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## EDITORIAL

### NEITHER REPRESENTATION NOR VALUES? OR, “EUROPE’S MOMENT” – PART II

Part I of this *Editorial* dealt with the interrelation between representation and taxation reflected in the measures adopted or envisaged by the EU institutions to face the COVID-19 pandemic. It argued that a more courageous approach in each phase of this virtuous circle could have significantly enhanced the legitimacy of the Union as an entity expressing the sentiment of the European citizenry and taking action to fulfil its common interest.

There is, however, another relationship which is at stake in these turbulent days. Representation also entails the existence of a set of distinctive values shared by a community, whose protection and promotion should be shared by its representatives. This conceptual scheme, simplistic as it may be, can help us understand the story of the conditionality mechanism designed to exclude EU Member States (MS) which violate the Union’s fundamental values from the financial assistance provided for by the Next Generation EU (NGEU) project.

As is well known, this mechanism is established by Regulation 2020/2092 of the European Parliament and of the Council, of 16 December 2020, on a general regime of conditionality for the protection of the Union budget. It is equally notorious that, prior to its approval, the European Council adopted, with the usual method of *consensus*, a declaration related to its implementation, incorporated in its Conclusions of the meeting of 10 and 11 December 2020.

This declaration is composed of two parts. First, it directs the Commission not to implement, or to propose the implementation, of the Regulation before the adoption of guidelines to be drafted “in close consultation with the Member States”, and before the adoption of a decision of the CJEU following an action for annulment which, presumably, some MS will soon lodge (para. 2, let. c). As noted by early commentators, this part of the declaration interferes with the prerogatives of the Commission to ensure the application of the law under the Treaties, conferred on it by Art. 17 TEU. Moreover, it will undermine the effectiveness of the substantive obligation to respect the rule of law, by relaxing its means of control.

In a different and perhaps even more insidious way, the declaration tends to use the notions contained in the Regulation to empty it of its very essence. This logical operation



unfolds along three steps. First the declaration highlights the functional link between the mechanism and its objective, namely, to protect the Union's budget (para. 2, let. a). Second, on the basis of this assumption, it stresses the subsidiarity role of the new mechanism *vis-à-vis* other mechanisms specifically aimed to supervise the implementation of the budget (para. 2, let. d). Finally, the declaration draws the ultimate consequence of that functional link by imposing a standard of strict proportionality between the consequences produced by a possible breach of the rule of law on the financial interests of the Union and the measures to be adopted to remedy it (para. 2, let. e). This link is further enhanced by the requirement that the relevance and use of evidence demonstrating the existence of a breach of the rule of law "will be determined exclusively in light of the Regulation's aim to protect the Union's financial interests" (para. 2, let. h).

This test appears to be a *probatio diabolica*; one which will presumably render inoperative the conditionality mechanism. If it is the case that any breach of the rule of law must be causally linked to the Union's financial interests in order to be sanctioned, the mechanism appears to be doomed to fail. While political regimes inspired by the principle of democracy and the rule of law have proved throughout history to be the most virtuous (or, perhaps, the least vicious), it is much more difficult to demonstrate, on the basis of the properly grounded empirical evidence, their link with mundane interests of a financial nature. By imposing a causal link between a breach of the rule of law and a damage to the financial interests of the Union, the European Council has *de facto* blocked the operation of the mechanism and deprived the Regulation of its *effet utile*.

This, presumably, was the ultimate aim of the European Council when trying to square the circle: to be nominally uncompromising on the Unions' values whilst rendering it particularly difficult, if not even impossible, to establish their breach.

The legal method used by the European Council to attain its objective deserves close attention. If at first sight it constitutes a faithful implementation of the principle of conferral – establishing a link between the objectives of the Union and the means designed to attain them – on closer inspection, it appears technically wrong and politically perverse.

Regulation 2020/2092 is based on Art. 322, para. 1, let. a), which gives the EU the power to adopt "financial rules" to implement the budget and to attain the objectives laid down by Art. 310, paras 4 and 5, namely, to ensure the sound financial management and to counter fraud and any other illegal activities affecting the financial interests of the Union.

At first sight, the technical analysis conducted on the legal basis of Regulation 2020/2092 seems to lead to the conclusion that, in spite of the clear interferences by the European Council on the prerogatives of other Institutions of the Union – alas, a frequent occurrence – the interpretive declaration of the European Council has simply stated the obvious, namely that the mechanism of the Regulation must only pursue its objectives, according to the classic doctrine of conferred competences.

This conclusion, however, is not only cynical. It may also prove to be undermined by a proper understanding of the relationship between the Union's values as laid down in Art. 2 TEU and its system of competences.

Art. 3, para. 1, TEU expressly describes the promotion of its values as one of the Union's aims. Beyond its rhetorical effect, this provision can hardly be devoid of legal effect. The promotion of the values as one of the aims of the Unions' action rather suggests that they form part of the standards against which the legality of Union's legal acts must be assessed. This view is not unrealistic. It appears to be consistent with the broad logic of the Treaties and was upheld by recent case law of the Court of Justice.

