by the AG in his Opinion, it found that one of the conditions laid down in Directive 2010/24 for the assistance request to be issued, namely that the claim not be contested in the applicant MS, could not be deemed to be fulfilled in a case such as that of Mr. Donnellan: as being informed of the existence of a claim is a necessary precondition for such claim to be open to judicial contestation, a claim which could not be contested on the grounds that the taxpayer was not made aware of its very existence could not be deemed as fulfilling such non-contestation requirement.⁸² Such a conclusion was reached stressing the importance of Art. 47 of the Charter, the standard of effectiveness of which could not be deemed to have been complied with in circumstances such as those at stake.⁸³ Preventing possible allegations

⁷⁷ *Ibid.*, paras 36-38.

⁷⁸ *Ibid.*, paras 40-41. It is interesting to notice here that, by contrast, in *Berlioz* no express reference to Opinion 2/13 as such had been made. This might signal an increasing willingness of the Court to progressively broaden the scope of the principle beyond the area of freedom, security and justice to which it was primarily tied by Opinion 2/13 (and, possibly, in the direction suggested in K. LENAERTS, *La Vie Après l'Avis*, cit., extensively referred to above, section III). See, underlining this aspect of the judgment, F. PÉRALDI-LENEUF, *Confiance Mutuelle en Matière de Recouvrement de Créance, in Europe, in Europe – Actualité du Droit de l'Union Européenne*, 2018, pp. 18-19.

⁷⁹ *Donnellan*, cit., paras 44-46.

⁸⁰ Court of Justice, judgment of 14 January 2010, case C-233/08, *Kyrian*. This was the immediate antecedent to *Donnellan*, delivered construing Directive 76/308/EEC which was, in turn, the immediate antecedent to Directive 2010/24 and contained, in particular, a provision analogous to Art. 14 of such latter Directive, as restricting the jurisdiction of the judge in the requested MS to “enforcement measures taken in the Member State in which the requested authority is situated”. See *infra* for further detail.

⁸¹ *Donnellan*, cit., para. 47, quoting *Kyrian*, cit., para. 42.

⁸² *Donnellan*, cit., para. 57.

⁸³ Art. 47 is quoted in both para. 55 and para. 58. Curiously enough, though, while in the conclusion the Court focuses on the fact that Mr. Donnellan was not informed at all of the existence of the fine, so

in the opposite on the part of Greece from being made, the Court held that such finding was not open to contestation on the grounds that Mr. Donnellan had still been notified the uniform instrument permitting enforcement, given that the function of such instrument is to provide the requested authority with a legal title to enforce the recovery, and not to place the taxpayer in a position as to assert their rights.⁸⁴

Not unlike in *Berlioz*, then, the Court was faced with a case where the conditions set forth by an EU norm for an act to be issued in the context of a horizontal administrative proceeding were not fulfilled; unlike in *Berlioz*, however, it was confronted with a legislative norm explicitly stating that a plea aiming at having such violation reviewed by a court, as one relating to the uniform instrument permitting enforcement, ought to be brought before a judge in the applicant MS. The dilemma was solved in favour of effective judicial protection: contrary to the view taken at the outset of the ruling, the Court posited that, reading Art. 14 of Directive 2010/24 in the light of Art. 47 of the Charter, the restrictive allocation of jurisdiction enshrined in the former provision “[could not] reasonably be invoked against [Mr. Donnellan]”,⁸⁵ to the effect that the Irish judge could not be considered as being prevented from refusing to enforce the Greek request for recovery on the grounds which Mr. Donnellan was complaining about.

IV.2. ASSESSMENT

The case of *Donnellan* went largely unnoticed,⁸⁶ most likely because it was perceived by commentators as a mere restatement of the principles which could already be inferred from the way more annotated case of *Kyrian*, briefly mentioned above. *Kyrian* was delivered in the context of proceedings brought by a Czech taxpayer against an instrument permitting enforcement in the Czech Republic, issued pursuant to a request for assistance in the recovery of a claim made to the Czech authorities by the German fiscal administration under Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures. This measure lays down a system broadly comparable to the refined one set up by Directive 2010/24, including, for the present purposes, as regards the system for assistance in the

that he was prevented from challenging the decision before a Greek judge, as implied by the allocation of jurisdiction enshrined in Art. 14 of the Directive (para. 57), on the reasoning in those paragraphs it stresses, rather, the fact that he was not made aware of the facts and reasoning underlying the decision itself. This is probably due to the fact that, as pointed at in para. 60, the Greek Government claimed in its submissions before the Court, contrary to what had initially been maintained, that Donnellan was not barred from bringing a claim in a Greek court by Greek procedural law. Still, the reasoning appears somehow ambiguous, both in content and in structure.

⁸⁴ *Donnellan*, cit., para. 53.

⁸⁵ *Ibid.*, para. 59.

⁸⁶ The case information webpage on the CJEU's website (available at curia.europa.eu) only mentioned three scholarly articles addressing the case. The authors of this contribution were not able to identify, by means of an autonomous research, any further academic reference to the ruling.

notification of documents and in the recovery of claims, and the ensuing apportionment of jurisdiction.⁸⁷ Mr. Kyrian complained about not being allowed to fully understand the scope of the claim after having been notified the instrument permitting enforcement by the Czech authorities, on two accounts. Firstly, because of the fact that the identification of the debtor contained therein was unclear, it being possible to understand it as referring to Mr. Kyrian himself, as well as to his father and his son. Secondly, because the documents emanating from Germany which had been served on him by the Czech authorities, had not been translated from German, and could therefore not be understood by him. It was in this context that the Court first developed the principle that while, pursuant to the allocation of jurisdiction between the MS involved, it was not possible for the judges of the requested MS to assess the legality of the underlying claim *per se*, such judges could still refuse enforceability of the order in their domestic legal system, when such an enforcement would be liable to breach such State's public policy.⁸⁸ For such a refusal to be made, though, the judge in the requested MS would still need to be given jurisdiction, and one which would not be excluded under the provisions then in force. Given that such provisions envisaged the jurisdiction of judges in the requested MS only as regarded "enforcement measures" taken in the requested MS,⁸⁹ the Court construed such concept in an extensive manner, so as to encompass "notification to the addressee by the requested authority of all instruments and decisions which emanate" from the applicant MS,⁹⁰ as being

⁸⁷ Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, as amended by Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties.

⁸⁸ *Kyrian*, cit., paras 42-43. The conclusion, eminently dictated by considerations of substantive justice, was reached reasoning on the equation, highlighted above in the context of Directive 2010/24, between the (now, uniform) instrument permitting enforcement upon request of the applicant MS, on the one hand, and national instruments permitting enforcement in the requested MS, on the other hand. In more detail, the Court held that "it is hard to imagine that [a national instrument permitting the enforcement of the claim] would be enforced [by the requested MS] if that enforcement were liable to be contrary to the public policy of that State" (*ibid.*, para. 43). That is, interestingly, the Court resorted to an indent which was inserted by the legislature with the primary purpose of ensuring that the authority in the requested MS would diligently and expeditiously process the request issued by the applicant authority, in order to strengthen taxpayers' rights in a system lacking strong safeguarding provisions in this respect. However, in doing so, it accepted the risk that the effectiveness and speed of the collection be jeopardised, contrary to the apparent assumptions of the legislature (the focus on the effectiveness of the recovery proceeding can also be seen in the "whereas" part of Directive 76/308), reminding of the equally ranking importance of safeguarding the position of taxpayers.

⁸⁹ See Directive 76/308, Art. 12, para. 3. On the other hand, judges in the applicant MS were then vested with jurisdiction to adjudicate disputes concerning either the substantive tax claim or the instrument permitting enforcement in the applicant MS (Directive 76/308, Art. 12, para. 1).

⁹⁰ *Kyrian*, cit., para. 46.

“the first stage of the enforcement” – a solution which, as shown above, was subsequently codified in Art. 14, para. 2, of Directive 2010/24.⁹¹

Yet, *Donnellan* differs from *Kyrian* in some important respects, and what is argued here is that it signals a further advancement in the Court’s openness to admitting the carrying out of transnational judicial review in the context of horizontal composite procedures. First and foremost, in *Donnellan* it was the applicant (Greek) authority which (purportedly) notified the documents relating to the claim to the taxpayer, without availing itself of the possibility to ask for the assistance of the requested (Irish) authority envisaged in Art. 8 of Directive 2010/24. Admittedly, this was the decisive flaw in the proceeding initiated against Mr. Donnellan: the first document reaching him was the uniform instrument permitting enforcement in Ireland, which, as recalled above, was deemed insufficient by the Court to fulfill the requirements of Art. 47 of the Charter. In *Kyrian*, on the opposite, the whole notification process was undertaken by the requested (Czech) authority. This core factual difference is conducive to wholly different decisory outcomes.

Hence, whereas in *Kyrian* the Court could interpret the concept of “enforcement measures” taken by the requested (Czech) authority so as to encompass notifications performed by such authority in compliance with its own national law without contravening the overall logic underlying the allocation of jurisdiction in the Directives concerned,⁹² and without encountering any positive legal provision preventing it from doing so, none of the above conditions prevailed in *Donnellan*. Quite the contrary, refusing to enforce the uniform instrument permitting enforcement in Ireland implied directly reviewing the notification carried out by the Greek authorities pursuant to Greek law, that which was explicitly ruled out by Art. 14, para. 1, of Directive 2010/24. The Court was thus forced to simply state that the norm “cannot reasonably be invoked” against Mr. Donnellan – quite awkward a conclusion, which hints at the fact that, had the preliminary reference been one of validity rather than one of interpretation, the Court could have been forced to declare the provision null and void, at least insofar as it was to be applied in exceptional circumstances such as those at stake. Moreover, the right to an effective judicial remedy is nowhere quoted in *Kyrian*.⁹³ The conclusion reached there only drew on a self-sufficient construction of the concept of “enforcement measures” in the context of Directive 76/308, and even when it came to assessing the limits of the review to be carried out on the notifica-

⁹¹ See, as regards the ensuing “outdating” of this aspect of *Kyrian*, I. DE TROYER, *The Tax Debtor’s Right of Defence in Case of Cross-Border Collection of Taxes*, in *EC Tax Review*, 2019, p. 18 *et seq.* (in particular, pp. 22-23).

⁹² Which the Court itself explained in the following terms in *Kyrian*, *cit.*, para. 40: “[The Directive’s allocation of jurisdiction] results from the fact that the claim and the instrument permitting enforcement are established on the basis of the law in force in the Member State in which the applicant authority is situated, whilst, for enforcement measures in the Member State in which the requested authority is situated, the latter applies [...] the provisions which its national law lays down for corresponding measures, that authority being the best placed to judge the legality of the measure according to its national law”.

⁹³ A point also made in F. PÉRALDI-LENEUF, *Confiance Mutuelle*, *cit.*

tion from the perspective of the flaws highlighted by Mr. Kyrian, reference was only made to a self-standing function of the notification “to make it possible for the addressee to understand the subject-matter and the cause of the notified measure and to assert [their] rights”.⁹⁴ On the contrary, as shown above, the decisive factor leading the Court to conclude for the setting aside of the secondary law norm in *Donnellan* is Art. 47 of the Charter – that which, in turn, was the only way for such an outcome to be tenable, given that the wording of Art. 14 was directly conflicting with the solution the Irish court was attempting to be given leeway for.⁹⁵

These factual and legal differences, coupled with the fact, underlined above, that this time the Court decided to read the case in terms of mutual trust and exceptions thereto, places *Donnellan* in the strand of jurisprudence opened by *Berlio*, in terms of (gradual and cautious) opening on the part of the Court to the concept of transnational judicial review. First and foremost, *Donnellan* goes one step further than *Kyrian*, and could, in the future, be liable to amount on its own to a further authoritative precedent for advocates of transnational judicial review as an integral part of the Union’s system of judicial protection. Whereas *Kyrian* was structurally not able to exit the limited remit of Directive 76/308, in that it was wholly based on the cluster of legal concepts contained therein, *Donnellan* relies on an overarching norm of a general application, Art. 47 of the Charter, meant to apply across the whole of the EU legal system and, at the very least, to foster similar, extensive constructions of relevant, sectoral norms. The analysis sketched above in Section III can therefore be recalled: there seems to be no reason why the same conclusion should not be reached in the context of any other horizontal composite procedure, in the light of both the general scope of Art. 47 and the other principles of constitutional law of the Union liable to be of relevance here.⁹⁶

⁹⁴ *Kyrian*, cit., para. 58.

⁹⁵ *En passant*, it might also be noticed that, unlike in *Berlio*, the Court in *Donnellan* completely overlooked the question of whether Art. 47 of the Charter was applicable, even though the situation in the two cases was, in this respect, profoundly similar (as in *Berlio*, apparently no “right and freedom guaranteed by the law of the Union”, but rather, at best, a mere question of whether a substantive, de-subjectivised Union norm governing administrative action had been complied with, was at stake). The Court seemed simply to rely on the assumption that Art. 47 was applicable, hastily mentioning, referring to *ZZ*, cit., that “a decision adversely affecting [the applicant’s] interests” was involved (*Donnellan*, cit., para. 55). Interestingly, still, AG Tanchev mentioned in his Opinion delivered on 8 March 2018, case C-34/17, *Eamonn Donnellan v. The Revenue Commissioners*, para. 60, that, the situation being “governed by EU law”, Art. 47 was applicable *sic et simpliciter*, and expressly quoted *Berlio* itself (which, as recalled above, precisely concluded for such a correspondence between EU law in the abstract and the right to an effective judicial remedy) to ground such statement.

⁹⁶ Indeed, also in this case the principle of autonomy of EU law is fostered by the possibility for the Irish judge to apply relevant EU norms (the conditions placed on the request for assistance in the recovery of claims – but, that this is what was really at stake in *Donnellan* is objectionable: see *infra*, as well as Art. 47 itself) irrespective of any influence possibly displayed by Greek law; and so is the principle of uniformity, given that the review carried out by the Irish judge, with its openness to the issuance of prelimi-

Still, *Donnellan* also goes one step further *Berliož* itself. Whereas *Berliož* essentially implied a direct application of Art. 47 of the Charter on the part of the Court, allowed by the legal vacuum left by the legislature in Directive 2011/16 as regards issues of jurisdiction, *Donnellan* signals the willingness of the Court even to set aside secondary law norms taking an explicit stance *against* transnational judicial review. This amounts, in effect, to directly applying Art. 47, an operation which is conceptually not as straightforward, since Art. 47 of the Charter, *qua lex generalis*, should in principle give way to Art. 14 of the Directive, *qua lex specialis*. Furthermore, as a general matter, conflicts of such kind are to be addressed by means of a hierarchical approach, resulting in a declaration of invalidity of the secondary norm, rather than by a mere non-application thereof. Under this line of reasoning, one would therefore conclude that the Irish court should have issued a reference of validity, aiming at having the conflict between the two provisions settled through a declaration of Art. 14 of the Directive null and void *in parte qua*. Given that it opted not to do so, the Court nonetheless reached a functionally equivalent solution by means of the preliminary question of interpretation procedure. It thus seems that, relying on *Donnellan*, judges across the Union will be able to review foreign acts in horizontal composite procedures, directly applying Art. 47, even in cases where they would explicitly be barred from doing so by norms of secondary law, and without being compelled, pursuant to the *Foto-Frost* jurisprudence,⁹⁷ to ask a preliminary question on the validity of those restrictive norms.

When placed into context, this latter aspect shows how the Court of Justice is, silently, applying the principles stated by the European Court of Human Rights in *Avotiņš*. Whereas the Court carefully avoids mentioning it explicitly, this emerges quite clearly from *Berliož*, and is all the more evident in *Donnellan*. The Court had no real need to read the whole case through the lenses of mutual trust and of exceptions thereto, as it could have simply looked at the allocation of jurisdiction in the framework of the specific legislation at stake, also taking into account that mutual trust is a principle referring, first and foremost, to the area of freedom, security and justice. Yet, in the very same moment it decided to do so, it opened its reasoning to scrutiny from the perspective of *Avotiņš*. The outcome eventually reached is, in turn, in line with *Avotiņš*' requirement for the national courts not to "refrain from examining [a serious and substantiated complaint that a Convention right has been manifestly deficient] on the sole ground" that

nary references to the Court of Justice, prevents uneven interpretations of those norms from being given by fiscal authorities throughout the Union, without the possibility to bring about homogeneity in courts.

⁹⁷ Court of Justice, judgment of 22 October 1987, case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*. Reportedly, the Court of Justice found in this case that "The national courts have no jurisdiction themselves to declare that measures taken by Community institutions are invalid", to the effect that, where they so deem, they have no alternative but to issue a validity preliminary reference.

EU law is being applied.⁹⁸ Indeed, Mr. Donnellan's claim that his right to an effective judicial remedy was being impaired was rather "serious and substantiated", given the exceptional circumstances of his case, and given that Art. 14 of the Directive was essentially preventing him from having access to any form of judicial redress. The question addressed to the Court of Justice by the Irish judge, in turn, sought to clarify whether that norm was to be applied mechanically, the risk of a breach of Mr. Donnellan's right to effective judicial protection notwithstanding. The Court then accepted that Art. 14 could be disregarded in circumstances such as those at stake; however, as hinted at above, in the internal logic of the EU system of remedies such disregard could be predicated not to be acceptable, as, in cases of breach of a primary law provision, secondary law norms should rather be declared null and void. It is, therefore, arguably to meet the European Court of Human Rights' concerns that the Court of Justice allowed for the non-application of rather explicit a norm: again, as in *Berlioz*, had it not allowed the Irish judge to do so, it would have been confronted with the risk of Mr. Donnellan's case being brought before the European Court, leading to the conclusion that the applicant's rights had been breached because of the application of EU law and rebutting the *Bosphorus* presumption. Cherry on top, it was the Commission itself in its submissions which, as emerges from the Opinion of AG Tachev, urged on the Court to allow the Irish judge to refuse enforcement of the uniform instrument, precisely on the grounds of the need for *Avotiņš v. Latvia* to be complied with, strengthening the impression that such an apparently strange decision can be explained in terms of judicial dialogue between the Court of Justice and the European Court of Human Rights.⁹⁹

One further remark can be made. Once it reaches the conclusion that the Irish judge's jurisdiction can be affirmed, the Court takes an ambiguous stance as regards the *object* of the review to be carried out exercising that jurisdiction. As recalled above, the Court takes the view that enforcement can be refused because the request could not be made, since the condition that the claim not be contested in the applicant MS, was not fulfilled. This

⁹⁸ See note 40 and corresponding text in the main body. The analysis carried out above, at note 47 and corresponding text in the main body, as regards the applicability of Art. 6 of the ECHR in the case at stake can also be recalled here, since in *Donnellan* as well an administrative penalty, qualifying as a "criminal charge" for the purposes of Art. 6, is at stake.

⁹⁹ See Opinion of AG Tachev, *Donnellan*, cit., paras 45-46: "The Commission takes the view that [*Avotiņš*] resolves the dilemma in the main proceedings. Applying principles established in *Avotiņš v. Latvia* [...] it follows that, normally, the requested Member State is precluded from reviewing the validity or enforceability of the instrument, where the plaintiff has not exhausted legal remedies. However, in exceptional cases, where the court of the requested State is satisfied beyond any reasonable doubt that no effective judicial remedy is available to the interested person in the applicant Member State, then the division of roles set out in Article 14 of Directive 2010/24 should not apply. Consequently, the courts of the requested Member State may exceptionally review whether the enforcement of the instrument is liable, in particular, to lead to a manifest breach of the fundamental right to an effective judicial remedy under Article 47 [...] and a flagrant denial of justice and, in such case, refuse to execute the request for recovery of the claim".

was, in essence, the view taken by AG Tachev in his Opinion,¹⁰⁰ which admittedly tried to resolve the case by making exclusive reference to the system set up by Directive 2010/24 and to the *Kyrian* jurisprudence, arguably in an attempt to dilute the overt clash between Art. 47 of the Charter and Art. 14 of the Directive.¹⁰¹ In other words, the flaw identified by the AG and the Court is of a *substantive* nature, and hereby comparable with *Berlioz*: the preparatory act (the request for assistance in the recovery) was adopted *ultra vires*, as the conditions laid down by the legislature for the administrative authority to issue it (that the claim not be contested in the “home” legal system) were not fulfilled, and hence the final act (the uniform instrument permitting enforcement in Ireland or, *rectius*, its enforceability) is affected by derivative illegality.¹⁰² Therefore, even if the Court does not elaborate on the point, under this line of reasoning, in terms of the allocation of jurisdiction pursuant to Art. 14 of the Directive the claim involved a “dispute concerning the uniform instrument permitting enforcement in the requested MS”.

Yet, this analysis can be questioned. As recalled above, AG Tachev’s line of reasoning essentially aimed at reconciling Art. 14 of the Directive with Art. 47 of the Charter. Accordingly, he focused not so much on the uniform instrument of enforcement (that which would have entailed an acknowledgement of the unambiguous wording of the provision, attributing the dispute to the jurisdiction of Greek judges), but, rather, on “the letter of demand” sent by the Irish authorities to Mr. Donnellan, to which such instrument was attached. The latter, in AG Tachev’s view, “amounted to an enforcement measure within the meaning of Art. 14(2) of Directive 2010/24, and one that was issued by the requested authority under conditions that were not in compliance with the right to effective judicial protection”.¹⁰³ The Irish judge’s jurisdiction could thus be established without any need to set Art. 14 aside, as under that provision such judge is competent to hear claims involving “enforcement measures taken in the requested Member State”, and enforcement of the measure could thus be refused resorting to the *Kyrian* jurisprudence.

As shown above, however, the Court is way more open to recognise the conflict between Art. 14 of the Directive and Art. 47 of the Charter (that which the AG only admitted subsidiarily),¹⁰⁴ and it can thus be questioned whether there is any real need to resort to

¹⁰⁰ *Ibid.*, paras 63-71.

¹⁰¹ *Ibid.*, para. 69: “If [...] the first step of notification does not take place until after the issue of a uniform instrument permitting enforcement [...], enforcement of the claim can be challenged, pursuant to the *Kyrian* case, before the courts of the requested State [...]”.

¹⁰² See note 82 and corresponding text in the main body.

¹⁰³ Opinion of AG Tachev, *Donnellan*, cit., para. 89.

¹⁰⁴ See *ibid.*, para. 89, the second limb of which reads: “*In the alternative*, the competence of the bodies of requested Member States [*sic*; this is clearly a typo, and the AG actually refers to applicant MS] under Article 14(1) of Directive 2010/24 with respect to disputes concerning enforcement instruments is to be read subject to compliance with the sequence of request for information, notification and enforcement that is established by Directive 2010/24, the text of Article 14(1) and recital 12 notwithstanding. In its

AG Tachev's analysis. That this reasoning is artificial is shown by the outcome of the ruling: the Irish judge will be able to refuse to enforce the claim "on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery was made to [the requested authority]",¹⁰⁵ and it will do so by setting Art. 14 of the Directive aside. In other words, the Court is actually concerned with an eminently *procedural* issue: as highlighted above, what the Court reprimands is that Mr. Donnellan was not "able to know and understand effectively and completely the meaning and scope of the action brought against him",¹⁰⁶ to the effect that Art. 47 of the Charter effectively works not only as an argument to establish the Irish judge's jurisdiction, but, indeed, also as the benchmark against which to assess the legality of the whole of the composite procedure. In the wording of Art. 14 of the Directive, what is to be set aside is not, in fact, as artificially maintained, the allocation on the Greek judiciary of the competence to hear "disputes concerning the uniform instrument permitting enforcement in the requested Member State", but, rather, that to judge on "the validity of a notification made by a competent authority of the applicant Member State". Once the Court decided to recognise and tackle the conflict between such apportionment and Art. 47 of the Charter, it would have been desirable, for the sake of clarity, that an argument explicitly developed to conceal such conflict not be resorted to.

Elucidating this point, *Donnellan* can therefore be usefully contrasted to *Berlioz* to show the different shapes which transnational judicial review can take. On the one hand, in *Berlioz*, we have a genuinely *substantive* review of the preparatory act on the part of the judge of the MS to which the authority adopting the final act belongs: the Luxembourgish court reprehends the French authority for having issued a request for information in a case where the conditions laid down by the Union's legislature for doing so were not fulfilled, the information sought lacking foreseeable relevance. On the other hand, in *Donnellan*, we have a *procedural* review of the preliminary act, disguised as a substantive one: the Irish court reviews whether the notification undertaken by the Greek administration complies with a procedural standard meant to secure the effective possibility for Mr. Donnellan to assert his rights and interests, conveyed in the substantive provisions governing the power for the administrations involved to levy taxes and impose penalties on him.

What is interesting is that, unlike in *Berlioz*, where action undertaken by the Luxembourgish authority could be reviewed in the light of a relatively precise substantive secondary law norm, such procedural standard is not contained in a provision precisely detailing the procedure to be followed, as Directive 2010/24 does not provide, as such, for a

absence, it is for the competent bodies of the requested Member States to review compliance of the enforcement process with Article 47 of the Charter" (emphasis added).

¹⁰⁵ *Donnellan*, cit., para. 62.

¹⁰⁶ *Ibid.*, para. 58, quoting case law rendered in the domain of the area of freedom, security and justice and, in particular, concerning the service and notification of judicial documents. See note 86, as regards the lack of clarity to be found in the ruling in this respect.

unitary composite procedure whereby transnational notification of relevant documents is necessarily tied to recovery of the claim. This is so, because requests for assistance in notification and requests for assistance in the recovery can be sent independently of one another (and, indeed, *Donnellan* entailed precisely a request for assistance in the recovery not preceded by any request for assistance in notification, and the Court did not show any concern with this hiatus as such).¹⁰⁷ What is at stake is the minimum and abstract standard provided for by Art. 47 of the Charter. The review carried out by the Irish court is therefore not different, in nature, from the one which could be performed by the European Court of Human Rights, or by the Court of Justice itself, in a classical constitutional-like adjudication – and this could sound rather shocking in terms of sovereign equality between MS. One might be tempted to conclude that intrusions on the sovereignty of State A on the part of judges in State B can be accepted in a case such as *Berlioz*, or assuming that an administrative procedure minutely regulated by an EU norm is regulated in each and every step, so that violations thereof can be pointed out in a rather uncontroversial manner, but that allowing B to review A's action in the light of such a value-laden and sensitive benchmark as a human rights norm is all too much.

However, constitutionally upheaving as it may seem from a traditional, sovereignty-focused perspective, the outcome in *Donnellan* does indeed seem to be the natural corollary of the system of shared sovereignty prevailing in the EU. In the case of substantive flaws the judge in State A is entitled to review the preparatory act issued by the authority in State B, in that the respective legal systems are integrated by the provision laying down the conditions under which each authority is entitled or required to act in the context of the composite procedure, and the judge in A is required to apply the

¹⁰⁷ AG Tachev took, in his Opinion, *Donnellan*, cit. (paras 63-71), a different view, claiming that the Directive “set[s] out a sequence providing for assistance by way of exchange of information, then notification, then recovery” (para. 65), and grounded his reading of the substantive flawedness of the uniform instrument permitting enforcement precisely on such sequence. Still, that the various forms of cross-border assistance in the recovery of claims are conceived of by the legislature as independent of each another is apparent from Recital 7 of the Directive, and it is AG Tachev himself who admits (para. 68) that “the Greek authorities were not obliged to seek the assistance of the Irish authorities [...] to notify the 2009 Assessment act”, in that they retained the possibility to do so under Art. 8, para. 2, of the Directive. That notification of the documents necessary for the taxpayer to fully understand the scope of the claim they are confronted with must precede notification of the uniform instrument permitting enforcement seems, indeed, to be only a consequence of Art. 47 itself, in the light of the Court's finding that the standardised information to be included in the uniform instrument of enforcement is not such as to place its addressee in such a position as to grasp the issue and to raise a defence against it (see note 84 and corresponding text in the main body). In this respect, I. DE TROYER, *The Tax Debtor's Right of Defence*, cit., pp. 21-23, points out that a contemporary issuance of the uniform instrument permitting enforcement in the requested MS and of a document satisfying the requirement that the taxpayer be put in such a position as to be able to assert their rights (be it the uniform notification form envisaged in Art. 8 of the Directive or the initial instrument permitting enforcement in the applicant MS) should, in principle, suffice to bring the procedure in line with the requirements of Art. 47 of the Charter.

norm as much as the authority in B is required to execute it. If this can be accepted without many hurdles, as it has been accepted in the comments to *Berlioz*, the same should in principle be concluded in a hypothetical case, where a detailed procedural provision laid down in secondary law is breached. This is not, however, different in essence from the case of *Donnellan* where such a detailed provision is lacking, but integration between legal systems and authorities is to be found nonetheless – though in the *prima facie* awkward form of a constitutional-like norm such as Art. 47 of the Charter. The equal commitment of Greece and Ireland to administratively execute EU law, therefore, opens to the possibility for the Irish judge to directly review the activity of the Greek authority in the light of the right to an effective judicial remedy, which is, itself, part of the cluster of norms governing the composite procedure.

V. CONCLUDING REMARKS

The case of *Berlioz* might well be the first step on the path towards a fuller and more effective judicial protection, in an area where this has so far been inadequate and defective. The reasoning deployed by the Court shows that, while waiting for more effective solutions to be introduced, with a view to granting full protection also against violations of the national law of the authorities competent for earlier steps of the procedure,¹⁰⁸ it is possible to interpret the current state of EU law, pivoting on the right to an effective judicial remedy, so as to afford redress, at least, against the most egregious violations of the EU norms laying down the conditions under which administrative authorities are to act in the execution of EU law.¹⁰⁹

¹⁰⁸ The proposal in H.C.H. HOFMANN, *Decisionmaking in EU Administrative Law*, cit., pp. 213-214, of envisaging a form of “preliminary rulings from courts of other Member States when necessary to review final decisions established with the input of other Member State agencies under composite procedures”, is the most well-known of such possible solutions.

¹⁰⁹ As anticipated at note 49 and surrounding text, as regards the scope of the review the Court of Justice is actually still somehow cautious, reflecting the finding in Opinion 2/13 that limitations on mutual trust could be tolerated, in principle, “in exceptional circumstances” only. Indeed, the test to be used in scrutinizing the information request is one of inquiring into whether it is “manifestly devoid of any foreseeable relevance” (*Berlioz*, cit., para. 86): an extremely high threshold, the strictness of which is, moreover, further underlined by the finding that, as a matter of principle, the standard for carrying out this assessment should be based on the minimum information which, pursuant to Art. 20, para. 2, Directive 2011/16, the requesting authority must indicate to the requested authority (the identity of the person under fiscal investigation and of any person believed to be in possession of the requested information, as well as the tax purpose for which such investigation is being effected) (*Berlioz*, cit., para. 86). This restrictive approach is, nonetheless, relaxed by the acknowledgement that, on the one hand, the requested authority can, in processing the information request, ask the requesting authority for additional information (*ibid.*, para. 81), and, on the other hand, that, where the minimum information standard referred to above proves not to be sufficient for the lawfulness of the information request to be scrutinised, that the reviewing court can ask the requested authority for such additional information, where it has been provided to the latter (*ibid.*, para. 92).

As this contribution has tried to show, nothing seems to preclude a generalisation of this finding to other horizontal procedures, and accepting the possibility to carry out transnational judicial review in such procedures would also be consistent with other principles of the EU constitutional order, such as those of uniformity and autonomy. The ultimate purpose to be served is the upholding of the rule of law, including its “objective” aspect, which the EU solemnly commits to in the Preamble of the TEU and in Art. 2 of the same Treaty. The most effective way to ensure that the rule of law is respected, in a context where most national legal systems do not allow for preparatory acts to be autonomously challenged before court,¹¹⁰ is precisely that of enabling transnational judicial review in the context of claims brought before the final act. This solution, moreover, finds a powerful conceptual justification in the notion that all judges in all MS are to be regarded as “EU courts of general jurisdiction”, or as *juges de droit commun*. If each and every national court is to be regarded as equally called upon in applying EU law, there seems to be no reason for administrative acts meant to execute such law not to be reviewed in the light of the applicable norms for the mere reason that they emanate from authorities of another MS.

The case of *Donnellan*, on its part, may be thought of as a signal that the Court of Justice is increasingly aware of the gaps in judicial protection ensuing from strictly sticking to the traditional stance on transnational judicial review in horizontal composite procedures, and that it is ready to elaborate on the foundations laid down in *Berlioz* to tackle them. Unlike in *Berlioz*, in *Donnellan* the Court explicitly stretches the principle of mutual trust, as a legal concept, beyond its remit “proper”, that of the area of freedom, security and justice, so as to encompass cooperation in fiscal matters. In doing so it paves the way for even more solid an application of the principles enshrined in *Avotiņš*, which, though keeping on being nowhere mentioned in the ruling as such, amount to the necessary background against which to read the strand of case law which is gradually emerging on these issues, as made evident by the explicit reference to the case made by the Commission in its submissions in *Donnellan*. The ruling can therefore also be viewed as another say in the ongoing judicial dialogue between the Court of Justice and the European Court of Human Rights. While explicitly tying transnational judicial review to mutual trust inevitably dooms it to be an exceptional remedy, just as exceptional are acceptable derogations to mutual trust as developed in Opinion 2/13, it also gives it the potential to become a cross-cutting concept. Indeed, if mutual trust informs the relationship between MS across sectoral policy areas, from the area of freedom, security and justice to cooperation in fiscal matters, so does transnational judicial review, as the corollary to mutual trust itself mandated for by Art. 47 of the Charter. *Donnellan* also indicates that, in the Court’s opinion, the right to an effective judicial remedy can, in fact, be directly applied so as to allow for transnational judicial review to be performed, even where a secondary law norm explicitly excludes

¹¹⁰ See note 7.

such possibility. Albeit not perfectly in line with prevailing attitudes on the system of remedies before the Court, under which in cases of such overt a conflict references of validity should in principle be resorted to, this approach attributes even more potential on the expanding scope of transnational judicial review.

Taken together, *Berlioz* and *Donnellan* also powerfully exemplify that, just like in national administrative law systems, violations of EU law occurring in horizontal composite procedures, requiring redress to be afforded in the shape of transnational judicial review, can be of both a substantive and a procedural nature. In the first case, authorities in the earlier stages of the procedure exercise an executive power without the conditions for doing so laid down in the applicable EU legal act being fulfilled. This is what the French authority did in *Berlioz*, asking the Luxembourgish authority for an information lacking foreseeable relevance. When procedural violations are concerned, it is the procedure meant to place the subjects impinged on by the exercise of administrative power in such a position as to be able to assert the rights they enjoy under substantive law which is disregarded. *Donnellan* shows that this can be the case even where there is no underlying EU substantive norm, and, even more interestingly, where EU law does not regulate the procedure in detail. Mr. Donnellan was not properly given the information needed for an administrative decision affecting his interests to be challenged before court, and this was enough for the course of action undertaken by the authorities involved to fall short of the standard required by Art. 47 of the Charter. The right to an effective judicial remedy is therefore capable of providing a yardstick to directly measure the procedural legality of horizontal composite procedures, while at the same time being the main legal basis upon which transnational judicial review can find its way in the EU legal system.

The policy area of cooperation in fiscal matters is thus working as a powerful laboratory for developments in the case law of the Court of Justice which could be of relevance way beyond its scope, and involve a rethinking of conventional assumptions in EU constitutional law and EU administrative law as a whole. One cannot but welcome the increasing awareness on the part of the Court of the gaps in judicial protection which have this far been left in the field of horizontal composite procedures, and praise the path taken to fill them. If, as Judge Lenaerts argues, the mutual commitment to the protection of fundamental rights and to respect for the rule of law is what justifies the very existence of the principle of mutual trust between the MS, the time has come to draw the necessary consequences thereof, and to allow the judiciary to fully perform its protective function. *Berlioz* and *Donnellan* leave room for doing so. It is now up to the Court not to let down the hopes it has engendered.



ARTICLES

THE INTEGRATION OF MIGRATION CONCERNS INTO EU EXTERNAL POLICIES: INSTRUMENTS, TECHNIQUES AND LEGAL PROBLEMS

SARA POLI*

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ABSTRACT: This *Article* examines the recent EU practice of concluding practical arrangements designed, on the one hand, to return irregular migrants to countries of origin or transit and, on the other, to provide trade incentives to States hosting refugees, such as Jordan, in exchange for offering Syrian refugees employment opportunities. After examining the legal nature of the mentioned *sui generis* instruments, it is argued that preference for informal agreements with third countries is capable of affecting the external powers enjoyed by the European Parliament and the EU's accountability in its external action. The *Article* stresses that the Compact with Jordan has, to some extent, improved the situation of Syrians in that country. Finally, it is contended that the exceptional importance attached to the readmission of third country nationals in EU relations with developing countries has made the EU lose sight of the primary aim of development cooperation policy, which is to fight poverty.

KEYWORDS: EU migration policy– informal agreements – EU-Jordan Compact – refugees – EU neighbourhood policy – development cooperation policy.

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I. INTRODUCTION

Since 2015, the EU has increasingly used its external powers to contain movements of migrants and asylum seekers, as well as to prevent the smuggling of these persons¹ and the loss of their lives at sea.²

In a Communication of June 2016, the Commission stressed that formal or informal agreements with third countries should be concluded in order to tackle migration upstream.³ It also emphasised that the cooperation between, on the one hand, the EU and/or its Member States and, on the other, countries of origin and transit of migrants and asylum seekers should be enhanced in order to stem the flows of people seeking to enter the Member States' territories.⁴ The point was made that "Development and neighbourhood policy tools should reinforce local capacity building, including for border control, asylum, counter-smuggling and reintegration efforts".⁵ This comment made clear that cooperation in the field of migration would be of strategic importance in EU relations with EU neighbour and developing countries.

This *Article* aims to examine the legal instruments and techniques used by the EU to integrate migration concerns into its external policies. It shows how the dominance of these concerns has affected, on the one hand, the quality of the legal instruments used to shape cooperation with third countries and the principle of institutional balance and, on the other, the consistency of EU external relations. Section II of the *Article* shows that

¹ For example, in 2015 the EU made use of its powers under the Common Security and Defence Policy to authorise a military mission to counter the smuggling of migrants and to prevent illegal migration flows. See Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

² However, the use of external powers to address migration concerns is not new. In 1994, the Commission published a Communication in which it emphasised the need for a comprehensive approach to migration pressure that required a coordination of action in the field of foreign policy, trade policy, development cooperation and immigration and asylum policy by the Union and its Member States. See Communication from the Commission to the Council and the European Parliament COM(94) 23 final of 23 February 1994 on Immigration and Asylum Policies, para. 50. Two years earlier, the European Council had adopted a Declaration on Principles governing External Aspects of Migration Policy.

³ Communication COM(2016) 385 of 7 June 2016 from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration.

⁴ This is an aspect of the so-called "externalization of migration controls". See for comments, D. DAVITTI, *Biopolitical Borders and the State of Exception in the European Migration "Crisis"*, in *European Journal of International Law*, 2018, p. 1178 *et seq.*; B. FRELICK, I.M. KYSEL, J. PODKUL, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, in *Journal of Migration and Human Security*, 2016, p. 190 *et seq.*; M. DI FILIPPO, *Fighting Against Irregular Forms of Migration: the Poisonous Fruits of the Securitarian Approach to Cooperation with Mediterranean Countries*, due to publication in F. IPPOLITO, F. CASOLARI, G. BORZONI (eds), *Bilateral Relations in the Mediterranean: Prospects for Migration Issues*, Cheltenham: Edward Elgar Publishing, forthcoming; G. PAPAGIANNI, *Forging an External EU Migration Policy*, in *European Journal of Migration and Law*, 2013, p. 283 *et seq.*

⁵ Communication COM(2016) 385, cit., p. 2.

the EU and its Member States have concluded practical arrangements with third countries in accordance with the Communication of 2016. Yet, the implementation of the strategy, defined in that Communication, has had an impact on the institutional balance designed by the Treaty. Section III draws attention to the Compacts with EU neighbour countries hosting refugees and in particular the Compact with Jordan. The context of the adoption of this *sui generis* instrument and its controversial legal nature are also considered. Section IV examines how the EU has favoured the adoption of the Compact with Jordan to support the latter's efforts to integrate Syrian refugees in the job market. This section will show that the EU has inaugurated a new technique, consisting of providing trade incentives to third countries hosting large communities of refugees, in exchange for integrating them into the job market. It is the first time that this form of positive conditionality has been used by the EU. Section V considers the actual impact of the Compact on the situation of Syrian refugees, while the following section emphasises the difference between EU-Jordan and EU-Lebanon priorities, as well as the reasons why there are no Compacts with Tunisia. Section VII explores the extent to which it is legally possible to integrate migration concerns into development cooperation policy; this issue needs to be raised since most of the non-European countries of origin/transit of migrant flows are middle -or low- income countries. Importantly, cooperation in the field of migration has been crucial in the negotiation of an important multilateral Treaty between the EU, its Member States and African, Caribbean and Pacific (ACP) countries: this is the post Cotonou Agreement. The exceptional importance attached to cooperation in managing migration flows and borders, in the context of its relations with developing countries, bears the risk of the EU losing sight of the primary aim of development cooperation policy, which is to fight poverty. Section VIII draws some conclusions on the impact that the use of informal instruments, examined in the paper, has had on the position of refugees. At the same time, the EU approach is criticised since the excessive use of practical arrangements affects the powers of the European Parliament. Furthermore, it is emphasised how migration concerns have dominated the EU-ACP countries relations, leading the EU to act in a manner which is not consistent with the objectives of the development cooperation policy.

II. THE COMPACTS AND PRACTICAL ARRANGEMENTS FOR THE RETURN OF IRREGULAR MIGRANTS AND THEIR IMPACT ON THE PRINCIPLE OF INSTITUTIONAL BALANCE

The informalisation of cooperation in the area of migration management has become an established phenomenon in the EU.⁶ After the adoption of the Communication of

⁶ For a recent study on the informalisation of instruments aimed at making the return of third country nationals more efficient see J.P. CASSARINO, *Informalizing EU Readmission Policy*, in A. RIPOLL SERVENT, F.

June 2016, the EU has made use of a wide array of informal instruments in its relations with third countries that are at the origin of migration flows. A few months before this Communication was issued, the Commission listed a number of priority actions to manage the inflows of migrants and refugees. One of them was to make the system of return of irregular migrants work.⁷ The view was taken that EU efforts had to be directed towards third countries with a low return *ratio*. Special attention was also to be given to countries from which irregular entries had significantly increased in 2015, such as Afghanistan and Bangladesh, as well as to countries of origin and/or transit such as Algeria, Ethiopia, Ghana, Ivory Coast, Mali, Niger, Nigeria, Pakistan, Senegal, Somalia, Sudan and Tunisia.⁸ Finally, it was added that where readmission Treaties were in place, as in the case of Pakistan,⁹ their implementation had to improve.

The Commission stated that the EU and its Member States, acting in a coordinated manner, should have agreed with third countries on “comprehensive partnerships” named “Compacts”,¹⁰ designed to better manage migration in full respect of humanitarian and human rights obligations.¹¹ The short-term objectives of these instruments were to save lives – avoiding the situation where migrants and refugees take dangerous journeys – and to increase the rate of return of migrants to countries of origin and transit. Compacts worked by financially supporting the readmitting countries and the communities that would reintegrate those who returned.¹² The prominence of the Compacts in the overall relations with third countries was clearly identified in the words of the Commission that defined them as a “key component” of these relations.¹³ In the first report on the implementation of the partnership framework, Compacts were better defined. In essence, they are instruments of a political nature used by the Member States and the EU to “deliver targets and joint commitments” on the basis of operational cooperation with a third

TRAUNER (eds), *The Routledge Handbook of Justice and Home Affairs Research*, London: Routledge, 2018, p. 83 *et seq.*

⁷ Communication COM(2016) 85 final of 10 February 2016 from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, p. 16.

⁸ *Ibid.*, pp. 16-18.

⁹ Agreement between the European Community and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation, p. 52 *et seq.*

¹⁰ See *Migration Compact. Contribution to an EU Strategy for External Action on Migration* – Non-paper from Italy, 15 April 2016, governo.it. D. VITIELLO, *Il contributo dell'Unione europea alla governance internazionale dei flussi di massa dei rifugiati e migranti: spunti per una rilettura critica dei Global Compacts*, in *Diritto, immigrazione e cittadinanza*, 2018, p. 21 *et seq.*

¹¹ Communication COM(2016) 385, cit., p. 6.

¹² *Ibid.*, p. 7.

¹³ *Ibid.*, p. 6.

country.¹⁴ The Commission stated that they can lead to the development of a readmission agreement, but there was no obligation for them to do so. The reason for the preference of informal agreements is that the conclusion of EU-wide readmission agreements with third countries of origin or transit of migrants was never easy when it was not coupled with visa-liberalisation treaties.¹⁵ In addition, even where readmission agreements were in place, there were difficulties in returning third countries nationals to their countries of origin,¹⁶ and these hurdles double for EU Member States seeking to return irregular migrants who are not nationals of the countries of departure.¹⁷

Thus, the Commission puts forward the idea of informal arrangements; in its view, the Compact approach “avoids the risk that concrete delivery is held up by technical negotiations for a fully-fledged formal agreement”.¹⁸ The suggestion is made that Member States should make the cooperation mutually beneficial, for example by opening up legal channels of migration.

The use of non-legally binding instruments as a basis for cooperation with third countries in the field of migration is not new.¹⁹ It was inaugurated in 2005 and later

¹⁴ Communication COM(2016) 700 final of 18 October 2016 from the Commission to the European Parliament, the European Council and the Council, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, p. 3.

¹⁵ Third countries do not easily agree on readmission agreements when the EU is not ready to offer in exchange a visa-liberalisation agreement. For example, the EU has not been able to conclude a readmission agreement with Morocco, despite attempts to negotiate such an agreement since 2000. S. CARRERA, J.P. CASSARINO, N. EL QUADIM, M. LAULOU, L. DEN HORTOG, *EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?*, in *CEPS Papers in Liberty and Security*, no. 87, 2016, pp. 5-6.

¹⁶ Although every state has an obligation, under international customary law, to readmit its own nationals, the lack of identification documents often prevents the discharge of this obligation. Communication COM(2017) 200 final of 2 March 2017 from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - a renewed action plan, p. 1. According to the most recent data, the third countries with the highest number of nationals (over 10,000 per year) who were issued with a return decision are Morocco, Ukraine, Albania, Afghanistan, Algeria, Iraq, Pakistan, Guinea, Mali, Tunisia, India and Nigeria. Communication COM(2019) 481 final of 16 October 2019 from the Commission to the European Parliament, the European Council and the Council on Progress report on the implementation of the European Agenda on migration, p. 15.

¹⁷ In this case, there is no obligation for a State to readmit third country nationals.

¹⁸ Communication COM(2016) 700, cit., p. 3.

¹⁹ Informal agreements are used in other areas of EU law, too. For example, in 2006 the EU adopted a memorandum of understanding on a Swiss financial contribution to reducing economic and social disparities in the enlarged Union. This memorandum was the political basis for the conclusion of formal bilateral agreements between Switzerland and countries acceding to the EU. In 2013, the Vice-President of the Commission responsible for external relations and the commissioner for regional policy signed an addendum to that memorandum with Switzerland in order for the latter to financially support Croatia's accession. The need for the memorandum was due to the fact that for Switzerland it was not possible to conclude a binding agreement on such a financial contribution. The Council did not authorise the signature and brought an annulment action against the addendum before the Court of Justice. The latter annulled the Commission decision to sign the addendum for breach of the principle of conferral: the Coun-

changed in 2011 for the Global Approach to Migration and Mobility (GAMM).²⁰ Under this strategy, the EU does not exclusively rely on legally binding readmission agreements to cooperate with third countries (in fact, until 2016 there were only 17 EU-wide agreements,²¹ and a proliferation of bilateral agreements concluded by Member States).²² Informal instruments such as policy dialogues, Common Agendas on Migration and Mobility (CAMMs),²³ and also mobility partnerships were used.²⁴

However, during 2016 the Commission generalised the use of “practical arrangements” instead of formal readmission agreements with countries of origin or transit of third country nationals in preventing uncontrolled movements of peoples and/or in ensuring the readmission of irregular migrants.²⁵ The first instrument of this kind was the

cil, and not the Commission, has the power to sign an agreement. See Court of Justice, judgment of 28 July 2016, case C-660/13, *Council v. Commission* commented by T. VERELLEN, *On Conferral, Institutional Balance and Non-binding International Agreements: The Swiss MoU Case*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1225 *et seq.*

²⁰ Communication COM(2011) 743 final of 18 November 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on The global approach to migration and mobility.

²¹ For a full list of agreements see E. CARLI, *EU Readmission Agreements as Tools for Fighting Irregular Migration: an Appraisal Twenty Years on from the Tampere European Council*, in *Freedom, Security and Justice*, 2019, pp. 13-14.

²² The bilateral readmission agreements concluded by Member States are more numerous than those concluded by the EU. See E. CLUNY, *The EU's New Migration Partnership with Mali: Shifting Towards a Risky Security-Migration-Development Nexus*, in *EU Diplomacy Paper*, 2018, No. 1, College of Europe, p. 18. Indeed, in the area of freedom, security and justice, Member States share their powers with the EU and may act unilaterally until the EU pre-empts their action. This happens when the Council has authorised the opening of the negotiation of a readmission agreement. The principle of pre-emption fully applies when the EU has concluded an international agreement with a third country. Yet, Member States have a duty to refrain from negotiating a bilateral agreement with a third country after the Council has opened the negotiation for the conclusion of an agreement with that State. For a discussion on these issues, see B. VAN VOOREN, *The Principle of Pre-Emption after Opinion 1/2003 and Coherence in the EU Readmission Policy*, in M. CREMONA, J. MONAR, S. POLI (eds), *The External Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels: P.I.E. Peter Lang, 2011, p. 176 *et seq.*

²³ For a full list of high-level dialogues existing at the time the Communication on a new partnership framework was adopted, see annex II of Communication COM(2016) 385, cit. The Agendas are the most recent political instruments intended to help third countries, including by providing financial support, to better manage their borders and prevent migration flows. They also have a humanitarian objective which is to prevent human trafficking and people smuggling.

²⁴ See for more details on the mobility partnerships, S. POLI, C. CINELLI, *Mobility and Legal Migration in the Context of the European Neighbourhood Policy: What Role for the European Union?* in *Revista Española de Derecho Comunitario*, 2017, p. 977 *et seq.*, especially pp. 983-987.

²⁵ For a more comprehensive overview of the external instruments used by the EU see P. GARCIA ANDRADE, I. MARTÍN, *EU Cooperation with Third Countries in the Field of Migration*, in *Study for the LIBE Committee*, 2015; P.J. CARDWELL, *Tackling Europe's Migration 'Crisis' through Law and 'New Governance'*, in *Global Policy*, 2018, p. 1 *et seq.*; S. CARRERA, J. SANTOS VARA, T. STRIK, *The External Dimension of the EU Migration and Asylum Policies in Times of Crisis*, in S. CARRERA, J. SANTOS VARA, T. STRIK (eds), *Constitutionalising the External Di-*

notorious EU-Turkey statement which was coupled with the Facility for Refugees,²⁶ dated March 2016.²⁷ As is known, that declaration was contestably attributed by the General Court to the representatives of Member States' governments and not to the EU.²⁸ The mentioned order has been criticised since it has weakened the EU institutions' accountability for their action. It could also be argued that the Court's interpretation might have provided impetus to the development of further forms of "practical arrangements" to manage the EU migration challenges.

Five countries, some of which had already agreed CAMMs,²⁹ are identified by the Commission as possible parties to launch and agree Compacts: these are Niger, Nigeria, Senegal, Mali and Ethiopia.³⁰ They are considered explicitly as priority countries in the first progress report on the new Partnership framework, and the detailed reasons for this are identified in this document.³¹ Cooperation with Asian countries such as Afghanistan is also considered of "high importance".³²

After the publication of the Communication, no formal readmission agreements were concluded with the priority countries.³³ In its most recent reports on the implementation of the 2016 Communication on a partnership framework, no mention was made of any progress in the cooperation on return of irregular migrants with Niger, Nigeria, Senegal and Mali. However, a number of non-legally binding initiatives were taken with respect to non-priority countries. In October 2016, the "Joint Way Forward on migration issues" was

mensions of EU Migration Policies in Times of Crisis – Legality, Rule of Law and Fundamental Rights Reconsidered, 2019, Cheltenham: Edward Elgar, p. 1 *et seq.*

²⁶ See EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016. For a recent comment, see V. ZAMBRANO, *Accordi informali con Stati terzi in materia di gestione dei flussi migratori: considerazioni critiche con riferimento alla prassi dell'Unione europea e dell'Italia*, in *Freedom, Security and Justice*, No 1, 2019, pp. 127-129.

²⁷ J.P. CASSARINO, *Informalising Readmission Agreements in the European Neighbourhood*, in *The International Spectator*, 2007, p. 179 *et seq.*

²⁸ General Court, order of 27 February 2017, case T-192/16, *NF v. European Council*; General Court, order of 28 February 2017, case T-193/16, *NG v. European Council*, and General Court, order of 28 February 2017, case T-257/16, *NM v. European Council*. For comments see E. CANNIZZARO, *Denialism as the Supreme Expression of Realism - A Quick Comment on NF v. European Council*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 251 *et seq.*

²⁹ This is the case of the CAMM with Nigeria, which was agreed in March 2015, and of Niger and Ethiopia whose CAMMs were signed on the first day of the EU-Africa Valletta Summit (11-12 November 2015). See the Press release IP/15/6050 of the European Commission of 23 September 2015. For the texts of the CAMMs with Nigeria and Ethiopia see ec.europa.eu. Finally, see the Mali-EU Joint Communiqué on the High Level Dialogue on Migration of April 2016.

³⁰ Communication COM(2016) 385, cit., p. 16.

³¹ Niger is a key transit country, Nigeria and Senegal are countries of origin of migration, and Mali and Ethiopia are both countries of origin and transit of migrants (and of refugees in the case of Ethiopia).

³² Communication COM(2016) 700, cit., p. 11.

³³ The negotiation of such an EU-wide readmission agreement is ongoing with Nigeria since October 2016. *Ibid.*, p. 7.

agreed with Afghanistan.³⁴ It is not even clear which institution negotiated such an instrument; the document is published on the website of the European External Action Service. Under the terms of this non-legally binding document, the Parties commit to step up their cooperation on addressing and preventing irregular migration and on the return and reintegration of irregular migrants. This is complemented by bilateral memoranda of understanding concluded in parallel by several EU Member States. Therefore, it seems that the Joint Way Forward has somehow opened up the possibility for Member States to conclude bilateral informal agreements in parallel with the EU.

The second example of informal arrangements is the 2017 Standard Operating Procedures (SOP) for the identification and return of persons without authorisation to stay, agreed with Bangladesh. They are inspired by principles similar to those of the Joint Way Forward with Afghanistan.³⁵ They were laid down to support the EU Member States' bilateral relations with Bangladesh: these procedures, which do not create rights or obligations for the Parties, are intended to ensure the smooth, dignified and orderly return of Bangladeshi nationals who have no legal basis to stay in the territory of the requesting country and who do not hold a valid travel document. In an unpublished document, which is not formally attributed to any EU institutions, it is rather ironic to read about the intention to establish "*transparent procedures*" (emphasis added) for the identification of persons. The SOP with Bangladesh is based on cooperation between the administrative authorities of the EU Member States and the third country concerned and is facilitated by the EU. Although the intention of the parties is for the SOP not to create rights and obligations under international or EU law, the document lays down a number of specific commitments undertaken by the Parties to exchange information and documents within precise time limits. For this author, it is at least arguable that this document (and others of its kind) has legally binding effects.³⁶

In addition to the two informal agreements mentioned above, in its report of 2019 the Commission states that new "practical arrangements"³⁷ were agreed with Guinea,

³⁴ See the EU-Afghanistan Joint Way Forward on migration issues of 2 October 2016, available at eeas.europa.eu/headquarters/headquarters-homepage/11107/joint-way-forward-on-migration-issues-between-afghanistan-and-the-eu_en. For comments on this instrument see C. WARIN, Z. ZHEKOVA, *The Joint Way Forward on Migration Issues Between Afghanistan and the EU: EU External Policy and the Recourse to Non-Binding Law*, in *Cambridge International Law Journal*, 2017, p. 143 et seq.

³⁵ EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay, included in Annex 1 to Commission Decision of 8 September 2017 on the signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons without an Authorisation to Stay, on file with the author and not accessible to the public.

³⁶ See also the comments made by C. MOLINARI, *The EU and Its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns*, in *European Law Review*, 2019, pp. 835-836.

³⁷ The practical arrangements concluded by the Commission are additional to those attributable to Member States. Considering the special bonds between Italy and Libya, a memorandum of understanding was concluded on 2 February 2017 between the two countries. This is an example of an agreement

Ethiopia, Gambia, Côte d'Ivoire.³⁸ Once again, it is not possible to find traces of the texts of these informal agreements in the official journal. It seems that cooperation with these countries takes the form of regular meetings, migration Liaison Officers are sent from the EU Member States to third countries, while third countries' liaison officers in key EU Member States help with the identification of potential returnees.³⁹ In substance, this form of cooperation is intended to lead "to equivalent results in terms of cooperation on actual returns".⁴⁰

It is submitted that by privileging the conclusion of informal arrangements in order to overcome the difficulties of concluding formal ones, the EU has undermined the democratic principle,⁴¹ the principle of institutional balance and, to some extent, the rule of law,⁴² which is one of its values.

At this juncture, it is necessary to briefly examine how the European Parliament has reacted to the use of informal arrangements. It should be noted that in a resolution of 2017 this institution expressed regret that the EU and its Member States had opted for the conclusion of agreements with third countries, which avoid parliamentary scrutiny.⁴³ Here, in reality, the Parliament is not complaining of not being informed on the negotiation of an international agreement on readmission or of not being asked to approve it. Indeed, should the Commission and the Council take this course of action, the decision concluding the agreement would certainly be challenged before the Court of Justice and annulled for breach of Art. 218, para. 6, let. a), TFEU.⁴⁴ Rather, the Parlia-

concluded by a Member State *qua* Member State without the formal involvement of the Union. The text of the memorandum can be found on this website: eumigrationlawblog.eu. For comments see: A.V. PALM, *The EU External Policy on Migration and Asylum: What Role for Italy in Shaping Its Future?*, Policy Brief, in *Observatory on European Migration Law*, May 2017. See A. LIGUORI, *Migration Law and the Externalization of Border Controls*, Oxon: Routledge, 2019.

³⁸ Communication COM(2018) 798 final of 4 December 2018 from the Commission to the European Parliament, the European Council and the Council on Managing migration in all its aspects: progress under the European agenda on migration, p. 9. For further details, see E. TEMPRANO ARROYO, *Using EU Aid to Address the Root Causes of Migration and Refugees Flows*, in *EUI Migration Policy Centre*, 2019, p. 77.

³⁹ Communication COM(2018) 798, p. 10.

⁴⁰ COM(2017) 471 final, Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, p. 3.

⁴¹ The lack of parliamentary control at EU level goes in parallel with the circumvention of the Italian parliament's powers under Art. 80 of the Italian Constitution. Indeed, *memoranda* of understanding with Sudan on the one hand, and with Libya on the other, were respectively signed by Italy in 2016 and 2017 in a simplified form, while they should have been concluded in solemn form. V. ZAMBRANO, *Accordi informali con Stati terzi*, cit.

⁴² C. MOLINARI, *The EU and its Perilous Journey*, cit., pp. 837-839.

⁴³ See European Parliament resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)), P8_TA(2017)0124, para. 70.

⁴⁴ Indeed, the Parliament can exercise its power to reject an EU-wide agreement in areas where the ordinary legislative procedure applies; under Art. 79, para. 2, TFEU the Parliament has co-legislative powers with the Council and therefore the power to approve agreements in the area of readmission is con-

ment complains about the lack of its involvement in the negotiation of informal agreements and in their implementation.

Although the conclusion of informal agreements is not prohibited by EU primary law, abuse of these instruments may affect the principle of institutional balance. After the Lisbon Treaty, Member States conferred on the European Parliament the power to approve readmission agreements. Should informal arrangements, with similar effects to readmission agreements, be concluded instead of legally binding Treaties, this institution would be excluded from the decision-making process and, as a result, the institutional balance designed by the Treaty, as far as the European Parliament's role in EU external relations is concerned, would be altered. This institution would face legal hurdles in challenging the practical arrangements before the Court since it is not clear to what extent these acts have legal effects. The Court has not yet had the chance to rule on whether the recurrent use of informal arrangements without any form of involvement by the Parliament could breach the principles of loyal cooperation, or conferral of powers or institutional balance. In contrast, the Court had this opportunity with respect to the external activity of other institutions.⁴⁵

III. COMPACTS WITH COUNTRIES HOSTING REFUGEES: THE CONTEXT OF THEIR ADOPTION AND THEIR LEGAL NATURE

The Communication on a new partnership framework refers to the discussion on the Partnership priorities with Jordan and Lebanon that started in 2015. These are not priority countries, but they host large communities of refugees since their territories are heavily affected by the consequences of the Syrian conflict. In particular, because of this war, the two southern neighbours have hosted high numbers of displaced persons for a protracted period. Neither of them has ratified the UNHCR Geneva 1951 Refugee Convention, nor the New York Protocol. Syrian refugees have arrived in these countries in very poor condition and with scarce prospects of integration, given that they are not allowed to work. Therefore, Jordan and Lebanon provide ideal test cases to experiment on new approaches to the management of refugees⁴⁶ whereby the integration of these persons into the host countries should be favoured and incentivised.

In 2016, two "Compacts" were agreed with Jordan⁴⁷ and Lebanon,⁴⁸ once again without the involvement of the European Parliament. Before delving into the content of the

ferred on the Parliament. M. GATTI, *La Dichiarazione UE-Turchia sulla Migrazione: un Trattato Concluso in Violazione delle Prerogative del Parlamento?*, in *Eurojus.it*, 11 aprile 2016, www.rivista.eurojus.it.

⁴⁵ For example, the Court of Justice held that the Commission had breached the mentioned principles by signing a memorandum of understanding with Switzerland in 2013 without the Council's authorisation. See *Council v. Commission*, cit.

⁴⁶ See *infra*, section IV.

⁴⁷ The Compact with Jordan is detailed in the Annex of Decision 1/2016 of the EU-Jordan association Council of 19 December 2016 agreeing on EU-Jordan Partnership Priorities.

Compacts, it is necessary to briefly refer to the context that led to their adoption. In February 2016, the United Nations, together with the leaders of Germany, Kuwait, Norway, and the United Kingdom, organised an International Conference on the Syrian crisis in London. One of the aims of the meeting was to raise funds and to obtain loans from donors,⁴⁹ to support the efforts of Syria's neighbouring countries (and other countries such as Iraq and Turkey) in hosting Syrian refugees. As we can learn from the final declaration of the countries at the end of the Conference, the participants of this meeting "agreed to reduce the pressure on countries hosting refugees by supporting them in providing access to jobs and education that will benefit both refugees and host communities. Through linking relief and development efforts, this will provide a lasting benefit for those countries as well as the tools for Syrians to re-build their own country once they are able to return".⁵⁰ The declaration further states: "[...] participants agreed to support [hosting governments] in areas such as access to external markets, access to concessional financing and increased external support for public and private sector job creation".⁵¹ Jordan issued a position paper at the Conference in which it claimed that the Syrian crisis could be transformed into a development opportunity for the country.⁵²

However, this could be possible only through financial support and access to European markets under easier terms than those available under the Euro-Mediterranean agreement that binds the southern neighbour to the EU.⁵³ The request was advanced to accelerate the plans to revise preferential rules of origin applicable under that treaty by the end of the summer 2016. The Jordanian Government undertook "to designate five development zones and provide these with maximum incentives under the new investment law".⁵⁴ These initiatives were held to have the potential to provide additional jobs for Jordanians and Syrian refugees. The point was made that there was a clear link between the generosity of access to EU markets and the creation of additional employment opportunities. The Government committed to modify the legislation to allow Syrian refugees to apply for work permits both inside and outside the designated zones. It was estimated that with the necessary support of the international community,

⁴⁸ See Decision 1/2016 of the EU-Lebanon Association Council of 22 December 2016. The Compact is included in the Annex of this act.

⁴⁹ The World Bank, The European Investment Bank, The European Bank for Reconstruction and Development and the Islamic Bank.

⁵⁰ See Co-hosts declaration of the supporting Syria and the region Conference, available at assets.publishing.service.gov.uk, para. 9.

⁵¹ *Ibid.*, para. 10.

⁵² See Jordan's statement published on the website of the London Conference of 4 February 2016, available at assets.publishing.service.gov.uk.

⁵³ See Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part. For the text of the agreement see eur-lex.europa.eu.

⁵⁴ See Jordan's statement, cit.

about 200,000 job opportunities for Syrian refugees could be created in the coming years. Finally, Jordan committed to strengthen the education of Syrian children.

In July 2016, the EU-Jordan Association Committee, operating in the context of the Euro-Mediterranean agreement,⁵⁵ temporarily (until 2026) modified the rules of origin applicable to Jordan's exports of goods.⁵⁶ In December 2016, the EU-Jordan Association Council endorsed a list of priorities⁵⁷ of cooperation between 2016 and 2018 and a Compact that replaced the Action Plan between the EU and Jordan of 2012. The new list of priorities includes the most important areas of cooperation between the parties in a time span of two years. Since the first one is strengthening cooperation in regional stability, a plan on how to achieve this objective is detailed and articulated in the text and in the *addenda* of the Compact. In short, the EU intends to facilitate trade with Jordan by changing the rules of origin provided in the existing association agreement between the two parties and the Member States so as to favour the import of products coming from Jordan's designated areas under the condition that Syrians are employed in these zones.⁵⁸ The Compact is used here as a *sui generis* instrument which favours the integration of Syrian refugees in the job market through trade incentives. It is a way for the EU to reward partners that prevent the movement of refugees. This instrument has potential beneficial effects for the refugees and the host country, as well as for the EU. Indeed, its primary aim is to improve the living conditions of refugees and to strengthen Jordan's resilience. In addition, the host country is provided with macro-financial assistance and other forms of assistance.⁵⁹ Furthermore, Syrians who work in Jordan are less likely to cross the Mediterranean Sea to reach the territories of the Member States.

⁵⁵ See art. 93 of the Euro-Mediterranean agreement, cit.

⁵⁶ Decision n. 1/2016 of the EU-Jordan Association Committee of 19 July 2016 amending the provisions of Protocol 3 to the Euro-Mediterranean Agreement establishing an Association 'between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, concerning the definition of the concept of originating products' and the list of working or processing required to be carried out on non-originating materials in order for certain categories of products, manufactured in dedicated development zones and industrial areas, and connected with generating employment for Syrian refugees and Jordanians, to obtain originating status.

⁵⁷ These are political commitments which replace the Action Plan between the EU and Jordan of 2012; they do not as such have legally binding force.

⁵⁸ M. PANIZZON, *Trade-for-Refugee Employment: Nexing for Deterrence or Development in the EU-Jordan Compact?*, in S. CARRERA, L. DEN HERTOOG, M. PANIZZON, D. KOSTAKOPOULOU (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Leiden: Brill, 2018, p. 244 *et seq.* See also S. POLI, *The Principle of Conditionality in the EU's Relations with Neighbours: its Evolution and Reconciliation with the Principle of Consistency*, in *Il diritto dell'Unione europea*, 2018, p. 525 *et seq.*, especially pp. 543-550.

⁵⁹ The European Commission proposed on 29 June 2016 a second Macro-Financial Assistance (MFA) operation for Jordan in the amount of EUR 200 million, after the first operation was authorised in 2013. See Decision 2016/2371 of the European Parliament and of the Council of 14 December 2016 providing further macro-financial assistance to the Hashemite Kingdom of Jordan.

In exchange for the EU's support, the negotiation of an EU-Jordan readmission agreement and of an EU-Lebanon mobility partnership should have started.⁶⁰

From a legal point of view, the Compact is a bilateral instrument since it has been adopted by the EU-Jordan Association Council, a body formed by representatives of Jordan and EU officials from the Council and the Commission. The legal nature of the Compact is subject to debate: indeed, the EU-Jordan Association Committee, which simplified the rules of origin of the EU-Jordan Association Agreement, has legally binding powers under Art. 94, para. 2, of that agreement and has actually modified Protocol no. 3 of the Euro-Mediterranean agreement through a legally binding Decision.⁶¹ Therefore, it seems that the Compact had legally binding effects. However, as we can read from the text of the Decision adopted by the Association Council in December 2016, the latter body *recommends* that the Parties implement the EU-Jordan Partnership Priorities, including the Compact, under Art. 91 of the Euro-Mediterranean agreement.⁶² Therefore, it seems that the Compact is not legally binding. It may be argued that the Compact is a legal hybrid which was pragmatically used to support a country hosting refugees and also to disincentivise refugees from crossing the Mediterranean Sea.

IV. THE INTEGRATION OF REFUGEES IN THE JOB MARKET OF THE HOST COUNTRY THROUGH TRADE INCENTIVES IN THE EU-JORDAN COMPACT

After the London Conference of 2016, the EU acted to favour the implementation of the commitments made by Jordan and by Lebanon in that context.⁶³ The terms of the Compacts with these countries are quite different. For the purpose of this study, the most interesting is the former since it is pervaded by a new form of conditionality which is aimed not merely at “adequately hosting refugees” but also at integrating them into the job market of the receiving State. In contrast, the Compact with Lebanon presents limited commitments as far as the integration of the Syrians in the job market is concerned, as we shall see later.

⁶⁰ Communication COM(2016) 960 final of 14 December 2016 from the Commission to the European Parliament, the European Council and the Council on Second Progress Report: First Deliverables on the Partnership Framework with third countries under the European Agenda on Migration, p. 9.

⁶¹ See *supra*, footnote 56.

⁶² Art. 91 of the EU-Jordan Association agreement provides the Association Council with the power to issue (legally binding) decisions and to adopt recommendations. For the text of the Decision, see *supra*, footnote 47.

⁶³ See Council Decision on the Union position within the Association Council set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, with regard to the adoption of EU-Jordan Partnership Priorities and annexed Compact, JOIN(2016) 41, p. 11.

The Compact with Jordan may be appreciated since it is designed both by the EU and the host country, although it is based on a number of conditions defined by the EU.⁶⁴ In adopting the Compact with Jordan, the EU was influenced by the debate on Global Refugee Compacts carried out in the UN context⁶⁵ and to some extent, with its action, it is favouring the implementation of the UN-led initiative; the EU considers Global Compacts “a unique opportunity to bring forward a common approach on migration and forced displacement at the global level”.⁶⁶ The idea promoted by the UN General Assembly is that developed countries and donors should support the economic integration of refugees in the labour market of the host communities rather than providing assistance to these persons in camps, a solution that should be used only exceptionally and for a short period of time.⁶⁷ The Compact with Jordan is an exemplification of the new philosophy and is to some extent inspired by a human rights approach to migration-related problems. At the same time, this instrument has positive side-effect for the EU: refugees are less likely to leave Jordan when they are integrated into the job market.

The trade incentives are the most innovative aspect of the Compact. The EU undertakes to temporarily⁶⁸ relax the rules of origin for products originating from production facilities located in 18 pre-determined Special Development Zones (SEZ) and Industrial Areas, “as long as these are linked to job opportunities under the same conditions for both Jordanians and Syrian refugees” (emphasis added).⁶⁹ The target to reach is 15 per cent of jobs for Syrians in the first two years and 25 per cent thereafter, “with the overall aim to reach the target of 200,000 job opportunities for Syrian refugees at Country level”.⁷⁰ Relaxation of the rules of origin implies that products from the designated areas will be subject to the same regime available to less-developed countries, under the Generalised System of Preferences (GSP): “everything but arms”.⁷¹

While the use of unilateral trade measures to achieve developmental objectives is well established in EU practice,⁷² and is based to some extent on political conditionality, it is the first time that the EU has made trade concessions for a low-middle-income country,

⁶⁴ See also P. GARCIA ANDRADE, *EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally*, in *Common Market Law Review*, 2018, p. 158.

⁶⁵ The first draft of the Compact dates 9 March 2018. See un.org.

⁶⁶ See CFSP Report on Our priorities in 2018, as endorsed by the Council on 16 July 2018, document 11161/18 of 16 July 2018, para. 98, p. 51.

⁶⁷ P. COLLIER, A. BETTS, *Refuge: Transforming a Broken Refugee System*, New York: Penguin Random House, 2017.

⁶⁸ For 10 years.

⁶⁹ JOIN(2016) 41, cit., p. 12.

⁷⁰ *Ibid.*

⁷¹ See E. TEMPRANO ARROYO, *Promoting Labour Market Integration of Refugees with Trade Preferences: Beyond the EU-Jordan Compact*, in *RSCAS Working Paper*, no. 42, 2018, p. 6.

⁷² The Generalised System of Preferences was inaugurated in 1979 and throughout the years has been subject to numerous changes.

subject to the successful integration of refugees into the job market.⁷³ It should be noted that the EU's move is in line with the Global Compact on refugees, which states: "In some contexts, where appropriate, preferential trade arrangements could be explored in line with relevant international obligations, especially for goods and sectors with high refugee participation in the labour force; as could instruments to attract private sector and infrastructure investment and support the capacity of local businesses".⁷⁴

However, commentators have criticised the trade concessions made by the EU as they are subject to a number of conditions which may be considered "overly restrictive".⁷⁵ Indeed, relaxation of the rules of origin is limited *ratione loci* and *temporis*. Only exporters who are located in the designated zones or industrial sites benefit from the relaxation of the rules of origin if they manufacture specific goods and meet the targets of employing enough Syrians. Furthermore, although the possibility to extend the simplified version of these rules to all goods is envisaged, again this is tied to meeting the employment targets set out above.⁷⁶ The EU's upgrade of economic cooperation with Jordan⁷⁷ is also connected to the country's successful integration of Syrian refugees in the job market.⁷⁸ This may be considered an essential condition to develop the cooperation and bring it to a higher level.

The reason why the conditions of the Compact are very strict is that the trade concessions were designed to make it very attractive to the Jordanian Government to integrate Syrians in the job market and for the refugees to stay in the host country. Certainly, the EU has also provided macro-financial assistance to Jordan in the form of loans in

⁷³ It should be noted that, so far, the implementation of the Jordanian commitments has been problematic: this country is far from reaching its targets of 200,000 work permits. Although there was a sharp increase in the number of job permits issued to Syrians, the overall target of 200,000 which Jordan had undertaken to reach at the London Conference is very high for a country with a widespread informal job market. E. TEMPRANO ARROYO, *Promoting Labour Market Integration*, cit., pp. 10-11.

⁷⁴ See General Assembly, Report of the United Nations High Commissioners on Refugees, Part II Global Compact on Refugees of 13 September 2018, UN Doc. A/73/12, para. 2.2, p. 14.

⁷⁵ *Ibid.*, p. 6.

⁷⁶ "Once the latter target is achieved, the EU will consider further extending the Rule of Origin derogations and simplifying the conditions necessary for producers in Jordan to benefit from these new rules of origin regime". See JOIN(2016) 41, p. 12.

⁷⁷ It has been announced that preparations will start to launch negotiations of an Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA) to enable Jordanian products of selected sectors to enter the EU market without additional technical controls. The possibility to negotiate a Deep and Comprehensive Free Trade Agreement (DCFTA) is also envisaged. Finally, despite the existence of a mobility partnership, the possibility to have a visa-liberalisation agreement is made subject to the conclusion of a readmission agreement.

⁷⁸ It should be added that the EU support is linked to the compliance with the target of the integration of Syrians in the job market. For example, in 2016 the EU has granted macro-financial assistance to boost Jordan's economic stability. However, such an assistance is deprived of conditions related to the employment of Syrians.

order to create a good investment environment in this country;⁷⁹ yet, the Compact is centred on the integration of Syrian migrants rather than on fostering the growth of the host country. In the next section, we shall see to what extent the EU's goal to improve the situation of Syrians on the ground was achieved.

V. AN ASSESSMENT OF THE EU-JORDAN COMPACT

In December 2018, the EU and Jordan agreed to prolong the duration of the trade preferences to 2030, thus showing the Parties' support for the model of burden sharing inaugurated with the Compact.⁸⁰ It is necessary to examine the effects of the adoption of this partnership in order to assess whether the decision to prolong the trade preferences was sound.

The first observation that can be made is that, looking at the bare figures, the number of work permits issued in 2016 was over 103,000; this is remarkable, even though the target was 200,000. Thus, it can be argued that the situation of Syrians has improved; before the Compact was agreed on, refugees were not allowed to apply for work permits and were forced to rely on informal work. Yet, not all jobs are available to Syrians. A further worrisome factor is that the work permits do not include an integrated social/health/insurance package. The new law on health of January 2018 provides that Syrian refugees must pay 80 per cent of the standard fees of health insurance. As recognised by the High Representative of the Union for Foreign Affairs and Security, this "weakens the incentives to seek legal, declared work".⁸¹ In addition, the fact that work permits were issued does not mean that the working conditions are decent. In this respect, it is reassuring that the EU has signed a contract with the International Labour Organization (ILO) for the latter to monitor the labour standards of the authorised companies.⁸² The ILO has also conducted interviews with Syrians and has highlighted that the Compact provides tangible improvements for them. The ILO study shows that the possibility of having access to work permits has enhanced the feeling of security and has improved the economic conditions of refugees.⁸³ It is to be hoped that in the coming years the efforts made by the Jordan government⁸⁴ to ease the granting of work

⁷⁹ See Decision 2016/2371, cit.

⁸⁰ E. GRAWERT, *The EU-Jordan Compact*, in *Bonn International Center for Conversion (BBIC) Policy Brief*, No. 3, 2019, p. 3.

⁸¹ Commission Staff Working Document of 12 November 2018, Report on EU-Jordan relations in the framework of the revised ENP (2017-2018), SWD(2018) 485 final, p. 9.

⁸² *Ibid.*, p. 8.

⁸³ ILO report, *Lessons learned and emerging good practices-Of ILO's Syria crisis response*, 2018, pp. 31 and 70.

⁸⁴ SWD(2018) 485 final, cit., p. 10.

permits will continue.⁸⁵ The data available in the first five month of 2018 raise some worries since they reveal that only a limited number of permits (20,000) were issued.⁸⁶

While the conclusion of the EU-Compact with Jordan has implied an improvement in the situation of Syrians, it is not clear whether the host country has benefited from the operation of the Compact. Indeed, only a limited number of Jordanian companies have been authorised to export under this scheme.⁸⁷ Although the Compact is presented as an occasion to turn the challenges posed by the Syria crisis into concrete opportunities for the benefit of the population of Jordan, Syrian refugees and the EU, it is a myth that this instrument promotes Jordan's prosperity. The Compact intends to strengthen Jordan's stability and, more broadly, regional stability by integrating Syrian refugees in the job market,⁸⁸ thus preventing migration flows. The EU decided to limit the exceptions to the rules of origin to products coming from the designated zones. It is not at all certain that the trade scheme will actually have a positive impact on Jordan's growth.⁸⁹ Although the trade preferences given to goods manufactured in Jordan's designated industrial sites cover 85 per cent of the exports,⁹⁰ the EU could have been more generous in drafting the exceptions to the rules of origin. For example, the Union could have eased exports of Jordan's manufactured agricultural products,⁹¹ as requested by this country. It is regrettable that the EU has only made trade concessions linked to the objective of integrating Syrians in the job market. Besides, the EU could have been more benevolent with Jordan, merely on account of the hardships that this country has had in hosting Syrian refugees.

VI. THE EU-LEBANON PARTNERSHIP PRIORITIES AND THE LACK OF A COMPACT WITH TUNISIA

By contrast with the EU-Jordan Compact, the EU-Lebanon partnership priorities 2016-2018 and the Compact, approved by the EU-Lebanon Association Council in November 2016, sets out very limited commitments with respect to the employment integration of Syrians living in this small country.⁹²

⁸⁵ The Jordan government has waived the fees to request a work permit.

⁸⁶ SWD(2018) 485 final, cit., p. 9.

⁸⁷ *Ibid.*, p. 11.

⁸⁸ The relation of the rules of origin is intended to mitigate "the costs imposed by hosting a large number of Syrian refugees".

⁸⁹ It should be noted that similar trade schemes, adopted by the US, did not produce spillover effects on the Jordanian economy. E. TEMPRANO ARROYO, *Promoting Labour Market Integration*, cit., p. 16.

⁹⁰ *Ibid.*, p. 6.

⁹¹ *Ibid.*, p. 12.

⁹² There are 1.5 million Syrians in Jordan, either as registered or unregistered persons.

Indeed, the presence of refugees is considered temporary;⁹³ in addition, as a result of Lebanon's statement at the London Conference, this country intends to ease Syrians' access to jobs in certain sectors where refugees are not in direct competition with nationals.⁹⁴ Lebanon has hinted at the possibility of issuing work permits as appropriate to Syrians if new investments in the country create new jobs. Decision 1/2016 of the EU-Lebanon Association Council, in which priorities for cooperation and the Compact are formalised, significantly states: "Improving economic opportunities for refugees and displaced persons from Syria will have to come in the broader context of improving the economic resilience of the country as a whole through foreign and local investments in job-creating projects, infrastructures and local economic development".⁹⁵ The Compact included in the annex to the mentioned decision adds: "Any measures undertaken within the scope of this Compact will not be to the detriment of the Lebanese people and will be in conformity with the Lebanese Constitution, Lebanese laws and regulations".⁹⁶ The commitment to ease access to work in the Decision is possibly drafted in stricter terms than those made in Lebanon's statement at the London Conference of February 2016; indeed, the former document adds that easing access to jobs for Syrians is a "controlled" process.⁹⁷ The reason for Lebanon's more restrictive approach to the integration of Syrians in the job market may be explained by Lebanon's opposition to integrating Syrians in the country.⁹⁸

In contrast to Jordan and Lebanon, the EU has not agreed on a Compact with Tunisia, despite the fact that this country hosts large numbers of Libyans who left their country after 2011, and it is becoming a significant country of departure.⁹⁹ According to recent data, Tunisia was the country with the highest number of departures to Italy in 2019.¹⁰⁰ The Communication on a new partnership framework envisages the conclusion of visa liberalisation and readmission agreements.¹⁰¹ The Commission has recommended the opening of negotiations for the conclusion of a readmission agreement since 2014.¹⁰² Should the negotiations succeed, Tunisia would be the first southern neighbour with a visa facilitation agreement. Yet, at the time of writing, discussion with

⁹³ See also on this issue F. DE BEL-AIR, *Migration Profile: Lebanon*, in *Robert Schuman Centre for Advanced Studies, Policy Briefs*, no. 12, 2017, p. 5.

⁹⁴ Such as agriculture, construction and other labour-intensive sectors. See London Conference, Lebanon statement of intent, available at: assets.publishing.service.gov.uk.

⁹⁵ Decision 1/2016, cit., p. 117.

⁹⁶ *Ibid.*, p. 120.

⁹⁷ *Ibid.*, p. 121.

⁹⁸ See E. TEMPRANO ARROYO, *Promoting Labour Market Integration*, cit., p. 8.

⁹⁹ Communication COM(2019) 126 final of 6 March 2019 from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration, p. 3.

¹⁰⁰ COM(2019) 481, cit., p. 3.

¹⁰¹ Joint Declaration on Mobility Partnership between Tunisia, and the European Union and its Member States of 3 March 2014. The participating EU Member States to this partnership are 10.

¹⁰² COM(2014) 493 final (the document is declassified only in part).

this third country is still ongoing. It should be noted that managing migration effectively was a priority both for the EU and for Tunisia in 2014;¹⁰³ however, the latest EU-Tunisia strategic priorities for the period 2018-2020 consider the conclusion of a deep and comprehensive free trade agreement a priority in order to contribute to Tunisia's gradual integration into the EU's internal market.¹⁰⁴ There is no mention of any Compacts with Tunisia. This may be explained by the fact that the number of refugees in the country is limited in absolute terms,¹⁰⁵ and it is not worth it for the EU to insist on having a Compact similar to that of Jordan.

VII. THE INTEGRATION OF MIGRATION CONCERNS INTO EU RELATIONS WITH DEVELOPING COUNTRIES: LEGAL AND POLICY ISSUES

All EU priority countries listed in the Communication on a new partnership framework are low-income or middle-income economies. Cooperation between the EU and developing countries stretches to the field of migration. The multifaceted nature of EU development cooperation was acknowledged in the judgment *Portugal v. Council*¹⁰⁶ in which the Court stated that a cooperation agreement with India, covering various fields, including protection of human rights, could be based on the provision of the Treaty dealing with development cooperation. In a later case, the Court had the opportunity to examine whether an agreement based on Art. 209 TFEU could also cover the obligations to readmit third country nationals. In the *Philippines Partnership Cooperation* case,¹⁰⁷ the Court recognised the possibility of envisaging *general* obligations in the field of readmission of third country nationals in an agreement of this kind,¹⁰⁸ thus confirming the broad scope of development cooperation policy.¹⁰⁹ Yet, the EU institutions could not use a development cooperation agreement to impose *specific* obligations on third countries to readmit irregular migrants. Should the EU be interested in obtaining a commitment from its partner country

¹⁰³ *Ibid.*, p. 11.

¹⁰⁴ Decision 1/2018 of the EU-Jordan association Council of 12 December 2018 agreeing on a two-year extension of the EU-Jordan Partnership Priorities.

¹⁰⁵ There are about 4500 refugees in the country. See <https://data2.unhcr.org/en/country/tun>, accessed on 15 March 2020.

¹⁰⁶ Court of Justice, judgment of 3 December 1996, case C-268/94, *Portugal v. Council*.

¹⁰⁷ See Court of Justice, judgment of 11 June 2014, case C-377/12, *Commission v. Council*.

¹⁰⁸ *Ibid.*

¹⁰⁹ The Court annulled the decision concluding a framework agreement on partnership and cooperation between the EU, its Member States and the Philippines since the Council had wrongly included Art. 79, para. 3, TFEU as one of the legal bases of the mentioned act. That Treaty provision recognises an explicit competence of the EU to conclude readmission agreements. However, the Court found that Art. 209 TFEU was a sufficient legal basis to cover the general obligations in the field of migration included in Art. 26 of the concerned agreement.

to readmit his own nationals, it ought to conclude an *ad hoc* agreement based on Art. 79, para. 3, TFEU. This is in line with the principle of conferral.¹¹⁰

Looking at the practice, EU institutions give cooperation in the field of migration a central role in their relations with developing countries. The new European Consensus on Development of 2017 presents migration as an opportunity for development for developing countries: well-managed migration and mobility foster the growth and sustainable development of poor countries;¹¹¹ in addition, migrants' remittances and "brain circulation" tend to reduce poverty. It is submitted that while cooperation in the field of migration is legally possible and mutually beneficial for the EU and developing countries,¹¹² considering cooperation in migration management an essential aspect of EU relations with those countries lies in conflict with the policy objective of development policy. After the publication of the 2016 Communication on a new partnership framework, cooperation in the area of migration has gained exceptional importance in the EU and Member States' relations with poor countries. The following paragraph of the Commission is particularly meaningful:

"Increasing coherence between migration and development policy is important to ensure that development assistance helps partner countries manage migration more effectively, and also incentivises them to effectively cooperate on readmission of irregular migrants. Positive and negative incentives should be integrated in the EU's development policy, rewarding those countries that fulfil their international obligation to readmit their own nationals, and those that cooperate in managing the flows of irregular migrants from third countries, as well as those taking action to adequately host persons fleeing conflict and persecution. Equally, there must be consequences for those who do not cooperate on readmission and return".¹¹³

The invoking of the principle of coherence between internal and external EU policies by the Commission is striking and does not take into consideration that the EU also has an obligation to act consistently with development cooperation policy.¹¹⁴

Having promoted the partnership framework with third countries in the field of migration, the Commission has subordinated fighting poverty in developing countries to

¹¹⁰ M. BROBERG, R. HOLDGAARD, *Demarcating the Union's Development Cooperation Policy After Lisbon: Commission v. Council (Philippine PCFA)*, in *Common Market Law Review*, 2015, p. 566.

¹¹¹ New European Consensus on development, available at ec.europa.eu, par. 39. See also M. BORRACCETTI, C. CARLETTI, *Il Global Compact sulla migrazione tra scenari internazionali e realtà europea*, in *Freedom, Security and Justice*, 2018, p. 39 *et seq.*

¹¹² J. SILGA, *Assessing the Consistency of EU Development Cooperation with Readmission in the EU-Philippines Agreement Case – a Balancing Exercise*, in *European Law Review*, 2015, p. 452 *et seq.*

¹¹³ Communication COM(2016) 385, cit., p. 9.

¹¹⁴ Under Art. 21, para. 3, TEU, the Union shall ensure consistency between the different areas of its external action and between these and its other policies (including development cooperation policy).

their cooperation in the field of readmission.¹¹⁵ The quality of such cooperation seems to affect overall relations with the EU. The Parliament does not seem to share the Commission's position and has advocated a "balanced approach" in the application of the partnership framework. The view is taken that the EU should not aim at achieving measurable increases in the number and rate of returns in EU relations with third countries; mobility partnerships and circular migration agreements, facilitating the movement of third-country nationals to the EU, should also be agreed so as to sustain the socio-economic development of both parties.¹¹⁶

A further index of the prominence of migration concerns in EU relations with developing countries is the use of the Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa.¹¹⁷ This fund, which was created in 2015 after the EU-Africa Summit, is supported by the Commission and by most of the Member States, while it is not subject to Parliamentary scrutiny.¹¹⁸ The fund not only aims at providing greater economic and developmental opportunities and at preventing conflicts, or strengthening the resilience of the most vulnerable, but it is also intended to improve the migration management in countries of origin, transit and destination. It has been correctly observed that funds of this kind are set up to tackle situations of emergencies rather than to address the root causes of migration.¹¹⁹

The disproportionate importance attached to the containment of migration flows, in the context of EU relations with developing countries, is confirmed by the Communication on renewed partnership with the ACP Group of States,¹²⁰ in which the Commission sets out its ideas on how to change the Partnership Agreement between the ACP States on the one hand, and the EU and its Member States on the other (the "Cotonou Agreement"), signed in 2000 and due to expire in February 2020.

In 2016, the Commission started to define the way multilateral partnership should change and to assess the way it worked in the past. The Commission is critical of cooperation with ACP countries in the field of readmission of third country nationals. Indeed, despite the fact that the Cotonou agreement contains a clause concerning cooperation

¹¹⁵ The same European Consensus on development uses ambiguous words: "partner countries are invited to seize the opportunities of migration". This may imply that countries sealing their borders so as to prevent uncontrolled movement of persons will receive additional financial support from the EU.

¹¹⁶ See European Parliament resolution P8_TA(2017)0124, paras 49-50.

¹¹⁷ For more information on the multidonor Trust funds supported by the EU between 2013 and 2016 see www.ec.europa.eu.

¹¹⁸ S. CARRERA, L. DEN HERTOOG, J. NÚÑEZ, FERRER, R. MUSMECI, L. VOSYLIŪTE, M. PILATI, *Oversight and Management of the EU Trust Funds Democratic Accountability Challenges and Promising Practices*, European Parliament study (CONT Committee), 2018, p. 9. However, the European Parliament has been invited to participate as an observer to the meeting of the Boards of the EU Trust Fund for Africa.

¹¹⁹ *Ibid.*, p. 87 *et seq.*

¹²⁰ Joint Communication to the Council and to the European Parliament, A renewed partnership with the countries of Africa, the Caribbean and the Pacific, JOIN(2016) 52.

in the field of irregular migration, the EU has been unable to use it to readmit irregular migrants from ACP countries. Art. 13, para. 5, of the agreement envisages that ACP countries may conclude bilateral readmission agreements with the EU. This is a very similar provision to Art. 26, para. 4, of the Philippines partnership cooperation agreement whose legality was examined in the above-mentioned case *Commission v. Council*.¹²¹ It is not possible to impose specific obligations to take back nationals for ACP countries on the basis of that provision: a separate readmission agreement must be concluded. In 2010, the EU attempted to change the article under consideration so as to be able to expedite the return of irregular migrants coming from ACP countries of origin. However, the EU met the opposition of ACP countries; a compromise solution was the adoption of a Joint Declaration of the ACP-EU Joint Council which opened up a regional dialogue between the Parties in the concerned area. In this context, it does not come as a surprise that the Commission's proposal that in future the partnership "integrate [...] important policy developments such as the European Agenda on Migration and related Partnership Framework".¹²² According to the Commission, the objective is to help "to respond to crises through immediate and measurable results, but also lay the foundations of an enhanced cooperation with countries of origin, transit and destination with a well-managed migration and mobility policy at its core".¹²³ Once again, the idea emerges that the greater the success in managing migration, the larger the benefits that partner countries will receive from the EU. Political conditions were traditionally attached to the disbursement of aid: yet, these were related to respect of values such as democracy and human rights rather than to border controls and cooperation in the field of migration. In development cooperation policy post 2015, cooperation in this area seems to have the same importance as respect of the mentioned political values.

On its side, the ACP group of States emphasises that the return and readmission processes to the country of origin should be on a voluntary basis.¹²⁴ It further argues that the contribution of remittances to development is limited since they cannot be equated to other international financial flows, such as foreign direct investment, Official Development Assistance or other public sources of financing for development. It makes the point that the new agreement should include political dialogue that addresses migration, taking into account the rights of migrants, and finally states that the use of development aid for the negotiation of restrictive border controls should be excluded.¹²⁵

At the time of writing, it is not possible to examine how the provisions of the post-Cotonou agreement with ACP countries were changed since the final text has still to be

¹²¹ *Commission v. Council*, cit.

¹²² JOIN(2016) 52, cit., point 3.1.3.

¹²³ *Ibid.*

¹²⁴ See ACP negotiating mandate for a post-Cotonou partnership agreement with the European Union, ACP/00/011/18 final, 30 May 2018, point 158.

¹²⁵ *Ibid.*, point 159.

signed. In December 2019, the decision was taken to prolong the partnership agreement between the EU, its Member States and the ACP countries until the end of December 2020.¹²⁶

VIII. FINAL REMARKS

After the EU migration crisis reached its peak in 2016, the EU and its Member States have favoured the use of practical arrangements, political dialogues and *sui generis* instruments (such as Compacts) with countries of origin and/or transit of migrants or with countries hosting refugees. The recurrent use of these instruments, which is not forbidden by the Lisbon Treaty, has reduced the accountability of the EU institutions and has affected the institutional balance to the detriment of the European Parliament. The EU has been ready to use trade incentives to support the integration of Syrian refugees into Jordan's economic life and has attempted to make cooperation in the area of migration more central in its relations with developing countries. Overall, the measures adopted so far by the EU have contributed to reducing to the minimum the number of irregular entries in 2018 compared with the previous five years,¹²⁷ and have made the EU Member States more resilient to the challenges posed by migration, despite the lack of cooperation of the Visegrad group which has substantially boycotted the relocation and resettlement schemes. However, these positive developments have not led to the abolishment of the internal border controls in certain members of the Schengen area that had re-introduced them in 2015.¹²⁸ In addition, the EU has not ensured consistency between its actions and activities and the main objective of development cooperation policy, in breach of Art. 7 TFEU.¹²⁹ Indeed, the EU's development assistance is now geared towards the enhancement of the capacity of developing countries to manage their borders rather than to fight poverty, which is the overarching objective of development cooperation policy.

The Compact with Jordan is not very different in spirit from the controversial EU-Turkey statement of 18 March 2016 which is considered part of an innovative and successful approach,¹³⁰ despite the increase in the number of arrivals to the Greek islands in 2018 and the low rate of returns from the Greek islands to Turkey.¹³¹ Two equally important drives lie at the basis of the EU's decision to innovate its approach to migration. These are, on the one hand, the need to improve the situation of Syrians in the host state

¹²⁶ See Decision 3/2019 of the ACP-EU Committee of ambassadors of 17 December 2019, p. 3 *et seq.*

¹²⁷ Communication COM(2019) 481, cit., p. 1.

¹²⁸ The internal border controls were re-introduced because of the pressure coming from the nationals of Western Balkans as well as from other third country nationals using the Eastern migration route. See ec.europa.eu.

¹²⁹ "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."

¹³⁰ Communication COM(2019) 481, cit., p. 6.

¹³¹ *Ibid.*, p. 18.

and, on the other, the necessity to prevent asylum seekers from taking Central and Eastern migration routes. Indeed, it is less costly for developed countries to financially support refugees if they stay in a developing country (or, as in the case of Jordan, in a lower-middle-income country) rather than hosting them in their territories. At the same time, it should also be acknowledged that Turkey, Jordan and Lebanon are the countries which had most of their refugees re-settled in the EU.¹³² This implies that the Member States, through the EU, have supported, to some extent, countries hosting refugees.

Undeniably, both initiatives grant non-humanitarian assistance to the receiving countries to improve Syrians' access to basic services and, in the case of the Jordan Compact, the integration of refugees in the job market is facilitated. Fostering access to employment and the integration of refugees is a policy option worth pursuing since it does help improve the situation of refugees. Yet, the mentioned initiatives do not offer long-term solutions to problems which are not of a temporary nature. Leaving aside the case of asylum seekers, in order to prevent the loss of lives of economic migrants in the Mediterranean Sea, it would be necessary to open legal channels of migration, depending on the needs of the job market at national levels. Yet, in this area, Member States are exclusively competent;¹³³ and the major obstacle is their unwillingness to take initiatives in the field of legal migration.¹³⁴

¹³² *Ibid.*

¹³³ See Art. 79, para. 4, TFEU.

¹³⁴ Report from the Commission to the European Parliament, the European Council and the Council, Fourth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, COM(2017) 350, pp. 13-14.



ARTICLES

HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW – FIRST PART

edited by Grażyna Baranowska and León Castellanos-Jankiewicz

HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW: AN INTRODUCTION

GRAZYNA BARANOWSKA* AND LEÓN CASTELLANOS-JANKIEWICZ**

TABLE OF CONTENTS: I. Introductory remarks. – II. The governance of historical memory in Europe. – III. The rule of law. – VI. Memory governance and the rule of law. – V. Concluding remarks.

ABSTRACT: The legal governance of historical memory in Eastern and Central Europe has grown exponentially over the past two decades. This development runs parallel to the region's reckoning with its communist legacies at the national level, where national identity has been harnessed and sometimes instrumentalised to adopt revisionist interpretations of the past. Mnemonic governance in these States has also been heavily influenced by their proximity or membership to the European Union, which upholds the rule of law as a fundamental value. At the same time, the region's Soviet legacies have been projected by a newfound Russian assertiveness in the area, which has resulted in a phenomena known as memory wars. Those developments are accompanying the ongoing process of democratic transition in Eastern and Central European States. This introductory *Article* sets out the premises of the *Special Section* on historical memory in post-Communist Europe and the rule of law, by showing that these democratization processes are far from linear. It does so by first outlining the trajectory of memory governance in Western Europe, which has focused on the Holocaust as a foundational European narrative. It then outlines the tensions emerging between this account and the historical specificities of post-communist States which experienced different forms of totalitarianism. Finally, the introduction shows that the embrace of the rule of law

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in post-communist Europe in the form of the European Union project, transitional justice or democratic values has also been at odds with the region's mnemonic governance.

KEYWORDS: memory laws – rule of law – East and Central Europe – memory governance – mnemonic governance – memory wars.

I. INTRODUCTORY REMARKS

This two-part *Special Section* addresses historical memory and the rule of law in the particular context of post-communist Europe. Historical memory has played a significant role in the aftermath of communism as Eastern European countries come to terms with their past. But the euphoria of the 1990s has been followed by the realization that communist legacies – in their legal, historical and political dimensions – might be more entangled with national politics than has hitherto been acknowledged. The contributions in the *Special Section* engage with how Eastern European countries are dealing with their past, as they undergo the process of democratic transition and integration with the European Union.

The region is not homogenous in its history and the way it is approached.¹ The differences between post-communist countries concern the severity of the regime(s) that were in place, how communism ended, and the way in which the communist legacy is perceived today.² However, the common dominator is that the contemporary politics of memory in post-communist Europe are heavily dominated by the legacies of World War II and the Nazi and Soviet regimes.³ The memory of communism and its political contestation through legal means has thus become one of the central concerns of the analyzed countries in recent years.⁴ Interethnic conflicts, which had been suppressed during communism and reappeared fiercely after 1989, are an additional important cause explaining the surge in memory laws, especially in the post-Yugoslav countries.

¹ On a division of Eastern Europe into four “meso-regions” with distinctively different cultures of remembrance, see S. TROEBST, *Halecki Revisited: Europe's Conflicting Cultures of Remembrance*, in P. MEUSBURGER, MICHAEL HEFFERNAN, E. WUNDER *Cultural Memories. The Geographical Point of View*, Springer 2011.

² V. PETTAI, E.-C. PETTAI, *Transitional and Retrospective Justice in the Baltic States*, Cambridge: Cambridge University Press 2015; N. KOPOSOV, *Memory Laws, Memory Wars. The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2018; U. BELAVASAU, A. GLISZCZYNSKA, *The Remarkable Rise of 'Law and Historical Memory' in Europe: Theorizing Trends and Prospects in Recent Literature*, in *Journal of Law and Society*, 2020, p. 1 et seq.

³ N. KOPOSOV, *Memory Laws, Memory Wars*, cit., pp. 129-148.

⁴ U. BELAVASAU, A. WÓJCIK, *La criminalisation de l'expression historique en Pologne: la loi mémorielle de 2018*, in *Archives de politique criminelle*, 2018, p. 175 et seq.; A. WÓJCIK, U. BELAVASAU, *Posponer los cambios de nombre de las calles tras la transición de la democracia: lecciones legales de Polonia*, in J. GUIXÉ et al. (eds), *Diez años de leyes y políticas de memoria (2007-2017)*, 2019, p. 27 et seq. See also on the criminalization of communism L. NEUMAYER, *The Criminalization of Communism in the European Political Space after the Cold War*, New York: Routledge, 2018.

Nikolay Koposov has identified three main factors which led Eastern Europe to become an important center for legislative activity concerning the past in his groundbreaking monograph *Memory Laws, Memory Wars*, published in 2018. First, the overly-optimistic expectations about the future gradually gave way to a more complex perception of history, which resulted in a growing nostalgia for the communist period. Second, the EU's official Holocaust-centered politics expanded eastwards as post-communist countries entered the EU. Within the EU integration processes, these countries adapted those memory policies, and added their own distinctive features. Third, Putin's neo-imperial rule in Russia put forward an interpretation of the war focusing on the Soviet Union's decisive role in the victory over fascism.⁵ Russia's increasing assertiveness on the world stage over the past decade has exacerbated this problem significantly, thus leading to what Koposov terms "memory wars".

As identified by Koposov, it is important to consider the role of EU politics and integration in the region's memory governance in more detail to understand the specificities of post-communist States' engagement with the past in East and Central Europe. Before post-communist European countries could influence pan-European memory politics, the EU and Council of Europe built their normative frameworks upon the value of acknowledging past crimes and avoiding future ones, with the Holocaust being the central element of this policy.⁶ The post-communist countries which joined the Union later had to accept and adopt that policy as a matter of conditionality.⁷ However, as Eva-Clarita Pettai argues, pushing the young post-communist democracies towards confronting the Holocaust had counterproductive effects.⁸ Central to the introduction of memory laws in many post-communist countries was the European Council's 2008 Framework Decision on Racism and Xenophobia⁹, which required States-members to introduce genocide denial bans and other measures relating to the governance of historical memory.¹⁰ Problematically, this Decision has sought to provide a uniform narrative that has sometimes clashed with the diverse historical experiences in the vast Eu-

⁵ *Ibid.*, pp. 126-127.

⁶ A. SIERP, *History, Memory and Trans-European Identity: Unifying Divisions*, New York: Routledge, 2014, pp. 125-127.

⁷ On this point, see U. BELAVUSAU, *Historical Revisionism in Comparative Perspective: Law, Politics, and Surrogate Mourning*, in *EUI Law Working Papers*, no. 12, 2013, p. 1 *et seq.*; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer Law International, 2008.

⁸ E.-C. PETTAI, *Protecting Memory of Criminalizing Dissent? Memory Laws in Lithuania and Latvia*, in E. BARKAN, A. LANG, *Memory Laws: Criminalizing Historical Narrative* (forthcoming).

⁹ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

¹⁰ L. CAJANI, *The Implementation of the Framework Decision by the EU Member States*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, Cambridge: Cambridge University Press, 2017, pp. 136-138. See also U. BELAVUSAU, *Memory Laws and Freedom of Speech: Governance of History in European Law*, in A. KOLTAY (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression*, Budapest: Wolters Kluwer, 2015, p. 537 *et seq.*

ropean legal space. While the EU's politics thus aimed at creating a common European historical memory, which would strengthen the political community, the way this was perceived and shaped domestically in Eastern Europe did not always serve the purpose.

Pursuant to the 2008 Framework Decision, the EU's memory politics aim at creating a common European narrative centered on the Holocaust as a pivotal element of European identity and integration that is also invoked to combat racism and prevent national and ethnic conflicts.¹¹ Nevertheless, the Decision's reception in domestic law has been uneven, as Emanuela Fronza notes that "the crimes gradually implemented in countries with different legal traditions and political histories do not seem to reflect the universal values the EU Framework Decision intended to promote".¹² This is especially true in post-communist countries, as the adopted memory laws are not always aimed at combating racism or preventing national and ethnic conflicts, and do not serve this purpose in practice. Indeed, they often reinforce one-sided and Manichean national narratives which, although harmless at first blush, may have disproportionate effects on minority groups. A Lithuanian law adopted in 2010 to criminalize the denial of Nazi and Soviet crimes can serve as a vivid example. As the initial case law shows, Lithuanian courts have gone to great lengths to sanction the denial of Soviet crimes either because these statements have incited public disorder or were clearly defamatory. However, in cases concerning the Holocaust, the courts only assessed whether the accused actually denied the Holocaust without accounting for other societal aspects of their statement's implications. Consequently, in practice, the Lithuanian memory law does not protect minorities and instead validates the views of majority populations, protecting them against certain historical reinterpretations.¹³

II. THE GOVERNANCE OF HISTORICAL MEMORY IN EUROPE

Throughout the 2000s, memory laws have been adopted by governments in post-communist States to forward political agendas.¹⁴ While the term "memory laws" is not unambiguous, we adopt the broad approach proposed by Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias in *Law and Memory*, their seminal volume mapping the

¹¹ K.-G. KARLSSON, *The Uses of History and the Third Wave of Europeanisation*, in M. PAKIER, B. STRATH (eds), *A European Memory? Contested Histories and the Politics of Remembrance*, New York: Berghahn Books, 2010.

¹² E. FRONZA, *Memory and Punishment, Historical Denialism, Free Speech and the Limits of Criminal Law*, The Hague: Springer, 2018, p. 19. See also pp. 55-62 on the Framework Decision 2008/913/JHA.

¹³ E.-C. PETTAI, *Protecting Memory of Criminalizing Dissent?*, cit. See also N. KOPOSOV, *Memory Laws: Historical Evidence in Support of the "Slippery Slope" Argument*, in *Verfassungsblog*, 8 January 2018, verfassungsblog.de.

¹⁴ See the database of the MELA project ("Memory Laws in European and Comparative Perspective"), compiling a database of relevant memory laws and judgements for future reference and comparative constitutional studies: melaproject.org.

field, and define them as acts that enshrine State-approved interpretations of crucial historical events.¹⁵ These legal and extralegal measures are often at odds with democratic values because they perpetuate official narratives, use exclusionary devices and, in some extreme cases, facilitate the waging of transnational memory wars.¹⁶ Some of these provisions even emphasize ethno-national identity in ways reminiscent of the succession of crises and democratic backsliding that marked the interwar period.¹⁷ Within the European Union, and in Poland¹⁸ and Hungary¹⁹ in particular, there has been an active engagement with the legal governance of historical memory as an euphemistic reason to protect national narratives, often to the detriment of racial, religious and linguistic minorities. Russia and Ukraine, for their part, have enacted a barrage of punitive laws which stifle any criticism or reformulation of their respective side's role in the Second World War, resulting in what Koposov has termed memory wars between the two countries. In the Balkans, the phenomena of memory governance has been aimed at recasting the transitional justice narratives established in the judicial findings of the International Criminal Tribunal for the Former Yugoslavia. Serbia, in particular, has played an active role in reframing the transitional narrative according to which it bore the brunt of responsibility for atrocities committed against Bosnian Muslims, and has

¹⁵ U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS, *Introduction: Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, Cambridge: Cambridge University Press, 2017. See also the debate on memory laws in *Verfassungsblog*, in particular: A. GLISZCZYŃSKA-GRABIAS, *Law and Memory*, 4 January 2018, verfassungsblog.de; E. HEINZE, *Law and Historical Memory: Theorising the Discipline*, 7 January 2018, verfassungsblog.de. For a narrower definitions see N. KOPOSOV, *Memory Laws, Memory Wars*, cit., p. 6.

¹⁶ M. MALKSOO, *Memory Must Be Defended: Beyond the Politics of Mnemonical Security*, in *Security Dialogue*, 2015, p. 221 et seq. I. NUZOV, *Freedom of Symbolic Speech in the Context of Memory Wars in Eastern Europe*, in *Human Rights Law Review*, 2019, p. 231 et seq. On how security concerns are used to justify the adoption of memory laws see also: A. WÓJCIK, *Memory Laws and Security*, in *Verfassungsblog*, 5 January 2018, verfassungsblog.de. See also Model Declaration on Law and Historical Memory proposed by the MELA research consortium, melaproject.org. The Model Declaration on Law and Historical Memory will be printed in the second part of this *Special Section*.

¹⁷ M. BUCHOLC, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland after 2015*, in *Hague Journal on the Rule of Law*, 2018, p. 85 et seq. On the interwar period see E.H. CARR, *The Twenty Years' Crisis, 1919-1939*, London: Palgrave Macmillan, 1939.

¹⁸ On memory laws in Poland, see: U. BELAVUSAU, *The Rise of Memory Laws in Poland*, in *Security and Human Rights*, 2018, p. 36 et seq.; A. GLISZCZYŃSKA-GRABIAS, *Deployment of Memory with the Tools of Law – The Case of Poland*, in *Review of Central and Eastern European Law*, 2019, p. 464 et seq.; A. GLISZCZYŃSKA-GRABIAS, G. BARANOWSKA, A. WÓJCIK, *Law-secured Narratives of the Past in Poland in Light of International Human Rights Law Standards*, in *Polish Yearbook of International Law*, 2018, p. 59 et seq.; A. WÓJCIK, *Laws Affecting Historical Memory from the Perspective of Human Rights*, PhD dissertation (on file with authors).

¹⁹ G. HALMAI, *Memory Politics in Hungary: Political Justice without Rule of Law*, in *Verfassungsblog*, 10 January 2018, verfassungsblog.de; M. BÁN, *The Legal Governance of Historical Memory and the Rule of Law*, PhD dissertation (on file with authors).

relied on politically-appointed commissions to highlight the plight of ethnic Serbians during that conflict in a manner that furthers its geopolitical interests.

The past has therefore become a powerful tool in the furtherance of current political agendas in East and Central Europe. One obvious reason for this newfound interest around memory governance in the region is related to the fact that these countries have been coming to terms with the legacies of their communist past. However, it also obeys to parallel developments in Western European States, where the legacies of victimhood resulting from the Holocaust have attained a hallowed character in mainstream national politics and within the normative framework of the European Union. Among the first instruments to address this was the 1996 Joint Action to Combat Racism and Xenophobia, which defined genocide denial as a form of anti-Semitic and anti-democratic behavior and required Member States to introduce legislation prohibiting it.²⁰ In 2008, the Joint Action was expanded by a Council Framework Decision which reiterated the importance of genocide denial bans.²¹

The initial enthusiasm with which memory laws were adopted in Western Europe during the 1990s has changed markedly over the years. The first academic discussions about memory laws emerged in France, where the term '*lois mémorielles*' was coined in the context of the freedom of historical research.²² Soon thereafter, the debate centered on the prohibition of the denial of the Armenian genocide and issues of equal status between this tragedy and the Holocaust.²³ The ensuing debates have revealed the tensions between the competing interests of the various national minorities in the European legal space, and have been framed in terms of the right to freedom of expression, matters of public remembrance and issues regarding the inclusion or exclusion of historical material in educational curricula. Over the past decade, memory laws have elicited deeper fractures within the European project. This is because the explosion of the legal governance of historical memory in the Eastern European States that acceded to the Union from 2004 onward has brought fundamental European values under

²⁰ Council Joint Action 96/443/JHA of 15 July 1996 adopted by the on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.

²¹ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal.

²² P. NORA, *Malaise dans l'identité historique*, in *Liberté pour l'histoire*, Paris: CNRS Éditions, 2008.

²³ V. DUCLERT, *Faut-il une loi contre le négationnisme du génocide des Arméniens ? Un raisonnement historique sur le tournant de 2012*, in *Histoire@Politique*, 2013, p. 281 et seq.; U. BELAVUSAU, *Armenian Genocide v. Holocaust in Strasbourg: Trivialisation in Comparison*, in *Verfassungsblog*, 13 February 2014, verfassungsblog.de. In the Eastern European context, some memory laws have been compared to certain provisions in the Turkish criminal code which are used to penalize statements affirming the Armenian genocide. For a discussion on those comparisons and on different provisions used in Turkey to penalize such statements see G. BARANOWSKA, *Penalizing Statements about the Past in Turkey*, in P. GRZEBYK (ed.), *Responsibility for Negation of International Crimes. Memory Law – International Crimes – Denial*, Warsaw: The Justice Institute, 2020, (forthcoming).

threat, particularly as regards the much-vaunted notion of the rule of law. While not all of the European post-communist countries are members of the European Union, developments in Eastern Europe have become a major challenge for the EU because most of the relevant countries have acceded to the Union. Additionally, the EU regulation of memory has been used locally by all Member States as an opportunity to structure and renegotiate ideological conflicts.

The identification of an asymmetry resulting from the different approaches to memory governance adopted in East and Central Europe, on the one hand, and Western European States, on the other, constitutes the starting point of this Special Section. This dislocation has also led to so-called democratic backsliding in the region and threats to the rule of law in the eyes of European institutions, as populism and nationalism gain a foothold in East and Central European politics.

III. THE RULE OF LAW

Despite its ubiquitous character in contemporary governance, the rule of law has been seldom applied to the legal governance of historical memory in post-communist Europe. This is perhaps because the liberal political tradition associated to the rule of law is a particular outgrowth of Western European thought.²⁴ Moreover, the West has often framed the political emphasis on cultural identity in Eastern and Central European States as being premised on the centrality of ethnicity in nation-building, thus relegating the liberal tradition to the background.²⁵ However, in recent years, the rule of law has gained traction as a barometer for the health of democratic societies that provides an indicative reading of good governance. Moreover, with the fall of communism and the accession of Eastern European States to the European Union, the rule of law has become a yardstick to be reckoned with.

The rule of law has been identified as bearing a distinct character in East and Central Europe during and after communism. Throughout the Cold War, law subverted democratic participation by sustaining authoritarian practices and institutions.²⁶ Today, it occupies an increasingly important position in multilateral and intergovernmental governance. The European Union has enshrined the concept of the rule of law in the Preamble to the Treaty on European Union and in Art. 2 of that instrument, according to which “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

²⁴ T. BINGHAM, *The Rule of Law*, London: Penguin, 2011.

²⁵ M. SHAHABUDDIN, *The Ethnic Dichotomy of ‘Self’ and ‘Other’ Within Europe: Inter-war Minority Protection in Perspective*, in D. FRENCH (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge: Cambridge University Press, 2013 pp. 417-418.

²⁶ M. KRYGIER, *Marxism and the Rule of Law: Reflections after the Collapse of Communism*, in *Law & Social Inquiry*, 1990, p. 640.

of persons belonging to minorities".²⁷ In 2014, the European Commission published a working definition of the rule of law which comprises the following six elements: legality, legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review including respect for human rights, and equality before the law.²⁸ Some of these legal elements had been culled from an influential report on the rule of law developed by the European Commission for Democracy Through Law (the Venice Commission) in 2011.²⁹

Recently, it has been argued that memory laws represent a potential threat to the rule of law in the European Union. Indeed, this assessment has been especially aimed at developments in Hungary and Poland, where post-communist legacies have been politicized, as noted in the *Articles* presented here by Könczöl and Kevevári, and Wyrzykowski, respectively.³⁰ The contested communist heritage has also been problematic in Ukraine and Lithuania, where proximity to Russia plays an important role as illustrated in the contributions to this *Special Section* by Chervastova and Bruskina. Moreover, in the Balkans, a region where States are angling for EU membership, governmental actors have engaged in revisionist politics that are challenging the well-established narratives instituted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), shifting the focus of victimhood in potential contradiction with the judicial findings of that Tribunal as outlined in the contribution by Tromp. In what follows we introduce the *Articles* comprising the *Special Section*, identify their overarching themes of mnemonic revisionism and contestation and explore their rule of law implications.

IV. MEMORY GOVERNANCE AND THE RULE OF LAW

The *Special Section* starts with Nikolay Koposov's contribution, which examines historians' protests against laws criminalizing certain statements about the past.³¹ By analysing opposition to memory laws, he shows how both the laws and the resistance to them have evolved. The initial opposition was conditioned by broader concerns about the freedom of expression, accompanied by the attempts to limit the explosion of particularistic memories. This has changed with the evolution of memory laws, which made concerns about their content even more serious, in particular in Eastern Europe. Koposov identifies the shifting of blame for historical injustices entirely onto others as the

²⁷ Art 2 TEU. The concept of the rule of law also features as the basis for the EU's external action and appears in the Preamble of the Charter of Fundamental Rights of the European Union.

²⁸ Communication COM(2014) 158 final/2 from the European Commission to the Parliament and the Council on a new EU Framework to strengthen the Rule of Law.

²⁹ Council of Europe, Venice Commission Report CDL-AD(2011)003rev of 25-26 March 2011 on the Rule of Law.

³⁰ M. BUCHOLC, *Commemorative Lawmaking*, cit, pp. 85-110.

³¹ N. KOPOSOV, *Historians, Memory Laws, and the Politics of the Past*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 107 et seq.

stereotypical and most problematic aspect of Eastern European memory laws. At worst, these provisions have been weaponised by nationalist and populist governments. Koposov argues that historians should invoke “the duty of history and knowledge”, rather than the “duty of memory”, which can be easily misused by populists. While being critical toward such laws, Koposov also argues that “there is little evidence to suggest that memory laws actually have limited the freedom of historical research, although their adoption has undoubtedly endangered it”.

Memory wars have also been a salient feature of the relationship between Russia and Ukraine, as outlined in the *Article* by Cherviasova.³² The fall of the Soviet Union has prompted a reckoning with the past in Ukraine that has divided society and pitted the country against Russian narratives of Soviet glory supported by the neo-imperialistic policies of the Putin regime, and neighbouring countries such as Poland. Cherviasova focuses on the so-called decommunization package, a set of legislative measures adopted in 2015 to condemn the Nazi and Communist legacies and honour the memory of Ukrainian fighters for independence. This reading of history has conflicted with the Russian policy of glorifying Soviet victories during the Second World War. Problematically, however, these laws portray an uncritical and unequivocally positive picture of the Ukrainian resistance, which at times was responsible for the commission of crimes. This leads Cherviasova to conclude that these laws are ultimately whitewashing the past.

The *Article* by Nika Bruskina also examines the legacies of communist-era resistance to the Soviet regime by discussing the tension between characterizing Lithuanian narratives of victimhood and resistance as genocide, and the limits of international law and human rights in this regard which arose in the *Vasiliauskas* and *Drėlingas* cases before the European Court of Human Rights.³³ In particular, Bruskina shows how the domestic courts of Lithuania succeeded in upholding convictions for genocide while characterizing the partisan resistance – an eminently political group and therefore not protected by the definition of genocide – as part of the ethno-national group that is covered by the Genocide Convention.

Nevenka Tromp's *Article* on the recasting of Serbia from “principal wrongdoer” to “legitimate warring party” during the Balkan Wars of the 1990s shows that the legacy of international criminal tribunals and their findings can be challenged by post-transitional narratives to further strategic geopolitical goals. It highlights the vulnerability of international judicial institutions in the face of political and institutional revisionism and the limitations that transnational liberal networks may have in the shaping of post-conflict societies. Tromp argues that in relativizing the findings of the ICTY through the victimi-

³² See A. CHERVIASTOVA, *On the Frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 119 *et seq.*

³³ N. BRUSKINA, *The Crime of Genocide Against the Lithuanian Partisans: A Dialogue Between the Council of Europe and the Lithuanian Courts*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 137 *et seq.*

zation of Serbians during the Balkan Wars, post-conflict *élites* in Serbia have reintroduced the politics of the past into contemporary debates. Not only that – by changing the transitional justice narrative, Tromp argues that Serbia's aim is “to provide the legitimisation for the return to the geopolitical designs of the predecessor regime that were not achieved during the war despite the commission of mass atrocities”.³⁴ The upending of the narrative established by the ICTY is a strategic move which involves very little risks from the EU's standpoint as far as Serbia is concerned. This is because the EU has limited itself to encourage judicial and other forms of cooperation between the ICTY and the States in which it enjoys jurisdiction, but has done little to frame the ICTY's legacy within a rule of law framework for the region's future. The fact that very little detracts the Serbian State from distorting the Tribunal's narrative shows that transitional justice frameworks can be vulnerable to manipulation via memory politics.

The re-framing of memory politics is also taking place in Poland and has been identified as part of the “democratic backsliding” taking place in recent years.³⁵ The most salient example of this phenomenon is the law on “defamation of the good name of the Polish State and nation” which was enacted in 2018 and initially attached criminal sanctions to the public assertion of the existence of “Polish death camps” during World War II. Although the criminal liability element was removed months after its enactment, the law stands as a testament to the pervasive consequences of memory legislation in the region. The law and the developments following its adoption are discussed by Mirosław Wyrzykowski in his *Article* for this *Special Section*.³⁶ Wyrzykowski, who is a former judge of the Polish Constitutional Tribunal, sheds light on the adopted Act outlining the process of its referral to the Constitutional Tribunal and the subsequent amendments which modified it. As the 2018 Act was not the first legislative initiative to criminalize the defamation of the good name of the Polish State in the context of history, Wyrzykowski compares it to an earlier law and shows the peculiarities of the new one. Among those differences is the broadening of the scope of the competences of the Institute of National Remembrance to also encompass crimes committed by “Ukrainian nationalists” and Ukrainian formations collaborating with the Third German Reich. This development shows how memory laws in Eastern Europe are not only tackling Soviet and Nazi crimes, but are starting to engage with historical conflicts between nations. The Act was amended just after six months, as Wyrzykowski argues, due to the very strong negative stance of international public opinion. However, the criticism primarily targeted the act's restrictions on open debates and objective research on the Holocaust, in particular as regards the co-responsibility of Poles for murdering Jews and looting their property during and immediately after World War II.

³⁴ N. TROMP, *Misjudging History at Mass Atrocities Trials: Bosnian Genocide in the Courtroom, 1992-1995*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, forthcoming.

³⁵ M. BUCHOLC, *Commemorative Lawmaking*, cit, pp. 85-110.

³⁶ M. WYRZYKOWSKI, “National Untruth”: *Controversial Law on the Polish Institute of National Remembrance?*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, forthcoming.

In this sense, public disapproval did not so much concern the part of the Act relating to “Ukrainian nationalists”, which was subsequently judged by the Constitutional Tribunal as failing to meet the requirements of to be a sufficiently precise legal regulation. As a result, the Constitutional Tribunal found that the reference to Ukrainian nationalists violated the principle of a democratic state of law and the constitutional requirement for the necessary determination of a criminal law norm. While the term “Ukrainian nationalist” was later eliminated from the Act, it still contains the introduced references to Ukrainian formations collaborating with the Third German Reich.

In Hungary, the other EU Member State in Eastern Europe where the rule of law standard is increasingly under threat, memory regulation is also of utmost relevance to the phenomenon of democratic backsliding. The historical references in the Fundamental Law of Hungary are closely analysed by Miklós Könczöl and István Kevevári, who show how these provisions can be regarded as an attempt to radically change the relationship between law and memory in society. Their *Article* explores the implications of introducing historical concepts to the Hungarian Fundamental Law on the basis of two distinct phrases.³⁷ First, that the provisions of the Law are to be interpreted in accordance with the achievements of the “historical constitution”, which comprises a collection of historical documents dating back to medieval times.³⁸ Secondly, they analyse the obligation of every organ of the State to protect “the constitutional identity and Christian culture of Hungary”. The authors show the tendency to increase the volume of historical references in the constitutional text, which are intended to emphasize the unifying historical narrative. Including “Christian culture” in the Fundamental Law is particularly interesting, as it appears to be triggered by recent events, in particular the perceived political and cultural conflicts at the European level. This might be both the increase non-Christian immigrants and European legislation changing cultural traditions. Könczöl and Kevevári conclude that the historicisation of constitutional concepts seems to be undertaken by the constitution-makers, as well as by those interpreting the text, in particular the Constitutional Court. To illustrate the societal implications of these attitudes, the book review by Marina Bán surveys the recent literature on the relationship between memorials and the State.

V. CONCLUDING REMARKS

This *Special Section* shows that the democratization process in Eastern and Central European States has been far from linear. Indeed, the political and legal voids left by the fall of communism have created spaces of contestation in respect to the historical legacies of totalitarianism, national identity, and, ultimately, the recognition of otherness.

³⁷ M. KÖNCZÖL, I. KEVEVÁRI, *History and Interpretation in the Fundamental Law of Hungary*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 161 *et seq.*

³⁸ K.L. SCHEPPELE, *The Constitutional Basis of Hungarian Conservatism*, in *East European Constitutional Review*, 2020, p. 51 *et seq.*

The political, economic and geographical proximity of the European Union and Russia have contributed to increasing the stakes for the States concerned. This is partially due to their attempt to reconcile a commitment with rule of law standards, on the one hand, with a robust assertion of national identity via the legal governance of historical memory, on the other, in contradistinction to Soviet legacies such as in Poland. At the same time, the increasing assertiveness of Russian influence in the region has caused governments to engage in historical revisionism through judicial measures, as shown in the Lithuanian context, or to resort to all-out memory wars, such as in Ukraine. Ultimately, these contributions aim at illustrating how the past has become an arena of contemporary political and legal contestation in post-communist States.



ARTICLES

HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW – FIRST PART

edited by Grażyna Baranowska and León Castellanos-Jankiewicz

HISTORIANS, MEMORY LAWS, AND THE POLITICS OF THE PAST

NIKOLAY KOPOSOV*

TABLE OF CONTENTS: I. Historians against memory laws. – II. Historical memory and criminal law. – III. Universal values and particularistic memories. – IV. Populism and memory in Eastern Europe – V. Concluding remarks.

ABSTRACT: This *Article* examines historians' protests against memory laws that criminalize certain statements about the past. Most typically, historians protest these laws in the name of freedom of research. However, the chronology of their protests, which became widespread only in the 2000s, a decade and a half after the adoption of the first bans on Holocaust denial, suggests that their opposition to memory laws had other reasons as well. The Author argues that these reasons had to do with the evolution of the legislation of memory, namely, the expansion of such prohibitions on topics other than Holocaust denial, which many historians interpreted as a manifestation of the "competition between victims" and of the decay of democracy as a universal project. The *Article* further considers the changes that occurred in this legislation as a result of the rise of national populism, especially in Eastern Europe, where bans on certain statements about the past are increasingly used to promote national narratives. The 2014 Russian memory law, which criminalizes "the dissemination of knowingly false information on the activities of the USSR during the Second World War" and protect the memory of the Stalin regime, is an extreme example of this tendency. The author suggests that the memory laws' focus on concrete historical events that function as sacred symbols of national and other communities, has facilitated their emergence as a preferred instrument of populist history politics based on particularistic memories rather than on the cosmopolitan memory of the Holocaust.

KEYWORDS: memory laws – historical memory – holocaust – communist crimes – populism – particularism.

I. HISTORIANS AGAINST MEMORY LAWS

In 2006, a group of Belgian historians published a petition against memory laws, in which they posited: "[u]ne judiciarisation croissante du débat historique constitue une atteinte à

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la liberté d'expression et de la recherché".¹ On multiple occasions, similar statements were made by different historical societies and groups of historians all across the world. The French-based association *Liberté pour l'Histoire* has played a crucial role in making historians aware of the potential problems that criminalization of claims about the past may create for historical research and public debates. The American Historical Association has also been remarkably persistent in protesting memory laws drafted and/or adopted in different countries. Although some historians do support their governments' banning certain interpretations of history, my impression is that most colleagues in Europe and North America are strongly opposed to memory laws or, at the very least, are sceptical of them. Even in such countries as Russia and Ukraine, some historians have been deeply concerned, respectively, about the 2014 statute that has penalized any criticism of Stalin's policy during World War II (WWII)² and the 2015 "de-communization laws" that have forbidden insults to the memory of "fighters for Ukraine's independence", even though some of those "fighters" had been involved in crimes against humanity.³

Historians' initial reaction to the criminalisation of certain statements about the past was very different. In France, the 1990 Gayssot Act (a classical Holocaust denial law) was welcomed by most historians, with few dissenting voices. The situation changed in the 2000s, especially with the debates about the 2005 Mekachera Act, which provided that "les programmes scolaires reconnaissent [...] le rôle positif de la présence française outre-mer" (that is, of French colonialism).⁴ Public protests forced President Jacques Chirac to repeal this clause a year later. Nevertheless, the episode triggered a broader discussion of whether memory laws (both criminal and declarative) are acceptable in a democratic society. In 2008, the *Liberté pour l'Histoire* association convinced the French parliament that regulating historical memory is not parliament's legitimate function.⁵ Notwithstanding, several memory laws were passed after 2008. Historians' petitions against memory laws that I am aware of appeared after 2005 (e.g., in Belgium in 2006, Italy in 2007, Russia in

¹ *Pléthore de mémoire: quand l'État se mêle d'histoire...*, in *La Libre Belgique*, 25 January 2006, lalibre.be, also published on *Le Soir*, 25 January 2006, lesoir.be.

² *Federal'nyi zakon N 128-FZ ot 5 maya 2014 O vnesenii izemeniy v ot del'nyie zakonodatel'nyie akty Rossiyskoy Federatsii*, Article 1. For a French translation of one of the 2009 petitions against the first draft of the law see "Appel aux citoyens de Russie, à son président et à la Douma": www.lph-asso.fr.

³ *Zakon Ukraini 314-VIII vid 09.04.2015 Pro pravovoy status ta vshanuvannya pamyati bortsiv za nezalezhnist' Ukraini u XX stolitti*. See also *Open Letter from Scholars and Experts on Ukraine Re. the So-Called 'Anti-Communist Law'*, published on lph-asso.fr. On the memory laws in Ukraine see also A. CHERVASTOVA, *On the Frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 119 et seq.

⁴ *Loi no 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés*.

⁵ *Assemblée Nationale. Rapport d'information no 1262: Rassembler la Nation autour d'une mémoire partagée* (Paris: Assemblée Nationale, 2008), p. 181. See *Liberté pour l'histoire: Une pétition pour l'abrogation des articles de loi contraignant la recherche et l'enseignement de cette discipline*, in *Libération*, 13 December 2005, liberation.fr, and *Appel de Blois*, in *Le Monde*, 10 October 2008, lemonde.fr.

2009, Ukraine in 2015, and so on). It is hard to measure the efficiency of these protests but, at least in some cases (in Italy in 2007 and in Belgium in 2006), the historians' resolute stand against the criminalization of statements about the past contributed to their countries' decisions not to pass (at least for a while) such statutes.

Without exception, all such petitions argue that establishing an "official truth" about the past limits the freedom of historical research. By contrast, those historians who support memory laws insist that such enactments do not limit their freedom because they only ban intentionally untrue and insulting statements. This is also the position of the authors of memory laws. Moreover, some of these acts clearly state that they do not apply to *bona fide* historical research (although without specifying who will decide whether a given historical claim is sufficiently well-documented). Moreover, memory laws are used very infrequently. It is exceptional for a professional historian to be accused of violating them, the failed case against Olivier Pétré-Grenouilleau in France in 2005 being perhaps the best-known example of such accusations.⁶ Even in Putin's Russia, the 2014 "Stalinist" law has been used only a handful of times and not against professional historians.⁷

In other words, there is little evidence to suggest that memory laws actually have limited the freedom of historical research, although their adoption has undoubtedly endangered it. But this potential danger does not sufficiently explain the historians' mobilization against memory laws, especially in France.

What changed historians' attitudes to these laws? I would argue that this was largely due to the changing nature of this legislation and the changing political and cultural climate. In this *Article*, I will focus on *ad hoc* statutes criminalizing certain claims about the past.⁸

II. HISTORICAL MEMORY AND CRIMINAL LAW

To date, twenty-eight European countries (as well as Israel and Rwanda)⁹ have passed *ad hoc* memory laws that criminalize certain statements about the past, including Germany (1985/1994), France (1990/2016), Austria (1992), Switzerland (1993), Belgium

⁶ D. KHAPAEVA, *Des lois historiques aux lois mémorielles: 19 historiens français pour la liberté de l'histoire*, in *Le Banquet*, 2007, pp. 131-148; S. LÖYTÖMÄKI, *Law and the Politics of Memory: Confronting the Past*, London: Routledge, 2014, pp. 97-98; M.O. BARUCH, *Des lois indignes? Les Historiens, la politique et le droit*, Paris: Talendier, 2013, pp. 15-17.

⁷ For example, in June 2016, Russian blogger Vladimir Luzgin was sentenced to a fine of 200,000 rubles (about 3,300 US dollars) for reposting an article claiming that WWII began with the German and Soviet invasion of Poland.

⁸ On memory laws, see R.A. KAHN, *Holocaust Denial and the Law: A Comparative Study*, New York, Basingstoke: Palgrave Macmillan, 2004; U. BELAVUSAU, A. GLISZCZYNSKA-GRABIAS (eds), *Law and Memory: Towards Legal Governance of History*, Cambridge: Cambridge University Press, 2017; and N. KOPOSOV, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2017.

⁹ See Israel's Denial of Holocaust (Prohibition) Law 5746-1986 of July 8, 1986 and Rwanda's Law No. 33bis/2003 on Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes.

(1995), Spain (1995/2015), Luxembourg (1997/2012), Poland (1998/2018), Liechtenstein (1999), the Czech Republic (2000/2009), Slovakia (2001/2005), Romania (2002/2015), Slovenia (2004/2008), Macedonia (2004), Andorra (2005), Cyprus (2006/2011), Portugal (2008), Albania (2008), Malta (2009), Latvia (2009/2014), Hungary (January 2010/June 2010), Montenegro (2010), Lithuania (2010), Bulgaria (2011), Croatia (2011), Greece (2014), Russia (2014), and Italy (2016).¹⁰ In addition, the Netherlands, Ukraine, and Turkey have norms that can be viewed as borderline cases within the same category.¹¹

One can distinguish two stages in the evolution of memory laws. During the initial period, which lasted approximately from 1985 to 1998, those acts were adopted almost exclusively in “old” continental democracies such as Germany, France, Austria, and Belgium, which had been directly implicated in the Holocaust. Unsurprisingly, then, the memory of Nazi crimes was their main focus. The second period began in the late 1990s. It was characterized by further “internationalization” of memorialization; the role of the EU in promoting it;¹² the extension of memory laws to new subjects (e.g., the Armenian genocide, communist crimes, the slave trade); and their expansion in Southern and Eastern Europe.

The growing popularity of memory laws resulted in a gradual change of their character. Initially conceived as a means of maintaining peace, they have tended to become a weapon of choice in the ensuing “memory wars” fought within and/or between many European countries, of which Eastern Europe and France are the most obvious examples.

At the turn of the 1990s, the international political climate was largely determined by the fall of communism and the seemingly decisive triumph of liberal democracy, for which the formation of the humanistic, victim-centered culture of memory was an important aspect. The first Holocaust denial laws expressed those nations’ repentance for their participation in that crime.

Soon, there emerged a tendency toward expanding the ban on denialism to crimes against humanity in general, of which the 1993 Swiss and the 1995 Spanish laws were the earliest examples. In 1997, Luxembourgian legislators created a “two-part” model and

¹⁰ In brackets, I give the dates of those countries’ first laws that have criminalized certain statements about the past and the dates of their substantial amendments.

¹¹ The Netherlands has a Supreme Court ruling of 1997 that Holocaust denial is punishable as defamation of Jews. Between January 2014 and April 2015, Ukraine had a law criminalizing the denial of fascist crimes; currently, Ukraine has two acts that outlaw the denial of the Holodomor (since 2006) and insults to the memory of “fighters for Ukraine’s independence” (since 2015), but neither of them provides any penalties for violating those bans. Turkey has (since 2005) Art. 301 of its Penal Code, which forbids insults to the Turkish state. Without technically being a memory law, this article is used against those who recognize the Armenian genocide. Common law countries such as the USA, Canada, and Great Britain do not have *ad hoc* statutes criminalizing statements about the past, nor do Scandinavian countries whose legal systems have been influenced by the common law tradition.

¹² See Art. 6, para. 1, Additional Protocol to the 2003 Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, and Art. 1, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

prohibited the denial of both Nazi crimes and all other genocides recognized by a Luxembourgian or by an international instance.¹³ This model was later reproduced in the European Council Framework Decision of 2008 and in several national enactments.¹⁴

Simultaneously, different communities of memory began claiming legal protection for their historical narratives. In France, this resulted in the adoption, in 2001, of two declarative memory laws, the first of which (the "Armenian" law) "[l]a France reconnaît publiquement le génocide arménien de 1915" in the Ottoman Empire, while the second (the Taubira Act) "[l]a République française reconnaît que la traite négrière [...] et l'esclavage [...] constituent un crime contre l'humanité".¹⁵ Immediately after their adoption, memory activists began working to criminalize the denial of those crimes on the model of the Gayssot Act. I am aware of about fifteen such drafts introduced into the French parliament since 2001. Along with the Mekachera Act, these drafts have informed the immediate context of the French historians' protests against memory laws.

III. UNIVERSAL VALUES AND PARTICULARISTIC MEMORIES

These protests suggest that many French historians consider the expansion of memory laws a manifestation of the "competition of victims" and of the fragmentation and crisis of the French national identity.

Thus, the first president of the *Liberté pour l'Histoire* association, René Rémond, gave the following answer to the question about the potential dangers of the "legitimate recognition of diversity" (read: the expansion of memory laws): "[l]e processus devient dangereux quand l'attachement à la particularité prend le pas sur l'adhésion à la généralité et devient un obstacle à l'ouverture sur l'universel".¹⁶ Rémond's successor, Pierre Nora, criticizes particularistic memories and memory laws that protect them for emphasizing past tragedies, which deprives France of its "positive relation" to its history and stimulates a "national masochism" in the name of multiculturalism.¹⁷ This is, of course, linked to Nora's understanding of present-day historical memory, which he views as an "artificial

¹³ Loi du 19 juillet 1997 complétant le code pénal en modifiant l'incrimination du racisme et en portant incrimination du révisionnisme [...], Art. 3.

¹⁴ See the 2005 Slovak law, the 2008 Slovenian law, the 2010 Lithuanian law, the 2014 Greek law, and the 2015 Romanian law. In contrast, the 1999 Lichtenstein's law, the 2004 Macedonian law, the 2004 Slovenian law, the 2005 Andorran law, the 2007 Portuguese law, the 2008 Albanian law, the 2009 Maltese law, the 2009 Latvian law, the 2010 Montenegrin law, and the 2015 Spanish law forbid to deny any genocide, while the 2002 Romanian law, the Hungarian law of January 2010, the 2014 Ukrainian law, the 2014 Russian law, and the 2016 Italian law focus on the denial of Nazi crimes.

¹⁵ Loi no. 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915 and Loi no. 2001-434 du 21 mai 2001 tendant à la reconnaissance, par la France, de la traite et de l'esclavage en tant que crime contre l'humanité.

¹⁶ R. RÉMOND, *Quand l'Etat se mêle de l'histoire: Entretiens avec François Azouvi*, Paris: Stock, 2006, p. 86.

¹⁷ P. NORA, *Malaise dans l'identité historique*, in P. NORA, F. CHANDERNAGOR (eds), *Liberté pour l'histoire*, Paris: CNRS Editions, 2008, pp. 20-23.

hyper-reality" created by various agents of memory in the interests of political manipulation. Outside France, proliferation of particularistic memories ("a new focus on narrow ethnicity") is often assessed in equally negative terms as a sign "of a retreat from transformative politics" and from "progress toward civic enfranchisement and growing equality".¹⁸ As a Finnish scholar has recently claimed, "[l]egal engagements in memory and identity politics tend to give rise to competition between victims [...], leading to further polarization of particular groups against each other and the state".¹⁹

These formulas are very different from the language of the historians' petitions, which typically emphasize the danger of memory laws for democratic freedoms. However, the arguments concerning the freedom of research and the competition of victims naturally complement each other, especially insofar as both express the historians' sense of their diminishing control over the collective representations of the past. The afore-mentioned Belgian petition demonstrates this logic: "[p]lutôt que le devoir de mémoire tant invoqué, nous aimerions voir plus souvent invoquer le devoir d'histoire et de savoir".²⁰ Indeed, in contrast to collective memory, historical knowledge seems to be much more compatible with "l'adhésion à la généralité et devient un obstacle à l'ouverture sur l'universel", in other words, with democracy viewed as an essentially universalistic project.

The problem of particularistic memories is linked to the uniqueness of the Holocaust. Although the *Liberté pour l'Histoire* association calls for the abrogation of all memory laws, it seems to consider the Gayssot Act far less damaging than other statutes. Indeed, the Shoah is often perceived as "a generalized symbol of human suffering and moral evil".²¹ In other words, the memory of the Holocaust can be opposed to those of other past atrocities as a "future-oriented cosmopolitan memory"²² significantly different from particularistic memories of national communities and other constituencies. Unsurprisingly, the partisans of *ad hoc* statutes protecting those memories argue that all memory laws "have been adopted in the name of universal values".²³

Today, however, it may be difficult to insist on the uniqueness of the Holocaust in exactly the same terms as during the 1986-1987 German *Historikerstreit*. Trivializing the Shoah by comparison with other cases of mass atrocities was then rightly viewed as an

¹⁸ C.C. MAIER, *A Surfeit of Memory? Reflections on History, Melancholy and Denial*, in *History and Memory*, 1993, pp. 136-52. See also A. HUYSEN, *International Human Rights and the Politics of Memory: Limits and Challenges*, in *Criticism*, 2011, pp. 607-624.

¹⁹ S. LÖYTÖMÄKI, *Law and Memory: The Politics of Victimhood*, in *Griffith Law Review*, 2012, pp. 1, 19.

²⁰ See *supra*, note 1.

²¹ J.C. ALEXANDER, *On the Social Construction of Moral Universals: The Holocaust from War Crime to Trauma Drama*, in *European Journal of Social Theory*, 2002, p. 6.

²² D. LEVY, N. SZNAIDER, *The Holocaust and Memory in the Global Age*, Philadelphia: Temple University Press, 2006.

²³ Quoted in M.O. BARUCH, *Des lois indignes?*, cit., p. 319.

attempt to whitewash Germany's past.²⁴ Thirty years later, this explanation remains largely valid with regard to numerous similar cases, especially in Eastern Europe (we will return to that in the next section). Nonetheless, claiming a unique status for the Shoah is now increasingly considered insulting to other memory communities because of a "hierarchy of victims" that the focus on the memory of the Holocaust is said to entail. Expanding the ban on denialism to other topics is typically justified by the need to bring the "memorial apartheid" to an end.

That is why the opponents of the expansion of memory laws now tend to refer to the unique status of the memory of the Holocaust rather than to the uniqueness of the Holocaust itself. This position manifests itself in particular in a series of recent decisions made by the European Court of Human Rights and the French Constitutional Council. A legal scholar summarizes the position of the European Court of Human Rights in the *Perinçek v. Switzerland* case in the following way: "Whereas the denial of the Holocaust is presumed to be a subtle form of anti-Semitism – as such warranting an *ad hoc* legal regime – other types of denialism do not necessarily entail comparable harm, thereby calling for a case-specific analysis".²⁵

A ruling of the French Constitutional Council of 8 January 2016 is another example of the same logic. The Council stated that Holocaust negationism is different from that of all other genocides in that it "constituent en eux-mêmes une incitation au racisme et à l'antisémitisme" not least because the extermination of the Jews "commis [...] en partie sur le territoire national."²⁶ That is why "aucune autre négation d'un crime contre l'humanité [...] ne serait porteuse, dans notre société, d'une violence symbolique équivalente".²⁷ In other words, what has to be compared are the discourses about genocides rather than the genocides themselves, and this comparison suggests that the memory of the Shoah must have a special legal status. Both decisions were intended to put limits on the "legitimate recognition of diversity", in line with the afore-mentioned historians' stand on the issue.

The opposition to memory laws was thus initially conditioned at least as much by the attempts to limit the explosion of particularistic memories as by broader concerns about the freedom of expression. In other words, it was a reaction to the content of some memory laws as well as to the very fact of their adoption. The evolution of the leg-

²⁴ C.C. MAIER, *The Unmasterable Past: History, Holocaust, and German National Identity*, Cambridge, Mass., London: Harvard University Press, 1988.

²⁵ P. LOBBA, *A European Halt to Laws Against Genocide Denial?*, in *European Criminal Law Review*, 2014, p. 60. In 2015, the European Court of Human Rights overruled the 2007 sentence of a Swiss court that had found Turkish nationalist Doğu Perinçek guilty of racially motivated denial of the Armenian genocide.

²⁶ French Constitutional Council, judgment of 8 January 2016, no. 2015-512 QPC.

²⁷ See French Constitutional Council, judgment of 8 January 2016, no. 2015-512 QPC – Commentaire, p. 23.

isolation of memory and its expansion onto Eastern Europe have made concerns over their content even more serious.

IV. POPULISM AND MEMORY IN EASTERN EUROPE

There are striking differences between the contexts in which memory laws emerged in the 1980s and 1990s in the “old” Western European democracies and in which they further developed in the 2000s and 2010s, when Eastern Europe became the main centre of legislative activity regarding the past. The beginning of the new century witnessed a crisis of democracy in many countries, a rise of national populism, and the formation of the authoritarian regimes in Russia, Turkey, Hungary,²⁸ and (to some extent) Poland. In the former communist states, the rise of nationalism was largely conditioned by the difficulties of the transition period, which exacerbated their century-old complex of inferiority *vis-à-vis* the West as well as their historical grievances against their neighbours. Some of the memory laws adopted in Eastern Europe faithfully reflected the emergence of a culture of memory that differed substantially from the democratic memory based on the sympathy toward the victims of history and on the notion of state repentance for the crimes of the past (genocide being, by definition, a state-sponsored crime).

To be sure, several Eastern European countries (e.g., Slovakia, Slovenia, Romania, Croatia, and Bulgaria) adopted memory laws on the EU model. But some other countries, including Poland, the Czech Republic, Hungary, Lithuania, and Latvia criminalized the denial of both Nazi and communist crimes. The countries in this second group clearly differ from the first: they have a stronger record of anti-Soviet resistance, feel more vulnerable because of Putin’s neo-imperial ambitions, and are involved in harsh disputes with Moscow about the past.

In Eastern Europe, memories of WWII could not be the same as in the West or in Russia, because at the end of the war, the region was occupied by one of the victors with the consent of the others.²⁹ Communist regimes are normally seen here as a result of foreign conquest. In addition, some of these countries were Hitler’s allies, and parts of their population were actively involved in the Holocaust. Unsurprisingly, the culture of victimhood in the region has taken a special form of self-victimization of national communities that view themselves as victims of the Soviets, the Nazis, and even the West – but not as co-perpetrators of Nazi and communist crimes.³⁰ The promulgation of the Western-style memory laws did not quite match the specificity of the region’s historical experience.

²⁸ For a thorough analysis of historical references in the constitution of Hungary, see M. KÖNCZÖL, I. KEVEVÁRI, *History and Interpretation in the Fundamental Law of Hungary*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 161 *et seq.*

²⁹ T. SNYDER, *Bloodlands: Europe between Hitler and Stalin*, New York: Basic Books, 2010.

³⁰ J.-P. HIMKA, J. B. MICHLIC (eds), *Bringing the Dark Past to Light: The Reception of the Holocaust in Post-communist Europe*, Lincoln, London: University of Nebraska Press, 2013.

The problem with these typically Eastern European memory laws is not so much that they envisage fascism and communism as two equally criminal regimes – which is understandable in light of these countries' historical experience – but that they shift the blame for historical injustices entirely onto others (Nazi Germany and the USSR), victimize the past for the nation-states' sake, and use history as a means of nationalist mobilization. This is the exact opposite of what memory laws were meant to achieve in Western Europe and what the EU sought to ensure by promoting such legislation. None of these East European laws mentions that significant parts of these countries' populations participated in both Nazi and communist atrocities.

Thus, the 1998 Polish memory law prohibited the denial of “crimes perpetrated against persons of Polish nationality and Polish citizens of other [...] nationalities” (the word “nationality” is here used in the sense of ethnicity). This was an obvious attempt to downplay the importance of the Holocaust and present the Poles rather than the Jews as Hitler's main victims. The law passed over in silence the participation of Poles in the Shoah.³¹ Lithuania's memory law of 2010 forbids the denial of crimes “committed by the USSR or Nazi Germany in the territory of the Republic of Lithuania or against the inhabitants of the Republic of Lithuania”,³² as if Lithuanians themselves had committed no crimes against humanity. Such laws follow the logic of competition between victims far beyond the limits to which it is normally confined in the West.

Indeed, as Jan-Werner Müller reminds us,³³ there are different kinds of populism, including national (or ethno-) populism, the rise of which has deeply marked the turn of the twenty-first century, especially in Eastern Europe. In contrast to Western Europe, several Eastern European memory laws are products of national populism.

Russia and Turkey are extreme cases of this deplorable tendency. In May 2014, in the midst of the Ukraine crisis, Russian government criminalized “the dissemination of knowingly false information on the activities of the USSR during the Second World War”.³⁴ Any criticism of Stalin's policy can be subsumed under this formula. In 2005, Turkey amended its Penal Code by introducing Art. 301, which criminalized insults to the Turkish state and which is normally used against those who recognize the extermi-

³¹ Law No. 155 of December 18, 1998, On the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, Arts 1 and 55.

³² Law No. VIII-1968 of 26 September 2000, on the Approval and Entry into Force of the Criminal Code, consolidated version valid as of 1 April 2016, Art. 170.2. See N. BRUSKINA, *The Crime of Genocide Against the Lithuanian Partisans: A Dialogue Between the Council of Europe and the Lithuanian Courts*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 137 *et seq.*, for an analysis of how “genocide” has been interpreted in this context.

³³ J.-W. MÜLLER, *What Is Populism?*, Philadelphia: University of Pennsylvania Press, 2016, pp. 7-9.

³⁴ See *supra*, note 2.

nation of the Armenians in the Ottoman Empire as a genocide.³⁵ These laws do not just silence, but openly protect the memory of the perpetrators of state-sponsored crimes.

The much-debated 2018 Polish memory law is similar to the 2014 Russian and the 2005 Turkish statutes in that it introduced criminal sanctions for “publicly and contrary to the facts” ascribing to the Polish people or government the “responsibility or co-responsibility for Nazi crimes” or “other offenses that constitute crimes against peace, crimes against humanity, or war crimes”.³⁶ The law in fact protects the memory of Polish nationalists and ordinary Poles, who killed or denounced to the Nazis tens of thousands of Jews hiding in the so-called “Arian zones” (that is, outside the ghettos). In other words, the law protects the memory of the perpetrators, although differently from Russia and Turkey, these perpetrators were individual Poles rather than the government. This 2018 statute has considerably deteriorated Poland’s legislation of memory, which was already problematic after the adoption of the afore-mentioned 1998 act. However, its most scandalous provisions have been repealed under international pressure in June 2018.³⁷

V. CONCLUDING REMARKS

Memory laws came into being to promote peace and overcome self-congratulatory national narratives. Over time, however, they have become one of the preferred instruments of national populists. Old democracies ill-advisedly set the example of infringing freedom of expression, and some new democracies and authoritarian regimes have enthusiastically followed suit. The proliferation of memory laws and their expansion on topics other than the Holocaust were, notwithstanding their authors’ intentions, the first steps in this direction, which arguably explains why historians have withdrawn their initial support for this legislation.

Since historical memory first became an object of criminal law about three decades ago, many things have changed in our societies.³⁸ Two important lessons that the history of memory laws teaches us are that we need to re-invent our strategies for the epoch of the rise of populism and that historians should more consistently invoke “the duty of history and knowledge” rather than the duty of memory, which is being increasingly misused by populist memory entrepreneurs.

³⁵ T. NAAMAT, N. OSIN, D. PORAT (eds), *Legislating for Equality: A Multinational Collection of Non-Discrimination Norms*, Leiden, Boston: Martinus Nijhoff, 2012, p. 478.

³⁶ Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [...]. For more on the law and its subsequent amendments see M. WYRZYKOWSKI, “National Untruth”: *Controversial Law on the Polish Institute of National Remembrance?*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, forthcoming.

³⁷ Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [...].

³⁸ I. KRASTEV, *The Unraveling of the Post-1989 Order*, in *Journal of Democracy*, 2016, pp. 5-15.

The ease with which memory laws have been overtaken by nationalistic history politics (and by particularistic memories in some Western countries) can hardly be viewed as purely contingent, and not only because anti-democratic forces can only profit from the growing punitive trend initiated by democratic countries. I believe that the memory laws' cultural form has been crucial for this transformation. Indeed, all such laws without exception ban "heretical" interpretations of concrete (typically, traumatic) historical events that function as sacred symbols of national and other communities. Since the end of the twentieth century, Western historical consciousness has become focused on those events rather than on future-oriented philosophies of history commonly dismissed as master narratives. Memory laws operate in the realm of symbolism, memory, and myth, in which nationalism may be more at home than is democracy, whose main strength lies in its universalistic future-oriented character. This is why the very first memory laws, inspired as they were by the emerging democratic culture of memory, already signified a changing political dynamic that few observers could then foresee.



ARTICLES

HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW – FIRST PART

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ON THE FRONTLINE OF EUROPEAN MEMORY WARS: MEMORY LAWS AND POLICY IN UKRAINE

ALINA CHERVIATSOVA*

TABLE OF CONTENTS: I. Introduction. – II. Dealing with the communist past: the Ukrainian case. – II.1. Ukraine's waves of decommunization. – II.2. Ukrainian memory laws: the decommunization package. – III. Ukraine in the European memory wars. – VI. Conclusions.

ABSTRACT: In April 2015, Ukraine adopted the so-called decommunization package which reflects its attempts to deal with the past and defines directions of its current memory policy. To cope with the communist past and create a new pantheon of national heroes, Ukraine is re-writing its history, selectively choosing among the several memories those that can foster its national identity and cohesion. This is a controversial process which divided Ukraine's society and resulted in so-called memory wars – a clash of the State-sponsored historical narratives – with Russia and Poland. The internal and external contradictions which are a feature of decommunization in Ukraine give a reason to state that the frontline of European memory wars goes across this country. The present *Article* provides an overview of memory laws from Ukraine's decommunization package, analyses Ukraine's "official" historical narratives, and discusses the memory wars with Russia and Poland that it has been recently involved in.

KEYWORDS: memory laws – memory wars – memory policy – decommunization – Ukraine – Russia – Poland.

I. INTRODUCTION

Collective memories matter politically as they are closely related to national identity and a State's self-legitimation.¹ This explains why States are preoccupied with collective

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memories and their legal regulation, as they prescribe by so-called memory laws what ought to be remembered or forgotten. In Europe, whose past contains the traumas of World War I, World War II, fascism and communism, the legal regulation of collective memories has become so widespread that one can speak about a “new subject in comparative law and transitional justice”.²

The collapse of the Soviet Union and the end of the Cold War have both shifted historical narratives and released memories that were hitherto frozen. This is the reason behind the current “memory boom” and the Europe-wide proliferation of memory laws. In this context, the Ukrainian laws on decommunization, adopted in April 2015, are not a unique case: they reflect attempts to overcome the communist past that is common to the Central and Eastern European countries. Yet, decommunization in Ukraine has been a controversial and complicated process: first, it has polarized Ukraine’s society; second, it has caused a conflict about the past and its interpretation (“memory war”) not only between Ukraine and Russia – a supporter and caretaker of the Soviet “glory” and “heroes”, but also between Ukraine and Poland – a country which has largely turned the page on its communist past. The internal and external contradictions resulting from the Ukrainian memory policy give reason to state that the frontline of European memory wars goes across Ukraine.³

To analyse the complexity of the current decommunization process in Ukraine, this *Article* addresses the following questions: what are the methods of decommunization in Ukraine? What are the historical narratives supported by Ukraine during this process? Why and to what extent have they been selected as an “official” truth? What are the reasons behind memory wars between Ukraine and Russia, on the one hand, and Ukraine and Poland, on the other?

The *Article* consists of two parts. It first provides a brief overview of the decommunization process in Ukraine and the memory laws stemming from the decommunization package to describe Ukraine’s memory policy and its contradictions. The second part is devoted to the conflicts over history and its interpretation – memory wars – between Ukraine and both Poland and Russia, their reasons and consequences.

¹ J.-W. MÜLLER, *Introduction: The Power of Memory, the Memory of Power and the Power over Memory*, in J.-W. MÜLLER (ed.), *Memory and Power in Post-War Europe: Studies in the Presence of the Past*, Cambridge: Cambridge University Press, 2002, pp. 1-2.

² U. BELAVUSAU, A. GLISZCZYNSKA-GRABIAS, *Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, in U. BELAVUSAU, A. GLISZCZYNSKA-GRABIAS (eds), *Law and Memory: Towards Legal Governance of History*, Cambridge: Cambridge University Press, 2017, p. 1 *et seq.*

³ For a discussion of the populist context in which memory wars arise in Eastern Europe, see N. KOPOSOV, *Historians, Memory Laws, and the Politics of the Past*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 107 *et seq.* particularly section IV.

II. DEALING WITH THE COMMUNIST PAST: THE UKRAINIAN CASE

II.1. UKRAINE'S WAVES OF DECOMMUNIZATION

All post-totalitarian societies face the difficult question of how to deal with the past: to condemn past wrongdoings or deny them, punish or forgive, remember or forget. Decommunization in Ukraine is moving between these extremes. Since decommunization began in the early 1990s, it followed the process of Ukraine's State-building and a search of national identity. For a long time, the process of decommunization had been haphazard and unsystematic, although nowadays it remains controversial and asymmetric, and finds strong support in Ukraine's western region, while the country's east and south display an active hostility to the process.

There have been three periods of decommunization in Ukraine: *i)* from the prohibition of the Communist Party of Ukraine (1991) to its re-establishment (1993); *ii)* from the Orange Revolution (2004) to Viktor Yanukovich's victory in the presidential elections (2010); and *iii)* from Euromaidan and the laws on decommunization (2015) to the present.

The first attempt to condemn the communist past was made in 1991, some months before the collapse of the Soviet Union, with the adoption of the Law on Rehabilitation of Victims of Political Repressions in Ukraine. The Preamble to the Law reads:

"After 1917, during the Civil War and subsequent decades, a lot of human blood has spilled on the land of Ukraine. [...] The mass repressions committed by the Stalinist regime and its leaders in the Republic left the hardest legacy [...] The Verkhovna Rada of Ukraine condemns repressions and distances itself from the terrorist methods of the governing state, expresses condolences to the victims of unreasonable repressions and their relatives, declares its intention to restore justice, to eliminate the consequences of arbitrariness and violations of civil rights [...], and guarantees the people of Ukraine, that this negative experience will never be repeated [...]"⁴

Notably, the Law refers not to the communist regime but to the Stalinist regime, condemning only crimes related to Stalin. Accordingly, it does not raise the question about the Communist Party's involvement in the repressions, its responsibility and prohibition.

The decision to ban the Communist Party of Ukraine was made on 26 August 1991,⁵ two days after Ukraine proclaimed its independence. However, the ban did not prevent

⁴ Law of Ukraine no. 963-XII of 17 April 1991 "Pro reabilitaciu politychnykh repressiy v Ukraini" [On rehabilitation of victims of political repressions in Ukraine], zakon.rada.gov.ua.

⁵ Decree of the Verkhovna Rada of Ukraine no. 1435-XII of 26 August 1991 "Pro tymchasove prypynennia diyalnosti komunistychnoi partii v Ukraini" [On suspension activities of the Communist Party of Ukraine], zakon.rada.gov.ua; Decree of the Verkhovna Rada of Ukraine no. 1468-XII of 30 August 1991 "Pro zaboronu diyal'nosti Kompartiyi Ukrayiny" [On prohibition of the Communist Party of Ukraine], zakon.rada.gov.ua.

the Communist Party of Ukraine from reestablishing itself in June 1993.⁶ Over the next two decades, from the parliamentary elections of 1994 to the parliamentary elections of 2014, the Communist Party of Ukraine was represented in the Verkhovna Rada of Ukraine, the parliament. Moreover, until the aftermath of the Orange Revolution in 2004, the Communist Party was one of the most influential political forces in Ukraine. In the parliamentary elections of March 1998, the party gained almost 25 percent of the vote, becoming the largest party in Parliament. In December 2001, the Constitutional Court of Ukraine ruled that the parliamentary decrees to ban the Communist Party of Ukraine in 1991 were unconstitutional.⁷

In 2004, decommunization in Ukraine received further impetus. During the second wave of decommunization, which coincided with Viktor Yushchenko's presidency, there were three major initiatives in Ukraine's memory policy: *i)* the establishment of the Ukrainian Institute of National Memory;⁸ *ii)* the State campaign promoting the recognition of the Holodomor famine as genocide against Ukrainians;⁹ and *iii)* the attempts to glorify Stepan Bandera, a leader of the Organization of Ukrainian Nationalists (OUN), which provoked heated debates inside Ukraine¹⁰ and negative international reactions.¹¹

⁶ The Parliamentary Decree 3220-XII explicitly said that the citizens of Ukraine are allowed to create political organization in accordance with Ukrainian legislation. See: Decree of the Verkhovna Rada of Ukraine no. 3220-XII of 14 May 1993 "Pro Ukazy Prezydiyi Verkhovnoyi Rady Ukrayiny vid 26 i 30 serpnia 1991 roku 'Pro tymchasove pryypnennya diyal'nosti Kompartiyi Ukrayiny', 'Pro zaboronu diyal'nosti Kompartiyi Ukrayiny'" [Decrees of the Presidium of the Verkhovna Rada of Ukraine of 26 and 30 August 1991 On suspension activities of the Communist Party of Ukraine, On prohibition of the Communist Party of Ukraine], zakon.rada.gov.ua.

⁷ Decision of the Constitutional Court of Ukraine no. 20-pn/2001 of 27 December 2001 "Sprava pro ukazy Prezydiyi Verkhovnoyi Rady Ukrayiny shchodo Kompartiyi Ukrayiny, zareyestrovanoi 22 lypnia 1991 roku" [Case of the prohibition of the Communist Party of Ukraine, registered on 22 July 1991], zakon5.rada.gov.ua.

⁸ Decree of the Cabinet of Ministers of Ukraine No 764 of 31 May 2006 "Pro utvorennia Ukrayins'koho instytutu natsional'noyi pam'yati" [On the establishment of the Ukrainian Institute National Memory], zakon.rada.gov.ua.

⁹ The Law on the Holodomor 1932-1933 in Ukraine condemned "the criminal acts of the totalitarian regime of the USSR, aimed to organize the Holodomor, which caused annihilation of millions people, destruction of the social foundations of the Ukrainians, their centuries-old traditions, spiritual culture and ethnic identity' and prohibited the Holodomor denial". See: Law of Ukraine no. 376-V of 28 November 2006 "Pro Holodomor 1932-1933 rokiv v Ukraini" [On the Holodomor of 1932-33 in Ukraine].

¹⁰ In 2010, President Yushchenko awarded Stepan Bandera the title of "National Hero of Ukraine". Bandera has always been a divisive figure: a hero in the West of Ukraine and Kiev and a Nazi criminal everywhere east of the Dnieper river. There were several attempts to challenge the constitutionality (legality) of the President's Decree. The Verkhovna Rada of the Crimea Autonomous Republic appealed to the Constitutional Court of Ukraine arguing that this decision violates Ukrainian legislation (Law on the State Awards of Ukraine) arguing that the title "National Hero of Ukraine" can be granted only to a person with Ukrainian citizenship. Bandera, due to obvious historical reasons, had never been a citizen of Ukraine. The Constitutional Court of Ukraine refused to consider the claim and found it inadmissible. Yet, the President's Decree was declared illegal by the District Administrative Court of the Donetsk region.

The Euromaidan and the Revolution of Dignity, accompanied by the spontaneous demolition of Lenin's monuments (the so-called "Leninopad", or "Lenin fall"), started a new phase of decommunization, which culminated in April 2015 when the decommunization package was adopted. The methods of decommunization gave reason for some to assert that decommunization in Ukraine is similar to totalitarian practices of the bygone era.¹² These critics have stressed that the decommunization package was adopted in a "conspirator manner"¹³ without public discussion and with violation of parliamentary procedures. In addition, they argue, it would have a chilling effect for historical discussion and research because of the imposition of harsh criminal sanctions. Particularly, the Open Letter from scholars and experts on Ukraine regarding the so-called "anti-communist" law stresses that the decommunization package contradicted freedom of speech: "Over the past 15 years, Vladimir Putin's Russia has invested enormous resources in the politicization of history. It would be ruinous if Ukraine went down the same road [...] Any legal or 'administrative' distortion of history is an assault on the most basic purpose of scholarly inquiry: pursuit of truth. Any official attack on historical memory is unjust. Difficult and contentious issues must remain matters of debate"¹⁴

II.2. UKRAINIAN MEMORY LAWS: THE DECOMMUNIZATION PACKAGE

For the purpose of this *Article* a brief overview of the decommunization package should be made: what are the Ukrainian memory laws about? What historical narratives do they construct? Why have they been criticized in the context of free speech and academic freedom?

The decommunization package includes four laws: Law on the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols;¹⁵ Law on the legal status and honouring the memory of fighters for Ukrainian's independence in the 20th century;¹⁶ Law on perpetuation of the victory over

¹¹ See European Parliament Resolution P7_TA(2010)0035 of 25 February 2010 on the situation in Ukraine.

¹² M. HAUKHMAN, *The Case of Decommunization*, in *Krytyka*, May 2015, krytyka.com; D. R. MARPLES, *Ukraine in Conflict. An Analytical Chronicle*, Bristol: E-International Relations, 2017, p. 190 *et seq.*

¹³ M. HAUKHMAN, *The Case of Decommunization*, cit.

¹⁴ *Open Letter from Scholars and Experts on Ukraine Re. the So-Called "Anti-Communist Law"*, in *Krytyka*, April 2015, krytyka.com.

¹⁵ Law of Ukraine No 317-VIII of 9 April 2015 "Pro zasudzhennya komunistychnoho ta natsional-sotsialistychnoho (natsysts'koho) totalitarnykh rezhymiv v Ukrayini ta zaboronu propahandy yikhno'yi symboliky" [On the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols], zakon3.rada.gov.ua.

¹⁶ Law of Ukraine no. 314-VIII of 9 April 2015 "Pro pravovyy status ta vshanuvannya pam'yati bortsiv za nezalezhnist' Ukrainy u XX stolitti" [On the legal status and honoring the memory of fighters for Ukrainian's independence in the 20th century], zakon3.rada.gov.ua.

Nazism in the Second World War of 1935-1945;¹⁷ Law on access to the archives of repressive agencies of the Communist totalitarian regime of 1917-1991.¹⁸ Although, these four laws are united by a general purpose to regulate Ukraine's memory policy, they are different in terms of their methods, instruments and specific aims.¹⁹ Three laws from the package – the Law on condemnation of totalitarian regimes, the Law on fighters and the Law on the Victory – are memory laws aimed to (re)construct historical narratives: the first condemns the totalitarian past and prohibits Nazi and communist propaganda and totalitarian symbols; the second one aims at shaping the national identity by glorifying the history of the struggle for Ukrainian statehood; the third one reflects current attempts to rethink the Second World War, its legacy and lessons for Ukraine. The proponents of the decommunization package see it as an ideological weapon in the conflict with the Russian Federation whose memory policy is largely based on the glorification of the Soviet past. For example, the Law on condemnation of totalitarian regimes mentions the elimination of the threat to independence, sovereignty, territorial integrity and national security of Ukraine among its aims.

The following discussion analyses three memory laws from the decommunization package to explain their role in European memory wars, reveal their shortcomings and internal controversies.

The Law on the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols is the central one for the process of decommunization. This law:

- equates the communist and Nazi regimes and condemns them as criminal and incompatible with fundamental human rights and freedoms; both regimes are labelled as regimes that “exercised a policy of state terror” (Art. 2);
- prohibits propaganda of totalitarian regimes (Art. 3) banning three different actions: “public denial of the criminal nature of the communist totalitarian regime of 1917-1991 in Ukraine and of the Nazi totalitarian regime”; “dissemination of information aimed to excuse the criminal nature of these regimes”; “production and/or dissemination and public use of products containing the symbols of the communist and Nazi totalitarian regimes” (Art. 1, para. 2);
- bans the symbols of totalitarian regimes (Art. 3) according to the provided list;

¹⁷ Law of Ukraine no. 315-VIII of 9 April 2015 “Pro uvichnennya peremohy nad natsyzmom u Druhiy Svitoviy Viyni 1939-1945 rokiv” [On perpetuation of the victory over Nazism in the Second World War of 1935-1945], zakon3.rada.gov.ua.

¹⁸ Law of Ukraine no. 316-VIII of 9 April 2015 “Pro dostup do arkhiviv represyvykh orhaniv komunistychnoho totalitarnoho rezhymu 1917-1991 rokiv” [Law on access to the archives of repressive agencies of the Communist totalitarian regime of 1917-1991], zakon3.rada.gov.ua.

¹⁹ Law no. 316-VIII which opens access to the secret archives is not a memory law, rather a technical one. It does not regulate historical narratives or directly affect historical debates. It facilitates historical research by providing new sources. For this reason, Law no. 316-VIII will not be analyzed in this *Article*.

- prohibits creation or activity of any entity which propagates totalitarian regimes or uses totalitarian symbols;
- sets procedures and timeframes for the toponymic changes across the country as well as the dismantling of monuments which propagate the communist regime and its symbols.

The Law has been widely criticized in the context of free speech. Particularly, the Venice Commission pointed out that it introduces criminal punishment for “totalitarian propaganda” without providing a clear definition of this notion. As it noted:

“...the combination of broadness, vagueness, openness, lack of objective detectability and ambiguity in meaning, places the applicability of the Law’s provisions – both in terms of what can be forbidden and which acts in relation to such a symbol may be forbidden – almost completely at the authorities’ discretion. It does so to a degree that may lead to a situation where individuals could transgress provisions of the Law accidentally and without intent. It is near to impossible for individuals to properly anticipate lawful or unlawful behavior based on the text of the Law”.²⁰

Moreover, since the Law’s key concepts – “propaganda” and “criminal nature of communist regime” – are too unclear, it has introduced a confusing provision to the Criminal Code of Ukraine. New Art. 436-1 of the Criminal Code of Ukraine which is titled “Production, dissemination of communist and Nazi symbols and propaganda of communist and national socialist (Nazi) totalitarian regimes” does not mention “propaganda” in the main text, setting criminal responsibility for “production, dissemination and public use of totalitarian symbols” and for “public performance of the anthems of Ukrainian SSR, USSR, other union or autonomous Soviet republics”. This wording raises questions not only about the meaning of “propaganda” but also whether it is punishable.

Additionally, the prohibition to perform the Soviet anthems can spark a diplomatic scandal between Ukraine and other post-Soviet republics whose national anthems have derived from the Soviet ones. For instance, the contemporary anthem of the Russian Federation and the Republic of Belarus are a “reincarnation” (with some minor changes) of the USSR’s and the Belarusian SSR anthem, accordingly; Uzbekistan and Tajikistan use music from the anthems of their Soviet predecessors. Since Art. 436-1 makes no exception regarding the anthems, their performance is illegal.

It should be noted that Art. 436-1 provides severe criminal sanctions: up to five years imprisonment with or without confiscation or from five to ten years imprisonment in case of repeated acts, or acts committed by a person holding public office or an

²⁰ European Commission for Democracy through Law (Venice Commission), OSCE Office for Democratic Institutions and Human Rights, Joint *Interim* Opinion on the Law of Ukraine on the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of Their Symbols, of 21 December 2015, CDL-Ad (2015) 041.

organized group. The article is an example of misuse of criminal responsibility as it imposes disproportional punishment.²¹

The Venice Commission was right to criticize the Law on condemnation of totalitarian regimes. To meet the Commission's requirements, Ukraine was expected to shape the definition of "communist propaganda" (for instance, instead of "criminal nature" of the communist regime, the Law should refer to the concrete crimes committed), to ease sanctions and limit their use to the exceptional cases which constitute acts of hate speech. But it has never happened, and the Commission's recommendations were ignored. Moreover, in July 2019 the Constitutional Court of Ukraine confirmed constitutionality of the Law on condemnation of totalitarian regimes and, by implication, the policy of decommunization and its methods.²²

Ukraine is going through a contradictory process of re-writing its history, selectively choosing among the concurring memories those that can foster its national identity. This explains why the laws from the same decommunization package – particularly, the Law on the condemnation of totalitarian regimes and the Law on perpetuation of the Victory over Nazism in the Second World War of 1939-1945 – contradict each other. The first law made it illegal to use the Soviet symbols of the Great Patriotic War, including the Banner of Victory, which for years was an inalienable element of the Victory Day celebration. Moreover, the Banner of Victory, before 2015, was protected by the Law on perpetuation of the Victory in the Great Patriotic War.²³ This law has been replaced by the Law on perpetuation of the Victory over Nazism in the Second World War of 1939-1945 from the recent decommunization package. Although the Law in force does prescribe a respectful attitude to the Banner of Victory, it demands, as "a sacred duty of the state and citizens of Ukraine", that the war veterans (the Red Army's former soldiers) be respected. "Duty to respect" implies the veteran's right to use the Banner of Victory and other military symbols during the Victory Day celebrations, even though they contain communist symbols. Yet, the prohibition of communist symbols has a priority over "an attitude of respect" towards war veterans: there have been several criminal prosecutions against those who tried to raise the Banner of Victory celebrating the 9th of May.

²¹ To compare: intended grievous bodily injury (Art. 122 of the Criminal Code of Ukraine), illegal confinement or abduction of a person (Art. 146 of the Criminal Code of Ukraine), and rape (Art. 152) are punished as severely as propaganda or use of totalitarian symbols. See in: Criminal Code of Ukraine (English translation), www.legislationline.org.

²² Judgment of the Constitutional Court of Ukraine no. 9-p/2019 of 16 July 2019 "Pro konstytutsiynost' Zakonu Ukrainy 'Pro zasudzhennya komunistychnoho ta natsional-sotsialistychnoho (natsyst-s'koho) totalitarnykh rezhymiv v Ukraini ta zaboronu propahandy yikhnoyi symbolik'" [On constitutionality of Law on the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols], zakon.rada.gov.ua.

²³ Law of Ukraine no. 1684-III of 20 April 2000 "Pro uvichnennya Peremohy u Velykii Vitchyznyaniy viyni 1941-1945 rokiv" [On perpetuation of the Victory in the Great Patriotic War], zakon.rada.gov.ua.

The legal initiative to amend the Criminal Code and allow the use of the Banner of Victory during the Victory Day celebration has not been supported.

The fact that within a short period Ukraine had two laws – the Law on perpetuation of the Victory in the Great Patriotic War (adopted in 2000) and the Law on perpetuation of the Victory over Nazism in the Second World War of 1939-1945 (adopted in 2015) – which are devoted to the same historical event reflects a tectonic shift in Ukraine's understanding of history. The old law continued the Soviet tradition of glorifying the past, promoting historical narratives of the Great Patriotic War. It was focused on the war, its heroes and victory: "Victory Day is a day of celebration of the immortal feat of the people – the winner over fascism, the national memory of its struggle for freedom and independence of the Motherland" (Art. 1).

The old law was very similar to Russia's Law on perpetuation of the Soviet people's Victory in the Great Patriotic War 1941-1945 and its current memory policy aimed to protect the glory of the past.

The new law brings Ukraine closer to European narratives of stateless victimhood and reconciliation. Considering the victory over Nazism in the context of the Second World War, the law recognizes historical responsibility of the USSR for the outbreak of war. It also introduces a new date for commemoration – the 8th of May, the Day of Memory and Reconciliation, which, however, does not exclude the 9th of May, the Victory Day.

The new law is aimed to construct a narrative of "united victory" to present Ukraine not as a part of the USSR but as one of the allied countries, together with the USA, France and the United Kingdom, who won the war. With its adoption, the Soviet narrative of "Great Patriotic War" and "great victory" has lost its monopoly in Ukraine.

Ukraine's memory policy has two opposite directions – positive and negative – operating simultaneously: the negative one is aimed at destroying historical myths of the communist past (the Law on condemnation of totalitarian regimes), while the positive memory policy seeks to create a new pantheon of national heroes, who were forgotten or even condemned in Soviet time. Thus, the implementation of memory policy transforms former heroes into villains and, on the contrary, former villains into heroes.

The positive direction of memory policy is represented in the Law on the legal status and honouring memory of fighters for Ukrainian's independence in the twentieth century. As can be seen in its title, this law constructs a narrative of "fighters for Ukraine's independence in the 20th century", meaning from the October revolution to the collapse of the Soviet Union. It is a controversial document from historical, sociological and legal perspectives. First, the list of fighters provided (Art. 1) is too wide and, from the historical point of view, is too simplistic to be taken seriously.²⁴ It includes all

²⁴ See M. HAUKHMAN, *The Case of Decommunization*, cit.: "The list contains organizations, members of which, through their resistance to Soviet power, in the best case risked finding themselves behind bars, as well as organizations in which membership did not even cause career troubles. In the latter case I have

structures, organizations and persons who fought for independence – from the Ukrainian People's Republic of 1918 to the People's Movement of Perestroyka (Narodniy Ruch), and from the Organization of Ukrainian Nationalists to the Ukrainian Helsinki Group – without any differentiation. As noted, "The various organizations are vastly different. How can one compare, for example, the intellectual leaders of the Ukrainian People's Republic (UNR) with the young hotheads of the Organization of Ukrainian Nationalists (OUN) in the 1930s or the ruthless insurgents of the Ukrainian Insurgent Army (UPA)?"²⁵

Second, treating the Ukrainian Military Organization (UVO), the Organization of Ukrainian Nationalists (OUN) and the Ukrainian Insurgent Army (UPA) as heroes, the Law on fighters imposes a regional narrative of history (these structures and their leaders are only respected in Western Ukraine) to the entire country. The problem here is that the paramilitary units of Ukrainian nationalists fought against the Red Army. For the populations of South and East Ukraine, these "fighters" are traitors and Nazi collaborators that cannot be accepted as national heroes.

The legal critique of the Law on the fighters for independence is focused mainly on two problems: first, the Law makes no exception from the list of "fighters" regardless of the means of struggle they used; second, it imposes a positive interpretation of the past under a vague threat of punishment.

Art. 2 of the Law proclaims that Ukraine "considers as legal all forms and methods of struggle for its independence in 20th century". This means that a self-reflective and self-critical approach towards the struggle for independence has been rejected. Ukraine does not distance itself from the crimes committed by the "fighters"; moreover, it denies these crimes.

The Law on the fighters for independence thus whitewashes the past. This is clearly reflected in the amendments to the Law on the status of war veterans and guarantees of their social protection²⁶ which were introduced in accordance with the Law on the fighters for independence. Before December 2018, the status of war veterans could be granted to the soldiers of the Ukrainian Insurgent Army "who fought against Nazi invaders on the temporarily occupied territory of Ukraine in 1941-1944 and who did not commit crimes against peace and humanity...".²⁷ With the reference to the Law on fighters, this provision was changed, so that a status of war veterans could be given to "persons who participated in all forms of armed struggle for Ukraine's independence in

in mind the 'Popular Movement of Ukraine for Perestroika' [Rukh] and other oppositional organizations from 1989–1991. It is strange to see them included in the same list as the organization of Ukrainian Nationalists (OUN) and the Ukrainian Insurgent Army (UPA)".

²⁵ D. R. MARPLES, *Ukraine in Conflict*, cit., p. 132 et seq.

²⁶ Law of Ukraine no. 3551-XII of 22 October 1993 "Pro status veteraniv viyny, harantiyi yikh sotsial'noho zakhystu" [On the status of war veterans and guarantees of their social protection], zakon.rada.gov.ua.

²⁷ *Ibidem*.

the 20th century as members of the Ukrainian Insurgent Army, the Ukrainian Rebel Army of Ataman Taras Borovets (Bulba) 'the Polissya Sich', the Ukrainian People's Revolutionary Army (UNRA), and armed units of the Organization of Ukrainian Nationalists" (Art. 6, para. 16).²⁸ Thus, the wording "crimes against peace and humanity" has been removed from the legislation to erase memories about awkward moments when Ukraine's heroes were perpetrators.

Furthermore, to protect past glories, the Law on fighters introduces responsibility for "a public display of disrespectful attitude" toward fighters for independence and "a public denial of legitimacy of the struggle for Ukraine's independence" (Art. 6). It should be noted that neither meaning of "disrespectful attitude" nor liability measures have been specified.²⁹ However, even without clear sanctions, the Law can effectively freeze historical discussion suppressing questions about crimes committed by fighters for independence during the Second World War.

III. UKRAINE IN THE EUROPEAN MEMORY WARS

Ukraine's attempts to re-think the past resulted in its involvement in the European memory wars, particularly, with Russia and Poland. The notion "memory war" refers to a conflict regarding the past and its interpretation. Memory war is a clash of State-sponsored (i.e. imposed by law) historical narratives, when several States adhere to different interpretations of the same historical events: State A promotes a position which contradicts the position of State B and can be punishable under its legislation; in the last case (when criminal sanctions are used to protect "official" truth), there is no chance to end a memory war through open dialog and reconciliation. Usually, a memory war occurs from the attempts of self-victimization or self-glorification – in the modern world no one wants to be pictured as a perpetrator.³⁰ This is the case of Russia, Poland and Ukraine.

In European memory wars, Russia finds itself on the defensive: to legitimize its geopolitical claims, it has to protect its mantel as Europe's liberator. This historical narrative has been challenged by Central and Eastern European States. In December 2010, six EU countries from the former Soviet bloc (Lithuania, Latvia, Bulgaria, Hungary, Romania and the Czech Republic) petitioned the European Commission to criminalize denials of

²⁸ Law of Ukraine no. 2325-VIII of 13 March 2018 no. 2325-VIII "Pro vnesennya zmin do deyakykh zakonodavchykh aktiv Ukrayiny shchodo udoskonalennya protsedury reabilitatsiyi zhertv represiy komunistychnoho totalitarnoho rezhymu 1917-1991 rokiv" [On Amendments to Some Legislative Acts of Ukraine on Improving the Rehabilitation Procedure for Victims of Repression of the Communist Totalitarian Regime of 1917-1991], zakon.rada.gov.ua.

²⁹ After amendments Art. 6 of the Law on the legal status of war veterans reads: "Ukrainian nationals, foreigners and stateless persons who publicly express disrespect for [fighters for independence] stipulated in Article 1 of this law [...] bear liability in accordance with current Ukrainian legislation".

³⁰ In this sense, criminal responsibility for the Holocaust denial in Germany and Austria is a rare exception.

crimes committed by the Communist regime and to adopt a document similar to the Framework Decision on Combating Racism and Xenophobia. Although the proposal was rejected on the EU level, the criminal codes of these countries include articles to punish the denial of crimes committed by both totalitarian regimes. In response to these legal initiatives, Russia introduced Art. 354-1 "Rehabilitation of Nazism" to its penal code, where the equalization of Nazi Germany and the USSR as totalitarian regimes was deemed "falsification of history" and even a threat to the country's national security. This law was adopted in April 2014, at the beginning of the conflict with Ukraine.

Art. 354-1 is aimed to protect Russia's glory of the past: this is a crime to "deny the facts established by the International Military Tribunal", "approve the crimes adjudicated by said Tribunal" as well as "spread knowingly false information on the activities of the Soviet Union during the Second World War".³¹ Thus, any historical discussion about pre-war cooperation between Hitler and Stalin, war crimes committed by the Red Army or the post-war Soviet occupation can be qualified as "rehabilitation of Nazism". Accordingly, everyone who opposes the Russian official truth can be accused of being a "Nazi". In September 2016, Russia's Supreme Court upheld the conviction of Vladimir Luzgin under Art. 354-1 who was fined about 2,800 euros for reposting in the popular Russian social network *Vkontakte* a link to an online article *Fifteen facts about the 'Banderovtsy', or: What the Kremlin Is Silent About*. The article countered what its author perceived as Russian misconceptions about the Ukrainian independence movement during the Second World War, particularly, the Ukrainian nationalists and their leader Stepan Bandera (1909-59).³² The statements that the Soviet Union and Nazi Germany "actively collaborated in dividing Europe according to the Molotov-Ribbentrop Pact, jointly attacked Poland and unleashed the Second World War" were problematic in the context of Art. 354-1. The Supreme Court found that Luzgin's repost of the claim – though seen by few people – that the USSR and Germany both attacked Poland in September 1939, contributes to forming a negative opinion of the Soviet Union's activities during the Second World War and assists in the "rehabilitation of Nazism".

It should be stressed that an official understanding of the Molotov-Ribbentrop Pact (1939) and the Soviet role in the origins the Second World War differed over the years. For fifty years the Kremlin denied the existence of a secret Protocol to the Pact, which effectively divided Eastern Europe in German and Soviet "spheres of influence" and mapped out in detail the territory each party expected to gain at the expense of Poland, Finland, Latvia, Lithuania and Estonia. Only in 1989, during Gorbachev's *perestroika*, this act of secret diplomacy was admitted and condemned. The Decree on political and legal

³¹ Notably, Art. 354-1 partly repeats provisions of Art. 190-1 of the Soviet Russia's criminal code, which punished the "spreading of knowingly false fabrications" about the Soviet system; in the Soviet time it was widely used against the dissidents.

³² An analysis of *Luzgin* case see in M. EDELE, *Fighting Russia's History Wars: Vladimir Putin and the Codification of World War II*, in *History and Memory*, 2017, p. 90 et seq.

assessment of the Treaty of Non-aggression between Germany and the Soviet Union adopted on 24 December 1989 by the First Congress of people's deputies stated: "[...] the Secret Protocol signed on 23 August 1939, and other secret protocols signed with Germany in 1939-1941, both by the method of drafting them and by their content, deviated from the Leninist principles of Soviet foreign policy. From a legal point of view, the delineation of 'spheres of interest' between the USSR and Germany [...] contradicted sovereignty and independence of third countries concerned".³³

The Decree referred to a number of the peace treaties between the USSR and Latvia, Lithuania and Estonia as well as the Soviet Union's similar obligations in respect to Poland and Finland, which were violated. In intrinsic essence and form, the Secret Protocol was an "act of Stalin's personal power and did not represent the will of the Soviet people, who were not responsible for the collusion". Based on this, the Congress of the people's deputies declared the Secret Protocol "legally void from the moment of its signing".

In 2009, President Vladimir Putin stated that Russia condemned the Pact and the Secret Protocol as an "immoral" act of collaboration with Nazi Germany and called upon other European States to follow Russia's example and condemn their past agreements with Nazis, and the Munich agreements in particular. 10 years on, the Pact is treated as a great achievement of Soviet diplomacy: the USSR had to sign an agreement with Nazi Germany to protect own security when it became clear that the Soviet efforts to form an anti-Hitler coalition failed. The Molotov-Ribbentrop Pact continued European policy, started in 1938 with the German annexation of Czechoslovakia and the Munich agreements. As Putin noted in 2014: "People are still arguing about the Molotov-Ribbentrop Pact to the present day. And they accuse the Soviet Union of carving up Poland. But what did Poland itself do when the Germans occupied Czechoslovakia? They grabbed a piece of Czechoslovakia! (Laughs) They did that before the end of May [1939]! (Laughs) And then they got their payback".³⁴

Considering that condemnation of the Molotov-Ribbentrop Pact in 1989 legitimated the Baltic countries' claims for independence (in this context it was the starting point of the Soviet Union's dissolution) and that praise for the treaty became Russia's official narrative after the Crimea annexation in 2014, the changes in the Kremlin's rhetoric indicate the political direction Moscow has taken over the last decades.