The logic of the EU competences was significantly altered by the Lisbon Treaty, which added a number of general objectives cutting across the policies and actions of the Union. The effect of these cross-cutting objectives is determined by Art. 7 TFEU, which directs the Union to "ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". If such an effect is produced by provisions enshrined in the TFEU, which protect interests relevant but not of a fundamental character, it can be logically inferred that it must also be produced by Art. 3, para. 1, TEU, which protects the fundamental values of the Union. This assumption is further upheld by Articles 3, para. 5, and 21, paras 1 and 2, which specify, albeit with a varying phraseology, that the Union's values must guide the full range of the Union's actions and policies within the scope of the EU's external action. If such an effect is expressly imposed by the Treaties in the domain of the Union's external action, *a fortiori*, it should apply to its internal action.

In addition, the role exerted by the Union's values has been acknowledged by the Court of Justice, which has dismissed the idea that the Union's values have no effect on the system of competence. It has actively developed the doctrine that values must "integrate" the set of the "objectives and principles" which must be attained by the Union's policies and actions (See Opinion 1/15, paras 143-144).

Regulation 2020/2092 seems to constitute the perfect implementation of this doctrine. It is apparent that measures of financial assistance to political regimes repudiating the Union's values could not be further from the promotion of these values under the terms of Art. 3 TEU.

The idea promoted by the political declaration of the European Council – that violations of the rule of law come within the scope of the Regulation only if this violation produces a detrimental impact of the principle of the sound financial management – is therefore untenable, in legal logic no less than legal ethics. There would be no need to make a Regulation to determine that conduct of a MS affecting the sound financial management of EU funds are in breach of EU law; Art. 310, para. 5, and the existing rules implementing it would have been more than sufficient.

Nor should the declaration be regarded as an intelligent expedient necessary to overcome the objections of Poland and Hungary. These MS perceived Regulation 2020/2092

as a serious obstacle to the pursuit of their own model of illiberal democracy within the Union and did not shy away from threatening to veto the new decision on own resources and on the Multiannual financial framework *i.e.* the financial sources of NGEU.

The option of adopting the acts contributing to the NGEU project through enhanced cooperation was never seriously considered. Yet this move could have made it technically possible, though laborious, to adopt the decisions on financial resources by unanimous voting of the MS participating in that enterprise. Incidentally, such a road would have radically changed the role of values in this troubled context; from a means of avoiding financial sanctions to a premise for being part of a project aimed at re-founding the Union from its very foundations.

The European Council chose the opposite path. This is not only the latest exercise in intergovernmentalism, a disease which is gradually perverting the entire edifice of the European integration. It is also an exercise in political hyperrealism, which creates the illusion of reality while remaining in the realm of art.

Beyond the problems surrounding its application, Regulation 2020/2092 symbolically expresses a very basic paradigm: participation in the integration project entails the sharing of its fundamental values. Its unconditioned adoption, therefore, would have transposed the discourse on Union's values from axiology to law; it would have definitively established the Union as a community of values; it would have constituted a revolutionary start for a new phase of the process of integration. To have given all this up in the name of a political compromise has indelibly stained this European moment.

**E. C.**



## ARTICLES

# MIND THE FOG, STAND CLEAR OF THE CLIFF! FROM THE POLITICAL DECLARATION TO THE POST-BREXIT EU-UK LEGAL FRAMEWORK – PART I

ADAM ŁAZOWSKI\*

TABLE OF CONTENTS: I. Introduction. – II. Genesis of the Political Declaration. – III. Transitional period and post-Brexit negotiations. – III.1. The transitional period: *raison d'être* and the basic parameters. – III.2. Political Declaration and negotiations of the future EU-UK framework. – III.3. Post-Brexit negotiations. IV. Post-Brexit legal framework: from the drawing board to the Christmas Eve deal. – IV.1. Introduction. – IV.2. The big picture: the EU's relations with neighbours. – IV.3. Towards the post-Brexit legal framework: the Political Declaration and early proposals. – V. The post-Brexit EU-UK legal framework: an overview. – V.1. Introduction. – V.2. EU-UK Trade and Cooperation Agreement. – V.3. Euratom-UK Agreement on Co-operation on the Safe and Peaceful Uses of Nuclear Energy. – V.4. EU-UK Agreement on Security Procedures for the Exchange of Classified Information. – V.5. EU-UK Withdrawal Agreement. – VI. Foundations for EU-UK cooperation. – VI.1. Introduction. – VI.2. The future relationship based on shared values. – VII. Institutional set-up. – VII.1. Introduction. – VII.2. Institutional framework in the EU-UK Withdrawal Agreement. – VII.3. Skeleton of the institutional structure envisaged in the Political Declaration. – VII.4. EU-UK Joint institutions in the post-Brexit framework. – VIII. Conclusions.

ABSTRACT: The Brexit saga has reached a watershed moment. The United Kingdom withdrew from the European Union on 31 January 2020 and, following the expiry of the transitional period laid down in the EU-UK Withdrawal Agreement (EU-UK WA), it ceased to be bound by EU law. By the same token, it entered uncharted waters as a former EU Member State trying to find its place in an economically integrated world. This *Article* takes stock of the legal affairs as they stood on 1 January 2021. Yet, at the same time, it puts the new EU-UK legal framework in a broader perspective. For this purpose, it treats as a point of reference the Political Declaration, which was signed alongside the EU-UK Withdrawal Agreement. A good chunk of its potential has materialised in the EU-UK Trade and Cooperation Agreement (EU-UK TCA), although in some respects the proposals laid down in the Political Declaration are yet to turn into reality. Thus, to confine it to history books would be rather premature. While it is impossible to predict the future, the time is right to put the EU-UK legal framework under the microscope and to analyse its main legal parameters. The present *Article* offers such an insight. In part I, the centre of gravity is on institutional matters.

\* Professor of European Union Law, University of Westminster (London), Visiting Professor, College of Europe (Natolin), a.lazowski@westminster.ac.uk. The Author is grateful to the anonymous reviewers for their comments. The usual disclaimer applies.



KEYWORDS: Brexit – Political Declaration – EU-UK Trade and Cooperation Agreement – direct effect – human rights – institutional framework.

## I. INTRODUCTION

Predicting the future is a rather risky business. Although the art of fortune telling spans centuries, experience proves that it is more intellectual and emotional roulette than anything else. In a similar fashion, making any predictions about the way in which EU-UK relations would evolve was, at the time of writing, a rather hazardous exercise. The two sides have just parted ways with the completion of the post-Brexit transitional period on 31 December 2020, followed moments later by the entry into force on 1 January 2021 of the EU-UK Trade and Cooperation Agreement.<sup>1</sup> Without a shadow of doubt, this was a watershed moment for bilateral relations between the EU and its former Member State. The key question remained whether it was the beginning of a beautiful friendship or the starting point for a tense and potentially acrimonious relationship between neighbours.<sup>2</sup> With the above in mind, the time is right to take a closer look at the key parameters of the emerging new framework for EU-UK relations. As is well-known, the main beacons for navigation were laid in the Political Declaration, which was signed alongside the EU-UK Withdrawal Agreement.<sup>3</sup> They served as a point of departure for negotiations on the post-Brexit framework. The talks, not without political drama, ended at the eleventh hour, facilitating the signing of the EU-UK TCA on 30 December 2020, and its provisional application as of 1 January 2021.<sup>4</sup> This, however, is unlikely to be the final scene of the lengthy Brexit opera, but rather a relatively swift transition between acts. Arguably, before we reach some sort of closing *crescendo*, more acts are likely to follow in the years to come.

The aim of this *Article* is to take stock of the recent developments. In particular, it endeavours to juxtapose the ambitions outlined in the Political Declaration with what was eventually agreed in the EU-UK TCA, as well as in the two flanking agreements which were

<sup>1</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (hereinafter referred to as EU-UK TCA).

<sup>2</sup> See T.G. ASH, *The UK and EU Are Heading for Bad-Tempered Rivalry, Unless We Can Avert It*, The Guardian, 14 January 2021, [www.theguardian.com](http://www.theguardian.com).

<sup>3</sup> Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom.

<sup>4</sup> Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information.

also signed on 30 December 2020.<sup>5</sup> As will be demonstrated, the Political Declaration should not yet be confined to the history books, as it has not reached its potential. To put it differently, some of the *desiderata* listed therein have not materialised in the new EU-UK framework, and thus they may remain points of departure for future talks. In order to flesh out the main contours of the future relationship laid down in the Political Declaration, and how they translated into the key parameters of the EU-UK TCA (as well as the supplementing agreements), this *Article* is divided into two parts. The first instalment covers institutional matters, and is organised in the following fashion. Section II looks at the Political Declaration, its genesis and cardinal features. It serves as the point of departure for Section III, where the analysis turns to the post-Brexit transitional period and the negotiations of the new EU-UK legal framework. In turn, sections IV and V focus on the formal shape of the new EU-UK relationship. The foundations of the newly re-designed bilateral relationship are examined in section VI. Last but not least, the EU-UK institutional setup is presented in section VII. Part II of the *Article*, which is devoted to substantive matters (trade in goods, services, movement of capital, judicial cooperation in criminal matters, fisheries, and the dispute settlement) will follow.

## II. GENESIS OF THE POLITICAL DECLARATION

As is well known, and by now prolifically documented in the academic literature, Art. 50 TEU governs the withdrawal procedure.<sup>6</sup> It gives preference for a consensual exit based on a withdrawal agreement. As a residual option it also provides for a withdrawal without any formal agreement, should a withdrawal agreement be neither desired nor possible.<sup>7</sup> In terms of substance, the wording of the sunset clause is vague, allowing for a

<sup>5</sup> Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning Security Procedures for Exchanging and Protecting Classified Information (hereinafter referred to as EU-UK SPCI); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy (hereinafter referred to as Euratom-UK SPNE).