Thus, Luzgin's conviction, supported by the Supreme Court, was in line with the recent shift in Russia's memory policy. After Russia's Supreme Court, Luzgin appealed to the European Court of Human Rights to test Art. 354-1 of the Russian Penal Code within Art. 10 of the European Convention on freedom of speech.

³³ Decree of the USSR Council of the People's Deputies no. 979-1 of 24 December 1989 "O politicheskoy i pravovoy otsenke sovetsko-germanskogo dogovora o nenapadenii ot 1939 goda" [On the political and legal assessment of the soviet-german non-attackment agreement of 1939], www.lawmix.ru.

³⁴ R. COALSON, *Turning Back Time: Putting Putin's Molotov-Ribbentrop Defense into Context*, in *Radio Free Europe – Radio Liberty*, 15 May 2015, www.rferl.org.

Although Art. 354-1 of the Russian Penal Code is an extreme case of legislating on the issues of the past (it explicitly defends the reputation of an oppressive regime), in terms of sanctions, it is less hard than Art. 436-1 of the Ukrainian Penal Code: in Russia, “rehabilitation of Nazism” can be punished by fine or imprisonment, while in Ukraine imprisonment for totalitarian (communist) propaganda has no alternatives. This explains why the defendants under Art. 436-1 are ready to plead guilty in exchange for probation – it allows them to avoid prison.³⁵ This is the reason why the Ukrainian cases of “communist propaganda” are highly unlikely to reach the European Court of Human Rights.

Russia’s cult of the Great Patriotic War, which entirely attributes victory over Nazi Germany to the Red Army, cannot tolerate anti-Soviet historical narratives. In this vision, anti-Soviet means anti-Russian and, at the same time, pro-Nazi. This is a simplistic interpretation of history, but it is successfully used by Russian propaganda. For instance, it is applied to the Russian-Ukrainian conflict: pro-Russian separatists in the Donetsk and Luhansk regions are presented as “anti-fascist fighters”, while the government of Ukraine are labelled as “Nazis”. As a result of this binary “fascist”-“anti-fascist” rhetoric within the Russian-Ukrainian conflict, the Red Army’s symbols have received a new meaning in Ukraine. For instance, the Saint George Ribbon which was a symbol of commemoration of the veterans of the Eastern Front during the Second World War became a symbol of Crimea’s annexation and of the Russian-Ukrainian conflict after 2014 because it was used by pro-Russian separatists. In May 2017, Ukraine outlawed this symbol: Art. 173-3 on “Manufacturing and propaganda of the Saint George Ribbon”, introduced to the Ukrainian Code of Administrative Offences, imposes a fine for the “use, public demonstration or wearing” of the Saint George ribbon.

Adopting the Law on condemnation of totalitarian regimes, which equates the communist regime with the Nazi regime, Ukraine confronted Russia’s historical narratives and joint “anti-Russian” coalition on the European memory front. At the same time, Ukraine’s attempts to forge national identity using a heroic myth of fighters for independence have resulted in a memory clash with Poland.

Although, these two countries were the “bloodlands” during the Second World War,³⁶ Ukrainians and Poles have different war memories.³⁷ Timothy Snyder outlines

³⁵ Since 2015 Art. 354-1 has been invoked many times. All cases of communist propaganda are very similar: a bare demonstration of the communist symbols (such as red star, hammer and sickle, Lenin’s portrait or communist slogans on the T-shirt or Facebook page) was a ground for imprisonment. To avoid it, all defendant plead guilty. For an overview of the cases see: glavcom.ua.

³⁶ T. SNYDER, *Bloodlands: Europe Between Hitler and Stalin*, New York: Basic Books, 2012.

³⁷ See T. SNYDER, *Memory of Sovereignty and Sovereignty over Memory*, in J.-W. MÜLLER (ed.), *Memory and Power in Post-War Europe*, cit., pp. 41-42: “[F]or patriotic Ukrainians the Organization of Ukrainian Nationalists (OUN) created a moment of Ukrainian sovereign action by declaring a Ukrainian state under Nazi occupation in 1941 and a lasting memory of national heroism by their doomed struggle; for Poles its UPA was the organization which cleansed Poles from Western Ukraine in 1943 and 1944. Ukrainian patriots... are unwilling to except that the UPA did commit mass race murder in 1943-4. Poles... are apt to believe that the anti-Ukrainian

the problem well when he argues that: "Cleansing actions (the word used at the time) [...] were carried out in the name of the Ukrainian nation against Poles and in the name of the Polish nation against Ukrainians".³⁸

Hence, Ukrainian heroes are criminals for Poland and *vice versa*. Thus, any attempt, to whitewash the past using the law undertaken by any party to the conflict, will be perceived as an act of hostility by its counterpart and push for further, even more aggressive, legislation on memory to protect an official truth. The Law on fighters for Ukraine's independence says: "public denial of the legitimacy of the struggle for Ukraine's independence is desecration of the memory of fighters for Ukraine's independence in the 20th century, denigration of the dignity of the Ukrainian people and is unlawful" (Art. 6). It means that the Law on fighters forbids:

"to question the legitimacy of an organization (UPA) that slaughtered tens of thousands of Poles in one of the most heinous acts of ethnic cleansing in the history of Ukraine, [...] exempt[s] from criticism the OUN, one of the most extreme political groups in Western Ukraine between the wars, and one which collaborated with Nazi Germany at the outset of the Soviet invasion in 1941. It also took part in anti-Jewish pogroms in Ukraine and, in the case of the Melnyk faction, remained allied with the occupation regime throughout the war".³⁹

The Law on fighters for Ukraine's independence made it impossible to continue an open Ukrainian-Polish dialogue on the legacy of the Second World War, particularly, the Volyn events:⁴⁰ a claim that the Organization of Ukrainian Nationalists (OUN) and the Ukrainian Insurgent Army (UPA) participated in murders of Polish civilians in the Volyn region can be deemed as "denigration" of the Ukrainian people.

Reacting to the Ukrainian memory law, in July 2016 the Polish parliament proclaimed the Volyn massacre to be a genocide of Poles committed by the Ukrainian Nationalists and declared 11 July the National Day of Volyn Genocide Victims Remembrance.⁴¹ In February 2018, Poland took a further step to protect the memory of the Volyn massacre's victims and introduced criminal responsibility for denial of the crimes

military operations of 1944-7 were a direct result of the UPA's earlier ethnic cleansing. Both views are substantially incorrect. The UPA did indeed brutally murder [...] Polish civilians in 1943-3. But in 1944-7 the Polish communist regime acted to 'resolve the Ukrainian question in Poland', not only to liquidate the UPA".

³⁸ *Ibidem*, p. 42.

³⁹ *Open Letter from Scholars and Experts on Ukraine Re. the So-Called "Anti-Communist Law"*, in Krytyka, April 2015, krytyka.com.

⁴⁰ See more on the Volyn tragedy in A. PORTNOV, *Clash of Victimhoods: the Volhynia Massacre in Polish and Ukrainian memory*, www.opendemocracy.net.

⁴¹ *Polish MPs Adopted Resolution Calling 1940s Massacre Genocide*, Polish Radio, 22 July 2016, www.thenews.pl.

committed by the Ukrainian Nationalists through amendments to the Law on the Institute of National Remembrance (Art. 2, let. a)).⁴²

Reacting to the amendments, the Ukrainian Foreign Ministry expressed "concern about the attempts to portray Ukrainians exclusively as 'criminal nationalists' and 'collaborators of the Third Reich'".⁴³ In turn, the Ukrainian Parliament stressed that "the Amendment contradicts the nature and spirit of the strategic partnership between Ukraine and Poland" and warned against "incitement of conflicts between traditionally friendly Ukrainian and Polish peoples" as these conflicts are in the interests of their common enemies "which were the Nazi and communist regimes in the past" and "the Russian aggressor today".

Memory legislation from both countries threatened the first achievements of a long and very difficult process of mutual forgiveness and commemoration of innocent victims killed during the 1940s, including Ukrainians and Poles.⁴⁴ Instead of a reconciliation process, Ukraine and Poland had a "memory" war: Ukrainian heroes were declared culprits under Polish legislation, which, in turn, "denigrated the dignity of the Ukrainian people" and was "unlawful" in Ukraine.

The amendments to the Law on the Institute of National Remembrance regarding the crimes of the Ukrainian nationalists (Art. 2, let. a)) were almost unknown outside Poland and Ukraine. The main cause for concern were, however, Art. 55, let. a) and b), labelled as "the Polish Holocaust Bill". These provisions were aimed to protect the "reputation of the Republic and the Polish Nation". Art. 55, let. a), provided that:

"Whoever claims, publicly and contrary to the facts, that the Polish Nation or the Republic of Poland is responsible or co-responsible for Nazi crimes committed by the Third Reich [...], or for other felonies that constitute crimes against peace, crimes against humanity or war crimes, or whoever otherwise grossly diminishes the responsibility of the true perpetrators of said crimes – shall be liable to pay a fine or imprisonment for up to 3 years".⁴⁵

⁴² Amendment to the Act on the Institute of National Remembrance, orka.sejm.gov.pl.

⁴³ Comment of the Ukrainian Ministry of Foreign Affairs of 26 January 2018, mfa.gov.ua.

⁴⁴ The two countries have made a number of joint statements concerning the conflict in the 1940s between Poles and Ukrainians: Statement by the Presidents of Ukraine and Poland on Concorde and Reconciliation of 21 May 1997; Statement by the Parliaments of Ukraine and Poland on the 60th Anniversary of the Volyn Tragedy dated 10 July 2003; Joint Statement by the Presidents of Ukraine and Poland on Reconciliation on the 60th Anniversary of the Volyn Tragedy dated 11 July 2003; Address by Greek-Catholic bishops of Ukraine and Roman-Catholic bishops of Poland on the Act of mutual forgiveness and reconciliation of June 2005; Joint Statement by the Presidents of Ukraine and Poland on the occasion of the 60th anniversary of the Wisla event dated 27 April 2007; Joint Declaration between the Ukrainian Greek-Catholic Church and the Roman-Catholic Church on the 70th anniversary of the Volyn crime dated 28 June 2013. These statements are listed in the Ukrainian Parliament's Statement on Resolutions on Volyn Tragedy approved by Polish Senate and Sejm on 7 and 22 July 2016 (8 September 2016), available at: rada.gov.ua.

⁴⁵ As no official English translation has as yet been made available, we refer to an unofficial English translation provided by the Times of Israel (1 February 2018), retrieved 24 January 2019. For the original

Art. 55, let. b), stipulated that criminal sanctions applied to Polish and foreign nationals irrespective of the regulations in force in the location where the criminal act was committed. In addition to criminal sanctions, civil sanctions were also expressly provided for.

"The Polish Holocaust Bill" provisions sparked a real diplomatic row between Poland and Israel; it was strongly criticized by the USA⁴⁶ and inside the EU.⁴⁷

The Israeli Foreign Ministry stated: "The State of Israel opposes categorically the Polish Senate decision. Israel views with utmost gravity any attempt to challenge historical truth. No law will change the facts".⁴⁸

As a countermeasure, the Israeli Parliament was ready to amend Israel's law on Holocaust denial to criminalize diminishing or denial of the role played by those who aided the Nazis in their persecution of Jews; it was also suggested that Israel should provide a legal defence to everyone prosecuted under the new Polish law.⁴⁹

On 27 June 2018, to cope with one of the biggest diplomatic crises in its recent history and yielding to international pressure, Poland repealed Art. 55, let. a) and b), of the Law on the Institute of National Remembrance, "breaking the national record in speed of proceeding a bill in Parliament and getting it signed into the law by the President".⁵⁰ On this wave, on 17 January 2019, the Constitutional Tribunal of Poland declared Art. 2, let. a), of the said Law – the provisions regarding the Ukrainian nationalists' crimes against Poles – unconstitutional. Thus, memory war between Ukraine and Poland had a lull in the battle. Its further development – towards reconciliation or new escalation of the memory conflict – depends on Ukraine and its readiness to revise the heroic narratives using a self-critical approach.

IV. CONCLUSIONS

Memory wars in which Ukraine participates, prove that politicization and instrumentalization of history is the worst way of dealing with the past. Although States always have a temptation to use "selective amnesia" in their memory policies, they should be aware that this method can succeed in the short term, but it is doomed in a longer perspective: na-

see: Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej, Dziennik Ustaw (2018), Item 369. For a discussion of this law in the Polish context, see M. WYRZYKOWSKI, "National Untruth": *Controversial Law on the Polish Institute of National Remembrance?*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, forthcoming.

⁴⁶ R. NOACK, *Poland's Senate passes Holocaust Complicity Bill Despite Concerns from U.S., Israel*, in *The Washington Post*, 2 February 2018, www.washingtonpost.com.

⁴⁷ BBC News, *Poland Holocaust Law: France criticizes 'ill advised' text*, 7 February 2018, www.bbc.com.

⁴⁸ The Israeli Ministry of the Foreign Affairs Statement on Polish Senate decision, 1 February 2018, mfa.gov.il.

⁴⁹ M. BACHNER, *Lawmaker Proposes Israeli Legislation to Counter Polish Holocaust Bill*, in *The Times of Israel*, 1 February 2018, www.timesofisrael.com.

⁵⁰ J. JARACZEWSKI, *Fast Random-Access Memory (Laws) – The June 2018 Amendments to the Polish "Holocaust Law"*, in *Verfassungsblog*, 23 July 2018, verfassungsblog.de.

tional identity built on national myths that inspire pride but not regret about the past wrongdoings will certainly result in a constant return to the unsolved problems and suppressed historical traumas, especially in the light of clashes over memory with neighbours.

Despite the fact that Ukraine, Russia and Poland protect mutually exclusive collective memories, their memory policies are very similar: the three countries promote historical narratives of self-glorification (myth of fighters for Ukraine's independence, cult of the Great Patriotic War, "the Polish Holocaust bill") or self-victimization (the process of decommunization in Ukraine, Polish attempts to introduce criminal responsibility for crimes committed by the Ukrainian nationalists) without critical self-reflection. This type of memory policies results from the State's attempt to be the sole caretaker of national memory. Protecting an "official" truth, Ukraine, Russia and Poland treat freedom of speech as a secondary value, using similar "totalitarian" approaches to history. The proliferation of memory laws with criminal sanctions reflects an escalation of memory wars, in which historians, journalists and civil activists are the first victims. Indeed, "remembering the past and writing about it no longer seem the innocent activities they once were taken to be".⁵¹

⁵¹ P. BURKE, *History as Social Memory*, in T. BUTLER (ed.), *Memory: History, Culture and the Mind*, Oxford: Blackwell, 1989, p. 98 *et seq.*



ARTICLES

HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW – FIRST PART

edited by Grażyna Baranowska and León Castellanos-Jankiewicz

THE CRIME OF GENOCIDE AGAINST THE LITHUANIAN PARTISANS: A DIALOGUE BETWEEN THE COUNCIL OF EUROPE AND THE LITHUANIAN COURTS

NIKA BRUSKINA*

TABLE OF CONTENTS: I. Introduction. – II. Historical background. – III. The ruling of the Constitutional Court of Lithuania of 18 March 2014 and the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Vasiliauskas v. Lithuania* – their impact on the case-law of the Lithuanian courts in the genocide cases – III.1. The ruling of the Constitutional Court of Lithuania of 18 March 2014 as the first call to review the domestic case-law in the genocide cases – III.2. The judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas v. Lithuania* case as the second call to review the domestic case-law in the genocide cases. – IV. The cases examined by the Lithuanian courts following the ruling of the Constitutional Court of 18 March 2014 and the judgment of the European Court of Human Rights in the *Vasiliauskas v. Lithuania* case. – V. The *Drėlingas* case before the European Court of Human Rights as the test for the progress done by the domestic courts. – VI. Conclusion.

ABSTRACT: The *Article* begins with a historical background and an overview of the earlier case-law of the Lithuanian courts which concluded that certain individuals' acts directed against the Lithuanian partisans as a "separate political group" during the Soviet occupation regime could be qualified as a crime of genocide. Second, the *Article* analyses two relevant decisions – the ruling of the Constitutional Court of Lithuania of 18 March 2014 and the judgment of the Grand Chamber of the European Court of Human Rights of 20 October 2015 in the case of *Vasiliauskas v. Lithuania* (judgment of 20 October 2015, no. 35343/05). Third, the *Article* argues that in light of the reasoning in these two decisions, the Lithuanian courts modified their argumentation as regards the notion of a protected group under the crime of genocide that was done during the Soviet occupation. The *Article* notes that such a change of the case law of the domestic courts was positively assessed by the Committee of Ministers of the Council of Europe and the European Court of Human Rights in its judgment of 12 March 2019

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in the *Drélingas v. Lithuania* case (no. 28859/16). The *Article* concludes that this modified argumentation of the Lithuanian courts demonstrates the existence of effective dialogue between the Council of Europe and the domestic courts of Lithuania as well as their ambition to ensure the rule of law is respected while putting the individuals on trial for their crimes committed in the past.

KEYWORDS: genocide – partisans – Soviet occupation – Convention for the Protection of Human Rights and Fundamental Freedoms – European Court of Human Rights – non-retroactivity of criminal law.

I. INTRODUCTION

After the Baltic States were occupied, the Soviet policy was to eliminate the members of the national resistance to the Soviet occupation in the 1940s-1950s – i.e. the partisans and their supporters. The criminal prosecutions against the Soviet officials with respect to the crimes committed against the partisans and their supporters took place in all three Baltic States since the 1990s after those three States restored their independence.¹ However, it seems that only the practice of the Republic of Lithuania was consistent as regards the qualification as genocide of the acts of the Soviet officials against the Lithuanian partisans and their supporters.²

The evaluation of the role of the Lithuanian partisans and the qualification of the acts against the Lithuanian partisans as genocide has been a matter of controversy and debate. Such prosecutions raised certain doubts among scholars and, later, among the domestic courts themselves. To these actors, it was questionable whether such prosecutions were compatible with the *nullum crimen, nulla poena sine lege* principle. It is generally recognized that the maxim *nullum crimen, nulla poena sine lege* (meaning that only the law can define a crime and prescribe a penalty) is one of the fundamental principles of modern criminal law and is an essential element of the rule of law – which requires that State authorities shall act in accordance with the law and the acts of the State authorities shall thus be foreseeable for the individuals.³ As regards the prosecutions for the crime of

¹ E.-C. PETTAI, *Prosecuting Soviet Genocide: Comparing the Politics of Criminal Justice in the Baltic States*, in *European Politics and Society*, 2017, p. 1 et seq. The prosecution of Communist-era crimes committed by Soviet officials has also become a recurring issue in Ukraine. See A. CHERVIASTOVA, *On the Frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 119 et seq.

² D. ŽALIMAS, *Crimes Committed by the Communist Regimes from the Standpoint of International Legislation: Lithuanian Case Study*, in *Conference on the Crimes of Communist Regimes, the Institute for the Study of Totalitarian Regimes*, 2010, Prague, www.ustrcr.cz.

³ L.-A. SICILIANOS, *L'Articulation entre Droit International Humanitaire et Droits de l'Homme dans la Jurisprudence de la Cour Européenne des Droits de l'Homme*, in *Swiss Review of International and European Law*, 2017, p. 9 et seq.; A. RYCHLEWSKA, *The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees*, in *Polish Yearbook of International Law*, 2016, p. 163 et seq.; T. DE SOUZA DIAS, *Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?*, in *Human Rights Law Review*, 2020, p. 1 et seq.

genocide against the Lithuanian partisans, the thrust of the dispute was connected with the scope of the term “protected groups” under the definition of genocide.

A legally binding definition of genocide is embodied in the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, Genocide Convention),⁴ which was adopted on 9 December 1948. The Genocide Convention entered into force in respect of the Republic of Lithuania on 1 May 1996, i.e. after Lithuania restored its independence, but what is important is that the USSR signed the Genocide Convention on 16 December 1949 and ratified it on 3 May 1954.⁵ Therefore, it can be argued that the instrument prohibiting acts of genocide was *accessible* and *foreseeable* to the convicts at the time they committed their acts during the Soviet occupation. However, under Art. 2 of the Genocide Convention, the crime of genocide is committed against certain protected groups or part thereof: a national, ethnical, racial or religious group. In the Genocide Convention the list of protected groups is exhaustive and it does not include any other separate groups like political or social groups.⁶ Therefore, some other international or domestic legal source was needed to make such prosecution for the genocide against the partisans – who were held as a separate political group – in accordance with the rule of law. During the Soviet occupation, the Criminal Code of the Lithuanian Soviet Socialist Republic (hereafter, the Lithuanian SSR) of 1961 was applied in the territory of the Republic of Lithuania, but that Code did not define the crime of genocide and thus no criminal liability was established for the genocide at the relevant time. After the independence of Lithuania was restored, the Lithuanian authorities convicted the individuals for the genocide against the partisans as a separate political group by retroactively applying Art. 99 (Genocide) of the Criminal Code of the Republic of Lithuania, as effective as of 1 May 2003 (hereafter, the 2003 Criminal Code or the Lithuanian Criminal Code), to the events occurring in the 1940s-1950s.⁷ Indeed, one can

⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in *UNTS*, vol. 78, p. 277.

⁵ See the list of participants to the Genocide Convention, available at treaties.un.org.

⁶ According to Art. 2 of the Genocide Convention, “genocide means any of the following acts committed with *intent to destroy, in whole or in part, a national, ethnical, racial or religious group* (emphasis added), as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group” (emphasis added).

⁷ Art. 99 (Genocide) of the Criminal Code of the Republic of Lithuania, as effective as of 1 May 2003, stipulates “A person who, seeking to physically destroy, in whole or in part, the persons belonging to any *national, ethnic, racial, religious, social or political group*, organised, was in charge of or participated in their killing, in torturing, in causing bodily harm to them, in hindering their mental development, in their deportation or otherwise inflicted on them the conditions of life bringing about the death of all or a part of them, restricted the birth of the persons belonging to those groups or forcibly transferred their children to other groups, shall be punished by deprivation of freedom from five to twenty years, or by life imprisonment” (emphasis added).

note that Art. 99 of the 2003 Criminal Code, in addition to national, ethnic, racial, and religious groups, also included social and political groups as protected entities. However, as has been already noted, those separate political and social groups were not covered by the definition of genocide at the material time of their commission in the 1940s-1950s. Therefore, the domestic law pursuant to which the Lithuanian prosecutor and the courts put the individuals on trial could not have been foreseeable to the convicted individuals at the time of their involvement in the acts against the partisans. This fact led the European Court of Human Rights to find a violation of Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the European Convention)⁸ in the *Vasiliauskas v. Lithuania* case.⁹

In this connection, it should be recalled that the European Court of Human Rights recognizes that “it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime”.¹⁰ Under the universally recognized norms of international law, no statutory limitation for conviction shall be applied to the international crimes,¹¹ including the crime of genocide as defined under the Genocide Convention. The Court recognizes that imprescriptibility (non-applicability of statutory limitations) of the international crimes is compatible with the European Convention,¹² even if the events took place sixty years ago.¹³ However, States must act in compliance with the requirements of Art. 7 (no punishment without law) in doing so.¹⁴ By bringing the criminals to justice, the rule of law must be respected in all cases. As stressed by the Court, Art. 7 prohibits the retrospective application of criminal law to an accused’s disadvantage. Art. 7 of the European Convention is not breached when at the time of its commission the criminal offence was clearly defined in written or unwritten form, be it in international or domestic law (even if the domestic law in force at the material time is interpreted and applied in the light of the rule of law

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, CETS No. 005, Rome, 4 November 1950, entry into force 3 September 1953.

⁹ European Court of Human Rights, judgment of 20 October 2015, no. 35343/05, *Vasiliauskas v. Lithuania* [GC].

¹⁰ European Court of Human Rights, judgment of 22 March 2001, nos 34044/96, 35532/97 and 44801/98, *Streletz, Kessler and Krenz v. Germany* [GC], para. 81; decision of 28 June 2001, no. 46362/99, *Glaessner v. Germany*; decision of 21 June 2011, no. 2615/10, *Polednová v. the Czech Republic*.

¹¹ Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted by the General Assembly of the United Nations on 26 November 1968, in *UNTS*, vol. 754, p. 73; European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 25 January 1974, CETS No. 082.

¹² European Court of Human Rights: decision of 29 May 2001, no. 63716/00, *Sawoniuk v. the United Kingdom*; decision of 25 November 2014, no. 45520/04 and 19363/05, *Larionovs v. Latvia and Tess v. Latvia*, para. 151.

¹³ European Court of Human Rights, decision of 23 March 2010, no 36586/08, *Sommer v. Italy*.

¹⁴ European Court of Human Rights, judgment of 18 July 2013, nos 2312/08 and 34179/08, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], para. 75 and the cases cited therein.

and a democratic regime which were put in place after the repressive regime during which the crime was committed). The European Court of Human Rights admits that Art. 7 of the European Convention “cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, *provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen*”.¹⁵ However, in every case, that law must be accessible and foreseeable to the convicted person.¹⁶

Turning to the foreseeability of the law in the Soviet genocide cases, one may find that the case-law of the Lithuanian domestic courts changed in the light of the explanation of the Constitutional Court of Lithuania of 18 March 2014 and, in particular, after the judgment of the European Court of Human Rights in the above-mentioned *Vasiliauskas* case. The Republic of Lithuania succeeded in demonstrating before the Committee of Ministers of the Council of Europe as well as once again before the European Court of Human Rights (in the *Drėlingas v. Lithuania* case)¹⁷ that the conviction and punishment for the crime of genocide against the Lithuanian partisans during the Soviet occupation did not violate the principle of the rule of law as embodied in Art. 7 of the European Convention. The conviction for genocide was consistent with the essence of the criminal offence of genocide and could reasonably have been foreseen by the convicts at the time the alleged crimes were committed. In particular, the extensive historical background that was provided by the domestic courts in those cases showed that at the time of the commission of the crime the convicts could foresee that they could be punished for the genocide against the partisans as significant part of the Lithuanian nation. In other words, the Lithuanian courts held that it was the genocide against part of the national ethnic group protected under the Genocide Convention which was in force in the Soviet Union at the material time. The key to the success of the Lithuanian authorities in obtaining the convictions was thorough application of the guidelines provided by the Constitutional Court of Lithuania and the European Court of Human Rights in the aforementioned *Vasiliauskas* case.

¹⁵ European Court of Human Rights: judgment of 12 July 2007, no. 74613/01, *Jorgic v. Germany*, para. 101 (emphasis added); judgment of 19 September 2008, no. 9174/02, *Korbely v. Hungary* [GC], para. 71; judgment of 17 May 2010, no. 36376/04, *Kononov v. Latvia* [GC], para. 185; see also Guide on Article 7 of the European Convention Human Rights – No punishment without law, updated on 31 December 2019, www.echr.coe.int.

¹⁶ European Court of Human Rights: judgment of 22 November 1995, no. 20166/92, *S.W. v. the United Kingdom*, paras 34-36; judgment of 22 March 2001, nos 34044/96, 35532/97 and 44801/98, *Streletz, Kessler and Krenz v. Germany* [GC]; decision of 17 January 2006, nos 23052/04 and 24018/04, *Kolk & Kislyiy v Estonia*; decision of 24 January 2006, no. 14685/04, *Penart v Estonia*; judgment of 12 July 2007, no. 74613/01; *Jorgic v. Germany*, cit., para. 100; *Korbely v. Hungary* [GC], cit., paras 69-70; *Kononov v. Latvia* [GC], cit., para. 185 and the cases cited therein.

¹⁷ European Court of Human Rights, judgment of 12 March 2019, no. 28859/16, *Drėlingas v. Lithuania*.

II. HISTORICAL BACKGROUND

First and foremost, one should start from the historical background. On 15 June 1940 the Soviet army invaded Lithuania. The Government of Lithuania was removed from office. On 3 August 1940 Lithuania was annexed to the Soviet Union. On 22 June 1941 the territory was occupied by Nazi German forces. In July 1944 Soviet rule was re-established in Lithuanian territory. A nation-wide partisan movement began in Lithuania in 1944 and officially lasted until 1953. The members of armed and unarmed resistance were seeking to re-establish independent Lithuania. It has been generally acknowledged that the Lithuanian nation supported the partisans.¹⁸ The anti-Soviet partisan movement in Lithuania was one of the biggest partisan movements in post-World War Two and the biggest in the Baltic States. The Soviet government formed a repressive mechanism – namely, the NKVD (People's Commissariat for Internal Affairs) and the MGB (Ministry of State Security) – in order to suppress the opposition of the Lithuanian nation to the occupation. The partisan movement is highly important for the history of Lithuania. After the independence of Lithuania was restored, on 2 May 1990 the Supreme Council adopted the Law “On Restoring the Rights of Persons Repressed for Resistance Against the Occupational Regimes”, which *inter alia* held that “the resistance of the inhabitants of Lithuania to aggression and occupation regimes did not contradict national and international law” and that “the Supreme Council of the Republic of Lithuania assesses the struggle of the participants in the resistance movement as the expression of the nation's right to self-defense”.¹⁹ On 23 January 1997 the Lithuanian Parliament adopted the Law on the Status of Participants in Resistance against the Occupations of 1940-90.²⁰ The Law stipulates that, in the period 1944-1953, armed national resistance (the Lithuanian partisan war) took place in Lithuania against the occupying army of the Soviet Union and the Soviet regime. The Preamble also *inter alia* states that the declaration of the Council of an all-partisan organisation, the Movement of the Struggle for the Freedom of Lithuania (*Lietuvos laisvės kovos sąjūdis*), of 16 February 1949 expressed the “sovereign will of the nation”. The commemoration measures taken by the independent State of Lithuania show the respect for the partisans and their significance for the Lithuanian nation. For instance, by the resolution of the Parliament of 12 March 2009 the partisan Jonas Žemaitis (codename “Vytautas”)²¹ was recognized as the

¹⁸ See *Vasiliauskas v. Lithuania* [GC], cit., paras 11-14; see also Constitutional Court of the Republic of Lithuania, judgment of 18 March 2014, no. KT11-N4/2014; European Court of Human Rights, *Drėlingas v. Lithuania*, cit., paras 51-52, 100-111.

¹⁹ The Law “On Restoring the Rights of Persons Repressed for Resistance Against the Occupational Regimes”.

²⁰ The Law on the Status of Participants in Resistance against the Occupations of 1940-90.

²¹ Jonas Žemaitis was one of the main leaders of the Lithuanian partisans, in February 1949 elected as the chairman of the Presidium of the Council of the Movement of the Struggle for the Freedom of Lithuania, a temporary leader of the defensive forces. Jonas Žemaitis-Vytautas (1909-1954), genocid.lt.

Head of the State.²² The Parliament, *inter alia* having regard to the fact that 6 March 2018 marked 100 years since the birth of the partisan “Vanagas”, stressing the importance of the partisan movement fighting against the Soviet occupation, and seeking to honour “Vanagas”, announced that 2018 would be the year of “Adolfas Ramanauskas-Vanagas”.²³ The words of the speaker of the Parliament, Viktoras Pranckietis, encapsulate the significance of the partisans in Lithuania in general, and that of “Vanagas” in particular, as regards their historical role: “how much bravery had the fighters for freedom who led us to the independence. The Head of the defensive forces of the Movement of the Struggle for the Freedom of Lithuania Adolfas Ramanauskas-Vanagas through cold, darkness and death, led his nation to the freedom. He was the leader. He was a man of a century”.²⁴

One may ask why the Soviet acts against the Lithuanian partisans were qualified as genocide, but not as a crime against humanity or a war crime. For example, in Estonia, the killing of the partisans was qualified not as genocide, but as a crime against humanity.²⁵ There were also suggestions from scholars to qualify Soviet regime crimes against the Lithuanian partisans as crimes against humanity or war crimes.²⁶ It seems that qualification of the participation in the killing of the partisans during the Soviet occupation of Estonia as crime against humanity did not pose a problem in the European Court of Human Rights. In fact, the European Court upheld the conclusion of the Estonian courts that such acts constituted crimes against humanity under international law at the time of their commission, particularly in light of the Nuremberg Charter (1945), and Resolution No. 95 of the United Nations General Assembly (1946),²⁷ and therefore established that the finding of criminal responsibility for the crime against humanity of killing the partisans was not a violation of Art. 7 of the European Convention.²⁸ However, the Lithuanian authorities reserved their own opinion: they have been consistently qualifying the acts of the Soviet officials against the partisans as genocide. As noted by Lithuanian scholar J. Žilinskas,

²² The resolution of the Parliament of 12 March 2009, recognizing Jonas Žemaitis as the Head of the State of Lithuania.

²³ Resolution no. XIII-739 of the Seimas of the Republic of Lithuania of 16 November 2017.

²⁴ Speech by the Speaker of the Parliament Viktoras Pranckietis at the solemn commemoration of the Day of Restoration of Independence of Lithuania, press release of 11 March 2018 (translation by the author), www.lrs.lt.

²⁵ E.-C. PETTAI, *Prosecuting Soviet Genocide*, cit., p. 6 *et seq.*

²⁶ L. MÄLKSOO, *Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law*, in *Leiden Journal of International Law*, 2001, p. 778 *et seq.*; J. ŽILINSKAS, *Vasiliauskas vs. Lithuania: Battle Lost in the War to Come?*, in *International Comparative Jurisprudence*, 2016, p. 70.

²⁷ Charter of the International Military Tribunal, annexed to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, London, 8 August 1945, UNTS, vol. 82, p. 279; General Assembly, Resolution A/RES/95(I) of 11 December 1946, Affirmation of the principles of international law recognized by the Charter of the Nurnberg Tribunal.

²⁸ European Court of Human Rights, decision of 24 January 2006, no. 14685/04, *Penart v. Estonia*.

it was in fact an expression of political will as well as public opinion to qualify crimes committed by both the Nazi and the Soviet regimes against the Lithuanian residents as genocide.²⁹ He further explains that a possible reason for a failure of the Lithuanian prosecutors and the courts to qualify the acts as crimes against humanity was a belated introduction of the definition of that crime into the Lithuanian legal system (a definition of a crime that corresponded to the international definition of a crime against humanity was only introduced into the Lithuanian Criminal Code in 2003). Another reason was the position of the authorities when dealing with historical injustices that “genocide” has a stronger impact on public opinion than “crimes against humanity”; the last reason could be the unclear concept of the crime against humanity until the end of twentieth century.³⁰

In particular, in their initial decisions, the Lithuanian courts found that the Lithuanian partisans, their contact persons and supporters during the Soviet occupation regime could be held as a “separate political group”, i.e. a group of persons united by common political views. All of those persons, the courts found, were against the Soviet occupation regime and were striving for the independent State of Lithuania. The domestic courts determined that such a “separate political group” was protected under the definition of genocide as established under Art. 99 of the 2003 Criminal Code of Lithuania and, accordingly, certain individuals’ acts which sought to destroy that separate political group physically and which were enumerated in Art. 99 of the 2003 Criminal Code could be qualified as a crime of genocide under Art. 99 of the 2003 Criminal Code of Lithuania.³¹ Some judgments named the Lithuanian partisans and their supporters not as a “separate political group”, but as a “separate national-ethnic-political group”.³² Be that as it may, none of those judgments explained the relationship between the concepts of “separate political groups” and “separate national-ethnic-political groups” with any of the groups that were protected under the definition of genocide at the time that the alleged criminal acts were committed. It is evident that such a provision of the domestic law (Art. 99 of the 2003 Criminal Code) was applied retroactively as it was not in force in the 1940s-1950s, i.e. at the time the acts were committed. The domestic courts in their judgments did not refer to the international law or domestic law as in force at the time the alleged acts of the convicted persons were committed. Therefore, the reasoning of the domestic courts as to the non-retroactivity of the criminal law was lacking in those judgments.

²⁹ J. ŽILINSKAS, *Broadening the Concept of Genocide in Lithuania's Criminal Law and the Principle of Nullum Crimen Sine Lege*, in *Jurisprudence*, 2009, p. 336 et seq.

³⁰ J. ŽILINSKAS, *Broadening the Concept of Genocide*, cit., p. 338 et seq.; J. ŽILINSKAS, *Vasiliauskas vs. Lithuania: Battle lost in the War to Come?*, cit., p. 70 et seq.

³¹ The Court of Appeal of Lithuania, judgment of 9 January 2009, criminal case no. 1A-21/2009; the Vilnius Regional Court, judgment of 20 January 2012, criminal case no. 1-68-190-2012; the Court of Appeal of Lithuania, judgment of 6 February 2013, criminal case no. 1A-104/2013

³² The Court of Appeal of Lithuania of 21 December 2011, criminal case no. 1A-177/2011.

The ruling of the Constitutional Court of Lithuania and the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Vasiliauskas v. Lithuania*, which are discussed in the next section, disclose the defects in this case-law of the domestic courts.

III. THE RULING OF THE CONSTITUTIONAL COURT OF LITHUANIA OF 18 MARCH 2014 AND THE JUDGMENT OF THE GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE OF *VASILIAUSKAS V. LITHUANIA*: THEIR IMPACT ON THE CASE-LAW OF THE LITHUANIAN COURTS CONCERNING THE GENOCIDE CASES

This section discusses two decisions (the Ruling of the Constitutional Court of Lithuania and the judgment of the European Court of Human Rights) which were highly important for the further development of the case-law of the Lithuanian courts in the Soviet genocide cases.

III.1. THE RULING OF THE CONSTITUTIONAL COURT OF LITHUANIA OF 18 MARCH 2014 AS THE FIRST CALL TO REVIEW THE DOMESTIC CASE-LAW IN THE GENOCIDE CASES

Some domestic courts, examining five criminal cases on the genocide against the partisans, as well as a group of members of the Parliament of the Republic of Lithuania, had doubts as regards *inter alia* the constitutionality of Art. 3, para. 3,³³ and Art. 99 of the 2003 Criminal Code of Lithuania and instituted proceedings before the Constitutional Court requesting an interpretation.

On 18 March 2014, the Constitutional Court *inter alia* recognized that the legal regulation, established in Art. 3, para. 3, of the Criminal Code, to the effect that it permitted to apply retroactive criminal responsibility under Art. 99 of the Criminal Code for the genocide of persons belonging to any social or political group, was in conflict with Art. 31, para. 4, of the Constitution³⁴ and the constitutional principle of a state under the rule of law. In other words, it was not compatible with the Constitution to bring a person to trial under Art 99 of the 2003 Criminal Code for the actions aimed at physically destroying, in whole or in part, the members of any social or political group, where such actions had been committed before the Lithuanian Criminal Code established criminal responsibility.

The Constitutional Court made a review of the crimes perpetrated by the Soviet totalitarian regime and the scale of the Soviet repressions. The Constitutional Court observed

³³ The 2003 Criminal Code of the Republic of Lithuania. Art. 3. Term of Validity of a Criminal Law "[...] 3. A criminal law establishing the criminality of an act, imposing a more severe penalty upon or otherwise aggravating legal circumstances of the person who has committed the criminal act shall have no retroactive effect. The provisions of this Code establishing liability for genocide (Art. 99) [...] shall constitute an exception."

³⁴ The Constitution of the Republic of Lithuania, Art. 31: "Punishment may be imposed or applied only on the grounds established by law".

that “according to various data, due to both occupations carried out by the USSR, the Republic of Lithuania lost almost one-fifth of its population”. The Constitutional Court, referring to the data presented by the Genocide and Resistance Research Centre of Lithuania, summarized the losses incurred during the period of the Soviet occupation (1940–1941 and 1944–1990), i.e. that, in all, 85.000 residents of the Republic of Lithuania perished or were killed, and around 132.000 residents were deported to the Soviet Union. Among those who perished or were killed, 20.000 were partisans and their supporters (data for 1944–1952), between 35.000 and 37.000 political prisoners perished in special camps and prisons, and around 28.000 deportees perished in exile; up to 130.000 residents of Lithuania were detained and arrested, 32.000 were repressed and transferred to special camps and prisons, around 108.400 were forcibly recruited to the USSR troops in 1944–1945. Finally, during the 1944–1953 guerrilla war against the occupation, all in all, 186.000 people were arrested and imprisoned. Citing the research conducted by historians, the Constitutional Court added that “the crimes against the residents of the Republic of Lithuania were part of the targeted and systematic totalitarian policy pursued by the USSR”. The Constitutional Court noted that those repressions were directed against the most active political and social groups of the residents of the Republic of Lithuania: participants in the resistance against the occupation and their supporters, civil servants and officials of the State of Lithuania, Lithuanian public figures, intellectuals and the academic community, farmers, priests, and members of the families of those groups. The Constitutional Court explained that by means of the repressions, the Soviet occupation regime sought to exterminate, to cause harm and break those people.

The Constitutional Court of Lithuania, having regard to the historical context, including, the aforesaid ideology and policy of the Soviet occupation regime where certain groups of people were eliminated, as well as to the scale of repressions of the USSR against residents of the Republic of Lithuania, concluded that at the time of Soviet mass repressions, the crimes perpetrated by the Soviet occupation regime, “in case of the proof of the existence of a special purpose aimed at destroying, in whole or in part, any national, ethnic, racial or religious group”, might be qualified as genocide *inter alia* under the Genocide Convention. The Constitutional Court noted that actions may also be recognized as genocide if they are aimed at destroying certain social or political groups that constitute a significant part of any national, ethnical, racial, or religious group and the destruction of which would have an impact on the respective national, ethnical, racial, or religious group as a whole.

As to the partisans’ role, the Constitutional Court of Lithuania observed that according to the laws of the Republic of Lithuania “the organised armed resistance against the Soviet occupation is regarded as self-defence of the State of Lithuania”. In light of the international and historical context, the Constitutional Court stressed that the significance of the partisans for the national group (the Lithuanian nation) – the group that is covered by the definition of genocide – shall be taken into consideration while qualify-

ing the acts against partisans as a genocide.³⁵ Therefore, it was the first time the domestic courts were given the advice as regards the methodology on how to examine the cases of genocide against partisans. The second time was at the international level – the judgment of the European Court of Human Rights in the case of *Vasiliauskas v. Lithuania*, which is discussed in the next section.

III.2. THE JUDGMENT OF THE GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE *VASILIAUSKAS V. LITHUANIA* CASE AS THE SECOND CALL TO REVIEW THE DOMESTIC CASE-LAW IN THE GENOCIDE CASES

In a judgment of 4 February 2004, the Kaunas Regional Court (the first-instance court) found Mr. V. Vasiliauskas guilty of genocide under Art. 99 of the 2003 Criminal Code, as it was proven that the applicant, an operational agent of the LSSR MGB at the relevant time, on 2 January 1953, was participating in the operation during which two partisans were killed. The court of first instance referred to the partisans as members of a political group. Thus, the judgment was restricted to the physical destruction of a separate political group, that of Lithuanian partisans. On 21 September 2004, the Court of Appeal upheld the conviction. Examining whether there was a retroactive application of the Lithuanian Criminal Code, the Court of Appeal noted that holding the Lithuanian partisans (participants in armed resistance to the Soviet occupation regime) as a separate 'political' group, as was done in the trial court's verdict, was not precise. According to the Court of Appeal, the Soviet genocide was carried out precisely on the criteria of the inhabitants' nationality/ethnicity. The domestic appellate court concluded that Lithuanian partisans were representatives of the Lithuanian nation and they could be attributed not only to political, but also to national and ethnic groups, that is to say, to the groups listed in the Genocide Convention in force at the time of commission of the crime. On 22 February 2005 the Supreme Court of Lithuania also upheld the conviction of the applicant Vasiliauskas.³⁶ Addressing the matter of retroactivity, the Supreme Court of Lithuania noted that the applicant "had been convicted of involvement in the physical extermination of a part of the inhabitants of Lithuania who belonged to a separate political group, that is, Lithuanian partisans – members of the resistance to the Soviet occupying power". The Supreme Court observed that between 1944 and 1953 the "nation's armed resistance – the partisan war – against the USSR's occupying army and structures of the occupying regime was underway in Lithuania." After being convicted by the domestic courts at all three instances, Mr. V. Vasiliauskas lodged his petition with the European Court of Human Rights. Mr. Vasiliauskas, invoking Art. 7 of the European Convention, complained that the wide interpretation of the crime of genocide encompassing the acts against the Lithuanian partisans did not have a basis in the wording of that offence as laid down in public international law at the

³⁵ The Constitutional Court of the Republic of Lithuania, judgement of 18 March 2014, cit.

³⁶ The Supreme Court of Lithuania, judgment of 22 February 2005, criminal case no. 2K-158/2005.

material time. The chamber of the European Court of Human Rights to which the case was assigned decided to relinquish jurisdiction in favor of the Grand Chamber of the European Court on the basis of Art. 30 of the Convention.³⁷

The Grand Chamber of the European Court of Human Rights decided in the applicant's favour and found a violation of Art. 7 of the European Convention due to a retro-active conviction of the applicant.³⁸ The European Court of Human Rights thus examined "whether the applicant's conviction for genocide was consistent with the essence of that offence and could reasonably have been foreseen by the applicant at the time of his participation in the operation of 2 January 1953 during which the two partisans, J.A. and A.A., were killed".³⁹ Although the European Court of Human Rights found that instruments of international law (Resolution 96 (I) of the UN General Assembly of 1946 as well as the Genocide Convention) prohibiting genocide were sufficiently accessible to the applicant,⁴⁰ the European Court concluded that Vasiliauskas could not have foreseen at the time of the killing of the partisans that his acts would be qualified as a genocide. The European Court ruled that there was "no sufficiently strong basis for finding that customary international law as it stood in 1953 included 'political groups' among those falling within the definition of genocide". Thereafter, the European Court analysed the provisions of the Genocide Convention, which was in force at the time the applicant was participating in the killing of Lithuanian partisans. The European Court noted that the Court of Appeal of Lithuania held that the partisans, as participants in armed resistance to occupying power, had also been "representatives of the Lithuanian nation, that is, the national group". In this connection, the European Court of Human Rights emphasized that "the Court of Appeal did not explain what the notion 'representatives' entailed. Nor did it provide much historical or factual account as to how the Lithuanian partisans were representing the Lithuanian nation". The European Court of Human Rights found that the reasoning as to the relationship between the Lithuanian partisans to the national group was also lacking in the judgment of the court of the last instance – the Supreme Court of Lithuania.⁴¹ As the later sections of this *Article* demonstrate, para. 181 of the judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas* case appeared to be vital for the future development of the case-law of the domestic courts in the cases related to the genocide against partisans.

³⁷ Art. 30 of the European Convention states that "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects".

³⁸ *Vasiliauskas v. Lithuania* [GC], cit.

³⁹ *Ibid.*, para. 162.

⁴⁰ *Ibid.*, paras 167-168.

⁴¹ *Ibid.*, para. 179.

The Grand Chamber of the European Court then found as follows:

"The Court has already established that in 1953 political groups were excluded from the definition of genocide under international law [...]. It follows that the prosecutors were precluded from retroactively charging, and the domestic courts from retroactively convicting the applicant for the genocide of Lithuanian partisans, for being part of a political group [...]. Moreover, even if the international courts' subsequent interpretation of the term "in part" was available in 1953, there is no firm finding in the establishment of the facts by the domestic criminal courts to enable the Court to assess on which basis the domestic courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group, in other words, a group protected under Art. II of the Genocide Convention".⁴²

The Grand Chamber of the European Court of Human Rights thus found a violation of Art. 7 of the European Convention by nine votes to eight. Five dissenting opinions were annexed to the judgment of the Grand Chamber, attesting to the challenging task of dealing with the past in judicial decisions.

Indeed, the *Vasiliauskas v. Lithuania* case reflects the relevance of historical facts for establishing criminal responsibility for the crime of genocide. The judgment demonstrates the importance of the need for the knowledge of history and its additional interpretation. In his dissenting opinion, Judge E. Kūris from Lithuania stressed that "a trial is not a university seminar in history, and a judgment is not an encyclopaedia". The domestic courts, which deliver their judgments "in a specific society for the members of that society", must not "explicitly provide "much historical and factual account [...] as to facts which are obvious to that society". "These facts are known to every schoolchild in that society. True, they are not necessarily known in Strasbourg, but in that event this is Strasbourg's problem".⁴³ Judge E. Kūris held that the significant role of the Lithuanian partisans in the resistance to the Soviet occupation and the survival of the Lithuanian nation were self-evident facts and shall not be proved. Indeed, this separate opinion of the Judge from Lithuania shows the differences between the perception of Lithuanian judges acting within national society and European judges as regards the need for further elaboration of the historical facts in their judgments. It seems that the European Court of Human Rights sought to ensure that the judgments of the domestic courts were as substantiated as possible in order to preclude any sign of a violation of the rule of law and to justify the conclusion that the individual could be charged and convicted for the genocide of part of the national group – the group that was covered by the definition of genocide at the time of commission of the offence.

Pursuant to Art. 46 of the European Convention, the final judgments of the European Court of Human Rights are binding on the Contracting Parties in any case to which they are parties. The Committee of Ministers of the Council of Europe is tasked with the super-

⁴² *Ibid.*, para. 181.

⁴³ *Ibid.*, dissenting opinion of judge Kūris.

vision and execution of those judgments.⁴⁴ Therefore, if the European Court of Human Rights finds a violation of the European Convention or the Protocol(s) thereto in the case against a certain State Party, that respondent State has a legal obligation not just to pay the sums awarded by way of just satisfaction under Art. 41 of the European Convention, “but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects”. Be that as it may, the implementation measures chosen by the State Party shall be compatible with the conclusions set out in the judgment of the European Court of Human Rights.⁴⁵ In the *Vasiliauskas* case, the Republic of Lithuania implemented properly the individual measures taken to end the violation found by the European Court of Human Rights and put the applicant in the same situation as it was prior to the violation. First, the Government of Lithuania paid the applicant the sums awarded by the European Court of Human Rights.⁴⁶ Second, in accordance with the domestic law the Supreme Court of Lithuania reopened the criminal proceedings in the applicant’s case and found that Mr. V. Vasiliauskas’ conviction for genocide of the Lithuanian partisans had been in breach of Art. 7 of the European Convention and of Art. 31, para. 4, of the Constitution because of the insufficient argumentation of the domestic courts as regards the group against which the acts were committed. As the criminal charges could not be amended due to the death of Mr. Vasiliauskas, therefore, the earlier court decisions whereby Mr. Vasiliauskas had been found guilty of genocide were quashed and the criminal case against Vasiliauskas was discontinued.⁴⁷ The next section of this *Article* will discuss one of the main general measures taken by the State seeking to prevent new similar violations. Namely, the case-law of the Lithuanian courts that was modified after the judgment of the European Court of Human Rights in the *Vasiliauskas* case will be examined.

⁴⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, cit.

⁴⁵ European Court of Human Rights: judgment of 22 June 2004, no. 31443/96, *Broniowski v. Poland* [GC], para. 192; judgment of 17 July 2014, no. 47848/08, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], para. 158; judgment of 6 November 2018, nos 55391/13, 57728/13, 74041/13, *Ramos Nunes de Carvalho e Sá v. Portugal*, para. 222. Committee of Ministers of the Council of Europe, Recommendation No. R (2000) 2 to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights of 19 January 2000.

⁴⁶ The European Court of Human Rights held that the finding of a violation of Art. 7 of the European Convention constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant Vasiliauskas, but the European Court awarded the applicant EUR 10,072 in respect of pecuniary damage – the sum the applicant had paid to the civil claimant (the relative of the killed partisans) in the domestic court proceedings and EUR 2,450 in respect of costs and expenses (*Vasiliauskas v. Lithuania* [GC], cit., paras 192-198).

⁴⁷ The Supreme Court of Lithuania, judgment of 27 October 2016, criminal case no. 2A-P-8-788/2016. As regards the overview of the reopening proceedings in the *Vasiliauskas* case, see also European Court of Human Rights, *Drėlingas v. Lithuania*, cit., paras 60-65.

IV. THE CASES EXAMINED BY THE LITHUANIAN COURTS FOLLOWING THE RULING OF THE CONSTITUTIONAL COURT OF 18 MARCH 2014 AND THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE *VASILIAUSKAS V. LITHUANIA* CASE

Even before the ruling of the Constitutional Court of Lithuania and the judgment of the European Court of Human Rights in the *Vasiliauskas* case, one could find the view that political and social groups were included in the definition of genocide in Lithuanian law because these groups closely overlap with national, religious and ethnic groups. The domestic courts were criticized for their failure to make more detailed explanations in their judgments on the relation between these groups and their judgments were therefore inconsistent with the requirements of international law as regards the definition of protected groups under the Genocide Convention.⁴⁸ After the judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas v. Lithuania* case was delivered, both the Lithuanian Prosecutor's Office and the domestic courts understood the aforementioned para. 181 of that judgment as an urge to fill in the gap of the lacking argumentation as regards the notion of the group against which the genocide was committed during the Soviet occupation. Indeed, it seems that besides the ruling of the Constitutional Court of 18 March 2014, para. 181 of the judgment of the Grand Chamber also brought some hope for the domestic courts to evade future violations of Art. 7 of the European Convention in the genocide against partisans cases if the courts provided further explanations as regards the significance of the partisans for the survival of the Lithuanian nation – i.e., the group protected under the Genocide Convention at the time the criminal acts were committed. Therefore, referring to the explanation as given in the ruling of the Constitutional Court of Lithuania of 18 March 2014, and to the judgment of the European Court of Human Rights in the *Vasiliauskas v. Lithuania* case, the Lithuanian courts modified their argumentation in the cases under Art. 99 of the Criminal Code not linking the Lithuanian partisans to a separate political group, but taking instead the wider understanding of the Lithuanian partisans as part of the national and ethnic group that was protected under the international law in the 1950s (at the time the acts against the Lithuanian partisans were committed). In such cases, after the ruling of the Constitutional Court of Lithuania⁴⁹ and, in particular, after the judgment of the European Court of Human Rights in the *Vasiliauskas* case,⁵⁰ the courts provided extensive argumentation which sought to prove that the person charged with genocide

⁴⁸ J. ŽILINSKAS, *Broadening the Concept of Genocide*, cit., p. 343; J. ŽILINSKAS, *Vasiliauskas vs. Lithuania: Battle lost in the War to Come?*, cit., p. 68.

⁴⁹ The Court of Appeal of Lithuania, judgment of 20 June 2014, criminal case no. 1A-6/2014; the Supreme Court of Lithuania, judgment of 24 February 2015, criminal case no. 2K-48-222/2015.

⁵⁰ The Supreme Court of Lithuania, judgment of 12 April 2016, criminal case no. 2K-P-18-648/2016.

was acting with special intent to physically destroy the Lithuanian partisans as constituting a significant part of the national group.

As mentioned in the previous section of this *Article*, under Art. 46, paras 1 and 2 of the European Convention, the Contracting States shall abide by the final judgments of the European Court of Human Rights in the cases instituted against them. Therefore, after the European Court of Human Rights found a violation of Art. 7 of the European Convention in the *Vasiliauskas v. Lithuania* case, the Government, executing that judgment, informed the Committee of Ministers of the Council of Europe of developments in the case-law of the domestic courts. The Government stated that the principles indicated in the judgment of the European Court of Human Rights in the *Vasiliauskas* case had been taken into account by the domestic courts. The domestic courts were providing extensive explanations as to why the Lithuanian partisans should be regarded as a significant part of the Lithuanian national ethnic group at the material time.⁵¹ The Committee of Ministers decided to close this case in light of the measures taken by the Lithuanian authorities.⁵² The only delegation of the Council of Europe which resisted against closure of supervision was the Russian Federation.⁵³ Therefore, by the closure of the *Vasiliauskas* case the States of the Council of Europe demonstrated tolerance to the position of the Lithuanian authorities as regards the notion of the protected group in genocide cases related to the period of Soviet occupation. Therefore, it was the first victory of the Lithuanian domestic authorities in such genocide cases at the international level. The next section will show that the international judicial institution – the European Court of Human Rights – had also the chance to provide the legal assessment of the evolution of the domestic courts' decisions.

⁵¹ See Action report (05/10/2017) - Communication from Lithuania concerning the case of *Vasiliauskas v. Lithuania* (Application No. 35343/05), hudoc.exec.coe.int.

⁵² Committee of Ministers of the Council of Europe, Resolution CM/ResDH(2017)430 Execution of the judgment of the European Court of Human Rights *Vasiliauskas* against Lithuania of 7 December 2017.

⁵³ In this regard it may be recalled that the Russian Federation is of the strong view that the Lithuanian partisans were participating in the bandit groups and killing the civilians, thus the acts against the partisans is not a genocide. О планах увековечить в Литве память главаря «лесных братьев» А.Раманаускаса-Ванагаса, из брифинга официального представителя МИД России М.В.Захаровой, in the Ministry of Foreign Affairs of the Russian Federation, 4 October 2018, lithuania.mid.ru; the submissions of the Russian Government, third-party intervener, in *Vasiliauskas v. Lithuania* [GC], cit., paras 147-152; Комментарий Департамента информации и печати МИД России в связи с постановлением Европейского Суда по правам человека по делу «Дрелингас против Литвы», 1839-14-09-2019, in the Ministry of Foreign Affairs of the Russian Federation, 14 September 2019, www.mid.ru. In response, the Republic of Lithuania holds that the aim of such statements by the Russian Federation is "discrediting the Lithuanian armed resistance movement and denying the fact of the Soviet occupation in general". Lithuania's Foreign Ministry summons Russian Ambassador, voices strong protest, in the Ministry of Foreign Affairs of the Republic of Lithuania, 8 October 2018, www.urm.lt.

V. THE *DRÉLINGAS* CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AS THE TEST FOR THE PROGRESS DONE BY THE DOMESTIC COURTS

After the judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas* case, the European Court had the chance to examine one more similar case brought by Mr. Drélingas. It was very interesting to follow what judgment would be taken in the *Drélingas* case, in particular, regard being had to the fact the earlier judgment in the case of *Vasiliauskas* had been adopted by the minimal margin: 9 to 8, and had been followed by a number of dissenting opinions, which in volume almost were equal to the judgment.

The applicant – Mr. Drélingas – was convicted of genocide, under Art. 99 of the Lithuanian Criminal Code. The domestic courts established that as of 1952 Mr. Drélingas had worked as an operational agent of the MGB (Ministry of State Security), a Soviet repressive structure tasked with suppressing the resistance to the Soviet occupation. It was proved that on 11 and 12 October 1956, Mr. Drélingas had taken part in the operation during which one of the most prominent leaders of the Lithuanian partisans – A. R. “Vanagas” – had been captured together with his wife, B. M. “Vanda”, who was also a partisan, seeking to exterminate them physically. After being seized, on 12 October 1956 “Vanagas” and “Vanda” were detained on remand. On 24-25 September 1957 “Vanagas” was sentenced to death penalty by the decision of the Supreme Court of the Lithuanian SSR. On 29 November 1957 “Vanagas” was shot as result of that sentence. On 8 May 1957 by the decision of the Supreme Court of the LSSR “Vanda” was deported to Siberia for the period of 8 years.

By the final judgment of 12 April 2016, delivered by the Plenary Session of the Criminal Chamber of the Supreme Court of Lithuania (17 Judges) in the criminal case⁵⁴ the defendant, Mr. Drélingas, was convicted for the first time already after the judgment of the European Court of Human Rights in the *Vasiliauskas* case. The Supreme Court upheld the decisions of the inferior courts as regards the conviction of Mr. Drélingas under Art. 99 of the Lithuanian Criminal Code. The Supreme Court, invoking the case-file of the applicant, recalled that, by 1956 – when the crime was committed – the applicant had already been working in the MGB-KGB structures for some years. Mr. Drélingas was aware of the actions of repressive nature against partisans; he also knew about “Vanagas”, as a leader of partisans, and about his absconding. The applicant participated in one out of two detention groups of “Vanagas” and “Vanda”. All that proved that at the relevant time he had been aware of the repressive policy of the USSR aimed at the physical extermination of the Lithuanian partisans as significant part of the Lithuanian nation, their contacts and their supporters, as members of a national and ethnic group, and that such acts are regarded as genocide under the international law as well as the

⁵⁴ The Supreme Court of Lithuania, judgment of 12 April 2016, criminal case no. 2K-P-18-648/2016.

applicant participated in these acts. The Supreme Court of Lithuania found that the groups and parts of them should be evaluated having regard to the concrete political, social, historic, cultural context as well as the understanding of the defendant. The Supreme Court recalled that the definition of a national and an ethnic group should be linked with the concept of a nation. The first meaning of nation is related to the notion of ethnicity or an ethnic group and means a historically developed community of persons – an ethnic nation with common ethnic, cultural characteristics (origin, language, self-awareness, territory, traditions, etc.). The other meaning of a nation pertains to the notion nation (Latin *natio*) or a modern nation to which, as a formation, the attributes of statehood, nationalism and citizenship are characteristic. Thus, a national group means a historically developed community of people belonging to a certain nation, formed on the basis of the language, territory, socio-economic life, culture, national self-awareness and other common characteristics. The persons belonging to both a national and an ethnic group may be interrelated and a complete delimitation of such groups is not always possible. The genocide can at the same time target a group of persons who belong to several protected groups under the Genocide Convention. The Supreme Court gave particular consideration to the conclusion of the Grand Chamber of the European Court of Human Rights in the aforementioned judgment of *Vasiliauskas v. Lithuania*. The Supreme Court provided an extensive explanation, elaborating upon the elements which had led to the conclusion that the Lithuanian partisans had been “a significant part of the Lithuanian nation as a national and ethnic group”. Among other things, the Supreme Court provided an analysis of the generally known legal and historical circumstances of 1940-1956 as regards the scope (massive scale) of the national resistance to the occupational power and the scale of repressions of the Soviet occupational power against the Lithuanian population. The Supreme Court noted that the Soviet repression had been targeted against the most active and prominent part of the Lithuanian nation, defined by the criteria of nationality and ethnicity. Such extermination had the clear goal of having an impact on the demographic situation of the Lithuanian nation, namely, its survival. The Supreme Court found that Lithuanian partisans, their contact persons and their supporters had represented a significant part of the Lithuanian population, as a national and ethnic group, because the partisans had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation. The domestic court recalled that Lithuanian partisans who had the support of Lithuanian residents implemented the right of the nation to self-defence against occupation and aggression, repressions against the Lithuanians. The Supreme Court concluded that the total number of victim participants of the resistance – Lithuanian partisans, their contact persons and supporters, who were killed or suffered repression, is significant both in absolute terms and considering the number of the total population of Lithuania of that time. The Supreme Court therefore held that such characteristics led to the conclusion that partisans, as a group, were a significant part of a protected –

national and ethnic – group, and that their extermination had therefore constituted genocide, both under Art. 99 of the Lithuanian Criminal Code, and under Art. II of the Genocide Convention. The Supreme Court also recalled that the inferior courts had established the role and activity of both “Vanagas” and “Vanda” – both of them were active participants of resistance to the Soviet occupation, while “Vanagas” was one of the leaders of that resistance.

Mr Drėlingas in his application before the European Court of Human Rights complained that he had been convicted of genocide in breach of Art. 7 of the European Convention. The European Court, again not unanimously, by five votes to two, found that there had been no violation of Art. 7 of the European Convention in that case. Two dissenting opinions of Judges Motoc and Ranzoni were appended to this judgment.⁵⁵ If one compares the wording of the Government’s observations and the judgment of the European Court in the *Drėlingas* case, one can see that the majority of the Judges of the European Court of Human Rights fully upheld the arguments of the Government in that case.

In the *Drėlingas* case, the European Court of Human Rights noted that the Lithuanian domestic courts at three levels of jurisdiction had thoroughly examined the participation of the applicant in the operation to capture the two partisans. The European Court was satisfied that the domestic courts had examined the historical background and the archive documents regarding the impugned operation. The European Court also agreed that the applicant must have clearly understood that after the capture of the two partisans they would be eliminated. Accordingly, the fact that A.R. “Vanagas” was shot and B.M. “Vanda” deported on the basis of LSSR Supreme Court decisions does not alter or remove the applicant’s criminal responsibility for their fate.

The European Court of Human Rights was satisfied with the extensive explanation and reasoning given by the Supreme Court of Lithuania in the *Drėlingas* case that had been carried out in the light of the principles formulated by the Grand Chamber of the European Court in the case of *Vasiliauskas*. The European Court concluded that the Supreme Court of Lithuania had addressed the weakness identified by the European Court in para. 181 of the judgment in the *Vasiliauskas* case, where the European Court had criticized the lack of the historical account given by the domestic courts.

In the judgment in the *Drėlingas* case, the European Court of Human Rights recognized that the ruling of the Constitutional Court had already begun providing a historical context in respect of the partisan movement in Lithuania and its significance for the Lithuanian nation. The European Court agreed that the ruling of the Constitutional Court (delivered before the judgment of the European Court in the case of *Vasiliauskas*) together with the judgment of the European Court in the case of *Vasiliauskas* helped the domestic courts of general jurisdiction to eliminate the problems identified by the European Court before⁵⁶.

⁵⁵ European Court of Human Rights, *Drėlingas v. Lithuania*, cit.

⁵⁶ *Ibid.*, para. 104.

The European Court of Human Rights found that the interpretation of the judgment of the Grand Chamber in the case of *Vasiliauskas* as formulated in the judgment of the Supreme Court in the *Drėlingas* case was “loyal”, “taken in good faith in order to comply with Lithuania’s international obligations”.

What is also interesting is that the European Court of Human Rights, while examining whether the domestic courts properly understood the conclusions of the European Court in the case of *Vasiliauskas*, analysed the examples of the case-law of the domestic courts as presented by the Government in their observations, i.e. judgments adopted by the Lithuanian domestic courts after the European Court’s judgment in the *Vasiliauskas v. Lithuania* case. It seems that in such a way the European Court of Human Rights wished to assess in general the case-law after the judgment in the *Vasiliauskas* case. Namely, the European Court, referring to para. 71 of its judgment in the case of *Hutchinson v. the United Kingdom*,⁵⁷ agreed with the Lithuanian Government that in the *Drėlingas* case “the Supreme Court drew the necessary conclusions from the *Vasiliauskas* judgment and, by clarifying the domestic case-law, addressed the cause of the Convention violation”.⁵⁸ Therefore, the European Court of Human Rights recognized that judicial interpretation of the Lithuanian courts was consistent with the essence of the offence and could reasonably be foreseen by the applicant at the material time. In other words, the European Court agreed that the interpretation of the domestic courts in the applicant’s case was consistent with the definition of genocide as it stood at the time the applicant committed his acts (in the 1950s).

Under Art. 44, para. 2, of the European Convention, the judgments of the Chamber (seven judges) of the European Court of Human Rights become final when the parties to the case do not request that the case be referred to the Grand Chamber of the European Court of Human Rights within the period of three months after the date of the judgment, or when the panel of the Grand Chamber rejects the request of the parties/party to refer the case to the Grand Chamber⁵⁹. After the judgment of the Chamber of the European Court was announced, the applicant Mr. Drėlingas requested to refer the case to the Grand Chamber of the European Court. The judgment of the European Court of Human Rights in the *Drėlingas* case became final only on 9 September 2019, when at its meeting of 9 September 2019 the Grand Chamber panel of five judges decided to reject the applicant’s request.⁶⁰

⁵⁷ European Court of Human Rights, judgment of 17 January 2017, no. 57592/08, *Hutchinson v. UK* [GC].

⁵⁸ European Court of Human Rights, *Drėlingas v. Lithuania*, cit., para. 109.

⁵⁹ European Convention of Human Rights, Art. 44. “[...] 2. The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43”.

⁶⁰ Grand Chamber Panel’s decisions – September 2019. Press Release – Referrals to Grand Chamber, hudoc.echr.coe.int.

The reaction to the judgment of the European Court of Human Rights in the *Drėlingas* case varied. According to T. de Souza Dias, it is questionable whether the interpretation of the Lithuanian domestic courts, that was upheld by the European Court of Human Rights in the *Drėlingas* case, regarding the Lithuanian partisans as a substantive part of the protected group was foreseeable at the material time. However, T. de Souza Dias found it important that the European Court of Human Rights did not depart from its finding in the *Vasiliauskas* case that the definition of genocide could not retroactively cover the separate political group as such.⁶¹ It is recognized that even though the *Vasiliauskas* and *Drėlingas* cases are mainly related to the past and historic crimes, their consequences could be far reaching as regards the interpretation of genocide.⁶²

Perhaps, one might admit that besides all the legal criteria, in the *Drėlingas* case, contrary to the *Vasiliauskas* case, the European Court of Human Rights paid more attention to the particular historical context within which the alleged acts of the applicant were committed. As it was stated in the dissenting opinion annexed to the judgment in the case of *Vasiliauskas* “[w]e cannot accept that a protected group (a nation) which defends itself against the destruction of its very fabric though the mobilisation of a resistance movement suddenly, by that act of resistance, transforms itself solely into a ‘political group’, thus placing itself outside the terms of the Genocide Convention. This would be to interpret both the Genocide Convention and the Convention’s provisions in an overly formalistic manner and in a spirit inconsistent with their purpose.”⁶³ As Judge Kūris pointed out, “Courts in their ivory towers deal with law. But not only that. More importantly, they deal with human justice”.⁶⁴ Indeed, one may suppose that in the *Drėlingas* case the European Court of Human Rights arrived at the conclusion that there was no violation of Art. 7 of the European Convention as the European Court did not apply the *nullum crimen sine lege* principle strictly, but tried to give respect to the collective memory prevailing in Lithuania as well as to the collective perception of the acts directed against the partisans in Lithuania. In the *Drėlingas* case, the Judges of the European Court of Human Rights shared the understanding of the historical facts with the Lithuanian courts.

Invoking the case-law of the European Court of Human Rights, the scholars conclude that when the acts of the perpetrators violate basic human rights of the other individuals, “core values of human dignity and freedom”, the European Court of Human Rights balances the right to foreseeability (the right of the perpetrator – the applicant before the European Court of Human Rights) with the other values guaranteed under the European Convention (the rights of the victims, social justice, etc.). What the European Court of Hu-

⁶¹ T. DE SOUZA DIAS, *Accessibility and Foreseeability*, cit., p. 20.

⁶² J. ŽILINSKAS, *Drėlingas v. Lithuania (ECHR): Ethno-Political Genocide Confirmed?*, in *EJLTalk!*, 15 April 2019, www.ejltalk.org.

⁶³ Joint Dissenting Opinion of Judges Villiger, Power-Forde, Pinto De Albuquerque And Kūris, in *Vasiliauskas v. Lithuania* [GC], cit., para. 16.

⁶⁴ Dissenting opinion of Judge Kūris, in *Vasiliauskas v. Lithuania* [GC], cit., para. 8.

man Rights establishes in such cases is whether the judgments of the domestic courts which punish the persons for the crime violate the object and purpose of Art. 7 of the European Convention or not.⁶⁵ The judgment of the European Court of Human Rights in the *Drélingas* case might also be explained by the conclusion made by A. Rychlewska. Namely, the individuals charged with a crime cannot rely on the legal practice of the State authorities which was in force at the time of commission of the crime if that legal practice permitted to violate basic human rights (for example, the right to life) of the other individuals⁶⁶. It thus seems that some of the factors which led the European Court of Human Rights to find no violation of Art. 7 of the European Convention in the *Drélingas* case could be two factors stressed in the dissenting opinions of the Judges in the *Vasiliauskas* case, namely, the need to fight against impunity for the serious human rights violations and demonstrate deference to the right of the Lithuanian society to their historical truth.⁶⁷

The *Drélingas* case is also an example of how after the dialogue between the Council of Europe institutions (the Committee of Ministers, the European Court of Human Rights) and the Lithuanian domestic authorities, the “judicial truth” achieved before the European Court of Human Rights was made consistent with the “historical truth” – i.e., as it was pertinently defined by E.C. Pettai, with the “dominant narrative in societal and political discourses of the past”.⁶⁸

VI. CONCLUSION

The judgment of the European Court of Human Rights in the *Drélingas* case demonstrates that the reasoning of the domestic courts as adopted after the judgment of the European Court in the case of *Vasiliauskas v. Lithuania* and the interpretation of the European Court judgment in the case of *Vasiliauskas* is found to be compatible with the

⁶⁵ W. A. SCHABAS, *Retroactive Application of the Genocide Convention*, in *University of St. Thomas Journal of Law and Public Policy*, 2010, p. 54; A. RYCHLEWSKA, *The Nullum Crimen Sine Lege Principle*, cit., p. 180 et seq.

⁶⁶ A. RYCHLEWSKA, *The Nullum Crimen Sine Lege Principle*, cit., p. 183.

⁶⁷ See Joint dissenting opinion of Judges Villiger, Power-Forde, Pinto de Albuquerque and Küris, paras 18, 39; dissenting opinion of Judge Ziemele, paras 26-27 and dissenting opinion of Judge Power-Forde, in *Vasiliauskas v. Lithuania* [GC], cit. K. Ambos stresses that the majority in the *Vasiliauskas* case sought to ensure the rule of law was respected while applying criminal responsibility for the crimes of the past, whereas the main arguments of the dissenting Judges in that case were the fight against impunity and seeking to ensure the effectiveness of the rights guaranteed under the European Convention. K. Ambos criticizes such a view of the minority as it is not the role of the court to establish the historical record, see K. Ambos, *The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights*, in *Human Rights Law Review*, 2017, p. 184 et seq. As regards the recognition of collective and social dimension of the investigations and accountability, see also A. M. PANEPINTO, *The Right to the Truth in International Law: The Significance of Strasbourg's Contributions*, in *Legal Studies*, 2017, p. 18 et seq. As regards ideological considerations about the Stalin's policy in the dissenting opinions of the Judges in the *Vasiliauskas* case, see also R. BERCEA, A. MERCESCU, *Ideology Within and Behind the Decisions of the European Judges*, in *Romanian Journal of Comparative Law*, 2017, p. 155 et seq.

⁶⁸ As regards the term of “historical truth”, see E.-C. PETTAI, *Prosecuting Soviet genocide*, cit., p. 11.

European Convention requirements. It was highly important for the domestic courts to receive the endorsement of their reasoning by the European Court of Human Rights.

The genocide cases examined in this *Article* demonstrate that the domestic courts have come a long way in the past years. At the beginning, the Lithuanian courts put the Lithuanian partisans under the cover of a “separate political group” or “separate national-ethnic-political group” under the 2003 Criminal Code of Lithuania. By prosecuting the individuals for the genocide against such a “separate political group”, the courts in fact ignored the prohibition of retroactivity of the criminal law to the detriment of the accused. Thereafter, in light of the explanations given by the Constitutional Court of Lithuania, the domestic courts took the right position by stressing that the Lithuanian partisans were not only a separate political group, but also part of the Lithuanian nation, that is part of the protected group under international law (the Genocide Convention) at the time the criminal acts were committed. Lastly, following the principles formulated in the judgment of the Grand Chamber of the European Court of Human Rights in the *Vasiliauskas* case, the Lithuanian courts extended their argumentation by providing detailed historical context in order to demonstrate the close link between the Lithuanian partisans with the Lithuanian nation (the protected national and ethnic group) and the significant role that the Lithuanian partisans played for the survival of that group. These positive developments in the case-law of the domestic courts show the effective dialogue held between the domestic courts and the Council of Europe institutions (the Committee of Ministers and, in particular, the European Court of Human Rights) as well as a strong wish of the domestic courts to fulfil the international legal obligations of the State of Lithuania and at the same time to put an end to the impunity for the past violations. The judgment of the European Court of Human Rights in the case of *Drėlingas v. Lithuania* is important from the legal perspective as it provided the European Court of Human Rights with the possibility to assess whether the rule of law was respected while convicting the Soviet officials for the genocide against the Lithuanian partisans. The *Drėlingas* case is also important historically as it is the first time the international judicial institution has found that implementation of the Soviet repressive policy against the Lithuanian partisans, their contact persons and supporters can amount to the crime of genocide as it was understood under the international law in the 1950s, i.e. at the time that policy was carried out.



ARTICLES

HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW – FIRST PART

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HISTORY AND INTERPRETATION IN THE FUNDAMENTAL LAW OF HUNGARY

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TABLE OF CONTENTS: I. Introduction. – II. Historical constitution. – III. Constitutional identity. – IV. Christian culture. – V. History and interpretation. – V.1. Achievements of the historical constitution. – V.2. Constitutional identity. – V.3. Christian culture. – VI. Conclusion: partisan tendencies and neutralising efforts.

ABSTRACT: This *Article* focuses on some of the rules of interpretation contained in the Fundamental Law of Hungary (Art. R), which, while not belonging to the class of “memory laws” in the strict sense, make use of certain historically charged concepts. These concepts, examined in the first part of the *Article* in turn, are 1) the “achievements of the historical constitution”, 2) the “constitutional identity”, and 3) the “Christian culture” of Hungary. It is argued that in terms of their substance, these are open to competing historical interpretations. The second part of the *Article* deals with the pragmatic aspect of these provisions, that is, 4) their functions in constitutional interpretation. Based on that, the conclusion summarises 5) the role and motivation of historicising concepts both from the perspective of the constitution-maker and that of constitutional lawyers.

KEYWORDS: fundamental law of Hungary – rule of law – historical constitution – constitutional identity – Christian culture – constitutional interpretation.

I. INTRODUCTION

Memory laws as a means of regulating historical memory have seen an unprecedented expansion since the turn of the millennium. Accordingly, theoretical encounters with that current of legislation have been increasingly frequent in the field of legal and politi-

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cal studies.¹ One of the cases arousing attention in recent scholarship has been that of Hungarian law, and the new constitution, the Fundamental Law of 2011, in particular.

The Fundamental Law of Hungary (FL), while not in itself a “memory law” in the narrow sense of the term,² contains a considerable amount of historical references clearly aimed at establishing a coherent view of Hungarian history. Thus, it not only falls within the category of “laws affecting historical memory”,³ but can also be regarded as an attempt at radically changing the relationship between (Hungarian) law and memory. The role that the FL plays within a broader current of memory politics has been described, and criticised, in a number of publications⁴ since its enactment in 2011.

This *Article* takes a different perspective by focusing on the ways certain conceptions of history influence the interpretation of passages not explicitly dealing with historical narratives, and yet indirectly linked to them. It does so by looking at some of the rules of interpretation contained in the FL, and to Art. R in particular.⁵ These competing interpretations, we shall argue, depend on one’s understanding of certain historically charged concepts.

Art. R, section 3, of the FL provides that “[t]he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic[al] constitution”. Section 4, introduced by

¹ For comparative studies, see most recently N. KOPOSOV, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2017; U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory: Towards Legal Governance of History*, Cambridge: Cambridge University Press, 2017, and K. GAUBA, *Rethinking ‘Memory Laws’ from a Comparative Perspective*, in M.P. SINGH, N. KUMAR (eds), *The Indian Yearbook of Comparative Law 2018*, Singapore: Springer, 2019, 233 *et seq.*

² That is, laws that use state sanctions to protect certain interpretations of historical events or historical narratives. Cf. A. GLISZCZYŃSKA-GRABIAS, G. BARANOWSK, A. WÓJCIK, *Law-secured Narratives of the Past in Poland in Light of International Human Rights Law Standards*, in *Polish Yearbook of International Law*, 2018, p. 60, quoting Council of Europe, *Memory Laws and Freedom of Expression: Thematic Factsheet*, July 2018, available at rm.coe.int.

³ Cf. E. HEINZE, *Epilogue: Beyond ‘Memory Laws’: Towards a General Theory of Law and Historical Discourse*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 413 *et seq.*

⁴ See, e.g., Zs. KÖRTVÉLYESI, *From “We the People” to “We the Nation”*, in G. A. TÓTH (ed.), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law*, Budapest and New York: CEU Press, 2012, p. 111 *et seq.*; M. DANI, *The ‘Partisan Constitution’ and the Corrosion of European Constitutional Culture*, in *LEQS Papers*, no. 68, 2013, available at www.lse.ac.uk; A. CIEGER, *National Identity and Constitutional Patriotism in the Context of Modern Hungarian History*, in *Hungarian Historical Review*, 2016, p. 123 *et seq.*; K. MIKLÓSSY, H. NYSSÖNEN, *Defining the New Polity: Constitutional Memory in Hungary and Beyond*, in *Journal of Contemporary European Studies*, 2018, p. 322 *et seq.*

⁵ The FL consists of eight parts: 1) the opening motto, 2) National Avowal, 3) Foundation, 4) Freedom and Responsibility, 5) The State, 6) Special Legal Order, 7) Closing and Miscellaneous Provisions, 8) postamble. The Articles in 3), 4), and 5)–6) are marked with capital letters, Roman numerals, and Arabic numerals, respectively.

the seventh amendment of the FL, adds that “[t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State”.⁶

In what follows, we shall first give an overview of the “semantic” aspect of the key concepts in these provisions, that is, the competing interpretations of (II) the historical constitution, (III) constitutional identity, and (IV) the Christian culture of Hungary. After that, we shall turn to the “pragmatic” aspect, that is, (V) the appearance of these concepts in the relevant case-law of the Hungarian Constitutional Court. In our conclusion (VI), we shall summarise the possible roles and motivations for using such concepts in constitutional provisions and rules for their interpretation.

II. HISTORICAL CONSTITUTION

The notion that a “historical constitution” should play a role in interpreting the FL has aroused a good deal of interest, political as well as scholarly, since the publication of the first drafts. Quite clearly, the very term alludes to an image of constitutional continuity, and more specifically, to the discourses focusing on that continuity in the first half of the 20th century.⁷

As for the general notion of continuity, the very title of the new constitution, Fundamental Law, has been explained as the sign of a new constitutional paradigm. As pointed out by one of the chief drafters, József Szájer, MEP, “[t]he Fundamental Law is, as shown by its name, a single document that is the foundation, or from a different, Kelsenian perspective, the summit of our formal legal system. It is part of the constitution, but at the same time less than the constitution”.⁸ Given that the FL’s preamble states that constitutional continuity was interrupted “due to foreign occupations”,⁹ what the constitution-making (and -naming) act seeks to achieve here is “to revive the rich millennial constitutional tradition of Hungary and restore its continuity”.¹⁰

⁶ Quotations follow the official translation of the consolidated version of 29 June 2018 (incorporating the seven amendments), available at www.kormany.hu.

⁷ For an overview of the interwar debates concerning “constitutional continuity”, see G. SCHWEITZER, *Molnár Kálmán és a két világháború közötti alkotmányjogtudomány dilemmái* (Kálmán Molnár and the Dilemmas of Interwar Constitutional Scholarship), in *MTA Law Working Papers*, no. 33, 2015, jog.tk.mta.hu.

⁸ J. SZÁJER, *Az Alaptörvény és a történeti alkotmány. Csevár Nóra beszélget Szájer Józseffel* (*The Fundamental Law and the Historical Constitution. An Interview with József Szájer by Nóra Csevár*), in *Jogelméleti Szemle*, 2012, no. 4, jesz.ajk.elte.hu.

⁹ The relevant text of the preamble (National Avowal) runs as follows: “We do not recognise the suspension of our historic constitution due to foreign occupations. [...] We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we therefore proclaim it to be invalid. [...] We date the restoration of our country’s self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed. We shall consider this date to be the beginning of our country’s new democracy and constitutional order”.

¹⁰ J. SZÁJER, *Az Alaptörvény és a történeti alkotmány*, cit.

It needs to be emphasised that the text speaks of “achievements” of the historical constitution, thus opening the possibility of a selection, to be made by those interpreting the FL. That, too, has been pointed out by Szájer,¹¹ thus relativising the “rebuilding” and “reviving” tendencies in constitution-making to some extent.

Post-2011 constitutional scholarship has produced a range of views concerning the actual time limits of the historical constitution.¹² As the FL itself mentions both “foreign occupations” (in connection with the loss of “self-determination” on 19 March 1944) and the communist constitution of 1949, either may serve as the closing date. A further question concerns whether post-1944 (or post-1949) developments may count as “achievements”.¹³ Finally, it may be argued that either the democratic transition (in 1990) or the passing of the FL (in 2011) has re-established continuity, and therefore recent legislation or Constitutional Court jurisprudence¹⁴ may also add to these achievements.

Criticism against using the term “historical constitution” has focused on four points: i) the impossibility of re-establishing constitutional continuity; ii) the incompatibility of the FL with the notion of a historical constitution; iii) the undesirable consequences of establishing any link with the pre-1945 constitutional tradition; and finally iv) the general lack of clarity as regards the normative content of the term.

i) The lack of constitutional continuity is acknowledged, somewhat ambiguously, by the constitution-makers themselves (cf. the reference to the loss of self-determination cited above). The declaration of the invalidity of the previous constitution in the National Avowal seems to be more of a challenge to its political legitimacy than an actual attempt at returning to the pre-1949 *status quo*. Yet, even returning to that constitutional setting would not re-establish continuity.¹⁵ Already the constitutional scholarship of the interwar period perceived the end of constitutional continuity after the abdication of King Charles IV, and Act 1 of 1946 abandoned monarchy for a republican constitution.¹⁶

¹¹ *Ibidem*, opposing the “achievements” to the totality of the European “*acquis communautaire*”, which he otherwise mentions as the source of inspiration for coining the term.

¹² For a recent overview, see I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában (The historical constitution in the jurisprudence of the Constitutional Court)*, in *Közjogi Szemle*, 2016, no. 4, p. 44 *et seq.*

¹³ See Á. RIXER, *A történeti alkotmány lehetséges jelentéstartalmai (The possible meanings of the historical constitution)*, in *Jogelméleti Szemle*, 2011, no. 3, jesz.ajk.elte.hu.

¹⁴ For a similar view, related to the concept of “the unseen constitution”, see the interview with László Sólyom, the first President of the Hungarian Constitutional Court: A. STUMPF, *Sólyom László az új alkotmányról (László Sólyom on the New Constitution)*, in *Heti Válasz*, 21 April 2011, where Sólyom states that “what can be used of the historical constitution is the unseen constitution, that is, the coherent system of constitutional values and principles built up through the application of our rule-of-law Constitution, which is part of the European constitutional tradition, and is also shaping that tradition”.

¹⁵ For a different conception of continuity, see K. PÓCZA, *Is a Revival Possible? Theoretical Reflections on the Historical Constitution*, in F. HÖRCHER, T. LORMAN (eds) *A History of the Hungarian Constitution: Law, Government and Political Culture in Central Europe*, London, New York: I. B. Tauris, 2018, p. 211 *et seq.*

¹⁶ See G. SCHWEITZER, *Molnár Kálmán és a két világháború közötti alkotmányjogtudomány dilemmái*, cit.

Arguably, then, constitutional continuity would be a fiction, and one without a clear content in terms of specific institutions. The selective function of “achievements” is actually a means for tackling that problem.

ii) The claim of its drafters notwithstanding, it has been argued that the FL is a charter constitution replacing the former one, Act 20 of 1949. Even though that latter is declared invalid in the National Avowal, as “the basis for tyrannical rule”, the closing provisions state that the “Fundamental Law shall be adopted by the National Assembly pursuant to Sections 19(3)a) and 24(3) of Act XX of 1949”, thus making it the formal source of validity for the new constitution. In a substantive sense, the penultimate paragraph of the National Avowal declares that “[o]ur Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation’s will and the form in which we want to live”. While a charter constitution may, in principle, still be regarded as part of a historical constitution, the two terms are normally used as opposites, and Hungarian constitutional discourses follow that usage.

iii) In terms of the consequences of linking the FL to the Hungarian constitutional tradition, it is often pointed out that certain elements of the tradition are simply incompatible with the current constitutional situation. Part of these elements may be summarised by the symbol of the “Holy Crown of Hungary”, which has been linked to the tradition of monarchy (as opposed to the republic, cf. Art. B, para. 2), the territorial claims of pre-war Hungary (as opposed to the current borders), and the tradition of an established church (as opposed to the separation of church and state, cf. Art. VII, para. 3).¹⁷ While the text of the FL does not actually grant such an interpretation, as its reference to the Holy Crown restricts its function to embodying “the constitutional continuity of Hungary’s statehood and the unity of the nation”, the so-called “doctrine of the Holy Crown” is often mentioned in official and unofficial government communications, albeit with an emphasis on the rule-of-law traditions rather than the above elements.¹⁸

iv) In addition to the above points concerning the (possible) substance of the historical reference, a formal issue is also raised. As has been pointed out in almost all comments and contributions on the topic, the lack of clarity may be considered as the most serious problem for interpreting and applying section 3. Opinions range from regarding

¹⁷ See, for each of these points, Z. SZENTE, *The Doctrine of the Holy Crown in the Hungarian Historical Constitution*, in *Journal on European History of Law*, 2013, pp. 109-115, and Z. SZENTE, *A 2011. évi Alaptörvény és a történeti alkotmány összekapcsolásának mítosza (The myth of connecting the Fundamental Law of 2011 to the historical constitution)*, in *Közjogi Szemle*, 2019, no. 1, p. 8.

¹⁸ For some recent examples, see *Szent Korona-tan, az íratlan alkotmány (The Doctrine of the Holy Crown: The Unwritten Constitution)*, in *Hirado.hu*, 6 January 2018, available at hirado.hu; A. SZOMOR, *Egy évezred történelmi kataklizmái sem tudták megsemmisíteni (Even the historical cataclysms of a millennium could not destroy it)*, in *origo.hu*, 20 August 2018, www.origo.hu.

it as a purely ornamental or ideological element¹⁹ to offering criteria for identifying historical achievements.²⁰ Even the wording of judicial opinions diverges, referring to the provision as “a framework”, “a principle”, or “a norm”. As we are going to see presently, the Constitutional Court has chosen not to ignore the duty of interpretation thus established, but to avoid using it in a polemical manner.

III. CONSTITUTIONAL IDENTITY

While the reference to the historical constitution may be regarded as a specifically Hungarian phenomenon, constitutional identity has played a role in European constitutional debates for quite a while. That debate inscribed itself into the discourse on the question of sovereignty within the European Union. While the very existence of the Union is linked to the primacy of EU law and its direct effect, it is also characterised by the constitutional pluralism resulting from the Member States keeping their sovereignty. Conflicts arising between the two kinds of legal orders, European and domestic law, have provoked responses from constitutional courts of Member States already before the Maastricht Treaty.²¹ Part of the concerns addressed in these decisions were related to the level of human rights protection, while others focused on safeguarding national sovereignty.

Drafters of the Maastricht Treaty tried to tackle the latter kind of reservation through Art. 4, para. 2, providing that “[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”.

In subsequent constitutional debates, “national identity” has been interpreted as “constitutional identity”.²² Arguably, however, rhetoric focused on the defence of constitutional identity is essentially about the protection of Member State sovereignty against centralisation in the EU.²³ Yet that protection may be served differently, with the image used by several scholars, with a shield or a sword.²⁴ Constitutional identity as “shield”

¹⁹ See Z. SZENTE, *The Doctrine of the Holy Crown*, cit.

²⁰ See Á. RIXER, *A vívmány-teszt (The Achievement Test)*, Budapest: Dialóg Campus, 2018.

²¹ Cf. *Solange I* (German Federal Constitutional Court, judgment of 29 May 1974, BvL 52/71) to *Lisbon* (German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09).

²² That move is criticised as unfounded by E. CLOOTS, *National Identity, Constitutional Identity, and Sovereignty in the EU*, in *Netherlands Journal of Legal Philosophy*, 2016, p. 84.

²³ *Ibidem*, p. 83 et seq.

²⁴ See, e.g., T. KONSTADINIDES, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, in *Cambridge Yearbook of European Legal Studies*, 2011, p. 195 et seq.

has been interpreted as a way of guiding European integration into a desired direction from the perspective of a Member State. An early example for this is the German Constitutional Court's *Solange I* decision which forced the EU to provide for the protection of human rights.²⁵ This approach is not *per se* hostile to integration, yet the Member State concerned demands something in return. Using the concept as a "sword", however, actually poses a challenge to the primacy of EU law.

IV. CHRISTIAN CULTURE

Unlike the concepts discussed above, the "Christian culture of Hungary" refers to two things that are not legal in nature, and not even indirectly created by the state: culture and Christianity. On the one hand, both the law and the state are parts of culture as a whole. On the other hand, what makes a nation's culture Christian is its special relationship to that particular religion, the latter being another part of culture.

The new passage of Art. R is not alone in referencing religion within the FL. Starting with the motto "God bless the Hungarians", taken from the national anthem, the preamble (itself entitled "National Avowal", or, more literally, "National Profession of Faith"²⁶) declares that "[w]e are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago", and "[w]e recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country". Later on, it also mentions the so-called "Holy Crown", albeit as an object that "embodies the constitutional continuity of Hungary's statehood and the unity of the nation". In the closing sentences, the text speaks on behalf of the members of the National Assembly, who adopt the FL "being aware of [their] responsibility before God and man". Given that context, the question arises whether there is anything new brought in by the Seventh Amendment, and whether the notion of protecting the Christian culture of Hungary can be interpreted from the perspective of historical memory.

Shortly after the enactment of the Amendment, two notes by prominent Hungarian constitutional lawyers were published. Both texts focus on the question of whether the sentence inserted as para. 4 of Art. R adds anything to the already existing references to religion in general, and Christianity in particular. While the two contributions differ in their approach, there are some common points which deserve attention here.

²⁵ P. FARAGUNA, *Constitutional Identity in the EU – A Shield or a Sword?*, in *German Law Journal*, 2017, p. 1627.