<sup>6</sup> See, *inter alia*, P. CRAIG, *The Process: Brexit and the Anatomy of Article 50*, in F. FABBRINI (ed.), *The Law & Politics of Brexit*, Oxford: Oxford University Press, 2017, p. 49 *et seq.*; E. JONES, *The Negotiations*, in F. FABBRINI (ed.), *The Law & Politics of Brexit. Volume II. The Withdrawal Agreement*, Oxford: Oxford University Press, 2020, p. 37 *et seq.*; K.A. ARMSTRONG, *Brexit Time. Leaving the EU – Why, How and When*, Cambridge: Cambridge University Press, 2017, p. 197 *et seq.*; C. HILLION, *Accession and Withdrawal in the Law of the European Union*, in A. ARNULL, D. CHALMERS (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, p. 126 *et seq.*; M. VAN DER WEL, R.A. WESSEL, *The Brexit Roadmap: Mapping the Choices and Consequences during the EU/UK withdrawal and Future Relationship Negotiations*, CLEER Working Paper 2017/5; C. HILLION, *Withdrawal Under Article 50 TEU: An Integration-Friendly Process*, in *Common Market Law Review*, 2018, p. 29 *et seq.*; P. EECKHOUT, E. FRANTZIOU, *Brexit and Article 50 TEU: A Constitutionalist Reading*, in *Common Market Law Review*, 2017, p. 695 *et seq.*

<sup>7</sup> See, *inter alia*, A. ŁAZOWSKI, *Unilateral Withdrawal from the EU: Realistic Scenario or a Folly?*, in *Journal of European Public Policy*, 2016, p. 1294 *et seq.*

number of perfectly sound interpretations. Not surprisingly, the preferred reading of Art. 50 TEU was clarified in the course of the EU-UK withdrawal talks in such a fashion as to serve the EU's negotiation strategy. In many respects, the EU largely proceeded as if the interpretation of Art. 50 TEU was *fait accompli*. This applied to both the *modus operandi* for the withdrawal process and to the substance of the exit talks. In accordance with Art. 50 TEU, the aim of a withdrawal agreement should be to determine the terms of withdrawal, taking into account the future relations between the EU and the exiting country. It is the latter part that proved to be rather controversial, and left a great deal of room for manoeuvre for the European Union and its negotiation team. Arguably, at least two interpretations of Art. 50 TEU were on the cards when the Brexit proceedings commenced. The maximalist take on Art. 50 TEU would be that the negotiations should cover both the terms of exit and the future relations, with a view to achieving a smooth downgrade from EU membership to an association or partnership of sorts.<sup>8</sup> The minimalist interpretation was to proceed in the opposite direction, that is, to bring sequencing into the withdrawal *modus operandi*. Not surprisingly, the second option was very much preferred by the European Union for a host of legal and political reasons. It is hard to escape the conclusion that *realpolitik* prevailed, as the consecutive talks on the terms of exit and future relations gave much more bargaining power to the EU and, by the same token, gradually weakened the position of the exiting country. The prevailing school of thought held by the European Union was that an agreement concluded under Art. 50 TEU should cover merely the terms of exit, while the proper negotiations of a future framework would only start when the United Kingdom had exited the EU.<sup>9</sup> It was agreed that the basic contours would be determined in a non-binding document developed jointly by the EU and the UK. This, even from a formal point of view, was an interesting proposition. While a withdrawal agreement is, as per Art. 50 TEU, a treaty between the EU and a departing Member State, the future relations were to be sketched merely in a non-binding political declaration, thus any excursions therefrom would not constitute breaches of international obligations. From the point of view of Brexit, this was a blessing and a curse. On the one hand, as soon as the United Kingdom left the European Union on 31 January 2020, the two sides had a beacon for navigation. On the other hand, it gave them ample flexibility, and permitted the United Kingdom to back-track on the inconvenient parts of the gentlemen's agreement as soon as the talks on future relations commenced.

<sup>8</sup> As advocated by the present Author in an earlier contribution to the debate. See A. ŁAZOWSKI, *Withdrawal from the European Union and Alternatives to Membership*, in *European Law Review*, 2012, p. 523 *et seq.*

<sup>9</sup> See further on the EU-UK withdrawal negotiations, *inter alia*, A. ŁAZOWSKI, *Be Careful What You Wish for: Procedural Parameters of EU Withdrawal*, in C. CLOSA (ed.), *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the European Union*, Cambridge: Cambridge University Press, 2017, p. 234 *et seq.*



The first drafts of the Political Declaration on post-Brexit EU-UK relations were made public in 2018.<sup>10</sup> Further updates appeared in the course of 2019, when the Brexit drama was slowly turning into an opera buffa.<sup>11</sup> At that stage, it became rather clear that whatever the final shape of the Political Declaration was meant to be, it would lack detail. Yet, the canvas was out, and the first strokes of the painters' brush were being made. The picture stemming from the Political Declaration was full of qualities typical of impressionism: blurry and distant, at best. Alas, when it comes to law, the prerequisite of legal certainty requires precision and shading known from the old Dutch school. One needs a Vermeer, while the impressionists, or even more so, the abstract artists, should remain confined to art galleries, and under no circumstances are they to serve as intellectual points of reference for lawmakers. So, to the disappointment of many, the Political Declaration was merely a starting point. The language employed by the drafters allowed one to identify the areas where there was consensus on the steps forward, and dossiers where the parties only managed to indicate their intentions to engage in discussions when the time was right. Hence, the Political Declaration is – in some respects – a deal in the making, and in others a wish-list. In hindsight, this is hardly surprising bearing in mind that the United Kingdom commenced its EU withdrawal negotiations without a clear idea where it was heading. In the wake of the Brexit referendum, the mediocrity of its political circles came to the surface. It was a Molotov cocktail of fantasy visions, sheer ignorance and clear-cut opportunism.<sup>12</sup> Most of the time, the ruling Conservative Party was busy negotiating with itself, not with the European Union.<sup>13</sup> Towards the end of the withdrawal proceedings, the latter showed clear signs of exacerbation with the painful lack of detail coming from London. Three consecutive extensions of EU membership, and the consequential delay of Brexit, added to the fatigue. Nevertheless, the general contours of future relations were available when the post-Brexit negotiations commenced in March 2020.