²⁶ On the historical and literary connotations of the title see F. HORKAY HÖRCHER, *The National Avowal*, in B. SCHANDA, ZS. A. VARGA, L. CSINK (eds), *The Basic Law of Hungary*, Dublin: Clarus Press, 2012, p. 25 *et seq.*

Taking a more critical stance, Gábor Halmai points out the twofold message of the Amendment.²⁷ At a European level, he argues, the text speaks to Christian Democratic parties (which is also the term accompanying or sometimes replacing “illiberal democracy” in the self-styling of the current Hungarian regime²⁸), and together with the widely used reference to Robert Schuman’s *dictum*, it is a sign of allegiance (and, one should add, also a warning that the Europeanness of more liberal currents can be questioned). In terms of domestic constitutional law, Halmai states, the amendment expresses a clear preference for Christianity, as opposed to both non-Christian religions and non-religious world views. He sees two possible consequences: “it can be used as a basis of reference [for the Constitutional Court] to annul any legal norm allegedly violating Christian culture”, and that “the representatives of the Christian religion can feel themselves entitled to be intolerant towards the representatives of other religions”. Yet these are mere possibilities, particularly because (as Halmai himself emphasises) believers, and especially church-goers, are a minority in Hungarian society, even among those voting for the incumbent parties. Moreover, the overall message is inconsistent, as government communication often alludes to pre-Christian symbols traditionally linked to the Hungarian national past. Thus, “Christianity and religion serve as reference points that [Prime Minister Viktor] Orbán’s right wing populism uses opportunistically”, following “the authoritarian traditions of the Horthy-regime between the two World Wars”, with its (implicit) idea of a national religion. In sum, Halmai concludes, the amendment “strengthens the role of religion to constitutionally legitimize the concept of ethnic nation”. Halmai does not offer much to support that latter claim, however. What can justify such an interpretation is perhaps the opposition of Christian culture and non-European immigrants, often labelled *en bloc* as “Muslims”. That opposition is not part of the constitutional text but clearly present in government communications,²⁹ together with allusions to the historical role of Hungary as the “defender of Christianity” against the Turkish invaders of the 15th–17th centuries.³⁰

²⁷ G. HALMAI, *Fidesz and Faith: Ethno-Nationalism in Hungary*, in *VerfassungsBlog*, 29 June 2018, verfassungsblog.de.

²⁸ See, e.g., Z. KOVÁCS, *PM Orbán at Tusványos: “The essence of illiberal democracy is the protection of Christian liberty”*, in *About Hungary*, 27 July 2019, abouthungary.hu.

²⁹ A recent example is PM Orbán’s speech at the Atreju 2019 event held by the Brothers of Italy party (FdI), on 21 September, available at abouthungary.hu, with the claim that “migrants will become citizens with voting rights; and they are Muslim people who will never support policies which are based on Christian foundations”.

³⁰ See, e.g., PM Orbán’s 2015 interview in the Swiss weekly *Die Weltwoche*: R. KÖPPEL, W. KOYDL, *Ein Wort von Merkel – und die Flut ist gestoppt (A word from Merkel – and the flood stops)*, in *Die Weltwoche*, 13 November 2015. An English translation is available at abouthungary.hu.

Balázs Schanda adopts a different perspective in his note,³¹ and focusses on the semantic content of the conception of “Christian culture”. Pointing out that the state has no access to the essence of Christianity, that is, a religious doctrine, he argues that the FL can only regard the Christian culture of Hungary as a fact, not as something to be achieved. That is supported by the wording of the constitutional passage, speaking of protection. As for the question of whether Hungarian culture can be described as “Christian”,³² he refers to the historical connection between the birth of Hungarian culture and the adoption of Christianity,³³ stating however that “in terms of our days it cannot be suggested that the role of Christianity would be exclusive”. What follows from that is, according to Schanda, that the constitution-maker only wishes to protect the cultural identity of Hungary, which, as part of Europe, is rooted in Christian traditions.

That latter position seems to be supported by the reasoning of the modification proposal to the amendment, which actually introduced the reference to “Christian culture”.³⁴ Quite enigmatically, however, the reasoning only states that “[i]n Europe, there are currently processes going on that may lead to a transformation of the traditional cultural landscape of Europe. Without Christian culture there is no Europe and no Hungary. Christian culture is a universal value, the preservation of which is of special importance, and for that reason, the protective role of the state needs to appear among the provisions of the Fundamental Law”. While it is unclear whether the protective duties thus established are aimed against non-Christian immigrants or European legislation changing cultural traditions, the identification of “Christianity” with “the traditional cultural landscape of Europe” is apparent.

V. HISTORY AND INTERPRETATION

Among the three concepts examined, it is the achievements of the historical constitution which have been most reflected in the reasoning of the Constitutional Court, given its earlier appearance in the text of the FL. In this section, we give a brief overview of relevant case-law, focusing on the historical and memory-related aspects of the Constitutional Court’s interpretation.

³¹ B. SCHANDA, *Magyarország keresztény kultúrájáról (On the Christian Culture of Hungary)*, in *Pázmány Law Working Papers*, no. 8, 2018, plwp.eu.

³² For a positive answer, based on the inseparability of evaluative and descriptive aspects, and quoting PM József Antall (1990–1993) claiming that in Central Europe “even atheists are religious”, see M. PAKSY-BETKE, *Construction normative de l’identité nationale et fait religieux – vue de Hongrie*, in *Lettre Droits de l’homme en Europe centrale et orientale*, 2013, p. 14.

³³ Quoting Antal Szerb, an author and historian of ideas, who stated that any attempt to reconstruct a pre-Christian Hungarian culture is “perverse and ridiculous”. cf. A. SZERB, *Magyar irodalomtörténet (A History of Hungarian Literature)*, Budapest: Magvető, 1992 (original ed. 1934), p. 29.

³⁴ Modification proposal to the amendment of 14 June 2018, T/332/11, available at www.parlament.hu.

V.1. ACHIEVEMENTS OF THE HISTORICAL CONSTITUTION

While the Constitutional Court has, since its earliest decisions, referred to relevant facts of legal history,³⁵ the amendment has raised the question of how the provisions of the FL can be “interpreted in accordance with [...] our historic[al] constitution”. As mentioned above (in section I), the text refers to “achievements” rather than to the historical constitution as a whole. This definitely allows for some degree of selection, while the identification of the historical constitution remains a preliminary question, setting limits for that selection.³⁶

As the FL does not specify the meaning of the term “historical constitution”, the Court has started to develop its own doctrine soon after the FL entered into force. In a reasoning touching upon the issue of judicial independence, it stated that: “It is a minimum requirement of the consolidated interpretation of the Hungarian historical constitution to accept that the Acts of Parliament constituting the civic transformation completed in the 19th century form part of the historical constitution. These had been the Acts that had created – upon significant precedents – a solid fundament of legal institutions that served as a basis for building a modern state under the rule of law”.³⁷

In addition to describing the core of the historical achievements that may serve as the basis of constitutional interpretation, the Court also emphasised that “[i]t is a duty of the Constitutional Court to determine on the basis of the Fundamental Law which elements of the historical constitution should be regarded as achievements”.³⁸ In subsequent decisions, that happened through the labelling of certain principles and institutions as achievements of the historical constitution, mostly with reference to historical parallels, but seldom on the basis of comparative analysis. Among the historical achievements thus identified are, in addition to judicial independence,³⁹ the right to legal remedy,⁴⁰ judicial review of administrative acts,⁴¹ freedom of the press,⁴² disciplinary liability of judges,⁴³ religious freedom,⁴⁴ and local self-government.⁴⁵ References to

³⁵ See I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában*, cit., p. 44, with references.

³⁶ *Ibidem*, p. 45 *et seq.*

³⁷ Hungarian Constitutional Court, judgment of 7 July 2012, 33/2012 AB, para. 75.

³⁸ *Ibidem*.

³⁹ See further Hungarian Constitutional Court, judgment of 4 October 2012, 25/2013 AB, decision of 11 February 2014, 3015/2014 AB, as well as judgment of 8 February 2016, 2/2016 AB, on the separation of the judicial and administrative branches.

⁴⁰ Cf. Hungarian Constitutional Court, judgment of 21 July 2015, 26/2015 AB.

⁴¹ Hungarian Constitutional Court, judgment of 5 June 2015, 17/2015 AB, with reference to Act 26 of 1896 and the pre-FL judgment of 1 July 1997, 39/1997 AB. Cf. I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában*, cit., p. 45.

⁴² Hungarian Constitutional Court, judgment of 29 September 2014, 28/2014 AB.

⁴³ Hungarian Constitutional Court, judgment of 15 July 2014, 21/2014 AB.

⁴⁴ Hungarian Constitutional Court, judgment of 1 March 2013, 6/2013 AB.

⁴⁵ Hungarian Constitutional Court, judgment of 2 October 2015, 29/2015 AB.

historical achievements are, however, more frequent than that: they are sometimes just established by way of mentioning Art. R, section 3, among the constitutional bases of the decisions, and sometimes even negatively, that is, by stating that something is *not* part of the historical constitution.⁴⁶

V.2. CONSTITUTIONAL IDENTITY

In the first decision to use and interpret the concept of constitutional identity,⁴⁷ the Constitutional Court of Hungary practically identified the meaning of the term with that of the “achievements of the historical constitution”. After stating that the content of constitutional identity will be developed on a case-by-case basis,⁴⁸ the Court explained that:

“The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical constitution; the Fundamental Law and thus the whole Hungarian legal system are based upon them”.⁴⁹

The decision, of course, was not about the historical roots of constitutional identity but focused on the question of sovereignty. The Court ruled that the primacy of EU law notwithstanding, there may be exceptional cases in which it may, “as a resort of *ultima ratio*, [...] examine whether exercising competences on the basis of Article E(2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary”.⁵⁰ The power thus vindicated (“sovereignty control”) has been exerted by the Court in a more recent decision⁵¹ not allowing the EU Agreement on a Unified Patent Court⁵² to be promulgated. While that latter decision actually develops a historical argument (i.e. that the UPC

⁴⁶ Cf. I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában*, cit., p. 46, with examples.

⁴⁷ Hungarian Constitutional Court, judgment of 5 December 2016, 22/2016 AB.

⁴⁸ *Ibidem*, para. 64.

⁴⁹ *Ibidem*, para. 65. A dissenting opinion to a later decision comes quite close to that interpretation by speaking of the “self-identity of Hungary based on its historical constitution”: judgment of 9 July 2018, 9/2018 AB, Stumpf, dissenting, at para. 83.

⁵⁰ See Á. MOHAY, N. TÓTH, *Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E(2) of the Fundamental Law*, in *American Journal of International Law*, 2017, p. 468 *et seq.*; K. KELEMEN, *The Hungarian Constitutional Court and the Concept of National Constitutional Identity*, in *Ianus – Diritto e Finanza*, 2017, p. 23 *et seq.*

⁵¹ Hungarian Constitutional Court, judgment of 9 July 2018, 9/2018 AB.

⁵² Agreement on a Unified Patent Court of 19 February 2013 (2013/C 175/01).

Court was not included in the Founding Treaties of the EU), no reference to the historical aspects of constitutional identity is made.

V.3. CHRISTIAN CULTURE

As for the Christian culture of Hungary, to date there is no post-2018 decision using the concept in its reasoning. In earlier case-law, the relationship between law and religion is mentioned in a few cases, though not in the actual reasons. A recent decision (judgment of 23 July 2014, 27/2014 AB), adapting the reasoning of an earlier one (judgment of 12 February 1993, 4/1993 AB), nevertheless emphasises the institutional separation of the state and religious communities as well as the equality of the latter.⁵³

Most recently, in decision of 5 March 2018, 3081/2018 AB, the petitioner referred to, *inter alia*, the passages of the National Avowal mentioning Christianity and family values (the focus being on the latter). The Court did not address the merits of the petition, which it did not admit due to formal reasons. In a dissenting opinion, however, one of the judges approached the problem from the perspective of religious freedom. He argued that “[a]lthough the recognition and protection of Sunday as a day of rest was traditionally based on religious considerations in societies with a Christian majority, today that factor plays no definitive role: it is only a minority that has a demand for religion-based holidays, whereas the holiday character of Sunday is regulated and protected by the state due to explicitly secular, rather than religious, reasons. Nevertheless, that protection – if effective – has the not inconsiderable corollary of being related to the right of religious practice”.⁵⁴ Thus, the argument is directed at the protection of a religious minority rather than the (majority) culture. The claim that the regulation of national holidays, although partly of religious origin, is not related to any specific religion anymore follows an early decision of the Court (judgment of 27 February 1993, 10/1993 AB).

Before the issue of the Sunday work ban, it was the new regulation of the legal status of religious communities, by Act 206 of 2011, which elicited several petitions. In dealing with these, the Court primarily focused on rule-of-law considerations, and mentioned the historical role of religious communities only in its reference to the National Avowal. What is interesting to note here is that while the constitutional text puts a special emphasis on Christianity, with only a vague reference to respecting the “religious traditions of our country”, the wording of the decision is more general: “the importance

⁵³ Cf. G. SCHWEITZER, “Becsüljük országunk különböző vallási hagyományait” (“We value the various religious traditions of our country”), in A. PATYI (ed.), *Rendhagyó kommentár egy rendhagyó preambulumról: Magyarország Alaptörvénye, Nemzeti hitvallás (An Unusual Commentary on an Unusual Preamble: The Fundamental Law of Hungary, National Avowal)*, Budapest: Dialóg Campus, 2019. p. 119.

⁵⁴ Hungarian Constitutional Court, decision of 5 March, 3081/2018 AB, Schanda, dissenting, para. 30. The petition was directed against certain provisions of Act 23 of 2016 abolishing the partial ban on Sunday work in the retail sector, introduced by Act 102 of 2014.

of religion and churches for the history and social life of Hungary is also appreciated by the national avowal (preamble) of the Fundamental Law”.⁵⁵

VI. CONCLUSION: PARTISAN TENDENCIES AND NEUTRALISING EFFORTS

What seems to be the common factor in the two strains of the above investigations may be described as the historicisation of constitutional concepts. That seems to happen by the constitution-maker as well as by constitutional lawyers (and, in particular, by the Constitutional Court) interpreting the text. The ways of, and reasons for, doing so may differ, however.

In the case of the constitution-maker, there seems to be a tendency to increase the volume of historical references in the constitutional text. Considering the difference between the original conception and the text enacted in 2011,⁵⁶ the growth of the preamble is striking. The amendments then added to these references, seeking to complete the unifying historical narrative already present in the National Avowal, e.g. by emphasising the responsibility of the political heirs of the Socialist Workers’ Party.⁵⁷ The latter move brought the constitutional narrative closer to the present, not in terms of creating (or at least re-establishing) a national community, but by making it part of political struggles of the day.

Both chronologically and in its content, the reference to the historical constitution seems to belong to the first wave, that is, the community-centred narrative elements. Constitutional identity and Christian culture, in turn, share the two-faced character of the second wave, by assuming an existing national unity on the one hand, and situating it within the perceived political and cultural conflicts at the European level on the other. In doing so, they seem to be closer to declarative political statements than actual normative provisions.

That notwithstanding, the Constitutional Court, and the scholarly community in general, seem to have seriously considered the normative content of Art. R, sections 3 and 4, even though a critical tone has been present even in certain dissenting opinions. It is in this interpretive discourse that the concepts of constitutional identity and Christian culture become historicised explicitly as well. While that tendency seems to parallel the intensified memory politics of the post-2010 regime, it may be motivated by different considerations. When seeking to contribute to the feeling of community or to participate in political conflicts by way of introducing new constitutional provisions, the constitution-maker may not need historical(ly sounding) concepts to be clear. To a certain

⁵⁵ Hungarian Constitutional Court, judgment of 1 March 2013, 6/2013 AB, para. 122.

⁵⁶ See I. VÖRÖS, *A történeti alkotmány az Alkotmánybíróság gyakorlatában*, cit., p. 47, quoting Resolution 9/2011 OGY of the National Assembly of 9 March 2011 on the preparations of the new Constitution.

⁵⁷ See M. KÖNCZÖL, *Dealing with the Past in and around the Fundamental Law of Hungary*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 246 et seq.

degree, conceptual opacity may better serve both integrative and partisan aims. Those interpreting the constitutional text, however, may adopt a historicising approach for two reasons. First, pointing to specific historical events, achievements or documents is often the easiest way to offer a more or less well-defined reading that is also less liable to be rejected as subjective. Second, such an objectivising move distances the interpreter from current political debates. To sum up: historical references in constitutional interpretation can be used to neutralise certain tendencies of constitution-making, in terms of both clarity and objectivity.



ARTICLES

RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

edited by Cristina Fasone, Daniele Gallo and Jan Wouters

RE-CONNECTING AUTHORITY AND DEMOCRATIC LEGITIMACY IN THE EU: INTRODUCTORY REMARKS

CRISTINA FASONE*, DANIELE GALLO** AND JAN WOUTERS***

TABLE OF CONTENTS: I. The disconnection between the *loci* of authority and those of democratic control. – II. The competence problem in the Union. – III. Reconciling Europe with its citizens through democracy and rule of law. – IV. Scope and contents.

ABSTRACT: One of the main problems the Union has to cope with is the difficulty in properly articulating the relationship between authority and democratic legitimacy, in particular the disconnection between the allocation of powers to the EU and to its Member States and the forms of democratic control over their exercise in the Union. Indeed, it seems that the more EU authority expands, the more the democratic legitimacy of the Union is in trouble. In the EU the source of authority is dislocated out of the traditional forms of democratic accountability, which have been shaped domestically by centuries of constitutional history. In addition to this, the “punctiform” nature of many EU decision-making processes, starting at one level of government – regional, national or supranational – and ending up being concluded at a different level, favours this feeling of disorientation amongst European citizens. The attitude of several national governments, which tend to blame the EU for their own failures, exacerbates this problem and leads to the perception of EU institutions as not only distant, but also detached from the needs of ordinary citizens.

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KEYWORDS: authority – legitimacy – disconnection – EU competences – democratic control – rule of law.

I. THE DISCONNECTION BETWEEN THE *LOCI* OF AUTHORITY AND THOSE OF DEMOCRATIC CONTROL

The problem of the “democratic deficit” in the European Union is probably as old as the process of European integration, being initially ascribed by David Marquand, in 1979, to the weak democratic legitimacy of the then European Community institutions due to the limited authority of the Parliamentary Assembly.¹ Against this backdrop he proposed the empowerment of the soon-to be elected European Parliament.² Whether the diagnosis of a “democratic deficit” for the Union is still accurate is, however, a different question. The Treaty of Rome in 1957 entailed a limited, but revolutionary for the time, conferral of powers to the Communities’ institutions, though not particularly in favour of the Parliamentary Assembly, which remained mainly a consultative authority at least until the budgetary treaties of the 1970s.³ However, most powers, and core state powers in particular, firmly remained in the hands of national institutions, including national parliaments.⁴ During the first stage of the European integration process, the idea of national legislatures’ disempowerment derives much more from domestic politics and national executive dominance in parliamentary systems, from the rise of the “administrative state”, and from processes of globalisation in general,⁵ than from the alleged transfer of powers to the EU without democratic control.

The self-empowering attitude of Community institutions, starting from the Court of Justice,⁶ the European Commission⁷ and the same European Parliament,⁸ drawing on

¹ D. MARQUAND, *Parliament for Europe*, London: Jonathan Cape, 1979, *passim*, and Y. MÉNY, *De La Démocratie en Europe: Old Concepts and New Challenges*, in *Journal of Common Market Studies*, 2003, p. 8.

² D. MARQUAND, *Parliament for Europe*, cit., p. 64.

³ See the Treaty amending certain budgetary provisions signed in Luxembourg on 22 April 1970 and entered into force on 1 January 1971, and the Treaty amending Certain Financial Provisions, signed in Brussels on 22 July 1975 and entered into force on 1 June 1977.

⁴ Or of Member States’ governments acting at Community level in the Council, which explains why liberal intergovernmentalists have disputed the idea of a democratic deficit of the EU. See, amongst many, A. MORAVCSIK, *In Defence of the “Democratic Deficit”, Reassessing Legitimacy in the European Union*, in *Journal of Common Market Studies*, 2002, p. 603 *et seq.*

⁵ See S. ISSACHAROFF, *Democracy’s Deficits*, in *The University of Chicago Law Review*, 2018, p. 485 *et seq.*

⁶ Since Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*, and Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. Enel*. See D. GALLO, *L’efficacia diretta del diritto dell’Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa*, Milano: Giuffrè, 2018, *passim*; R. SCHÜTZE, *Direct and indirect effects of Union law*, in R. SCHÜTZE, T. TRIDIMAS (eds), *Oxford Principles of EU Law*, Oxford: Oxford University Press, 2018, p. 265 *et seq.*; J.H.H. WEILER, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, in *International Journal of Constitutional Law*, 2014, p. 94 *et seq.*; A. TIZZANO, J. KOKOTT, S. PRECHAL (eds), *50th Anniversary of the Judgment Van Gend en Loos 1963-2013, Conference proceedings*, Luxembourg: Office of the official publications of the European

an extensive and teleological interpretation of the Treaties⁹ and leading to the setting up of a supranational organisation in contrast to “ordinary international organizations”,¹⁰ might have fed the rhetoric of the “democratic deficit”. The argument goes as follows: the Community legal system acquires an autonomy of action – an authority – that Member States might not be willing to confer to supranational institutions in principle, based on a literal interpretation of the Treaty. The first European Parliament’s elections in 1979 and the start of the “season” of Treaty revisions, from the 1980s to the Treaty of Lisbon, have probably changed the picture.

On the one hand, it became clear that Member States were in fact willing to increase the Community-Union’s competences at every treaty change so as to encompass, well beyond a purely economic understanding of the internal market, citizenship, coordination of economic policy, migration and criminal law, just to mention the most sensitive areas for the national sovereignty. At the same time, however, the “blame game” of national governments against the EU institutions – despite them being part of the Council and of the European Council – started.¹¹ European institutions have often been portrayed by domestic executives and media as being completely detached from domestic constitutional systems, making decisions with a huge impact on European citizens’ lives without clear and effective forms of democratic accountability. This understanding, today further echoed by Eurosceptic and populist parties and governments, dismisses and challenges the fundamental tenets of representative democracy in Europe, provided by Art. 10, para. 2, TEU:

Union, 13 May 2013, *passim*; M. POIARES MADURO, L. AZOULAI (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart Publishing, 2010, *passim*; E. EDWARD, *Direct Effect: Myth, Mess or Mystery?*, in J.M. PRINSSSEN, A. SCHRAUWEN (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine*, Groningen: Europa Law Publishing, 2002, p. 1 *et seq.*; S. PRECHAL, *Does Direct Effect Still Matter?*, in *Common Market Law Review*, 2000, p. 1047 *et seq.*; P. CRAIG, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, in *Oxford Journal of Legal Studies*, 1992, p. 453 *et seq.*; P. PESCATORE, *The Doctrine of “Direct Effect”: An Infant Disease of Community Law*, in *European Law Review*, 1983, p. 155 *et seq.*

⁷ See L. RYE, *The Legitimacy of the EU in Historical Perspective. History of a Never-ending Quest*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 191 *et seq.*

⁸ As is well-known, the Parliamentary Assembly renamed itself “European Parliament” in 1962 (*cf.* the Resolution of 30 March 1962 on the name of the Assembly) though the new denomination was acknowledged in primary law only with the Single European Act of 1986. On the self-empowering attitude of the European Parliament, see O. COSTA, *Le Parlement européen, assemblée délibérante*, Bruxelles: Éditions de l’Université de Bruxelles, 2001, p. 120 *et seq.*

⁹ M. POIARES MADURO, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, in *European Journal of Legal Studies*, 2007, p. 1 *et seq.*

¹⁰ See J.H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2405 *et seq.*, before the entry into force of the Treaty of Maastricht.

¹¹ See S. NOVAK, *The silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union*, in *Journal of Common Market Studies*, 2013, p. 1091 *et seq.*; S.B. HOBOLT, J. TILLEY, *Blaming Europe? Responsibility Without Accountability in the European Union*, Oxford: Oxford University Press, 2014, p. 123 *et seq.*

"Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens".

On the other hand, the role and powers of the other pillar of representative democracy in Europe, the European Parliament, have also been severely criticised (Arts 10, para. 2, and 14 TEU). Once being directly elected, high expectations have been raised by the fact that it would have become a parliament like any other. However, in terms of composition and of electoral system(s), there is little doubt that the European Parliament can hardly be equated to a domestic legislature or even to a federal Congress, although comparative studies abound in this regard.¹² Lacking a uniform electoral procedure (Art. 223, para. 1, TFEU), the current mixture of common electoral principles¹³ and domestic electoral legislations,¹⁴ even more than the implementation of the principle of degressive proportionality,¹⁵ makes it difficult to perceive the European Parliament as representing European citizenry.¹⁶ Furthermore, once the European Parliament is elected, the current appointment and accountability procedures towards the other institutions and, first of all *vis-à-vis* the Commission, fail to let people understand how their representatives in the Parliament can affect the political directions, the agenda

¹² See A. KREPPPEL, *The Environmental Determinants of Legislative Structure: A Comparison of the US House of Representatives and the European Parliament*, in T.J. POWER, N.C. RAE (eds), *Exporting Congress? The Influence of U.S. Congress on World Legislatures*, Pittsburgh: University of Pittsburgh Press, 2006, p. 137 *et seq.*; S. FABBRINI, *Between Power and Influence: the European Parliament in a dual Constitutional Regime*, in *Journal of European Integration*, 2019, p. 417 *et seq.*, especially in relation to the US Congress.

¹³ See Council Decision (EC, Euratom) 2002/772 of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision (ECSC, EEC, Euratom) 76/787 of 21 October 2002, and Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage.

¹⁴ On this point, see Court of Justice, judgment of 19 December 2019, case C-502/19, *Junqueras*.

¹⁵ Particularly criticised, as is well known, by the German Federal Constitutional Court in the Lisbon Treaty ruling (judgment of 30 June 2009, 2 BvE 2/08) and in the judgments of 9 November 2011, 2 BvC 4/10, and of 26 February 2014, 2 BvE 2/13 *et al.*, 2 BvR 2220/13 *et al.*, on the national electoral threshold for the European elections. The most evident distortions of the principle of degressive proportionality have recently been corrected, with a revised distribution of seats amongst Member States, "taking advantage" of 46 of the 73 UK seats that have just been vacated after Brexit. While some seats have been redistributed (46), the remaining 27 seats have remained on hold, waiting for future EU enlargements rather than been assigned to a transnational constituency or to transnational lists, for example. See M. BARTL, *Hayek Upside-Down: On the Democratic Effects of Transnational Lists*, in *German Law Journal*, 2020, p. 57.

¹⁶ And this goes well beyond the so-called "no demos" thesis, which seems to have lost sight in the current debate in favour of a more sophisticated account of the EU democratic polity as a "demoicracy". See K. NICOLAÏDIS, *The Idea of European Demoicracy*, in J. DICKSON, P. ELEFThERiADIS (eds), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012, p. 247 *et seq.*, and R. BELLAMY, *A Republican Europe of States. Cosmopolitanism, Intergovernmentalism and Democracy in the EU*, Cambridge: Cambridge University Press, 2019, especially pp. 95-208.

and the priorities of the Union.¹⁷ The European Parliament typically works by building large majorities, based on changing coalitions of political groups, which often do not mirror the majority formed at the time of the vote of investiture of the Commission.¹⁸ The traditional accounts and alternatives developed within Nation States when it comes to forms of democratic government – parliamentary, presidential and semi-presidential, each of them entailing specific accountability mechanisms – are not satisfactory when referred to the Union. By the same token, the critical assessment of the European Parliament's role in the Union neglects the extraordinary powers which this democratic assembly holds in a comparative perspective. No other parliaments in the Union today can compete with the legislative and budgetary powers of the European Parliament,¹⁹ which has been described as one of the most powerful parliaments in the world.²⁰

Does this mean that there is no democratic problem in the Union and that citizens' criticism of EU institutions and the European Parliament especially is only due to a lack of understanding and awareness about the EU institutional set up? In part, as the European Parliament and the European Commission's communication strategies indicate, there is a communication problem on what the EU delivers and how it does so.²¹ In part, as happens in many national democracies, the EU is unable to mobilise citizen participation within and beyond the elections, for example through mechanisms of bottom-up civic engagement.²²

¹⁷ Tasks that Art. 15, para. 1, TEU appears to assign to the European Council, in the first place, on which the European Parliament has very loose tools of control. See W. WESSELS, O. ROZENBERG, *Democratic Control in the Member States of the European Council and the Eurozone Summits*, Study for the European Parliament, Directorate General for Internal Policies, PE 474.392, 2013, and D. DINAN, *Relations Between the European Council and the European Parliament. Institutional and Political Dynamics*, European Parliamentary Research Service, European Council Oversight Unit of the European Parliament, PE 630.288, 2018. On the problem of electoral accountability in the EU see J. NAVARRO, *Electoral Accountability in the European Union: An Analysis of the European Parliament Elections with Respect to the EU's Political Deficit*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 209 *et seq.*

¹⁸ See R. CORBETT, F. JACOBS, R. NEVILLE, *The European Parliament*, London: John Harper Publishing, 2016, pp. 11-12 and 237.

¹⁹ Even though it is certainly true that the amount of resources that the EP can mobilise through the EU budget are really limited (a little bit more than 1 per cent of the GNI) and is not able, with very limited exceptions, to intervene on the revenues. See C. FASONE, N. LUPO, *The Union Budget and the Budgetary Procedure*, in R. SCHÜTZE, T. TRIDIMAS (eds), *Oxford Principles of European Union Law*, cit., p. 809 *et seq.*

²⁰ S. HIX, A.G. NOURY, G. ROLAND, *Democratic Politics in the European Parliament*, Cambridge: Cambridge University Press, 2007, p. 3.

²¹ See the recent application, devised before the 2019 European Parliament's elections, *What Europe does for me*, <https://what-europe-does-for-me.eu/en/home>.

²² A. ALEMANN, *Europe's Democracy Challenge. Citizen Participation in and Beyond Elections*, in *German Law Journal*, 2020, p. 35 *et seq.* Petitions, European citizens' initiatives and the Commission's public consultation can be deemed to tackle this problem effectively.

II. THE COMPETENCE PROBLEM IN THE UNION

However, the discontent towards the EU may also be significantly affected by the confusion that the process of European integration has triggered, with the responsibility of both the Member States and the EU itself, between the *loci* of authority, where the power is held and exercised, and those ensuring the democratic control of the decision-making processes – and hence, their democratic legitimacy – preferably through institutions that are directly elected. What at first sight is a very straightforward principle, the principle of conferral,²³ the bulwark for the articulation of the relationships between the Union and the States, faces several problems in its implementation.

First of all, except for the fields of exclusive competence (Art. 3 TFEU), in all the other fields – albeit to a different extent depending on whether the competence is shared (Art. 4 TFEU), where pre-emption occurs,²⁴ or, instead, the EU is deemed to support, complement or supplement national actions (Art. 6 TFEU) – the divide amongst the share of power between the States and the Union is somewhat blurred.²⁵ Where the authority actually lies depends on other principles, in particular subsidiarity and proportionality (Arts 5, paras 3, and 4 TEU), that have been amongst the most contested in the EU.²⁶ Suffice it to say that especially to tame the (too) creative and political interpreta-

²³ Like happens in most federations: see K. LENAERTS, *Constitutionalism and the Many Faces of Federalism*, in *American Journal of Comparative Law*, 1990, p. 205 et seq.; R. SCHÜTZE, *From Dual to Cooperative Federalism. The Changing Structure of EU Law*, Oxford: Oxford University Press, 2009, p. 76 et seq.; D. HALBERSTAM, *Federalism: Theory, Policy, Law*, in M. ROSENFELD, A. SÀJÒ (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, especially pp. 589-602. According to Art. 5, para. 2, TEU: “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. On the competences of the EU and the principle of conferral, see A. VON BOGDANDY, J. BAST, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, in *Common Market Law Review*, 2002, p. 227 et seq.; L. AZOULAI, *Introduction. The Question of Competence*, in L. AZOULAI (ed.), *The Question of Competence in the European Union*, Oxford: Oxford University Press, 2014, p. 1 et seq.; T. KOSTADINIDES, *The competences of the Union*, cit., p. 191 et seq.

²⁴ See A. ARENA, *The Doctrine of Union Preemption in the EU Internal Market: Between Sein and Sollen*, in *Columbia Journal of European Law*, 2010, p. 477 et seq. See, however, the “parallel” competences laid down in Art. 4, paras 3 and 4, TFEU, where no pre-emption takes place.

²⁵ Up to the point of questioning whether, after all, exclusive Member States’ competences still exist: see B. DE WITTE, *Exclusive Member State Competences-Is There Such a Thing?*, in S. GARBEN, I. GOVAERE (eds), *The Division of Competences between the EU and the Member States. Reflections of the Past, Present and Future*, Oxford: Hart Publishing, 2017, p. 59 et seq. By contrast, in some fields of exclusive competence, for example monetary policy, the authority of national institutions, like the national central banks through the ESCB, is still crucial for the monetary governance of the Eurozone.

²⁶ On the principle of proportionality, see G. DE BÚRCA, *The Principle of Proportionality and its Application in EC Law*, in *Yearbook of European Law*, 1993, p. 105 et seq.; T.-I. HARBO, *The Function of the Proportionality Principle in EU Law*, in *European Law Journal*, 2010, p. 158 et seq.; T. TRIDIMAS, *The Principle of Proportionality*, in *Oxford Principles of EU Law*, cit., p. 243 et seq. On the principle of subsidiarity, see G. DE BÚRCA, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, in *Journal of Common Market*

tions of the subsidiarity principle provided by national parliaments – now involved in its *ex ante* monitoring (Art. 12 TEU and Protocol no. 2)²⁷ – the Juncker Commission established a “task force” on “Subsidiarity, Proportionality and ‘Doing Less More Efficiently’”, chaired by First Vice President Frans Timmermans, precisely to investigate how to deal with them properly and whose conclusions, except for limited innovations, have largely confirmed the problematic management of those principles.²⁸

In addition to this, the exercise of powers at supranational level does not normally go in favour of the European Parliament, and sometimes not even of the Council or of the Commission. The number of legislative acts approved through the ordinary legislative procedure per year is just a minimal proportion compared to the other legislative acts and, most importantly, to non-legislative acts.²⁹ This comes in addition to the regulatory or quasi-rule-making powers which the many EU agencies are equipped with, with more or less effective control by the Commission.³⁰

Given the inevitable complexity of EU policy-making procedures – their preeminent technical nature and multilingualism do not help either – it is difficult to hold the decision-maker(s) accountable in a transparent and public manner. The ordinary European citizen may face troubles in understanding who has the power to do what in the Union. In the European context decision-making procedures take place partly at supranational level and partly at domestic level, particularly for the implementation of EU law; with the involvement, next to truly supranational institutions, like the Parliament and the Commission, of national governments represented in EU institutions and of national officials sitting in the many committees the European Commission hosts.³¹ There is no

Studies, 1998, p. 217 *et seq.*; G. DAVIES, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, in *Common Market Law Review*, 2006, p. 63 *et seq.*; R. SCHÜTZE, *Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?*, in *Cambridge Law Journal*, 2009, p. 525 *et seq.*

²⁷ K. GRANAT, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, Oxford: Hart, 2017, *passim*.

²⁸ The main results of the task force's work have been, as highlighted in the final report, the predisposition of a model grid for subsidiarity and proportionality to be used as common reference for all EU institutions and for national parliaments and the notion of “EU added value” to be proved by the Commission when putting forward a new legislative proposal.

²⁹ In 2019, for example, 75 basic legislative acts were adopted through the ordinary legislative procedure (plus 51 amending acts), 320 basic legislative acts were adopted through special legislative procedures as Council acts (75 amending acts), there were 60 basic delegated acts (65 amending acts), 513 basic implementing acts (359 amending ones) and 405 other acts, most of which were the Commission's decisions. Source: Legal Acts – Statistics, EUR-Lex, eur-lex.europa.eu.

³⁰ M. BUSUIOC, *European Agencies: Law and Practices of Accountability*, Oxford: Oxford University Press, 2010, p. 75 *et seq.*; M. SIMONCINI, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Oxford: Hart Publishing, 2018, ch. 2.

³¹ On comitology, C.F. BERGSTRÖM, *Comitology: Delegation of Powers in the European Union and the Committee System*, Oxford: Oxford University Press, 2005, pp. 186-284; M. SAVINO, *The role of Committees in the EU Institutional Balance: Deliberative or Procedural Supranationalism?*, in T. CHRISTIANSEN, J.M. OETTEL, B.

direct accountability chain between the European Parliament and such institutions and bodies, notwithstanding the Parliament's attempt to expand its scrutiny and oversight powers.³² By the same token, also for national parliaments, despite what was codified in Art. 10 TEU, overall there is still limited access and disclosure by their own government of information regarding the activity of the Council, of the European Council and the other intergovernmental fora.³³ Likewise, for national parliaments, it is anything but easy to control the activity of the EU institutions. Traditionally, accountability tools are designed to work within the same level of government, not across them. Until now, the attempts of both the European Commission and the European Central Bank in the framework of the European Semester and of Banking Union, respectively, to create channels of direct interaction with national parliaments – thus enriching the accountability mechanisms also in favour of the domestic level of government³⁴ – have not paved the way to an enhanced democratic and streamlined control of EU executive action.³⁵

VACCARI (eds), *21st Century Comitology. Implementing Committees in the Enlarged European Union*, Maastricht: European Institute of Public Administration, 2009, p. 19 *et seq.*

³² The European Parliament has drawn, in particular, on Arts 14 and 15, para. 6, TEU, Arts 230 and 235, para. 2, TFEU, on the inter-institutional agreement on better law-making, and on its rules of procedure (Arts 37 and 118a on annual and multiannual programming; Arts 128, 129, 130 and 210 on parliamentary questions; and Art. 123 on the statements of the Council and the European Council's members in front of the Parliament). Additionally, the Court of Justice has also contributed to this trend, starting from its landmark judgment in: Court of Justice, judgment of 29 October 1980, case C-138/79, *SA Roquette Frères v Council*.

³³ O. ROZENBERG, W. WESSELS, *Democratic Control in the Member States of the European Council and the Euro zone summits*, cit., p. 14 *et seq.*; D. CURTIN, *Challenging Executive Dominance in European Democracy*, in *Modern Law Review*, 2014, p. 1 *et seq.*

³⁴ See the economic dialogue (e.g. Art. 14 of Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, and Art. 15 of Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area) and the banking dialogue (Arts 20 and 21 of the Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, and Art. 45 of Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010). In addition to these “dialogues” which happened to be established in fields where national interests and national law are still dominant, the European Commission directly interacts with national parliaments in the framework of the early warning mechanism and of the political dialogue (Protocols no. 2 and no. 1 annexed to the Treaty of Lisbon).

³⁵ On the economic dialogue, see B. CRUM, D. CURTIN, *The Challenge of Making the European Union Executive Power Accountable*, in S. PIATTONI (ed.), *The European Union. Democratic Principles and Institutional Architectures in Times of Crisis*, Oxford: Oxford University Press, 2015, p. 63 *et seq.*; on the banking dialogue, see D. FROMAGE, R. IBRIDO, *The ‘Banking Dialogue’ as a Model to Improve Parliamentary Involvement in the Monetary Dialogue?*, in *Journal of European Integration*, 2018, p. 295 *et seq.*

Moreover, the problem of the disconnection between the place of authority and the nature of the democratic control that the exercise of EU (conferred) powers entails is further worsened by the asymmetries featuring the degree of integration reached by Member States in a certain policy area or on a single issue. Europe *à la carte* and differentiated integration that tend to materialise through opt-ins and opt-outs, forms of enhanced and structured cooperation (though marginally used so far), agreements amongst some Member States only, not to mention the divide between Eurozone and non-Eurozone, and *de facto* asymmetries (e.g. Northern vs. Southern countries, countries of first arrival vs. countries of final destination, Western vs. Eastern countries, etc.) complicate the disconnection(s) between national and EU decision-makers and the citizens.

The confusion with the powers and limits of the EU is also translated into the academic debate. For one, politics as emerging from democratic discretionary choices is excessively constrained at EU level. The “over-constitutionalisation” of EU primary law thesis argues that the Treaties abound in procedural and substantive details unlike most domestic Constitutions, thus frustrating the possibility for EU institutions to engage with truly autonomous political decisions.³⁶

For others, instead, the level of autonomy which EU law has reached – the “unconfined power of EU law” – is able to generate a permanent contestation by national authorities and civil society against the EU that, although potentially positive as long as democratic, can easily be turned into a destructive conflict.³⁷

Both visions, though apparently in contrast, highlight the limits of the EU’s political authority and the quest for enhanced democratic legitimacy. The perception of a technocratic domination of the EU, with the many constraints and hurdles posed to democratic scrutiny, both at national and at supranational level, in fact hides the existence of very sophisticated and articulated instances of democratic control of the EU decision-making process within the European Parliament, in national parliaments and through interparliamentary cooperation. All of this fails to provide a coherent system of democratic accountability. Remarkably, in contrast to the “democratic deficit” thesis, some authors argue that the EU is actually affected by a “democratic surplus”.³⁸ At the same time the idea that the EU has gone too far in “overstretching” its powers without national polities having a say, beyond the occasion of Treaty revisions, has fed the rhetoric of a “re-nationalisation” of EU powers

³⁶ See D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, p. 460 *et seq.* To some extent this idea also echoes Schmidt’s view of the Union as based on “policies without politics” (V.A. SCHMIDT, *Democracy in Europe: The EU and National Politics*, Oxford: Oxford University Press, 2006, p. 156) and the idea of the EU legislature as constrained by the Court of Justice’s case law, on which see G. DAVIES, *The European Union Legislature as an Agent of the European Court of Justice*, in *Journal of Common Market Studies*, 2016, p. 846 *et seq.*

³⁷ See D. CHALMERS, *The Unconfined Power of European Union Law*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 405 *et seq.*

³⁸ See A. PSYGKAS, *From the “Democratic Deficit” to a “Democratic Surplus”: Constructing Administrative Democracy in Europe*, Oxford: Oxford University Press, 2017, p. 1 *et seq.*

– taking back control! – as the Brexit saga confirms, and as a controversial and dangerous use of the “national constitutional identity” discourse seems to prove.³⁹

III. Where do citizens stand in such a complex relationship between the EU and its Member States? The many crises the EU has experienced over the last few years – the financial, eurozone, migration, the rule of law and the Coronavirus crises⁴⁰ – have further jeopardised the problem of the disconnection between authority and democratic legitimacy in the Union. This has been exacerbated by the Union’s inability to deliver. For this not only the EU is to blame: Member States bear significant responsibilities as well. For example, national governments have been unwilling to confer further powers to the EU so as to complete the Economic and Monetary Union (EMU), or to create effective solidarity mechanisms across Member States to tackle migration. *A fortiori* the responsibility for rule of law backsliding and democratic decay affecting several Member States lies primarily at national level,⁴¹ even though it has been convincingly argued that a (too) quick accession to the EU without sufficient scrutiny of the respect of these fundamental principles has not helped the situation.⁴²

³⁹ See the case of the Hungarian Constitutional Court, judgment of 5 December 2016, no. 22, on the European Council Decision 2015/1601/EU of 22 September 2015 on the relocation of immigrants and the quota system, on which see, critically, G. HALMAI, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law*, in *Review of Central and East European Law*, 2018, p. 23 *et seq.* A number of Constitutional and Supreme Courts today have drawn on Art. 4, para. 2, TEU, which refers to “national identity” to elaborate their own version of the “constitutional identity review” towards EU law; a tool which has been normally used to signal the existence of national supreme constitutional principles to be protected, in a joint cooperative enterprise with the EU institutions and the Court of Justice in particular. In some instances, like the one just mentioned, however, the “constitutional identity” has been used as a confrontational tool, thus leading some scholars to question the constitutional identity review in its entirety. See for instance R.D. KELEMEN, L. PECH, *Why Autocrats Love Constitutional Identity and Constitutional Pluralism: Lessons from Hungary and Poland*, in *RECONNECT Working Paper*, no. 2, September 2018, *passim*; F. FABBRINI, A. SAJÒ, *The Dangers of Constitutional Identity*, in *European Law Journal*, 2019, p. 457 *et seq.*; G. DI FEDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, in *European Public Law*, 2019, p. 347 *et seq.*

⁴⁰ On the problematic management of the Eurozone crisis, see C. PINELLI, *The Dichotomy Between “Input Legitimacy” and “Output Legitimacy” in the Light of the EU Institutional Developments*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 225 *et seq.*

⁴¹ See A. SANDULLI, *The Double Face of the Rule of Law in the European Legal Order: An Administrative Law Perspective*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 237 *et seq.* See also T.T. KONCEWICZ, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, in *Review of Central and East European Law*, 2018, p. 116 *et seq.*, and W. SADURSKI, *Poland’s Constitutional Breakdown*, Oxford: Oxford University Press, 2019, p. 58 *et seq.*

⁴² See J. WOUTERS, *Revisiting Art. 2 TEU: A True Union of Values?*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 255 *et seq.* See also D. KOCHENOV, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law*, Den Haag: Kluwer Law International, 2008, *passim*.

Yet for a long time the EU has probably been slow and ineffective in its reaction to the rule of law crisis,⁴³ only recently trying to propose a more comprehensive and coordinated toolkit of measures to face rule of law problems.⁴⁴ The active and consistent stance of the Court of Justice in its latest decisions has also supported a shift in the approach,⁴⁵ with a view to promote “integration through the rule of law”.⁴⁶

In light of these developments, citizens have remained mainly spectators of this drama, with fundamental rights seriously in danger in those Member States, like Hungary and Poland, that have been affected most by rule of law backsliding: political capture of courts, free media under attack, academic institutions forced to relocate elsewhere and even the right to have free and democratic elections have been put into question.⁴⁷ Although the national governments in question have been established through democratic elections, as they gradually dismantled the institutions from within a (formal) constitutional state,⁴⁸ the basic tenets of liberal constitutionalism have gone. This is happening while the level of trust of citizens towards national and EU institutions has gradually declined.⁴⁹

⁴³ See L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 3 *et seq.*

⁴⁴ See the Communication COM(2019) 163 final of 3 April 2019 from the Commission to European Parliament, the European Council and the Council on Further strengthening the Rule of Law within the Union. State of play and possible next steps, and Communication COM(2019) 343 final of 17 July 2019 from the Commission to European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Strengthening the rule of Law within the Union. A Blueprint for Action, and the critical remarks by D. KOCHENOV, *Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law*, in *Hague Journal on the Rule of Law*, 2019, p. 423 *et seq.*

⁴⁵ See Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*; judgment of 25 July 2018, case C-216/18 PPU, LM; order of 17 December 2018 and judgment of 24 June 2019, case C-619/18, *Commission v. Poland*; judgment of 5 November 2019, case C-192/18, *Commission v. Poland*; judgement of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, A.K. v. *Krajowa Rada Sądownictwa*, and *CP and DO v. Sąd Najwyższy*; all of them emphasising the link between effective judicial protection under Art. 19 TEU and Art. 47 of the Charter of fundamental rights of the EU (Charter) and the principle of judicial independence.

⁴⁶ K. LENAERTS, *New Horizons for the Rule of Law Within the EU*, in *German Law Journal*, 2020, p. 29.

⁴⁷ See Venice Commission, Draft Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Opinion no. 720/2013 of 29 May 2012, CDL(2012)023, Strasbourg; Venice Commission-OSCE/ODIHR, Draft joint opinion on the Act on the elections of Members of Parliament of Hungary, Opinion no. 662/2012 of 1 June 2012, CDL(2012)033, Strasbourg, and B. MAJTÉNYI, A. NAGY, P. KÁLLAI, “Only Fidesz” – *Minority Electoral Law in Hungary*, in *Verfassungsblog*, 31 March 2018, verfassungsblog.de.

⁴⁸ This is a point that many scholars highlight, in comparison to the traditional practice of authoritarian *coups d'état*: see A. HUQ, T. GINSBURG, *How to Lose a Constitutional Democracy*, in *UCLA Law Review*, 2018, p. 78 *et seq.*; D. ZIBLATT, S. LEVITSKY, *How Democracies Die. What History Reveals About Our Future*, London: Viking, 2018, *passim*; M.A. GRABER, *What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy*, in M.A. GRABER, S. LEVINSON, M. TUSHNET (eds), *Constitutional Democracy in Crisis*, Oxford: Oxford University Press, 2018, p. 665 *et seq.*

⁴⁹ See the European Council Bratislava Declaration and Roadmap adopted on 16 September 2016 in the framework of the Bratislava Summit of 27 Member States, and the Report by L. VAN DEN BRANDE, Spe-

It can thus be asked whether the EU is apt to restore trust with European citizens and rescue national constitutional democracies like it did, at the start of the integration process, with States in the aftermath of the Second World War.⁵⁰ The RECONNECT Horizon 2020 Project on “Reconciling Europe with its Citizens through Democracy and Rule of Law”, in the framework of which this *Special Section* is published, contends that the EU can regain legitimacy if it takes citizens’ aspirations and preferences duly into account. Art. 2 TEU raises high expectations on what the EU can deliver,⁵¹ also in relation to countries that seem to have lost confidence in rule of law and democratic principles. Human dignity, freedom, democracy, equality, the rule of law and protection of minorities are values upon which the EU is founded and are common to the Member States, according to Art. 2 TEU. Moreover, these values are deemed to be implemented in societies in which “pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. In particular, the RECONNECT project emphasises the importance of preserving and promoting justice and solidarity in all areas of the Union’s action as a way to restore citizens’ credibility in the EU institutions. The results of the 2019 European elections, with the defeat and normalisation-institutionalisation of the Eurosceptic front, are to some extent a further confirmation of this.⁵²

Through a comprehensive examination of principles, practices, and perceptions of democracy and the rule of law in the EU carried out by a consortium of 18 academic partner institutions led by KU Leuven, RECONNECT aims to detect how democratic and rule of law principles and practices of national and EU institutions resonate with the actual aspirations, perceptions and preferences of citizens so as to build up a new narrative for Europe reconnecting the Union to its citizens.

The *Articles* of this *Special Section* were first presented at the RECONNECT workshop held on 1 February 2019 at LUISS Guido Carli on “Reconceptualizing Authority and Legitimacy in the EU: New Architectures and Procedures to Reconnect the Union with its Citizens”, organised in the framework of Work Package 4 of RECONNECT, looking at concepts like democracy and rule of law, legitimacy and authority in relation to solidarity and justice, and to sovereignty. Since then the papers have been revised and re-worked to provide a more consistent account for the authority and legitimacy challenges which the EU faces.

cial Adviser to the President of the European Commission, Jean-Claude Juncker, on *Reaching Out to EU Citizens: A New Opportunity. “About us, with us, for us”*, October 2017, ec.europa.eu.

⁵⁰ See A. MILWARD, *The European Rescue of the Nation-State*, 2000, London: Routledge, p. 21 *et seq.* A Recent Standard Eurobarometer Survey, after the 2019 European elections, however, shows an improvement in the perception of the EU by the European citizens, including a record high support for the euro: Standard Eurobarometer 91, August 2019.

⁵¹ See J. WOUTERS, *Revisiting Art. 2 TEU*, cit., and A. VON BOGDANDY, L.D. SPIEKER, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, in *European Constitutional Law Review*, 2019, p. 391 *et seq.*

⁵² See Editorial, *The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?*, in *European Papers*, Vol. 4, 2019, No 1, www.europeanpapers.eu, p. 3 *et seq.*

IV. SCOPE AND CONTENTS

As highlighted above, one of the main problems the Union has to cope with is the difficulty in properly articulating the relationship between authority and democratic legitimacy. This leads to the perception of EU institutions as not only distant, but also detached from the needs of ordinary citizens. In the EU the source of authority is dislocated out of the traditional forms of democratic accountability, which have been shaped domestically by centuries of constitutional history. In addition to this, the “punctiform” nature of many EU decision-making processes, starting at one level of government – regional, national or supranational – and ending up being concluded at a different level, favours this feeling of disorientation amongst European citizens. The attitude of several national governments, which tend to blame the EU for their own failures, exacerbates this problem.

The aim of this *Special Section* is to tackle the problem of the disconnection between the allocation of powers between the EU and its Member States and the forms of democratic control over the exercise of authority in the Union. In order to highlight the evolution of this problem, it is investigated at different moments in time of the European integration process, from its foundation to the crises that occurred during the last decade. Indeed, it seems that the more the EU authority expands, the more the democratic legitimacy of the Union is in trouble. Each contribution looks at the problem of the disconnection that has been highlighted from a specific perspective: the design by the Union’s “founding fathers” of mechanisms of democratic accountability of the Commission; the effectiveness of the electoral accountability of the European Parliament; the democratic legitimacy problems caused by the Eurozone crisis and leading to the tension between technocratic dominance and populism; the asymmetry between administrative and constitutional developments of the EU and the limits of the role of law in the Union; and the ability of the EU to effectively control the respect of the fundamental values on which the entire European construction is built. Every article refers to a critical juncture of European integration:⁵³ the passage from the Treaty of Paris to the Treaty of Rome; the making of an elected supranational Parliament after 1979; the crisis triggered by the rejection of the Constitutional Treaty; the Eurozone crisis; and the rule of law crisis or, more fundamentally, the erosion of the values enshrined in Art. 2 TEU.

All the Authors highlight, from their own perspective of analysis, how one of the controversial points for the legitimacy of the EU is precisely the mismatch between the authority exercised by the European institutions and by the Member States, the reach and the limits of such authority and the mechanisms of democratic accountability. The interdisciplinary nature of the RECONNECT project is demonstrated by the multidisciplinary background of the authors of this *Special Section*, ranging from law, political science and history.

⁵³ G. CAPOCCIA, R.D. KELEMEN, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, in *World Politics*, 2007, p. 341 *et seq.*

Lise Rye's *Article on The Legitimacy of the EU in Historical Perspective: History of a Never-ending Quest* opens the *Special Section* by focusing on the foundational decade of the European integration process. It critically assesses the idea of legitimacy as "legality" stemming from the Treaty of Paris and from the Treaty of Rome, considering the Member States' decision to create a common market as the justification for the setting up of supranational institutions and for the empowerment of the European Commission. The *Article* argues that while the mechanisms for ensuring democratic legitimacy were weak in the Treaty of Rome, and the democratic relationship between citizens and Community institutions was not a central concern back then, the Treaty provided for basic accountability mechanisms, for example of the Commission *vis-à-vis* the then Parliamentary Assembly, that would acquire more visibility and strength in the decades to come.

Julien Navarro's *Article on Electoral Accountability in the European Union: An Analysis of the European Parliament Elections with Respect to the EU's Political Deficit* examines accountability in the EU by looking at European elections. The *Article* discusses and challenges the idea that the Union suffers from a democratic deficit. The author advances that it is rather a political deficit that affects the EU and its disconnection from the citizens, linked to a problem of electoral accountability. The European Parliament elections are of special interest as they provide – at least in theory – the most direct channel for institutional accountability as well as the necessary incentives for political actors to act responsively. However, the declining turnout in European elections and the lack of knowledge about the EU on the part of voters reveal flaws in the performance of the accountability mechanisms at EU level. Such deficiencies depend, in part, on the internal procedures of the Parliament and on the design and the practice of the European Parliament's elections, which to a large extent are still reliant on national electoral rules and electoral campaigns.

Cesare Pinelli's *Article on The Dichotomy Between "Input Legitimacy" and "Output Legitimacy" in the Light of the EU Institutional Developments* leads us to the complex legitimacy problem that arose in the aftermath of the Eurozone's sovereign debt crisis. This crisis has triggered a "twin legitimacy deficit", with output legitimacy undermined, in terms of the EU's capacity to react through European-wide redistributive policies, and the input legitimacy of national representative institutions severely limited under the strict conditionality put in place by the new governance system and by the "command-and-control relationship" imposed. According to the author, the case-law of the Court of Justice, in cases like *Pringle* and *Gauweiler*, has revealed the same paradox. On the one hand, we have witnessed the imposition by an "unaccountable technocracy" (or the self-imposition by Member States) of a series of automatisms that limit the autonomy of national governments. On the other hand, the "command-and-control" style of intervention is also meant to impose a structural convergence amongst very different national economies and can be considered as illegitimate. Technocratic and intergovernmental dominance has further worsened the disconnection between the EU and its citizens also from the input legitimacy perspective, favouring a sort of populist backlash against the Union.

Aldo Sandulli's *Article on The Double Face of the Rule of Law in the European Legal Order: An Administrative Law Perspective* turns our attention to the role of law in the Union and its understanding and objectives, in order to explain the disconnection between European citizens and EU institutions. Three main asymmetries of the EU legal system are detected in comparison to the evolution of modern States. The first derives from a predominantly legalistic approach in the development of the Union, with the law being in an imbalanced relationship with other social sciences like economics and sociology. The second asymmetry, linked to the former, depends on the EU process of "juridification" of economic rules, with a specific ordoliberal approach entrenched in EU primary and secondary law and with narrow avenues for national economies to deviate from EU legal "orthodoxy". The third asymmetry arises from the contrast between the growing body of EU administrative law *vis-à-vis* the very limited development of constitutional law in the European legal system, whereby constitutional law refers to the (lack of the) ability of the EU to constitute power and to mobilise resources on its own. This asymmetry is the most problematic from a democratic perspective, as the development of constitutional law, at least at national level, is expected to prepare the ground for the advancement of administrative law, and not the other way around. The *Article* concludes by arguing that the attempt to reconnect European citizens and EU institutions needs to start from a conception of the law that is non-infrastructural nor instrumental to serve a specific economic project and from a more appropriate consistent balance between administrative and constitutional law.

Finally, Jan Wouters' *Revisiting Art. 2 of the TEU: A Union of Values?* offers a critical assessment of this Treaty provision, from its genesis to its implementation so far. The *Article* examines the enforcement of the EU's foundational values both in the accession stage and during the membership of the Union. The author highlights two main weaknesses related to Art. 2 TEU with regard to the main discourse that this *Special Section* seeks to advance. First, there is an asymmetry between the nature of Art. 2 TEU's values, which are foundational of the whole EU architecture, and the limited reach of EU action for their enforcement. Second, the EU and the Commission in particular, have followed quite a legalistic-technocratic assessment of the compliance with the rule of law principles rather than endorsing a broader and far-reaching view on Art. 2 TEU application that could combine all the values together. Under such broader view, other values like democracy, justice and solidarity could be given the same rank and strength as the rule of law, at the time of the accession process and once membership is acquired. This would probably help the Union to connect more strongly with the citizens of the acceding countries and to reconnect with those of the Member States, even though there are limits for the EU alone to deliver without the active cooperation of the Member States.



ARTICLES

RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

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THE LEGITIMACY OF THE EU IN HISTORICAL PERSPECTIVE: HISTORY OF A NEVER-ENDING QUEST

LISE RYE*

TABLE OF CONTENTS: I. Introduction. – II. The Treaty of Paris and the introduction of supranationality. – III. The idea of legitimacy as legality in the Treaty of Rome. – IV. Mechanisms for legitimacy through democratic rule in the Treaty of Rome. – V. Concluding remarks.

ABSTRACT: This *Article* revisits the EU's foundational decade with the view to explain the idea of legitimacy as legality that made its mark on the Treaties of Paris (1951) and Rome (1957). To the architects of these Treaties, it was the Member States' decision to create a common market that justified the creation of supranational institutions in general and the powers of the European Commission in particular. While the mechanisms for legitimacy through democratic rule in the Treaty of Rome were weak, this Treaty nevertheless included the seeds for such rule, leading to the conclusion that the legacy of the Treaty of Rome in this matter is mixed.

KEYWORDS: common market – elitism – technocracy – legitimacy – Spaak – democratic rule.

I. INTRODUCTION

The period of permissive consensus is generally and across academic disciplines interpreted as a period where legitimacy, in a European context, was a non-issue.¹ This period thus contrasts sharply with the post-Maastricht period, where concerns about the

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¹ F. LANGDAL, G. VON SYDOW, *Democracy, Legitimacy and Constitutionalism*, in *Scandinavian Studies in Law*, 2007, p. 351 *et seq.*

legitimacy of European integration became widespread.² Existing research explains the absence of politicization of European level politics in the period between the French National Assembly's 1954 rejection of the Treaty establishing the European Defense Community (EDC) and the 1991 Treaty on European Union with this period's focus on market integration. "The implications for most people (except perhaps for farmers) were limited or not transparent", Hooghe and Marks point out, in a highly cited article from 2009. Consequently, "Public opinion was quiescent".³ This *Article* shifts the focus from the general public to the political and administrative *élites* that prepared and negotiated the 1951 Treaty of Paris and the 1957 Treaty on the European Economic Community (henceforth the Treaty of Rome). The *Article's* point of departure is that ideas of legitimacy did inform the work leading up to the founding Treaties and that an idea of legitimacy as legality dominated this work. Drawing on the existing canon of historical literature and primary sources from the Historical Archives of the European Union, the purpose of the *Article* is to explain how the idea of legitimacy as legality developed and manifested itself in the institutional architectures and in the 1957 decision to authorize the Commission to negotiate trade deals with third countries.⁴

The following section discusses the introduction of supranationality in the Treaty of Paris, which from a perspective of popular participation set the European integration project off on the wrong foot. Turning to the Treaty of Rome, the third and fourth sections examine the work in the Intergovernmental Committee and the Intergovernmental Conference respectively. Historians have generally not been too preoccupied with the emergence of European-level institutions, leading to a situation where historical research has relied heavily on *memoirs*.⁵ Anne Borger-de Smedt's 2012 article into the basis for European law in the Treaties of the 1950s is a welcome exception to this trend. Borger-de Smedt investigates why the Treaties of Paris and Rome offered "sufficient legal basis for the European Court of Justice (ECJ) to build its constitutional interpretation", when they were "apparently designed to ensure the centrality of the Member-States."⁶ This *Article* concentrates on the role of the European Commission. Section three asks how the Treaty of Rome came to include this common institution with pow-

² A. FØLLESDAL, *Legitimacy Theories of the European Union*, in *ARENA Working Papers*, 2004, available at www.sv.uio.no.

³ L. HOOGHE, G. MARKS, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, in *British Journal of Political Science*, 2008, p. 5.

⁴ The archives consulted for this *Article* is the CM3/NEGO-fonds held by the Historical Archives of the European Union (HAEU). The CM3/NEGO fonds consist of 418 files, covering the period from the 1955 relaunch of European integration to the 1957 Treaties of Rome. I am thankful to my colleague at Copenhagen University, Morten Rasmussen, who generously lent me a digitalized version of these fonds.

⁵ K. SEIDEL, *The Process of Politics in Europe: The Rise of European Elites and Supranational Institutions*, London, New York: I.B. Tauris Publishers, pp. 2-3.

⁶ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome*, in *Contemporary European History*, 2012, p. 340.

ers of its own. The argument presented is that Paul-Henri Spaak's role in this matter was key. In making sure that all proposals could be traced back to the decisions of the participating governments, Spaak managed to keep the sovereignty conscious governments on board. Spaak also formulated the principles that informed the work in the Intergovernmental Committee, and that eventually led this Committee to propose four distinct institutions. Section four examines the negotiating parties' decision to grant the Commission the authority to negotiate trade deals with third countries, explaining how this was considered a necessary consequence of the move from sectoral to general integration. In both cases that the *Article* examines, the States' decision to create a common market justified the creation of supranational institutions, in general, and powers of the European Commission, in particular. In combination with the deliberate exclusion of mechanisms for legitimacy through democratic rule, this set the scene for the backlash that manifested itself against the EU legitimacy deficit from the 1990s onwards.

II. THE TREATY OF PARIS AND THE INTRODUCTION OF SUPRANATIONALITY

Historical research interprets the formulation of the 1951 Treaty of Paris as a tug-of-war between the advocates of a strong and independent High Authority and the champions of democratic control.⁷ In her fine empirical study of the basis for European law, Anne Borger-de Smedt demonstrates how this tug-of-war eventually ended in a pragmatic compromise.⁸ This compromise also constituted a first and important step in the establishment of an elitist culture where experts exerted significant power and where the mechanisms for popular participation and control were weak. In that sense, the Treaty represented a victory for the functionalist approach to European integration, and a setback for the competing, constitutional approach that other European federalists had advocated since the final years of World War II. With this Treaty, the signatories initiated a predominantly pragmatic and technocratic form of cooperation that paid little concern to citizens' participation. The Europe that took shape from the beginning of the 1950s was the Europe of Jean Monnet, not of Altiero Spinelli – Monnet's Italian contemporary, who conducted a life-long battle for a more democratic Europe.

The Treaty of Paris established an institutional architecture that reflected contemporary political, economic and social concerns and the personal experience of key actors. The centerpiece of this architecture was the High Authority – the mighty predecessor of today's European Commission and the brainchild of Jean Monnet.⁹ The historical literature traces Monnet's insistence on a powerful supranational institution to his positive experience with inter-allied executive committees during the World Wars, with eco-

⁷ A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, London: Routledge, 1984, p. 409.

⁸ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law, 1950-57*, cit., p. 347.

⁹ D. SPIERENBURG, R. POIDEVIN, *The History of the High Authority of the European Coal and Steel Community. Supranationality in Operation*, London: Weidenfeld & Nicolson, 1994, p. 10.

conomic planning in France after World War II, as well as to the role of transatlantic policy networks.¹⁰ The existing scholarly research argues that the legacy of the Monnet Plan that led to the creation of the European Coal and Steel Community (ECSC) was to establish the notion of a technocratic approach as well as a corporatist mode of operation.¹¹ On a more general level, the faith in experts, the elite-orientation and the delegation of authority to supranational institutions that would eventually characterize the ECSC was also a reaction against the mobilization of masses associated with totalitarianism and the failure of the more intergovernmental League of Nations to prevent World War II.¹²

The Schuman Plan envisaged a vague institutional structure, making no mention of either a council of ministers or an assembly. Its focus was on the new and supranational body – the High Authority –, while stressing that “appropriate measures” would be provided “for means of appeal against the decisions of the Authority”.¹³ At the opening of the Paris negotiations, it soon became clear that while the other delegations accepted the supranational institution in principle, they insisted on the need for political and judicial measures to limit and control its powers.¹⁴ Dirk Spierenburg, the head of the Dutch delegation, later recalled how Monnet, in his capacity as chair, tried to solve the institutional problems early, in restricted sessions with the heads of delegation.¹⁵ In these settings, Monnet argued the case of the High Authority, but he also introduced the creation of an assembly representing the national parliaments: “Independent of governments, its members would take decisions by majority voting and be accountable to an assembly representing the parliaments of the member countries. It would have

¹⁰ For a general introduction to the connection between Monnet’s international experience and his viewpoints on European institutions, see J. GILLINGHAM, *European Integration 1950-2003. Superstate or New Market Economy*, Cambridge: Cambridge University Press, 2003, pp. 20-21. For a thorough account of Monnet’s international experience during and between the world wars, see F. DÛCHENE, *Jean Monnet. The First Statesman of Interdependence*, New York: W.W. Norton & Company, 1994. On the role of the national delegations in the Paris negotiations, see J. GILLINGHAM, *Coal, Steel, and the Rebirth of Europe, 1945-1955*, Cambridge: Cambridge University Press, ch. 5. For an in-depth historical study of the role of transatlantic policy networks in the formulation of the Treaty of Paris, see B. LEUCHT, *Transatlantic Policy Networks and the Formation of Core Europe*, Portsmouth: University of Portsmouth, 2008.

¹¹ K. FEATHERSTONE, *Jean Monnet and the “Democratic Deficit” in the European Union*, in *Journal of Common Market Studies*, 1994, p. 150.

¹² On the Coal and Steel Community as a measure to prevent new conflict, see M. EILSTRUP-SANGIOVANNI, D. VERDIER, *European Integration as a Solution to War*, in *European Journal of International Relations*, 2005, p. 99 *et seq.*

¹³ The Schuman Declaration, 9 May 1950. The full text of the declaration is available at europa.eu.

¹⁴ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law*, cit., p. 342; A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, cit., p. 409.

¹⁵ D. SPIERENBURG, R. POIDEVIN, *The History of the High Authority of the European Coal and Steel Community*, cit., p. 14. The other heads of delegations were Walter Hallstein (West Germany), Maximilien Suetens (Belgium), Paolo Emilio Taviani (Italy) and Albert Wehrer (Luxembourg).

contacts with all interest groups through a series of advisory committees, and it would have its own resources, rather than depending on government subsidies".¹⁶

The literature on the ECSC negotiations seems to agree that France was responsible for adding the assembly, in the words of Alan S. Milward as a means to "blunt the technocratic edge of the Authority".¹⁷ Anne Boerger-de-Smedt traces this decision back to the French socialist politician, André Philip, "who had sternly condemned the lack of democratic supervision in the new organization".¹⁸ Confronted with concerns from the other delegations, most notably the Benelux countries, Monnet also agreed to demands for a council of ministers and a judicial body that could settle disputes. The Benelux countries wanted not only a certain level of governmental supervision, but also a clear definition of the powers of the High Authority.¹⁹ Along with West Germany, these countries also insisted on the introduction of a permanent court, if for somewhat different reasons. The Benelux countries argued the case for an international court that would not only review the legality of the High Authority's decisions but also assess, in its rulings, the socio-economic consequences within which this authority had acted. Bonn favored a court that also could act as a constitutional court. The result was, Boerger-de-Smedt concludes, a court that defies easy categorization: "More than an international Court, but not quite a constitutional Court either, it was mainly an administrative Court, empowered to ensure that the HA would act within the powers granted by the Treaty".²⁰

Overall, the architects of the first European community paid little concern to popular participation. The ECSC was designed to protect the peoples of Europe from their tendency to wage war. Five years after World War II, the prevailing opinion was that peace would be best served by a greater emphasis on technocracy. The political legitimacy of the new community was indirect – borrowed from the democratic Member States that chose to participate in it. This approach was not without its critics. Altiero Spinelli – a champion of the competing constitutional approach to European integration – was one of them. "Monnet has the great merit of having built Europe", he reportedly said, "and the great responsibility to have built it badly".²¹

¹⁶ D. SPIERENBURG, R. POIDEVIN, *The History of the High Authority of the European Coal and Steel Community*, cit., pp. 14-15.

¹⁷ A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, cit., p. 409.

¹⁸ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law*, cit., p. 341.

¹⁹ A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, cit., p. 409.

²⁰ A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law*, cit., p. 346.

²¹ M. BURGESS, *Federalism and European Union*, London: Routledge, 1989, pp. 55-56, cited in K. FEATHERSTONE, *Jean Monnet and the "Democratic Deficit"*, cit., p. 150.

III. THE IDEA OF LEGITIMACY AS LEGALITY IN THE TREATY OF ROME

The 1955 decision to move from sectoral integration in two industries to a general common market triggered a revision of the institutional architecture that had been established with the Treaty of Paris. The decision to make the establishment of a common market their objective in economic policy was one of the outcomes of the Messina Conference in June that year, where the foreign ministers of the six ECSC Member States came together to discuss how to develop their cooperation. The decision to pursue European integration in the economic sphere, broke the impasse that had occurred the year before, when the French National Assembly rejected the plan for defense integration among the six, and thereby closed the door to the accompanying plan for foreign political cooperation. The shift to further economic integration was a way out of deadlock and a reflection of the fact that the small and highly trade-dependent Benelux countries had assumed the role as the drivers of European integration.²² To the architects of this Treaty, the end justified the means. It was the States' decision to establish a common market that legitimized the creation of supranational institutions.

By 1955, the idea of a European common market had already floated around for three years. Motivated by his own country's dependence on exports, and inspired by the experience of the Benelux Union, based on a customs union agreement dating back to 1944, Johan Willem Beyen, Dutch Minister of Foreign Affairs, had made two previous attempts to convince the members of the ECSC of the virtues of a general common market. From his own experience as an international banker and businessperson, Beyen also recognized that protectionism was an issue that was difficult to address at a national level and one that, consequently, required an international approach. French resistance had blocked Beyen's previous advances. This time, he allied with his Belgian colleague, Paul-Henri Spaak, who linked Beyen's vision to France's interest in atomic energy cooperation. Together with Joseph Beck, Luxembourg's Minister of Foreign Affairs, they formulated their proposal in a May 1955 memorandum that was presented to the French, German and Italian governments later that same month. At the Messina Conference in June that same year, the ECSC member states adopted a declaration identifying a common market as one of the ways in which to ensure progress in the uniting of Europe.

The decision to create a common market justified the creation of supranational institutions. The Benelux countries argued from the outset that the creation of a common market presupposed the establishment of a common institution, equipped with the au-

²² A.S. MILWARD, *The European Rescue of the Nation-State*, London: Routledge, 1992. On the key role of the Netherlands in the process leading up to the Treaties of Rome, see A.G. HARRYVAN, *In Pursuit of Influence. The Netherlands' European Policy during the Formative Years of the European Union*, Brussels: P.I.E. Peter Lang, 2009.

thority that the realization of this market would take.²³ Eventually, the Messina Declaration did not go that far. This declaration simply identified the study of “institutional agencies appropriate for the realization and operating of the common market” as one of the prerequisites for the said market.²⁴ The declaration gave no guidance on the authority to be invested in such agencies. It made no mention of the need for oversight through some kind of democratic apparatus. It merely established that intergovernmental conferences would be convened to draft the relevant Treaties, and that these conferences would be prepared by an Intergovernmental committee assisted by experts and under the leadership of “a political personality”.²⁵

That political personality was Paul-Henri Spaak, a member of the Belgian Socialist party and a holder of numerous ministerial positions. The Intergovernmental Committee included, in addition to Spaak, the heads of the six national delegations – four politicians, an ambassador and a university professor.²⁶ Finally, a representative of the British government also attended the Committee’s meetings. The Intergovernmental Committee convened for the first time on 9 July 1955. A Steering Committee comprising the heads of the national delegations and chaired by Spaak was immediately appointed to initiate, direct, coordinate and regularly monitor the work of the specialized committees. These included a committee on the common market, investments and social problems; a committee on conventional energy sources; a committee on nuclear energy; a committee on transport and public works plus several sub-committees. In accordance with the Messina Declaration, the Intergovernmental Committee would submit its report by 1 October 1955. The general assumption was that this deadline would be too tight. “The date of 1 October will probably come and go”, *Le Figaro* wrote the day after the constituent meeting.²⁷

Spaak played a central role in the process leading to the Treaty of Rome. This is not a controversial claim. According to Pierre-Henri Laurent, the work in the Intergovernmental Committee “remained under the near absolute control of the appointed president of the comité”.²⁸ Laurent commends Spaak for his handling of the institutional question, where the Benelux countries’ call for a joint institution with a proper authority

²³ Mémorandum des Pays Benelux aux six Pays de la CECA, undated, Historical Archives of the European Union (HAEU), CM3/NEGO 3.

²⁴ Résolution adoptée par les Ministres des Affaires étrangères des Etats membres de la CECA, réunis à Messine les 1^{er} et 2 juin 1955, HAEU CM3/NEGO 6.

²⁵ *Ibid.*

²⁶ The national delegations were led by Ambassador Ophüls (Germany), Baron Snoy (Belgium), Félix Gaillard (France), Ludovico Benvenuti (Italy), Lambert Schaus (Luxembourg) and Professor Verryn Stuart (the Netherlands). P.-H. SPAAK, *The Continuing Battle. Memoirs of a European 1936-1966*, London: Weidenfeld and Nicolson, 1971, p. 238.

²⁷ J.L., *La conférence de la relance européenne s'ouvre aujourd'hui à Bruxelles*, in *Le Figaro*, 10 July 1955, translation available at cvce.eu.

²⁸ P.H. LAURENT, *Paul-Henri Spaak and the Diplomatic Origins of the Common Market, 1955-56*, in *Political Science Quarterly*, 1970, p. 384.

collided with the positions of France and Germany, who insisted “on the elimination of the principle of supranationality from the language of the future”.²⁹ This raises the question of how the Treaty of Rome nevertheless came to include provisions for a common institution with powers of its own. Laurent argues that Spaak, in keeping with the Benelux countries’ position, “wanted an institution with power of its own and ability to act independently of the national governments”.³⁰ In what follows, I identify two moves made by Spaak that helped achieve this goal.

First, Spaak insisted on a strict division of labor between politicians and experts, making sure that all expert proposals had a basis in decisions made by the Member States. The point of departure for the Intergovernmental Committee’s work, was the decision to create a common market, as stated in the Messina Declaration. The Steering Committee developed its directives to the specialized committees on basis of the provisions of this declaration. The specialized Committees’ mandates were further restricted to a discussion of technical issues only. When presenting the Committee’s work to the foreign ministers of the six in Noordwijk in September 1955, Spaak argued that this would leave the experts the freedom to approach the technical issues without any *a priori* or doctrinal ideas. Their sole concern would be to identify the most effective solutions. The proposals for institutional structures should in turn follow from the experts’ technical recommendations. The experts in the specialized committees were explicitly instructed *not* to present proposals regarding the establishment of common institutions: “Ils ne doivent présenter de propositions en ce qui concerne l’établissement de certaines institutions que dans le cadre des solutions proposées et pour autant que ces solutions l’exigent. Ainsi, les propositions en matière institutionnelle devront-elles apparaître comme une conséquence des propositions techniques, les problèmes étant abordés sans aucun *a priori* et sans aucune idée doctrinale, mais uniquement avec le souci de l’efficacité à atteindre”.³¹ To the ministers gathering in Noordwijk, Spaak emphasized that more general statements remained the domain of the national politicians, as they were the ones with a link to the general public. He also took care to point out that the political responsibility resided with the director and, eventually, with the ministers.³²

Second, Spaak formulated four principles that supplemented the Messina Declaration and guided the work in the specialized committees. The first of these principles established that the handling of issues related to the common market could not be dependent on consensual or majoritarian decision-making. These issues included the monitoring of the application of Member States commitments and compliance with competition rules,

²⁹ *Ibid.*, p. 378.

³⁰ *Ibid.*, p. 388.

³¹ *Projet de Procès-Verbal de la réunion des Ministres des Affaires Etrangères des Etat membres de la CECA, tenue à Noordwijk le 6 septembre 1955, HAEU CM3/NEGO 180, p. 9.*

³² *Ibid.*, p. 10.

and the administration of safeguard clauses.³³ Spaak's notes to the heads of delegations give some insight into the reasoning behind this principle. A consensus-based system of decision-making implied the likelihood of vetoes and the risk that the law would disappear in interstate bargaining. Majoritarian decision-making could, in turn, pave the way for the emergence of interest coalitions. Consequently, Spaak wrote to the heads of delegation in October 1955 that "[...] la création d'un organe dote d'une autorité propre et d'une responsabilité commune apparaît indispensable".³⁴

The second principle established a distinction between general economic policy and the specific problems related to the functioning of the common market. The expectation was, Spaak explained to the heads of delegation, that the Member States would eventually harmonize their monetary, budgetary and social policies. Pending such harmonization, a distinction between general economic policy and the handling of problems related to the common market was necessary. The Member States would retain their competences in general economic policy. Given the impact that this policy would have on the common market, a certain level of coordination would nevertheless be required. Consequently, the Member States should confer upon the common institution the power to conduct studies and make proposals in economic policy.³⁵

The third principle stated the need for an appellate and dispute-settling institution. The need for a legal and binding mechanism caused little discussion, possibly because a common court with corresponding competences already existed in the ECSC. In the matter of this institution, Spaak merely pointed out that there was a need for a body where appeals against the decisions of the common institution could be addressed and that could settle disputes between the common institution and the Member States as well as disputes between Member States.

Finally, the fourth principle established that the responsibilities of the common institutions had to be clearly defined. If these principles were recognized, Spaak told the heads of delegations in November 1955, the parties would succeed in establishing an institution with decision-making powers in the areas of competition rules and safeguard clauses, and with the power to conduct studies and present proposals in economic policy in general.³⁶

A preoccupation with legitimacy accompanied the formulation of these principles. From Spaak's 1955 perspective, a common supranational institution was advantageous

³³ The concern with the administration of safeguard clauses reflected the position of the French government, which was the one of the Six that was less favorable to trade liberalization than its involvement in the creation of a common market could suggest. The French protectionist tradition was strong, and Paris was eager to maintain as many of its protective measures for as long as possible. L. RYE, *In Quest of Time, Protection and Approval: France and the Claims for Social Harmonization in the European Economic Community, 1955-56*, in *Journal of European Integration History*, 2002, p. 85 *et seq.*

³⁴ Note to the Heads of Delegation of 24 October 1955, HAEU CM3/NEGO 41.

³⁵ *Ibid.*

³⁶ *Ibid.*

not only because it would enable the members of the common market to avoid the pitfalls associated with consensus or majoritarian rule. The independent authority that he prescribed would also be in position to take legitimate decisions on behalf of the members of the common market, as this market was an area where the members had a shared responsibility, and where they, consequently, did not represent the specific interests of the national governments: "L'avantage immédiat d'un organisme commun est qu'il peut légitimement statuer à la majorité parce que ses membres ont une responsabilité commune, au lieu d'être les représentants individuels de gouvernements nationaux".³⁷

The historical evidence leaves no doubt about the impact that Spaak's four principles had on the Intergovernmental Committee's work and, subsequently, on the institutional architecture of the Treaty of Rome. As the minutes of the meetings in the Steering Committee demonstrate, the heads of the national delegations frequently returned to these principles in their discussions, and they never discarded them.³⁸ The principles thus appear in the Intergovernmental Committee's report of April 1956, commonly referred to as the Spaak Report. In this report, the four principles are rearranged, but easily recognizable. The principle that general economic policy is distinct from the specific problems related to the common market figures first. Then follows the principle that the running of a common market is incompatible with consensual or majoritarian decision-making, leading to the conclusion that the creation of this market demands the creation of an institution with a proper authority and a common responsibility. The third principle, as it appears in the Spaak Report, states that as the general economic policies of the Member States impact the common market decisively, a certain coordination between such policies and common market issues is necessary. When this is the case, the common institution may make proposals with a bearing on general economic policy, and the principle of unanimity may be departed from, "grâce à la garantie d'objectivité" that follows from the existence of a common institution. The fourth principle states the need for legal recourse and parliamentary control.³⁹ As stated in the Spaak Report, the Intergovernmental Committee's proposal to create four distinct institutions was based on these principles: "De ces principes ressort la nécessité d'établir quatre institutions distincts".⁴⁰

The collection of historical documents relating to the Rome Treaty negotiations include files on the history of each treaty article. The file pertaining to Art. 155, on the powers of the Commission, contain the minutes of a meeting between Spaak and the heads of the national delegations entitled "Problème des Institutions". The point of departure for this meeting was the four principles that then figured in the Spaak Report. At the opening

³⁷ *Ibid.*

³⁸ Document de travail No. 6, du 8 novembre 1955, Institutions, Comité intergouvernemental créé par la conférence de Messine, HAEU CM3/NEGO 30.

³⁹ Rapport des Chefs de Délégation aux Ministres des affaires étrangères du 21 Avril 1956, CM3/NEGO 91.

⁴⁰ *Ibid.*, p. 18.

of the meeting, Spaak encouraged those that disagreed with these principles, or who had comments relating to these principles, to make these known. In the following interventions, neither France nor Germany objected to the four principles. Both Paris and Bonn insisted, however, that the Council of Ministers should have a more influential role in the common market than what was the case in the Coal and Steel Community.⁴¹

IV. MECHANISMS FOR LEGITIMACY THROUGH DEMOCRATIC RULE IN THE TREATY OF ROME

One of the advances in the 1957 Treaty of Rome was the chapter on a common commercial policy. In contrast to the ECSC, which had no external powers, this chapter, *inter alia*, delegated authority to negotiate trade agreements from the Member States to the European Commission. This Treaty's Art. 113, section three, stated that: "Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it".⁴² Previous research explains the delegation of authority to the European Commission in the area of trade negotiations with two main factors. First, in insulating the policy-making process from domestic pressure, the assumption was that this would enable the promotion of a more liberal international trade order. Second, the expectation was that a single voice in trade policy would facilitate the conclusion of trade agreements with third countries and increase the Community's external influence.⁴³ The Treaty of Rome was, as Meunier and Nikolaïdis state, "a revolutionary document" in the field of trade.⁴⁴ A refusal to introduce direct elections to the Assembly (European Parliament) accompanied the decision to authorize the Commission in trade. The idea of legitimacy as legality thus gained ground, while mechanisms for legitimacy through democratic rule were rejected, amplifying the elitist and technocratic nature of European integration.

To the Treaty's architects, the Commission's authority in trade negotiations was a necessary consequence of the decision to move from sectoral to general integration. The Intergovernmental Committee already by the autumn 1955 took the position that the negotiation of trade agreements had to become a matter for the Community. The Committee's starting-point was that the establishment of a common commercial policy followed logically from the decision to create a common market. The cooperation that

⁴¹ Réunion des Chefs de Délégation, Problème des Institutions, undated, CM3/NEGO 257.

⁴² Art. 113, section 3, of the Treaty of Rome.

⁴³ S. MEUNIER, K. NIKOLAÏDIS, *Who Speaks for Europe? The Delegation of Trade Authority in the EU*, in *Journal of Common Market Studies*, 1999, p. 480.

⁴⁴ *Ibid.*, p. 479.

had been established with the ECSC was deep, but at the same time limited, confined to two industries. The reduced scope of this cooperation had allowed for a certain autonomy on the part of the Member States, as trade in coal and steel were but two elements in a more comprehensive balance of payments. With the transition to a general common market, trade policy would become a matter of common concern. A November 1955 working document stated that just as the parties had acknowledged that the Community would have a common external policy, it would also be for the Community to negotiate common trade agreements.⁴⁵

The Intergovernmental Committee's next move in the process that eventually led to the adoption of Art. 113 was to propose a division of labor between intergovernmental and supranational institutions. From February 1956, the Committee worked on the assumption that there would be four institutions: a council of ministers, a commission (as an executive), a court of justice and an assembly. Spaak convened the heads of delegation in the middle of this month with the view to discussing procedures, competences and the workings of the different institutions.⁴⁶ The point of departure was the tasks that the establishment and operating of the common market required. The list of requirements was long. It included overseeing compliance with the obligations undertaken by the Member States; supervision of the companies' compliance with competition rules; the settling of conditions for the maintenance or elimination of subsidies or other measures with equivalent effect; the administration of exceptions and safeguard clauses; the removal of discrimination; the mending of trade distortions and the preparation – to the degree that this would be possible – of legal harmonization and the management of restructuring- and development funds.

The division of labor between the institutions that the Intergovernmental Committee put forward, empowered of the Commission in all matters pertaining to the common market. The Committee identified the Council as the governments' instrument for general political coordination and the organ for joint governmental decisions. The Council should, as a rule, make decisions based on unanimity. The committee substantiated this position with the argument that a majority of governments constituted no objective entity, only a coalition of interests. Unanimity would be of the essence in matters pertaining to harmonization of legislation; financial balance; employment and stabilization policy. However, and as touched upon in the previous section, decisions in these matters would also have a direct bearing on the workings of the common market. Consequently, the committee argued, to facilitate the functioning of the common market, it would be legitimate to entrust the Commission with the power to submit proposals on these matters to the Council. Occasionally, operating the common market would also demand a clarification of questions that were rooted in general economic

⁴⁵ Working document no. 7 of 30 November 1955, HAEU CM3/NEGO 31.

⁴⁶ Appendix to document no. 6 of 13 February 1956 on *Institutions*, HAEU CM3/NEGO 32.

policy but that were too essential to risk their blocking by veto. On such occasions, the parties could deviate from the principle of unanimity.⁴⁷

The Committee described the Commission as the organ entrusted with administration of the treaty. Importantly, the Committee also identified this institution as the one that would oversee the functioning and development of the common market. In some matters, the Commission would have decision-making authority. These were all matters that could affect the functioning of the common market including competition rules, subsidies and other dispositions with discriminatory effect, such as the use of safeguard clauses.⁴⁸

The Intergovernmental Committee submitted its report in April 1956. Spaak later compared this document to the Messina Declaration, pointing out the progress that had been achieved. "The ideas which had only been outlined vaguely at Messina were this time listed, defined and explained", Spaak wrote in his memoirs.⁴⁹ The report thus put the governments in a position, Spaak pointed out, where they could accurately assess the implications of a policy which they until then had endorsed in principle only. The foreign ministers of the Six adopted the report at their meeting in Venice in May 1956, after less than two hours of discussion.⁵⁰ The Intergovernmental Conference opened in Brussels the following month with the view to draft two Treaties based on the Spaak Committee's report, for the Common Market and Euratom respectively. Two groups were appointed to examine technical questions. Hans von der Groeben, a German diplomat, chaired the group for the common market. A drafting group was also set up, under the direction of Italian ambassador Roberto Ducci. Its task was to frame the conclusions of the Spaak Report in the form of articles that could serve as a basis of the first version of the Treaties. A committee of heads of delegations chaired by Spaak directed the process.

Within the framework of the Intergovernmental conference, the discussion on the authority of the various institutions continued. The fundamental problem was to establish procedures for the decision-making that the implementation of the treaty demanded. From the perspective of the conference, all other problems were subordinate to this. Mechanisms for consultation, representation and management would in any case be introduced in keeping with practice in all complex international organizations. The problem had two dimensions, namely the need to know who should take decisions, and the need to know who should control them. On the one hand, the treaty imposed specific obligations on its members. In such matters, it would be for the Member States to ensure implementation. On the other hand, the treaty included objectives that could not be realized by state obligations only. Consequently, the Conference established that it would be necessary to charge the community, and more precisely some of the com-

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ P.-H. SPAAK, *The Continuing Battle*, cit., p. 240.

⁵⁰ *Ibid.*

munity institutions, with the task to take some decisions.⁵¹ The conference also highlighted a new argument in favor of this position, namely that in a program that would cover many years, it was impossible to include all necessary decisions in one treaty. The countries would have to create common institutions, and to confer on these institutions the authority to take necessary decisions.⁵²

As had been the case in the Intergovernmental Committee, a key concern was the need to strike the balance between sovereignty and efficiency – between national interests on the one hand, and the demands that followed from the realization of the common market on the other.⁵³ Pierre Pescatore was the legal adviser to the Luxembourg Foreign Ministry and a member of the drafting group directed by Roberto Ducci. He later recalled how the negotiations took place in an atmosphere of urgency and prudence. On the one hand, there was an urgent need to “regroup in the face of a Soviet threat that was still very real”. On the other hand, there was the awareness of limits, following the EDC failure and the situation in France: “People had had enough, given the position of the State in France and the failure of the EDC, which had been attempted in a supranational spirit: the word was taboo”.⁵⁴

The question that remained was to establish which institutions should take which decisions. When approaching this question, the conference introduced the concept of “matters of essential interest for the member states”, distinguishing between matters of such interest and matters where the realization of treaty objectives was paramount.⁵⁵ The first category included significant treaty amendments, decisions that exceeded existing treaty obligations and matters of economic policy where the Member States remained accountable to the national parliaments. In such matters, the concern with the most efficient realization of treaty objectives would have to yield to the need to obtain consensus. The second category included issues where concern with the realization of treaty objectives was stronger, and where national interests were less at stake. In such matters, the Council of Ministers could take majority decisions, with the consent of the Commission. A State could thus be overruled, but only if the Commission gave a “European guarantee”.⁵⁶ Finally, the secretariat envisaged a third category, where the efficient realization of the common market was crucial, or where the interests of every Member State demanded an avoidance of vetoes or interest coalitions. In such matters,

⁵¹ Note du 11 October 1956, sur le système essentiel à prévoir dans le Traité sur le Marché commun européen, HAEU CM3/NEGO 185.

⁵² Draft note from the President of 12 October 1956, HAEU CM3/NEGO 185.

⁵³ Note du Secrétariat du 11 octobre 1956, HAEU CM3/NEGO 185.

⁵⁴ P. PESCATORE, in Centre virtuel de la connaissance sur l'Europe, *Interview with Pierre Pescatore: The international context at the time of the Val Duchesse negotiations*, 10 September 2003, cvce.eu.

⁵⁵ Note du Secrétariat du 11 October 1956, cit.

⁵⁶ *Ibid.*

the decision-making authority could reside in the Commission, on condition of this body's prior consulting with the Council.⁵⁷

From the end of November 1956, drafts of what would eventually become Arts 110-116 shuttled back and forth between the working group on the common market and the committee of heads of delegations. In the early drafts, the Commission was entrusted with the power to negotiate customs only.⁵⁸ This was still the case in a draft for the chapter on a common commercial policy tabled by the conference secretariat on 3 January 1957. This draft stated that there would be a common commercial policy and that the conclusion of trade agreements should be based on common principles.

A few days later, the Common Market group formulated a new draft for the same chapter. This version included a draft Art. 62 (later to become Art. 113) that granted the Commission the authority to negotiate agreements pertaining to the common commercial policy: "En vue de l'élaboration de la politique commerciale commune, la Commission soumet des propositions au Conseil. Les négociations sont conduites par la Commission en consultation avec un Comité désigné par le Conseil pour l'assister dans cette tâche, et dans le cadre des directives que le Conseil peut lui adresser. Les résultats des négociations sont soumis à l'approbation du Conseil, qui statue à la majorité qualifiée".⁵⁹

The archives consulted for this *Article* show that the new draft was the result of a meeting in the committee for heads of delegation at the end of December. In this meeting, Von der Groeben, the chair of the Common Market group, asked that Art. 62 should go back to his group for new examination. When re-examining it, the group should take into consideration the situation that would emerge if the Member States, at the end of the transition period, had not succeeded in harmonizing their liberalization vis-à-vis third countries. The group should further act in consideration of the fact that negotiations occurring within the framework of the Common Commercial Policy should follow the same procedure as the one provided for in tariff negotiations, on the understanding that this procedure should apply not only in tariff negotiations but in all other negotiations that the member states would conduct after the end of the transition period.⁶⁰

Shortly after the decision to authorize the Commission in trade negotiations, the ECSC countries rejected a proposal for direct elections to the Common Assembly. The proposal was tabled by Italy. When the foreign ministers of the ECSC countries met to settle outstanding issues in January/February 1957, Gaetano Martino reminded his colleagues of the fundamentally political nature of their endeavor. For the purpose of the political unification of Europe, the introduction of direct elections to the Common As-

⁵⁷ *Ibid.*

⁵⁸ Groupe du Marché Commun du 20 Novembre 1956, HAEU CM3/NEGO 244.

⁵⁹ Groupe du Marché Commun, Document de travail du 8 janvier 1957, concernant la politique commerciale commune, HAEU CM3/NEGO 244, p. 7.

⁶⁰ Comité des Chefs de Délégation, Projet de procès-verbal de la réunion du Comité des Chefs de Délégation tenue à Bruxelles les 19 et 20 décembre 1956, du 27 décembre 1956, HAEU CM3/NEGO 119.

sembly would, he argued, constitute a first step “dont l’effet psychologique sur l’opinion publique serait certain”.⁶¹ The proposal did not succeed. As the minutes of this meeting makes clear, the other ministers expressed the opinion that this would be premature: “il leur paraît premature de prévoir dès a present l’élection des membres de l’Assemblée au suffrage universel direct”.⁶²

That the national delegations disagreed on the provisions for a motion of censure against the Commission, suggest that they were guided by diverging ideas of legitimacy. Minutes from meetings of the national delegations show that “certaines délégations” argued that the Assembly, in order to ensure the stability of the Commission, only should be able to vote on a motion of censure once per year. The German, Italian and Dutch delegations argued in contrast to this that there should be no limits on the Assembly’s right to conduct such vote. When explaining his government’s position, Germany’s foreign minister, Heinrich von Brentano, made it clear that it was “essentiellement inspirée par le souci de renforcer l’influence de l’Assemblée”.⁶³ This position eventually prevailed, finding its way into the treaty in its Art. 144.

V. CONCLUDING REFLECTIONS

This *Article* set out to explain the idea of legitimacy as legality that informed the founding Treaties of the 1950s, searching for answers in the existing canon of historical literature and in the holdings of the Historical Archives of the European Union. The creation of the ECSC High Authority reflected contemporary concerns and the personal experience of Jean Monnet. Due to the insistence of other delegations, the creation of the High Authority was accompanied by other institutions that would somewhat balance its authority. Eventually, the ECSC institutional structure nevertheless stand out as technocratic and elitist, with little room for popular participation. A few years later, Paul-Henri Spaak formulated the principles that informed the institutional structure of what would eventually become the European Economic Community. From Spaak’s 1955 perspective, the European Commission was able to take legitimate decisions on behalf of the Member States in matters pertaining to the common market, because the Commission represented the Member States, and because it enabled their decision to create a common market.

Today, the 1950s may seem long gone and without obvious relevance for the union’s present-day challenges. The EU nevertheless builds on the institutional structure that emerged in this decade, and while this structure has developed considerably since then, it still reflects ideas that prevailed at the time and circumstances long since changed. The early history of the EU is thus important to the understanding of trends

⁶¹ Projet de procès-verbal de la Conférence des Ministres des Affaires Etrangères des Etats membres de la CEEA, Bruxelles, 26-28 janvier et 4 février 1957, HAEU CM3/NEGO 96.

⁶² *Ibid.*

⁶³ *Ibid.*

that emerged in the 1990s. The existing historical research links the decreasing public support for the EU that manifested itself in this decade to the approach that marked the formulation of the founding Treaties of the 1950s. It was the legacy of Monnet's technocracy and elitism, the argument goes, to leave the Commission as a weak and fragile democratic entity. Moreover, so long as attempts to rectify the democratic deficit concentrated on the relationship between the Council and the European Parliament, an important part of the problem remained.⁶⁴ The EU policy-making machinery broke down, John Gillingham writes, "at the very time that regulations and directives implementing the Single European Act began to register in the lives of ordinary people".⁶⁵

Political scientists argue that democratization in the EU is the result of constitutional conflict between institutional actors. Strong actors in this system push, the argument goes, for further integration in order to increase efficiency without paying much attention to democratic legitimacy. Such behaviour leaves, in turn, room for weak actors, to question the legitimacy of integration and put normative pressure on the powerful actors. Democracy in the EU has normative origins, Frank Schimmelfennig argues, that differ from the economic or social origins of democracy highlighted in studies of the nation-state.⁶⁶ Historians tend to agree with this line of reasoning. Eirini Karamouzi and Emma De Angelis show how the process of identifying the EC with democracy started in the European Parliament, where MEPs "managed to turn the existence of their at the time near-powerless institution into a symbol of the Community's commitment to democracy".⁶⁷ While the Treaty of Rome established an institutional structure that was predominantly elitist and technocratic, this structure also contained the seeds of a more democratic EU.

⁶⁴ K. FEATHERSTONE, *Jean Monnet and the "Democratic Deficit"*, cit., p. 150.

⁶⁵ J. GILLINGHAM, *European Integration 1950-2003*, cit., p. 305.

⁶⁶ F. SCHIMMELFENNIG, *The Normative Origins of Democracy in the European Union: Toward a Transformational Theory of Democratization*, in *European Political Science Review*, 2010, p. 211 et seq.

⁶⁷ E. DE ANGELIS, E. KARAMOUI, *Enlargement and the Historical Origins of the European Community's Democratic Identity, 1961-1978*, in *Contemporary European History*, 2016, p. 457.



ARTICLES

RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

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ELECTORAL ACCOUNTABILITY IN THE EUROPEAN UNION: AN ANALYSIS OF THE EUROPEAN PARLIAMENT ELECTIONS WITH RESPECT TO THE EU'S POLITICAL DEFICIT

JULIEN NAVARRO*

TABLE OF CONTENTS: I. Introduction. – II. European Union: a democratic or a political deficit? – III. Conceptualizing accountability. – IV. Mechanisms of accountability in the EU and the EP elections. – IV.1. EU complexities. – IV.2. The deficiencies of electoral accountability. – V. Conclusion: from legitimacy to authority. – VI. Acknowledgments.

ABSTRACT: This *Article* discusses the usefulness of the concept of accountability, and of *electoral* accountability more precisely, for the analysis of the European Union (EU). Starting from the idea that the EU does not suffer so much from a democratic deficit but rather from a *political* one, it argues that much more attention should be given to the concrete mechanisms through which EU decision-makers are held accountable. Among the latter, elections to the European Parliament (EP) are of special interest as they provide – at least in theory – the most direct channel for institutional accountability as well as the necessary incentives for political actors to act responsively. However, the declining turnout in European elections and the lack of knowledge of the EU on the part of voters reveal flaws in accountability at the EU level. The latter are attributed to the internal working of the EP and to certain features of the electoral system for the election of its members.

KEYWORDS: accountability – democratic deficit – European elections – European Parliament – legitimacy – transparency.

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I. INTRODUCTION

The rejection of the European Constitutional Treaty by the French and Dutch voters in 2005, the outcome of the referendum in the United Kingdom on EU membership in 2016 and, more generally, the growing success of anti-EU parties are the most visible signs of a rampant legitimacy crisis of the EU. Beyond specific temporary circumstances that have aggravated citizens' distrust such as the economic crisis of 2007,¹ the EU indeed faces existential questions regarding its very *raison d'être* as well as its aims and functioning, with the threat of European disintegration looming on the horizon.² Against this backdrop, the objective of this *Article* is to explore the reasons why the direct election of the European Parliament (EP) and the continued expansion of its powers did not provide sufficient answers to the so-called "democratic deficit" of the EU. With the concept of accountability at the centre of this analysis, I argue that elections are not solely a mechanism through which citizens express policy preferences but also a means for them to hold governments accountable. However, the mechanisms of electoral accountability at the European level face major institutional and political obstacles that are responsible for the continued legitimacy crisis of the EU. The 2019 EP elections provide the empirical material on which my argument is built.

The rest of the *Article* is organised as follows. In the next section, I argue that the EU suffers more from a political deficit than from a genuinely democratic one. Then, I propose to put the concept of electoral accountability at the heart of the analysis of the democratic functioning of the EU. The following section explores the institutional and political features that limit the efficiency of electoral accountability mechanisms as a legitimizing tool. In closing, I discuss the results and highlight their significance for the future of the EU.

II. EUROPEAN UNION: A DEMOCRATIC OR A POLITICAL DEFICIT?

There are many indicators of the popular distrust in, and, even, of the rise of hostile feelings towards the EU. Two are more particularly critical for the long-term legitimacy of the whole project: the rise of Eurosceptic parties calling for the (partial) dismantling of the EU,³ on the one hand, and the low participation in EP elections, on the other.⁴ Regarding the latter, even though the 2019 election saw an improvement with a turnout of 50.95 per cent (compared to 42.61 per cent five years earlier), the turnout compares poorly to what is usually observed in legislative and presidential elections in Member States. This sug-

¹ K. ARMINGEON, B. CEKA, *The Loss of Trust in the European Union During the Great Recession since 2007: The Role of Heuristics from the National Political System*, in *European Union Politics*, 2014, p. 82 et seq.

² E. JONES, *Towards a Theory of Disintegration*, in *Journal of European Public Policy*, 2018, p. 440 et seq.

³ E. HERNÁNDEZ, H. KRIESI, *Turning Your Back on the EU. The Role of Eurosceptic Parties in the 2014 European Parliament Elections*, in *Electoral Studies*, 2016, p. 515 et seq.

⁴ M. FRANKLIN, S.B. HOBOLT, *European Elections and the European Voter*, in J. RICARDSON, S. MAZEY (eds), *European Union: Power and Policy-Making*, London: Routledge, 2015, p. 399 et seq.

gests that the EU legitimacy crisis that emerged in the early 1990s has not disappeared and that the successive treaty reforms did not produce the expected benefits.⁵

The theme of a “democratic deficit” emerged in the 1990s to identify the profound imbalance between the EU’s growing powers and its incomplete democratic credentials.⁶ From the foundation of the European Coal and Steel Community (ECSC) onwards, it was argued, the transfer of competences from the national to the supranational level happened at a much faster pace than the establishment of proper democratic mechanisms. The direct election of the EP starting in 1979 was an important move to create a direct link between citizens and EU institutions, but the powers of the EP were only consultative at the time. Since then, however, they have increased steadily and, as a result, the very idea of an EU democratic deficit can be called into question.⁷

Indeed, the aim of the latest revisions of the Treaties was to improve the democratic credentials of the EU, as made explicit in the Laeken Declaration on the future of the European Union of 15 December 2001. Continuing a trend that was already visible in the Treaties of Amsterdam and of Nice, the Treaty of Lisbon strengthened the role of the EP in the decision-making process of the EU as well its political control of the Commission. It also expanded the influence of national parliaments that now have a greater ability to scrutinise proposed EU law. Consequently, the EU today offers multiple channels of delegation and representation that greatly improve its democratic quality, at least from a *formal* perspective.⁸ As a polity, it has federal features that allow comparisons with other political system such as that of Canada,⁹ and the United States.¹⁰ In the case of the EU, the constitutive territorial units (the Member States) are represented in the Council, whose members are accountable to the national parliaments, and the citizens by directly elected parliamentarians (see Art. 10 of the Treaty on the European Union). Most of the democratic gaps in this system have been filled in recent years, notably thanks to the publicity of votes in the Council and the increased role of the EP in the

⁵ R.C. EICHENBERG, R.J. DALTON, *Post-Maastricht Blues: The Transformation of Citizen Support for European Integration, 1973–2004*, in *Acta Politica*, 2007, p. 128 *et seq.*

⁶ The term “democratic deficit” was coined much earlier, but it truly began to cause controversy and entered the mainstream of political debate during the first half of the 1990s (i.e. in the aftermath of the Treaty of Maastricht).

⁷ A. MORAVCSIK, *In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union*, in *JCMS: Journal of Common Market Studies*, 2002, p. 603 *et seq.*

⁸ Some policy areas remain, however, outside of the scope of this democratization by “parliamentarization”. This is most notably the case for the Economic and Monetary Union and for the Common Foreign and Security Policy.

⁹ A. VERDUN, *The Federal Features of the EU: Lessons from Canada*, in *Politics and Governance*, 2016, p. 100 *et seq.*

¹⁰ R. SCHÜTZE, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford: Oxford University Press, 2009, *passim*; S. FABBRINI, *Compound democracies. Why the EU and the US Are Becoming Similar*, Oxford: Oxford University Press, 2010, *passim*.

European Commission selection process.¹¹ Some limited elements of participatory democracy have even been introduced, such as the European citizens' initiative.¹² Following the adoption of the Treaty of Lisbon, one can therefore argue that most of the *formal* deficit of democracy has been addressed.¹³

Still, there is undoubtedly room for democratic improvements in the institutions and decision-making processes of the EU.¹⁴ However, the important point here is that the current democratic crisis is not only – and perhaps not principally – a matter of institutional design and cannot therefore be solved through mere institutional engineering; it also relates to the actors' subjectivity and perceptions, starting with the citizens. If legitimacy is defined as a belief – “a belief by virtue of which persons exercising authority are lent prestige” –,¹⁵ then the EU clearly lacks legitimacy whatever the qualities of its institutions. As pointed out before, the improvement of EU democratic features was accompanied not by increased support but, paradoxically, by growing scepticism – if not contempt – on the part of European citizens.¹⁶

In fact, the EU may not suffer so much from a democratic deficit but from a *political* one. As others have already argued, the EU lacks “democratic arenas for contestation” and appears to be insulated from political competition.¹⁷ The temptation to rely on some form of “output legitimacy”,¹⁸ and to highlight the benefits of the EU is not a satisfactory solution, even though this is what many EU leaders have been proposing following the tradition of building Europe “through concrete achievements”, as famously put in the Declaration of 9 May 1950 delivered by Robert Schuman.¹⁹ The first problem with substantive forms of legitimacy is that they do not provide proper mechanisms to ensure that the government serves the citizens' true preferences: “a democracy would al-

¹¹ It has been noted however that, in the aftermath of the Eurozone crisis, the technocratic elements have been strengthened at the expense of *national* representative democracy in the field of economic and fiscal governance. See I. SÁNCHEZ-CUENCA, *From a Deficit of Democracy to a Technocratic Order: The Post-crisis Debate on Europe*, in *Annual Review of Political Science*, 2017, p. 351 et seq.

¹² E. MONAGHAN, *Assessing Participation and Democracy in the EU: The Case of the European Citizens' Initiative*, in *Perspectives on European Politics and Society*, 2012, p. 285 et seq.

¹³ See however S. KRÖGER, D. FRIEDRICH, *Democratic Representation in the EU: Two Kinds of Subjectivity*, in *Journal of European Public Policy*, 2013, p. 171 et seq.

¹⁴ See S. BARBOU DES PLACES (ed), *Democratising the Euro Area Through a Treaty?*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 7 et seq.

¹⁵ M. WEBER, *The Theory of Social and Economic Organization*, New York: Free Press, 1964, p. 382.

¹⁶ This paradox was notably pointed out by O. ROZENBERG, *L'influence du Parlement européen et l'indifférence de ses électeurs: une corrélation fallacieuse?*, in *Politique européenne*, 2009, p. 7 et seq. in the case of the EP.

¹⁷ A. FØLLESDAL, S. HIX, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, in *JCMS: Journal of Common Market Studies*, 2006, p. 533 et seq.

¹⁸ F. SCHARPF, *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, 1999, p. 13 et seq.

¹⁹ Schuman Declaration of 9 May 1950, available at europa.eu.

most definitely produce outcomes that are different to those produced by ‘enlightened’ technocrats. Hence, one problem for the EU is that its policy outcomes may not be those policies that would be preferred by a political majority after a debate”.²⁰ Additionally, in the absence of explicit consent given to the government, efficient policies do not guarantee political support. For example, distrust towards the EU is also deep in countries that have clearly benefited from their membership.²¹ In fact, the EU fuels a feeling of distance, of loss of control. It needs to give its citizens an active role. This is where the concept of accountability might be useful.

III. CONCEPTUALIZING ACCOUNTABILITY

The concept of accountability is core to any serious analysis of democracy – or, more precisely, of representative democracy. However, it only recently entered the debate on democracy in the EU and did so with a narrow approach. Let me first stress that any definition of democracy implies that the government follows the people’s preferences (i.e. that it shows responsiveness) and that some form of control – or accountability – is necessary for this to happen.²² In other words, modern democracies can be described and analysed as systems designed to ensure government accountability. As emphasised by Manin: “It is the rendering of accounts that has constituted from the beginning the democratic component of representation”.²³ What exactly does this imply for the study of the EU? I will first dig into the concept of accountability itself before applying it to the specific context of the EU.

The concept of accountability has recently become very popular and has consequently been taken in all kinds of directions. It is, for instance, sometimes considered to be an equivalent of neighbouring concepts such as “responsibility”, “control” or “responsiveness”. Faced with the risk of “conceptual stretching”,²⁴ it has been argued that it is preferable to limit the use of the term to its core definition.²⁵ The original (etymological) meaning of accountability gives a first indication: it refers to the process of being called “to account” for one’s actions by some authority and this is what accountability

²⁰ A. FØLLESDAL, S. HIX, *Why There Is a Democratic Deficit*, cit., p. 545.

²¹ That said, it is clear that the EU also suffers from the multiple crises that have hindered its ability to deliver in the past years. See D. BRAUN, M. TAUSENDPFUND, *The Impact of the Euro Crisis on Citizens’ Support for the European Union*, in *Journal of European Integration*, 2014, p. 231 et seq.

²² A. PRZEWORKSKI, S. C. STOKES, B. MANIN (eds), *Democracy, Accountability, and Representation*, Cambridge, New York: Cambridge University Press, 1999, p. 4.

²³ B. MANIN, *The Principles of Representative Government*, Cambridge: Cambridge University Press, 1997, *passim*. The wording in French is even more telling: “C’est la reedition des comptes qui, depuis l’origine, constitue l’élément démocratique fondamental du lien représentatif”. See B. MANIN, *Principes du gouvernement représentatif*, Paris: Calmann-Levy, 1996, p. 301.

²⁴ G. SARTORI, *Concept Misformation in Comparative Politics*, in *American Political Science Review*, 1970, p. 1033 et seq.

²⁵ R. MULGAN, *Accountability: An Ever-Expanding Concept?*, in *Public Administration*, 2000, p. 555 et seq.

should fundamentally be understood as. In a nutshell, in politics, accountability relates to “the requirement for representatives to answer to the represented on the disposal of their powers and duties, act upon criticisms or requirements made of them, and accept (some) responsibility for failure, incompetence, or deceit”.²⁶

Moving one step further, Mulgan argues convincingly that accountability has three fundamental features: externality, rectification, and authority.²⁷ Briefly:

1) Accountability is external, meaning that the account is given to some other person or body outside the body or person held accountable. In democratic politics, those who govern are distinct from (and thus accountable to) the “governed” or the “represented” (be it the voters, the citizens or the people).

2) Accountability involves “a process of rectification” in that one side, the one calling for account, seeks answers and rectification whereas the other side, the one being held accountable, responds and accepts sanctions (or rewards). Accountability thus involves social interaction and exchange, which generally takes the form of elections in democracies.

3) Thirdly, accountability implies “rights of authority”, i.e. those holding to account are asserting some form of higher legitimacy over those who are accountable (including the right to demand answers and impose sanctions). In politics, this authority lies with the people, as democracy is supposedly the government of the people.

As argued before, elections are a key component of accountability in democratic systems. While democracy is supposedly the “government by the people”, the contemporary form of government is undoubtedly representative. However, elections provide a channel for people to express their preferences and, even more importantly, give consent to their government. Technically, elections not only enable voters to choose who is going to govern them. They also allow them to sanction (or reward) those who govern them as they are elected for a limited period and elections are held on a recurring basis. As put by Le Sueur: “In a democracy, the ultimate form of public accountability is through elections”.²⁸ I should also stress that elections present all the features of accountability described before i.e. externality, exchange and authority. Externality is not the most obvious since the people is supposedly the sovereign in democratic systems. However, it has long been recognised that people’s sovereignty is a legal fiction and that power is in fact vested in the hands of a limited (though not entirely closed) political elite.²⁹ The people nevertheless retain the “rights of authority”, that is they are ultimately in charge of demanding answers and sanctioning those who govern. Finally, elections are by nature an interaction process where political offer and demand meet.

²⁶ J. BRADBURY, *Accountability*, in I. MCLEAN, A. McMILLAN (eds), *The Concise Oxford Dictionary of Politics*, Oxford: Oxford University Press, 2009, www.oxfordreference.com.

²⁷ R. MULGAN, *Accountability*, cit., pp. 555-556.

²⁸ A. LE SUEUR, *Accountability*, in P. CANE, J. CONAGHAN (eds), *The New Oxford Companion to Law*, Oxford: Oxford University Press, 2008, p. 7.

²⁹ See R. ARON, *Démocratie et totalitarisme*, Paris: Gallimard, 2007, p. 56.

According to Mulgan whom I follow closely again here, in practice accountability has two complementary sides.³⁰ On the one hand, it is a situation in which someone is responsible for things that happen and can give a satisfactory reason for them; it is more or less synonymous with answerability, blameworthiness, liability, and the expectation of account giving. As I will argue later, the EU has mostly focused on this dimension of accountability so far. This aspect is certainly highly desirable from a normative standpoint but it remains limited as to its effects and consequences. On the other hand, accountability can be taken to mean the degree to which what precedes actually happens. It relies ultimately on a sanction/reward mechanism, as in the phrase “being held accountable”. In other words, accountability does not only depend on the agent but also on the principal’s capacity and willingness to exercise its responsibility.

The beauty of elections is – at least in theory – that they provide both the most powerful institutional mechanism for accountability and the incentives for actors to be accountable. Indeed, elections have a dual nature: prospective and retrospective.³¹ Through them, voters choose who will govern them but they can also express a retrospective judgement on the incumbents who they may sanction or reward. The dual nature of elections – and in particular the dimension of accountability – results from their repetition. Those who govern know that they will face the popular judgement in the next election. Since they are assumed to seek reelection, they rationally anticipate the voters’ judgement and are therefore incentivized to take their preferences into consideration.³² Such a mechanism of electoral accountability is also important from the voters’ perspective. People (and voters in particular) do not have fixed (or purely exogenously determined) preferences regarding policy outcomes.³³ They form their opinions about which policy they want through iterative and deliberative processes. These opinions are likely to change depending on the circumstances and the justifications provided by those who govern. In other words, voters’ preferences are shaped by the democratic process itself at the core of which we find accountability in the double form of reason giving by politicians and sanction/reward giving by voters. While accountability has come to be considered the hallmark of democracy, its effectiveness in the context of the EU is highly questionable.

IV. MECHANISMS OF ACCOUNTABILITY IN THE EU AND THE EP ELECTIONS

While EP elections allow citizens to have a direct say on EU policy choices, they do not provide very efficient means for voters to hold EU decision-makers accountable, that is to

³⁰ R. MULGAN, *Accountability*, cit., p. 570.

³¹ A. HEALY, N. MALHOTRA, *Retrospective Voting Reconsidered*, in *Annual Review of Political Science*, 2013, p. 285 *et seq.*

³² B. MANIN, *The Principles*, cit., p. 178.

³³ J. ELSTER, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences*, Cambridge: Cambridge University Press, 2015, p. 165 *et seq.*

reward or sanction them for their deeds. This situation results from both the structure of EU decision-making process and the political characteristics of these elections.

IV.1. EU COMPLEXITIES

The situation in the EU on the subject of accountability – as well as transparency – has changed a lot since the Commission published its White Paper on European Governance nearly 20 years ago.³⁴ Regarding accountability, the European Commission stressed the need to clarify the role of each institution in order to make decisions more transparent: “roles in the legislative and executive processes need to be clearer. Each of the EU Institutions must explain and take responsibility for what it does in Europe. But there is also a need for greater clarity and responsibility from Member States and all those involved in developing and implementing EU policy at whatever level”.³⁵

Various developments in the past two decades have contributed to rendering the EU more accountable, especially if when considering the first dimension of the concept (answerability, blameworthiness, liability, and the expectation of account giving) identified in the preceding section.³⁶ Not only is the decision-making process increasingly open and transparent,³⁷ but there are new enforcement mechanisms, such as the EU ombudsman and the establishment of transparency registers, that insure that this is the case.³⁸ Besides, in line with the stated aim of the White Paper on European Governance “to communicate more actively with the general public on European issues”,³⁹ the communication policy of the European Union has been rethought although its efficiency remains limited.⁴⁰ This is not to say that everything is perfect at the EU level, and there are some drawbacks to transparency,⁴¹ but the EU is undoubtedly doing much better than most national political systems and administrations in Europe.

³⁴ Commission, European Governance - A White Paper, COM(2001) 428 final.

³⁵ *Ibidem*.

³⁶ S. PEERS, M. COSTA, *Reassessing the Accountability of European Union Decentralized Agencies: Mind the Independence Gap*, in *European Public Law*, 2016, p. 645 et seq.; E.M. BUSUIOC, *European Agencies: Law and Practices of Accountability*, Oxford: Oxford University Press, 2013, *passim*; M.A.P. BOVENS, D. CURTIN, P. T HART (eds), *The Real World of EU Accountability: What Deficit?*, Oxford: Oxford University Press, 2010, *passim*.

³⁷ J. LODGE, *Transparency and EU Governance: Balancing Openness with Security*, in *Journal of Contemporary European Studies*, 2003, p. 95 et seq.

³⁸ P. MAGNETTE, *Contrôler l'Europe: Pouvoirs et Responsabilité Dans l'Union Européenne*, Bruxelles: Editions de l'Université de Bruxelles, 2003, *passim*.

³⁹ White Paper on European Governance, p. 9.

⁴⁰ F. FORET, *Légitimer l'Europe: Pouvoir et Symbolique à l'ère de La Gouvernance*, Paris: Presses de Sciences Po, 2008, p. 55 et seq.

⁴¹ S. NOVAK, *The Silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union: The Silence of Ministers*, in *JCMS: Journal of Common Market Studies*, 2013, p. 1091 et seq.

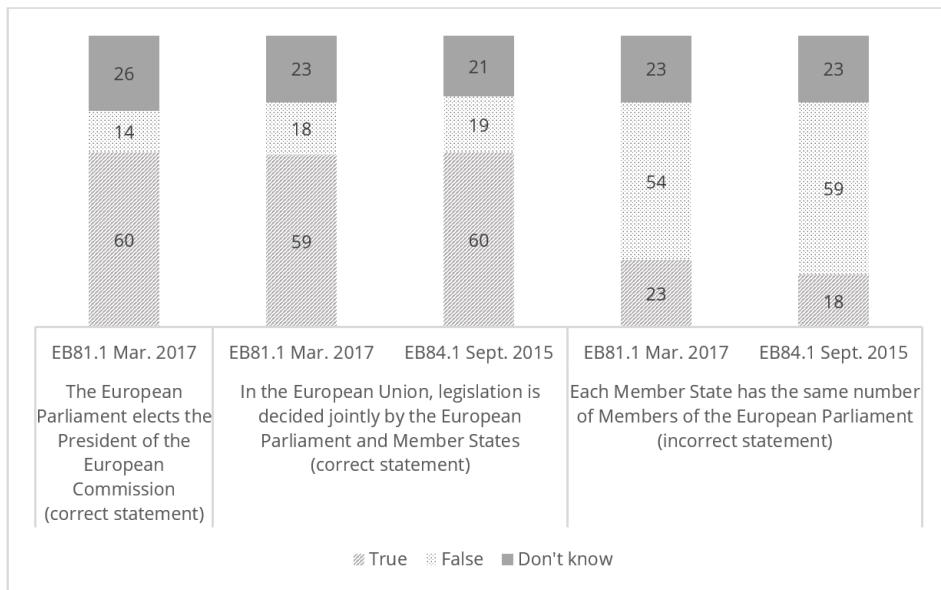


FIGURE 1. General knowledge of the European Parliament (Evolution September 2015-March 2017). Note: The wording of the question was “For each of the following statements about the EU could you please tell me whether you think it is true or false?” (Source: European Parliament Research Service, “Two years until the 2019 European elections. Special Eurobarometer of the European Parliament”, Brussels April 2017).

The problem of the EU here is not so much its lack of openness and transparency but the complexity of its decision-making process. On top of the complex triangular relationship between the Commission, the EP, and the Council of ministers, most decisions rely on a web of committees and agencies that defies the understanding of ordinary citizens. Besides, there is no real separation of powers,⁴² as well as no clear distinction between legislative and executive acts.⁴³ In a nutshell, the multiplicity of actors and institutions involved as well as the “confusion of powers”⁴⁴ – vertically and horizontally – result in a dilution of responsibilities that is a major obstacle to effective accountability as it is difficult (if not impossible) for voters to know who is ultimately responsible and sanction (or reward) them. What is more, attempts to make the EU more democratic, for example by involving

⁴² G. CONWAY, *Recovering a Separation of Powers in the European Union*, in *European Law Journal*, 2011, p. 304 et seq.

⁴³ H. HOFMANN, *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality*, in *European Law Journal*, 2009, p. 482 et seq.

⁴⁴ S. FABBRINI, *Europe's Future: Decoupling and Reforming*, Cambridge: Cambridge University Press, 2019, p. 105.

the national parliaments, may have unintended consequences and make the situation even worse. In fact, the multiple channels of representation in the EU can lead to a “democratic surplus” that is itself responsible for a democratic deficit.⁴⁵

Additionally, the EU operates under a “multiple decision-making regime” that only makes things more complicated for citizens. This is true, of course, of the inter-institutional relations that follow complex and lengthy processes, but also for the functioning of the EP itself. The latter as well as the European elections deserve special attention. As shown by Figure 1, a large share of Europeans are not aware of the EP’s composition, legislative power or role in electing the President of the Commission. While accountability in the EU is a broader question, the lack of knowledge about the EP is a particular problem as it is supposed to be the only body connecting citizens directly to the supranational institutions. As argued by Paul Magnette, “la reddition des comptes reste incomplète, ou inconcevable quand elle ne peut déboucher en dernière instance sur une sanction électorale”.⁴⁶ Do the EP elections provide citizens with a satisfactory tool for accountability? And do voters actually use these elections to hold their representatives accountable?

IV.2. THE DEFICIENCIES OF ELECTORAL ACCOUNTABILITY

The empirical analysis of EP elections departs dramatically from the “ideal” of elections as an effective mechanism to sanction or reward incumbents. The standard interpretation of EP elections is that they are “second order” national contests.⁴⁷ This means that EP elections are more determined by domestic political cleavages than by alternatives originating in the EU. This is the case because national political systems decide most of what needs to be decided politically in the low salience context of “second-order elections” to the EP. The initial explanatory pattern is that people perceive there to be less at stake in second-order elections and therefore vote differently than in their first order counterpart. Consequently, it is possible to make several predictions about the results of such elections, in particular a lower turnout than at the national level, a decline in votes for government parties (and larger parties in general) and a higher vote share for smaller ones. With some small nuances, this second-order model remains the standard interpretation of EP elections.⁴⁸

In terms of democratic accountability, the second-order nature of EP elections poses two problems. First, the weakness of popular participation indicates in itself that voters are not effectively exercising their right to hold their representatives accountable. The outcome of the election is therefore barely interpretable in terms of sanction or

⁴⁵ R. BELLAMY, S. KRÖGER, *Representation Deficits and Surpluses in EU Policy-Making*, in *Journal of European Integration*, 2013, p. 477 et seq.

⁴⁶ P. MAGNETTE, *Contrôler l'Europe*, cit., p. 159.

⁴⁷ K. REIF, H. SCHMITT, *Nine Second Order National Elections: A Conceptual Framework for the Analysis of European Elections Results*, in *European Journal of Political Research*, 1980, p. 3 et seq.

⁴⁸ L. DE SIO, M.N. FRANKLIN, L. RUSSO (eds), *The European Parliament Elections of 2019*, Rome: Luiss University Press, 2019, pp. 57-70.

reward of the incumbents; and in turn, representatives are not really incentivised to be responsive to their voters given that there are so few voters. Second, empirical evidence suggests that voters sanction first-order national incumbents, i.e. national governments. The focus on national partisan competition and national issues, which tends to result in the decline in votes for the national government, only diminishes the chances that voters would be interested in holding MEPs [*à la prima volt* *ache viene usato l'acronimo, mettere per esteso*] accountable. As a matter of fact, the analysis of EP elections seldom considers the possibility of retrospective voting. When it does, it is to assess the impact on electoral outcomes of the national economic performance not that of the EU.⁴⁹ This is, however, a research blind spot that needs further investigation as there is some empirical evidence suggesting that MEPs' parliamentary performance matters for their reselection and re-election chances.⁵⁰

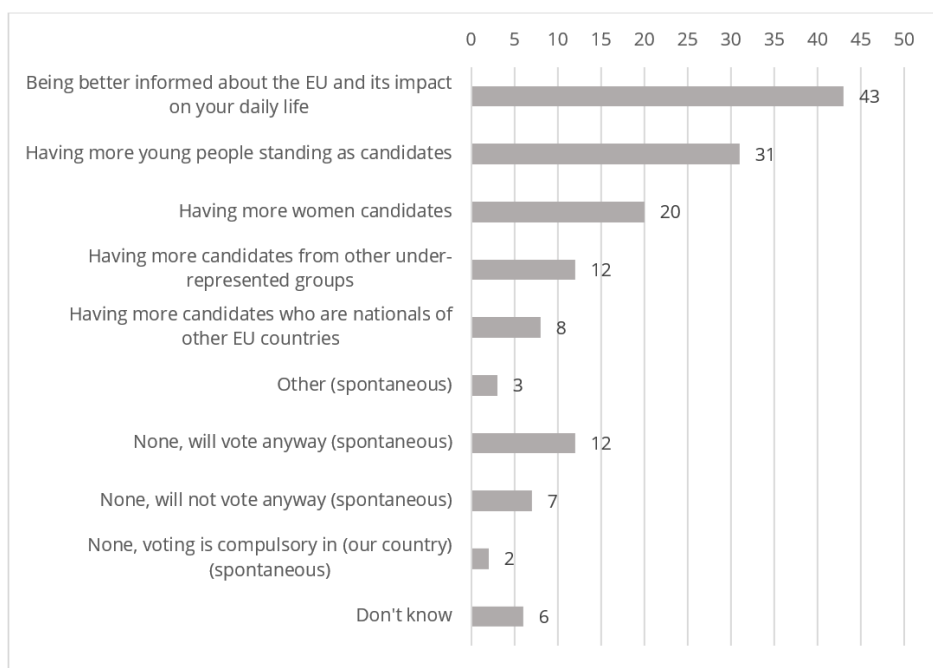


FIGURE 2. Factors of participation at the next EP elections (per cent). Note: The wording of the question was "The next European Parliament elections will be held in May 2019. Which of the following would make you more inclined to vote in these elections?" (maximum three answers) (N=27,474)

⁴⁹ T. KOUSSE, *Retrospective Voting and Strategic Behavior in European Parliament Elections*, in *Electoral Studies*, 2004, pp. 1 et seq.

⁵⁰ J. NAVARRO, *Le travail parlementaire, un investissement payant? Les Élections Comme Évaluation Rétrospective du Bilan des Députés Sortants*, in *Revue Internationale de Politique Comparée*, 2010, p. 141 et seq.

In general, however, voters have limited information about EU politics, which contributes to their low participation in EP elections. In a Eurobarometer survey conducted a few months before the 2019 election, being better informed about the EU and its impact on their daily life was the first element mentioned by respondents among the factors likely to make them more inclined to vote in the subsequent EP election.⁵¹ More than four in ten respondents (43 per cent) chose this item, which was the one most mentioned in 20 countries.⁵² In seven countries, the absolute majority of respondents said that being better informed about the EU and its impact would make them more inclined to vote in the next elections, with the highest proportions recorded in France (60 per cent), Sweden (66 per cent), and the Netherlands (67 per cent).

The lack of information – also regarding the real powers of the EP – is certainly an important explanation of the low turnout in European elections and their second-order nature. EU politics suffers from a deficit in media coverage.⁵³ Citizens are in general less informed about the process of EU policy-making, the EU political class and its actions, than they are about the same at the national level.⁵⁴ There are, however, other structural obstacles to a real electoral accountability in the EU that impede its full democratization.

Considering the first dimension of accountability, the EP is far from being as open and as transparent as one could expect and its system of voting (by a show of hands) prevents any possibility of monitoring MEPs' choices.⁵⁵ The practice of trilogues between the three main institutions means that significant parts of the EU's legislative process are conducted under a veil of secrecy.⁵⁶ Besides, the process of coalition formation inside the EP does not help to clarify responsibilities. While political group cohesion is relatively high, intra-party cohesion is lower than conventional wisdom would suggest when the main political groups are opposing.⁵⁷ The growing partisan fragmentation of the EP has made coalitions more difficult to form and more unstable, a phenomenon that is likely to be exacerbated after the 2019 election.⁵⁸ In other words, as

⁵¹ Commission, *Special Eurobarometer 477 - Democracy and Elections*, 2008.

⁵² They could give up to three responses.

⁵³ C.H. DE VREESE, 'Europe' in the News: A Cross-National Comparative Study of the News Coverage of Key EU Events, in *European Union Politics*, 2001, p. 283 et seq.

⁵⁴ N. BRACK, Y.S. RITTELMAYER, C. STANCULESCU, *L'Europe en Campagne Électorale: une Analyse Croisée des Médias Nationaux*, in *Politique européenne*, 2010, p. 173 et seq.

⁵⁵ P. SETTEMBRI, *Transparency and the EU Legislator: 'Let He Who Is Without Sin Cast the First Stone'*, in *JCMS: Journal of Common Market Studies*, 2005, p. 637 et seq.

⁵⁶ G.J. BRANDSMA, *Transparency of EU Informal Trilogues through Public Feedback in the European Parliament: Promise Unfulfilled*, in *Journal of European Public Policy*, 2019, p. 1464 et seq.

⁵⁷ S. BOWLER, G. McELROY, *Political Group Cohesion and 'Hurrah' Voting in the European Parliament*, in *Journal of European Public Policy*, 2015, p. 1355 et seq.

⁵⁸ On the political dynamic resulting from the 2019 EP elections, see E. CANNIZZARO, *The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?*, in *European Papers*, 2019, Vol. 4, No 1, www.europeanpapers.eu, p. 3 et seq.

Føllesdal and Hix have noted,⁵⁹ it is not so much that the EU lacks satisfying formal accountability mechanisms but that, in the absence of a clear majority-opposition divide, there is no governing party that the voters could wish to sanction or reward.

The institutional set-up of the EP elections strengthens the latter phenomenon. The lack of uniformity in the rules for these elections has often been lamented.⁶⁰ According to Costa, for instance, “quarante ans après [la première élection au suffrage direct], le Parlement européen souffre toujours de problèmes de représentativité démocratique en raison de la diversité des règles électorales nationales”.⁶¹ The row surrounding the jailed or exiled Catalan leaders elected to the EP in June 2019 but unable to take their seat shows well the contradictions of supranational elections organised in a national setting.⁶² However, beyond the legal intricacies and contradictions of the current situation, the biggest mismatch relates to the very principle of *European* elections being held in *national* constituencies. Such a system allows neither the individual responsibility of MEPs (with the partial exception of the few countries with preferential voting) nor that of European political groups. While voting in the EP increasingly follows partisan (i.e. transnational party groups) lines, *national* political parties select the candidates and run the electoral campaigns for the EP elections. There is therefore no clear connection – on the voters’ side – between their vote and the performance of incumbent parties in the EP. In turn, MEPs are not very much incentivised to be responsive to their voters given the small probability that the latter would sanction or reward them based on their past performance. In this respect, the creation of a Europe-wide electoral constituency that was alluded to by Ursula von der Leyen in her speech to the Parliament on 16 July 2019,⁶³ is certainly not a panacea but could nevertheless contribute to reducing the gap between the political process (of majority formation) at the EU level and the voters’ control over their representatives.

V. CONCLUSION: FROM LEGITIMACY TO AUTHORITY

This article has argued in favour of a careful analysis of electoral accountability processes as a research strategy to better understand the nature of the EU’s political defi-

⁵⁹ A. FØLLESDAL, S. HIX, *Why There Is a Democratic Deficit*, cit., p. 533 et seq.

⁶⁰ See the European Parliament resolution of 11 November 2015 on the reform of the electoral law of the European Union.

⁶¹ O. COSTA, *Histoire de la réforme électorale européenne et de l’Acte électoral de 1976. Démocratisation et légitimité politique*, Luxembourg: Office des publications de l’Union Européenne, 2016, p. 57.

⁶² Several Catalan MEPs were not officially inducted as MEPs by the Spanish authorities as they were in exile or denied the right to leave prison to take a Constitutional oath, a prerequisite to taking up a parliamentary mandate in Spain. See B. RIOS, *EU advocate general: jailed Catalan leader has right to immunity as MEP-elect*, in *Euractiv*, 12 November 2019, www.euractiv.com.

⁶³ The issue of transnational lists also appears in Ursula von der Leyen, Mission Letter to Věra Jourová - European Commission Vice-President for Values and Transparency, ec.europa.eu, p. 4.

cit. Even though it only sketches preliminary ideas, it is already clear that the capacity of EP elections to improve the EU's accountability depends as much on institutional constraints as on the engagement of political actors. In practice, if accountability requires that those who govern are ready to face their responsibilities, it also rests on the capacity and the willingness of those who are governed, the voters or the citizens, to hold them accountable. A failure to do so entails some very negative consequences for the political system as a whole.

Indeed, since Max Weber, we know that political authority depends on some form of legitimacy. In a would-be democratic system such as the EU, electoral legitimacy is supposed to grant the government sufficient authority and capacity to act. This point was clearly perceived by political actors from all sides in the debates preceding the direct election to the EP. Both the opponents as well as the proponents of this reform recognized a direct and causal link between the legitimacy provided by the election and the power and influence of the EP. More precisely, they anticipated that such an important institutional step would strengthen the influence and autonomy of the EP. Two quotes from the discussion preceding the ratification of the 1976 Act in the French Senate illustrate this point:⁶⁴

"Certes, l'Assemblée élue au suffrage universel direct ne détiendra pas plus de pouvoir que l'Assemblée actuelle. Mais de quelle autorité, de quelle influence sera-t-elle investie !"⁶⁵

"Dès l'instant où l'élection des représentants des neuf pays, dont la France, au sein de l'Assemblée européenne aura lieu au suffrage universel, il va se créer une certaine dynamique [...] on nous imposera des clauses dont nous ne voulons pas, en particulier cette assemblée constituante qui serait totalement incompatible avec l'indépendance de notre pays."⁶⁶

As one can see, the common understanding when the EP direct election was first established was that the legitimacy conferred by the election would also provide the EP with an increased authority to exercise its competences (and allow it to go beyond its formal powers). If one takes the causal relationship that it is at the heart of this claim seriously, one should also ponder the extent to which the EP's ability to act effectively is diminished by the lack of awareness and enthusiasm of citizens. If electoral legitimacy can result in increased authority, then limited electoral legitimacy must logically lead to lessened authority! The lack of accountability could have another consequence. In the context of rising populism and anti-EU feelings, voters may be tempted to throw away not only the politicians but the system itself, as is often the case in newly established

⁶⁴ French Senate, *Act Concerning the Election of the Members of the European Parliament by Direct Universal Suffrage*, 8 October 1976.

⁶⁵ Claude Mont (Rapporteur de la Commission des Affaires étrangères du Sénat), *Compte rendu intégral de la séance du 23 June 1977*, in *Journal officiel de la République française*, 24 June 1977, p. 1659.

⁶⁶ Pierre Carous, *ibidem*, p. 1670.

democracies.⁶⁷ In other words, the rejection of the EU, of which Brexit is only the apex, may well result from the lack (or the perception of a lack of) proper accountability mechanisms that would offer citizens alternative policy options and a capacity to change the course of the EU.

VI. ACKNOWLEDGEMENTS

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⁶⁷ M.W. SVOLIK, *Learning to Love Democracy: Electoral Accountability and the Success of Democracy*, in *American Journal of Political Science*, 2013, p. 685 et seq.



ARTICLES

RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

edited by Cristina Fasone, Daniele Gallo and Jan Wouters

THE DICHOTOMY BETWEEN “INPUT LEGITIMACY” AND “OUTPUT LEGITIMACY” IN THE LIGHT OF THE EU INSTITUTIONAL DEVELOPMENTS

CESARE PINELLI*

TABLE OF CONTENTS: I. The dichotomy's original purposes. – II. The distinction between redistributive and regulatory policies. – III. The financial crisis and the emergence of an EU “twin legitimacy deficit”. – IV. *Pringle* and *Gauweiler* as symptoms of the contradictory response to the financial crisis. – V. The pivotal role of national governments in deepening the Eurozone's accountability deficit. – VI. Conclusion.

ABSTRACT: The *Article* deals with the complex legitimacy problem that arose in the aftermath of the Eurozone's sovereign debt crisis. This crisis has triggered a “twin legitimacy deficit”, with output legitimacy undermined, in terms of the EU's capacity to react through European-wide redistributive policies, and the input legitimacy of national representative institutions severely limited under the strict conditionality put in place by the new governance system and by the “command-and-control relationship” imposed. The case law of the Court of Justice, in cases like *Pringle* (Court of Justice, judgment of 27 November 2012, case C-370/12) and *Gauweiler* (Court of justice, judgment of 16 June 2015, case C-62/14), has revealed the same paradox. On the one hand, we have witnessed the imposition by an “unaccountable technocracy” (or the self-imposition by Member States) of a series of automatisms that limit the autonomy of national governments. On the other hand, the “command-and-control” style of intervention is also meant to impose a structural convergence amongst very different national economies and can be considered as illegitimate. Technocratic and intergovernmental dominance has further worsened the disconnection between the EU and its citizens also from the input legitimacy perspective, favouring a sort of populist backlash against the Union.

KEYWORDS: twin legitimacy deficit – Eurozone crisis – conditionality – technocratic dominance – intergovernmentalism – accountability.

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I. THE DICHOTOMY'S ORIGINAL PURPOSES

In the last decade of the 20th century, the old dichotomy between “government by the people” and “government for the people” was adapted to the EU institutional system and re-shaped as opposition between an *input legitimacy*, grounded on political representation, and an *output legitimacy*, namely the capacity of governmental policies of solving common problems of the governed. Such operation was meant to react against the longstanding thesis of the EU's democratic deficit, namely a legitimacy's gap of institutional assessment *vis-à-vis* that of national constitutional democracies. Fritz Scharpf and Giandomenico Majone among others, objected that the core governing functions of the EU do not need an input legitimization, given the strong output legitimacy they are provided with.¹

Although diverging from the neoliberal thesis, according to which European integration should be confined to removing national barriers to the free movement of goods, services, capital and persons, the notion of the EU as a “regulatory state” committed to the definition and enforcement of rules promoting economic efficiency, without significant taxing and spending powers that would allow it to pursue policies of redistribution,² relies on the Pareto's assumption that rules aimed at promoting efficiency will improve general welfare without violating significant interests. In this perspective EU policies are, again, not in need of (input-oriented) democratic legitimation. Instead, their (output-oriented) legitimacy needs to be protected against political intervention.

My intention is to verify whether, and if so to what extent, the input/output dichotomy can be used as an analytical tool for understanding the evolution of the EU institutional assessment, particularly in the aftermath of the Eurozone's crisis.

II. THE DISTINCTION BETWEEN REDISTRIBUTIVE AND REGULATORY POLICIES

The input/output dichotomy has raised criticism on theoretical grounds. For Richard Bellamy, “[d]emocratic expertise has supplied the main argument for the non-majoritarian account of ‘output’ democracy. This case turns on a distinction between ‘redistributive’ and ‘regulatory’ policies and argues that majoritarian or counter-majoritarian measures may be appropriate for the former but are unnecessary or even pernicious for the latter”.³ However, “most ‘purely’ technical decisions raise normative issues and are often less clear-cut empirically than is claimed [.....]. Even policy decisions

¹ G. MAJONE, *Europe's Democratic Deficit: the Question of Standards*, in *European Law Journal*, 1998, p. 5 *et seq.*, and F. SCHARPF, *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, 1999, p. 6 *et seq.*

² G. MAJONE, *Regulating Europe*, London: Routledge, 1996.

³ R. BELLAMY, *Democracy Without Democracy? Can the EU's Democratic ‘Outputs’ be Separated from Democratic ‘Inputs’ Provided by Competitive Parties and Majority Rule?*, in *Journal of European Public Policy*, 2012, p. 8.

that rest on reasonably well-attested natural scientific arguments cannot be decided by scientific experts alone".⁴

On the other hand, he admits that the contention that the EU deals mainly with issues that are neither best handled by democratic politics nor electorally salient "contains a kernel of truth", namely that each EU Member State "has its own internal systems of social justice for which its citizens are co-responsible through their equal participation within majoritarian systems of democracy. To the extent that the wealth and survival of these States depend on co-operation with other States, it seems appropriate to share the costs and benefits of these arrangements equitably".⁵ In this perspective, "the non-majoritarian and counter-majoritarian mechanisms of the EU can be legitimized so long as their scope and operation is controlled by the majoritarian systems of the member states – with them taking over this role from the ECJ. However, when removed from such control, they cannot offer pan-European decision-making with anything but spurious and ineffective democratic credentials".⁶

The theoretical underpinnings of Bellamy's critique would require further inquiry, particularly in the light of Scharpf's clarification that "the *input-oriented* tradition" reflects the ideals of participatory democracy whose "starting point is the Rousseauian equation of the common good with the 'general will' of the people", whereas "[i]n the *output-oriented* tradition" going back to Aristotle's and Montesquieu's arguments favoring "mixed constitutions" and canonized by the Federalist Papers, the common interest was seen to be as much threatened by the potential "tyranny of the majority" as it was in danger of being corrupted by self-interested governors.⁷

I will instead concentrate on Bellamy's arguments against the pretention of governing society through expertise. While indeed affecting the Commission's ideology for a long while, such pretention should be distinguished from the fact that EU policies are regulatory rather than redistributive. When the input/output dichotomy was firstly prospected, it corresponded to a distribution of policies between the EU and its Member States that was famously depicted in terms of "Keynes at home, Smith abroad",⁸ namely to the assignment to the EU of regulatory policies, and to Member States of the redistributive ones. In the previous decades, such distribution was sufficiently clear-cut, with the effect that the internal market's performances could be measured as such, as well as those of the Welfare State within each national context.

⁴ *Ibidem*, p. 9.

⁵ *Ibidem*, p. 15.

⁶ *Ibidem*, pp. 15-16.

⁷ F. SCHARPF, *Problem-Solving Effectiveness and Democratic Accountability in the EU*, in MPIfG Working Paper, no. 01, 2003, www.mpiifg.de, p. 3.

⁸ R. GILPIN, *The Political Economy of International Relations*, Princeton: Princeton University Press, 1987, p. 355.

Under the Maastricht Treaty, the before mentioned distribution of policies was maintained, notwithstanding the EU acquired the features of a political enterprise that deeply affected its relationship with the Member States. Such change was promptly noted by those who had firstly used the input/output dichotomy for prospecting the EU's legitimacy issue.

Majone recognized that at least since the 1990s "the problem of the democratic deficit could no longer be ignored or minimized", especially because the Commission was increasingly provided with a variety of functions, in addition to its regulatory tasks, which greatly rendered difficult to evaluate the overall quality of its performance, and therefore to enforce political accountability.⁹ And Sharpf noted that, although the EU "is known to be in charge of limited competencies and it lacks a 'government' in the sense of a politically visible center of power that could be held politically accountable for unsatisfactory states of affairs", a constitutional asymmetry was emerging between the legal constraints following from European liberalization and competition rules and national social-protection rules. These conflicts, he added, "will pale in comparison to the political crises that will arise if the Commission and the Court should be allowed to continue in applying European competition law to the core areas of welfare state services which traditionally had been farthest removed from the market".¹⁰ On the other hand, it might be noted that the enforcement of regulatory policies, whenever requiring national intervention, depends on whether these policies put at risk electoral consent. Think at the 2000 Lisbon Strategy, whose ambition consisted in making Europe by 2010 "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion". That Strategy was supported from an ambitious design of governance, the "Open Method of Coordination", that relied on processes rather than on formal acts, on soft law rather than on hard law, and on coordination, peer review, networks and heterarchy rather than on centralised hierarchical tools of compliance. But it also appeared clear that, contrary to the Maastricht constraints, the bulk of the whole design depended on the Member States discretionary power in engaging in internal structural reforms of the welfare sectors.¹¹

Twenty years later, the EU's delay *vis-à-vis* China and the US is widely held in developing a "knowledge-based economy". It is therefore difficult to deny that the Lisbon Strategy failed because of the resistance of national governments in investing in technological development, requiring regulatory policies, at the expenses of the traditional welfare's redistributive policies.

⁹ G. MAJONE, *Dilemmas of European Integration*, Oxford: Oxford University Press, 2005, p. 38.

¹⁰ F. SCHARPF, *Problem-Solving Effectiveness*, cit., p. 15.

¹¹ R. COLLIAT, *A Critical Genealogy of European Macroeconomic Governance*, in *European Law Journal*, 2012, p. 18.

III. THE FINANCIAL CRISIS AND THE EMERGENCE OF AN EU "TWIN LEGITIMACY DEFICIT"

With the financial crisis, the celebrated EU economic efficiency proved to be more vulnerable than ever. Measures adopted for contrasting that crisis generated a slow but continuous process of fiscal integration whose effects were however controversial. As Francesco Nicoli puts it:

"On the one hand, fiscal integration is not sufficiently developed yet to re-establish European-wide output legitimacy. On the other hand, the first elements of the new economic governance aimed to constrain domestic behaviour and increase the power of insulated institutions in fiscal matters, generating a democratic deficit. In other words, current EU anti-crisis measures, while having limited European-wide redistributive effects (no output legitimacy at EU level), greatly reduce the space of action on economic policy of national lawmakers, constraining their capacity of enacting redistributive policies at domestic level. By doing so without successfully addressing the crisis, the EU has both reduced its output legitimacy and hindered the input legitimacy of national governments, contributing to the rise of Eurosceptic parties in several countries. In other words, the crisis has created a 'twin legitimacy deficit' of European integration: not sufficient redistributive policies to achieve output legitimacy, but sufficient progress towards insulated decision making on fiscal policy to fail to reach input legitimacy. While 'performance deficit' drove the neofunctional stage of integration towards the construction of insulated institutions, democratic deficit is likely to be the driving force of the post functional phase of integration".¹²

I share Nicoli's view about the "twin legitimacy deficit", related to the outputs no less than to inputs, now affecting European integration. I would rather add that an understanding of such deficit should take into account the transformations occurred within the EU institutional scenario, and the economic governance in particular.

Since the Maastricht Treaty, it was widely held that that governance was affected from a structural asymmetry between the quasi-federal powers of the European Central Bank (ECB) and the weak co-ordination of the Member States' political economy. And some added that such asymmetry was problematic not because it contradicted the usual distribution of powers between governments and central banks within nation-states, but because of the shortcomings it engendered within the EU itself.¹³ In the post-crisis European Monetary Union's governance, such asymmetry has generated a paradox that can be caught in the Court of Justice case law. To that end, I will compare *Pringle* with *Gauweiler*. Although going back, respectively, to 2012 and to 2015, these de-

¹² F. NICOLI, *Democratic Legitimacy in the Era of Fiscal Integration*, in *Journal of European Integration*, 2017, p. 393.

¹³ See recently C. JOERGES, C. KREUDER-SONNEN, *European Studies and the European Crisis: Legal and Political Science between Critique and Complacency*, in *European Law Journal*, 2017, p. 15.

cisions still appear particularly meaningful for exposing the before mentioned asymmetry, nor have been contradicted in the following case law.

IV. *PRINGLE* AND *GAUWEILER* AS SYMPTOMS OF THE CONTRADICTIONARY RESPONSE TO THE FINANCIAL CRISIS

In *Pringle*,¹⁴ the Court of Justice held that the European Stability Mechanism (ESM) Treaty was compatible with EU law, in particular with the no-bail-out clause of Art. 125 of the TFEU, because it created a financial rescue mechanism for Eurozone States facing major sovereign debt problems, without directly assuming their debts, but rather granting loans to those countries. While adopting a literal reading of Art. 125, the Court of Justice added that the reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under para. 3 of Art. 136 TFEU “is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States’ economic policies”.¹⁵ On the other hand, the Court stated that the conditionality prescribed “does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the Union”.¹⁶

However, the very Court’s admission that the additional paragraph to Art. 136 TFEU was introduced with the aim of legitimizing a mechanism whose legal basis were strongly disputed under EU law proves that it consisted in establishing an emergency rule, such as that of making financial support dependent on loan agreements specifying not only the *level* of cuts to be made, but also *in what areas* they are to be made by a Member State.¹⁷ To say that the mentioned provision makes renders “strict conditionality” compatible with the coordination of national economic policies obliterates thus a crucial point. As it has been observed:

“The *Pringle* judgment endorses a shift in the EU’s monetary constitution from crisis prevention to crisis management, when bailout funds are only granted in conjunction with the imposition of strict conditionality on beneficiary states. By making the imposition of strict conditionality a constitutional requirement, the Court has imported a concept with controversial reputation into EU law. This constitutional shift in the narrow sense also has constitutional implications in a broader sense; the imposition of strict conditionality is sure to change the constraints within which the political bargaining of the beneficiary states take place”.¹⁸

¹⁴ Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

¹⁵ *Ibidem*, para. 69.

¹⁶ *Ibidem*, para. 111.

¹⁷ J. WHITE, *Authority after Emergency Rule*, in *The Modern Law Review*, 2015, p. 590 *et seq.*

¹⁸ P.-A. VAN MALLEGHEM, *Pringle: A Paradigm Shift in the European Union Monetary Constitution*, in *German Law Journal*, 2013, pp. 163-164.

Furthermore, the Court denied that the ESM was in breach of the general principle of effective judicial protection as enshrined in Art. 47 of the Charter of Fundamental Rights of the European Union, since "the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism".¹⁹

The Court's approach to the interplay between EU law and an international instrument as the ESM Treaty was thus clearly formal and led to a contradiction. While confining its scrutiny to the mere ascertainment of the Member States' purpose of legitimizing emergency measures through an amendment to the TFEU, the Court admitted the irrelevance of EU primary law (such as the Charter's provisions) *vis-à-vis* those measures, being enacted by international instruments. Alternatively, it had to admit that the amendment was not reconcilable with foundational principles of the European project such as equality, mutual respect and co-operation, transformed "into command-and-control relationships".²⁰ Such admission would amount to challenge the European Council, which the Court did not dare to do.

In *Gauweiler and Others*,²¹ the Court of Justice answered to the first German Constitutional Court's preliminary reference. The judgement has appeared "complaisant with respect to admissibility. What might have been read as a sharp threat to disobey, was benevolently and correctly, as it turned out, interpreted as provisional hypotheses. The answers given on the merits, however, were not quite as accommodating".²²

The Court of Justice affirmed that the OMT program "is intended to rectify the disruption to the monetary policy transmission mechanism caused by the specific situation of government bonds issued by certain Member States",²³ and that it could not be "treated as equivalent to an economic policy measure" to the extent that it interfered only indirectly in the field of economic policy.²⁴ Nor the fact that the ECB made implementation of the programme conditional upon the European Financial Stability Facility (EFSF) or with ESM macroeconomic adjustment programs brought the Court to a different conclusion: the purchase of government bonds on the secondary market subject to a condition of compliance with a macroeconomic adjustment programme could indeed

¹⁹ *Pringle*, cit., para. 180.

²⁰ C. JOERGES, *The Overburdening of Law by Ordoliberalism and the Integration Project*, in J. HIEN, C. JOERGES (eds), *Ordoliberalism, Law and the Rule of Economics*, Oxford: Hart Publishing, 2017, p. 196.

²¹ Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler and Others*.

²² G. LÜBBE-WOLF, *Transnational Judicial Interactions and the Diplomatisation of Judicial Decision-Making*, in C. LANDFRIED (ed.), *Judicial Power. How Constitutional Courts Affect Political Transformations*, Cambridge: Cambridge University Press, 2019, p. 246.

²³ *Gauweiler and Others*, cit., para 55.

²⁴ *Ibidem*, para. 59.

be regarded as falling within economic policy when the purchase is undertaken by the ESM, with the difference, however, that the latter “is intended to safeguard the stability of the euro area, that objective not falling within monetary policy”, while the ECB may use that instrument “only in so far as is necessary for the maintenance of price stability”,²⁵ and “is not intended to take the place of that of the ESM in order to achieve the latter’s objectives but must, on the contrary, be implemented independently on the basis of the objectives particular to monetary policy”.²⁶

On the other hand, the Court held that, when it makes choices of a technical nature and undertakes forecasts and complex assessments, the ECB “must be allowed [...] a broad discretion”, subject to a proportionality test only for the obligation “to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions”.²⁷ Unsurprisingly, the conclusion was that the ECB’s analysis of the economic situation of the euro area was not “vitiated by a manifest error of assessment”.²⁸

Pringle and *Gauweiler* differ both for their origins and for the issues at stake. The Irish Supreme Court had rejected the “sovereignty claim”, while the Federal Constitutional Court of Germany (FCC) maintained that its assumption of an EU *ultra vires* act was intrinsically connected with an identity review. Moreover, the ESM’s compatibility with EU law raised the general issue of whether and to which extent EU institutions could participate in an agreement with states outside the confines of the EU;²⁹ the OMT’s compatibility with EU law regarded instead a single soft law measure,³⁰ although posing a general question such as that of the definition of the boundaries between monetary and economic policy under EU primary law. Finally, the before mentioned decisions differ for their consequences. *Pringle* said the final word on the possibility for the CJEU of checking the legal constraints set up by the ESM Treaty, both because, according to the Irish Supreme Court’s ruling, it would have no effect on the Irish constitutional order, and because of the scope of the decision. *Gauweiler*, to the contrary, leaved entirely open the possibility of further judicial scrutiny not only to the interaction which the FCC sought to establish with the Court of Justice, but also to the fact that the ECB might take other decisions affecting the monetary/economic policy divide, as *Weiss* would clearly demonstrate.³¹

²⁵ *Ibidem*, para. 64.

²⁶ *Ibidem*, para. 65.

²⁷ *Ibidem*, para. 69.

²⁸ *Ibidem*, para. 74.

²⁹ P. CRAIG, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, in *European Constitutional Law Review*, 2013, p. 263 et seq.

³⁰ J. ALBERTI, *Challenging the Evolution of the EMU: The Justiciability of Soft Law Measures Enacted by the ECB Against the Financial Crisis Before the European Courts?*, in *Yearbook of European Law*, 2018, p. 627.

³¹ Court of Justice, judgment of 11 December 2018, case C-493/17, *Weiss and Others*.

Pringle and *Gauweiler*, it might be argued, differ for the Court of Justice's approach as well. While in *Pringle* the Court tends to ignore the substantial consequences on EU law of the ESM treaty's adoption, *Gauweiler* reflects, to the contrary, a substantial approach with the aim of putting under the label of "monetary policy" all the tasks that the ECB decided to acquire beyond the TFEU's letter. However, contextually considered, these cases reveal the paradox resulting from the measures adopted in the Eurozone as institutional responses to the crisis, namely the claim of national governments to create a system based on automatisms, and the discretionary powers acquired by the ECB beyond the maintenance of price stability.

It is this double contradiction that characterizes the Eurozone's crisis management. Therefore, the issue at stake does not only consist in what is left of the powers of the Member States in the sphere of economic policy, on the presumption that *Gauweiler* has legitimized the ECB as "an extremely powerful actor", and that "Europe's 'economic constitution' and its entire constitutional configuration has been replaced by the discretionary decision-making powers of an unaccountable technocracy".³² This is just one side of the coin. The other one consists of the imposition of structural convergence of the Southern with the Northern economies of the Eurozone: and "command-and-control interventions, which are guided by the presumption that one size will fit all, are accompanied by the risk of destructive effects. The imposition of changes with disintegrative impact is not only unwise; it is also illegitimate".³³

It is against this uncomfortable background that we should evaluate the Court of Justice's approach. Its deference toward the Member States and the EU institutions on the one hand, and toward the ECB on the other hand, simply adhered to the contradictory developments that took place in the EMU in the aftermath of the financial crisis. Given the fact that such crisis precipitated the euro crisis, *Pringle's* rule that the EU institutions can participate in an agreement with states outside the EU confines, provided that such involvement is compatible with the Lisbon Treaty, nor alters the essential character of the powers conferred on the institutions by that Treaty, was "premised on the need to legitimate whatever action was required by EU institutions within whatever institutional forum to stave off the impending collapse of Greece, Portugal and Ireland, with devastating effects for the entire EU".³⁴ *Gauweiler's* relying on the technical nature of the ECB choices with a view to justify "a broad discretion" regarding the use of the public sector purchase programme (PSPP) reveals as well the Court of Justice's need to legitimate the action of EU institutions *vis-à-vis* the euro crisis.

³² C. JOERGES, *The Overburdening of Law by Ordoliberalism and the Integration Project*, cit., p. 198 et seq.

³³ C. JOERGES, *Comments on the Draft Treaty on the Democratization of the Governance of the Euro Area*, in *European Papers*, 2018, Vol. 3, No 1, www.europeanpapers.eu, p. 80.

³⁴ P. CRAIG, *Pringle and the Use of EU Institutions*, cit., p. 268.

Also others admit that “both cases demonstrate an overburdening of the law and the judiciary in times of political crisis and conceptual paucity. It is an understandable reasoning of the Court not to take a legalistic stance which could have provoked far-reaching political consequences for which the judicial system is not the legitimate author”, although adding that the Court “sanctified extra-legal emergency measures constitutionally and thus contributed to normalising discretionary authority in the new (anti-)constitutional constellation”.³⁵

V. THE PIVOTAL ROLE OF NATIONAL GOVERNMENTS IN DEEPENING THE EUROZONE’S ACCOUNTABILITY DEFICIT

On the other hand, the crisis management provoked an enduring disconnection between EU institutions and citizens even from an input legitimacy perspective. For Schmidt:

“as the crisis evolved from 2010 through 2014, and as EU institutional actors became increasingly concerned about continued poor economic performance and growing political volatility, they slowly began to reinterpret the rules and recalibrate the numbers, albeit mostly without admitting it in their communicative discourse to the public. Instead, they generally continued to insist that they were sticking to the rules even as, behind closed doors in their coordinative discourses of policy construction, they were debating, contesting, and compromising on rules (re)interpretation. The increasing disconnection between what EU actors have said and what they have done has also contributed to major divides in public perceptions of their actions, generally splitting Northern and Southern Europe but also, within them, the winners and the losers of European economic integration”.³⁶

Furthermore, according to Majone:

“As the crisis intensifies, all the proposed ad hoc solutions tend to aggravate the democratic deficit of the EU. It is not only the citizens that are being excluded from the debate about the future of the eurozone; most national governments are forced to accept the solutions proposed by a few leaders representing the major stockholders of the ECB. Thus, the risk of a complete normative failure – a default rather than a simple deficit of democracy at the European level – is by now quite concrete. Indeed, the mechanisms recently set up in the hope of resolving the eurozone crisis clearly reveal a willingness to sacrifice democratic legitimacy in order to rescue the monetary union. More than this, the very idea of European integration, as conceived by the founding fathers, is threatened by the latest developments”.³⁷

³⁵ C. JOERGES, C. KREUDER-SONNEN, *European Studies and the European Crisis*, cit., p. 20.

³⁶ V. SCHMIDT, *The Eurozone Crisis of Democratic Legitimacy. Can the EU Rebuild Public Trust and Support for European Economic Integration?*, in *European Commission Discussion Paper 15*, 26 September 2015.

³⁷ G. MAJONE, *From Regulatory State to a Democratic Default*, in *Journal of Common Market Studies*, 2014, pp. 1221-1222.

However, we should be aware that the "increasing disconnection" was not provoked by all EU actors. The opinion that the Lisbon Treaty would put the premises for the emergence of a true parliamentary form of government was practically vanished by the dominant role that the European Council acquired due to the fallout of the global financial crisis. Such role was not without costs for national governments, pushing them to the center of the EU institutional stage. For a long time, they had preferred to remain behind it. Given the dispersal of power affecting the EU institutional arrangement, national governments were able to leave to the EU the burden of hard choices, starting with those concerning the national budget, without paying electoral costs. Rulers dislike being held accountable. It was arguably in their own interest both to maintain the EU system as it is, with no chance of identifying accountable rulers behind the blue sky and the stars, and to let people believe the media tale of "Brussels" as a seat of inaccessible technocracy.

Although clearly artificial, the divide between national politics and supranational technocratic governance permeated the popular imagination, hiding the dilemma between the adoption of long-term policies that require time to be understood by citizens and are not without risks in terms of electoral approval, and the mere administration of the present, with the related dismissal of politics. While regularly preferring the latter, the national governments' condition is to lay the blame of the European malaise on the "obscure and unelected" officials of Brussels.³⁸

At the time of the Lisbon Treaty's enactment, national governments were still attempting to hide behind the EU flag for fuelling popular distrust at home against "Europe". And yet, they were sawing off the branch they were sitting on. It was the Eurozone crisis that increased the dominance of inter-governmentalism,³⁹ to the point of pushing national governments to the centre stage. The old game was over. The European Council's crucial role in the adoption of financial measures aimed at reducing national expenditures for the citizens' welfare could no longer be denied.

Even the ESM, which was created through an international law agreement without the formal participation of the Union, represents "an intergovernmental experiment": although its international nature has partially shielded the ESM from judicial and political accountability, "the extreme institutional proximity" between the Eurogroup and the Board of Governors established by the ESM suffices to demonstrate the subsistence of a "gap in the judicial and political accountability of ESM-based conditionality programmes".⁴⁰

³⁸ C. PINELLI, *The Discourses on Post-National Governance and the Democratic Deficit Absent an EU Government*, in *European Constitutional Law Review*, 2013, p. 184.

³⁹ O. CRAMME, *The Worrying Inevitability of EU Intergovernmentalism*, in *Policy Network*, 9 December 2012, www.ucl.ac.uk.

⁴⁰ F. PENNESI, *The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?*, in *European Papers*, 2018, Vol. 3, No 2, www.europeanpapers.eu, p. 512.

As for the Commission's proposal to transform the ESM into "a unique legal entity under EU law" called European Monetary Fund (EMF), it reflects a contradiction between the aim of linking its decision-making governance to the "robust accountability framework of the Union together with a full-fledged judicial control",⁴¹ and the fact that the EMF would succeed the ESM "with its current financial and institutional structures essentially preserved".⁴² It is true that "[o]nce the Mechanism becomes an EU body, then it will always be possible to further increase its accountability, whereas further, incremental improvements would be impossible as long as it is an international organisation".⁴³ Such hopeful developments require however time, as if the current crisis of the EU could still be managed by ordinary means.

VI. CONCLUSION

Here we are then. Apparently, the financial crisis transformed the input/output legitimacy distinction into a dilemma between technocratic governance and populism. A different conclusion may however result while looking at how the need for fiscal integration was viewed as a response to the Eurozone crisis. The technocracy vs. populism dilemma may rather be a symptom of the before mentioned "twin legitimacy deficit", which demonstrates per se that the EU cannot longer rely on the success of its economic performances for compensating the lack of democratic credentials *vis-à-vis* the European citizens. Its legitimacy appears today seriously eroded with respect to the output no less than to the input.

The main reason for this decay lies in the fact that expectations for the EU performances are clearly disproportionate for an institutional assessment that lacks a true government. Responses to the financial crisis have further exacerbated that gap in the Eurozone, with the European Council's dominance and its insistence in recurring to automatism for ensuring fiscal integration as an alternative to a supranational governance in the field of fiscal policy. It is this dominance, rather than technocracy, that bars further developments of the European enterprise, as the citizens' increasing malaise toward the EU suffices to demonstrate.

⁴¹ Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM (2017) 827 final, p. 3.

⁴² *Ibidem*, p. 5.

⁴³ F. PENNESI, *The Accountability of the European Stability Mechanism*, cit., p. 545.



ARTICLES

RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

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THE DOUBLE FACE OF THE RULE OF LAW IN THE EUROPEAN LEGAL ORDER: AN ADMINISTRATIVE LAW PERSPECTIVE

ALDO SANDULLI*

TABLE OF CONTENTS: I. The paradox of the European rule of law. – II. The rule of law in the modern State and in the European legal order. – III. The genetic heritage of the rule of law in the European legal order. – IV. Technocratic legitimacy and the progressive construction of a living constitution. – V. Administrative law and constitutional law in the European legal order. – VI. Reconnecting citizens to the European institutions: the role of law in Europe. – VII. The rule of law in action from the administrative law standpoint.

ABSTRACT: This *Article* aims to outline three problematic aspects arising from the peculiar, composite nature of the European legal system considering its many asymmetries. The first element is of a cultural-historical nature, and the goal is to highlight that, in terms of scientific and methodological ascendancy, the European order came into being with a different genetic heritage from that of modern States. The second aspect concerns the relationship between economics and law and the growing process of “juridification” of economic rules. The aim is to show how this process may have altered the traditional concept of the rule of law as it has taken shape in democracies. The third part explores the idea that this may have affected the diversified and asymmetric development of administrative and constitutional law in the European legal order. It then looks at how this asymmetry may have contributed to the aforementioned disconnect between citizens and institutions. The *Article* concludes by arguing that the attempt to reconnect European citizens and Institutions needs to start from a non-infrastructural and non-instrumental concept of law and from a consistent balance in the relationship between administrative and constitutional law.

KEYWORDS: rule of law – European legal order – legitimacy – democracy – administrative law – constitutional law.

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I. THE PARADOX OF THE EUROPEAN RULE OF LAW

In recent years, the European legal system has been considered as a shield against the so-called rule of law backsliding,¹ i.e. against the attacks on the guarantee of fundamental rights, the rise of illiberal democracies and, in particular, against the attempt to undermine the effective and independent judicial protection in EU countries that were once considered to fulfill the values of Art. 2 TEU.²

From the Treaty of Rome to Ursula von der Leyen's recent opening speech,³ the European rule of law has always been interpreted as a foundational value and a cornerstone in the protection of the European democratic order. However, conflicting views exist regarding the concept of European rule of law as it has developed during the European integration process, especially after the failure to adopt the European Constitution, and the subsequent global economic and financial crisis.

It has been pointed out – as in the recent intervention of Peter Huber, an influential judge of the German Constitutional Court – that the high level of independence of the European Central Bank (ECB) in managing monetary policy raises serious questions about the democratic legitimacy of that policy. Similar observations have also been made with regard to European Agencies.⁴

The deep-rooted causes of this paradox, i.e. the tension between the policy-making role of these independent actors and their weak democratic legitimacy, have certainly led to the growing disconnect between the citizenry and the European institutions, which has impinged upon the legal systems of the Member States (under the form of sovereignism, populism, and not least, Brexit).

This *Article* aims to outline some problematic aspects arising from the peculiar, composite nature of the European legal system and the many asymmetries it presents, namely the asymmetries between economics and law, between law and politics, between administrative law and constitutional law, and relatedly between the protection of economic and social rights. These problematic aspects all stem from the nature of the European system as a dynamic, evolving system, so that the process of European

¹ See, among others, L. PECH, S. PLATON, *Judicial independence under threat: The Court of Justice to the rescue in the ASJP case*, in *Common Market Law Review*, 2018, p. 1827 et seq.

² See, for instance, Court of Justice, judgment of 6 November 2012, case C-286/12, *Commission v. Hungary*; judgment of 8 April 2014, case C-288/12, *Commission v. Hungary*; and cases C-66/18 and C-78/18 still pending; judgment of 25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)*; judgment of 5 November 2019, case C-192/18, *Commission v. Poland II*; judgment of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*.

³ Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission, Strasbourg, 16 July 2019, ec.europa.eu.

⁴ P.M. HUBER, *The ECB under the scrutiny of the Bundesverfassungsgericht*, in *Building Bridges: Central Banking Law in an Interconnected World*, ECB Legal Conference, 2019, ecb.europa.eu, p. 28 et seq.

integration may in fact be viewed from different angles, as having a double face, as it will be explained.

The first element to note is cultural-historical in nature and, in terms of scientific and methodological ascendancy, it derives from the fact that the European order came into being with a different genetic “pedigree” compared to what has been witnessed in relation to modern States. Therefore, it will be necessary to understand how, in historical terms, this may have influenced the subsequent developments of the European integration process.

The second aspect concerns the relationship between economics and law and the growing process of “juridification” of the rules governing the economy. This process, indeed, may have altered the traditional concept of the rule of law as it has taken shape in national democracies.

The third problematic aspect refers to the circumstance that the codification of economic rules may have affected the diversified and asymmetric development of administrative and constitutional law in the European legal order, which in turn can be seen as one of the elements underlying the disconnect between citizens and institutions.

The *Article* concludes by arguing that the attempt to reconnect European citizens and EU institutions needs to start from a non-infrastructural and instrumental concept of law, i.e. looking at the substance of what EU regulates and should regulate, and from a consistent balance in the relationship between administrative and constitutional law.

II. THE RULE OF LAW IN THE MODERN STATE AND IN THE EUROPEAN LEGAL ORDER

The concept of rule of law has been fundamental in the construction of the modern State. The law has been an instrument to organize political power, and its exercise has been planned in a sort of consubstantiation between the State and the law and between the law and the State. The law has been understood as a tool for the State and the State apparatus has been functional to the enforcement of the law.

The evolution of the rule of law has led to the autonomous affirmation of law and rights, especially in the constitutional and welfare States of the third quarter of the twentieth century, in the wake of the transition from the modern to the post-modern age, grounded in constitutional pluralism. In the major States of Western Europe, political representation, democracy, freedom, solidarity, justice, and access to independent and impartial courts have portrayed the fundamental contents of the rule of law.⁵

At a time when the rule of law was undergoing its greatest development in the constitutional State in the 1950s, the European legal order was growing fast. A good start-

⁵ On history and the principles of the rule of law see, *ex multis*, T. BINGHAM, *The Rule of Law*, London: Penguin, 2011.

ing point for an assessment of how the rule of law in Europe has developed might be the distinction between the modern State and the post-modern European legal system.

A major distinction concerns the nature of the institutions, namely the composite and diarchic nature of the European legal order. It is based, on the one hand, on the dissolution of the “State” experience within the new paradigm of “diffused” or “multi-level” governance,⁶ in which plans mingle and combine in the absence of any reference to a social model at least endowed with primacy. On the other hand, the European legal system is founded, on the constant presence of Members States’ governments in the decision-making, the so-called intergovernmental model,⁷ which conditions the nature of the European legal order and that has been further strengthened in recent years.⁸ This structure of governance has favoured the growth of administrative law at European level, while constitutional law continues to stay in the background – given the EU’s lack of authority to constitute power – ,⁹ despite a few significant developments, such as the ability of the Court of Justice to curb and channel economic integration as well as to protect fundamental rights.¹⁰

But there is also a second distinction to bear in mind when analysing the rule of law in Europe. It concerns the distinct genetic nature of the European supranational order compared to that of the modern State, which came into being with its own legal (and philosophical) inherent features as, by the seventeenth and eighteenth centuries, law (together with philosophy) was an ancient and established social science. Thus, the law itself was the driver of the economic, political, and social developments of Europe from the seventeenth to the twentieth century. Economics was little more than an embryonic science, and the foundations of sociology emerged during the nineteenth century. This does not mean that, back then, rulers took decisions without considering also political and economic factors, but these were factual elements that were not elaborated through a solid scientific and methodological apparatus. The legal method character-

⁶ See, among others, I. PERNICE, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited*, in *Common Market Law Review*, 1999, p. 703 *et seq.* More recently, I. PERNICE, *Multilevel Constitutionalism and the Crisis of Democracy in Europe*, in *European Public Law Review*, 2015, p. 541 *et seq.* Against the theory of multilevel governance and in favour of the theory of the composite nature of the European legal order, see S. CASSESE, *L’Unione europea come organizzazione pubblica composita*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2000; S. CASSESE, *La crisi dello Stato*, Roma-Bari: Laterza, 2002, p. 71 *et seq.*; G. DELLA CANANEA, *L’Unione europea. Un ordinamento composito*, Roma-Bari: Laterza, 2003.

⁷ See A. MORAVISCK, F. SCHIMMELFENNIG, *Liberal Intergovernmentalism*, in A. WIENER, T. A. BÖRZEL, T. RISSE (eds), *European Integration Theory*, Oxford: Oxford University Press, 2019, p. 64 *et seq.*

⁸ C.J. BICKERTON, D. HODSON, U. PUETTER, *The New Intergovernmentalism and the Study of European Integration*, in C.J. BICKERTON, D. HODSON, U. PUETTER (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, Oxford: Oxford University Press, 2015, p. 1 *et seq.*

⁹ See P.L. LINDSETH, *Power and Legitimacy. Reconciling Europe with the Nation State*, Oxford: Oxford University Press, 2010, chapter 5.

¹⁰ See M. POIARES MADURO, L. AZOULAI (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart, 2010.

ised the development of the modern State in the dual directions of the welfare State and the constitutional State.

The “genome” of the European supranational order, instead, is made up of a multiplicity of “chromosomes”. By the mid-twentieth century, in addition to law, a series of other social sciences, such as economics, sociology, political science and statistics, had already come of age. The European Union, therefore, is an original system not only by virtue of its supranational and composite nature, but also because it is built upon a plurality of social science methods. Of these, in addition to the legal method, the economic method has held a position of particular importance, focusing especially on economic and technical-bureaucratic expertise at the European level,¹¹ with politics being left to the Member States.¹² The functionalist model has sought to foster integration through the market, trying above all to implement the ordoliberal theories of the social market economy. As has been pointed out, “European integration has always been driven by political factors [...]. Yet while the goals were always political, the means were always economic”.¹³

The task of the law, in this context, was above all to give material constitutional force¹⁴ to the process of economic integration (fostering *Integration through Law*),¹⁵ especially through the role played by the Court of Justice.

But the dual genome has meant that the production of EU norms had also been understood as a set of incentives and a system of cost-benefits that guide the behaviour of the EU policy-makers and of the Member States in terms of economic advantages and disadvantages, between ends and means, namely profit-economic effectiveness/efficiency, on the one hand, and proportionality/appropriacy, on the other. The preferred method through which EU policy-makers proceed is empirical, since the study of public and private behaviour – the omnipresent *ex ante* impact assessments – always precedes the definition of the rule, and the reasoning does not revolve much, or not primarily at least, around the principles of legality-equality-solidarity standing alone but on a rationale articulated around goals-results-social-well-being.¹⁶

¹¹ For a more extensive and in-depth analysis, see A. SANDULLI, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo*, Milano: Franco Angeli, 2018, in particular chapter II, p. 59 *et seq.*

¹² See V.A. SCHMIDT, *Democracy in Europe: The EU and National Politics*, Oxford: Oxford University Press, 2006.

¹³ R. BALDWIN, C. WYMPLOSZ, *The Economics of European Integration*, Maidenhead: McGraw-Hill Education, 2015, p. 31.

¹⁴ The theory of material constitution was developed, as well known, by C. MORTATI, *La Costituzione in senso materiale*, Milano: Giuffrè, 1940.

¹⁵ As known, “Integration through Law” was the project, started in Florence, at the European University Institute, in 1978 and directed by Mauro Cappelletti, Monica Seccombe and Joseph H.H. Weiler. In the 1980s, de Gruyter (Berlin) published five volumes as the result of this research project. On the contemporary relevance of that model see D. AUGENSTEIN (ed), *“Integration through Law” Revisited: The Making of the European Polity*, Farnham: Ashgate, 2012.

¹⁶ A. SANDULLI, *Il ruolo del diritto in Europa*, cit., pp. 61-62.

The question is whether this different genetic code determines a distinct functional attitude on the part of the national systems and of the European supranational system and thus of the way each system (and the courts that make them up) views certain fundamental rights and ensures their protection. It is a legal question that has been posed in different ways: either a question of the non-coaxial nature of the national and the supranational systems, or else the issue of the sustainable diversity existing among them.¹⁷

In particular, the question arises as to whether the functional approach to EU integration has not inevitably given to the development of European law a market-oriented slant, thereby leading to the creation of economic models that structurally bias the European institutions in favour of liberalisation to the detriment of social policies. This also seems to be the case of the Court of Justice, which appears not to foreground the protection of fundamental rights as its primary target – unlike what the constitutional courts of the Member States do – but the four freedoms of market operators, so the protection of social rights is indirect, derived, and episodic.¹⁸ The constitutional courts of the Member States therefore threaten to defend their rule of law through jurisdictional mechanisms such as “counter-limits”.¹⁹ This functional approach would therefore appear to be one of the main reasons for disconnection between European institutions and citizens.

The European institutions and the Court of Justice embody not only different manifestations of how the rule of law has developed compared to the national understanding of the rule of law, but they also constitute a shield protecting the foundations of the European rule of law both in relation to the legal systems of the Member States and with regard to the law of international organisations. The *Kadi* case,²⁰ regarding the protection of the rule of law outside the European legal order, but with significant implications for the EU

¹⁷ See, in particular, R. BIN, *Critica alla teoria dei diritti*, Milano: Franco Angeli, 2018.

¹⁸ See, among others, M. GOLDMANN, *The Great Recurrence. Karl Polanyi and the Crises of the European Union*, in *European Law Journal*, 2017, p. 262 et seq. See also D. GRIMM, *The Constitution of European Democracy*, Oxford: Oxford University Press, 2017, pp. 98-99: “The asymmetry also accounts for the liberalizing tendency of the ECJ’s jurisprudence. This is not to say that the ECJ pursues an agenda of economic liberalism. It rather pursues the treaty goal to establish and maintain the single market. Yet, since the vast majority of requests for a preliminary ruling – which reach the ECJ – has its origin in actions by economic actors who see their interests threatened by national legislation, and since the ECJ can contribute to the establishment of the single market only negatively, the result is a structural bias in favour of liberalization. This, in turn, affects social policy. Although reserved for Member States, social policy comes under pressure because of the liberalizing effects of the ECJ’s jurisprudence, combined with the effects of globalization, while the national social policy comes under pressure because upholding a high standard of social security tends to weaken the competitiveness of national economy”.

¹⁹ See, e.g., the Italian Constitutional Court, judgment of 22 June 1983, no. 183 and, even more so, judgment of 21 April 1989, no. 232.

²⁰ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat International Foundation v Council and Commission*, on which see, in particular, the commentary by G. DE BÚRCA, *The EU, the European Court of Justice and the International Legal Order after Kadi*, in *Harvard International Law Journal*, 2009, 1 et seq.

itself, and the recent cases against Hungary and Poland,²¹ or the *Associação Sindical dos Juízes Portugueses* case,²² on the enforcement of the rule of law within Member States, are cases in point. In *Kadi* the Court of Justice limits the implementation of the UN Security Council's anti-terrorist sanctions regime, by annulling the relevant EU regulation adopted in relation to Mr Kadi that violated the right to property and the due process, two crucial principles of the rule of law and safeguards against the unconditional application of international law in the EU context. In the more recent cases, instead, it is the principle of judicial independence that occupies a central stage. The rule of law discourse, in these cases, emerge under the duty of the Member States to ensure "remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Art. 19, para. 1, TEU), to be guaranteed (also) through national judges as judges of EU law. If their independence is endangered through various measures – e.g. salary and benefit cuts and forced early retirement – effective legal protection and remedies accorded by EU law are undermined as well (Art. 47 of the Charter of Fundamental Rights).

III. THE GENETIC HERITAGE OF THE RULE OF LAW IN THE EUROPEAN LEGAL ORDER

A second line of reasoning to unpack the rule of law in the EU derived from the peculiar relationship between law and economics in this context.

Grounded in the ordoliberal theories of the Freiburg School established in Germany in opposition to both state totalitarianism and market liberalism,²³ the neo-liberal doctrine of the Chicago School emerged in the 1990s and since then has started to influence the European integration process. Deregulation, the corporatisation of the machinery of State, new public management, constraints on public finance, and the reduction of social benefits have thus paved the way to a self-serving and teleocratic productivist and contractual vision of the legal order, overshadowing the nomocratic vision typical of political philosophy that had developed in the European legal and political culture over centuries.

The new European rule of law established itself from these complex lines of development, "born already hybrid: its legitimacy comes not only from its *auctoritas* (formally valid "legislative" law) but also and above all from its *ratio* (the substantive and procedural rights and principles of justice)".²⁴ The fundamental transition that had already taken place from *Rechtsstaat* to a community of law was based on the rule of law and defined by

²¹ See above, footnote 2.

²² Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*.

²³ See in particular, J. HIENM, C. JOERGES (eds), *Ordoliberalism, Law and the Rule of Economics*, Portland: Bloomsbury, 2017.

²⁴ M. VOGLIOTTI, *Legalità*, in *Enciclopedia del diritto - Annali*, 2013, p. 371 *et seq.*, in particular p. 410 *et seq.*

the Court of Justice via *Integration through law*, which resulted from the European Treaties' provisions and the general principles of EU law as identified by the Court.²⁵

However, that was a way of make law that was hybrid from the start, above all due to its dual genetic "pedigree" as described above: it is a model created on European functionalist lines, developed in the market for the market, largely using economic (and, to a lesser extent, sociological and political) methods. And after an initial period of equilibrium, in the last twenty-five years, the economy has even strengthened its dominant role with the creation and consolidation of the Economic and Monetary Union.

The hallmark of the evolution that has taken place in the European legal order is the fact that the economic method has "broken into" the legal sphere through a process of "juridification",²⁶ and the law has been exploited as an "infrastructure" to disseminate such method throughout the legal system.

Precepts from management have been translated into legal principles and this "juridification", focusing on economic rationality, has transformed the subject matter and the concept of legality: as it has been pointed out elsewhere, if "acting legally is no longer synonymous with acting efficiently, when the latter inspires the legal determination of administrative practice, all is lost".²⁷ Such a form of "juridified" efficiency has turned the necessarily dynamic and open-ended character of an economic process – into formal and binding rules, constraining and transforming them into legalism, and causing a logical and systemic short-circuit.

The resulting neo-liberal economic "constitution" has finally shaped the integration process in its various stages. The sovereign debt crisis has led to the development of an original regulatory framework, within which financial interests (and with them the related technicality of the sector) have shaped a new economic governance: an exceptional regulatory framework, in which the European institutions with specific technical expertise and a minimum degree of democratic legitimacy, like the ECB and various agencies, end up enjoying substantially unlimited powers.²⁸

This regulatory system, in which both hard and soft law operate, gives rise to a series of paradoxes. EU norms delegate supranational independent authorities with purely technical skills (like the ECB and European Securities and Markets Authority) the exer-

²⁵ See Court of Justice, judgment of 23 April 1986, case C-294/83, *Les Verts v Parliament*, also drawing on Walter Hallstein famous speech in October 1964, see W. HALLSTEIN, *L'unité de l'action européenne*, Lausanne: Centre de Recherche Européenne, 1965, p. 5 *et seq.*

²⁶ J. CHEVALLIER, *La juridicisation des préceptes managériaux*, in *Politiques et Management Public*, 1993, p. 111 *et seq.*

²⁷ A. R. TASSONE, *Sulla formula "amministrazione per risultati"*, in *Scritti in onore di Elio Casetta*, Napoli: Jovene, 2001, p. 813 *et seq.*, in particular p. 823 (own translation).

²⁸ Although, in relation to the ECB, the Court of Justice has set some conditions: see judgment of 16 June 2015, case C-62/14, *Peter Gauweiler and Others v. ECB*, and judgment of 11 December 2018, case C-493/17, *Heinrich Weiss and Others v. ECB*.

cise significant discretionary powers, while the discretion of the national administrations is increasingly limited. As has been pointed out,

“If public legal regulation is fundamentally based on the conformity/non-conformity binomial (of conduct and acts) with respect to a law and is thus based on the legal/illegal premise, which in turn allows judicial control – the new governance, on the other hand, revolves to a large extent around evaluations, i.e., around another binomial, that of the success/failure of the economic performance of States and, therefore, of the policies they plan or implement”.²⁹

In this respect, it is interesting to ask whether, especially after the serious economic crisis of 2008, European fiscal principles within the Euro system have become elements of the rule of law notion in the European Union,³⁰ given that they bind the governments of the Member States.³¹ Some have argued that the responses to the financial and to the public debt crisis have caused a constitutional mutation in the European legal order;³² others, by contrast, believe that a transformation has occurred, but it has been limited to institutional variation.³³

The changes occurred in relation to the new economic governance, however, are essential to understand two distinct but related challenges to the rule of law, both of which dependent on the emergence of European administrative law: a) the fact that the consolidation of high levels of technical expertise has not been balanced by increased levels of political legitimacy of the policy-makers thereby posing a problem of democratic accountability in relation of the decision-making process; b) the lack of a parallel development of

²⁹ L. DE LUCIA, “Pastorato” e “disciplinamento” nella governance economica europea, in *Diritto pubblico*, 2016, p. 867 et seq. (own translation).

³⁰ See, ex multis, C. KILPATRICK, *The EU and its Sovereign Debt Programmes: the Challenges of Liminal Legality*, in *Current Legal Problems*, 2017, p. 337 et seq. It may be assumed that this has indeed come about, at least on the formal level. On the substantive level, however, as these rules have little democratic legitimacy, they do not contribute to the rule of law in a strict sense.

³¹ See, ex multis, L. BESSELINK, J.H. REESTMAN, *The Fiscal Compact and the European Constitutions: ‘Europe Speaking German’*, in *European Constitutional Law Review*, 2012, p. 1 et seq.; K. TUORI, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge: Cambridge University Press, 2014; N. SCICLUNA, *European Union Constitutionalism in Crisis*, London-New York: Routledge, 2014. With regard to the Fiscal Compact and the so-called Golden Rule, see, among others, F. FABBRINI, *The Fiscal Compact, the ‘Golden Rule’ and the Paradox of European Federalism*, in *Boston College International and Comparative Law Review*, 2013, p. 1 et seq.

³² E. CHITI, P.G. TEIXEIRA, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, in *Common Market Law Review*, 2013, p. 683 et seq.; M. DAWSON, F. DE WITTE, *Constitutional Balance in the EU after the Euro-Crisis*, in *Modern Law Review*, 2013, p. 817 et seq.; C. JOERGES, *Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, in *German Law Journal*, 2014, p. 985 et seq.; M. DAWSON, F. DE WITTE, *From Balance to Conflict: a New Constitution for EU*, in *European Law Journal*, 2016, p. 204 et seq.

³³ B. DE WITTE, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?*, in *European Constitutional Law Review*, 2015, p. 434 et seq.

administrative and constitutional law in the European legal system, the latter being still marginal, leads to an overall democratic weakness of the European integration process.

IV. TECHNOCRATIC LEGITIMACY AND THE PROGRESSIVE CONSTRUCTION OF A LIVING CONSTITUTION

The issue of the technical expertise as a ground to take legitimate decisions, bureaucrats with high levels of technical knowledge who exercise increasing powers within the European institutional system, has given rise to a broad debate. While guaranteeing a high level of technical performance, this model of post-national democracy raises problems regarding the lack of political and democratic legitimacy and the lack of adequate checks to balance this ontological weakness.³⁴ European spill-over was based, in functional terms, on the neutrality of technical decision-makers, relying on output legitimacy, as technocratic legitimacy has been defined. This, of course, favoured the emergence of administrative law, which found a favourable environment for its evolution and adaptation.