<sup>10</sup> See, for instance, Draft Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 22 November 2018, XT 21095/18, [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>11</sup> See further, *inter alia*, P. CRAIG, *Brexit, A Drama: The Interregnum*, in *Yearbook of European Law*, 2018, p. 3 *et seq.*

<sup>12</sup> See, for instance, D. DAVIS, *Trade Deals. Tax Cuts. And Taking Time before Triggering Article 50. A Brexit Economic Strategy for Britain*, Conservative Home, 11 July 2016, [www.conservativehome.com](http://www.conservativehome.com).

<sup>13</sup> See, *inter alia*, F. FABBRINI, *The Brexit Negotiations and the May Government*, in *European Journal of Legal Studies*, Special Issue, 2019, p. 1 *et seq.*; E. JONES, *The Negotiations: Hampered by the UK's Weak Strategy*, in *European Journal of Legal Studies*, Special Issue, 2019, p. 23 *et seq.*

### III. THE TRANSITIONAL PERIOD AND POST-BREXIT NEGOTIATIONS

#### III.1. THE TRANSITIONAL PERIOD: *RAISON D'ÊTRE* AND THE BASIC PARAMETERS

The United Kingdom exited the European Union on 31 January 2020. On 1 February 2020 the EU-UK Withdrawal Agreement entered into force and, by the same token, the transitional period commenced.<sup>14</sup> The *raison d'être* was to avoid a cliff-edge scenario by extending the application of the EU *acquis* to the United Kingdom throughout the transition and, at the same time, facilitating negotiations of the future EU-UK framework.<sup>15</sup> It should be noted that during the transition the UK was also permitted to negotiate its own agreements with non-EU states, under the condition that none could enter into force until EU law ceased to apply to the UK.<sup>16</sup> Art. 126 WA, setting the calendar for the end of the transitional period, was drafted on the premise that the United Kingdom would leave the European Union, as scheduled, on 29 March 2019. This did not happen, and one of the consequences of the three consecutive extensions of membership was that the time pencilled in for future negotiations shrank to a mere 11 months.<sup>17</sup> It should be added that Art. 132 WA envisaged the possibility of a jointly agreed one-off extension of the transitional period, which could have pushed the deadline to 31 December 2021, or even 31 December 2022.<sup>18</sup> A decision in this respect would have had to

<sup>14</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (hereinafter referred to as the EU-UK Withdrawal Agreement or, for short, EU-UK WA).

<sup>15</sup> See further on the transitional period, *inter alia*, A. ŁAZOWSKI, *Exercises in Legal Acrobatics: The Brexit Transitional Arrangements*, in *European Papers*, 2017, Vol. 2, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 845 *et seq.*; K.A. ARMSTRONG, *After EU Membership: The United Kingdom in Transition*, in *European Journal of Legal Studies*, Special Issue, 2019, p. 59 *et seq.*; K.A. ARMSTRONG, *The Transition*, in F. FABBRINI (ed.), *The Law and Politics of Brexit. Volume II*, cit., p. 171 *et seq.*; M. DOUGAN, *An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-withdrawal "status quo" Transitional Regime under Article 50 TEU*, in *Common Market Law Review*, 2018, p. 57 *et seq.*; T. LOCK, *In the Twilight Zone: The Transition Period in the Withdrawal Agreement*, in J. SANTOS VARA, R.A. WESSEL, P.R. POLAK (eds), *The Routledge Handbook on the International Dimension of Brexit*, London and New York: Routledge, 2021, p. 30 *et seq.*

<sup>16</sup> See further, *inter alia*, P. KOUTRAKOS, *Managing Brexit. Trade Agreements Binding on the UK Pursuant to Its EU Membership*, in J. SANTOS VARA, R.A. WESSEL, P.R. POLAK (eds), *The Routledge Handbook on the International Dimension of Brexit*, cit., p. 75 *et seq.*; M. CREMONA, *The Withdrawal Agreement and the EU's International Agreements*, in *European Law Review*, 2020, p. 237 *et seq.*; J. LARIK, *Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-)Negotiations*, in *American Journal of International Law*, 2020, p. 443 *et seq.*; R.A. WESSEL, *Consequences of Brexit for International Agreements Concluded by the EU and Its Member States*, in *Common Market Law Review*, 2018, p. 101 *et seq.*; S. SILVEREKE, *Withdrawal from the EU and Bilateral Free Trade Agreements. Being Divorced is Worse?*, in *International Organizations Law Review*, 2018, p. 321 *et seq.*; A. ŁAZOWSKI, R.A. WESSEL, *The External Dimension of Withdrawal from the European Union*, in *Revue des affaires européennes*, 2016, p. 623 *et seq.*

<sup>17</sup> See further, *inter alia*, F. FABBRINI, R. SCHMIDT, *The Extensions*, in F. FABBRINI (ed.), *The Law and Politics of Brexit. Volume II*, cit., p. 66 *et seq.*