It has already been stated that the mechanisms of political accountability cannot easily be transposed in the European institutional system due to the way the accountability chain developed in the Member States, and it anyway needs to follow different paths on the basis of the organisational models to which it is meant to be applied.

In addition to this, two further problems have come to the fore. The first is a substantive question. The decision-making process followed by European agencies and other technical bodies operating within the EU institutional framework is lacking any link to electoral accountability and elections, which, instead, can be easily found, for example, in the United States, in the form of Presidential monitoring and direction over the federal agencies.

The second question is a procedural one. Among the European technical bodies, this presumed neutrality does not go hand in hand with adequate procedural guarantees on how technical authorities arrive at decisions, or, in procedural terms, on the judicial review of such technical decisions.

These problems have been dealt with in depth by the literature on the so-called “democratic deficit” and, for the purpose of this analysis two main opposite positions can be recalled here. On the one hand, Peter Lindseth claims that the European governance is eminently administrative in nature, with the consequence that European institutions, made up of bodies of bureaucrats with a technical training, are delegated by the Member States, which are the only subjects provided with a democratic legitimacy derived from the electorate (input democracy), to exercise regulatory power and to carry out tasks of social and economic regulation.³⁵

³⁴ On neutrality and lack of accountability of the European institutions, see, *ex multis*, E. CHITI, *Is EU Administrative Failing in Some of Its Crucial Tasks?*, in *European Law Journal*, 2016, p. 576 *et seq.*

³⁵ P. LINDSETH, *Power and Legitimacy. Reconciling Europe and the Nation-State*, cit.

The second approach, illustrated, among others, by Deirdre Curtin,³⁶ is based on the composite nature of the European order and on the gradual construction of a living European Constitution. Actions shaping the European integration are sedimented and added together, as it happens between different geological layers. The current democratic deficit is acknowledged, but also the progress made over the last few decades, for example in relation to the empowerment of the European Parliament, are taken into consideration. Fragmentation and institutional pluralism, on the other hand, are ontologically part of the European order and derive from the high degree of conflict that arises from the multiplicity and diversity of the institutional actors and the interests at stake. Consequently, according to this strand of scholarship, to gradually overcome the current deficit, in the short to medium term, a proactive role of the Court of Justice, the increased use of political safeguard and transparency mechanisms, the greater involvement of national parliaments as well as the better implementation of the organizational principle of accountability are needed.

This idea of the European legal order as a progressively evolving phenomenon could pave the way for the introduction of instruments aiming to reconnect citizens with political decision-making processes at the European level and that would include a more political form of democratic legitimacy.

V. ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW IN THE EUROPEAN LEGAL ORDER

Therefore, on the one hand, the functional and progressive development of the European legal order, above all of the economic and technically-oriented decisions and bodies, leaving politics mostly to the Member States, has made the rise and the consolidation of European constitutional law problematic; on the other hand, European administrative law has evolved rather easily, encountering few obstacles in its path.

Constitutional law experienced difficulties with regard to the construction of a European constitutional identity and the settlement of a supranational form of government, both in terms of the democratic deficit and the lack of transparency and public participation in the decision-making process and ultimately for the flexibility in the way the law is produced. With this regard, a sensitive area is that of the distribution of competences, regarding which, despite the progress made through the Treaty of Lisbon, a series of unresolved issues remain.³⁷ Likewise, for what concerns the protection of rights, despite the significant steps taken by the Court of Justice, there is still asymmetry in relation to the European Convention on Human Rights and a marked difference be-

³⁶ D. CURTIN, *Executive Power of the European Union. Law, Practices, and the Living Constitution*, Oxford: Oxford University Press, 2009.

³⁷ S. GARBEN, I. GOVAERE (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future*, Oxford: Hart, 2017.

tween the rulings of the European Court and their concrete application by the other European institutions.

These ambiguities had an effect on the (failed) attempt to adopt the European Constitution. While it is true that much of the content found its way into the Lisbon Treaty, it is also true that this failure has been a setback for European constitutional politics and that the Treaties are currently suffering from over-constitutionalisation, i.e. the excessive codification of EU rules and procedure at level of primary law, as Dieter Grimm notes.³⁸

European administrative law has taken quite the opposite route. Until a few decades ago, administrative law could only be linked to the State and could not exist beyond it. The last few decades have shown quite a different development and, especially after the Single European Act, the direction of European administrative law has been marked by enormous expansion in terms of scope of functions and competences, depth of development of principles and institutions, and the complexity of organisational configurations. Administrative law has freed itself of the State and has begun to explore unknown territories, both on continental and global levels, blooming and acting as a centre of gravity – a point of equilibrium – for the legal space beyond the State.

European administrative law initially developed through direct and shared administration only in a few specific, though essential, sectors, such as competition and agriculture. After the Single European Act and especially after the Maastricht Treaty (with its pillars and increased European competences), it has undergone an enormous increase in the scope of action in matter of economic and social cohesion, as well as in environmental policies. The steady growth of European agencies has further increased the importance of administrative law, although in some areas it has not produced the results expected, namely in the fields of social cohesion and open coordination, also due the limited competences enjoyed by the EU in this field.

Today this is no longer enough. The two-way process of constitutionalising administrative law and “administrativising” constitutional law,³⁹ which began and has developed in Europe itself, calls for a joint analysis of administrative and constitutional law. From this point of view, administrative law, given the way it developed at supranational level and globally, can be used as a basis for a renewed impetus for European constitutional law, or rather for European public law. The construction of a new institutional and polit-

³⁸ D. GRIMM, *The Constitution of European Democracy*, cit., p. 99: “Different from national constitutions, the treaties are not confined to those provisions that reflect the functions of a constitution. They are full of provisions that would be ordinary law in Member States. This is why they are so voluminous. As long as the treaties were treated as international law this was not a problem. As soon as they were constitutionalized their volume become problematic: in the EU the crucial difference between the rules for political decisions and the decisions themselves is too a large extent levelled. The EU is over-constitutionalized”.

³⁹ See, among others, F. WOLLENSCHLÄGER, *Constitutionalisation and Deconstitutionalisation of Administrative Law in View of Europeanisation and Emancipation*, in *Review of European Administrative Law*, 2017, p. 7 et seq.

ical structure for the Union is not reasonably possible without the decisive contribution of constitutional law.

This combination of administrative and constitutional law could bring beneficial effects, especially on the most controversial points in the European agenda: the development of European solidarity policies.⁴⁰ Policies of cohesion and cooperation have not worked well so far. But it may also be argued that, for the future of Europe, investment in solidarity, the protection of social rights, and the redistribution of wealth could also be a winning choice from the utilitarian, Benthamian, perspective.

VI. RECONNECTING CITIZENS TO THE EUROPEAN INSTITUTIONS: THE ROLE OF LAW IN EUROPE

With a view to reconnect citizens with the European institutions the lost balance between law, economics and politics has to be restored. Historical cycles bear witness to the need for law, politics, economics, and the other social sciences to proceed according to an equilibrium, in a relationship of mutual exchange.

In order to do this, we first need to be clear about the underlying objective. If we are merely interested in a common market, a Europe of economic interests, able to address the other economic blocs with adequate tonnage, this union can only be temporary and instrumental, implying a tenuous link among the political, social and identity perspectives: in other words, as long as there is an economic advantage, all well and good; but if this is no longer the case, then each to his own.

The sudden EU eastwards enlargement of the borders has caused problems regarding the very structure of this supranational legal system and they cannot be ignored.

If, by contrast, the intention is to create a European order that can represent the home for the European peoples, then another direction has to be established: "If Europe does not want to run aground, it must no longer appear as a technical-pragmatic construct of economic rationality; it must present itself as an idea of order and be anchored in a vision of the political will of the peoples no less than of individuals".⁴¹ First of all, it is necessary to rebuild the equilibria of the social model, making the contributions of the "partial systems" of the social sciences and the different methods symmetrical and mutually beneficial. This must be done in such a way that partiality does not prevail and that an interdisciplinary combination can be reconstituted.

⁴⁰ S. SCIARRA, *Solidarity and Conflict. European Social Law in Crisis*, Cambridge: Cambridge University Press, 2018.

⁴¹ E-W. BÖCKENFÖRDE, *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita*, Roma: Laterza, 2010, pp. 200-201. See M. KÜNKLER, T. STEIN, *Statism, Secularism, Liberalism – Böckenförde's Contributions to German Staatsrechtslehre in the Light of Contemporary Challenges Within and Beyond the State*, in *German Law Journal*, 2018, p. 137 et seq.

The way forward, in this direction, seems to be to strengthen cooperation between a small and cohesive group of countries in a union that can not only be economic, but also constitutional and political.⁴² These countries could more or less coincide with the founding States, which, having historically shared the founding principles of the democratic state, could be able to construct a new European order built on unity in difference, also working on the constitutional, political, and social levels to protect fundamental rights.

For this reason it is also important to reconstruct the deep contents of the European rule of law, bringing the substance of this concept back to the legal sphere. Indeed, we are witnessing several troubles in the application of the rule of law, in which we see formally non-legal norms endowed with real normative scope and, on the contrary, formally legal standards with dubious material normativity. It is therefore necessary to go back to the roots of European legality, emphasising once more the extrinsic and intrinsic aims of the law. A concept of law rich in substance referred to the ultimate values – one that avoids isolation and relegation to the role of law as mere infrastructure – is needed. It is true that law is a second-degree concept, not primeval like morality, spirituality, politics and economics, and has thus been continuously exploited throughout history, with religion, politics, and economics sometimes using it for marginal and instrumental goals, adapting it to their purposes. It is also true, however, that there exists a fundamental characteristic of legality, in its intrinsic, “militant” goals, one might say: it tends to guide society through a sense of normative value, in a search for proportion and, therefore, for the right balance between the many interests coexisting in society and among the goals of the various social sciences, and it shall be pursued through reasonable and accepted regulation, in such a way as to be able to continually adapt to social change.

It also follows that the law is naturally inspired by the form and limitations of the influence coming from the methods and goals of the other social sciences: the rule of law, understood in a substantive sense, constitutes a check against the primordial instincts leading to the prevalence of the methods and aims of one social science over the others. And, with this meaning, law plays a fundamental role in coalescing the aims of the other sciences at a given historical moment in order to transform their reasons into rules. Therefore, the lost balance between the different social sciences must be found once again: law, in this context, represents both the means through which this new balance may be found and the goal to be pursued precisely through the discovery of the right proportion.

This does not imply an absence of asymmetries and differences. It has been noted in this regard that a sustainable degree of asymmetry may even be a factor for integration, rather than disintegration, if “exercised in compliance with certain (procedural and

⁴² See, amongst many, F. SCHIMMELFENNIG, D. LEUFFEN, B. RITTBERGER, *The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation*, in *Journal of European Public Policy*, 2015, p. 764 et seq.; B. DE WITTE, *Variable Geometry and Differentiation as Structural Features of the EU Legal Order*, in B. DE WITTE, A. OTT, E. VOS (eds), *Between Flexibility and Disintegration The Trajectory of Differentiation in EU Law*, Cheltenham: Edward Elgar, 2017, p. 9 et seq.

substantive) guarantees in order to safeguard the constitutional core of the system of reference".⁴³

In conclusion, law can act as an infrastructure, but it must not deviate from the fundamental values (namely democracy and justice) at the heart of liberal constitutionalism. What is needed is a return to the "constitutional moment",⁴⁴ to the innermost meaning of "integration through law", to the original post-war period when law, politics, and economics merged in an efficacious union; a return to the 1944 Philadelphia Declaration, the expression, as an appendix to the horrors of the Second World War, of the will to construct a new international order based on law and justice and on the protection of fundamental rights.

VII. THE RULE OF LAW IN ACTION FROM THE ADMINISTRATIVE LAW STANDPOINT

In practical terms, in what directions can we work to build up a different structure for the European legal order, strengthening its democratic legitimacy and reconnecting citizens to the European institutions?

From the administrative law standpoint, there are basically three ways forward. First of all, there is the administrative procedure. A positive move would be to adopt a European administrative procedure Act, based on those already in place in the vast majority of Member States.⁴⁵ Although many principles and rules for administrative action have been drawn up in Court of Justice's case law, it is significant that the decisions of the European institutions based on technical expertise are often marked by opacity in terms of mechanisms for fair procedure, due process, and transparency.

A second area to work on might be the substantive aspects of the decision-making process. Procedural aspects must go hand in hand with substantive ones as far as the content of public decisions is concerned. From this point of view, the principle of proportionality is of vital importance for all the technical work carried out by the European institutions and in particular for the regulation of the financial markets: the decisions taken at European level must guarantee the least possible sacrifice for the holders of conflicting public and private interests.⁴⁶

⁴³ G. MARTINICO, *Quanto è sostenibile l'integrazione (asimmetrica) sovranazionale. Note di diritto comparato*, in *Istituzioni del federalismo*, 2018, p. 299 (own translation) and R. BELLAMY, S. KRÖGER, *Differentiated Integration as a Fair Scheme of Cooperation*, in *EUI Working Paper RSCAS*, no. 27, 2019.

⁴⁴ B. ACKERMAN, *We the People, Volume 1: Foundations*, Cambridge, MA: The Belknap Press of Harvard University Press, 1991.

⁴⁵ See the European Parliament resolutions, 15 January 2013 and 9 June 2016. See also the project ReNEUAL (renewal.eu): in particular, P. CRAIG, H.C.H. HOFMANN, J.-P. SCHNEIDER, J. ZILLER (eds), *ReNEUAL. Model Rules on EU Administrative Procedures*, Oxford: Oxford University Press, 2017.

⁴⁶ The democratic legitimacy of the public authorities and the contemporary needs for an administrative action based on reason are central questions not only in Europe, but also in the United States. In the last few years, Donald Trump has developed a plebiscitarian concept of democracy and interpreted

However, it would be a mistake to think that the acts adopted by the European institutions should simply be the result of the balance between the interests of the Member States (and the interests of private parties) in substantive and procedural terms. Administrative law alone is not enough; constitutional law and the clear adherence to and promotion of fundamental values in the adoption of common policies are also required.

This means intervening in the mixed field (at the same time constitutional and administrative) of the distribution of competences and of the institutional structure, the most delicate part of the integration process.

Emphasis should be given to the division of competences between supranational and national institutions and to the legitimacy of the European institutions' powers in the complex administrative integration: in particular, the unsolved accountability problems determined by the overcoming of the *Meroni* non-delegation doctrine and the division of powers between the European Commission, the EU agencies and national governments and administrations has to be tackled.⁴⁷

Moreover, differentiated integration could allow the implementation of common policies in the fields of taxation and banking. But it is above all through the revitalisation of policies fostering solidarity, the redistribution of wealth, and the management of borders that the ability to reconnect the European institutions with their citizens will come about: from these actions, European citizens will be able to appreciate once again the importance of a shared sense of belonging to this particular legal system.

The evolution of the European legal order shows that the current crisis is mainly one of legitimacy and political accountability, with a series of consequences for their operationalisation in terms of both *input* and *output legitimacy*. It also implies the demise of *political messianism*, which has marked the construction of Europe since the Schuman declaration.⁴⁸ In this regard, Joseph Weiler aptly remarks that "Democracy was not part of the original DNA of European Integration. It still feels like a foreign implant. With the collapse of its original political Messianism, the alienation we are now witnessing is only to be expected".⁴⁹

"its electoral mandate as a mandate to engage in quasi-authoritarian rule": see J.L. MASHAW, *Reasoned Administration and Democratic Legitimacy. How Administrative Law Supports Democratic Government*, Cambridge: Cambridge University Press, 2018, p. viii. Nevertheless, the author argues that the model of reasoned administration is still at the heart of modern American administrative law.

⁴⁷ See, in particular, M. SIMONCINI, *Administrative Regulation Beyond the Non-delegation Doctrine. A Study on EU Agencies*, Oxford: Hart, 2018.

⁴⁸ J.H.H. WEILER, *In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration*, in *Journal of European Integration*, 2012, p. 825 et seq.

⁴⁹ J.H.H. WEILER, *60 Years since the First European Community – Reflections on Political Messianism*, in *European Journal of International Law*, 2011. See also in this *Special Section* L. RYE, *The Legitimacy of the EU in Historical Perspective. History of a Never-ending Quest*, in *European Papers*, 2020, Vol. 5, No 1, www.europeanpapers.eu, p. 191 et seq.

We must not underestimate, as mentioned above, the other side of the coin. Compared to the national level of government, the European institutions and the Court of Justice are not only different manifestations of how the rule of law has developed as a result of financial and fiscal transformations. They also constitute a shield protecting the foundations of the European rule of law both in relation to the legal systems of the Member States and to international organisations, as shown by the aforementioned case law – *Kadi*, *Associação Sindical dos Juizes Portugueses* and the judgments against Hungary and Poland.

A recent example of this very important function performed by the European rule of law is the judgment of the Court of Justice on the independence of the Polish Supreme Court (C-619/18, *Commission v. Poland*). Three key issues emerge from this case: 1) the Court of Justice plays a central role in the EU's unique institutional organisation, since the European legal order has an unquestionable judicial traction; as in previous critical junctures, it is the court that gives new vigour to the integration process, through the law; 2) the constitutional legitimacy of the EU, weakened by the wreck of the draft European Constitution, can find renewed strength through the rediscovery and enhancement of the founding principles of the European order, as set out in the Treaties; 3) the move towards authoritarianism that is affecting some countries in particular, as well as the shift towards sovereignism and populism across the entire continent, can be curbed through law.

It is with this regard that the force of law needs to be understood not as mere infrastructure but as a form of enhancement of the principles underpinning the pact between the peoples of Europe.

Defence of the substantive principles of the rule of law and of the democratic structures based on checks and balances is the most important legacy of the past, to be protected in order to guarantee a solid future to the European citizens. To this end, it is to be hoped that the law – not seen in the merely formal or instrumental sense, but for its substance – will regain a central role in the European order.



ARTICLES

RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

edited by Cristina Fasone, Daniele Gallo and Jan Wouters

REVISITING ART. 2 TEU: A TRUE UNION OF VALUES?

JAN WOUTERS*

TABLE OF CONTENTS: I. Introduction. – II. Fundamental values and the Treaties of Lisbon. – II.1. Which values, and which status or role? – II.2. The EU's limited competences to act upon, and enforce, its values. – II.3. How common and deep are the Union's values? – III. Compliance with Art. 2 TEU at the stage of accession. – IV. Enforcement of Art. 2 TEU during membership of the Union. – IV.1. The use and non-use of Art. 7 TEU. – IV.2. The Commission's Rule of Law Framework. – IV.3. The Court of Justice's increasing role. – V. Concluding remarks.

ABSTRACT: The *Article* offers a critical assessment of Art. 2 TEU, from its genesis to its implementation so far. It examines the enforcement of the Union's foundational values both in the accession stage and during EU membership. Two main weaknesses related to Art. 2 TEU are highlighted in connection with the theme of this *Special Section*. First, there is an asymmetry between the nature of Art. 2 TEU's values, which are foundational for the whole EU project and architecture, and the limited competences conferred upon the Union to legislate with regard to these values and to enforce their respect. Second, the EU and the Commission in particular have followed a legalistic-technocratic assessment of compliance with rule of law principles rather than endorsing a broader view of Art. 2 that combines all of its values. Under such broader view, other values like democracy, justice and solidarity could be given the same rank as the rule of law, at the time of the accession process and once membership is acquired. It is submitted that this would help the Union to connect more strongly with the citizens of the acceding countries and to reconnect with those of the Member States.

KEYWORDS: Art. 2 TEU – Union of values – EU accession – EU membership – rule of law – EU competences.

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I. INTRODUCTION

This *Article* offers a critical assessment of Art. 2 of the Treaty on European Union (TEU), from its genesis to its implementation so far. The Article, inserted by the Treaty of Lisbon, lists the foundational values of the European Union (EU or Union): “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. It adds, in a second sentence, that 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”. This provision, which comes at the very beginning of the TEU and sums up the core values for which the EU stands, is clearly meant to be of fundamental importance.¹ It aims at underpinning the Union with a unique legitimacy for its citizens, namely the fact that it constitutes a “community of destiny” (*Schicksalsgemeinschaft*),² binding the States and peoples of Europe in a union of common shared values. If one of

¹ For other analyses of Art. 2 TEU and the Union’s fundamental values, see *inter alia* M. BENLOLO-CARABOT, *La CJCE et la protection des valeurs fondamentales de l’ordre juridique communautaire*, in *Revue du marché commun et de l’Union européenne*, 2009, p. 380 et seq.; F. BENOIT-ROHMER, *Valeurs et droits fondamentaux dans le traité de Lisbonne*, in E. BROSSET, C. CHEVALIER-GOVERS, V. EDJAHARIAN, C. SCHNEIDER (dir.), *Le traité de Lisbonne: reconfiguration ou déconstitutionnalisation de l’Union européenne*, Bruylant, 2009, p. 143 et seq.; D. BLUMENWITZ, D. MURSWIEK, G. H. GORNIG (eds), *Die Europäische Union als Wertegemeinschaft*, Berlin: Duncker & Humblot, 2005; M. CLAES, *Editorial Note: How Common Are the Values of the European Union?*, in *Croatian Yearbook of European Law & Policy*, 2019, p. vii et seq.; V. CONSTANTINESCO, *Les valeurs dans le Traité établissant une constitution pour l’Europe*, in S. BESSON, F. CHENEVAL, N. LEVRAT (eds), *Des valeurs pour l’Europe?*, Bruxelles: Bruylant, 2008, p. 47 et seq.; V. CONSTANTINESCO, *Les valeurs de l’Union, quelques précisions et mises à jour complémentaires*, in L. POTVIN-SOLIS (dir.), *Les valeurs communes dans l’Union européenne*, Onzièmes Journées Jean Monnet, Bruxelles: Bruylant, 2014, p. 47 et seq.; J.P. JACQUÉ, *Crise des valeurs dans l’Union européenne?*, in *Revue trimestrielle de droit européen*, 2016, p. 213 et seq.; M. KLAMERT, D. KOCHENOV, *Article 2 TEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary*, Oxford: Oxford University Press, 2019, p. 22 et seq.; S. LABAYLE, *Les valeurs européennes (1992/2002) – Deux décennies d’une Union de valeurs*, in *Revue Québécoise de droit international*, 2012, p. 39 et seq.; J. LACROIX, *Does Europe Need Common Values?*, in *European Journal of Political Theory*, 2009, p. 141 et seq.; P. LEINO, R. PETROV, *Between “Common Values” and Competing Universals*, in *European Law Journal*, 2009, p. 654 et seq.; S. LABAYLE, *Les valeurs de l’Union européenne*, doctoral thesis, Université Laval-Québec – Aix-Marseille Université, 2017; K. LENAERTS, M. DESOMER, *Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means*, in *European Law Review*, 2002, p. 377 et seq.; M. POTACS, *Wertkonforme Auslegung des Unionsrechts?*, in *Europarecht*, 2016, p. 164 et seq.; J. RIDEAU, *Les valeurs de l’Union européenne*, in *Revue des affaires européennes*, 2012, p. 329 et seq.; C. TOMUSCHAT, *Common Values and the Place of the Charter in Europe*, in *Revue européenne de droit public*, 2002, p. 159 et seq.; A.T. WILLIAMS, *Taking Values Seriously: Towards a Philosophy of EU Law*, in *Oxford Journal of Legal Studies*, 2009, p. 549 et seq.

² The EU was described in this manner by the former German Minister of Foreign Affairs, H.-D. GENSCHER, *Die EU ist eine Schicksalsgemeinschaft*, in *Der Tagesspiegel*, 21 December 2010, www.tagesspiegel.de.

the Member States would disregard those values, the legitimacy of the whole edifice would be endangered.³

However, in line with the theme of this *Special Section*, the present *Article* argues that the purported legitimacy gains of Art. 2 TEU are being undercut by two serious flaws, one pertaining to the current set-up of the EU's founding Treaties, the other to the enforcement actions of the Union's institutions. First, there is an asymmetry between the nature of Art. 2 TEU's values, which are foundational for the whole EU project and architecture, and the limited competences conferred upon the Union to legislate with regard to these values and to enforce their respect.⁴ Second, the EU's institutions, in particular the European Commission, has as of yet followed a rather fragmentary and legalistic-technocratic approach by focusing mainly on compliance with the rule of law, rather than endorsing a more comprehensive view on Art. 2 that combines all of its values together. Under such broader view, other values like democracy, justice and solidarity should be given the same rank and strength as the rule of law, both at the time of the accession process and once membership has been acquired. It is submitted that this would help the Union to connect more strongly with its citizens.⁵

The *Article* starts with a quick recap of how the Treaty of Lisbon has made the EU a union of values: what is the status and role of these fundamental values, and how should they be concretized and interpreted? What competences does the EU have to develop and legislate on them (Section II)? While a commitment to respect and promote these values is a prerequisite for EU membership pursuant to Art. 49 TEU, we will look into the practice of pre-accession monitoring of the Commission (Section III). Subsequently, we will examine the question of the enforcement of the Union's fundamental values during membership, looking at the problems related to Art. 7 TEU and the way in which the institutions, in particular the Commission and the CJEU have dealt in the recent past with the escalating rule of law crisis in a number of Member States (Section IV). In our concluding remarks we revisit our main findings in light of this special section's focus on the tension between authority and legitimacy (Section V).

³ See C. HILLION, *Overseeing the Rule of Law in the EU. Legal Mandate and Means*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, p. 59 *et seq.*, pp. 60-61; cf. the "all-affected principle" as discussed by J.-W. MÜLLER, *Should the EU Protect Democracy and the Rule of Law inside Member States*, in *European Law Journal*, 2015, p. 141 *et seq.*, pp. 144-145.

⁴ For this point, specifically with regard to human rights: J. WOUTERS, *From an Economic Community to a Union of Values: the Emergence of the EU's Commitment to Human Rights*, in J. WOUTERS, M. NOWAK, A.-L. CHANÉ, N. HACHEZ (eds), *The European Union and Human Rights: Law and Policy*, Oxford: Oxford University Press, forthcoming.

⁵ This is also the central tenet of the RECONNECT Horizon 2020 project (www.reconnect-europe.eu), as indicated in the introduction to this *Special Section*.

II. FUNDAMENTAL VALUES AND THE TREATY OF LISBON

II.1. WHICH VALUES, AND WHICH STATUS OR ROLE?

From the viewpoint of the Union legal order, the importance of Art. 2 TEU can hardly be overstated. It is not just a solemn declaration, but a binding treaty clause and a provision of EU primary law that figures on top of the EU's constitution – in other words, a *Grundnorm* for European integration.⁶ It commits both the Union, its institutions, and the Member States. As Jean-Claude Piris has observed, Art. 2 “is not only a political and symbolic statement. It has concrete legal effects”.⁷ Indeed, it is, first of all, a prerequisite for EU membership. Art. 49 TEU stipulates that “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”. Second, a “serious and persistent breach” of these values by a Member State may lead to a suspension of rights resulting from EU membership: that is the so-called “nuclear sanction” laid down in Art. 7, paras 2, and 3, TEU, and which because of its heavy nature has never been applied in practice, at least until now (see below, Section IV). Last but not least, the promotion of the aforementioned values is one of the first objectives of the EU according to Art. 3, para. 1, TEU, and a duty of the EU institutional framework pursuant to Art. 13, para. 1, TEU.

Still, Art. 2 harbours a number of ambiguities. A first one is the splitting up of the provision over two sentences, which begs the question whether the values listed in them have a different status. Some commentators consider that only the values listed in the first sentence belong to the Union's fundamental values, whereas those mentioned in the second sentence that characterize European society⁸ (pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men) would not be values but rather “evaluative characteristics”.⁹ This view should not be upheld. Given the fundamental role played in EU law by a number of the principles mentioned in the second sentence (in particular non-discrimination¹⁰ and equality be-

⁶ M. POTACS, *Wertkonforme Auslegung des Unionsrechts*, cit., pp. 165 and 176.

⁷ J.C. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 71.

⁸ While M. KLAMERT, D. KOCHENOV, *Article 2 TEU*, cit., consider it ambiguous whether the values listed “are considered to form part of the ‘society of the [Member States]’ or the ‘society of the Union’”, they consider it unlikely from a systematic point of view that “the Treaty would ascribe values to the [Member States]”; moreover, “such a reading would imply that the [Member States] cumulated would be said to constitute a single society”.

⁹ In German: “*wertende Merkmale*”: see M. HILF, F. SCHORKOPF, *Commentary to Article 2 TEU*, in E. GRABITZ, M. HILF, M. NETTESHEIM (eds), *Das Recht der europäischen Union*, München: Beck, 2019, para. 43.

¹⁰ See, in the case-law of the Court of Justice, in particular: judgment of 15 June 1978, case C-149/77, *Defrenne v. Sabena*, paras 26-27; judgment of 20 April 1996, case C-13/94, *P v. S and Cornwall County Council*, para. 19; judgment of 22 November 2005, case C-144/04, *Werner Mangold v. Rüdiger Helm*, paras 74-75; judgment of 11 July 2006, case C-13/05 *Chacón Navas*, para. 56; judgment of 19 January 2010, case C-555/07,

tween women and men¹¹), it is submitted that they belong to the set of fundamental Union values as well. They all are part of the “European identity”.¹²

This point may even be broadened. The fundamental values mentioned in Art. 2 TEU are not to be seen in clinical isolation from other crucial provisions of the EU’s founding Treaties. It is submitted that one has to read them together with the core objectives of the EU as laid down in Art. 3 TEU. Such combined reading makes clear that the Union is premised also on other fundamental values, like “combat[ing] social exclusion”, “promot[ing] social justice and protection”, “promot[ing] solidarity between generations”, “the protection of the rights of the child”, and “respect[ing the Union’s] rich cultural and linguistic diversity and ensur[ing] that Europe’s cultural heritage is safeguarded and enhanced”.¹³ Further down the Treaties, it becomes clear that sustainable development constitutes a fundamental principle as well.¹⁴ Most of these points are additions which the Treaty of Lisbon has made to the texts of the earlier Treaties.¹⁵ They highlight the centrality, to quote Piris again, of “respecting human values and caring for the well-being of the people”.¹⁶

As to the status and role of the said values, commentators tend to distinguish between values which are longstanding principles of EU law – such as human rights, non-

Seda Küçükdeveci v. Swedex GmbH & Co. KG, para. 21; judgment of 26 September 2013, case C-476/11 *HK Danmark v. Experian A/S*, para. 19; judgment of 18 July 2013, case C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*, para. 43; judgment of 7 November 2019, Joined Cases C-80/18 to C-83/18 *UNESA*, para. 47.

¹¹ The list of CJEU cases is too long to reproduce. See European Commission, *Compilation of Case-Law on the Equality of Treatment between Women and Men and on Non-Discrimination in the European Union*, 2010, op.europa.eu. For a more comprehensive and more up-to-date overview, see M. SCHONARD, *Equality Between Men and Women*, European Parliament Fact Sheets on the European Union, www.europarl.europa.eu.

¹² For this purpose, one can go back as far as the “Declaration on European Identity” adopted by the heads of state and government of the then nine Member States in Copenhagen on 20 November 1973 (Bulletin of the European Communities no. 12/1973, p. 118). The Declaration states notably: “The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights”.

¹³ See on this *inter alia* O. CALLIGARO, *From “European Cultural Heritage” to “Cultural Diversity”? The Changing Core Values of European Cultural Policy*, in *Politique Européenne*, 2014, p. 60 *et seq.*

¹⁴ See ninth recital, preamble TEU; Art. 3, paras 3 and 5 TEU; Art. 21, para 2, let. f), TEU; Art. 11 TFEU; third recital, preamble, and Art. 37 Charter of Fundamental Rights of the European Union (Charter). In opinion 2/15 of 16 May 2017, para. 147, the Court of Justice derived from the aforementioned TEU and TFEU provisions (combined with Art. 3, para. 5, TEU, Art. 21, para. 3, TEU, Art. 9 TFEU and Art. 205 TFEU) that “the objective of sustainable development henceforth forms an integral part of the common commercial policy”.

¹⁵ L.S. ROSSI, *Does the Lisbon Treaty Provide a Clearer Separation of Competences Between EU and Member States?*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, 2012, p. 85 *et seq.*, pp. 90-91.

¹⁶ J.C. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, cit., p. 73.

discrimination and equality of women and men – and those which are rather “programmatic” in nature – such as freedom, pluralism or tolerance.¹⁷ It is not certain that this distinction is helpful. What to do, for instance, with human dignity, justice and solidarity? It is submitted that these values and their interpretation need to be linked to those instances of secondary EU law where they have been elaborated upon and to the CJEU (and where suitable, national) case-law which refers to them. Apart from such “bottom-up” operationalisation, it can also be submitted that other EU law provisions must be interpreted in conformity with said values (“top-down” impact through value-consistent interpretation).¹⁸

A terminological remark may be in order here. There are some differences between the current Art. 2 TEU, on the one hand, and the terminology used in the EU’s Charter of Fundamental Rights (Charter), on the other. One may point to the second recital of the Charter’s preamble, which stresses that “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law”. Although the formulation of this recital makes a distinction between “indivisible, universal values” on the one hand, and “principles” on the other hand, it seems a somewhat pointless undertaking to try to distinguish systematically between “values” and “principles”: thus, in the wording of the 1997 Treaty of Amsterdam, the Union was “founded on the *principles* of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” (emphasis added), whereas the Treaty of Lisbon has elevated all of these into *values*.¹⁹

II.2. THE EU’S LIMITED COMPETENCES TO ACT UPON, AND ENFORCE, ITS VALUES

While at first sight Art. 2 TEU may be very impressive and indicate the transformation of a primarily economic integration project into a more political union based on fundamental values²⁰, when reading through the Treaties, it becomes clear that the constitutional design has its shortcomings. First of all, there is a striking asymmetry between the proclamation of the values in Art. 2 and the Union’s competences to act upon these values. The provisions of the Treaty on the Functioning of the European Union (TFEU) on competences do not mention the values of Art. 2 at all. It follows that the Union can only act on them in a *functional* manner, through the still mainly socio-economic policy powers it has been

¹⁷ See M. KLAMERT, D. KOCHENOV, *Article 2 TEU*, cit.

¹⁸ This has been argued convincingly by M. POTACS, *Wertkonforme Auslegung des Unionsrechts?*, cit. See the detailed overview of each of the values, referring to CJEU and national case-law, with J. RIDEAU, *Union européenne – Nature, valeurs et caractères généraux*, in *Jurisclasseur Europe Traité*, 2015, paras 27 et seq.; ID., *Les valeurs de l’Union européenne*, cit.

¹⁹ H. BLANKE, S. MANGIAMELI, *Article 2 [The Homogeneity Clause]*, in H. BLANKE, S. MANGIAMELI (eds), *The Treaty on European Union (TEU): A Commentary*, Berlin-Heidelberg: Springer, 2013, p. 109 et seq., para. 7; M. HILF, F. SCHORKOPF, *Commentary to Article 2 TEU*, cit., para. 11.

²⁰ For an analysis of this gradual transformative process, see J. WOUTERS, *From an Economic Community to a Union of Values*, cit.

endowed with.²¹ This imbalance is not unique to Art. 2. Also with regard to the EU's commitment to human rights, an illustration of it can be found in Art. 6, para. 1, and 2, TEU regarding the Charter and the Union's future accession to the European Convention on Human Rights (ECHR). Concerning the Charter, the Treaty emphasizes that it "shall not extend in any way the competences of the Union as defined in the Treaties"²²; on the EU's accession to the ECHR, it is stipulated that this "shall not affect the Union's competences as defined in the Treaties". In other words, the human rights *responsibilities* of the Union do not lead to any increase in the latter's human rights *powers*.

A similar asymmetry can be found with regard to the question of the *enforcement* of the Union's fundamental values. While Art. 13, para. 1, TEU proclaims that the EU's institutional framework "shall aim to promote its values", the Treaties do not, with the exception of the unwieldy Art. 7 TEU (on which *infra*, Section IV), contain any specific enforcement mechanism in this respect.

II.3. HOW COMMON AND DEEP ARE THE UNION'S VALUES?

One can develop another line of critical reflections on the substance of the fundamental values laid down in Art. 2 TEU. What is their actual meaning and scope? How "common" are they really – and not just on paper – between all the Member States?²³

As to the scope of the values, it should be observed that, with the exception of human rights, the Treaties do not define, elaborate or operationalize them further. With regard to human rights, there is the Charter, which since the Treaty of Lisbon has the force of primary EU law,²⁴ and which is becoming ever more widely applied and interpreted, in particular by the European Court of Justice. However, as evidence by Eurobarometer surveys,²⁵ the Charter is not widely known and understood. Even within certain Directorates

²¹ On the legitimacy problems of the EU's structural subordination of values to internal market considerations, see notably G. DAVIES, *Democracy and Legitimacy in the Shadow of Purposive Competence*, in *European Law Journal*, 2015, p. 2 *et seq.*

²² See also Art. 5, para. 2, Charter: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". Cf. also Declaration (No. 1) concerning the Charter of Fundamental Rights of the European Union, para. 2.

²³ This question has been examined as part of the FRAME project. FRAME – an acronym for "Fostering Human Rights Among EU (internal and external) Policies" – was a very large FP7 project about the role of human rights in EU internal and external policies, coordinated by the Leuven Centre for Global Governance Studies at KU Leuven, working together with 18 other partners. Its findings indicate that the actual common understanding and depth of the values remains rather limited: A. TIMMER, B. MAJTÉNYI, K. HÄUSLER, O. SALÁT, *EU Human Rights, Democracy and Rule of Law: From Concepts to Practice*, 2014, www.fp7-frame.eu.

²⁴ Art. 6, para. 1, TEU.

²⁵ In a recent Eurobarometer, 57 per cent of respondents (EU citizens from the then 28 Member States) had never heard of the Charter. Only 12 per cent were aware of the existence of the Charter *and* also knew what it was: Survey requested by European Commission, *Special Eurobarometer 487b – March 2019: Awareness of the Charter of Fundamental Rights of the European Union*, June 2019, op.europa.eu, p. 5.

General of the Commission there is not yet a sufficient knowledge and awareness of the implications of the fundamental rights laid down in the Charter for EU policies (e.g. when the EU is funding agricultural or cohesion projects).²⁶ The scope of application of the Charter is also a matter of confusion: it is not obvious for citizens to receive and properly understand the message that the Charter is “addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law” (Art. 51, para. 1, Charter);²⁷ in other words, that its scope of application is limited to the scope of application of EU law itself.²⁸ It means that for most day-to-day situations the relevant sources of human rights will not be the Charter, but rather the ECHR, fundamental rights laid down in national constitutional systems, and applicable international human rights instruments. For the other values there is not even any Treaty guidance at all.

It is therefore submitted that, when searching for a shared (between the EU and its Member States) understanding of the values of Art. 2, one will have to put national traditions and interpretations in the Member States together with the practice of the two European supranational courts, the CJEU in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg. Even then, in spite of their very active output of case-law, these two courts do not cover the whole field. For instance, for the protection of national minorities one should notably have recourse to the practice under an entirely different Council of Europe Convention, the 1995 Framework Convention on National Minorities.²⁹ And for such issues like children’s rights, the rights of women, the prohibition of torture and the rights of disabled persons, one should rather turn to the practice under the United Nations human rights treaties concerned, to which all EU Member States are a contracting party. If anything, these elements show that Europe’s value system is in essence multi-layered: it contains elements of national constitutional law, EU and Council of Europe law, and international human rights law, that constantly interact

²⁶ See for example the inquiry of the European Ombudsman concerning the respect for fundamental rights in the implementation of the EU cohesion policy: E. O’REILLY, *Decision of the European Ombudsman Closing Her Own-Initiative Inquiry OI/8/2014/AN Concerning the European Commission*, 11 May 2015.

²⁷ According to the abovementioned Eurobarometer, only 7 per cent of respondents correctly identified when the Charter applies: Survey requested by European Commission, *Special Eurobarometer 487b*, cit., p. 30.

²⁸ See European Parliament, Report on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework, 30 January 2019, 2017/2089 (INI).

²⁹ On the relationship between this Convention and EU law, see D. KOCHENOV, T. AGARIN, *Expecting Too Much? European Union’s Minority Protection Hide-and-Seek*, in *European Non-Discrimination Law Review*, 2017, p. 7 et seq.; A. VAN BOSSUYT, *L’Union européenne et la Protection des Minorités: une Question de Volonté Politique*, in *Cahiers de Droit Européen*, 2010, p. 425 et seq.

with each other.³⁰ Fortunately, the Treaties show a great openness towards international law³¹, which however is not always shared by the CJEU.³²

From the above it transpires that the Union of values is essentially of a multi-layered, multi-level nature. This implies a need for openness for the mutual interactions between international law, EU law and national constitutional law. As the Union has come to encompass an increasingly diverse set of Member States, with somewhat diverging historical trajectories, the multi-layered Union of values has become increasingly a challenge to maintain. The EU's fundamentals have begun to come under fire and the Union has been confronted with the serious shortcomings of its competences and enforcement tools regarding Art. 2 TEU. This is the case both at the stage of accession and for the Union's current Member States.

III. COMPLIANCE WITH ART. 2 TEU AT THE STAGE OF ACCESSION

Surprisingly, there is only scattered reference to Art. 2 TEU in the practice of the Union's accession process. One has the impression that the well-known Copenhagen criteria³³ and the absorption of the *acquis* are given much more weight than the values laid down in Art. 2 TEU. This already starts at an early stage, the so-called "screening" of candidate countries by the Commission. At this stage, "the Commission carries out a detailed examination, together with the candidate country, of each policy field (chapter), to determine how well the country is prepared. The findings by chapter are presented by the Commission to the Member States in the form of a screening report. The conclusion of

³⁰ As illustrated by the *Kadi* cases before the CJEU, the different levels may also clash and further clarification is sometimes asked from (European) courts. See L.I. GORDILLO, *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law*, Oxford: Hart Publishing, 2012.

³¹ See in particular Art. 3, para. 5, TEU's emphasis that the Union "shall contribute [...] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter". See also Art. 21, para. 1, and Art. 21, para. 2, let. b), TEU. On these, and other values in the EU's external relations, see *inter alia* M. CREMONA, *Values in EU Foreign Policy*, in M. EVANS, P. KOUTRAKOS (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World*, Oxford: Hart Publishing, 2011, p. 275 *et seq.*

³² See *inter alia* J. WOUTERS, *The Tormented Relationship between International Law and EU Law*, in P.H.F. BEKKER, R. DOLZER, M. WAIBEL (eds), *Making Transnational Law Work in the Global Economy. Essays in Honour of Detlev Vagts*, Cambridge: Cambridge University Press, 2010, p. 198 *et seq.*

³³ See the first of the criteria established by the Copenhagen European Council of 21-22 June 1993, which requires for membership that "the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". For EU accession negotiations to be launched, a country must already satisfy this criterion. For the argument that the Copenhagen political criteria, except minority protection, were already firmly established by 1973, see R. JANSE, *The Evolution of the Political Criteria for Accession to the European Community, 1957-1973*, in *European Law Journal*, 2018, p. 57 *et seq.*

this report is a recommendation of the Commission to either open negotiations directly or to require that certain conditions – opening benchmarks – should first be met”.³⁴

But how thorough is the screening concerning the components of Art. 2 TEU? Here the Commission's screening after Serbia requested to become an EU Member State in 2009 is revealing. The 2011 Commission Opinion on Serbia's application for EU membership does start by recalling Arts 49 and 2 TEU, but concretely it only applies the Copenhagen criteria as political conditions: the assessment is based on the Copenhagen criteria “relating to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, as well as on the conditionality of the Stabilisation and Association Process”.³⁵ However, in doing so, the Commission misses out on other values/principles laid down in Art. 2 TEU: human dignity, freedom, pluralism, non-discrimination, tolerance, justice, solidarity, equality of women and men.

The same finding seems to hold for the Commission's regular assessment reports during accession negotiations. For instance, the Commission's 2016 report on Turkey is very explicit on democracy, rule of law and human rights, including the rights of minorities, but one fails to find references to the other values of Art. 2 TEU. Admittedly, the 2016 report, written after the attempted *coup d'état* and the many restrictive measures subsequently taken by the Turkish authorities, is already so negative on human rights that one cannot imagine the values of human dignity and tolerance to be met:

“Gender-based violence, discrimination, hate speech against minorities, hate crime and violations of human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons continue to be a source of a serious concern. There has been serious backsliding in the past year in the area of freedom of expression. Selective and arbitrary application of the law, especially of the provisions on national security and the fight against terrorism, is having a negative impact on freedom of expression. [...] Freedom of assembly continues to be overly restricted, in law and practice”.³⁶

In the most recent Communications of the Commission on EU Enlargement Policy, there seems to be a slightly positive evolution, but a clear benchmarking with regard to a number of fundamental values of Art. 2 TEU is still largely absent. With regard to Serbia, for instance, in the Commission's 2019 Communication, no explicit mention is made of Art. 2 TEU. It is merely noted that “the EU's founding values include the rule of law and respect for human rights”.³⁷ The emphasis is fully placed on the functioning of the

³⁴ European Commission, *Steps towards joining*, ec.europa.eu.

³⁵ Communication COM (2011) 668 final of 12 October 2011 from the Commission, *Opinion on Serbia's application for membership of the European Union*, p. 5.

³⁶ Communication COM(2016) 715 final of 9 November 2016 from the Commission on EU Enlargement Policy, p. 17; see also Commission Staff Working Document SWD (2016) 366 final of 9 November 2016, *Turkey 2016 Report*, p. 7.

³⁷ Emphasis added.

judicial system and the fight against corruption, while issues such as police conduct, the prison system, freedom of expression, non-discrimination, equality between women and men, rights of the child, rights of persons with disabilities, rights of LGBTI persons and protection of national minorities are touched upon under the heading of "Fundamental rights". No mention is made of human dignity, pluralism, tolerance (mentioned once in relation to non-discrimination) and solidarity.³⁸ An identical approach was adopted with regard to Albania³⁹, Montenegro⁴⁰ and North Macedonia.⁴¹

The findings above beg the question: if the respect for, and the commitment to promote, these values is already given so little attention at the stage of accession, how can it be properly enforced during a country's membership? In that regard it is worth also reflecting on what are the implications of identifying the rule of law as *primus inter pares* among the principles enshrined in Art. 2. It could be argued that the focus, during the accession process, on the rule of law, along with the closely related democracy, human rights and the protection of minorities, is a result of how these are seen as playing a particular role in shaping the EU as a polity, once candidates for membership enter the Union. Even then, however, as indicated above, the Union has only a limited competence to legislate in these areas, which contributes to the asymmetry between the foundational nature of these values and the rather "impressionistic" sketching of such principles.⁴²

Nevertheless, the current screening practice should already be an advance compared to the earlier one. The ineffectiveness of the screening processes under Chapters 23 and 24⁴³ had become apparent when Romania and Bulgaria were granted membership in 2007, while a number of issues persisted in as far as the solidity of democracy and rule of law were concerned. The Co-operation and Verification Mechanism (CVM) was set up in

³⁸ Commission Staff Working Document SWD (2019) 219 final of 29 May 2019, *Serbia 2019 Report*, p.13 *et seq.*: The remainder of the report (which counts over 100 pages) focuses on the implementation of the *acquis* of substantive EU law.

³⁹ Commission Staff Working Document SWD (2019) 215 final of 29 May 2019, *Albania 2019 Report*, p. 14 *et seq.*

⁴⁰ Commission Staff Working Document SWD (2019) 217 final of 29 May 2019, *Montenegro 2019 Report*, p. 15 *et seq.*

⁴¹ Commission Staff Working Document SWD (2019) 218 final of 29 May 2019, *North Macedonia 2019 Report*, p. 14 *et seq.*

⁴² L. PECH, *The EU as a Global Rule of Law Promoter: The Consistency and Effectiveness Challenges*, in *Europe-Asia Journal*, 2016, p. 7 *et seq.*, pp. 7-8, p.14.

⁴³ Chapter 23 is on the "Judiciary and Fundamental Rights". It encompasses all domains that are essential to maintaining the Union as an area of freedom, security and justice. This includes impartiality and integrity of the courts; guarantees for fair trial procedures; prevention and deterrence of corruption; respect of EU citizens' rights and fundamental rights (EU Charter). Chapter 24 is on "Justice, Freedom and Security". The focus here is on ensuring that the prospective Member States have at their disposal the necessary administrative capacity within law enforcement agencies, in order to implement common rules in a number of areas (border control, visas, external migration, asylum, police cooperation, the fight against organised crime and against terrorism, cooperation in the field of drugs, customs cooperation and judicial cooperation in criminal and civil matters). An essential part of this is the *acquis* on the Schengen Area.

order to support the alignment of these new Member States with the rest of the EU: the political developments that peaked with the authoritarian features of the Ponta government in Romania and the rise of corruption and organised crime in Bulgaria became proof of the challenges of ensuring post-accession compliance.⁴⁴ The burgeoning crisis of rule of law and democracy in the EU led the Commission to announce a “new approach to negotiations in the rule of law area [which] introduces the need for solid track records of reform implementation to be developed throughout the negotiations process. Reforms need to be deeply entrenched, with the aim of irreversibility”.⁴⁵

Among the new developments, this approach entailed *i)* prioritising Chapters 23 and 24, *ii)* improving EU guidance and benchmarks, *iii)* the assessment of progress in implementation on the ground, *iv)* the fact that insufficient action taken in Chapters 23 and 24 prevents progress in other areas (“benchmarking”), and *v)* greater transparency and inclusiveness.

While this evolution did constitute a step forward, particularly when it comes to democracy and the rule of law, it did not bring about a fundamental shift in the EU’s approach to monitoring and assessing pre-accession compliance of Art. 2 TEU. Despite the improved clarity in the EU’s strategy, at the root of the shortcomings of the enlargement process are the challenges that come with the reform processes in prospective Member States. Serbia and Montenegro are the current frontrunners for accession to the EU, however, in both instances, shortcomings in the areas of democracy and the rule of law are still the major obstacle, which the Union does not appear to have become more effective at tackling. The Commission’s 2018 Enlargement Strategy noted that “[a]n even stronger focus on meeting the interim benchmarks in the rule of law area is vital. These requirements and conditions are already clearly spelt out by the Commission in its regular reporting. The countries’ leaders must now tackle the existing challenges forcefully and with clearer commitment”.⁴⁶ In Montenegro “corruption is widespread and remains an issue of concern” and “on fundamental rights [...] more efforts are still needed in strengthening the institutional framework and effective protection of human rights”. On freedom of expression, recent developments challenging the independence of public media bodies raise concerns.⁴⁷ Serbia faces much the same challenges, even if it has made significantly less progress overall.

⁴⁴ L. TONEVA-METODIEVA, *Beyond the Carrots and Sticks Paradigm: Rethinking the Cooperation and Verification Mechanism Experience of Bulgaria and Romania*, in *Perspectives on European Politics and Society*, 2014, p. 534 et seq.; European Commission, *Cooperation and Verification Mechanism for Bulgaria and Romania*, ec.europa.eu.

⁴⁵ Communication COM (2012) 600 final of 10 October 2012 from the Commission, *Enlargement Strategy and Main Challenges 2012–2013*, p. 3.

⁴⁶ Communication COM (2018) 65 final of 6 February 2018 from the Commission, *A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans*, p. 8.

⁴⁷ Communication COM (2018) 450 final of 17 April 2018 from the Commission, *2018 Communication on EU Enlargement Policy*, p. 6, p. 15.

What remains unclear is how the scenarios that one has seen developing in Romania, Hungary and Poland will be materially prevented. While current crises of democracy and the rule of law in recently acceded Member States have put into motion post-accession compliance mechanisms, it is apparent from the EU's focus on the Western Balkans that at the heart of the enlargement strategy lies not the diffusion of the EU's fundamental values, but geopolitical interest. Recent events, particularly in relation to Russia's influence in the Eastern neighbourhood, have made the EU ever more aware of the importance of ensuring stability in the region, for primarily geopolitical benefits, even though also economic and ideational factors come into play.⁴⁸

The EU's 2016 Global Strategy is explicit in stating that "[i]t is in the interests of our citizens to invest in the resilience of states and societies [...]. Under the current EU enlargement policy, a credible accession process grounded in strict and fair conditionality is vital to enhance the resilience of countries in the Western Balkans and of Turkey".⁴⁹ All of this, however, undermines the credibility of the logic of conditionality, as the process tends to be politically driven rather than truly merit-based. An aspect that leads us back to the superficiality of the scrutiny of the Copenhagen criteria, which has been highlighted as far as the rule of law is concerned by, among others, Martin Mendelski.⁵⁰

What emerges in this analysis of rule of law promotion in South Eastern Europe is that the EU is able to positively affect i) the implementation of the *acquis* and ii) judicial capacity (i.e. institutional efficiency and effectiveness). However, the effects on legal quality (formal legality) and the unbiased enforcement of the law (judicial impartiality) not only appear to be unaffected, but even show signs of worsening.⁵¹

Accession reforms tend to be assessed by their outcome, not the processes and the behaviour of the actors involved.⁵² In other words, the geopolitical pressures seem to unduly accelerate shifts in policy and institutional arrangements, often without rooting them in a concrete and far-reaching change in the principles and values that should provide the foundations for the lasting impact of pre-accession reforms. It can be sub-

⁴⁸ A. MORAVCSIK, M.A. VACHUDOVA, *National Interests, State Power, and EU Enlargement*, in *East European Politics and Societies*, 2003, p. 42 *et seq.* For comprehensive critique of conditionality in the European Neighbourhood policy, please refer to: D. KOCHENOV, E. BASHESKA, *ENP's Values Conditionality from Enlargements to Post-Crimea*, in S. POLI (ed.) *The EU and Its Values in the Neighbourhood*, Abington-New York: Routledge, 2016, p. 145 *et seq.*

⁴⁹ European External Action Service, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy*, June 2016, eeas.europa.eu, p. 9.

⁵⁰ M. MENDELSKI, *The EU's Pathological Power: The Failure of External Rule of Law Promotion in South Eastern Europe*, in *Southeastern Europe*, 2015, p. 318 *et seq.*

⁵¹ *Ibid.*, p. 340.

⁵² See on Bulgaria: G. DIMITROV, K. HARALAMPIEV, S. STOYCHEV, L. TONEVA-METODIEVA, *The Cooperation and Verification Mechanism: Shared Political Irresponsibility*, Sofia: St. Kliment Ohridski University Press, 2013. On Kosovo: A. L. CAPUSSELA, *State-Building in Kosovo: Democracy, Corruption and the EU in the Balkans*, London: I.B. Tauris, 2014.

mitted that a more comprehensive approach to the other values contained in Art. 2 TEU (human dignity, freedom, pluralism, non-discrimination, tolerance, justice, solidarity, equality of women and men) may well hold the key to an accession process that is able to effectively prevent the kind of backsliding we are now confronted with.⁵³ As noted above, these are areas that are clearly neglected by the EU's current approach, but if engaged with, could provide more coherence between the EU's values and developments in the (candidate) Member States.

IV. ENFORCEMENT OF ART. 2 TEU DURING MEMBERSHIP OF THE UNION

That leads to the enforcement of the fundamental values of Art. 2 TEU within the membership of the EU. One may recall that a somewhat bewildering first test-case of such enforcement took place at the beginning of this millennium, when Austria for the first time had a coalition government with a party from the far right in it, and the other 14 then Member States acted collectively, but outside of the structures of the Treaties, to safeguard the respect of fundamental rights and freedoms. For this initiative, the procedure of the new Art. 7 TEU (in its Amsterdam Treaty version) was not followed: rather, the sanctions constituted diplomatic retorsions. The episode showed the impracticability of international law tools within the EU setting and ended with the removal of the sanctions after a committee of experts found no alarming indications on breaches of EU values in Austria.⁵⁴

Hereafter we explore *i*) the practical use and limits of Art. 7 TEU, *ii*) the Commission's Rule of Law Framework, and *iii*) the increasing role of the CJEU in upholding the Union's fundamental values *vis-à-vis* Member States.

⁵³ D. KOCHENOV makes a similar argument, by highlighting how the focus on technical issues has gravely hampered the enforcement of Art. 2, in *The Acquis and Its Principles: The Enforcement of the 'Law' versus the Enforcement of 'Values' in the European Union*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2017, p. 9 *et seq.*

⁵⁴ On this episode and the many issues it raised, see *inter alia* E. BRIBOSIA, *Le Contrôle par l'Union Européenne du Respect de la Démocratie et des Droits de l'Homme par ses États Membres : à Propos de l'Autriche*, in *Journal des tribunaux. Droit européen*, 2000, p. 61 *et seq.*; W. HUMMER, W. OBWEXER, *Die Wahrung der „Verfassungsgrundsätze“ der EU: Rechtsfragen der „EU-Sanktionen“ gegen Österreich*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2000, p. 485 *et seq.*; P. KAINZ, *Als Österreich isoliert war: eine Untersuchung zum politischen Diskurs während der EU-14-Sanktionen*, Berlin: Lang, 2006; M. MERLINGEN, C. MUDDE, U. SEDELMEIER, *The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria* in *Journal of Common Market Studies*, 2001, p. 59 *et seq.*; P. PERNTHALER, P. HILPOLD, *Sanktionen als Instrument der Politikkontrolle: der Fall Österreich*, in *Integration*, 2000, p. 105 *et seq.*; E. REGAN, *Are EU Sanctions Against Austria Legal?*, in *Zeitschrift für öffentliches Recht*, 2000, p. 323 *et seq.*; T. SCHÖNBORN, *Die Causa Austria: zur Zulässigkeit bilateraler Sanktionen zwischen den Mitgliedstaaten der Europäischen Union*, Berlin: Lang, 2005; F. SCHORKOPF, *Verletzt Österreich die Homogenität in der Europäischen Union? Zur Zulässigkeit der „bilateralen“ Sanktionen gegen Österreich*, in *Deutsches Verwaltungsblatt*, 2000, p. 1036 *et seq.*; I. SEIDL-HOHENVELDERN, *The Boycot of Austria Within the European Union. Defence of European Values and Democracy*, in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Napoli: Ed. Scientifica, 2004, p. 1425 *et seq.*

IV.1. THE USE AND NON-USE OF ART. 7 TEU

Focusing instead on Art. 7 TEU, which was introduced by the Amsterdam Treaty and successively refined by the Nice Treaty (which added the preventative procedure of the first paragraph, based upon the establishment that there is a “clear risk of a serious breach” of the values laid down in Art. 2 TEU) and by the Treaty of Lisbon, it is sobering to find out that in the 21 years of its existence the Article has largely remained dead letter. The threshold for the activation of Art. 7 is rather high, which, combined with the political inclination of avoiding this kind of confrontation as far as possible, gives some indication of what has prevented its activation. The Commission, in its Communication on the new provision in 2003, clarified that “[t]he risk or breach identified must [...] go beyond specific situations and concern a more systematic problem. This is in fact the added value of this last-resort provision compared with the response to an individual breach”. It added that “[i]ndividual fundamental rights breaches must be dealt with through domestic, European and international court procedures”.⁵⁵

It remains puzzling why the Barroso Commission failed to trigger this procedure *vis-à-vis* Hungary in order to prevent it from moving toward an “illiberal State” since Viktor Orbán was elected in 2010. While this may have had to do with a lack of political courage (see *infra*, Section IV.2), it also again highlights how the lack of broader Union competences on matters covered by Art. 2 TEU prevents the Commission from bringing infringement cases against Member States that violate its provisions. While meritorious for single cases of violations, the reliance on the lack of implementation and/or infringement of substantive EU law significantly undercuts the effectiveness and scope of the EU’s action in the face of systemic rule of law backsliding. By stating his plans “to abandon liberal methods and principles of organising a society” and that the “new state that we are building is an illiberal state”, Orbán was clearly going against the values of Art. 2 TEU.⁵⁶ However, the Barroso Commission limited itself to the use of infringement procedures under Art. 258 TFEU (see below). For instance, it responded to the forced retirement of Hungarian judges with an infringement procedure based on age discrimination, indicative of the limitations of this tool.⁵⁷

⁵⁵ Communication COM (2003) 606 final of 15 October 2003 from the Commission on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, p. 7. The Commission concluded that it was “convinced that in this Union of values it will not be necessary to apply penalties pursuant to Article 7”, p. 12.

⁵⁶ I. TRAYNOR, *Budapest Autumn: Hollowing out Democracy on the Edge of Europe*, in *The Guardian*, 29 October 2014, www.theguardian.com.

⁵⁷ Court of Justice, judgment of 6 November 2012, case C-286/12, *Commission v. Hungary*. Even regarding the use of infringement procedures against Hungary the Commission may not have been fully consistent. For instance, the Commission backed away from starting an infringement case regarding the Hungarian government’s 12 billion Euros Paks II nuclear contract with the state-run Russian nuclear agency, even though EU procurement rules may have been violated: see Energy Reporters, *EU avoided row over Hungary’s Russian nuclear deal: leaks*, 12 January 2020, www.energy-reporters.com.

IV.2. THE COMMISSION'S RULE OF LAW FRAMEWORK

Barroso pushed the issue of rule of law, which he had voiced for the first time in his 2012 State of the Union address, to the end of his mandate. Only in its last year of operation, in 2014, the Barroso Commission adopted a mechanism, the “Rule of Law Framework” for addressing “systemic threats” to the rule of law in EU Member States. The so-called “pre-Article 7” procedure was aimed at improving the EU’s scope of action when dealing with Art. 2 TEU breaches, in particular with regard to rule of law backsliding. A three-stage dialogue between the Commission and the Member State in breach of Art. 2 TEU is foreseen: i) a Commission assessment; ii) a Commission recommendation; and iii) a follow-up to the Commission recommendation. If this process fails to achieve the necessary changes, Art. 7 TEU may be activated.⁵⁸ While this development was seen as a positive step forward in strengthening the EU’s capacity in tackling structural incompatibility with Art. 2 TEU, the flexibility that comes with a dialogue-based procedure is also its greatest weakness, since the Commission cannot truly enforce compliance.⁵⁹ The new framework also left significant leeway as to the Commission’s “political” assessment, a feature that immediately came into play in 2015, when the European Parliament had called on the Commission to launch the new rule of law framework procedure against Hungary, but it refused to do so on the grounds that there was no “systemic threat” to the rule of law.⁶⁰

The failure of the Barroso Commission to tackle the rule of law problems in Hungary has to be assessed critically. Was it because between 2010 and 2012 the EU was so much pre-occupied with the Eurozone sovereign debt crisis? Or rather because Orban’s party, Fidesz, belongs to the European People’s Party, the largest political group in the European Parliament, and hence could count on protection from some powerful national leaders? In fact, the ambivalence towards Hungary remained also with the Juncker Commission, with First Vice-President Timmermans noting still in late 2017 that “the situation in Hungary is not comparable to the situation in Poland”, as the latter had already been targeted by the pre-Article 7 procedure.⁶¹ This despite the fact that a number of infringement procedures had been initiated against Hungary, in particular on the violation of various asylum directives⁶², on forbidding the sale of land to foreign per-

⁵⁸ Communication COM(2014) 158 final of 11 March 2014 from the Commission, *A New EU Framework to Strengthen the Rule of Law*.

⁵⁹ For an in-depth analysis, see D. KOCHENOV, L. PECH, *Better Late than Never? On the European Commission’s Rule of Law Framework and Its First Activation*, in *Journal of Common Market Studies*, 2016, p. 1062 et seq.

⁶⁰ European Parliament, Debates on 2 December 2015, statement of Věra Jourová, O-000140/2015, www.europarl.europa.eu.

⁶¹ For a convincing critique of this statement: K.L. SCHEPPELE, L. PECH, *Why Poland and not Hungary?*, in *Verfassungsblog*, 8 March 2018, verfassungsblog.de.

⁶² Court of Justice: judgment of 2 April 2020, joined cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland and Others*; case C-808/18, *Commission v. Hungary*, in progress; case C-821/19, *Commission v.*

sons⁶³ and the unequal treatment of Roma children in the Hungarian education system⁶⁴, on restrictions on the financing of civil society organisations from abroad⁶⁵, and against the Hungarian Higher Education Law, which aimed to close down the Central European University.⁶⁶ In the proceedings brought against Hungary with regard to the Asylum Procedure Directive the Commission alleged for the first time a violation of the EU's Charter of Fundamental Rights.⁶⁷

The tide only began to turn with the first European Parliament resolution adopted on the situation in Hungary on 17 May 2017. Here it was recognised that “the developments in Hungary have led to a serious deterioration of the rule of law, democracy and fundamental rights over the past few years which could represent an emerging systemic threat to the rule of law in this Member State”.⁶⁸ In doing so, the process for presenting a proposal that would trigger Art. 7, para. 1, TEU began, leading finally to the European Parliament's adoption of a “reasoned proposal” on 12 September 2018.⁶⁹ The power to determine that there is a clear risk of a serious breach of the values referred to in Art. 2 TEU rests, however, with the Council, which must vote with a majority of four fifths of its Members, after a rather lengthy assessment process. The first hearings in respect of Hungary were organized in September and December 2019. They received considerable critique, both from the European Parliament⁷⁰ and scholars.⁷¹ As mentioned before in relation to pre-accession conditionality, enforcing compliance under Art. 7 TEU too remains a political process. Firstly, in the context of the European Parliament, where the prominence of the EPP for a long time prevented taking the necessary steps. Secondly, when it comes to the Member States themselves, where there is little appetite for establishing a prece-

Hungary, in progress. See the Opinion of AG Sharpston delivered on 31 October 2019, cases C-715/17, C-718/17 and C-719/17, *European Commission v. Poland, Hungary and the Czech Republic*.

⁶³ See Court of Justice, judgment of 21 May 2019, case C-235/17, *Commission v. Hungary*.

⁶⁴ See Court of Justice, case C-66/18, *Commission v. Hungary*, in progress.

⁶⁵ See Court of Justice, case C-78/18, *Commission v. Hungary (Transparency of associations)*, in progress; see the Opinion of AG Campos Sánchez-Bordona delivered on 14 January 2020, case C-78/18, *Commission v. Hungary (Transparency of associations)*.

⁶⁶ See Court of Justice, case C-66/18, *Commission v. Hungary*, in progress.

⁶⁷ G. HALMAI, *The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements Against Illiberal EU Member States*, in *EUI Working Papers*, LAW no. 6, 2018, pp. 5-6.

⁶⁸ European Parliament Resolution of 17 May 2017 on the situation in Hungary.

⁶⁹ 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. See J. RANKIN, *MEPs Vote to Pursue Action Against Hungary over Orbán Crackdown*, in *The Guardian*, 12 September 2018, www.theguardian.com.

⁷⁰ European Parliament Resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary.

⁷¹ L. PECH, *From “Nuclear Option” to Damp Squib?*, in *Verfassungsblog*, 13 November 2019, verfassungsblog.de.

dent for the EU's "interference" in domestic affairs. This hardly seems to constitute the most effective approach to reaching compliance with Art. 2 TEU.

In the case of Poland, since January 2016 the Juncker Commission started to apply the pre-Article 7 procedure in light of the Polish government's reform of the constitutional court and of public media. Meant to be in the first instance a dialogue mechanism, there seems to have been very little genuine dialogue between the Commission and the Polish government. The opposition from the government was unequivocal from the start of the process, with prime minister Kaczyński accusing the EU of acting beyond the scope of the Treaties.⁷² In April 2016 the European Parliament adopted a resolution in support of the Commission's action, noting that "the political and legal dispute concerning the composition of the Constitutional Tribunal and new rules on its operation [...] have given rise to concerns regarding the ability of the Constitutional Tribunal to uphold the constitution and guarantee respect for the rule of law".⁷³ The Commission Recommendation on the curtailment of independence of the constitutional court issued in July 2016 was ignored, as were the following three, in December 2016, and July and December 2017.⁷⁴ The Commission finally submitted a reasoned proposal on 20 December 2017 in accordance with Art. 7, para. 1, TEU, aimed at the "determination of a clear risk of a serious breach" noting that "after two years of dialogue with the Polish authorities which has not led to results and has not prevented further deterioration of the situation, it is necessary and proportionate to enter into a new phase of dialogue formally involving the European Parliament and the Council".⁷⁵ While the Council has organized three hearings in respect of Poland between June and December 2018, it has since then excelled in doing as little as possible, with the situation of the rule of law in Poland becoming ever worse.⁷⁶

Among the more recent threats to Art. 2 TEU are those that have emerged in Romania, which, as indicated above, has been under the EU's CVM since its accession. The 2019 CVM Report for Romania highlights a number of areas of concern, where the Commission confirmed "backtracking from the progress made in previous years". It has moreover formally warned the Romanian authorities in May 2019 that "if the necessary improvements were not made shortly, or if further negative steps were taken, the

⁷² J. CIENSKI, M. DE LA BAUME, *Poland and Commission Plan Crisis Talks*, in *POLITICO*, 30 May 2016, www.politico.eu.

⁷³ These relate, among other things, to the examination of cases and the order thereof, the raising of the attendance quorum and the majorities needed to pass decisions of the Tribunal. See: European Parliament Resolution of 13 April 2016 on the situation in Poland.

⁷⁴ G. HALMAI, *The Possibility and Desirability of Economic Sanction*, cit., p. 10.

⁷⁵ Commission Proposal of 20 December 2017 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, COM(2017) 835 final, p. 39.

⁷⁶ See L. PECH, P. WACHOWIEC, *1460 Days Later: Rule of Law in Poland R.I.P. (Part I)*, in *Verfassungsblog*, 13 January 2020, verfassungsblog.de.

Commission would take steps under the rule of law framework”.⁷⁷ Some of the most worrying developments in recent years include the dismissal of anti-corruption agency chief Laura Kovesi in 2018, who had been very successful. In 2017, concerns were raised by the Commission with regard to the amendments to safeguards that guarantee the independence of the judiciary.⁷⁸ A constitutional referendum on redefining marriage as exclusively between a man and a woman held on 6-7 of October 2018 was further evidence of the pressure on the fundamental values of Art. 2 TEU.⁷⁹

The challenges highlighted in the pre-accession phase (see *supra*, section III) are compounded by the reduced leverage the EU is able to exercise on its Member States, in what remains a highly political process. The double standards that have emerged when it comes to action towards Poland and Hungary, but also the general lack of “bite” in the rule of law framework, is driven by either party-political concerns (in the case of Fidesz’s membership of the EPP) or geopolitical national interests (in the case of Poland, as an ally against Russian influence).⁸⁰ These are the dynamics that have shaped a legalistic approach which has turned out to be rather ineffective, encouraging a reflection on the appropriateness of a narrow focus on judicial mechanisms rather than the quality of the rule of law and the other fundamental values laid down in Art. 2 TEU. Admittedly, there are advantages to circumscribing the EU’s approach in such manner, firmly rooted in the Treaties and seeking to depoliticise controversial issues.⁸¹ Such an approach, however, appears to clash with the far deeper implications of the “crisis of the liberal order”. As highlighted by Paul Blokker, a broader understanding is needed of the underpinnings of the rule of law, which takes due consideration of citizens’ acceptance of constitutional democracy, the elite’s commitment to the rule of law, the localised challenges that surround “legal transplants” (e.g. in post-communist countries), and the strengthening of democratic oversight through the societal empowerment of civic participation.⁸² Without due consideration of these dimensions, achieving long-lasting change appears to be wishful thinking.

⁷⁷ Communication COM(2019) 499 final of 22 October 2019 from the Commission, *Report on progress in Romania under the Cooperation and Verification Mechanism*, p. 17.

⁷⁸ C. LACATUS, *Is Romania at Risk of Backsliding over Corruption and the Rule of Law?*, in LSE EUROPP, 27 November 2017, blogs.lse.ac.uk.

⁷⁹ S. WALKER, *Romanians to Vote in Referendum LGBT Groups Say Is Fuelling Hate*, in *The Guardian*, 5 October 2018, www.theguardian.com.

⁸⁰ J. SARGENTINI, A. DIMITROVS, *The European Parliament’s Role: Towards New Copenhagen Criteria for Existing Member States?*, in *Journal of Common Market Studies*, 2016, p. 1085 et seq.

⁸¹ A. MAGEN, *Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU*, in *Journal of Common Market Studies*, 2016, p. 1050 et seq.

⁸² P. BLOKKER, *EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections*, in *SSRN Scholarly Paper*, 27 October 2015, papers.ssrn.com.

IV.3. THE COURT OF JUSTICE'S INCREASING ROLE

It should be mentioned, finally, that over the past few years, the CJEU became an important player in the rule of law debate. On 20 November 2017, the Court gave an order for *interim* relief in the case between the Commission and Poland regarding the chopping of the famous Białowieża forest. In a rather exceptional Grand Chamber setting, the Court not only granted the *interim* relief requested by the Commission but also, for the first time, declared its jurisdiction to impose penalty payments in such procedures. The most fascinating aspect of the order is hidden away in para. 102 and makes a surprise link with Art. 2 TEU:

"The purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded".⁸³

Commentators were quick to observe that, with its reference to Art. 2 TEU, the Court of Justice has shown its teeth and has pointed very subtly to the nuclear option.⁸⁴

Of still more fundamental importance is the judgment which the CJEU rendered on 25 July 2018 in the *LM* case.⁸⁵ The case concerned preliminary questions regarding the EU Arrest Warrant Framework Decision by the Irish High Court. Three European arrest warrants had been issued by Polish courts against a person, notably for drugs trafficking. When this person was arrested in Ireland, he objected to his surrender to Poland, as this would expose him to a real risk of a flagrant denial of justice in light of Poland's systemic issues from the viewpoint of the rule of law. In what is doubtlessly a landmark judgment, the CJEU's Grand Chamber made the following considerations of principle:

"[T]he requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.

Indeed, the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act [...].

⁸³ Court of Justice, judgment of 17 April 2018, case C-441/17 R, *Commission v. Poland*, para. 102.

⁸⁴ D. SARMIENTO, *Provisional (And Extraordinary) Measures in the Name of the Rule of Law*, in *Verfassungsblog*, 24 November 2017, verfassungsblog.de.

⁸⁵ Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *LM*. The judgment builds on the previous judgment in Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*.

In accordance with Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law [...].

The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law [...].

It follows that every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection [...]’.⁸⁶

The above case is significant as the CJEU, in pointing to a possible violation of the right to fair trial, and identifying independence and impartiality of the judiciary as essential conditions for the rule of law, makes a link to the values of Art. 2 TEU. However, there are a number of *caveats* in place, which limit the potential suspension of mutual trust among Member States. In the Court’s judgment, on the basis of the European Arrest Warrant Framework Decision, such a decision is reserved to the European Council, as it is Art. 7, para. 2, and not Art. 7, para. 1, which is identified as the appropriate procedure for this to take place. It is also further stated that even when, as is the case in the proceedings, the Member State issuing the European arrest warrant has been subject to a reasoned proposal of the Commission, pursuant to Art. 7, para. 1, the suspension can occur only on a case-by-case basis. In other words, the burden is on the defendants to “assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk”.⁸⁷ It would seem from this case that the CJEU is itself very much bound by the constraints and limitations of Art. 7 TEU in addressing Art. 2 TEU violations.⁸⁸

Apart from the option for national courts to request a preliminary ruling from the CJEU, as indicated above, the Commission can make use of its power to start infringement proceedings under Art. 258 TFEU, in order to enforce compliance with the rule of law or other Art. 2 values, but only if a related and specific provision of EU law can be identified.⁸⁹ With regard to the rule of law, this provision has been found in Art. 19 TEU on effective judicial protection, as also explained above in the *LM* case. The Commission

⁸⁶ *LM*, cit., paras 48-52.

⁸⁷ *Ibid.*, paras 68 and 70.

⁸⁸ For a critical analysis, see W. VAN BALLEGOIJ, P. BARD, *The CJEU in the Celmer Case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU*, in *Verfassungsblog*, 29 July 2018, verfassungsblog.de.

⁸⁹ For arguments in favour of a more “systemic” use of infringement actions, see K.L. SCHEPELE, *The Case for Systemic Infringement Actions*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, p. 105 et seq.; O. DE SCHUTTER, *Infringement Procedures as a Tool for the Enforcement of Fundamental Rights in the European Union*, in *Open Society*, European Policy Institute, October 2017, www.opensocietyfoundations.org.

has very recently brought several successful cases on this basis, denouncing the status of the Polish judiciary independence. Both the Polish Law on the Supreme Court⁹⁰ and the Polish Law on Ordinary Courts⁹¹ have been deemed incompatible with the principle of effective judicial protection, by introducing a compulsory retirement age for judges and at the same time granting respectively the Polish President and the Minister of Justice the discretionary power to extend the period of judicial activity of the otherwise forcefully retired judges.⁹² Other (secondary) EU law provisions have also been relied upon to guarantee the Art. 2 TEU values, for example in the case against Hungary mentioned above, where the Equal Treatment Directive 2000/78 was instrumentalised to contest a similar rule on compulsory retirement of hundreds of Hungarian judges.⁹³

V. CONCLUDING REMARKS

Will Art. 2 TEU and the fundamental values it represents, be better enforced in the future? In its recent case law, the Court of Justice gives hopeful signals. But there is only so much that the Court can do. Whether the Commission, the European Parliament and the Council will follow suit is another matter. This article made a critical analysis of Art. 2 and the past and present challenges to upholding the fundamental values that are the basis for the EU's constitutional design. At the core of these challenges is the asymmetry between the declared foundational nature of these values – aimed at ensuring the Union's legitimacy *vis-à-vis* its citizens – and the limited authority of the Union to act through its primarily socio-economic powers and with regard to the enforcement of the respect of these values, thereby negatively affecting the Union's legitimacy *vis-à-vis* its citizens. Key shortcomings were identified in the enforcement of Art. 2 TEU, both in the pre-accession phase, and within the EU's membership. When it comes to pre-accession, the Commission seems to rely on a rather legalistic approach to the values laid down in Art. 2 TEU. This is a matter both of scope (the rule of law is particularly prominent, while many other areas are absent) and nature of the assessment, which tends to focus on technical implementation and institutional capacity. By allowing the Member States to make political rather than merit-based decisions on the pace of enlargement, it also runs counter to the logic of conditionality and lays the ground for the current backsliding. This is a process that is shaped by geopolitical goals, as is the enforcement of Art. 2 *vis-à-vis* the EU's current Member States, with the mechanisms available either lacking

⁹⁰ Court of Justice, judgment of 24 June 2019, case C-619/18, *Commission v. Poland*.

⁹¹ Court of Justice, judgment of 5 November 2019, case C-192/18, *Commission v. Poland*.

⁹² See also M. COLI, *The Judgment of the CJEU in Commission v. Poland II (C-192/18): The Resurgence of Infringement Procedures as a Tool to Enforce the Rule of Law?*, in *Diritti Comparati*, 21 November 2019, www.diritticomparati.it.

⁹³ Court of Justice, judgment of 6 November 2012, case C-286/12, *Commission v. Hungary*.

“teeth” – i.e. the relatively new rule of law mechanism⁹⁴ – or proving too cumbersome procedurally (Art. 7 TEU). It is submitted that a process less defined by political and national interests, but informed by an approach that encompasses all values of Art. 2 TEU in a comprehensive manner, is essential in confronting the current crisis of the liberal order and in restoring trust between the Union and its citizens.

⁹⁴ In 2019, the Commission announced the launch of a Rule of Law Review Cycle and its intention to publish an Annual Rule of Law Report in support of this process: Communication COM(2019) 343 final of 17 July 2019 from the Commission, *Strengthening the rule of law within the Union. A blueprint for action*. The monitoring would, in contrast to the Rule of Law Framework, cover all EU Member States. The Council on its turn wants to undertake a yearly stocktaking exercise concerning the “state of play and key developments as regards the rule of law” based on the future Commission’s Annual Rule of Law Reports. It remains to be seen if these developments can contribute to the deepening of the rule of law commitment of all Member States, and whether any of these mechanisms can serve as an example or be broadened to include the observance of other Art. 2 TEU values.



ON DUBIOUS PARALLELS: THE TRANSNATIONAL EUROPEANS AND THE JEWS. A NOTE ON GARETH DAVIES' *ARTICLE*

LOÏC AZOULAI*

ABSTRACT: In a recent *Article* published in this *Journal*, Gareth Davies draws a parallel between European citizens as fashioned by EU law and pre-war Europe's Jews (G. DAVIES, *How Citizenship Divides: The New Legal Class of Transnational Europeans*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 675 *et seq.*). This parallel raises two serious issues. One is the complete lack of contextualisation of such a dubious comparison. The other is the lack of careful methodological engagement with the ways in which EU law operates in actual practice. This note cautions against the use of such parallels and calls for the development of renewed categories to analyse and critically assess the European Union and its law.

KEYWORDS: European Union Citizenship – Jews – European legal scholarship – methodology – social and cultural contexts – polarisation.

I should like to state that it is not my intention to offer a reflection on Gareth Davies' *Article* published in this *Journal* under the title *How Citizenship Divides: The New Legal Class of Transnational Europeans*.¹ This is not a reply aimed at discussing the substance and merits of the argument put forward. Certainly the analysis of Union citizenship law as creating a separate class of people undermining the integrity of the state and local communities is most unsatisfying, worthy of a meticulous review. But this is not the place to engage in this discussion. Any comment on substance might weaken, or take away the outrage that I feel about some irritatingly thoughtless statements appearing in this *Article*.

In the conclusive part of his *Article*, Gareth Davies writes: "*The idea of a rootless cosmopolitan elite with many of the social and economic characteristics above, and a similarly*

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¹ G. DAVIES, *How Citizenship Divides: The New Legal Class of Transnational Europeans*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 675 *et seq.*



tense relationship with more rooted and immobile citizens, is fairly ubiquitous, but the granting of a specific and privileged legal status to that group is a distinctive European step" (p. 693). This is not unheard in European legal scholarship. This is the well-known view that individuals fashioned by EU law sound like abstract and isolated creatures, with a feeling of homelessness and engaged in a form of free-riding. This view was famously echoed by Theresa May's statement on 5 October 2016 that *"if you believe you're a citizen of the world, you're a citizen of nowhere. You don't understand what the very word 'citizenship' means"*.

In this *Article*, the Author thought it was useful to go beyond this now rather conventional if completely unsubstantiated view and adds: *"In this European context it also invites parallels with Europe's Jews. They too were part of European states, and yet often seen as outsiders within them. They too were economically successful, and thanks to their connections with other Jews often distinctively transnational both in identity and in lives"* (*ibid.*). To which he adds some qualification, perhaps in order to mark his distance from a purely anti-Semitic discourse: *"They were sometimes seen as the most European of Europeans, but were also vulnerable because of this. Their alleged lack of loyalty to the nation and cosmopolitan rootlessness, as well as their alleged alien values, were, still are, core features of anti-Semitism"* (*ibid.*). If this was not bad enough, then came this: *"A psychoanalytic perspective might invite us to wonder if the continent is trying to regrow its lost limb, to repair its self-harm, and create a class that is an echo of the one it lost"* (*ibid.*).

It seems to me that, faced with such dubious words, I have the duty not to remain silent but to express my judgment firmly.

First of all, I would like to remind that there is no such thing as "Europe's Jews" as a homogenous social group in pre-war Europe, with people who would be *"part of European states"* in the sense of living in *"host states"*, who would be *"economically successful"*, mostly focusing on *"uprooted professions"* such as trade and finance, and being *"transnational both in identity and in lives"* thanks to their *"connections with other Jews"*. These are scandalously insufficient statements because they point to nothing but stereotypes. That Jews would have special social and cultural features that would make them *"the most European of Europeans"* is just a code for saying that they were unable to root in a national community and history. It is certainly a fact that these stereotypes were commonplace in Europe at the time. But does this allow one to suggest that they were based on actual social and cultural features?

The only way the Author marks his distance from these stereotypes is by alluding, in some instances and not all, to the way the Jews were *"seen"*, and by classifying some of their features, and not all, as *"alleged"* features. Unhappily, this is immediately followed by an astonishing leap: we are invited to wonder if Europe is not trying to *"create a class that is an echo of the one it lost"*. What is to be understood by this? The whole point of the *Article* is to argue that European citizens are *"legally separate"*, *"they are privileged"*, and *"they are threatening [...]* in a way that is disadvantageous to non-members of that

class". Union citizens would constitute "*a class*" structurally bound to "*humiliate welfare institutions and in doing so frightens those who need them most*" and to threaten "*local traditional values*" (*ibid.*, pp. 690-691). As is made clear throughout the text, the specific features of European citizenship – "*separate, privileged, threatening*" (*ibid.*, p. 688) – are not just subjective elements, reflecting social perceptions and social biases; they are structural features enshrined in a legal regime. The European citizens are not "perceived" as a threat. According to the Author, they are constructed as a threat through law. But, if the European citizens are, in legal terms, really (and not allegedly) a threat, how can this portray resonate with the Jewish comparison? Does it mean that Jews were actually "privileged" and "threatening"? Or does it mean, just to the opposite, that European citizens are not really "privileged" and "threatening" but rather subject to stigmatisation and made vulnerable because of this? If the latter is true, the whole point of the *Article* collapses. In any event, it seems clear that the parallel between Union citizens and Europe's Jews is ill-founded. It is the least felicitous analogy, and the one most likely to awaken feelings of hate and intolerance (towards both Jews and European citizens).

Now, let us assume these are uncontrolled leaps in the course of drafting an *Article*. We got it wrong. The true thinking of the Author on the matter is different. His intention would be to alert us to the fact that, despite being a wonderful innovation, EU citizenship law carries "risks", and we should be aware of these. What kind of risks? This does not emerge clearly in this *Article*. The Author mentions but does not substantiate risks of destabilisation of domestic welfare structures and risks of destabilisation of entrenched local values and habits. One would also think of the risk of distortion of this regime by politicians, activists or others willing to generate anti-EU sentiments. There is no doubt that it would be wrong to be blind to the growing sentiment among various groups of people across Europe that the European Union – its machinery, policies, and laws – are both too remote from pressing needs of people and too intrusive in people's everyday lives. One must attend to the backlash of European integration in Member States' societies that manifests in a number of ways, from disagreement to protest, from disillusion to a sense of disorientation or despair.² But why then rely on the terms used by those who attempt to instrumentalise and exploit this sense of disaffiliation to Europe? Why borrow the language used by nationalists and populists? Why use their language as an analytical frame for describing the operation of EU law? What happens in the *Article* is precisely this: the Author disguises the sentimental language of fear and separation in the clothes of an academic discourse; it turns convenient terms used to inflame social passions ("*separate, privileged, threatening*") into analytical categories. This is hardly understandable. This certainly does not serve the argument. More importantly, this points to a lack of careful methodological engagement with the ways in which EU

² See on this L. AZOULAI, *The Madness of Europe, Being Attached to It*, in *German Law Journal*, Special Issue n. 1, January 2020, pp. 100-103.

law may, in actual practice, contribute to shape or strengthen all sorts of cultural and social claims or fears. We certainly need to deepen our understanding of the social and cultural contexts in which EU law operates. Dubious parallels and outrageous categories do not provide sound foundations for such a study.

I would say more. There was a time when thousands of young Europeans let forth the cry *"We are all German Jews"*. This was to signify the relation of solidarity and fraternity with the victims of the inhumanity represented by Nazism, and it was to signify a form of solidarity among Europeans. We are all aware that we are living disturbing and perilous times. This alludes not only to the erosion of democratic orders, but also to a sense of deep polarisation in European societies. At such a serious moment in time, isn't it our responsibility to resist the reckless message, this sad cry: *"They are a class of Europeans/Jews"*?



HOW CITIZENSHIP DIVIDES: A RESPONSE TO LOIC AZOULAI

GARETH DAVIES*

ABSTRACT: This note is a brief response to Professor Azoulai's reaction (*On Dubious Parallels: The Transnational Europeans and the Jews. A Note on Gareth Davies' Article*, in *European Papers*, Vol. 5, 2020, No 1, forthcoming, www.europeanpapers.eu) to my *Article, How Citizenship Divides (How Citizenship Divides: The New Legal Class of Transnational Europeans*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 675 *et seq.*). He takes exception to my suggestion that Jews in early 20th century Europe, like mobile Union Citizens, were in a sense outsiders within the states that were their homes, and as members of a pan-European persecuted minority, also in a sense transnational. He seems to think that to suggest a minority may have a different sense of place and belonging in their state is to insult them. I think that to deny it is to deny them a voice and identity, as well as to reinforce the nationalist idea that the only good citizen is an uncomplicated one.

KEYWORDS: Union Citizenship – Jews in Europe – Judaism – minority identities – cosmopolitanism – European Union.

I was interested to read Loic Azoulai's comments on my *Article, How Citizenship Divides*.¹ In that *Article* I suggest that Union Citizenship law is creating a new class of people, who are to some extent outsiders in the states in which they live, and tending to be transnational in their lives.

I do not think that Professor Azoulai agrees with me on this, but his objection is largely that I go on to make a comparison between the position of the mobile Union Citizen, and the position of Jews in European society at the beginning of the 20th century. It is a brief comparison, a paragraph in the conclusion which suggests that we should reflect on the similarities, but nevertheless he finds it unacceptable.

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¹ See L. AZOULAI, *On Dubious Parallels: The Transnational Europeans and the Jews. A Note on Gareth Davies' Article*, in *European Papers*, Vol. 5, 2020, No 1, forthcoming, www.europeanpapers.eu and G. DAVIES, *How Citizenship Divides: The New Legal Class of Transnational Europeans*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 675 *et seq.* A minor detail: at one point Professor Azoulai refers to "up-rooted professions" in quotation marks. That phrase does not in fact appear in my *Article*.



The simplest comparison between mobile Citizens and Jews is in the reactions that they inspire in nationalists and populists. In recent years we have seen the emergence of anti-mobility rhetoric, in some quarters, which draws on old ideas of cosmopolitan rootlessness, on the stranger within importing alien values, and so on: the recognizable tropes of anti-Semitism then, and indeed now. Why note this? It reminds how Europe's majorities can react to those they see as other, and how mobile Citizens, European though they may be, could come to be seen this way. It is a warning: we should not assume that tolerance of those seen as strangers is a stable default. This point could of course be made *a fortiori* with respect to immigrants from outside the EU, but here I want to say that it can also be true within the community of Europeans. This seems hardly controversial, and indeed important.

I go further however, and suggest that mobile Citizens and Jews in Europe share some substantive characteristics. The similarity of the reactions is not arbitrary. Jews too were, to some extent, outsiders, and often, in some ways, transnational. At this point, if I understand him correctly, Professor Azoulay objects most strongly: he thinks, I believe, that I am perpetrating anti-Semitic stereotypes.

Anti-Semitism did not begin with the Nazis. For centuries, persecution and exclusion from rights were the norm in Europe. There had been many migrations across the continent, leading to a complex European diaspora. In the 1800s and early 1900s most European countries began to grant Jews civil rights and legal equality, but anti-Semitism did not stop there, and the social distance between Jews and non-Jews, and the *de facto*, if not always legal, exclusion from certain positions and roles, continued. I assume that this is not news.

When I say that Jews were to some extent outsiders I mean that they were seen that way by many in the majority, and that they will, inevitably, have been aware of this, and that their position in their states was fragile and conditional. They will have known that they were not fully accepted as equals, or even as fully belonging, by their non-Jewish compatriots. They will also have been aware that they were part of a Jewish community, a wider Jewish community, that was European, but in which Israel also played a role, for some symbolically, and for others, in the Zionist years, practically. They may certainly have been proud and patriotic Austrians, Poles or French citizens, but that was not the whole story of their identity, for most.

Professor Azoulay complains that I am stereotyping Jews, reducing them to generalisations, as if they all held the same attitudes. Of course, he is quite right to point out that such a large community – as it then was – was as diverse as any other, and there was no uniform attitude, lifestyle or set of beliefs. But I do not think it is going too far to suggest that for most Jews, whether a Frankfurt doctor or a poor Ukrainian farmer, an awareness of anti-Semitism by the majority around them, and an awareness of their belonging to the community of Jews, will have been part of what formed their political consciousness.

It is then inconceivable to think that Jews, in general, will have had the same relationship to their national community, their fellow-citizens, and to their nation as an institution and idea, as non-Jews had. Certainly, some of the more integrated and secular members of the Jewish community thought that they did. They turned out to be wrong.

To deny this is to deny their experience, indeed to deny their Jewishness – that it meant anything, or that it shaped their lives. It is like saying that all Americans – or Europeans – are the same and so there is no need to talk about colour. It is not for the majority to claim this until the minority tell them that it is so – and perhaps not even then.

It seems sometimes that Professor Azoulai thinks it is derogatory to suggest that people may have complex, or even conflicted identities, a sense of belonging that goes beyond the state. I disagree. It is not. Certainly nationalists would think otherwise: they despise nuanced belonging, and prize exclusive and absolute attachment to local peoples and soil. They are, however, the problem. Surely we do not combat them by accepting their demands and then pretending that everyone conforms? Is the answer to nationalism to insist that immigrants can be nationalists too? The nationalist says that only those who are unquestioning, unconflicted, nationalist, and full-blooded patriots are deserving members. I disagree – in fact, although it goes beyond this discussion, I would go further: it is the unquestioning who undermine nations, and the divided who may save them. That is, I would suggest, the European idea.

What the nationalist does, however, is twist features into slurs, turning cosmopolitan into disloyal, different into lesser. It is that twisting which is objectionable, not being either cosmopolitan or different, and if we allow ourselves to be convinced to the contrary we hand the xenophobe a great victory. When I described Jews as “often distinctively transnational in lives and identity” I was making a relatively banal and factual statement about what it was to be part of a historically persecuted pan-European minority. There is nothing, absolutely nothing, that is derogatory in that statement, and I am rather shocked that someone who is neither nationalist nor xenophobe could think there is.

It may be – I am not certain, and if this is not Professor Azoulai's view then I apologise, but it would seem to fit his argument – that he is just being a good Republican, defending the claim that a Polish Jew is the same as a Polish Catholic, and a French Muslim the same as a French atheist: there are merely citizens, not groups within them. However, that view is about rights, not identity. Certainly we may hope that the rights of all citizens are the same, and their religion or ethnicity makes no difference: an admirable ideal. However, that is not to say that their sense of their place in the world is the same. To claim this is to trivialize the features of who they are. If Frenchness is just a question of paperwork and civil rights, then there may be little need to distinguish between groups within. But if Frenchness is also about a sense of belonging, of safety, of acceptance, of home, then there are many ways of being French, and the history and experience of every individual and group will be part of what Frenchness and France means for them. Is that inconvenient for the Republican myth? *Tant pis*.

The reader may wonder why I am even going down this path. The *Article* is about Citizenship, and I could have just made the lighter point that criticism of the mobile often has anti-Semitic overtones and left it there. The answer is that I think cosmopolitanism enriches the continent. Those who feel the pull of more than one community, who experience a layered and even conflicting sense of belonging can help break down the walls between those whose sense of home is more absolute and defined, and they can help national communities change, grow and look at themselves in new lights. This can be true of the Basque-Spaniard, the Muslim Swede or the Transgender Pole as well as the mobile Citizen, a foreigner in her chosen home. We should celebrate that Europe is making space for people to exist as insiders-outsiders in the states where they live.

But these people are vulnerable. The national tribes are still the majority. I look at the Jews so that we do not forget the viciousness that can be produced for those who are inside the nation, but differently located within it. Certainly the comparison must not be stretched too far – studying abroad does not make one a Jew. But I do not think that the parallels, even if limited, are trivial in this time of populism and backlash. If Europe is creating Europeans – good. But that will create dangers too, and we should remember, and be prepared.



INSIGHTS

QUESTIONING EUROPEAN (UNION) SOVEREIGNTY

edited by Ségolène Barbou des Places

TAKING THE LANGUAGE OF “EUROPEAN SOVEREIGNTY” SERIOUSLY

SÉGOLÈNE BARBOU DES PLACES*

ABSTRACT: This *Insight* argues that the rise and spread of the notions of “European sovereignty” and “European Union sovereignty” must be taken seriously. Since 2017, they have become central categories in the main political discourses on the EU. The paper first addresses the question whether European (or EU) sovereignty is an adequate concept to give account of the nature, or the future, of European integration. It answers negatively. Then the *Insight* describes the claim for “European sovereignty” as a discursive form. As such, it performs different functions that must be analysed: the notion of European sovereignty permits to mobilise the EU actors who aim to “rebuild” Europe and it serves to accommodate conflicting visions of what the EU is and should be. To focus on language permits to understand why “European sovereignty” gains momentum in the discourses and the literature on EU integration.

KEYWORDS: European sovereignty – European Union sovereignty – language – concept – discursive form – power.

I. INTRODUCTION

Since 2017, observers have witnessed the rise and spread of a new notion: “European Union sovereignty”. Even if he did not invent the term, French President Macron played a prominent part in its emergence. On 7 September 2017 he delivered a speech on Athens Pnyx Hill¹ where he vowed to lead a “rebuilding” of the European Union, calling for more unity, more solidarity, and for a more “sovereign Europe”. A few weeks later, he gave his Sorbonne speech² where he explained “how to build the six keys to sovereign-

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¹ Ministry for Europe and Foreign Affairs, *European Union - Speech by the President of the French Republic (Athens, 7 September 2017)*, available at www.diplomatie.gouv.fr.

² Presidency of the French Republic, *New Initiative for Europe – Speech by the President of the French Republic Emmanuel Macron*, 26 September 2017, www.elysee.fr.



ty”.³ Since then, European sovereignty has become the antiphon of the French diplomacy. In its Munich discourse in February 2020, Mr Macron claimed, again, that the European Union had to become a strategic political power. And recently, on 23 April 2020, he described sovereignty and solidarity as the two axes for the European Union’s common response to the Covid crisis.⁴

Gradually the notion of EU sovereignty has permeated the vocabulary of European institutions, with President Juncker entitling his 2018 State of the Union Speech “the Hour of European Sovereignty”.⁵ This was undeniably a signal for the observers: many think tanks, in particular among those specialized in defence policy and UE external relations, followed suit and now increasingly refer to the “sovereign Europe”. Other EU institutional actors have made use of the term, progressively transforming it into an influential notion; the President of the European Central Bank Mario Draghi has hence used it several times.⁶ Commissioner Margrethe Vestager also promotes “EU digital sovereignty”⁷ while Commissioner Thierry Breton supports the development of “European technological sovereignty”.⁸ Even Chancellor Angela Merkel has incorporated the notion of European sovereignty in her vocabulary.⁹ Finally, the term has progressively been integrated into European legal terminology: in 2020 the Commission enacted two Communications where European sovereignty is given a significant role.¹⁰

Because the notion of European (Union) sovereignty was introduced into the linguistic and conceptual landscape of EU integration, EU jurists are compelled to reflect

³ The six keys are described as follow: 1) A Europe that guarantees every aspect of security; 2) A Europe that addresses the migration challenge; 3) A Europe looking to Africa and the Mediterranean; 4) A Europe exemplary in sustainable development; 5) A Europe of innovation and regulation adapted to the digital world; 6) A Europe standing as an economic and monetary power.

⁴ Franceinfo, *Une réponse solidaire, organisée et forte – Speech by the President of the French Republic Emmanuel Macron*, 23 April 2020, www.francetvinfo.fr.

⁵ European Commission, *State of the Union 2018: The Hour of European Sovereignty, Speech of the President of the European Commission*, 12 September 2018, ec.europa.eu.

⁶ European Central Bank, *Sovereignty in a globalised world, Speech by Mario Draghi, President of the ECB*, on the award of Laurea *honoris causa* in law from Università degli Studi di Bologna, Bologna, 22 February 2019, www.ecb.europa.eu.

⁷ *Live debate: Digital Sovereignty in the Age of Pandemics*, with Margrethe Vestager and Pascal Lamy, 24 April 2020, joinup.ec.europa.eu.

⁸ European Parliament, Hearing of Commissioner-designate Thierry Breton, 14 November 2011, www.europarl.europa.eu.

⁹ The German Federal Government, *Multilateralism Guarantees the Freedom of the Internet, Speech by the German Chancellor Angela Merkel*, 26 November 2019, www.bundesregierung.de.

¹⁰ Communication COM(2020) 50 final of 29 January 2020 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on Secure 5G deployment in the EU - Implementing the EU toolbox; Communication COM(2020) 37 final of 29 January 2020 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on Commission Work Programme 2020, A Union that strives for more.

on the potential impacts that this evolution has on their analytical categories. This is why *European Papers* has opened a debate. The contributions gathered in this special section aim to critically assess the spread of the terms European (and European Union) sovereignty. They also address the possibility of applying the concept of sovereignty to the EU, and try and evaluate what would be the legal consequences of Europe becoming a "sovereign" entity.

As a preliminary step for this enquiry, this paper focuses on the language of European sovereignty. It takes the view that jurists cannot disqualify words for the simple reason that they are, only, words used by political leaders. In less than three years, European sovereignty has become a category used to describe both the nature and the future of the EU. Hence is the necessity of striving to understand what EU political actors and observers do mean when they refer to the EU as a (possible) sovereign. In so doing, this paper assumes that the relevance and importance of the notion of European sovereignty are not to be found in its conceptual dimension. Rather, European sovereignty must be taken for what it has been so far: a discursive form.

II. THE WEAKNESS OF THE CONCEPT OF EUROPEAN (UNION) SOVEREIGNTY

Many observers, in particular among jurists, do not feel comfortable with the rise of the notions of "European sovereignty" and "European Union sovereignty". Admittedly, the recent context is not supportive of the idea that European sovereignty has a role to play in the future of European integration. Who indeed would defend the idea that the EU is, or could become, a sovereign, at a time when the German constitutional Court expresses so much reluctance to respect the European Court of Justice's authority?¹¹ What could European sovereignty mean in the context of a sanitary crisis that has led some Member States to unilaterally "close" their borders and to refuse elementary forms of cooperation? To put it in a less trivial way, is it still relevant, after reading Habermas and MacCormick, to keep using the word "sovereignty" (notably in the singular) to describe our European world? In other words, one question has to be addressed: is European (or EU) sovereignty an adequate concept to give account of the reality, or the future, of European integration?

Furthermore, the term European sovereignty, which was coined for political purposes,¹² has a particular discursive form: it is an oxymoron. While this latter characteristic is valuable for those who pursue a discursive strategy, it nevertheless creates ambi-

¹¹ German Bundesverfassungsgericht, judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15, paras 1-237, www.bverfg.de.

¹² "Because I will not allow the so-called 'sovereignists' be the only ones to use this term [...] Sovereignty is not the property of those who prefer to withdraw into national borders! Do not leave sovereignty to those who wish to wither, those who pretend that looking inwards is a defence, a protection, a decision when actually it is a hate for others, a refusal of those who come from abroad, a denial of decades of shared history where we have finally tried to move beyond nationalisms!", *European Union - Speech by the President of the French Republic (Athens, 7 September 2017)*, cit.

guity. Unsurprisingly the term European sovereignty was described as mere “slogan”; a “fuzzy” or “catchall notion”¹³ the meaning of which remains uncertain. There are a number of reasons to support this description, which suggests that the idea of European sovereignty is too vague to be a legal concept we could resort to in order to make sense of our European legal world. Let me mention two of them.

First, in the “discourse” of EU sovereignty, there is no such thing as one clear conception of what the notion means and entails. The term “European Union sovereignty”, which is the support of very different claims, is not only vague but its meaning is also changing. While European Union sovereignty is sometimes the synonym of “unity” or “solidarity”, it is likewise frequently used to refer to an increased harmonisation of national legislations or deepened integration (as in the term “technological” or “digital sovereignty”). This plurality of meanings can be rightly seen as undermining the added value of the notion. To be sure, the promoters of EU sovereignty never clarify how they use the term: are they speaking about internal and/or external sovereignty? Do they have in view a narrow (and formal) or a thick conception of sovereignty? Do they really agree on how EU sovereignty is articulated with national sovereignty? While Jean-Claude Juncker and Emmanuel Macron’s projects are explicitly based on the idea of “shared sovereignty”, claims for the EU’s digital or economic sovereignty seem to entail a less pluralistic conception of sovereignty in Europe. Lastly there is a net difference between Mr Macron, who claims that the overhaul of Europe will require amending the founding treaties¹⁴ and Mr Juncker, who is more cautious and who suggests to act within the current limits of EU competences.

Accordingly, there are substantial blind spots in the discourses of European sovereignty. Undeniably the promoters of the notion have in view one side of the notion of sovereignty: they indeed intend to refer to state sovereignty rather than popular sovereignty. This has opened the floor to criticism. A number of observers rightly ask: where is the sovereign in this call for European sovereignty? The notion of European sovereignty is thus said to be “driven by foreign-policy elites” who primarily wish to increase the power of the European executive “while there is little discussion of the legitimacy of this executive power, little discussion of whether it expresses the will of the people of Europe”.¹⁵ Despite Emmanuel Macron’s emphasis on democracy in his Athens speech, the claim for EU sovereignty is “not sufficiently connected with the issue of democracy

¹³ See C. ECKES, *EU Autonomy: Jurisdictional Sovereignty by a Different Name?*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 319 *et seq.*

¹⁴ “That will require, first and foremost, a new method to overhaul Europe. That is why I want this roadmap that I intend to propose to all EU Member States – this roadmap to build the future of our Europe over the next decade – not to involve a treaty negotiated sneakily behind closed doors in Paris, Brussels or Berlin. No, I propose that we try a new method: that by the end of the year, we sketch out the major principles of our approach, where we want to take our Europe, and define our objectives clearly”, President of the French Republic Emmanuel Macron, Speech held in Athens, 7 September 2017, *cit.*

¹⁵ H. KUNDNAMI, *Europe’s Sovereignty Conundrum*, in *Berlin Policy Journal*, 13 May 2020.

within the EU".¹⁶ For Nicolas Leron,¹⁷ this approach is problematic insofar as democracy is annexed to the project of sovereignty; it is secondary and conditional. In sum, European Union sovereignty certainly remains a notion (and a project) to be clarified.

Second, many observers have also expressed surprise when Mr Macron, who aimed at "rebuilding" the EU, resorted to the old and somehow hackneyed notion of sovereignty. It even appeared to be counterproductive to refer to the EU in the terms of sovereignty. Haven't two decades of writings emphasised the progressive inability of the notion of sovereignty to make sense of the international and European legal order? Sovereignty is increasingly viewed in "disaggregated terms"¹⁸ and there has been "much talk of pooled, shared, divided, split or partial sovereignty".¹⁹ Progressively, in the wake of Neil MacCormick notorious works,²⁰ the notion of "post-sovereignty" has gained momentum in Europe; both in the academy and in political circles, the concept of sovereignty is increasingly being ignored or dismissed "as an anachronistic irrelevance or as a reactionary danger in discussion of the terms of the emerging European and legal political configuration".²¹ This position certainly neglects the persistence of sovereignty in national constitutional discourses, but the rise of "multilevel constitutionalism" or "polyarchism"²² has nevertheless gradually eclipsed the traditional description of the EU through the lenses of sovereignty. The notion has been increasingly viewed as an irredeemably vague and polysemic concept, as redundant and incoherent. In brief, to describe the EU with the help of an outdated notion would be an unconvincing attempt to make something new out of something old.

Worse still, to describe the EU as (more) sovereign was akin to ignoring the political and legal nature of the EU. It is the law that governs the life of the EU, which is equally named a rule maker and a rule exporter. In short, EU law is generally described as an instrument to limit national sovereignty and the politics that comes with the popular conception of sovereignty. The ambition was to construct a "European Union through law" and, as Verellen underlines,²³ the EU is mainly "a rejection and overcoming of national sovereignty, whereby the 'old' (national sovereignty and, by extension, politics as the means through which to articulate the will of the people) is replaced by something 'new'

¹⁶ *Ibidem*.

¹⁷ N. LERON, *Les faux semblants de la souveraineté européenne*, in *Esprit*, 2019, no. 5, p. 111 *et seq.*, esp. p. 117.

¹⁸ N. WALKER, *Late Sovereignty in the European Union*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford: Hart, 2003, p. 14.

¹⁹ *Ibidem*.

²⁰ N. MACCORMICK, *Questioning Sovereignty: Law, State and Practical Reason*, Oxford: Oxford University Press, 1999.

²¹ N. WALKER, *Late Sovereignty in the European Union*, cit., p. 16.

²² J. COHEN, C. SABEL, *Directly Deliberative Polyarchy*, in *European Law Journal*, 1997, p. 313 *et seq.*

²³ See T. VERELLEN, *European Sovereignty Now? A Reflection on What It Means to Speak of "European Sovereignty"*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 307 *et seq.*

(the EU as a project of integration through law)". In brief, the European Union offers the hope of transcending the sovereign state rather than replicating it in some super state.²⁴

Because of its vagueness and its lack of coherence, the term "European sovereignty" has proven inadequate to conceptualise the EU and its possible future. Why then, in 2020, taking the risk to claim that Europe is and should become (more) "sovereign"? A simple answer can be given: because European sovereignty is a figure of speech. As such, it performs a number of functions that make it valuable for those who support the project of rebuilding the EU.

III. THE STRENGTHS OF THE LANGUAGE OF "EUROPEAN SOVEREIGNTY"

I would not go as far as Neil Walker who describes sovereignty as an "act of speech",²⁵ in the sense given by Austin, but I certainly agree with this author when he analyses sovereignty as a discursive form in which a claim is expressed. European sovereignty has similarly become a discursive form: the term performs different discursive and rhetorical functions. In looking at these different functions, we can better understand why the term gained momentum in the European discourse.

First, to mention the "sovereignty" of the European Union is not only a provocation, it is also a discursive strategy: it permits to trigger imagination. There is no denying that in most texts and discourses, "European sovereignty" symbolises the transformation of Europe. Emmanuel Macron was explicit in Athens: Europe "has always been nothing but a metamorphosis!" European sovereignty has even taken the form of an emblem: it expresses the hope that the EU, once transformed, will achieve its goals and cope with its current difficulties.

But there is more. The influence of the notion comes from its capacity to express an important (although less-than-glorious) reality: the EU is in crisis and its very existence as a polity is at risk. The assumption that the European construction is in danger is omnipresent in the EU sovereignty discourse. This is of no surprise: the Sorbonne speech was delivered a few months after President Trump had brought the "America first" theme of his presidential campaign to Europe, and had criticised the Europeans' "chronic underpayments" to the NATO. The call for a sovereign Europe was also triggered by the decisions of the US administration to abandon the nuclear agreement with Iran and to impose new sanctions that would affect European companies doing business in Iran.

Given the troubled geopolitical context, European leaders agreed on the necessity to (re)affirm the political and strategic role, and the influence, of the EU in the world. Read Emmanuel Macron: "How can we protect ourselves? As Nations alone? [...] The right level is the European level! Our European sovereignty is what will enable us to be digital cham-

²⁴ K. SCHIEMANN, *Europe and the Loss of Sovereignty*, in *International and Comparative Law Quarterly*, 2007, p. 475 *et seq.*

²⁵ N. WALKER, *Late Sovereignty in the European Union*, *cit.*, p. 6.

pions, build a strong economy, and make us an economic power in this changing world. And not be subjected to the law of the fittest, the Americans and, soon, the Chinese, but our own law [...] So yes, I want us to rediscover the strength of a sovereignty that is not national but European". In his 2018 State of the Union speech, Mr Juncker similarly argued that the transformation of the EU into "an active player, an architect of tomorrow's world" is needed: "*Weltpolitikfähigkeit*" and "leadership" were called for, together with the "capability" to act independently and "increased strong and effective agency".

In the context the EU is facing, the European Union was called sovereign precisely because sovereignty is the language of self-preservation. For Neil Walker, sovereignty can be defined as the discourse "in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity *qua* polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity".²⁶ This is precisely what EU political leaders have in mind when they claim that the EU is sovereign: they wish to ensure that the EU is capable of sustaining its identity and its status as a polity. The vocabulary of self-preservation is implicit in Emmanuel Macron's discourse on sovereignty: what allows us "to decide for ourselves, to decide our own rules, our own future, it is what makes our world. [...] The sovereignty that we want, is sovereignty which is there precisely to bring our forces together to build together a European power to decide not to be subjected to what the superpowers will do better than we will".²⁷ In Athens, he added: "nowhere else is there such a political and social space where collective preferences – our preferences – are defended as such. That is what European sovereignty is about! If we give it up, the result is simple: we will be subject to the rules of one side or another".²⁸

In sum, the EU is endangered by the competition and the influence of superpowers and its transformation is urgent. Its necessary evolution called for a change of vocabulary, and the notion of sovereignty was the most suitable concept to achieve this objective. It indeed points at the direction of power and capability because sovereignty can be understood "to be an expression of public power".²⁹ In the words of Bodin, sovereignty is the absolute and perpetual power in a commonwealth. Of course, this conception of sovereignty as absolute power was challenged by contemporary political theory. But the notion still conveys the ideas of power and command that are invoked by EU political leaders. As the Commission recently acknowledged, "Europe needs to be more geopolitical, more united and more effective in the way that it thinks and acts. It needs to invest in alliances and coalitions to advance our values, promote and protect

²⁶ *Ibidem*.

²⁷ European Union - Speech by the President of the French Republic (Athens, 7 September 2017), cit.

²⁸ *Ibidem*.

²⁹ M. LOUGHLIN, *Ten Tenets of Sovereignty*, in N. WALKER (ed.), *Sovereignty in transition*, cit., p. 67.

Europe's interests".³⁰ This is what the promoters of the notion of "European sovereignty" are calling for: transforming the EU into a supreme ordering power which has the capacity to sustain its identity and status as a political and legal entity.

Therefore, the call for European sovereignty is not synonymous with a call for the (greater) autonomy of the EU legal order, although the two notions of sovereignty and legal autonomy are related. The different discourses on EU sovereignty clarify this point: despite the autonomy of its legal order, as protected by the CJEU, the EU is said to be losing its "capability" to decide for its future as an economic and a political entity. The notion of sovereignty has resurfaced in the precise fields (defence, migration, technology, financial security, the protection of personal data) where the EU has no effective decision-making capacity. What is at stake in is neither the distribution of competences nor the authority of EU law: what the EU leaders are calling for is the necessity to transform the EU into an entity that is "capable" of resisting to the influence of other superpowers. In this respect, EU law does not appear to be sufficient: European sovereignty is a term that invites the EU to take international politics seriously.

The superpowers the EU is assumed to compete with are both public (the US, China and Russia) and private: the EU, like its Member States, fails to impose its regulations on multinationals. This is why the German Chancellor held that the EU should claim "digital sovereignty" by developing its own platform to manage data and reduce its reliance on the US-based cloud services run by Amazon, Microsoft and Google. As for the Commission, it recently emphasised the need "to respond to the security challenges posed by the 5G networks".³¹ This should remind us that, in the history of European States, sovereignty coincided with a dual primacy: the primacy of the political order over both the theological and the economic orders: the conquest of sovereignty "went along the conquest of control, and transformation of the economic domain (the domain of labour and production, of property and commerce) through a variety of means".³² This sense of sovereignty is crucial in the claim for European sovereignty: the autonomy of the political order relates as well to the imposition of public authority above spheres of private initiatives. When Bruno Lemaire, the French Minister for economic affairs, supported in turn the "European economic sovereignty", his ambition was to stand for more protectionism and more interventionism of the state on the market; it was a call for the public power to retake control of the private sphere. The same kind of claim has surfaced during the Covid-crisis, with European leaders calling for the EU's increased capacity to be self-sufficient in food and medicines, and willing to support the development of industrial EU "champions".

³⁰ Communication COM(2020) 37 final, cit.

³¹ Communication COM(2020) 50 final, cit., p. 6.

³² E. BALIBAR, *Prolegomena to Sovereignty*, in E. BALIBAR (ed.), *We the People of Europe?, Reflections on Transnational Citizenship*, Princeton: Princeton University Press, 2004, p. 147.

In brief, in the new geopolitical context the EU is facing, "instead of a transformation of international politics, there has been a transformation of pro-European thinking".³³ Pro-Europeans no longer see the EU as a model, but as a power that has to compete with others. In order to do so, they say, it needs "sovereignty". European sovereignty is the name for different things: it is the name for the perilous situation the EU is currently living; it is also (and above all) the justification for its evolution. As such, the claim of "European sovereignty" aims to mobilize the pro-Europeans. The notion of "European sovereignty" has a transformative effect: it modifies the perception that EU jurists have insofar as what was analysed as both impossible and undesirable ("sovereign Europe") finally appears to be a viable alternative to the current situation. "European Union sovereignty" is akin to a slogan, i.e. a repetitive expression of an idea and purpose, with the goal of persuading members of the public. Because "European sovereignty" is based upon the "totemic word"³⁴ of sovereignty, it could "produce powerful and sometimes unreasoned and unreasonable actions in our hearts and thus shape our actions and decisions".³⁵

There is a second reason why the term European sovereignty is now circulating in different arenas. Being a fuzzy notion, it is vague and flexible enough to accommodate conflicting visions of the European Union.

The term European (Union) sovereignty, as mentioned in the previous lines, is a call for a stronger Europe: the ambition is undeniably to strengthen the EU's capacity to compete with other "superpowers" – whether public or private. But while a number of observers are convinced that the EU must regain control in many fields, many European actors do not feel comfortable with the very idea of coupling "Europe" and "power". This can be because they are reluctant to adhere to the idea of "Europe puissance", supported by Charles de Gaulle and revived by Emmanuel Macron. This can also be because they consider that "European sovereignty" risks being the screen for Europe's closing on itself.

But more precisely it appears that the actors who have in mind the transformation of the EU are encountering a conceptual difficulty. Mr Juncker's position clarifies this difficulty: immediately after the Sorbonne speech, the former President of the Commission has supported the idea that the European Union should turn into a major sovereign power on the global stage "making the world in its image". His ambition was to make Europe militarily and economically independent from its traditional ally, the US: the EU should be "a global player" as well as a "global payer". But when asked whether he wanted the EU to have superpower status, Juncker avoided the term: "I want the EU to become a major player in the global scene," he said. "Superpower, I don't like that expression. We have to

³³ H. KUNDNAMI, *Europe's Sovereignty Conundrum*, cit.

³⁴ K. SCHIEMANN, *Europe and the Loss of Sovereignty*, cit., p. 476.

³⁵ *Ibidem*.

be super but not a superpower.” Immediately after, he expressed his disapproval “of those who pursued unilateral actions, waging trade and currency wars”.³⁶

In a recent column entitled “Embracing Europe’s power”,³⁷ the High Representative of the Union for Foreign Affairs and Security Policy Josep Borrell, conveyed the same kind of discomfort. He first argued that “we must relearn the language of power and conceive of Europe as a top-tier geostrategic actor. [...] Capitalising on Europe’s trade and investment policy, financial power, diplomatic presence, rule-making capacities, and growing security and defence instruments, we have plenty of levers of influence. Europe’s problem is not a lack of power. The problem is the lack of political will for the aggregation of its powers to ensure their coherence and maximize their impact”. But he instantly nuanced his position: “We must get serious about devising credible approaches to dealing with today’s global strategic actors: the United States, China, and Russia. While different in many ways, all three are practicing issue linkage and power politics. Our response should be differentiated and nuanced, but clear-eyed and ready to defend EU values, interests, and agreed international principles”.

The two institutional leaders address the key issue: how can they avoid creating a conflict between the two representations of the EU they support? Their challenge is indeed to adapt the European Union to a conflicting international context while, at the same time, preserving its very identity as a rule of law system. The EU was not constructed as a geopolitical entity: it was planned to transform “international politics by moving beyond a world of power politics to one based on the rule of law”.³⁸ The question European actors have to answer is a difficult one: how can the EU be, at the same time, a normative and a political power?

The reference to “sovereignty” permits to avoid the difficulty, by remaining at the discursive level. Sovereignty, because of the influence of Bodin and Schmidt, certainly evokes power and command. For Bodin, the sovereign, as the highest power of command, cannot be subject to the law. But at the same time, political theory has taught us that sovereignty is full of tensions and contradictions.³⁹ In a number of writings, sovereignty is not synonymous with pure power. To be sovereign does not equate to be outside the sphere of the law:⁴⁰ sovereign authority “is expressed through those established institutional forms which enable the general will to be articulated, that general will, although absolute, has nothing in common with the exercise of an arbitrary power.

³⁶ D. BOFFEY, *Juncker calls on EU to Seize Chance to Become Major Sovereign Power*, in *The Guardian*, 12 September 2018, www.theguardian.com.

³⁷ J. BORRELL, *Embracing Europe’s Power*, in *New Europe*, 14 February 2020, www.neweurope.eu.

³⁸ H. KUNDNAMI, *Europe’s Sovereignty Conundrum*, cit.

³⁹ E. BALIBAR, *Prolegomena to Sovereignty*, cit., p. 133 et seq.

⁴⁰ M. LOUGHLIN, *Ten Tenets of Sovereignty*, cit.

Sovereignty will is the antithesis of subjective will. And since the expression of this will takes the form of the law, sovereignty in reality means the sovereignty of law".⁴¹

While the semantic plurality of the term sovereignty creates ambiguities, it is also what makes it a useful rhetorical device for EU actors. The reference to European sovereignty is, to a certain extent, an oratorical precaution: it permits to support two different projects at the same time, without making the contradictions between them explicit. In short, the call to "European sovereignty" is a discursive form that allows institutional actors to hold on to the crest line: on the one hand, the EU must be transformed and adapted to the evolution of international politics – the "geopolitical Commission" supported by Mrs Von der Leyen being the name of this necessary adaptation; and on the other hand, the identity of the EU, as a rule of law system, must be preserved. The term European sovereignty ultimately serves to project what can be named a reasonable utopia.

IV. CONCLUSION

All in all, a new category has emerged in the vocabulary of EU integration. "European (Union) sovereignty" progressively tends to become an inescapable notion when it comes to reflect on the transformation of the European Union. While its conceptual meaning remains uncertain, it is more than a slogan: it offers a new terminology to conceive of the possible nature and future of the EU; it triggers imagination; it permits to coalesce different visions and projects of the EU. European sovereignty speaks to the reason and to the imagination. However, whether this figure of speech is also an act of speech is more than questionable. Theories of sovereignty have produced many attacks, often justified, from different directions. To put it in Konrad Schieman's words: "there are those who say that no State should be omnipotent, even within its borders. There are those who ask questions in relation to the boundaries of State and there are those who point out that in practice no State is omnipotent".⁴² It remains to be seen whether, in enouncing that sovereignty is European, the promoters of EU sovereignty will avoid comparable attacks. Admittedly language is powerful, but its strength depends on the acceptability of the words – and the representation conveyed by them – that are employed.

⁴¹ *Ibidem.*, p. 73. In contrast, Pavlos Eleftheriadis argues that sovereignty cannot be, at the same time, unlimited and limited: "where there is law there is no sovereignty, and where there is sovereignty there is no law", P. ELEFThERiADIS, *Law and Sovereignty*, in *Law and Philosophy*, 2010, p. 535 *et seq.*

⁴² K. SCHIEMANN, *Europe and the Loss of Sovereignty*, cit., p. 478.



INSIGHTS

QUESTIONING EUROPEAN (UNION) SOVEREIGNTY

edited by Ségolène Barbou des Places

A SOVEREIGN EUROPE AS A FUTURE OF SOVEREIGNTY

MATEJ AVBELJ*

ABSTRACT: Since the Peace of Westphalia sovereign political entities have unexceptionally been States and sovereignty has been thus long seen as entirely inseparable from the State. Does this mean that Emmanuel Macron in his calls for “sovereign Europe” is, in fact, campaigning in favor of turning the EU into a State? Or is he, in his political fervor, simply committing a category error? This *Insight* argues that neither is necessarily the case. The EU can be sovereign, without being a State.

KEYWORDS: European Union – territorial sovereignty – functional sovereignty – constitutionalism – pluralism – sovereign Europe.

I. DIVORCING SOVEREIGNTY FROM THE STATE

The times, they are changing. The actual social practices out there are changing too, and so are the concepts through which we have grown accustomed to comprehend, indeed to make sense, of our socio-political world. One of the key concepts of political modernity, its foundational concept as a matter of fact,¹ has been sovereignty. Sovereignty has been traditionally defined as an absolute, indivisible, unitary property of a territorially delimited political entity, which ultimately autonomously governs its internal affairs and enjoys equal independence externally in relation to other political entities.² Since the Peace of Westphalia sovereign political entities have unexceptionally been states. Consequently, it has been long argued that “sovereignty is entirely inseparable from the state,”³ so much

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¹ M. LOUGHLIN, *Ten Tenets of Sovereignty*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford: Hart, 2003, p. 80.

² J. BODIN, *Les six livres de la république*, Paris: Jacques du Puis, 1576.

³ See M. LOUGHLIN, *supra* note 1, at 73, quoting from C. LOYSEAU, *Traicté des Seigneuries*, Paris: Abel l'Angelier, 1614, p. ii.4.



so that: "*L'identité entre souveraineté et forme étatique est totale: toute entité souveraine est nécessairement un Etat et tout Etat est nécessairement souverain*".⁴ Staying faithful to this traditional notion of sovereignty, does this mean that Emmanuel Macron in his calls for "sovereign Europe" is, in fact, campaigning in favor of turning the EU into a State? Or is he, in his political fervor, simply committing a category error?

This short essay argues that neither is necessarily the case. The EU can be sovereign, without being a State. Sovereignty too can be reinterpreted without altering it beyond recognition and hence committing a category error. This becomes apparent if one, as we do, subscribes to a post-traditional conception of sovereignty.⁵ Rather than conceiving of sovereignty as an immutable concept,⁶ as a quasi of natural phenomenon,⁷ or abandoning it altogether,⁸ the post-traditional concept of sovereignty situates the traditional notion of sovereignty in the present socio-political context, by reinterpreting its conventional meaning, almost in a Dworkinian way, putting it in the best possible light all things considered.⁹

II. THE POST-TRADITIONAL CONCEPTION OF SOVEREIGNTY

Accordingly, sovereignty is conceived of as a speech act.¹⁰ It is a plausible claim to the ultimate legal and political authority¹¹ in designated policy fields and over subjects and objects in an identified space. Its plausibility derives from the acceptance by the audience, existing internally and externally of the claiming entity.¹² Since it is the acceptance of the claim to sovereignty, which determines a sovereign, not only States, but other entities can be sovereign too.¹³ This opens the way to severing the allegedly in-

⁴ A. PELLET, *Les fondements juridiques internationaux du droit communautaire*, in *Academy of European Law* (ed.), *Collected Courses of the Academy of European Law*, Brussels: Kluwer Law International, 1997, p. 229.

⁵ For a more in-depth discussion see M. AVBELJ, *Theorizing Sovereignty and European Integration*, in *Ratio Juris*, 2014, pp. 344-363.

⁶ R.O. KEOHANE, *Ironies of Sovereignty: The European Union and the United States*, in *Journal of Common Market Studies*, 2002, pp. 743-765.

⁷ For a distinction between natural and political concepts, see, R. DWORKIN, *Hart's Postscript and the Character of Political Philosophy*, in *Oxford Journal of Legal Studies*, 2004, p. 1 *et seq.*

⁸ N. MACCORMICK, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999.

⁹ R. DWORKIN, *Law's Empire*, Cambridge: Harvard University Press, 1986.

¹⁰ N. WALKER, *Late Sovereignty in the European Union*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford: Hart, 2003.

¹¹ *Ibid.*, p. 18.

¹² A. JAMES, *The Practice of Sovereign Statehood in Contemporary International Society*, in *Political Studies*, 1999, p. 462; also G. SØRENSEN, *Change and Continuity in a Fundamental Institution*, in *Political Studies*, 1999, p. 592.

¹³ For a discussion of other functional sovereign entities under transnational law, see M. AVBELJ, *The European Union under Transnational Law*, Oxford: Hart, 2018.

herent link between State and sovereignty; as well as, and consequently, between sovereignty and territory. As a result, not only States as territorial entities are sovereign, but other functional entities, which exercise certain functions over designated fields, can be sovereign too. If territorially sovereign States recognize such a functional sovereignty on their territory, a situation, hardly imaginable in our modern political history, of multiple sovereigns on a single territory can occur. As we have argued elsewhere, we witness a move from singular to pluralist sovereignty.¹⁴

Not only is this precisely what has been taking place in the process of European integration, this post-traditional pluralist conception of sovereignty also justifies the growing number of references to a sovereign European Union in contemporary political and public discourse. A sovereign European Union, that “protects, empowers and defends”,¹⁵ is thus not necessarily a State. It might well be, but for the EU to protect, empower and defend, it does not need to adopt a statist form and divest the present Member States of theirs. The EU can be, as it presently is, a non-statist federation: a union.¹⁶ This is a pluralist legal and political form, composed of twenty-seven territorially sovereign States; of a functionally sovereign supranational level, which are all integrated into a common legal and political whole that is more than the sum of its non-exhausted constitutive parts.

III. A FUNCTIONALLY SOVEREIGN EUROPEAN UNION

The EU, hence conceived of, is a novel legal and political form, which merits the quality of sovereignty. Its dual sovereign characters, territorial and functional, are namely mutually-reinforcing. That, which can no longer be achieved by singular territorial sovereign entities: the States, can be ensured by a larger functional sovereign: the EU. The latter complements the States, indeed rescues them,¹⁷ and hence, to the objectively possible extent, safeguards the European way of life.¹⁸ As the geo-strategic balance continues to shift in favour of new powers and as the old transatlantic alliance still melts, the EU Member States increasingly experience the need for a sovereign European Union. We can therefore expect that in the future the number of competences exercised by the EU will grow. Its functional sovereignty will be hence strengthened.

As functional sovereignty is not in a zero-sum relationship with the territorial sovereignty of the States, which are not endangered, but empowered by the EU, the main question for the future is not going to be, contrary to what the concern appears to be at

¹⁴ R. BELLAMY, D. CASTIGLIONE, *Building the Union: The Nature of Sovereignty in the Political Architecture of Europe*, in *Law and Philosophy*, 1997, p. 422; see also N. WALKER, *supra* note 10, p. 18, referring to a constitutionally pluralist definition of sovereignty.

¹⁵ European Commission, Press release of 2 May 2018, EU budget: Commission proposes a modern budget for a Union that protects, empowers and defends, ec.europa.eu.

¹⁶ M. AVBELJ, *Theory of European Union*, in *European Law Review*, 2011, p. 818 *et seq.*

¹⁷ A. MILWARD, *The European Rescue of the Nation State*, Routledge, 2000.

¹⁸ European Commission, *Promoting our European Way of Life*, ec.europa.eu.

present, how to defend the remaining nucleus of the national territorial sovereignty. The question will be how to ensure the accountability of the increasingly functionally sovereign EU. As this, despite having and exercising many statist competences, is not a State, the rule of law and democracy mechanisms, indeed constitutionalism as such, cannot be simply mechanically translated from the statist environment to beyond the State.¹⁹ In the future, even more than today, we shall be thus witnessing new socio-political practices that will be giving rise to a new socio-political phenomenon of a functionally sovereign non-statist European Union. There can be no doubt that, both in practice and theory, there are exciting times ahead.

¹⁹ N. WALKER, *Post-national Constitutionalism and the Problem of Translation*, in J.H.H. WEILER, M. WIND (eds), *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003, pp. 27-54.



INSIGHTS

QUESTIONING EUROPEAN (UNION) SOVEREIGNTY

edited by Ségolène Barbou des Places

THE TWO FACES OF EUROPEAN SOVEREIGNTY

ANTOINE BAILLEUX*

ABSTRACT: "European sovereignty" seems at first sight to be a misnomer. The EU is not sovereign in the classical sense of the word. By contrast, it can be argued that the EU transforms national sovereignty, both in its internal and external dimension. This "Europeanisation" of Member State's sovereignty could be seen as an attempt to restore and expand the "rule of law" not only by harnessing market forces but by using them in order to promote "home-grown" legal standards. In that sense, "European sovereignty" may be a legal *contradictio in terminis* but it may also be the only future of sovereignty *tout court*.

KEYWORDS: sovereignty – civilization – Brussels Effect – rule of law – globalisation – EU.

I. NO EUROPEAN SOVEREIGNTY...

Constitutional lawyers usually associate sovereignty with the State and consider it as a bi-faceted concept.¹ The *internal* dimension of sovereignty refers to the State's supreme normative power within its borders. The State does not only enjoy the "monopoly of legitimate violence" but it is also the ultimate source of any legal norm applicable on its territory. This is not to say that every law originates from the State but that no law can be enforced without the State's (whether explicit or tacit) approval. By contrast, the *external* dimension of sovereignty characterizes the State's independence *vis-à-vis* foreign entities, and most notably other States. It is the cornerstone of the Westphalian international legal order and underpins core principles of *jus gentium* such as the prohibition of the use of force and the non-interference in domestic affairs.

With this definition in mind, talking about "European sovereignty" seems at first glance quite a stretch.

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¹ On this issue, see A. BAILLEUX, H. DUMONT, *Le pacte constitutionnel européen*, Brussels: Bruylant, 2015, pp. 145-156.



Turning first to the internal side of sovereignty, it is common ground that the European Union does not enjoy the kind of supremacy that characterizes States. In spite of all the “new legal order” rhetoric developed by the Court of Justice, the European Union remains an international organization based on international treaties and therefore, ultimately, on national constitutions. Its “ever closer union” brings together “the peoples [plural] of Europe” and it has no say on either the conditions or the procedure to become a European citizen. Its members can freely decide to secede, as Brexit has just confirmed. Finally, its Court cannot annul national laws and only those EU rules which have direct effect must lead a domestic judge to set aside conflicting internal norms.²

The same holds true for the external dimension of sovereignty. The European Union neither has a territory of its own nor an army to defend it. It experiences difficulties speaking with one voice in international fora because of the unanimity requirement which governs its common foreign and security policy. And the EU-Canada Economic and Trade Agreement (CETA) saga shows us that even its power to close trade deals can be hampered by the veto of a small regional entity.

In the face of such compelling evidence, the expression “European sovereignty” turns out to be little more than a fancy catchword coined by federalists in order to keep their dream alive. It is based on a distortion of a concept that is central to both constitutional and international law. It must therefore be handled with extreme caution, if only because it has the potential of misleading the layman and fueling the “fake news” reservoir of Euroskeptic parties.

These misgivings should not, however, detract from a critical reflection on the way Europe *transforms* sovereignty, in both its internal and external dimensions.

II. ... BUT A “EUROPEANISED” (CONCEPT OF) SOVEREIGNTY

As regards its inner facet, it can be argued that the EU has *tamed* national sovereignty. As is well known, in most fields of EU competence the Member States have given up the unilateral exercise of their – increasingly illusory – normative supremacy in exchange for the collective use of a shared – but more effective – sovereignty. The majority voting system that epitomizes such a shift entailed tremendous sacrifices for the Member States, including accepting that norms they reject could apply on their territory and that rules they support could not.

Even more fundamentally perhaps, this deal also resulted in placing national governments and legislatures under the supervision of supranational bodies such as the Commission and the Court of Justice. From the outset, these two institutions have used the free movement principles to prevent Member States from using their normative

² This point was only recently clarified by the Court of Justice. See Court of Justice, judgment of 24 June 2019, case C-573/17, *Poplawski*.

power in a way that would discriminate citizens or economic actors from other European countries. As the European Union developed, the civilizing mechanic of EU law progressively extended to the protection of fundamental rights. This trend famously culminated in the Court of justice's red flags as regards Polish rules reshuffling the organization of justice, with the EU judiciary coming to the rescue of Polish citizens threatened by their government's attacks on the rule of law.³ Even the Member States' sovereign rights over their natural resources are not left unscathed by this Europeanisation process, as another case against Poland illustrates.⁴

In that sense, the European integration process can be characterized as a formidable civilizing process of national sovereignty,⁵ affording protection (of the foreign trader, of the European worker, of the national citizen, and even of the domestic wildlife) against the abusive exercise of sovereign rights by governments. In that respect, it can be argued that the European Union has – thus far – lived up to its historical mission, namely to prevent Nation States from cyclically relapsing into the *hubris* that sparked off two world wars and nurtured centuries of violence.

The Europeanisation process has also significantly – and arguably even more deeply – transformed the external dimension of sovereignty. It is no coincidence that the only six documents containing the expression “European sovereignty” in the EUR-Lex database all relate to the independence of the EU *vis-à-vis* foreign entities – whether States or multinationals.⁶ Used in this political and informal sense, this concept refers to the ability of the European Union to provide Member States with the kind of autonomy that none of them can any longer achieve separately on the global scale.

³ Court of justice, judgment of 24 June 2019, case C-619/18, *European Commission v. Poland (Indépendance de la Cour supreme)*; Court of Justice, judgment of 5 November 2019, case C-192/18, *European Commission v. Poland (Indépendance des juridictions de droit commun)*.

⁴ Court of Justice, judgment of 17 April 2018, case C-441/17, *European Commission v. Poland (Forêt de Białowieża)*.

⁵ In a similar vein, see J.H.H. WEILER, *To Be a European Citizen – Eros and Civilization*, in *Journal of European Public Policy*, 1997, p. 495 *et seq.*

⁶ These six documents are: 1) Opinion of the European Committee of the Regions — A new European agenda to speed up the development of maritime industries, COR 2018/06141; 2) Communication COM(2019) 218 final of 30 from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe in May 2019: Preparing for a more united, stronger and more democratic Union in an increasingly uncertain world – The European Commission's contribution to the informal EU27 leaders' meeting in Sibiu (Romania) on 9 May 2019; 3) Opinion of the European Economic and Social Committee on the “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the mid-term review on the implementation of the digital single market strategy – A connected digital single market for all” [COM(2017) 228 final]; 4) Opinion of the European Committee of the Regions on “A new stage in the European policy on blue growth”; 5) Commission Recommendation (EU) 2019/534 of 26 March 2019 Cybersecurity of 5G networks; 6) Written questions by Members of the European Parliament and their answers given by a European Union institution (2014/C 300/01).

But it would be a mistake to reduce this external side of “European sovereignty” to a shield designed to mitigate – or simply delay – Europe’s progressive loss of influence in a globalized world. As U.S. scholar Anu Bradford aptly demonstrates in her recent book on *The Brussels effect*,⁷ the European Union currently sets the regulatory tone at the global level on a variety of topics ranging from competition law to data, environment and consumer protection. The combination of a large and wealthy market, unsurpassed regulatory expertise and a high sensitivity to the protection of non-market values have turned the European Union into a *de facto* worldwide rule-maker with unmatched influence – even by the United States – on third country legislatures and large corporations.

To conclude, it should be noted that law and the market are the main driving forces behind this transformation of national sovereignty within the European Union, both in its internal and external dimensions. It is the protection of common rules (and primarily of common market rules) that justifies the EU’s interference in a Member State’s political choices. And it is the adoption of shared standards combined with a strong market power that preserves the autonomy and buttresses the leadership of European countries at the global level.

This process can be understood as a (partial and imperfect) response to the erosion of national sovereignty that affects all States across the world. Whereas globalization has given economic actors (mainly transnational corporations) leverage to strongarm national lawmakers and bypass democratic deliberation, the Europeanisation of Member States’ sovereignty could be seen as an attempt to restore and expand the “rule of law” not only by harnessing market forces but by using them in order to promote “home-grown” legal standards. In that sense, European sovereignty may be a legal *contradictio in terminis* but it may also be the only future of sovereignty *tout court*.

⁷ A. BRADFORD, *The Brussels Effect – How the European Union Rules the World*, Oxford: OUP, 2020.



INSIGHTS

QUESTIONING EUROPEAN (UNION) SOVEREIGNTY

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EUROPEAN SOVEREIGNTY NOW? A REFLECTION ON WHAT IT MEANS TO SPEAK OF “EUROPEAN SOVEREIGNTY”

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ABSTRACT: Spearheaded by French President Emmanuel Macron, the concept of “European sovereignty” is used increasingly often in debates on the role of the EU in the world. The concept’s recurrent use makes it important to reflect on what it means to speak of a “European sovereignty” in the context of the institutional reality which is the EU. To contribute to this effort, in this insight I look at the role of the concept of “sovereignty” in the case law of the Court of Justice of the EU; I explore the differences and similarities between “sovereignty” and “autonomy” as the ordering principles of, respectively, the international and EU legal orders; and I point to a number of advantages and disadvantages that come with speaking of a “European sovereignty”. I argue that, by refocussing political debate, the term may very well contribute to efforts to better equip the EU to face an increasingly unpredictable international environment. In the final analysis however, if the EU is to be able to “exist in the world as it currently exists, to defend our values and our interests”, a European external sovereignty must go hand in hand with a meaningful degree of internal sovereignty. This, in turn, requires a reshuffling of the balance of power between EU institutions, with a greater role for those institutions that represent the interests of the EU citizenry, as well as a more effective enforcement of existing EU policies. In particular as far as the first of these requirements is concerned, it is unclear at this juncture whether President Macron is willing to take steps in this direction.

KEYWORDS: European sovereignty – sovereignty – principle of autonomy – new legal order – European Union – Court of Justice of the European Union.

I. INTRODUCTION

In a 2017 speech at the Sorbonne University, French President Macron spoke of a “European sovereignty”, which he defined as “our capacity to exist in the world as it cur-

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rently exists, to defend our values and our interests”.¹ He immediately added that this “European sovereignty” is still to be realised (*à construire*). Since the Sorbonne speech, European sovereignty has become somewhat of a go-to concept in French government policy documents. In his speech on the eve of Brexit, on 31 January 2020, President Macron again mentioned that he is aware that “Europe can only continue to advance if we reform it thoroughly, to make it more sovereign, more democratic, closer to its citizens and therefore also more [straightforward in its daily functioning]”.² The term has also found its way to Brussels. For example, in his 2018 State of the Union speech, Commission President Jean-Claude Juncker mentioned that “[g]eopolitics teaches us that the time has come for European sovereignty, for Europe to take its destiny into its own hands. [...] This belief that ‘united we stand taller’ is the very essence of what it means to be part of the European Union [...] Sharing sovereignty where we need to makes each of our nation states stronger”.³ More recently, Commissioner Thierry Breton tweeted that “Europe must see itself as a political, strategic and sovereign power”.⁴ Similarly, official policy documents refer to Europe’s “technological sovereignty”⁵ and its “economic and financial sovereignty”.⁶

Its recurrent use in debates on the role of the EU in the world makes it important to reflect on what it means to speak of a “European sovereignty” in the context of the institutional reality which is the EU. To contribute to this effort, in this insight I look at the role of the concept of “sovereignty” in the case law of the CJEU (also: the Court) (section II) and I explore the differences and similarities between “sovereignty” and “autonomy” as the ordering principles of, respectively, the international and EU legal orders (section III). In a fourth and final section, I point to a number of advantages and disadvantages that come with speaking of a “European sovereignty”. I argue that by refocussing political debate the term may very well contribute to efforts to better equip the European Union to face an increasingly unpredictable international environment. In the final analysis however, if the EU is to be able to “exist in the world as it currently exists, to defend our values and our

¹ Presidency of the French Republic, *Initiative pour l’Europe – Speech of Emmanuel Macron pour une Europe souveraine, unie, démocratique*, 26 September 2017, available at www.elysee.fr: “Notre capacité à exister dans le monde actuel pour y défendre nos valeurs et nos intérêts”.

² Presidency of the French Republic, *Plus que jamais nous avons besoin d’Europe. Message by the Président Emmanuel Macron on Brexit*, 31 January 2020, available at www.elysee.fr: “[L]’Europe ne pourra continuer d’avancer que si nous la réformons en profondeur, pour la rendre plus souveraine, plus démocratique, plus proche de nos concitoyens et donc plus simple aussi dans son quotidien”.

³ European Commission, Press release, *European sovereignty: What does it mean to President Juncker?*, 12 September 2018, available at ec.europa.eu.

⁴ Tweet by @ThierryBreton of 15 February 2020, available at twitter.com.

⁵ Communication COM(2020) 50 final of 29 January 2020 from the Commission, *Secure 5G deployment in the EU – Implementing the EU toolbox*.

⁶ Communication COM(2020) 37 final of 29 January 2020 from the Commission, *Commission Work Programme 2020 – A Union that strives for more*.

interests”, a European *external* sovereignty must go hand in hand with a meaningful degree of *internal* sovereignty. This, in turn, requires a reshuffling of the balance of power between EU institutions, with a greater role for those institutions that represent the interests of the EU citizenry, as well as a more effective enforcement of existing EU policies. In particular as far as the first of these requirements is concerned, it is unclear at this juncture whether President Macron is willing to take steps in this direction.⁷

II. A POST-SOVEREIGN WORLD

Having read the work of Neil MacCormick with great interest as a law student, I had become convinced that sovereignty had become an obsolete concept no longer capable of explaining the contemporary globalised world consisting of overlapping legal orders.⁸ If anything, sovereignty -- the *Grundnorm* of an international system which had failed the world twice in the twentieth century -- had done more harm than good. From this perspective, the European integration project has been a laudable and indeed revolutionary project, intended, as it was, as an effort to move beyond sovereignty and construct a “post-sovereign” world. In this world, not sovereignty, but the rule of law would become the highest law of the land.⁹ Or, as Sir Francis Jacobs put it, within the European Union, the law itself would become sovereign.¹⁰

It is not a coincidence that one of the few references the CJEU ever made to the concept of “sovereignty” was when, in *Van Gend & Loos* and *Costa v. Enel*, it spoke of the limiting of national sovereignty with the view of establishing a “new legal order”. In the Court’s words in *Costa*:

“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their

⁷ This essay was written before the Covid-19 pandemic had reached Europe and thus before the German-French proposal to allow the Commission to borrow on financial markets to finance the recovery of the eurozone economy. If adopted, this proposal may contribute towards a strengthening of a European internal sovereignty. On the proposal, see M. KARNITSCHNIG, R. MOMTAZ, *Berlin Buckles on Bonds in €500B Franco-German Recovery Plan*, in *POLITICO*, 18 May 2020.

⁸ N. MACCORMICK, *Beyond the Sovereign State*, in *The Modern Law Review*, 1993, p. 1 *et seq.*; *Id.*, *Questioning Sovereignty*, Oxford: Oxford University Press, 2001.

⁹ In this sense, see G. DE BAERE, *European Integration and the Rule of Law in Foreign Policy*, in J. DICKSON, P. ELEFTHERIADIS (eds), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012, p. 363, describing the European integration project as “an attempt to infuse often destructive political processes with law in order to prevent war and to infuse international relations with predictability”.

¹⁰ F. JACOBS, *The Sovereignty of Law: The European Way*, Cambridge: Cambridge University Press, 2007.

sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.”¹¹

The Court continues to speak of “sovereignty” in such terms. For instance, in the context of the Area of Freedom, Security and Justice, it has referred to the European Arrest Warrant system as a project that aims to replace “a traditional system of cooperation between sovereign States”.¹² Here, the EU is presented as a rejection and an overcoming of national sovereignty, whereby the “old” (national sovereignty and, by extension, politics as the means through which to articulate the will of the people) is replaced by something “new” (the EU as a project of integration through law).¹³ This arguably is the case even in the *Wightman* judgment, on the possibility for a Member State to revoke a notification of its intention to withdraw from the EU.¹⁴ In this case, the Court confirmed that such a possibility exists as it “reflects a sovereign decision by that State to retain its status as a Member State of the European Union”.¹⁵ In this phrase the Court invokes national sovereignty, but only to protect the authority – or rather: the autonomy (see below) – of EU law. In short, EU law traditionally has had a two-fold aim: first, to limit national sovereignty and the politics that comes with the popular conception of sovereignty, and, second, to construct a European Union through law.

III. AUTONOMY: SOVEREIGNTY IN DISGUISE?

Against this backdrop, it is perhaps surprising that the Court itself sometimes appears in need of concepts that fulfil a similar symbolic function to the one performed by sovereignty in the national context. Within the Member States the notion of “sovereignty” captures the unity of the State and political community and, by extension, the distinctiveness of the State from other entities, in particular other sovereign States. Similarly, the EU, as a federation of States that aims to strike a balance between unity and diversity¹⁶, appears in need of a metaphor to capture the “unity” side of that balance, and to signify the distinctiveness of the EU as an entity in its own right.

¹¹ Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. Enel*, p. 593.

¹² See e.g. Court of Justice, judgment of 27 May 2019, case C-509/18, *PF (Procureur général de Lituanie)*, para. 43.

¹³ On the “integration through law” project, see M. CAPPELLETTI, M. SECCOMBE, J. WEILER, *Integration Through Law: Europe and the American Federal Experience*, Berlin: Walter de Gruyter, 1985.

¹⁴ Court of Justice, judgment of 10 December 2018, case C-621/18, *Wightman and others v. Secretary of State for Exiting the European Union*.

¹⁵ *Ibid*, para. 59.

¹⁶ On the conception of the EU as a federation of States, see e.g. R. SCHÜTZE, *European Constitutional Law*, Cambridge: Cambridge University Press, 2015, pp 40-79.

"Sovereignty" being unavailable, the Court of Justice has looked for alternatives to fulfil sovereignty's symbolic function.¹⁷ The aforementioned "new legal order" metaphor has been relied upon by the Court to denote the distinctiveness of EU law from the national legal orders. By emphasising the distinctiveness of EU law from domestic law (it was for the Court, not the national courts, the Court held in *Van Gend*, to decide whether a norm of EU law has direct effect within the legal orders of the Member States!; it was the EU, not the Member States, the Court held in *ERTA*, which had the competence to conclude the European Road Transport Agreement!¹⁸), the Court strove to protect and consolidate the autonomy of the, at that time, newly established European Economic Community from attempts by the Member States to instrumentalise its institutions. Already in *Van Gend* and in *Costa*, the Court had indeed made clear that the "new legal order" had an institutional dimension, endowed as the then European Economic Community was with "its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights".¹⁹ From the "new legal order" metaphor, the Court derived constitutional principles – most importantly the primacy principle – that aim to protect the autonomy of all EU institutions *vis-à-vis* the Member States. This autonomy – a term to which I return below – includes the ability of these institutions to make their own decisions, in accordance with the decision-making rules set out in the Treaties, and thus independently from the Member States.

Towards the international legal order, the principle of "autonomy" of EU law came to play a similar role in the Court's case law to the one played by the "new legal order" metaphor in cases involving the EU-Member State relationship. To protect the autonomy of EU law, the Court put limits on the ability of other courts, outside of the EU system, to interpret and apply EU law. For example, in opinion 2/13, the Court considered that the EU could not accede to the European Convention of Human Rights on the terms proposed in the draft accession treaty, as these terms would have limited the access of Member State courts to the Court of Justice, the exclusive interpreter of Union law.²⁰ More recently, in opinion 1/17, the Court concluded that the CETA Tribunal did not threaten the autonomy of Union law and the role of the Court, and was therefore permissible.²¹ The outcome of the analysis in both opinions was different, but the exercise was the same: the Court examined whether the proposed judicial framework would respect the autonomy of EU law.

¹⁷ In this sense, see J. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2481: "It would be more than ironic if a polity with its political process set up to counter the excesses of statism ended up coming round full circle and transforming itself into a (super)state".

¹⁸ Court of Justice, judgment of 31 March 1971, case C-22/70, *Commission v. Council*.

¹⁹ *Costa v. Enel*, cit., p. 593.

²⁰ Court of Justice, opinion 2/13 of 18 December 2014.

²¹ Court of Justice, opinion 1/17 of 30 April 2019.

Strictly speaking, the principle of autonomy has thus far only been relied upon to protect the prerogatives of the Court. It is clear, however, that the autonomy principle protects not only the autonomy of the Court, but also that of the political EU institutions (the European Commission, the European Parliament, the two Councils). Indeed, as the Court submitted, for example, in *Kadi I*: when it speaks of “autonomy”, it means the “autonomy of the [Union] legal system”.²² It follows that, as is the case for the “new legal order” metaphor in the EU-Member State context, “autonomy” covers the entirety of the Union legal order – an order which is, as mentioned earlier, endowed with its own institutional framework, as described in Arts 13 to 19 TEU.

From the previous point, it is not a far stretch to suggest that the autonomy principle not only denotes the autonomy of the Court of Justice to interpret and apply EU law in the face of international legal norms, but also the autonomy of the EU’s political institutions. As institutions endowed with certain powers by the EU Treaties, they ought to be able to act autonomously, in defence of EU values and principles – values and principles which, here as well, may very well be different from those of other actors on the international stage.²³ It follows also that, if this autonomy is to have any meaning, other actors ought to respect the autonomy of the EU and refrain from interfering in the EU’s internal affairs without the latter’s consent. In particular, they should respect the ability of the EU institutions to make decisions, and, in a spirit of good neighbourliness, not undertake actions that hinder the implementation and enforcement of such decisions.

To the international lawyer, all of this sounds familiar. Under international law, the principles of territorial integrity and non-intervention in the internal as well as the external affairs of States are core principles derived from international law’s own *Grundnorm*: state sovereignty. The EU cannot be considered a State under international law, as only a single State can exercise jurisdiction over a given territory, and sovereignty, at least from the vantage point of public international law, thus cannot be shared (it can, at most, be delegated to international organisations, such as the EU). Further, as discussed, for historical reasons, the EU does not *want* to be considered a State, constructed as it is as a project of “integration through law” that rejects the politics of (popular) sovereignty.

At the same time, however, as described in the above, the Court of Justice has occasionally felt compelled to advance claims that could, in functional terms, easily be understood as claims to sovereignty. In the Hobbesian tradition, “internal” sovereignty refers to the ultimate authority of a given government within the territory of the state in-

²² Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi v. Council and Commission*, para. 282 (emphasis added). Similarly, in opinion 1/17, cit., para. 110, the Court mentioned that “autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it”.

²³ See J. ODERMATT, *The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?*, in M. CREMONA (ed.), *Structural Principles in EU External Relations Law*, Oxford: Hart Publishing, 2018, p. 291 et seq., p. 293.

volved, whereas "external" sovereignty refers to the independence of a given state from other states, and the capacity of that state to engage in relations with other subjects of international law. External sovereignty denotes the idea that the State exists; that it is capable of acting in pursuit of its own interests and values; and, in legal terms, that it is capable of incurring rights and obligations to do so.²⁴ It is indeed tempting to draw a parallel between the "new legal order" metaphor and the autonomy principle on the one hand, and the internal and external dimensions of sovereignty on the other.²⁵

Claims to sovereignty, whether internal or external, can be weak or strong. A weak claim to sovereignty can be understood as a claim to a meaningful degree of authority, which does not have to be absolute.²⁶ Within a federal-type system characterised by a division of competences, sovereignty claims are necessarily of the weaker type, and can be distinguished from a strong claim to sovereignty in the Hobbesian sense of the term, according to which sovereignty is necessarily absolute and indivisible. In the EU, then, primacy (itself derived from the "new legal order" metaphor) can plausibly be reformulated as a weak claim to internal sovereignty, casting the EU as an effective "government" albeit within "limited fields", as the Court described in *Van Gend*, whereas autonomy can be understood as a strong claim to external sovereignty, whereby the Court, as it made clear in *Kadi I*, ranks the EU Treaties above international law.

IV. EUROPEAN SOVEREIGNTY?

As Mr Macron explained during his election campaign, the concept of "European sovereignty" aims to recapture a term that had been claimed by the radical and extreme right, which consistently depicts the European project as a threat to national sovereignty (Mr Macron spoke of a *souveraineté de réplî*). Regardless of the political-strategic considerations that may or may not be at play in Mr Macron's choice of terminology, however, what does it mean to speak of "European sovereignty"? Is there any added value in speaking of "sovereignty" as opposed to "autonomy", or is there something to be said for maintaining

²⁴ In this sense, see Permanent Court of International Justice, *S.S. Wimbledon* (Britain et al. v. Germany), judgment of 17 August 1923, para. 35: "No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty".

²⁵ For an argument in this sense, see C. ECKES, *The Autonomy of the EU Legal Order*, in *Europe and the World: A Law Review*, 2020, p. 19; and also J.W. VAN ROSSEM, *The Autonomy of EU Law: More Is Less?*, in R.A. WESSEL, S. BLOCKMANS (eds), *Between Autonomy and Dependence: the EU Legal Order Under the Influence of International Organisations*, The Hague: Asser Press, 2013, p. 25.

²⁶ See the definition of federalism as "the coexistence within a compound polity of multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority" in D. HALBERSTAM, *Comparative Federalism and the Role of the Judiciary*, in G.A. CALDEIRA, R.D. KELEMEN, K.E. WHITTINGTON (eds), *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press, 2008, p. 142 *et seq.*

the “autonomy” metaphor introduced by the Court of Justice? Further, it is worth looking into whether it is coherent to speak of a “European sovereignty” while at the same time defending French sovereignty, as Mr Macron has done on earlier occasions.²⁷

In addressing these questions, I return to the distinction introduced earlier between internal and external sovereignty. From the rather succinct definition provided by Mr Macron himself (he speaks of a capacity to exist “in the world”), it would appear that, for the French president, “European sovereignty” refers, primarily, to sovereignty’s external aspects. What Mr Macron appears to have in mind is a Europe that holds a seat at the decision-making table in international affairs, rather than a Europe that becomes (or remains?) a playground for other great powers, in particular the United States and China.²⁸ Further, by speaking of a capacity to exist in the world, Mr Macron would appear to advance a weak claim to external sovereignty: it is not because the EU can exist in the world that its Member States are precluded from existing alongside it.

Certain similarities between such a conception of sovereignty on the one hand, and the Court’s understanding of autonomy as set out in the above, on the other, are apparent. For Mr Macron, as for the Court, autonomy denotes independence from external influences. The Court aims to protect the autonomy of the EU judiciary to have the final say on the meaning of EU law; Mr Macron understands “European sovereignty” to capture the idea that “Europe” should be able to make its own decisions, independently from other powers. Further, and despite the fact that the Court’s autonomy claim is of the stronger type, the Court has been adamant to emphasise that it does not wish to foreclose international cooperation.²² Likewise, as suggested by the juxtaposition in his Sorbonne speech of “European sovereignty” on the one hand and a *souveraineté de repli* on the other, Mr Macron’s position does not appear to imply that “Europe” cannot or should not engage in relations with other powers. Clearly, there are similarities between both notions.

As speech acts, words can have performative power: they can change social reality. From this perspective, “European sovereignty”, at least if used in a weak, non-absolutist sense, may have two advantages compared to “autonomy” as developed in the Court’s case law. First, by introducing “sovereignty” in debates on the role of the EU on the international stage, issues that traditionally have been considered to fall within the sphere of “high” politics may come to carry greater weight within such debates. Following the failure of the European Defence Community, now over half a century ago, a Chinese wall had been erected within the EU’s decision-making machinery that separates issues of “high” politics (defence, security, concentrated within the Council) from those

²⁷ Tweet by @EmmanuelMacron of 4 January 2018, twitter.com: “*La France doit être une puissance forte et souveraine. C’est une des conditions pour relever les défis du XXI^e siècle*”.

²⁸ Emmanuel Macron in *His Own Words (English)*, in *The Economist*, 7 November 2019, www.economist.com: “I’m just saying that if we don’t wake up, face up to this situation and decide to do something about it, there’s a considerable risk that in the long run we will disappear geopolitically, or at least that we will no longer be in control of our destiny”.

of "low" politics (trade, concentrated within the Commission). Other great powers do not necessarily adhere to this separation, and are able more easily to deploy, for example, trade instruments in pursuit of security objectives. The aforementioned Chinese wall potentially puts the EU at a disadvantage in its dealings with such powers.²⁹ A strategic agenda built around the notion of "sovereignty" may contribute to the development of a more integrated approach to foreign policy making, whereby administrative actors in the Commission, the European External Action Service, the Council, and Member State administrations come to cooperate more closely with one another than has traditionally been the case.³⁰ There are reasons to expect this to be of benefit to the effectiveness of EU foreign relations.

Second, just as a "sovereignty"-focused agenda may lead to a greater emphasis on issues of "high politics", it may also pave the way for a greater emphasis on the democratic legitimacy of EU foreign policy making. As discussed, the Court of Justice has put autonomy to use as a means to protect its own independence from external influences. While the principle applies to the entire EU institutional framework, and thus also to the EU's political institutions, the principle's origins in the "new legal order" metaphor, itself devised as an effort to overcome national sovereignty, arguably make the autonomy principle ill-equipped to operate as a vehicle for a further democratisation of EU decision-making. By contrast, in the European context, sovereignty evokes self-government.³¹ The performative effect of speaking of the EU as a "sovereign" actor in international relations may very well contribute to creating the conditions required for the EU to put in place institutional reforms aimed at democratising EU foreign policy making. As I further elaborate below, such reforms are necessary if "European sovereignty" understood in an external sense is to have any meaning.

While there may thus be advantages in speaking the language of sovereignty, there are also obvious pitfalls. I focus on one ambiguity in Mr Macron's use of the term "European sovereignty", which harks back to the link between external and internal sovereignty. The French president defined "European sovereignty" as "our capacity to exist in the world as it currently exists, to defend our values and our interests". Who is the "our" in this definition, however? Mr Macron's choice of terminology may suggest his conception of "European sovereignty" is not wedded to the EU as an institutional project. A reference to a "European" (as opposed to an EU) defence in Mr Macron's Sorbonne speech

²⁹ For a similar argument in the US context, see R.D. BLACKWILL, J.M. HARRIS, *War by Other Means: Geoeconomics and Statecraft*, Cambridge, Massachusetts: Harvard University Press, 2017.

³⁰ For a recent call for such a more integrated approach, see T. GEHRKE, *What Could a Geoeconomic EU Look Like in 2020?*, in *Security Policy Brief*, no. 123, February 2020.

³¹ Note e.g. that, following the fall of communism, EU Member States had agreed only to recognise as new sovereign States those Eastern European States that had constituted themselves on a democratic basis. See Declaration of Guidelines on the Recognition of New States in Eastern Europe and in the Former Soviet Union, adopted at an Extraordinary EPC Ministerial Meeting at Brussels on 16 December 1991.

has already been translated into the setting up of a joint military intervention force, outside of the EU framework.³² If “Europe” is to be understood in a flexible, civilizational sense, rather than as a tangible, institutional reality, endowed with its own “actor-ness”³³, it is not “Europe” that is acting, but rather those European states.

If “Europe”, rather than European states, wish to construct a European *external* sovereignty, it will first be necessary to build a meaningful degree of *internal* sovereignty. As Christina Eckes argued: “To make a claim to external sovereignty, modern states must make a claim that they can govern their territory and their people (relatively) effectively”.³⁴ The same arguably applies to “Europe”. For “Europe” to hold external sovereignty, it must also “exist” as an institutional reality capable of “governing” its territory effectively. To construct an EU capable of “governing” its territory effectively, two elements are required: first, a European capacity to make decisions independently from individual constituent members, and second, a capacity to enforce those decisions *vis-à-vis* those members.³⁵ To achieve the former objective, the position of the two Councils should be counterbalanced by a greater involvement of the EU citizenry in the process of setting out the political directions and priorities of the EU (a responsibility which, today, is within the exclusive purview of the European Council). To achieve the latter, amongst other things, investments in novel mechanisms to monitor Member State activities that risk undermining EU policies would be required. An EU foreign direct investment screening mechanism whereby investments are screened at EU level would be an example of such a mechanism, making the EU less vulnerable to external pressures.³⁶

It is unclear, at this point, whether the aforementioned reforms are also what Mr Macron has in mind when he speaks of a “European sovereignty”. As far as the enforcement of EU law is concerned, the proposals made in his Sorbonne speech, or in his March 2019 open letter published in several European newspapers³⁷, suggest a willingness to move beyond the traditional model of executive federalism whereby the implementation of decisions taken at the EU level is left primarily to the Member States. Mr Macron’s calls for a larger EU budget, for an EU administrative capacity to enforce an integrated asylum policy, for an EU prosecutor to fight terrorism and organised crime,

³² D. BOFFEY, *Nine EU States Sign off on Joint Military Intervention Force*, in *The Guardian*, 25 June 2018.

³³ M. RHINARD, G. SJÖSTEDT, *The EU as a Global Actor: A New Conceptualisation Four Decades after “Actor-ness”*, Swedish Institute for International Affairs, 2019, p. 6.

³⁴ C. ECKES, *The Reflexive Relationship Between Internal and External Sovereignty*, in *Irish Journal of European Law*, 2015, p. 43.

³⁵ In a similar sense, see the reference to Sjöstedt’s conception of “actorness” in M. RHINARD, G. SJÖSTEDT, *op. cit.*, p. 2.

³⁶ On the vulnerability of the EU – in particular peripheral Member States – to external influences, see e.g. M.A. ORENSTEIN, R.D. KELEMEN, *Trojan Horses in EU Foreign Policy: Europe’s Hybrid Foreign Policy*, in *Journal of Common Market Studies*, 2017, p. 87 *et seq.*

³⁷ Emmanuel Macron: *Dear Europe, Brexit Is a Lesson for All of Us: It’s Time for Renewal*, in *The Guardian*, 4 March 2019.

as well as his emphasis on the proper enforcement of EU trade agreements (a proposal taken up by the Commission, which recently announced the creation of a "Chief Trade Enforcement Officer"): these suggestions all point to a willingness to invest more in executing and enforcing what has been decided at the EU level.

Less clear, however, is whether Mr Macron is willing to change the institutional set up of the EU to achieve a meaningful independent decision-making capacity. In his Sorbonne speech, Mr Macron called for the introduction of transnational electoral lists during European Parliament elections. This may be useful to increase citizen involvement in the electoral process; it does not lead, however, to more independent decision-making at the EU level. By contrast, I am not aware of suggestions to strengthen the institutional position of the Commission and Parliament *vis-à-vis* that of the two Councils. It is on this institutional nexus, however, that reforms are required if the EU is to acquire a meaningful independent decision-making capacity. As mentioned, within the current EU institutional set up, political directions are set out by the European Council.³⁸ As Deirdre Curtin mentioned in the context of internal decision-making (but the same arguably holds for the EU's external action): "The European Council calls the shots in general terms and largely tells the Commission (and the Council) what to do if formal legislation needs to be adopted".³⁹ Within this institutional framework, the preferences of Member States – in particular larger Member States – weigh heavily.⁴⁰ By increasing the relative weight of the EU institutions that represent competing interests – in particular those of the EU citizenry, such as the Parliament⁴¹ – EU policy outcomes would be decoupled, to some extent, from the preferences of individual Member States. In this sense, democratisation would lead to a greater independent decision-making capacity, and thus to greater internal sovereignty.

Absent a meaningful degree of independent decision-making capacity, and absent more effective enforcement mechanisms, the EU cannot meaningfully claim to enjoy internal sovereignty. By necessary implication, it will not be able to lay claim to external sovereignty, either. The path towards a meaningful external European sovereignty runs through institutional reform both at the legislative and the executive fronts. Much can be done under the existing Treaties (the aforementioned Chief Trade Enforcement Of-

³⁸ Art. 15, para. 1, TEU.

³⁹ D. CURTIN, *Democratic Accountability of EU Executive Power: A Reform Agenda for Parliaments*, in F. FABBRINI, E.M.H. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Government for the European Union and the Eurozone?*, Oxford: Hart Publishing, 2015, p. 177 *et seq.*

⁴⁰ On the risk of domination in EU decision-making, see e.g. S. FABBRINI, *From Consensus to Domination: The Intergovernmental Union in a Crisis Situation*, in *Journal of European Integration*, 2016, p. 587 *et seq.*

⁴¹ Another option would be to merge the Commission and European Council presidencies and to directly elect the holder of this office. Proposing the direct election of the European Council President, see F. FABBRINI, *Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council*, in *Indiana Journal of Global Legal Studies*, 2015, p. 269 *et seq.*

ficer being a good example, and the recently adopted FDI screening regulation being a step in the right direction⁴²). However, to put in place a meaningful democratisation of EU decision-making, and, by doing so, to construct an independent EU decision-making capacity, Treaty reform will be necessary. Whether this will happen remains to be seen. Recent developments surrounding the “Conference on the Future of Europe” do not suggest it will be on the table in the near future.⁴³

⁴² Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

⁴³ M. DE LA BAUME, *Conference on the Future of Europe: Don't mention the T word*, in *POLITICO*, 21 January 2020.



INSIGHTS

QUESTIONING EUROPEAN (UNION) SOVEREIGNTY

edited by Ségolène Barbou des Places

EU AUTONOMY: JURISDICTIONAL SOVEREIGNTY BY A DIFFERENT NAME?

CHRISTINA ECKES*

ABSTRACT: Despite all rhetorical references to European sovereignty, the EU cannot make a convincing claim to sovereignty *under international law*. International law does not vest non-state actors with sovereignty. What the EU can do and what it also does is that it *acts as if it was a sovereign entity and claims certain rights that are considered core elements of State sovereignty*. This paper sheds light on the meaning of the notion of sovereignty in the specific context of the EU's *external legal relations*. It argues that the Court of Justice's conception of the autonomy of the EU legal order provides the EU *de facto* with a core element of State sovereignty, namely a form of (negative) jurisdictional sovereignty that otherwise only States can claim. Under international law, a State's exclusive right to decide what acts shall be given effect on its territory is virtually undisputed. It is the core of the external aspect of negative sovereignty and functions as an independent, overriding justification to keep external influences out. The Court's autonomy conception serves the same purpose. The Court's broad conception of external influences that could threaten the EU's autonomy has in the past jeopardized international cooperation plans of the political institutions of the EU. Yet, shutting out external interference is also a necessary precondition for positive sovereignty, i.e. the ability to determine one's own course of action as a polity, as well as democratic legitimacy.

KEYWORDS: sovereignty – autonomy – Court of Justice – jurisdiction – opinion 2/13 – *Kadi*.

I. INTRODUCTION

The use of the term sovereignty in politics is soaring: not just in the national context – most prominently in the context of Brexit¹ – but also in relation to the EU.² Since 2017,

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¹ The “take back control” slogan of the Vote Leave campaign confirms how sovereignty can capture the public imagination.



French President Emmanuel Macron has repeatedly and provocatively stated in slightly different formulations that “only Europe can [...] guarantee *genuine sovereignty* or our ability to exist in today’s world to defend our values and interests”.³ The Commission President Jean-Claude Juncker entitled his last State of the Union in September 2018 “The Hour of European Sovereignty”.⁴ He had a clear external relations focus, advocating the Union’s global responsibility and added value in the current geopolitical situation.

Despite all rhetorical references to European sovereignty, the EU cannot make a convincing claim to sovereignty *under international law*. International law does not vest non-state actors with sovereignty. What the EU can do and what it also does is that it *acts as if it was a sovereign entity and claims certain rights that are considered core elements of State sovereignty*. Yet from a strictly legal perspective, neither international organisations nor the EU Member States formally accept the EU’s claims. This paper studies how the Court of Justice, while it has never literally claimed “sovereignty” for the EU, conceives of itself as a domestic court and claims, in spite of the EU’s contested status, sovereign rights for the EU under international law. The question of whether its claims are or should be recognized by other actors must be left aside in this short contribution to the debate.

This *Insight* argues that the Court’s conception of the autonomy of the EU legal order⁵ provides the EU *de facto* with a core element of State sovereignty, namely a form of (negative) jurisdictional sovereignty that otherwise only States can claim. By doing so, it aims to shed light on the meaning of the notion of sovereignty in the specific context of the EU’s *external legal relations*.⁶ Under international law, a State’s exclusive right to decide what acts shall be given effect on its territory is virtually undisputed. It is the core of the external aspect of negative sovereignty and functions as an independent, overriding justification to keep external influences out.⁷ Negative external sovereignty in this sense is consciously disconnected from the ability to govern, which is here understood as positive in-

² See M. LEONARD, J. SHAPIRO, *Empowering EU Member States with Strategic Sovereignty*, in M. LEONARD, J. SHAPIRO (eds), *Strategic Sovereignty: How Europe Can Regain the Capacity to Act. European Council on Foreign Relations Policy Brief*, 2019, p. 5 *et seq.*

³ Sorbonne speech of Emmanuel Macron, 26 September 2017 (emphasis added), available in English at: international.blogs.ouest-france.fr. Macron reiterated these ideas in his address to the European Parliament on 17 April 2018, available at: europarl.europa.eu.

⁴ European Commission, *State of the Union 2018: The Hour of European Sovereignty, Speech of the President of the European Commission*, 12 September 2018, ec.europa.eu.

⁵ See e.g., Court of Justice, opinion 2/13 of 18 December 2014 and opinion 1/17 of 30 April 2019; see also earlier: Court of Justice, opinion 1/09 of 8 March 2011 and opinion 1/91 of 14 December 1991. See also: Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat International Foundation v. Council and Commission*.

⁶ The terms “external relations” (emphasis on the law and political interaction between international actors) and “external actions” (emphasis on the Union’s participation and contribution in this), while expressing a different nuance, are used interchangeably.

⁷ See also: M. KOSKENNIEMI, *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge: Cambridge University Press, 2005, p. 237.

ternal sovereignty. One could even argue that this justification of shutting others out is one of the very purposes of using the notion of sovereignty under international law. It explains the frequent use of the notion before the International Court of Justice.

Section II unpacks the meaning of jurisdictional sovereignty. It explains why the concept is such a central element in the concept of sovereignty. It briefly distinguishes between the negative and positive, internal and external dimensions of sovereignty. Section III examines how the Court construes the autonomy of the EU legal order as a self-contained and self-referential legal system distinguishable and independent from national and international law. Section IV explains how this autonomy conception of the Court provides the EU with one core element of (State) sovereignty, namely *jurisdictional sovereignty*. Section V engages critically with the Court's conception and reflects more broadly on European sovereignty.

II. JURISDICTIONAL SOVEREIGNTY: A CORE ELEMENT OF AN ELUSIVE CONCEPT

The disagreement on sovereignty runs deep.⁸ It extends not only to the scope of the concept and conditions for being sovereign but also to the justification of the concept itself.⁹ Martti Koskenniemi distinguishes two irreconcilable positions of conceptualizing sovereignty: the legal approach that understands sovereignty as established and confined within the law and the pure fact approach conceptualising sovereignty as a normative fact which the law must accommodate. The two approaches go back to Hans Kelsen and Carl Schmitt, respectively. The core difference between the two approaches is how they understand the relationship between law and politics: each conferring primacy to one of them. Koskenniemi successfully demonstrates that both positions are necessary to avoid collapsing the concept of sovereignty by reducing it either to its legal or its factual political dimension, neither of which can by and of itself grasp the concept's meaning and force. What we can learn from this is that the combination of the two dimensions is what allows sovereignty to bridge facts and norms and vest it with force beyond the purely legal or purely factual context.

⁸ D. LOICK, *Kritik der Souveränität*, Frankfurt: Campus Verlag, 2012; D. GRIMM, *Souveränität – Herkunft und Zukunft eines Schlüsselbegriffs*, Berlin: Berlin University Press, 2009; R. JACKSON, *Sovereignty*, Cambridge: Polity Press, 2007; U. HALTERN, *Was bedeutet Souveränität?*, Tübingen: Mohr Siebeck, 2007; M. KOSKENNIEMI, *From Apology to Utopia*, cit., pp. 224-302; J. AGNEW, *Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics*, in *Annals of the Association of American Geographers*, 2005, p. 437 et seq.; N. MCCORMICK, *Questioning Sovereignty*, Oxford: Oxford University Press, 2008; R. JACKSON, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge: Cambridge University Press, 1990; H. KELSEN, *Das Problem der Souveränität und die Theorie des Völkerrechts*, Tübingen: Mohr, 1928.

⁹ Koskenniemi made an enlightening contribution as to some of the roots of disagreement by tracing the opposition between the legal and the pure fact approach to sovereignty under public international law: M. KOSKENNIEMI, *From Apology to Utopia*, cit., pp. 224-302; H. KELSEN, *Allgemeine Staatslehre*, Tübingen: Mohr Siebeck, 2019, p. 102 et seq.

In addition, I would like to add that neither the legal approach nor the pure fact approach gives sufficient attention to the emotional and socially construed “imaginaries” of sovereignty, which transcends the legal and factual political dimension, speaks to the imagination, and is one of the reasons why politicians use and abuse the notion of sovereignty.¹⁰ Furthermore, what scholars see in sovereignty is at least also coloured by their disciplinary background. Legal scholars emphasise the relevance of law in determining scope and conditions.¹¹ Social scientists often focus on the factual condition of being sovereign in a globalised world.¹² Scholars of the humanities when engaging with sovereignty often highlight that it is (also) a social construction that creates an emotive connection to culturally conservative values related to the image of self-rule as a group that can be contrasted with others.

I can here only focus on exclusive jurisdiction as a central element of what sovereignty is usually understood to at least also entail. This element can be better understood by distinguishing between a negative and positive, as well as in internal and external dimension of sovereignty. Positive sovereignty speaks to the ability to determine one’s own course of action. It depends amongst other things on negative sovereignty that is being able to shut external interference out. Both negative and the positive sovereignty are necessary to make the concept of sovereignty meaningful.¹³

They both have external and internal aspects. The negative external dimension has been summarised as “having a license from the international community to practice as an independent government in a particular territory”.¹⁴ Judge Huber of the Permanent Court of International Justice put it even more eloquently in the *Island of Palmas* case in the following way: “Sovereignty in the relations between States signifies independence, independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of the State”.¹⁵ Within law, this negative external function is highly important but I do by no means claim that it exhausts the meaning of sovereignty.

Jurisdictional sovereignty relates to the sovereign entity’s formal legal ability to construct and maintain a legal order. It plays a role in the positive and negative, internal and external dimensions of sovereignty. Positive jurisdictional sovereignty is the sovereign entity’s ability to set norms and ensure compliance within its own jurisdiction. It

¹⁰ The term is taken from: J. KOMÁREK, *European Constitutional Imaginaries: Utopias, Ideologies and the Other*, University of Copenhagen Faculty of Law Research Paper, no. 2020/88, 2019.

¹¹ D. GRIMM, *Souveränität*, cit., but also already: H. KELSEN, *Das Problem der Souveränität*, cit.

¹² J. AGNEW, *Sovereignty Regimes*, cit.

¹³ This is perhaps best argued based on an analogy with individual freedom, see: R. NOZICK, *Anarchie, Staat, Utopia*, Olzog: München, 2011 and C. TAYLOR, *What is Wrong with Negative Liberty?*, in D. MILLER (ed.), *Liberty*, Oxford: Oxford University Press, 1991, p. 141 *et seq.*

¹⁴ P. TAYLOR, *The United Nations in the 1990s: Proactive Cosmopolitanism and the Issue of Sovereignty*, in R. JACKSON (ed.), *Sovereignty at the Millennium, Political Studies* Oxford: Wiley-Blackwell, 1999, p. 538 *et seq.*

¹⁵ International Court of Justice, *Island of Palmas Case* (Netherlands v. USA), judgment of 4 April 1928.

boils down to realizing law's ability to structure society and guide behaviour and is traditionally exercised by the legislative. Negative jurisdictional sovereignty is a sort "legal keep out sign". It gives the sovereign entity the monopoly or final say about the legal norms applicable within the domestic legal order. While it is often exercised by domestic judges (giving or not giving effect to international norms) the ground rules of jurisdictional sovereignty may also be defined within a polity's constitution. Jurisdictional sovereignty does not speak to the entity's *international* legal obligations, that is the international legal norms that it is bound to respect.

External negative sovereignty is a general departure point for public international law.¹⁶ This is also sometimes summarized as "*Lotus* presumption", based on the Permanent Court of International Justice's reasoning in the *Lotus* case,¹⁷ holding that legal "[r]estrictions on the independence of States cannot... be presumed".¹⁸ Besides all potential factual implications, in its core, the *Lotus* presumption of the Permanent Court expresses jurisdictional sovereignty: it entails that the application of international law within the domestic legal systems may be determined by the latter, in principle in "*complete freedom*".¹⁹

III. EU AUTONOMY AS CONSTRUED BY THE COURT OF JUSTICE

The EU cannot make a plausible claim to sovereignty under international law. International and national courts largely classify EU law as international law and by doing so deny the EU's status as a domestic legal order, which would vest it with jurisdictional sovereignty and allow it to shut out external influences from its jurisdiction. In other words, the EU does not naturally enjoy this privilege. The Court of Justice had to actively claim it in order to construe the EU legal order as domestic. This is what its autonomy doctrine does: it aims to achieve in legal practice a situation that allows the EU to enjoy the privilege of jurisdictional sovereignty, that is of shutting out external influences as all States may naturally do because they are States.

¹⁶ H. HANDEYSIDE, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, in *Michigan Journal of International Law*, 2007, p. 71 *et seq.*

¹⁷ Permanent Court of International Justice, *S.S. Lotus* (France v. Turkey), judgment of 7 September 1927.

¹⁸ *Ibidem.*

¹⁹ A. CASSESE, *International Law*, Oxford: Oxford University Press, 2005, p. 219. See also J. D'ASPREMONT, F. DOPAGNE, *Kadi: The ECJ's Reminder of the Elementary Divide Between Legal Orders*, in *International Organizations Law Review*, 2008, p. 371 *et seq.*; A. NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford: Oxford University Press, 2011; J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 2012, p. 50; M. MENDEZ, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford: Oxford University Press, 2013, p. 58; J. ODERMATT, *The Court of Justice of the European Union: International or Domestic Court?*, in *Cambridge Journal of International and Comparative Law*, 2014, p. 696 *et seq.*, p. 701 and A. KACZOROWSKA-IRELAND, *Public International Law*, London: Routledge, 2015, p. 128.

The autonomy of the EU legal order as construed by the Court expresses that EU law is for its validity *not depending on national or international law*²⁰ but that it “stems from an *independent source of law*”.²¹ Maintaining this independence in practice depends on the Court’s jurisdictional authority as the final authority within this complete epistemic system.²² At the same time, the autonomy doctrine ensures that the Court remains the final authority. It allows the Court to protect the EU legal order from normative interference that could be “liable to adversely affect the specific characteristics of EU law and its autonomy”.²³ The Court’s broad understanding of an interference that is liable to have adverse effects has stood at several occasions in the way of international cooperation, most notably when the Court rejected EU accession to the ECHR under the carefully agreed conditions in opinion 2/13.²⁴

The Court attaches great relevance to upholding of its final jurisdictional authority within the EU legal order. This seems plausible in light of the fact that the very structure of modern law (EU, national or international) is at a doctrinal level based on a positivist epistemology that draws justification from coherence.²⁵ Hence, ensuring justification through coherence (on its own terms) is a logical priority of the Court of a “new legal order”.²⁶ Epistemological independence is what makes EU law a (domestic) legal order that has to answer to legitimacy question on its own terms.

The Court’s autonomy doctrine does not speak to or even consciously disregards the *positive, factual or political dimensions of autonomy or sovereignty*. It does not address any of the political or emotional elements of sovereignty or even allude to the ability to govern. In fact, by not mentioning the concept of sovereignty, the Court avoids the ambiguous and loaded connotations that this term may invoke. Several reasonable points can be raised to demonstrate that the EU’s autonomy is not only factually limited (as the ability of any polity in an interconnected world) but also institutionally and legally limited because of its particular nature as a multilevel and polyarchic construction that seems at times construed with the specific aim of avoiding clear hierarchies. The prime example is the joint and, in this way, mutually restrained power of all 27 Member States to amend the EU Treaties, including the powers of the Court. However, any of these factual, political, and legal limitations do not challenge the *epistemologically autonomous status* of the EU legal order ensured by protecting the Court’s monopoly of (final) interpretation.

²⁰ Opinion 1/17, cit., para. 109.

²¹ Opinion 2/13, cit., para. 166 (emphasis added). See also already: Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

²² I fully develop this argument at: C. ECKES, *The Autonomy of the EU Legal Order*, in *Europe and the World: A Law Review*, 2020, scienceopen.com.

²³ Opinion 2/13, cit., para. 178.

²⁴ *Ibid.*, para. 177 *et seq.*

²⁵ C. ECKES, *The Autonomy*, cit.

²⁶ Ever since Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*, but also e.g. in opinion 2/13 cit., para. 57.

IV. JURISDICTIONAL SOVEREIGNTY OF THE EU AS A LEGAL CONSTRUCTION

Francis Jacobs, former Advocate-General of the Court, spoke in 2006 about “the sovereignty of law”.²⁷ As a starting point, he concludes that “sovereignty is no longer a viable concept for explaining either the role of the State in international affairs or the internal arrangements of a modern State”.²⁸ He then demonstrates how both the ECHR and EU law shape the deep structures of the national legal orders. This builds to up to his suggestion of reading the rule of law as embodying the supremacy of law, including over the sovereign.²⁹ Within Koskeniemi’s distinction, Jacobs falls squarely under the legal approach, which also seems to be the position of the Court. This also corresponds to the reading of the EU as a legal framework of mutual restraint aimed at reigning in national sovereign excesses.³⁰

Leaning towards a strong legal approach to sovereignty is common within the epistemic community of EU law. It seems to correspond to the relevance of law for the coming into being of the EU.³¹ Law has set and continues to set the framework for EU integration. The Union is created by means of international treaties, which formally establish the EU institutions and determine the limits of their competences. Legal scholars, social scientists, and historians have argued that law has been and continues to be a driving force of EU integration.³² The Court has and continues to play a pivotal role in this respect; some even speak of judicialization of politics.³³

The preliminary reference procedure is the “keystone” of the EU’s judicial enforcement system, “which, by setting up a dialogue between one court and another, [...] has the object of securing uniform interpretation of EU law [...], thereby serving to ensure its consistency, its *full effect* and its *autonomy* as well as, ultimately, the *particular nature* of

²⁷ F. JACOBS, *The Sovereignty of Law: The European Way*, Cambridge: Cambridge University Press, 2006.

²⁸ *Ibid.*, p. 4.

²⁹ *Ibid.*, p. 49.

³⁰ P. CAPPS, *Human Dignity and the Foundations of International Law*, London: Hart Publishing, 2009, p. 127 characterises law as such as a framework of mutual restraint.

³¹ D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, p. 460 *et seq.*; J.H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2403 *et seq.*; S. SCHMIDT, *The European Court of Justice and the Policy Process*, Oxford: Oxford University Press, 2018; R.D. KELEMEN, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, Cambridge: Harvard University Press, 2011; R.D. KELEMEN, *On the Unsustainability of Constitutional Pluralism*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 136 *et seq.*; A. VAUCHEZ, *Brokering Europe*, Cambridge: Cambridge University Press, 2015.

³² *Ibid.*

³³ E. STEIN, *Lawyers, Judges, and the Making of a Transnational Constitution*, in *The American Journal of International Law*, 1981, p. 1 *et seq.*; J.H.H. WEILER, *The Transformation of Europe*, cit.; K. ALTER, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford: Oxford University Press, 2001; A. STONE SWEET, *The Judicial Construction of Europe*, Oxford: Oxford University Press, 2004.

the law established by the Treaties".³⁴ It is a formalized cooperation mechanism between the Court and national courts that allows the Court to reach within national legal orders. The relationship is not hierarchical in a way that the Court could repeal rulings of national courts. It hence depends on national courts' willingness to cooperate and comply. Member States also hold the power to refer repeatedly and potentially in order to enter into a debate on the right outcome.³⁵ This also explains the Court's willingness to protect the independence and the functioning of the national judiciary as a necessary element to a functioning EU legal order.³⁶

In the particular context of the EU as a legal construction that is strongly built on judicial cooperation, the Court's conception of the autonomy of the EU legal order gains great significance. National courts accept it as part of the judicial cooperation. The autonomy conception is the presumption on the basis of which the Court claims its right to determine what norms are valid and have effects within the EU legal order. When national courts accept the Court's rulings, they accept this presumption by acting in practice as if it was valid.³⁷ However, the Court cannot force national or international courts to accept its interpretation of EU law as autonomous and the EU legal order as domestic. It depends on their acceptance of this presumption for its own ability to claim the rights associated with jurisdictional sovereignty.

The Court also needs the autonomy conception to take a dualist approach *vis-à-vis* international law.³⁸ Without the autonomy conception, EU would lose its ability to claim certain rights that are usually associated with State sovereignty: the domestic and constitutional (supreme) nature of the State's law within its jurisdiction, the ability of its courts to uphold domestic law, including when it conflicts with international norms and including when these norms undermine domestic legal guarantees *vis-à-vis* individuals.³⁹ To make this more concrete: in the event of conflict of EU law with decisions of the UN collective security system, the Court would have to take a position similar to the Eu-

³⁴ Opinion 2/13, cit., para. 176 (emphasis added). Earlier, in opinion 1/09, cit., paras 77 *et seq.*: the Court rejected an international court or tribunal – the formation of the European and Community Patent Court – because it considered that the mechanism was susceptible of adversely affecting the position and powers of national courts within the preliminary ruling procedure.

³⁵ See e.g. Court of Justice, judgment of 8 September 2015, case C-105/14, *Taricco and others (Taricco I)* and judgment of 5 December 2017, case C-42/17, *M.A.S., MB (Taricco II)*.