<sup>18</sup> *Modus operandi* for the extension of the transitional period was provided in Art. 132 WA.

be taken before 1 July 2020. However, any extension was not only ruled out – almost *ab initio* – by HM Government, but was also written into UK law.<sup>19</sup> Arguably, the decision in this respect was taken on a political whim and did not seem to be a part of a thought-through strategy. Once again, the Brexit dogma prevailed. Surprisingly, even the economic mayhem caused by the Covid-19 pandemic did not make the UK government change its mind. The desire to end the transition at the earliest possibility was formally communicated to the EU during the meeting of the EU-UK Joint Committee on 12 June 2020,<sup>20</sup> and three days later confirmed at the High Level Meeting of the Prime Minister B. Johnson with the Presidents of the European Council and the European Commission.<sup>21</sup> As made clear by the Council Conclusions on EU-UK relations, the United Kingdom not only refused to ask for an extension but also would not entertain such a request should it come from the European Union.<sup>22</sup> All in all, the transitional period ended on 31 December 2020. Such lack of flexibility in Whitehall had a number of implications. For instance, it meant that the EU-UK negotiations had to be conducted without a moment to spare. Thus, the talks had to focus on the priority dossiers, pushing some other matters to the margins. Furthermore, it forced the EU-UK Joint Committee to intensify work on filling the gaps in the EU-UK WA, including the adoption of a highly controversial set of detailed rules governing trade between Great Britain and Northern Ireland.<sup>23</sup>

### III.2. POLITICAL DECLARATION AND THE NEGOTIATIONS OF THE FUTURE EU-UK FRAMEWORK

The basic rules on the post-Brexit negotiations were laid down in Art. 184 WA. It provided that the two sides were obliged to make their best endeavours to negotiate the agreements regulating the future relationship. They were expected to do so in good faith and with respect to their legal orders. As already noted, the key parameters were laid down in the Political Declaration. The mere existence of such a bilaterally agreed

<sup>19</sup> European Union (Withdrawal) Act 2018, s. 15A (as introduced by European Union (Withdrawal Agreement) Act 2020, s. 33).

<sup>20</sup> Press statement by Vice-President Maroš Šefčovič following the second meeting of the EU-UK Joint Committee, Brussels 12 June 2020, Statement/20/1055, 1.

<sup>21</sup> Council of the EU, EU-UK Statement following the High Level Meeting on 15 June 2020, Brussels 15 June 2020, Statements and Remarks 401/20.

<sup>22</sup> Council, Conclusions on EU-UK relations, Press Release 436/20, 25 June 2020, para 1.

<sup>23</sup> Decision 4/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 on the determination of goods not at risk; Decision 6/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 providing for the practical working arrangements relating to the exercise of the rights of Union representatives referred to in Article 12(2) of the Protocol on Ireland/Northern Ireland.

set of priorities was one of the idiosyncrasies of the post-Brexit EU-UK negotiations, facilitating the talks and providing a jointly agreed point of departure.<sup>24</sup> The talks were expected to be conducted expeditiously. Further details were provided in Part V of the Political Declaration. Another idiosyncrasy of the negotiations of the future EU-UK framework was their general objective: a downgrade of existing relations from fully fledged, although with plenty of opt-outs, EU membership to a future relationship of sorts.<sup>25</sup> For the first time in history, the European Union and one of its neighbours were going against the stream. This phenomenon was reflected in the opening paragraphs of the Political Declaration which, on the one hand, set ambitious objectives, yet, on the other hand, highlighted contrapuntal tendencies. While the United Kingdom was expected to attempt to keep as many elements of membership as it found fit, the European Union was ready to act in such a way as to preserve the integrity and coherence of its legal order, in particular its flagship project – the internal market. Both sides agreed, however, that the future relations should be based on “an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation”.<sup>26</sup> It should be noted that this list was non-exhaustive, thus the parties were, at least in theory, free also to venture into other territories. Either way, the general premise on which the negotiations were to be conducted was that whatever the outcome, the future EU-UK framework would be based on a balance of rights and obligations. Both sides were in unison that a downgrade was a *conditio sine qua non*, with the red lines visibly marked in para. 4 of the Political Declaration. The EU made it clear that the autonomy of its legal order would be protected, including the indivisibility of the four freedoms of the Internal Market. At the same time, the red lines drawn in Whitehall included the end of free movement of persons, combined with the freedom to develop its own trade policy towards the outside world. The combination of opening salvos in the Political Declaration was supplemented by an obvious acknowledgment that the downgrade in question put the United Kingdom in a privileged position in comparison with other neighbouring countries. It provided that: “[t]he future relationship will inevitably need to take account of this unique context”.<sup>27</sup> This caveat was favourable for both sides. Seen from Brussels, it made it clear that the European Union would be willing to go the extra mile and offer the United Kingdom privileged relations but, at the same time, it would not be under

<sup>24</sup> See further, *inter alia*, P. MARIANI, G. SACERDOTI, *The Negotiations on the Future Trade Relations*, in F. FABBRINI (ed.), *The Law & Politics of Brexit. Volume II*, cit., p. 211 *et seq.*

<sup>25</sup> See, *inter alia*, A. ŁAZOWSKI, *Inside but Out: United Kingdom and the EU*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law. Methods against Member States' Defiance*, Oxford: Oxford University Press, 2017, p. 493 *et seq.*

<sup>26</sup> Para. 3 of the Political Declaration.

<sup>27</sup> *Ibid.*, para. 5 of the Political Declaration.

any political obligation to offer the same to any other third country expressing a desire to deepen its relations with the EU. The same sentence, read through the Westminster lens, equipped the United Kingdom with ammunition for the negotiations. To put it differently, it gave Whitehall a political mandate to demand more from the future relationship than is traditionally made available to any other third country. However, as proven by the events of 2020, it did not indulge itself very much in this opportunity. While the EU offered a far reaching and comprehensive agreement, the UK was inclined to have a “Canada style” arrangement.<sup>28</sup>

### III.3. POST-BREXIT NEGOTIATIONS

As soon as the United Kingdom was out of the European Union, the negotiators switched gear. On the EU side, the European Commission presented a draft of the negotiation mandate on 3 February 2020.<sup>29</sup> It was approved by the Council on 25 February 2020.<sup>30</sup> Not surprisingly, the European Union proceeded on the basis of the *modus operandi* laid down in Art. 218 TFEU, which governs the procedure for the conclusion of international treaties.<sup>31</sup> It was clear from the start that the negotiations with a former Member State were meant to be a standard, yet idiosyncratic, external relations exercise. The negotiation mandate – building on the Political Declaration – was painfully detailed. The United Kingdom also took its first steps towards the negotiations, and alas it did so in a fashion known from the Brexit negotiations: with a speech by the Prime Minister outlining his shopping list.<sup>32</sup> A formal policy document, listing the priorities in the forthcoming negotiations, followed on 27 February 2020.<sup>33</sup> In a matter of days, it became clear that parts of the Political Declaration, seen from Whitehall, were not worth the paper they were written on. The battleground was set for the most contentious dossiers: the level playing field, the role of the Court of Justice in the dispute settlement procedure, the future arrangements on fisheries, and the cooperation in the area of Common Foreign and Security Policy. To add to this, the UK authorities repeatedly argued that they had no wish to instal customs

<sup>28</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (hereinafter referred to as the CETA).

<sup>29</sup> Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland, [ec.europa.eu](http://ec.europa.eu).

<sup>30</sup> Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>31</sup> See further, *inter alia*, J. HELISKOSKI, *The Procedural Law of International Agreements: A Thematic Journey Through Article 218 TFEU*, in *Common Market Law Review*, 2020, p. 79 *et seq.*; A. DASHWOOD, *EU Acts and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements*, in M. CREMONA, C. KILPATRICK (eds), *EU Legal Acts: Challenges and Transformations*, Oxford: Oxford University Press, 2018, p. 189 *et seq.*

<sup>32</sup> PM speech in Greenwich, 3 February 2020, [www.gov.uk](http://www.gov.uk).

<sup>33</sup> HM Government, *The Future Relationship with the EU. The UK's Approach to Negotiations*, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk).

checks between Great Britain and Northern Ireland. This clearly rang the alarm bells and raised doubts about whether the United Kingdom was ready to comply with the *desideratum* laid down in the Political Declaration that the negotiations were to be conducted in good faith. Not only was it backtracking on some elements of the gentleman's agreement, but it also signalled that it had no desire to comply with the binding obligation laid down in the Ireland/Northern Ireland Protocol to the EU-UK Withdrawal Agreement. As the talks progressed, it became clear that these dossiers were the main bones of contention and remained so until the last minute.

From the procedural point of view, the *modus operandi* was agreed by the EU and the UK in the Terms of Reference published on 28 February 2020.<sup>34</sup> On the EU side, the negotiations were to be conducted, in accordance with Art. 218 TFEU, by the European Commission. The Chief Negotiator was Michel Barnier, who had also been in charge of the Brexit talks. The UK Chief Negotiator was Lord Frost, who was in charge of Task Force Europe. The talks were conducted in plenary as well as in 11 negotiating groups.<sup>35</sup> The working language was English, with negotiations in French possible as an exception. Already at this stage it was agreed that the draft of the agreement(s) would be prepared in English, and subsequently translated into other official languages of the European Union. The latter factor, as discussed later in this *Article*, may have been of importance should discrepancies between different language versions of the EU-UK TCA become a source of dispute or litigation. The initial plan laid down in the Terms of Reference was to conduct five negotiation rounds, with locations alternating between Brussels and London. In hindsight, the post-Brexit talks were not only difficult because of their substance, and the pressures of time, but also due to the *modus operandi* imposed by the Covid-19 pandemic. Due to the pandemic, only the first round went as planned, while the next negotiating sessions had to be moved online.<sup>36</sup> While the worlds of Zoom or Skype are fit for purpose in many contexts, the lack of direct human interaction was not ideal during the early rounds of negotiations. Covid-19 also brought disruption to the talks as members of both teams became infected or had to go into self-isolation. It should be added that, in-between the negotiation rounds, informal talks continued. As not enough progress had been made by early June, the two sides agreed an Addendum to the Terms of Reference (12 June 2020),<sup>37</sup> agreeing on additional negotiation rounds throughout the summer, as well as specialised

<sup>34</sup> Terms of Reference on the UK-EU Future Relationship Negotiations, [ec.europa.eu](https://ec.europa.eu/eu-uk-relationship/).