³⁶ Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*; Court of Justice, judgment of 24 June 2019, case C-619/18, *Commission v. Poland*.

³⁷ Valid in the sense of practical reasoning not in the sense of true (compare e.g., R. ALEXY, *Theorie der juristischen Argumentation*, Frankfurt: Suhrkamp Taschenbuch Wissenschaft, 1983).

³⁸ See for a distinction of internal and external autonomy: J. ODERMATT, *The Principle of Autonomy: an Adolescent Disease of EU External Relations Law?*, in M. CREMONA (ed.), *Structural Principles in EU External Relations Law*, Portland: Hart Publishing, 2018, pp. 291-316.

³⁹ Compare *Kadi*, cit.

ropean Court of Human Rights for example in *Loizidou* and *Al-Jedda*, in which the European Court submitted the ECHR to the overarching authority of the UN.⁴⁰

From the standpoint of national and international law, the EU's ability to take a dualist approach to international law is far from uncontested. Both national courts and international courts have disagreed in different ways with the Court's autonomy conception. National constitutional courts adhere to a conception of sovereignty that is necessarily and inextricably connected to statehood. The German Federal Constitutional Court is traditionally the most vocal national constitutional court in explicating limits to EU integration as it sees them to flow *from the German Constitution*.⁴¹ Other national courts however are even more adamant than the German Constitutional Court.⁴² International courts classify EU law as international law and consider the Court as an international court.⁴³ The different views all challenge that EU law stems from an independent source of law and is neither dependent on national nor international law for its validity and interpretation. They submit it to either national or international law.

The Court's autonomy conception is nothing more or less than an alternative conceptual reading what the nature of EU law is. This reading is from the outset neither more or less convincing than the reading of national or international courts. One could perhaps say that it is less conventional and that the international and national standpoints long predate the Court's autonomous new legal order. Yet, it is necessary for the EU legal order to claim jurisdictional sovereignty, which in turn protects its epistemological independence from international and national law.

V. CONCLUDING REFLECTIONS ON THE COURT'S AUTONOMY CONCEPTION IN CONTEXT

States enjoy negative external jurisdictional sovereignty, that is recognition of their right to determine what external legal norms take effect within the internal legal order and end the internal effect of external norms at any point in time (even if this is in breach of inter-

⁴⁰ European Court of Human Rights: judgment of 18 December 1996, no. 15318/89, *Loizidou v. Turkey*, paras 52-56; judgment of 7 July 2011, no. 27021/08, *Al-Jedda v. United Kingdom*.

⁴¹ See above all German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, *Lis-sabon-Urteil*.

⁴² E.g., Supreme Court of Denmark, decision of 6 April 1998, case 361/1997, *Maastricht* (summary translated in *Common Market Law Review*, 1999, p. 854); See also for further examples European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *National Constitutional Avenues for Further EU Integration* – Study by L. BESSELINK, M. CLAES, Š. IMAMOVIĆ, J.H. REESTMAN, Brussels: European Union, 2014; Spanish Constitutional Tribunal, declaration 1/2004, case no. 6603-2004, *Constitutional Treaty*, available at: tribunalconstitucional.es.

⁴³ European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, para. 154, and following case law: the European Court of Human Rights sees the EU as an "international organization" to which States "have transferred part of their sovereignty" and EU law as an "international obligation" of the Member States.

national law). With its conception of the autonomy of the EU legal order, the Court claims the rights associated with *negative* external jurisdictional sovereignty, namely the right to formally legally keep external norms out. This is the very foundation of the Court's claim that the EU constitutes a new legal order, which can determine in its domestic law what is valid within its jurisdiction and what status external norms have. This autonomy of EU law from external domination is in turn the foundation of any claim to be a polity that can claim legitimacy based on internal coherence, objectives, and democratic structures.

In addition, the EU holds a considerable ambition to *positive* external sovereignty. The TEU details an extensive and ambitious catalogue of foreign policy objectives. These objectives presume that the EU is an international actor in its own right and with its own agenda.⁴⁴ Regularly after *Kadi* and after opinion 2/13, scholars speculated whether the Court's conception of autonomy weakened the positive dimension of autonomy, that is the EU's capacity and influence as an international actor. They argued that the Court's strong emphasis on autonomy (understood by the Court as negative external jurisdictional sovereignty) makes the rule-based multilateral cooperation to which the EU is committed⁴⁵ more difficult for the EU.⁴⁶

Many contemporary theorists agree that individual freedom in order to be meaningful requires both a negative and positive dimension.⁴⁷ Sovereignty equally requires both, a negative and a positive dimension, to be meaningful.⁴⁸ A similar argument can be made for the autonomy of the EU legal order. It is a *judicial doctrine*, developed in response to the question of what norms can have force within the EU legal order without undermining its foundations – not more but also not less. It is sharply limited to the formal legal sphere. This is not to say that the consequences of the Court's autonomy conception do not carry beyond the technical legal realm and affect the EU's positive autonomy in a broader, including factual sense – on the contrary.

Shutting out external influences, as the Court does, may not seem to create incentives for others to cooperate. Establishing international courts and tribunals are attempts to strengthen multilateral rule-based systems, which is a form of governance to which the EU strongly commits.⁴⁹ However, the EU can only take an influential role in any such multilateral system if it can also submit to the jurisdiction of any such court or

⁴⁴ See in particular Arts 3, para. 5, and 21 TEU.

⁴⁵ See e.g., Communication COM(2017) 240 of 10 May 2017 from the Commission, *Reflection Paper on Harnessing Globalisation*.

⁴⁶ E.g., C. ECKES, *EU Powers under External Pressure*, Oxford: Oxford University Press, 2019, p. 219.

⁴⁷ R. NOZICK, *Anarchie*, cit.; C. TAYLOR, *What is Wrong*, cit., read the well-known essay by I. BERLIN, *Zwei Freiheitsbegriffe*, in I. BERLIN (ed.), *Freiheit. Vier Versuche*, Frankfurt: Fischer, 1995 in light of his later writings (I. BERLIN, *Freedom and its Betrayal. Six Enemies of Human Liberty*, Princeton: Princeton University Press, 2002).

⁴⁸ M. RONZONI, *Zwei Konzeptionen staatlicher Souveränität und ihre Implikationen für die Gestaltung globaler Institutionen*, in P. NIESEN (ed.), *Transnationale Gerechtigkeit und Demokratie*, Frankfurt: Campus, 2012, p. 60 et seq.

⁴⁹ Communication COM(2017) 240.

tribunal. It seems hence plausible that the Court's strict conception of autonomy, which has made it repeatedly impossible for the EU to submit to international courts and tribunals, limits the EU's options and also affects its international influence.

At the same time, positive sovereignty also depends on negative sovereignty. Only an entity that can shut out external influences can possess the ability to determine its own course of action and to ensure not being hijacked by national or international agendas. For the EU, creating some stable distance both to national and international law has been a struggle, predominantly because the very objective – not just in the Court's case law but also in the objectives and structures of the EU Treaties – is to set up a new legal order that enjoys an unprecedented level of independence of both. The Court has the mandate to protect the EU legal order, normative autonomy, and also the autonomy of its institutions. Law, including EU law, can only be understood as an expression of the legitimate will of those governed by it if it enjoys autonomy from external domination.⁵⁰ In other words, the autonomy of law is a necessary – albeit not sufficient – condition for the (democratic) legitimacy of this law.

⁵⁰ Law as an expression of the autonomy of its subjects is probably best explained by J. HABERMAS, *Faktizität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, Frankfurt: Suhrkamp, 1994.



INSIGHTS

EU COURT OF JUSTICE STANDING UP TO ILLIBERAL DEMOCRACY: POLISH JUDICIAL “REFORMS” ON TRIAL

POLAND BEFORE THE COURT OF JUSTICE: LIMITLESS OR LIMITED CASE LAW ON ART. 19 TEU?

PABLO MARTÍN RODRÍGUEZ*

ABSTRACT: In 2019, the Court of Justice has ruled in an innovative case on the protection of the independence of Member States' judiciaries. In two judgments, delivered in June and November, the Court declared that several statutes amending the organisation of the Polish judicial system infringed the second subparagraph of Art. 19, para. 1, TEU because they did not respect judicial independence. This case law relies on two key legal arguments: an “ideal” holistic approach to judicial independence and the broadening of the material scope of Art. 19 TEU (see Court of Justice: judgment of 24 June 2019, case C-619/18, *Commission v. Poland (Independence of the Supreme Court)* [GC]; judgment of 5 November 2019, case C-192/18, *Commission v. Poland (Independence of ordinary courts)* [GC]). Both arguments may invite us to think that this case law is boundless. This *Insight* considers if some limits should nevertheless apply.

KEYWORDS: judicial independence – rule of law – Art. 19 TEU – Poland – Art. 2 TEU – scope of EU law.

“Aquí hay tres cosas: la una
que yo, Polonia, os estimo
tanto que os quiero librar
de la opresión y servicio
de un rey tirano, porque
no fuera señor benigno
el que a su patria y su imperio
pusiera en tanto peligro.”

(Basilio, Rey de Polonia)

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Jornada I, Escena VI, *La vida es sueño*
Calderón de la Barca¹

I. INTRODUCTION

Respect for the rule of law by the Member States (MS) of the European Union is an evidently complex extensive topic that has conditioned the recent history of the Union politically and legally.² The implications of this issue entail many technical aspects but they also relate to the very constitutional core of the EU since the rule of law is a founding value of the EU and a common value to all MS as provided in Art. 2 TEU.³

Although not limited to these countries, Hungary and Poland have played a leading role in this context, which has triggered political monitoring and sanctioning mechanisms (including, the pre-Art. 7 TEU rule of law framework) and filing legal actions before the Court of Justice as well. In this sense, the Court has been called upon to act on

¹ Fearing his heir Segismundo to be a tyrant king, Basilio the King of Poland proclaims “Here there are three things: the first / I dote, O Poland, on thee so / Since my wishes are thee to save / From the oppression and affliction / Of a tyrant King, because / Of his country and his kingdom / He were no benignant father / Who to such a risk would expose it” (Pedro Calderón de la Barca, *Life is a Dream*, Act I, Scene VI). The symbolic influence that Calderonian theatre displayed centuries later over Polish romanticism seems to revive today. As an elongation of the awe in *Life is a Dream*, the tribulations of Basilio, the King of Poland, uncannily mirror the current situation within the EU. If the quoted passage adamantly reflects EU position with regards to Poland’s compliance with the rule of law, would it suffice to add that the second thing troubling Basilio’s mind is committing himself a crime by seeking to prevent Segismundo’s ones, i.e. that in its pursuit to protecting the rule of law in Poland, the EU trespasses it itself.

² The already extensive literature on MS compliance is part of the larger topic and bibliography on the rule of law in the EU, see D.J. LIÑÁN NOGUERAS, P. MARTÍN RODRÍGUEZ (eds), *Estado de derecho y Unión Europea*, Madrid: Tecnos, 2018; C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016. Most prestigious journals have in fact dedicated specific volumes to this topic, see for example the introductory chapters by D. KOCHENOV, A. MAGEN, L. PECH, *Introduction: The Great Rule of Law Debate in the EU*, in *Journal of Common Market Studies*, 2016, p. 1045 *et seq.*; M. AVBELJ, *Rule of Law and the Economic Crisis in a Pluralist European Union*, in *Hague Journal on the Rule of Law*, 2016, p. 191 *et seq.*; M. ADAMS, R. JANSE, *Rule of Law Decay: Terminology, Causes, Methods, Markers and Remedies*, in *Hague Journal on the Rule of Law*, 2019, p. 1 *et seq.*

³ Some constitutional features of the European project if not the very constitutional essence of the EU seem to hang in the balance waiting for the final outcome. Indeed, the intellectual endeavour placing on the EU a portion of constitutional legitimacy (even non-derivative for some), which is so influential in today’s academia, would be seriously damaged if the EU ultimately proves itself unable to preserve its founding values. See *ad ex.* A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, M. TABOROWSKI, M. SCHMIDT, *A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines*, in *Common Market Law Review*, 2018, p. 983 *et seq.* However, let us admit that the issue goes far beyond the rule of law and pertains to another common value such as democracy more properly (see excellent T.G. DALY, *Democratic Decay: Conceptualising an Emerging Research Field*, in *Hague Journal on the Rule of Law*, 2019, p. 9 *et seq.*). The capacity of the rule of law to be legally operationalised has determined its use *vis-à-vis* other values (see A. MAGEN, *Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU*, in *Journal of Common Market Studies*, 2016, pp. 1058-1059).

several occasions with regards to certain controversial measures adopted by the Governments of these countries that could be deemed to contradict the rule of law. Among these measures, those concerning the organisation of the judiciary have brought about noticeable alarm. Unlike what happened previously,⁴ in the second half of 2019 the Court of Justice had established innovative case law and held that several Polish laws amending the organisation of the judiciary were in violation of Art. 19 TEU.

In a first judgment, of 24 June 2019, the Court affirmed that the law lowering the retirement age of the judges of the Supreme Court, while giving the President of the Republic the power to extend discretionarily their mandates, led to a violation of Art. 19 TEU because it breached judicial independence and the inherent irremovability of judges.⁵ Later, on November 5th, the Court ruled that the Polish Law of 12 July 2017 amending the retirement age of ordinary judges was in violation of Art. 19 TEU and also formed a direct discrimination based on sex as laid down in Directive 2006/54/EC.⁶

Of course these two judgments do not exhaust all the legal issues raised by a defective respect of the rule of law by MS, not even from a judicial perspective. There are many other cases (some of them still pending or imminent) that are directly related to this subject matter.⁷ Nevertheless, it is in these two judgments that the Court has set out a remarkably broad interpretation of Art. 19 TEU, the limits of which are not clear.⁸ This last question (i.e., the new case law on Art. 19 TEU and its potential limits) is the modest object of this *Insight*.

II. THE BROAD INTERPRETATION OF ART. 19 TEU

There are, in my opinion, two key legal elements in the reasoning of the Court that have led to the broad interpretation of Art. 19 TEU: 1) an “ideal” holistic approach to judicial independence, and 2) the emancipation of the material scope of Art. 19 TEU from the

⁴ A similarly questionable reform of the judiciary already took place in Hungary, but neither the Court of Justice (that condemned it for being a discrimination based on age in judgment of 14 December 2012, case C-286/12, *Commission v. Hungary* [GC]) nor the European Court of Human Rights (judgment of 23 June 2016, no. 20261/12, *Baka v. Hungary*) were able to reverse it.

⁵ Court of Justice, judgment of 24 June 2019, case C-619/18, *Commission v. Poland (Independence of the Supreme Court)* [GC].

⁶ Court of Justice, judgment of 5 November 2019, case C-192/18, *Commission v. Poland (Independence of ordinary courts)* [GC].

⁷ See, for example, Court of Justice: case C-522/18, *Zakład Ubezpieczeń Społecznych*; case C-537/18, *Krajowa Rada Sądownictwa*; joined cases C-558/18 and C-563/18, *Miasto Łowicz*; case C-563/18, *Prokuratura Okręgowa w Płocku*; case C-623/18, *Prokuratura Rejonowa w Słubicach*; C-668/18, *Uniparts*; case C-791/19, *Commission v. Poland (disciplinary regime)*.

⁸ In the recent judgment of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber)* [GC], the Court of Justice answered some questions referred by the Polish Supreme Court applying Art. 47 of the Charter of fundamental rights of the EU and EU secondary law but it did not to rule on Art. 19 TEU respect.

classic definition of the scope of EU law. Whereas the former is not too innovative, the latter certainly is, although it has not come as a surprise.

Both elements fit in the legal strategy that, in my opinion, the Court of Justice is putting in place to deal with this situation. This strategy is determined by previous experience in two ways. First, the Court is aware of the fact that the failure of political mechanisms has turned itself into the ultimate legal bastion to defend the common values enshrined in Art. 2 TEU.⁹ Beyond the failure of this judicial solution it is difficult to discern which possibilities are available.¹⁰ Accordingly, I think the Court is knowingly opting for a case law that both leaves open future developments and avoids loopholes that might be used to escape from it. Secondly, prior cases have proven beyond doubt that *interim* relief is paramount, given the extraordinary difficulty to reverse a *fait accompli* in these matters.¹¹ Since its judgment in *Associação Sindical dos Juizes Portugueses*,¹² the Court seems to be reinforcing this provisional protection with an anticipatory strategy in the sense of announcing or revealing the direction of future rulings.¹³ I believe that the “al-

⁹ As easily predicted, the political sanction mechanism encapsulated in Art. 7 TEU has cast no tangible results. More than two years ago, the Commission adopted a Reasoned proposal of 20 December 2017 in accordance with Article 7(1) TEU regarding the rule of law in Poland that included a 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, COM(2017) 835 final. More than a year ago the European Parliament issued Resolution P8_TA(2018)0340 of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. No further developments within the Council there have been so far (see the recent criticisms raised by the European Parliament in Resolution P9_TA(2020)0014 of 16 January 2020 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary). Furthermore, in its Communication COM(2019) 343 final of 17 July 2019, *Strengthening the rule of law within the Union – A blueprint for action*, the Commission emphasises its enforcement powers as the guardian of the Treaties, thereby recognising the limited results that can be expected from dialogue only (within the pre-Art. 7 TEU rule of law framework). Finally, the Council Presidency conclusions (ST 13622/19) of 19 November 2019 on the Evaluation of the annual rule of law dialogue should be seen as an enormous exercise of cynicism if it were not for the sad avowal of political impotence embodied therein.

¹⁰ See D. KOCHENOV, P. BÁRD, *The Last Soldier Standing? Courts vs Politicians and the Rule of Law Crisis in the New Member States of the EU*, in *European Yearbook of Constitutional Law*, 2019, p. 243 *et seq.*

¹¹ The perils of reacting too late are clear: once courts are seized, they turn into enablers as distinctly proves what happened with the Constitutional Courts in Hungary and Poland (see W. SADURSKI, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal to a Governmental Enabler*, in *Hague Journal on the Rule of Law*, 2019, p. 63 *et seq.*; P. CASTILLO-ORTIZ, *The Illiberal Abuse of Constitutional Courts in Europe*, in *European Constitutional Law Review*, 2019, p. 48 *et seq.*). Hence, the relevance of the innovative resort to interim relief in the first case *Commission v. Poland*, including the Order of the Vicepresident of 19 October 2018, case C-619/18 R, not published) awarding provisional protection, and confirmed by Order of 17 December 2018, case C-619/18 R).

¹² Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses* [GC].

¹³ In fact, almost everybody did read the judgment in *Associação Sindical dos Juizes Portugueses* [GC], cit., *à la polonoise*, i.e. announcing the enlarged scope of Art. 19 TEU. Likewise, the June judgment in *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., easily permitted to guess in which di-

ready expected result” tactic facilitates the fulfilment of rulings and the acceptance of interim relief orders.¹⁴

II.1. AN IDEAL HOLISTIC APPROACH TO JUDICIAL INDEPENDENCE

In accordance with existing case law,¹⁵ the Court defines judicial independence from a twofold perspective. From an external point of view, judicial independence requires that judges be protected from any external pressures, authorities or instructions preventing or hindering them adjudicating in an entirely autonomous way. From an internal point of view, judicial independence relates to the neutrality of the judge towards the parties and the outcome of the proceedings.¹⁶ Now, when assessing the respect of both aspects, the Court applies what we may term an ideal holistic approach. I will clarify these two terms (ideal and holistic).

On the one hand, the Court applies an *ideal* approach in the sense that it has opted for a theoretical bar. It is neither a question of proving an actual nor a potential interference in judges’ full autonomy. The standard is more exigent because judicial independence requires that rules be “such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it”.¹⁷ As AG Tachev expresses in a more animated way with resonances of the Strasbourg case law, “[a]ppearances are of a certain importance, so that ‘justice must not only be done, it must also be seen to be done’. What is at stake is the confidence which courts in a democratic society must inspire in the public”.¹⁸ Thus it is more about ruling out the suspicion (perception) of the public that the system might enable or tolerate interferences.¹⁹

rection the ruling in the second case would go. Again similarly both the *Commission v. Poland (Independence of ordinary courts)* [GC], cit., judgment and the judgment in *A.K. and Others* [GC], cit., have already in their reasoning enough elements for anticipating that the amended disciplinary regime affecting the Polish judiciary will be certainly considered against Art. 19 TEU in the pending infringement action (case C-791/19).

¹⁴ Given the unsatisfactory answer by Polish authorities to the judgment in *A.K. and Others* [GC], cit., just a few days ago the European Commission announced the request for interim relief in the pending case C-791/19, *Commission v. Poland (disciplinary regime)*. See Agence Europe, *La Commission demande à la Cour de justice de faire cesser provisoirement le nouveau régime disciplinaire visant les juges polonais*, in *Bulletin Quotidien Europe*, n. 12403, 15 January 2020.

¹⁵ *Ad ex.* Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], paras 63 and 65.

¹⁶ *Commission v. Poland (Independence of ordinary courts)* [GC], cit., paras 109-110.

¹⁷ *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., paras 74 and 108; *Commission v. Poland (Independence of ordinary courts)* [GC], cit., para. 111.

¹⁸ Opinion of AG Tachev delivered on 11 April 2019, case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, para. 71.

¹⁹ See this stricter standard repeatedly applied in *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., paras 78, 82, 84, 85, 86, 111 and 118; and in *Commission v. Poland (Independence of ordi-*

In accordance with this “ideal” approach, the Court enumerates the many aspects that would be comprised (meaning the rules to be analysed) in order to conclude on the inexistence of reasonable doubts. These relate to the composition of the judicial body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members. This evidently also comprises enough protection of their irremovability, which concerns not only the disciplinary system but also the extension of the term of office beyond the retirement age if a MS has decided to allow it.²⁰

On the other hand, it is very relevant in my opinion that the analysis is done in this *holistic* manner. The Court takes as a whole all the rules concerning all those aspects in order to resolve issues on the existence of reasonable doubt and consequently on the violation of judicial independence. This holistic approach is remarkably open, which means that it allows for a variety of arguments of legal and factual nature to be drawn into it.²¹ The relevance of this holistic approach that the Court has been able to apply more clearly in the second judgment is that it ends in a single conclusion with regard to the respect of judicial independence.²² Therefore, it precludes singling out a specific rule as the origin of the infringement and consequently focusing on a single rule whose change or removal would put an end to the violation.²³

Thus the Court dodges the perils of some sort of “lessons learned for taking over the judiciary” while achieving two objectives: *a*) executing the ruling requires dismantling the entire system, not just changing a piece of it, and *b*) there is nothing in its legal reasoning that would preclude the Court or restrict its leeway with respect to hypothetical future appraisals. This holistic assessment might prove very relevant if Poland’s compliance with

nary courts) [GC], cit., paras 119, 124 and 127. See an even more decided application in Opinion of AG Tanchev, *Commission v. Poland (Independence of the Supreme Court)*, cit., paras 87, 88 and 91; and also Opinion of AG Tanchev delivered on 20 June 2019, case C-192/18, *Commission v. Poland (Independence of ordinary courts)*, paras 111-112.

²⁰ *Commission v. Poland (Independence of ordinary courts)* [GC], cit., paras 111, 118-120.

²¹ Applying an ideal holistic approach admits using legal aspects such as the vagueness or objectivity of the rules or the existence of procedural and judicial guarantees against discretionary and arbitrariness (reasonable time, stating the reasons, judicial remedy) but also factual arguments relating to how rules have been in fact applied, the overall impact on the judicial body or on the individual professional carrier, the public declarations of the authorities concerning the purpose of the law, etc. It is also interesting noting that the Court applies judicial independence as the essence of a fundamental right in a perhaps circular way. Thus, when evaluating an exception to the principle of irremovability, the Court requires it to be justified on a legitimate objective and proportionate but also not to be “such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it” (*Commission v. Poland (Independence of the Supreme Court)* [GC], cit., para. 79).

²² *Commission v. Poland (Independence of ordinary courts)* [GC], cit., para. 130.

²³ The Court insists that a single rule or measure is not *per se* an infringement or that a single rule does not guarantee ironclad judicial independence. See *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., paras 111 and 115. The perils of “lessons learned” (i.e., the Hungarian *brief*) may be illustrated by the discrimination claim, interpreting the judgment in the sense that establishing a transitional regulation for retirement would erase the discrimination based on age (*ibid.*, para. 91).

the ruling is defective (i.e. it does not abrogate the laws concerned or amends them but trying again to control the judiciary) and it comes to a new infringement action. To a certain extent the ideal holistic approach has offered a suitable alternative to the clever notion of systemic infringement action suggested by the best doctrine.²⁴

II.2. THE BROADENING OF THE MATERIAL SCOPE OF ART. 19 TEU

This section addresses the core of these judgments' legal argumentation. The key point of this case law has been to understand the mandate enshrined in subparagraph 2 of Art. 19, para. 1, TEU so broadly and/or so literally as to go beyond the traditional scope of EU law. Admittedly, in interpreting that provision the Court seems to privilege a grammatical criterion, but felt it necessary to connect Art. 19 TEU with the value *rule of law* affirmed in Art. 2 TEU. This connection is quite developed in the first judgment concerning the Supreme Court to the point of appearing essential to the reasoning,²⁵ but in the second one concerning Polish ordinary judges it loses prominence compared to the literal interpretation and it appears to be downgraded to an opening and closing remark.²⁶

As known, the second subparagraph of Art. 19, para. 1, TEU reads: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". It thus implies, in the Court's opinion, that MS are obliged to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in those fields. Put simply, any MS judicial body (court or tribunal) that is called upon to apply EU law – meaning to adjudicate in EU law matters – must meet the requirements of effective judicial protection. The Court points out that the second subparagraph of Art. 19, para. 1, refers to "the fields covered by Union law" and not "when implementing Union law".²⁷ Therefore, this obligation exists irrespective of whether a MS is applying or not EU law in the sense of Art. 51, para. 1, of the Charter of fundamental rights of the EU (the Charter).

Yet, what that obligation entails ought to be deduced from the general principle of effective judicial protection pertaining to EU law. At this point the Court only nominally resumes its classic case law on EU general principles by recalling that this general principle is common to the constitutional traditions of the MS, that it is enshrined in Arts 6 and 13 of the European Convention on Human Rights, and that it has been reaffirmed in Art. 47

²⁴ K.L. SCHEPPELE, *Enforcing the Basic Principles of EU Law through Systemic Infringement Actions*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, cit., p. 105 *et seq.*; M. SCHMIDT, P. BOGDANOWICZ, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU*, in *Common Market Law Review*, 2018, p. 1061 *et seq.*

²⁵ *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., paras 42-47.

²⁶ *Commission v. Poland (Independence of ordinary courts)* [GC], cit., paras 98 and 106.

²⁷ *Commission v. Poland (Independence of the Supreme Court)* [GC], cit., para. 50; *Commission v. Poland (Independence of ordinary courts)* [GC], cit., para. 99.

of the Charter.²⁸ The consequence then is clear: as the Court states, “[t]o ensure that such ordinary courts are in a position to offer such [effective judicial] protection [in those abstract fields covered by EU law], maintaining their independence is essential”.²⁹

This is of course a bold case law as the Court has determined that EU law obligations under Art. 19 TEU do not depend on the MS implementing EU law. Therefore, as long as any judicial body is to apply EU law, it has to meet the requirements of effective judicial protection in general, and the guarantee of its independence in particular. Art. 19 TEU has thus a material scope that is much wider than the Charter or any general principle of EU law. In fact, for the Charter to be applicable, it would be necessary that the MS be implementing EU law in the sense of Art. 51 of the Charter (i.e., that the situation falls within the purview of EU law).³⁰ And it would be exactly the same with a general principle of EU law.³¹

The enlarged legal effects of Art. 19 TEU emerge when considering if a MS has failed to fulfil it. Because of the combined effect of its wording and the ideal holistic approach to judicial independence there is no need to prove that the independence of Polish judges has been compromised in concrete instances, let alone when applying EU law, in order to rule whether a particular reform of the judiciary infringes Art. 19 TEU.

By means of broadening the material scope of Art. 19 TEU the Court has thus found a smart way to solve the conundrum posed by Art. 2 TEU common values, which, as has been argued,³² must be respected by MS beyond the scope of EU law without calling into question the fundamental principle of conferral.³³ That is the reason why I think the Court’s

²⁸ The Court only pays lip service to the classic sources of EU general principles. No judgments other than its own are mentioned. Contrarily, see Opinions of AG Tanchev in *Commission v. Poland (Independence of the Supreme Court)*, cit., para. 71, and especially in *Commission v. Poland (Independence of ordinary courts)*, cit., *passim*.

²⁹ *Commission v. Poland (Independence of ordinary courts)* [GC], cit., para. 105.

³⁰ Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson*, paras 17-23.

³¹ Court of Justice: judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, para. 41; judgment of 13 March 2007, case C-432/05, *Unibet* [GC], paras 40-42.

³² O. MADER, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, in *Hague Journal on the Rule of Law*, 2019, p. 133 *et seq*. This conundrum of EU founding values has been illustrated by judicial cooperation in criminal matters. In order to apply mutual recognition based on mutual trust it is compulsory that MS respect fundamental rights (another Art. 2 common value) even when they are not implementing EU law (Court of Justice, judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.*, para. 48). The interest of this new approach in *Commission v. Poland* is that it offers a new better solution. So far (especially in the *Aranyosi* case, namely Court of Justice, judgment of 5 April 2016, case C-404/15, *Aranyosi and Căldăraru* [GC]), the Court was only able to design a shield for the EU legal system based on individual fundamental rights, but not a sword to address the underlying issue. See *in extenso* P. MARTÍN RODRÍGUEZ, *La emergencia de los límites constitucionales a la confianza mutua en el Espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia Aranyosi y Căldăraru*, in *Revista de Derecho Comunitario Europeo*, 2016, p. 859 *et seq*.

³³ It is worth quoting AG Tanchev’s reflection: “I would like to close, however, by underscoring that, in delimiting the scope of Art. 19(1) TEU, second subparagraph, what is at stake, at constitutional level, is the extent to which the Court has competence to substitute national constitutional courts and the European

emphasis on Art. 19 *vis-à-vis* the common values in Art. 2 in its second judgment is unfortunate. The argument based on the literal wording is not, in my opinion, as compelling as the Court holds. In fact, it is difficult to corroborate the idea that a concrete provision might go beyond EU competences (the scope of EU law) when the Treaties use the word “field” or “fields”, in particular when other linguistic versions such as the Spanish one are taken into account. The distinct connection of that provision with the case law in *Unión de Pequeños Agricultores* or *Unibet* does not favour that enlarged interpretation either.³⁴

Contrariwise, I think a broad interpretation of Art. 19 would find a strong substantive legal ground if it were guided by Art. 2 TEU, provided that the latter be construed as requiring MS to respect those common values even when they are not applying EU law. This interpretation of Art. 2 TEU does not encroach upon the principle of conferral but only limits MS when exercising those competences not conferred upon the Union, as the Court has precisely observed with regard to Art. 19 TEU.³⁵

Having said that, it should be noticed that, unless another equivalent Treaty provision is found, this case law is only valid for the common value of the rule of law and as long as the latter can be connected with effective judicial protection.³⁶ It is thus advisable to consider if, despite the unbound scope, this case law may have more limited effects.

III. THE PARADOX OF THE LIMITED EFFECTS OF THE CASE LAW ON ART. 19 TEU

III.1. AN UNLIKELY LIMIT: DENYING ART. 19 TEU DIRECT EFFECT

If the reasoning of the Court of Justice is followed literally, i.e. if Art. 19 TEU is to be understood as covering every single act or rule affecting directly or indirectly any national judicial body that is liable to apply EU law in abstract – covering practically all judges or courts that may adjudicate in fields covered by EU law – this case law would have a virtually boundless scope.

Court of Human Rights in adjudicating over fundamental rights violations. Respect for the boundary between the competences of the EU, and those of the Member States, is as important in an EU legal order based on the rule of law as the protection of fundamental rights” (Opinion of AG Tanchev, *Commission v. Poland* (Independence of ordinary courts), cit., para. 112).

³⁴ See A. ARNULL, *Article 19 [The Court of Justice of the European Union] (ex-Articles 220–224 EC)*, in H.-J. BLANKE, S. MANGIAMELI (eds), *The Treaty on European Union*, Berlin, Heidelberg: Springer-Verlag, 2013, p. 759 *et seq.*

³⁵ *Commission v. Poland* (Independence of the Supreme Court) [GC], cit., para. 52. *Commission v. Poland* (Independence of ordinary courts) [GC], cit., para. 102.

³⁶ Other prominent elements encompassed by the rule of law concept such as the principles of legality and legal certainty (including thereby the interdiction of arbitrariness) would be hardly covered by the effective judicial protection laid down in Art. 19. On the current content of the notion rule of law in EU law, see P. MARTÍN RODRÍGUEZ, *El estado de derecho y el sistema jurídico de la Unión Europea*, in D.J. LIÑÁN NOGUERAS, P.J. MARTÍN RODRÍGUEZ (eds), *Estado de derecho y Unión Europea*, cit., p. 160 *et seq.* *In extenso* see T. KONSTADINIDES, *The Rule of Law in the European Union. The Internal Dimension*, Oxford: Hart, 2016).

Any national judge may feel inclined to use EU law to challenge whatever legal measure that might amount in his/her opinion to an encroachment of his/her independence, which by definition would include any single disciplinary measure and/or rule, any single promotion rule or decision, every rule regarding appointment, abstention, rejection or dismissal of judicial members or any concrete application of those rules, just to name a few examples of components that the Court has mentioned in order to assess compliance with judicial independence.³⁷ The comprehensive definition of the latter (with its external and internal dimensions) would make the material scope of Art. 19 even broader. Furthermore, it should be borne in mind that there is no need for an actual application of those rules to bring a case, since the Art. 19 TEU mandate does not require it (the ideal approach), nor does it need a legal context in which the MS is applying or implementing EU law.

Moreover, it may be recalled that judicial independence is more a fundamental right for individuals than a privilege for judges; hence the tight link between Art. 19 TEU and Art. 47 of the Charter. So, theoretically, there should be no legal reason why individuals would be impeded from challenging any decision or rule on the ground that the competent judicial body lacks due independence.

Finally, bearing in mind the *ex tunc* declaratory effect of the judgments of the Court of Justice, the interpretation of Art. 19 TEU set out in this case law should apply to all instances, at least since the entry into force of the Treaty of Lisbon on December 1st 2009. This may prove extremely relevant because, as known, there have been other measures affecting the judicial independence in Poland or Hungary that were not tackled in time and remain in force.

By no means those considerations refer to a lab hypothesis. As mentioned, there exist a number of Polish references for a preliminary ruling that are related to these law amendments and pose the question of the application of Art. 19 TEU.³⁸ Indeed, AG Tanchev actually foresaw this possibility in the first infringement and he later regretted that the Court did not openly embrace the idea of demanding a higher bar (*a structural breach*) as suggested.³⁹ However, when delivering his opinions in some of the preliminary references mentioned above, AG Tanchev has proposed (if I have understood him correctly) two different sorts of limits. First, he continues to argue that Art. 19 TEU must be reserved for those measures that have an overall impact on the judiciary (*systemic or*

³⁷ The possibilities for encroaching upon judicial independence are evidently more varied. See E. ZELLER, *Access Points for Infringements of Judicial Independence – A Practical Tour d'Horizon*, in *ERA Forum*, 26 February 2019, available at www.link.springer.com.

³⁸ See *supra* footnotes 8 and 9.

³⁹ Respectively, Opinion of AG Tanchev, *Commission v. Poland (Independence of the Supreme Court)*, cit., footnote 42 and Opinion of AG Tanchev delivered on 27 June 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber)*, paras 146-147.

generalised), although it is not absolutely clear what this actually requires.⁴⁰ Secondly, AG Tanchev upholds that the case law on Art. 19 TEU must not modify the admissibility requirements for preliminary references even when a measure falls within the material scope of the former. Therefore, in order to prevent a request to end up in an advisory opinion, the judge *a quo* must establish a link with EU law (meaning justifying why the interpretation of Art. 19 TEU is relevant for resolving the proceedings that he/she is adjudicating).⁴¹ Perhaps this last remark might be difficult to reconcile with the ideal holistic approach to judicial independence that I introduced above.

The truth is that the Court of Justice maintains a certain ambiguity on this point, what may be seen as part of its cautious judicial strategy. In the recent judgment *A.K. and Others*, the Court has resolved that the application of the law amending the disciplinary chamber of the Polish Supreme Court was an infringement of Art. 47 of the Charter because of its lack of independence, but it has avoided ruling on a violation of Art. 19 TEU as well.⁴²

My view is close to the AG's first position because I think that any measure not affecting systemically judicial independence or, more accurately, any individual decision or question affecting judicial independence should be considered falling outside the reach of Art. 19 TEU. This would be the consequence of the aforementioned linkage with the EU founding values enshrined in Art. 2 TEU, which should guide the interpretation of Art. 19 TEU. Thus, any concrete or specific application of the rules organising the judiciary that might encroach upon judicial independence should be governed by Art. 47 of the Charter only, requiring thereby that the MS be implementing EU law in the sense of Art. 51, para. 1.

Therefore, it is not about reducing the material scope but more about refining the content of the obligation derived from the second subparagraph of Art. 19, para. 1, TEU. That provision obliges MS to establish a system of judicial remedies that guarantees effective legal protection when it comes to EU law. When the obligation is defined in those terms, it could be argued that the second subparagraph of Art. 19, para. 1, TEU should lack direct effect, at least in its classic meaning. Denying it direct effect would basically re-

⁴⁰ The position is better elaborated in Opinion AG Tanchev, *Commission v. Poland (Independence of ordinary courts)*, cit., paras 114-115, where he sustains that Art. 19 TEU should be confined to "structural infirmity" such as when a law impacts across entire tiers of the judiciary, i.e. "systemic or generalised deficiencies, which 'compromise the essence' of the irremovability and independence of judges". Particular incidents should be governed, in his view, by Art. 47 of the Charter only. Finally, the Advocate General does not rule out the simultaneous application of both provisions. However, in *A.K. and Others* the reason why the new disciplinary chamber of the Polish Supreme Court constitutes a structural infirmity affecting tiers of the judiciary falling under Art. 19 TEU seems to be more the previous judgment of Court of Justice (Opinion of AG Tanchev, *A.K. and Others*, cit., paras 149-152).

⁴¹ Opinion of AG Tanchev delivered on 24 September 2019, joined cases C-558/18 and C-563/18, *Miasto Łowicz*, para. 119.

⁴² Court of Justice, *A.K. and Others (Independence of the Disciplinary Chamber)* [GC], cit., para. 169.

strict Art. 19, para. 1, TEU to infringement actions, which does not mean depriving it of legal effects at all within the MS,⁴³ but it does mean empowering only the Commission with regards to its enforcement at EU level. This is in my opinion the best if not the only possible place for a Treaty provision whose material scope has been extended in such a remarkable way as to apply irrespective of whether a MS is implementing EU law or not.

However, one cannot realistically expect such a suggestion to be assumed for three main reasons. In the first place, Art. 19 TEU has so far been understood within the framework of the European *contentieux de la légalité* and the corresponding restricted standing for individuals before the CJEU. In this context, that provision would entail some progress from the previous case law in *Unión de Pequeños Agricultores* and *Unibet* by adding some positive obligations on account of MS that would even be compelled to establish entirely new judicial remedies, should it be necessary to assure the full respect of effective judicial protection. Such a robust reading of this provision was suggested by Lenaerts as early as 2007 and reaffirmed by Wildemeersch as recently as 2019.⁴⁴ However, it should be noticed that these strong effects of Art. 19 have always been thought and displayed within the traditional scope of EU law as proved by its symbiotic and inseparable relationship with Art. 47 of the Charter.

In the second place, it is true that direct effect, as long as it is connected with EU law primacy, has turned into a much more uncertain issue in the current case law of the Court of Justice.⁴⁵ Furthermore, as to the wording of the second subparagraph of Art. 19, para. 1, TEU, a plausible analogy with the *Taricco* judgment could be made, which would probably point in the opposite direction, i.e. interpreting that the primacy of such an unconditional obligation would at least trigger the *invocabilité d'exclusion*.⁴⁶

Last but not least, I believe there is another current reason why the Court would not rule out direct effect of this extended Art. 19 TEU. This reason is precisely not to forsake its potential overriding legal effects in domestic law. Such a powerful provision may come in handy whenever national courts might try to reverse past legal situations or decisions occurred under the empire of laws that breached judicial independence.⁴⁷ Thus, the Court may see in the solution suggested by AG Tanchev in *Miasto Łowicz* case

⁴³ K. LENAERTS, M. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2014, pp. 205-208.

⁴⁴ K. LENAERTS, *The Rule of Law and the Coherence of the Judicial System of the European Union*, in *Common Market Law Review*, 2007, pp. 1639-1640; J. WILDEMEERSCH, *Contentieux de la légalité des actes de l'Union européenne. Le mythe du droit à un recours effectif*, Bruxelles: Bruylant, 2019, p. 71 et seq.

⁴⁵ See M. LÓPEZ ESCUDERO, *Primacía del derecho de la Unión Europea y sus límites en la jurisprudencia reciente del TJUE*, in *Revista de Derecho Comunitario Europeo*, 2019, p. 787 et seq.

⁴⁶ Court of Justice, judgment of 8 September 2015, case C-105/14, *Taricco* [GC], paras 51-52.

⁴⁷ In any case I believe that these overriding domestic legal effects might prove extremely problematic in the long term. If the Court recognises the direct effect of Art. 19, para. 1, TEU while keeping its enlarged material scope, then that provision could be argued before any domestic court that is liable to apply EU law even in proceedings where no EU law is being discussed or alleged.

(i.e. strictly applying admissibility rules for preliminary references) a feasible path since it only affects the EU judicial level but it neither solves nor precludes which legal effects Art. 19 may have in MS domestic laws.

III.2. A CONTROVERSIAL EXISTENT LIMIT: ART. 19 TEU AND CASE LAW IN *MINISTER FOR JUSTICE AND EQUALITY (DÉFAILLANCES DU SYSTÈME JUDICIAIRE)*

It is important to consider if prior judgments of the Court within the context of mutual trust and mutual recognition have already set a limit to the potential effects of this case law in *Commission v. Poland*. This is particularly the case of the judgment in *Minister for Justice and Equality (Défaillances du système judiciaire)* because, as is well known, it also related to the independence of the judicial system in Poland as affected by the same amending Laws considered in the aforementioned cases *Commission v. Poland*. The question was referred by the Irish High Court in the context of executing several European arrest warrants (EAWs) surrendering some individuals to Polish judicial authorities.⁴⁸

In the judgment, the Court of Justice confirmed that the *Aranyosi* exception also applied when the essence of the right to a fair trial was compromised because of the lack of independence of the issuing judicial authority. However, having regard to all the “information” at its disposal, including the reasoned proposal of the Commission that clearly showed that the general requirement of systemic deficiencies regarding the independence of the Polish judiciary was met, the referring court asked if the concrete test was still needed. In this respect, the Court of Justice confirmed the *Aranyosi* formula, demanding the executing judicial authority also

“to assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, *having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant*”.⁴⁹

This case law is extremely problematic because it seems to contradict the ideal holistic approach to judicial independence that the Court has used not only with regard to Art. 19 TEU, but also when judging if a national prosecutor may qualify as a judicial authority when issuing an EAW.⁵⁰ Furthermore, this quasi shift from independence to im-

⁴⁸ *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit.

⁴⁹ *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., para. 75 (emphasis added).

⁵⁰ Admittedly, in this case law the Court seems to focus on potential interferences more than on the perception of individuals, but it is still an ideal approach not needing to prove an actual interference in the instance case. See Court of Justice, judgment of 27 May 2019: joined cases C-508/18 and C-82/19 PPU, *OG and PI* [GC], para. 80; case C-509/18, *PF* [GC], para. 52.

partiality may be more problematic considering that the Court in *Dorobantu* required national executing judges to trust other judicial authorities to the full extent. Thus, any assurances given by the issuing judicial authority are to be trusted in the absence of specific indications to the contrary. So it is “*only in exceptional circumstances, and on the basis of precise information*, that the executing judicial authority can find that, notwithstanding an assurance [...] there is a real risk of the person concerned”.⁵¹ If this applies to the assurances coming from judges who form part of a tainted judicial system, this results in a formidable limit to the case law settled in *Commission v. Poland (Independence of ordinary courts)*, since ordinary courts are in principle the natural addressees of mutual recognition requests in criminal matters.

The fact that there was still no judgment regarding Poland or that the *LM* case dealt with the so called horizontal *Solange*, may explain the cautiousness of the Court but they do not appear crucial in affirming the limitation mentioned above.⁵² Indeed, in *Minister for Justice and Equality (Défaillances du système judiciaire)* the Court made another statement with more far-reaching consequences, which I deem extremely debatable. The Court found that, within a context of mutual recognition, the executing authority can only avoid the general and the concrete tests when the Council had suspended the EAW by virtue of Art. 7 TEU.⁵³ Accordingly, it is submitted that the Court has thereby limited its jurisdiction and, to say the least, the potential effects of its judgments on Art. 19 TEU as well.

Let us say, in the first place, that I respectfully disagree with the underlying premise. In my opinion, Art. 7 TEU cannot be considered *the* legal mechanism for controlling the respect of Art. 2 common values, much less exclusively.⁵⁴ In fact, the judgments in *Commission v. Poland* show another legal channel for determining that a breach of Art. 2 values has occurred, since the Court has explicitly affirmed that Art. 19 TEU is a concrete expression of the value of the rule of law. I think that the Court has admitted a limitation to its own jurisdiction (which assumedly is defined by EU primary law only) based on a recital of an old pre-Lisbon third pillar act.⁵⁵

⁵¹ Court of Justice, judgment of 15 October 2019, case C-128/18, *Dorobantu* [GC], para. 69 (emphasis added).

⁵² See M. WENDEL, *Indépendance judiciaire et confiance mutuelle: à propos de l'arrêt LM*, in *Cahiers de droit européen*, 2019, p. 188 et seq.

⁵³ *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., paras 71-72.

⁵⁴ In my opinion, defending Art. 7 TEU exclusiveness results in the aporia of claiming that the ultimate respect of the rule of law in a Union based on it escapes none other than judicial review (P. MARTÍN RODRÍGUEZ, *El estado de derecho y el sistema jurídico de la Unión Europea*, in D.J. LIÑÁN NOGUERAS, P.J. MARTÍN RODRÍGUEZ (eds), *Estado de derecho y Unión Europea*, cit., p. 165 et seq. See concurrent arguments in M. SCHMIDT, P. BOGDANOWICZ, *The Infringement Procedure in the Rule of Law Crisis*, cit., pp. 1070-1072. See also contra O. MADER, *Enforcement of EU Values as a Political Endeavour*, cit., p. 139.

⁵⁵ This line of reasoning resorting to recital 10 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States was

In any case, it might be difficult to understand why Art. 7 TEU, which refers to Art. 2 TEU values, would have made the Court limit its jurisdiction to enforce Art. 19 TEU. I think that even accepting the limitation of the jurisdiction of the Court of Justice in matters of Art. 2 TEU and the corresponding competence of the Council to sanctioning an infringing MS, there is nothing in Art. 7 TEU that would obstruct the Court from determining the legal consequences of its declaratory judgments, especially when they clearly imply that mutual trust has been broken.

Commission v. Poland (Independence of ordinary courts) is a ruling declaring the existence of a violation of the essence of the right to a fair trial in terms of judicial independence of the whole Polish system. This hardly fits with sustaining at the same time that judicial resolution only suffices for considering the general test of systemic deficiencies met but not the concrete one. If so, the executing authority would still need to appreciate a concrete risk of fundamental rights violation after seeking contact with the issuing authority and loyally considering the guarantees and assurances that the latter might offer. This means no less than trusting the assurances emanating from a judge who pertains to a judicial system authoritatively declared not to be compliant with judicial independence. In my view, both lines of case law are not compatible with each other.

It is thus submitted that such a judgment declaring the infringement of Art. 19 TEU should supersede the *Minister for Justice and Equality (Défaillances du système judiciaire)* case law requiring both general and concrete tests. Accordingly, any nuance to the full declaratory effects of the Court's judgment should be placed in the obligation incumbent upon the executing judicial authority of relying on updated information which would mean assessing if the MS concerned has fulfilled the Court's ruling.

IV. FINAL REMARKS

The innovative case law regarding Art. 19 TEU that has been settled by the Court of Justice in 2019, even if expected, must be considered a conspicuous new element of EU constitutional law. The Court has managed to put that provision at the service of the founding values of the EU enshrined in Art. 2 TEU. By means of a literal reading thereof, the Court has found a smart way to resolve the legal conundrum posed by these common values, whose transversal nature makes them spill over the classic scope of EU law and conferred competences. Whereas to this date the better solution had been protecting the EU legal system from getting contaminated by the challenges to the common values that occurred outside the scope of EU law (such as the *Aranyosi* exception in judi-

originally suggested by AG Bot in the context of refusing recognition of an EAW for grounds other than those explicitly provided for and it seems to have been assumed by the Court of Justice in *Aranyosi and Căldăraru* [GC], cit., para. 81. Anyways I think that the old third pillar legislator does not deserve such legal credit, let alone when the Lisbon Treaty abrogates former Art. 46 TEU (Treaty of Nice) limitations on the CJEU's jurisdiction.

cial cooperation in criminal matters), this new case law offers a different and more incisive legal approach since the material scope of Art. 19 has been detached from the need of the MS to be implementing EU law.

It is regrettable that the Court had to act under the tremendous pressure of being the last legal barrier because of the disgraceful passiveness of EU intergovernmental bodies and the somewhat understandable early hesitance and insecurities of the Commission in such an uncharted territory. Leaving it all to the judicial weaponry is nonetheless dangerous.

However I think that the Court has lived up to the high expectations and this should be borne in mind when the unoriginal criticisms denouncing judicial activism flourish again as usual.

In this regard, I firmly believe that the ideal holistic approach to judicial independence applied within the framework of an infringement action will prove its cleverness in the long run, especially because of the extension of the material scope of Art. 19 TEU.

Nevertheless, that extension inevitably calls for considering its potential limits. It is by thinking over these potential limits that one realizes that the strategy of the Court has not come without a price and the chief task is to ensure that the new case law is clearly defined and congruent with the extant jurisprudential *acquis*.

As to the clearly defined effects, the situation is unmistakably unfinished. The Court still has to clarify very relevant aspects of this newly interpreted Art. 19 TEU, particularly to which extent it is to be applied *sic et simpliciter* in Member States' legal orders. Here it has been submitted that the content of the obligation deriving from Art. 19 TEU should be redrafted to cover only a systemic dimension and that rejecting its direct effect would place Art. 19 TEU in an enforcement scenario deemed adequate to its brand new constitutional position.

Concerning the compatibility with existing case law, the picture is less uniform. While one might be forced to conclude that prior case law on Art. 19 TEU has been profoundly disrupted by this new case law and its extended material scope, I find that the new case law on Art. 19 TEU may in fact help identify lines of case law that were not as rock-solid as we thought. *Minister for Justice and Equality (Défaillances du système judiciaire)* is an outstanding example of this situation, perhaps because it also deals with the question of EU founding values. And, in my opinion, this is the genuine legal issue that the Court has to firmly construe: the legal articulation of the EU founding values beyond the dominion of EU political actors (i.e. Art. 7 TEU).



INSIGHTS

EU COURT OF JUSTICE STANDING UP TO ILLIBERAL DEMOCRACY: POLISH JUDICIAL “REFORMS” ON TRIAL

TWO FACES OF THE POLISH SUPREME COURT AFTER “REFORMS” OF THE JUDICIARY SYSTEM IN POLAND: THE QUESTION OF JUDICIAL INDEPENDENCE AND APPOINTMENTS

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ABSTRACT: The present *Insight* compares the decisions of two chambers of the Polish Supreme Court regarding the domestic enforcement, under the terms laid down in the Polish Constitution, of a judgment of the Court of Justice, the independence of the judicial branch and the consequences of a judicial appointment. The starting point for the analysis is an overview of recent reforms of judiciary in Poland and the judgment of the Court of Justice in *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC] (judgement of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18). The first discussed ruling of the Supreme Court aimed to fully enforce that judgment of the Court of Justice, whereas the second sought to limit its actual impact.

KEYWORDS: independence – impartiality – Court of Justice – Polish Supreme Court – National Council of the Judiciary – Poland.

I. INTRODUCTION

The analysis discusses two decisions of the Polish Supreme Court against the background of the Court of Justice judgment in joined cases C-585/18, C-624/18 and C-625/18 *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*, which was rendered on 19 November 2019.¹ The decisions of the Supreme Court concerned the

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¹ Court of Justice, judgment of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC].



domestic application of the European and constitutional standards of impartiality and independence of national judicial authorities. The first decision adopted in December 2019² by the three-judge panel of the Supreme Court was a direct follow-up of the judgment of the Court of Justice of 19 November 2019. The second decision was adopted on 8 January 2020 by the Extraordinary Control and Public Affairs Chamber, added to the Polish Supreme Court as part of 2017-2019 “reforms” of the Polish judiciary, introduced by the Law and Justice (PiS) government.

Following my earlier contribution to the debate,³ I will compare two different interpretations of the Court of Justice’s judgment given by the two chambers of the Supreme Court. These interpretations reflect two different approaches to EU law and to the Polish constitutional law. They also represent two different visions of how the 2017-2019 “reforms” changed the judiciary in Poland. The first one is consistent with the Constitution and is EU-friendly, while the second tries to justify some of the unconstitutional changes in the Polish judiciary introduced by the Polish authorities dominated by the Law and Justice party.

II. THE “REFORMS” OF THE NATIONAL COUNCIL OF JUDICIARY AND THE SUPREME COURT

The Law and Justice “reforms” in Poland covered an important part of the judicial branch, including the Constitutional Tribunal as well as the courts of general jurisdiction.⁴ For the purpose of this analysis, I will briefly focus on changes in the powers and

² Supreme Court, judgment of 5 December 2019, case III Po 7/18.

³ M. KRAJEWSKI, M. ZIÓLKOWSKI, *The Power of ‘Appearances’*, in *Verfassungsblog*, 26 November 2019, www.verfassungsblog.de.

⁴ See more about the pending constitutional crisis in Poland: W. SADURSKI, *Poland’s Constitutional Breakdown*, Oxford: Oxford University Press, 2019, p. 162 *et seq.*; W. SADURSKI, *How Democracy Dies (in Poland): A Case-Study of Anti-Constitutional Populist Backsliding*, in *Sydney Law School Research Paper*, no. 1, 2018; M. WYRZYKOWSKI, *Bypassing the Constitution or Changing the Constitutional Order outside the Constitution*, in A. SZMYT, B. BANASZAK (eds), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989-2015*, Gdansk: Gdansk University Press, 2016, p. 159 *et seq.*; M. BERNATT, M. ZIÓLKOWSKI, *Statutory Anti-Constitutionalism*, in *Washington International Law Journal*, 2019, p. 487 *et seq.*; T. DRINÓCZI, A. BIENKACALA, *Illiberal Constitutionalism in Hungary and Poland: The Case of Judicialization of Politics*, in A. BIENKACALA, L. CSINK, T. MILEJ, M. SEROWANIEC (eds), *Liberal Constitutionalism – Between Individual and Collective Interests*, Toruń: Nicolaus Copernicus University in Toruń, 2017, p. 68 *et seq.*; L. GARLICKI, *Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland?)*, in A. SZMYT, B. BANASZAK (eds), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989-2015*, Gdansk: Gdansk University Press, 2016, p. 63 *et seq.*; W. SADURSKI, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralyzed Tribunal, to a Governmental Enabler*, in *Hague Journal of the Rule of Law*, 2019, p. 63 *et seq.*; T.T. KONCEWICZ, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, in *Review of Central and East European Law*, 2018, p. 116 *et seq.*; E. ŁĘTOWSKA, A. WIEWIÓROWSKA-DOMAGALSKA, *A ‘Good’ Change in the Polish Constitutional Tribunal?*, in *Osteuropa Recht*, 2016, p. 79 *et seq.*; A. CHMIELARZ-GROCHAL, J. SUŁKOWSKI, *Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland*, in *Przegląd Konstytucyjny*, 2018, p. 93 *et*

structures of only two of the constitutional authorities, namely: the National Council of Judiciary and the Supreme Court.

The changes affecting the National Judiciary Council were introduced in 2017⁵ but effectively entered into force the following year. The new law dissolved the existing Council and dismissed its members before the end of their terms. The new law changed the way its 15 members are elected.⁶ In the past, they were chosen by judges from among the judicial community. This was replaced by an ultimate power of the Sejm (the lower chamber of the Polish Parliament) to elect 15 members of the Council. Since the Sejm was to decide on majority within the Council, the balance between three branches of power, constitutionally provided in Art. 187, para. 1, of the Constitution,⁷ has been distorted. The new law also introduced a non-transparent procedure for selection of candidates to the Council.⁸ The “recomposed” Council started to work immediately during swift and sometimes extraordinary sessions in 2018. After very short interviews for the positions of Supreme Court judges, the Council recommended to the President of the Republic more than 39 candidates for appointment. Only a few of them were not appointed due to serious public charges against them, revealed after the Council’s decision. At the same time, the Council also negatively appraised a selection of the Supreme Court judges who were appointed in previous years. Moreover, the Council supported “reforms of the judiciary” in another

seq.; P. RADZIEWICZ, *On legal consequences of judgements of the Polish Constitutional Tribunal passed by an irregular panel*, in *Review of Comparative Law*, 2017, p. 45 *et seq.*

⁵ Act of 8 December 2017 Amending the Act on the National Judiciary Council and Others Acts, (Polish) Official Journal 2018, item 3.

⁶ For more see A. ŚLEDZIŃSKA-SIMON, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, in *German Law Journal*, 2018, pp. 1847-1851.

⁷ According to Art. 187, para. 1, of the Constitution: “The National Council of the Judiciary shall be composed as follows: 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 3) 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators”.

⁸ An NGO asked the Parliament for access to public information in order to check who supported candidates to the new National Council of the Judiciary. There were doubts whether candidates achieved sufficient support demanded by the law. The request of an NGO was declined by the Parliament. Consequently, the Supreme Administrative Court ordered publication of all files. The Parliament questioned the final judgement and asked for an intervention of the Data Protection Officer, who is also dependant on the government. The Officer started his own investigation with the result that the files remain unpublished. The National Council of Judiciary was not stopped by the doubts regarding its legitimacy and legality. During extraordinary sessions at the end of 2018, following quick and short interviews with candidates for the positions of Supreme Court judges, the Council recommended forty persons to be appointed by the President of the Republic. In the next two months, the President of the Republic appointed thirty-seven candidates as new Supreme Court judges. In 2019, the Council did not slow down and recommended new candidates who were immediately appointed. For more see: B. GRABOWSKA-MOROZ, K. ŁAKOMIEC, *‘Data Wars: the Phantom Menace’ – personal data protection in the context of rule of law backsliding*, in *Reconnect Blog*, 10 February 2020, www.reconnect-europe.eu.

way: it adopted a new interpretation⁹ of the code of judicial ethics indirectly warning the Polish judges against wearing in public t-shirts with the word “Constitution” on their front.¹⁰ On another occasion, the Council supported the governmental misinterpretation of the Court of Justice judgment of 19 November 2019.¹¹ Recently, acting hand in hand with the Ministry of Justice, the Council publicly criticised the Supreme Court for making a reference to the Court of Justice for a preliminary ruling.¹²

The changes regarding the Supreme Court took effect in 2018 when the new law on the Supreme Court entered into force.¹³ It lowered the retirement age for Supreme Court judges from seventy to sixty-five. That solution was directly applicable to acting judges without leaving them any right to decide whether or not to retire at the lower age. The new law imposed on acting judges, who were sixty-five or older, an obligation to obtain the consent of the Polish President to remain in service. The new law created a number of new positions in the Supreme Court by adding two new chambers to the Court’s structure: the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber. The Disciplinary Chamber was given the ultimate power to decide on disciplinary charges against all judges in the country, including the Supreme Court judges. The Extraordinary Control and Public Affairs Chamber was empowered to control general elections as well as to repeal final decisions of courts in a newly created extraordinary appeal procedure.¹⁴

The laws on the National Council of Judiciary and the Supreme Court gave rise to a number of questions and constitutional doubts concerning, without limitation, the labour law status of judges of the Supreme Court and the Supreme Administrative Court. A few of them decided to question the new laws before the Labour Law and Social Security Chamber of the Polish Supreme Court. All three claimants (judges of the highest courts) reached the age of 65 and, according to the new law, should have retired. In order to avoid that effect, one of those judges expressed her wish to continue her service at the Supreme Court. In accordance with the new law, she asked the President of the Republic for consent to remain in service. However, the newly appointed National Council of Judiciary was given the ultimate power to assess the judge’s motion addressed to the President of the Republic. Unfortunately for the judge, the National Council of Judiciary issued a negative opinion. The remaining two judges refused to ask

⁹ Resolution of the National Council of Judiciary of 12 December 2018.

¹⁰ Since 2015 the T-shirt has become a symbol of civic resistance against the violations of constitutional law.

¹¹ Resolution of the National Judiciary of Judiciary of 21 November 2019.

¹² Resolution of the National Judiciary of Judiciary of 13 December 2019.

¹³ Act of 8 December 2017 on the Supreme Court, (Polish) Official Journal 2018, item 5.

¹⁴ The new chamber with her new powers raised reasonable doubts and awareness also in a field of competition law – see more: M. BERNATT, *Rule of Law Crisis, Judiciary and Competition Law*, in *Legal Issues of Economic Integration*, 2019, p. 345 *et seq.*

for consent, arguing that it would have been a violation of the Constitution, in particular the principle of separation of powers. The President of the Republic sent to all three judges personal (and private) letters informing them about their retirement. The judges challenged the decisions of the National Council of Judiciary and the new law on the Supreme Court demanding a declaration that their employment relationship should continue. Moreover, they claimed to be victims of discrimination on the grounds of age, which is prohibited by Council Directive 2000/78 on equal treatment in employment and occupation.¹⁵ The panel of the Labour Law and Social Security Chamber referred the matter to the Court of Justice under the preliminary ruling procedure.

III. THE COURT OF JUSTICE JUDGMENT

The case before the Court of Justice concerned mainly the issues of independence and impartiality of two national bodies. One was involved in the process of appointing and assessing Polish judges (the National Council of Judiciary).¹⁶ The second was engaged in the process of prosecuting judges (the Disciplinary Chamber). The Disciplinary Chamber has jurisdiction to hear cases concerning judges' status,¹⁷ while the National Council of Judiciary has a crucial impact on the composition of the Disciplinary Chamber. This is the reason why the panel of the Labour Law and Social Security Chamber asked the Court of Justice whether the Disciplinary Chamber could be considered an independent court within the meaning of EU law. If not, the referring court asked whether it should provide effective judicial protection to the claimants by applying the previous jurisdictional provisions and examine the cases by itself.

¹⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

¹⁶ According to Art. 187, para. 1, of the Polish Constitution: "The National Council of the Judiciary shall be composed as follows: 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 3) 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators".

¹⁷ It should be emphasized that the case started to be heard by the Labour Law and Social Security Chamber of the Polish Supreme Court because it had jurisdiction in all labour matters before the new law of the Supreme Court entered into force. The law modified also the competences of the Supreme Court Chambers and all labour law cases were moved to the Disciplinary Chamber (it was a clear intention of the political majority to provide the Disciplinary Chamber, newly added to the Supreme Court structure, with ultimate jurisdiction in all cases concerned any aspect of judges' status). However, when the case was brought to the Supreme Court, the new Disciplinary Chamber had not been appointed yet. That's why the judges did not want to wait and appealed to the existing Labour Law and Social Security Chamber, instead of the new Disciplinary Chamber of the Supreme Court.

The Court of Justice had at least three possible strategies to settle the case. The first strategy was suggested by Advocate General Tanchev.¹⁸ However, providing a minimum standard of judicial independence would have been a “very risky” choice.¹⁹ The second strategy was to give a direct opinion on the provisions and practices like those in Poland. The third strategy was to prescribe the test of the appearance of independence for national judicial authorities and to give the referring court tools to settle the pending case in accordance with EU law standards.²⁰ The strongest advantage of this last strategy was that the Court of Justice avoided a big leap in its case-law regarding the rule of law²¹ and organization standards in the judiciary. Instead of giving abstract interpretations of what independence and impartiality mean under the EU law,²² the Court opted for a “more complex argumentative and balancing approach”²³ largely based on the concept of “appearance” of independence.²⁴ This concept is based on the idea that the judicial authority “cannot give rise to reasonable doubts, in the minds of individuals, as

¹⁸ Opinion of AG Tanchev delivered on 27 June 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)*.

¹⁹ M. KRAJEWSKI, M. ZIÓLKOWSKI, *The Power of ‘Appearances’*, cit. Taking into account different soft-law sources, the European Court of Human Rights case-law as well as the Venice Commission opinions, AG Tanchev in fact suggested a standard of judiciary organization that would be a minimum set of rules and principles for the Member States regarding appointments of judges. However, the hypothetical European minimum standard of organization of the judiciary might have been questioned since the composition and competences of judicial councils is different in various EU Member States depending on the constitutionally-rooted concepts of the separation of powers. It might have also provoked opposition in the form of references to the constitutional identity and constitutional traditions of the Member States. Finally, by following Advocate General’s opinion, the Court of Justice might have faced a flood of referrals for preliminary ruling from different courts questioning their own systems of organization of the judiciary.

²⁰ *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC], cit., paras 147-152.

²¹ Court of Justice: judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*; judgment of 25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC]; judgment of 24 July 2018, case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)* [GC].

²² The Court of Justice borrowed the concept of impartiality from the European Court of Human Rights case-law (judgment of 25 February 1997, no. 22107/93, *Findlay v. the United Kingdom*, para. 73; judgment of 3 March 2005, no. 54723/00, *Brudnicka and Others v. Poland*, para. 38; judgment of 30 November 2010, no. 23614/08, *Henryk Urban and Ryszard Urban v. Poland*, paras 45-46). It should be, however, emphasised that the Court of Justice did not add any new elements. One may suggest that rather doing that, the Court of Justice used the concepts of impartiality and independence generously *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC], cit., paras 121 and 128).

²³ M. KRAJEWSKI, M. ZIÓLKOWSKI, *The Power of ‘Appearances’*, cit.

²⁴ M. KRAJEWSKI, *The AG Opinion in the Celmer Case: Why the Test for the Appearance of Independence is Needed*, in *Verfassungsblog*, 5 July 2018, www.verfassungsblog.de; See also M. KRAJEWSKI, *Who is Afraid of the European Council? The Court of Justice’s Cautious Approach to the Independence of Domestic Judges ECJ 25 July 2018, Case C-216/18 PPU, The Minister for Justice and Equality v. L.M.*, in *European Constitutional Law Review*, 2018, p. 801 et seq.

to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges".²⁵

The Court decided that it should be the Polish Supreme Court's task to consider whether the Disciplinary Chamber, as well as the National Council of Judiciary, are independent and impartial. As it was observed: "the good news is that the ECJ gave to all Polish courts a powerful tool to ensure each citizen's right to a fair trial before an independent judge, without undermining the systems of judicial appointments in the other Member States".²⁶ Together with M. Krajewski we argued that it was probably the best way for the ECJ to maintain equilibrium in a pluralistic word of different constitutional solutions in the EU Member States:²⁷ "The bad news is that the test of appearance may easily be misused or abused. Rather than resolving the issue, the ECJ judgment opened a new chapter of the saga about judicial independence in Poland".²⁸

IV. THE EU-FRIENDLY FACE OF THE SUPREME COURT

After the Court of Justice gave a green light for national courts to assess judicial independence under Art. 47 of the Charter of Fundamental Rights of the European Union, the panel of the Labour Law and Social Security Chamber ruled directly, and for the first time in Polish constitutional history, that the Disciplinary Chamber is not a court within the meaning of EU law.²⁹ The National Council of Judiciary was recognized as a non-independent and not-impartial authority. As a consequence, the Disciplinary Chamber could not hear any case regardless of the power given to it by the binding statutory provisions. The application of that provision would have been a direct violation of EU law. Therefore, the panel decided to hear and to adjudicate in the pending case by itself, excluding the Disciplinary Chamber. The claimant's appeal was granted, and the decision of the National Council of the Judiciary was annulled.

As a result, the panel of the Labour Law and Social Security Chamber enforced the judgment of the Court of Justice, and called other courts for a judicial review of the in-

²⁵ A.K. (*Indépendance de la chambre disciplinaire de la Cour suprême*) [GC], cit., para. 134.

²⁶ M. KRAJEWSKI, M. ZIÓŁKOWSKI, *The Power of 'Appearances'*, cit.

²⁷ M. KRAJEWSKI, M. ZIÓŁKOWSKI, *EU Judicial Independence Decentralised: A.K. and others v Sąd Najwyższy (the Polish Supreme Court)*, in *Common Market Law Review* (forthcoming), and compare with slightly different assessment of the judgement offered by M. LELOUP, *An Uncertain First Step in the Field of Judicial Self-government ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A.K., CP and DO*, in *European Constitutional Law Review*, 2020, pp. 11-13. According to M. Lelup it was the first opportunity for the Court of Justice "to address [...] judicial councils and to elaborate on any standards to which they should adhere" (p. 11). Instead of doing that, the Court of Justice failed to develop criteria for judicial appointments and finally offered "protection that is lower than the one found in the case law of the Strasbourg Court" (p. 11). For criticism see: M KRAJEWSKI, M. ZIÓŁKOWSKI, *EU Judicial Independence*, cit.

²⁸ M. KRAJEWSKI, M. ZIÓŁKOWSKI, *The Power of 'Appearances'*, cit.

²⁹ A.K. (*Indépendance de la chambre disciplinaire de la Cour suprême*) [GC], cit.

dependence and impartiality of new judicial authorities³⁰ and assessed the appearance of independence of the National Council of the Judiciary and the Disciplinary Chamber. The assessment was, however, slightly modified in comparison to what the Court of Justice said. According to the Court of Justice, a non-independent procedure of a judge's appointment alone does not determine the result of an assessment of independence of that judge,³¹ whereas the panel of the Supreme Court ruled that in case of the highest court's judges, the result of the test of appearance hinged on the impartiality and independence of an authority like the National Council of Judiciary.³² Therefore the visible lack of independence of the authority responsible for the appointment procedure has a considerable impact on the independence of the judges appointed in such a procedure.

The National Council of Judiciary was recognised as a non-independent body for the following reasons. Firstly, it was established with a violation of the constitutional provisions. The term of the previously elected members of the Council was terminated by the Parliament, whereas the constitution did not give the Parliament such power.³³ The composition of the new Council (established in 2018) violated the constitutional principle of separation of powers.³⁴ Secondly, the new members of the Council were elected in non-

³⁰ *III Po 7/18*, cit., para. 22.

³¹ The reason was that there are different models of judges appointments in the Member States (that is, by an authority like the National Council of Judiciary or the executive), so the Court could not claim that low level, or even lack of independence, at the beginning of the appointment means that judges lack independence.

³² *III Po 7/18*, cit., para. 25.

³³ *Ibid.*, paras 40-41.

³⁴ The Supreme Court observed that: "The mechanism of electing NCJ members was considerably modified by the amending statute of 8 December 2017 [...]. Pursuant to Article 1(1), the Sejm shall elect fifteen Council members for a joint four-year term of office from among judges of the Supreme Court, common courts, administrative courts, and military courts. When making its choice, the Sejm shall – to the extent possible – recognize the need for judges of diverse types and levels of courts to be represented in the Council. Notably, the provisions of the Constitution of the Republic of Poland have not been amended to the extent of NCJ membership or NCJ members' appointment. This means that a statute could only lawfully amend the manner in which Council members (judges) were elected by judges rather than introduce a procedure of election of NCJ judicial members by the legislature. The aforementioned amendment to the NCJ Act passed jointly with the new Act on the Supreme Court provides a solution whereby the legislature and the executive – regardless of the long statutory tradition of a part of the Council members being elected by judges themselves, reflecting the Council's status and mandate, and of the judiciary being recognized as a power separate from other powers under the Constitution of the Republic of Poland – gain a nearly monopolistic position in deciding the NCJ membership. Today, the legislature is responsible for electing fifteen members of the NCJ who are judges, with six other NCJ members being parliamentary representatives (four and two of whom are elected by the Sejm and the Senate, respectively). The new mechanism of electing NCJ members who are judges has resulted in the decision on appointment of as many as twenty-one of the twenty-five (84 %) of Council members resting with both parliamentary houses. Furthermore, the Minister of Justice and a representative of the President of the Republic of Poland are *ex officio* Council members: consequently, twenty-three of the twenty-five Council members are ultimately appointed by authorities other than the judiciary. This is how the separation of powers and the checks and balances between the legislative, executive,

transparent proceedings.³⁵ Thirdly, according to the panel: “that elected Council members have directly benefitted from recent changes. They have been appointed to [...] positions at courts whose presidents and vice-presidents have been dismissed *ad hoc*, or applied for promotion to a court of higher instance”.³⁶ The fourth reason was that the new Council directly supported the most recent reforms of judiciary in Poland, criticised the Supreme Court and its judges.³⁷ The Supreme Court referred to the publicly expressed opinions, official decisions of the Council and its members to show how they stood hand in hand with the legislative and executive.³⁸ Additionally, the Court noticed that the Council's impartiality and independence were questioned publicly many times by the NGOs, lawyers' associations as well as the judges of courts of general jurisdiction.³⁹

Declaring lack of independence and impartiality of the National Council of Judiciary became the first step for the panel of the Labour Law and Social Security Chamber in assessing the Disciplinary Chamber. It should be remembered that this chamber was *ab initio* introduced into the structure of the top court. It was also granted an extraordinary position, funds and powers. It was appointed from the scratch, after candidates were heard before the non-independent National Council of Judiciary. The Disciplinary Chamber was recognized as a non-independent body for the following reasons. Firstly, its members were recruited from among individuals with publicly visible and strong connections to the legislature or the executive loyal to Law and Justice party.⁴⁰ Secondly, the rules and principles regarding the appointment of the Disciplinary Chamber members were modified twice halfway through the appointment procedure. Both modifications were made to exclude other candidates from the procedure and deprive them of the right to appeal to an independent court.⁴¹ The National Council of Judiciary was given a guarantee that its choice of candidates to the Disciplinary Chamber could not be questioned before any national court. The third reason was that the Disciplinary Chamber supported the directly unconstitutional reforms of the judiciary system and criticised⁴² Polish judges for references for preliminary ruling submitted to the Court of Justice.⁴³

However, the judgment of 5 December 2019 is important for at least three other reasons. The panel of the Labour Law and Social Security Chamber of the Supreme

and judiciary branches have been distorted, while having been duly described under Article 10 of the Constitution of the Republic of Poland as a foundation of a democratic rule of law state model (Article 2 of the Constitution of the Republic of Poland)” (*III Po 7/18*, cit.).

³⁵ *III Po 7/18*, cit., paras 46-48.

³⁶ *Ibid.*, para. 49.

³⁷ *Ibid.*, paras 50-51.

³⁸ *Ibid.*, paras 51-53.

³⁹ *Ibid.*, para. 56.

⁴⁰ *Ibid.*, para. 66.

⁴¹ *Ibid.*, paras 67-68.

⁴² Resolution of the National Council of Judiciary of 13 December 2019.

⁴³ *III Po 7/18*, cit., paras 75-78.

Court opted for a realistic approach to law in time of constitutional crisis.⁴⁴ It called for an examination of the law not just as it is expressed in the newly added statutory provision, but as it is actually applied, particularly by the newly appointed public officers. According to the panel, when it comes to the assessment of impartiality and independence of authorities like the National Council of Judiciary or the Disciplinary Chamber, a court cannot limit itself to the wording of the binding statutory provisions.⁴⁵ Even a perfect constitutional law and strong guarantees of independence may fail to protect authorities from democratic and constitutional backsliding. A national court, therefore, has to take into account how the authorities exercise powers in a broader legal and social context. The panel did it and enumerated the acts and declarations of the National Council of Judiciary (as well as its members) that have undermined their appearance of independence and impartiality. The long list may serve now as a point of reference for other national courts applying the test of appearance of independence.

The judgment of 5 December 2019 seems to be underpinned by a dialogist vision of the relationship between EU law and national law. Without any strong attachment to the constitutional hierarchy and collisions of norms, and without any references to the doctrine of absolute supremacy of the Constitution,⁴⁶ the panel of the Labour Law and Social Security Chamber of the Supreme Court separated its role as dialogue partner for the Court of Justice (under the framework of preliminary ruling procedure) from its role as dialogue partner for the Constitutional Tribunal (under the constitutional framework).⁴⁷ On the one hand, the three-judge panel underlined its constitutional authority and legitimacy to hear the case. The judges referred to the direct application of the Constitution and the principle of primacy of the EU law enshrined in Art. 91, paras 2 and 3, of the Constitution⁴⁸ as well as to the principle of EU-compliant statutory interpretation, which is well-established in the constitutional case-law.⁴⁹ On the other hand, the three-judges panel fully applied the *Simmmenthal* doctrine⁵⁰ and subsequent judgments

⁴⁴ *Ibid.*, para. 22.

⁴⁵ *Ibid.*, para. 26.

⁴⁶ Proclaimed in Poland directly by the Constitutional Tribunal in the accession judgement of 18 May 2005, case K 18/04.

⁴⁷ According to Art. 193 of the Constitution: "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court".

⁴⁸ According to Art. 91, paras 2 and 3, of the Constitution: "2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. 3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

⁴⁹ Constitutional Tribunal, judgment of 23 May 2003, case K 11/03.

⁵⁰ Court of Justice, judgment of 9 March 1978, case C-106/77, *Amministrazione delle finanze dello Stato v. Simmenthal*, para. 24.

of the Court of Justice,⁵¹ with particular attention to *Cordero-Alonso*⁵² and *Filipiak*⁵³ cases. The Supreme Court reminded that the constitutionality of a statutory provision, recognized by the national constitutional court, does not mean that this provision is also compatible with EU law. Moreover, a decision of national constitutional court to temporarily maintain in force the unconstitutional provision, cannot stop a national court, acting as a European court, from applying EU law.

All those remarks were necessary for the Supreme Court because the questions regarding the impartiality and independence of the Disciplinary Chamber and the National Council of Judiciary had not even been noticed either by the Polish President or by the Constitutional Tribunal. It should be remembered that the President appointed new judges without questioning the statuses of the Disciplinary Chamber and the National Council of Judiciary. The unconstitutionally composed Constitutional Tribunal held the provisions on the National Council of Judiciary to compliant with the Polish Constitution.⁵⁴ Neither the President of the Republic nor the Constitutional Tribunal waited for the judgment of the Court of Justice. Therefore, the Supreme Court had to confront itself with the national statutes being recognized as constitutional by the Constitutional Tribunal and complied with by the President of the Republic. Those statutes not only caused effects inconsistent with EU law (such as the creation of a non-independent judicial authority like the National Council of Judiciary), but – at the same time – they modified the structure and powers of the Supreme Court.

The main issue for the Supreme Court was to deny the effect of those statutes without provoking other constitutional authorities and involving the Constitutional Tribunal. The easiest answer from the EU law perspective was more complex from the constitutional law angle. Nevertheless, the Supreme Court followed the path of the two dialogues in which every court is simultaneously involved. One is with the Court of Justice, second – with the Constitutional Tribunal. According to the commented judgment, when it comes to human rights protection as well as to perception of judiciary independence, a national court has to choose the highest possible standard, no matter what the constitutional provision and interpretations say. As a consequence, courts may be involved in a dialogue with the Court of Justice only and avoid the Constitutional Tribunal. It seems that according to the discussed judgment, the Tribunal would remain the “court having the last say”, but not in all constitutional matters. The Supreme Court re-

⁵¹ Court of Justice, judgment of 8 September 2010, case C-409/06, *Winner Wetten* [GC].

⁵² Court of Justice, judgment of 7 September 2006, case C-81/05, *Cordero Alonso*.

⁵³ Court of Justice, judgment of 19 November 2009, case C-314/08, *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*.

⁵⁴ Constitutional Tribunal, judgment of 20 June 2017, case K 5/17.

served for itself at least the right to decide whether to act within the Union or national framework of human rights protection.⁵⁵

V. THE RESTRAINED FACE OF THE SUPREME COURT

The reaction to the above-mentioned judgment of the Supreme Court was almost immediate. Less than a month later, the Extraordinary Control and Public Affairs Chamber adopted its resolution,⁵⁶ also concerning the judgment of the Court of Justice of 19 November 2019.

The resolution of 8 January is a EU law-friendly decision, but only at the first sight.⁵⁷ The judges of the Extraordinary Control and Public Affairs Chamber underline that the judgment of the Court of Justice should be enforced and it is a duty of the Supreme Court to apply the test of appearance whenever necessary.⁵⁸ The judges also underline that there is no doubt that criteria provided by the Court of Justice should be applicable to the Disciplinary Chamber.⁵⁹ Its status may raise a reasonable doubt in the minds of individuals. Moreover, the judges share the view that the Constitutional Tribunal judgments regarding the status of the National Council of Judiciary should not refrain the Supreme Court from applying the Court of Justice judgment and its test of appearance.⁶⁰ However,

⁵⁵ The Polish constitution law has never reserved for the Constitutional Tribunal any monopoly to interpret the constitutional provisions similarly to the way international treaties do it for the international tribunals. Before the Constitution entered into force, the Tribunal was deprived of the power to give abstract and universally binding constitutional interpretations. The Tribunal was not even mentioned as a guardian of the Constitution by the then binding provisions (compare with Article 126). By 2015, the Tribunal archived that position in the Polish constitutional system by force of its arguments rather formal legitimacy.

⁵⁶ The Supreme Court (sitting as a panel of seven judges of the Extraordinary Control and Public Affairs Chamber), resolution of 8 January 2020, case I NOZP 3/19.

⁵⁷ The panel pointed out that "I. The Supreme Court, in reviewing an appeal against a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, examines – upon the grounds for the appeal and within its scope – whether the National Council of the Judiciary is an independent body according to the criteria as determined in the judgment of the Court of Justice of the European Union of 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18, A.K. and Others versus the Supreme Court, paragraphs 139-144. II. The Supreme Court sets aside, within the scope of the appeal, a resolution of the National Council of the Judiciary on presenting a candidate for the office of judge to the President of the Republic of Poland, provided that an appellant proves that the lack of independence on the part of the National Council of the Judiciary did affect the contents of such a resolution or provided that – having regard to the constitutional prohibition of reviewing effectiveness of the act of appointment to the office of judge by the President of the Republic of Poland, as well as the relation resulting thereof – the appellant will demonstrate the circumstance indicated in paragraph 125, or jointly the circumstances listed in paragraphs 147-151 of the judgment referred to in point I of the resolution, indicating that the court in whose bench such a judge will sit will not be independent and impartial." (*I NOZP 3/19*, cit.).

⁵⁸ *I NOZP 3/19*, cit., para. 9.

⁵⁹ *Ibid.*, para. 15.

⁶⁰ *Ibid.*, paras 16-17.

the panel of the Extraordinary Control and Public Affairs Chamber did not mention that the Constitutional Tribunal had been unconstitutionally composed, which the panel of the Labour Law and Social Security Chamber did expressly one month earlier.

The EU-friendly disguise can be seen through upon a more careful reading of the resolution of 8 January 2020. The panel of the Extraordinary Control and Public Affairs Chamber limited the enforcement of the judgment of the Court of Justice by using a very particular (and pro-governmental) interpretation of the constitutional provisions. According to the resolution, appointment of judges cannot be questioned before any court or any authority in Poland regardless of the nature and scope of violation of the law.⁶¹ The appointment of a judge is a "personal"⁶² power (prerogative)⁶³ of the President of the Republic. There are no dedicated statutory appellate proceedings in which the appointment could be changed, challenged or annulled.⁶⁴ In the panel's opinion, any mistake or violation of law made before the appointment has no effect on the judicial authority and legitimacy once the President of the Republic has made the decision. In other words, lack of independence and impartiality of the National Council of Judiciary, which selects candidates for judges, as well as that candidates' own lack of independence or impartiality from the executive during the appointment proceedings cannot undermine the independence of the candidates-turned-judges. The test of appearance of their independence cannot be applied to reasons and facts from the period before their appointments.⁶⁵

The resolution of 8 January 2020 differs from the judgment of 5 December 2019 for a host of reasons. First, the resolution presents a different approach to the EU law and its relationship with constitutional law. The judges of the Extraordinary Control and Public Affairs Chamber opted for a more traditional and hierarchical approach. They underlined an absolute primacy and application of the Constitution.⁶⁶ They also directly referred to limitations of EU law, expressed mainly in Art. 4 TEU.⁶⁷ The second difference between the two decisions concerns the standards of EU law regarding the appointment of judges. Whereas the judgment of 5 December 2019 focused on the functional guarantees for judicial independence under the Art. 47 of the Charter of Fundamental Rights of the European Union, the resolution of 8 January 2020 underlined the EU's lack power to regulate, or even direct, how the appointment of judges should take place in the Member States.⁶⁸ The judges of the Extraordinary Control and Public Affairs

⁶¹ *Ibid.*, para. 32.

⁶² *Ibid.*, paras 36-37.

⁶³ It should be underlined that similar arguments and interpretation of the Polish constitutional provisions were presented by the Polish Government in the case *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC], cit.

⁶⁴ *I NOZP 3/19*, cit., para. 32.

⁶⁵ *Ibid.*, para. 32 *in fine* and para. 33.

⁶⁶ *Ibid.*, paras 18 and 21.

⁶⁷ *Ibid.*, para. 19.

⁶⁸ *Ibid.*, para. 24.

Chamber pointed out that “Article 19 TEU does not specify the criteria of appointment, the appointing entity; neither does it release the Member States from the constitutional obligation to guarantee judicial appointments’ democratic legitimacy. Nor is the matter regulated by any other provision of EU law”.⁶⁹ The third difference worthy of mention is that, according to the resolution of 8 January 2020, the independence and impartiality of the newly appointed judges (including members of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber) cannot be evaluated by reference to lack of independence and impartiality of the National Council of Judiciary. According to the judgment of 5 December and the judgment of the Court of Justice, this is the starting point for the evaluation. The fourth difference is that the panel of the Extraordinary Control and Public Affairs Chamber did not share the legal realism of the panel of the Labour Law and Social Security Chamber. More specifically, the resolution of 8 January 2020 skipped the constitutional crisis context and precedent-setting nature of the issues heard by the Supreme Court. Instead, the panel underlined the role of the President of the Republic as the guardian of the Constitution,⁷⁰ the constitutional authority of the National Council of Judiciary,⁷¹ and the binding force of the new law.⁷² Last but not least, according to the judgment of 5 December 2019, the test of appearance applies to all newly appointed judges and covers all facts regarding their appointments and activity. The test was also developed for all national courts acting as European courts. According to the resolution of 8 January 2020, the test is addressed only to the Supreme Court⁷³ and it covers the facts and activities of the newly elected judges only after their appointment. This would mean that an important part of the Court of Justice directions⁷⁴ would have no effect in the Polish system.

To sum up, the newly appointed judges sitting on the panel of the Extraordinary Control and Public Affairs Chamber reacted directly to the judgment of the panel of the Labour Law and Social Security Chamber. They limited the enforcement of the judgment of Court of Justice as well as the judgment of 5 December 2019 to protect the effects of the 2017-2019 “reforms” of the judiciary in Poland, but also to protect the validity of their own appointments, their authority as well as their appearance of independence. As a result, the panel pointed out that the test developed by the Court of Justice and applied in the judgment of 5 December 2019 should not be applied under the Polish constitutional law with respect to the past. As for the future, the test was limited by the newly appointed judges so severely that it is almost impossible to carry it out.

⁶⁹ *Ibid.*, para. 24 *in fine*.

⁷⁰ *Ibid.*, para. 34.

⁷¹ *Ibid.*, paras 40-41.

⁷² *Ibid.*, para. 41 *et seq.*

⁷³ *Ibid.*, para. 59.

⁷⁴ A.K. (*Indépendance de la chambre disciplinaire de la Cour suprême*), cit., paras 125 and 147-151.

VI. CONCLUSIONS

The disagreement between the two (“old” and “new”) chambers of the Supreme Court, discussed above, resulted in a situation without precedent. On 23 January 2020, sixty judges of the Supreme Court after an extraordinary joint session of three (“old”) chambers of Poland’s top court adopted a new resolution.⁷⁵ It mainly followed the Supreme Court judgment of 5 December 2019 and the judgment of the Court of Justice. Firstly, the Supreme Court ruled that the Polish courts of general jurisdiction could be recognised as unlawfully composed when those courts delivered rulings with the participation of judges selected by the non-independent National Council of Judiciary. The lawfulness of a court’s panel should be assessed on a case by case basis and with respect to the concept of judicial independence provided by the Polish Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights. The Supreme Court limited this effect to the judgments rendered after 23 January 2020. Secondly, the Supreme Court ruled that the National Council of Judiciary was not independent and the Disciplinary Chamber was not a court in the sense of constitutional law and EU law. Thirdly, the Supreme Court declared that newly elected judges of the Supreme Court, in particular judges of the Disciplinary Chamber, could not lawfully sit on panels of the Supreme Court.

Unfortunately, the resolution of 23 January 2020 did not settle the disagreement between “old” and “new” chambers of the Supreme Court regarding the assessment of judicial independence in Poland. The resolution was ignored by the unconstitutional and non-independent Disciplinary Chamber as well as by the National Council of Judiciary.⁷⁶ Moreover, the new law on courts,⁷⁷ which entered into force on 14 February 2020, expressly prohibited all courts in Poland⁷⁸ from applying the test of appearance in any cases concerning judges who were appointed after 2018, and with the active involvement of the non-independent National Council of Judiciary. Therefore, the bad out-

⁷⁵ The Supreme Court (sitting as a panel of the Civil Chamber, the Criminal Chamber and the Labour Law and Social Security Chamber), resolution of 23 January 2020, case No. BSA I-4110-1/20. For more see M. KRAJEWSKI, M. ZIÓŁKOWSKI, *EU Judicial Independence*, cit.

⁷⁶ For more on the current situation see: A. APPLEBAUM, *The Disturbing Campaign Against Poland’s Judges*, in *The Atlantic*, 28 January 2020, www.theatlantic.com.

⁷⁷ Act of 20 December 2019 Amending the Act on System of Courts of General Jurisdiction, the Act on the Supreme Court as well as Other Acts, Official Journal 2020, item 190.

⁷⁸ The new law introduced new disciplinary offences. One of these offences is an act that questions the lawfulness and legal consequences of a judge’s appointment. Moreover, according to the new law, a judge cannot question another judge’s power to hear cases, even if the latter does not give the appearance of independence. The new provisions expressly prohibit judges from undermining the legitimacy and authority of the Constitutional Tribunal and the National Council of the Judiciary. The sanctions for a violation of those provisions are clear. The judge may be moved to another court or removed from office (see Arts 42a and 107 of the Act of 27 July 2001 on the System of Courts of General Jurisdiction; as amended).

look for the judiciary in Poland is more likely to become true as the restrained face of the Supreme Court is more likely to dominate in the nearest future.⁷⁹

In April 2020 the unconstitutionally composed Constitutional Tribunal gave its helping hand to the political majority, to the Disciplinary Chamber and to all “new” judges of the Supreme Court. For the first time in the Polish constitutional history, the Tribunal unlawfully suspended the Supreme Court’s panels to prevent “old” judges from the application of the Court of Justice judgement.⁸⁰ Then the Tribunal ruled that the Supreme Court’s resolution of 23 January 2020 is unconstitutional and has no effect.⁸¹ If that was not enough, the politically captured Tribunal ruled that the Supreme Court’s interpretation of EU law and the Constitution was a violation of the Parliament’s power to adopt statutes.⁸² Careful reading of the Polish Constitution⁸³ and statute on the Supreme Court⁸⁴ should be sufficient to claim that the Tribunal had no power to question the Supreme Court constitutional position and powers to interpret and apply the law. However, almost everything is possible when the political majority, and captured Constitutional Tribunal, have been playing “constitutional hardball”⁸⁵ for a long time and now start to act outside the constitutional system (“outside any procedures”).⁸⁶

⁷⁹ It should be noted that the President of Poland appointed one of the “new judges” as the First President of the Supreme Court. She cannot be considered an independent judge in light of the judgment of the ECJ in *A.K. (Indépendance de la chambre disciplinaire de la Cour suprême)* [GC], cit., and the subsequent rulings of the Polish Supreme Court. See M. KRAJEWSKI, M. ZIÓŁKOWSKI, *Can an Unlawful Judge be the First President of the Supreme Court?*, in *Verfassungsblog*, 26 May 2020, www.verfassungsblog.de.

⁸⁰ Constitutional Tribunal, decision of 28 January 2020, case Kpt 1/20.

⁸¹ Constitutional Tribunal, judgement of 20 April 2020, case U 2/20.

⁸² Constitutional Tribunal, decision of 21 April 2020, case Kpt 1/20.

⁸³ Art. 188 of the Constitution limits the Tribunal’s power to rule on unconstitutionality of normative acts only (i.e. statutes, international treaties or Government’s acts). The Supreme Court’s resolution, giving the interpretation of binding statutory provisions, cannot be recognised as a normative act even in a very progressive conceptual framework of judicial activism. Moreover, the Supreme Court is directly empowered in the Constitution to give interpretations of the law, which is formally and substantially different from Parliament’s act (Art. 183 of the Constitution).

⁸⁴ Art. 87 act on the Supreme Court directly provides the Supreme Court power to adopt resolutions in order to give an abstract interpretation of binding provisions. That kind of resolutions is binding for all panels of the Supreme Court.

⁸⁵ A term borrowed from by M.V. TUSHNET, *Constitutional Hardball*, in *John Marshall Law Review*, 2004, p. 523 *et seq.*

⁸⁶ To quote (in)famous Jarosław Kaczyński, when he silenced the Speaker of the Sejm during a parliamentary debate. In 2017 Kaczyński took the floor, ignored the parliamentary conventions and violated the Rules of Procedure. After he was asked by the Speaker as to the legal basis of his intervention, he honestly replied: “outside any procedures” and continued his speech to the parliament.



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