<sup>35</sup> 1. Trade in goods; 2. Trade in services and investment and other issues; 3. Level playing field for open and fair competition; 4. Transport; 5. Energy and civil nuclear cooperation; 6. Fisheries; 7. Mobility and social security coordination; 8. Law enforcement and judicial cooperation in criminal matters; 9. Thematic cooperation; 10. Participation in Union programmes; 11. Horizontal arrangements and governance.

<sup>36</sup> The negotiation rounds held on 20-24 April 2020, 11-15 May 2020 and 2-5 June 2020 took place on-line.

<sup>37</sup> Addendum to the Terms of Reference on the UK-EU Future Relationship Negotiations, 12 June 2020, [ec.europa.eu](https://ec.europa.eu/eu-uk-relationship/).

sessions between the Chief Negotiators and their closest teams. A further Addendum to the Terms of Reference, scheduling more negotiations, followed on 31 July 2020.<sup>38</sup> As the clock was ticking, with no end of talks in sight, the Chief Negotiators on 21 October 2020 agreed on “organising principles” that would eventually take them all the way to the completion of negotiations on 24 December 2020.<sup>39</sup>

As soon as the post-Brexit talks commenced, it was clear that their substantive scope would have to be adjusted to the reality on the ground: a very tight time schedule and shifting desires in Whitehall. In order to give the talks a firm anchor, the European Commission had already on 12 March 2020 presented a Draft Agreement on Future Relations.<sup>40</sup> It was subsequently amended several times and, consequentially, revised versions were made available to the public on a regular basis.<sup>41</sup> As a counterattack, the United Kingdom presented its own drafts of future agreements in May 2020. Sadly, they were not original by any stretch of the imagination. The government openly admitted that the drafts were, in fact, a compilation of various EU agreements with non-EU countries.<sup>42</sup> To make things look even more unprofessional, parts of the text were missing. In hindsight, this was wasted effort, as the final text of the EU-UK TCA is clearly built on the EU draft with a few parts left out, others tweaked, or simply moved around.

As already noted, the negotiations were successfully completed on Christmas Eve, a formal signature followed, and the three EU-UK Agreements entered into force, albeit

<sup>38</sup> Addendum to the Terms of Reference on the UK-EU Future Relationship Negotiations, 31 July 2020, [ec.europa.eu](https://ec.europa.eu).

<sup>39</sup> Organising principles for further negotiations, [ec.europa.eu](https://ec.europa.eu).

<sup>40</sup> Draft text of the Agreement on the New Partnership with the United Kingdom, [ec.europa.eu](https://ec.europa.eu) (hereinafter referred to as the Draft Agreement); Foreign Policy, Security and Defence part of the Draft text of the Agreement on the New Partnership with the United Kingdom, [ec.europa.eu](https://ec.europa.eu).

<sup>41</sup> Draft text of the Agreement on the New Partnership with the United Kingdom, *cit.*; Additional draft text of the Agreement on the New Partnership with the United Kingdom 15 July 2020, [ec.europa.eu](https://ec.europa.eu); Additional draft text of the Agreement on the New Partnership with the United Kingdom 14 August 2020 (law enforcement and judicial cooperation), [ec.europa.eu](https://ec.europa.eu); Additional draft text of the Agreement on the New Partnership with the United Kingdom 18 August 2020, [ec.europa.eu](https://ec.europa.eu); Additional draft text for the Agreement on the New Partnership with the United Kingdom 19 August 2020 (Cultural objects), [ec.europa.eu](https://ec.europa.eu); Additional draft text for the Agreement on the New Partnership with the United Kingdom 7 September 2020 (recognition of professional qualifications), [ec.europa.eu](https://ec.europa.eu).

<sup>42</sup> Draft UK-EU Comprehensive Free Trade Agreement (CFTA), [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft UK-EU CFTA Annexes, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft Fisheries Framework Agreement, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft Air Transport Agreement, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft Civil Aviation Safety Agreement, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft Energy Agreement, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft Social Security Coordination Agreement, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft Nuclear Energy Agreement, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft Agreement on Law Enforcement and Judicial Cooperation in Criminal Matters, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft Agreement on the transfer of unaccompanied asylum-seeking children, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk); Draft Agreement on the readmission of people residing without authorisation, [assets.publishing.service.gov.uk](https://assets.publishing.service.gov.uk).

on a provisional basis, on 1 January 2021.<sup>43</sup> This permitted the European Parliament to properly scrutinise the Agreements, before giving its formal assent.<sup>44</sup> It should be noted that adequate privilege was not granted to the House of Commons and the House of Lords, which were forced to conduct parliamentary scrutiny in a matter of hours on 30 December 2020. This was in stark contrast to the time spent on scrutiny of the accession to the European Communities<sup>45</sup> or the EU-UK Withdrawal Agreement and the post-Brexit negotiations.<sup>46</sup> It was yet another Brexit paradox. While the EU withdrawal was meant to strengthen the sovereignty of the UK Parliament, it was deprived of a chance for meaningful debate and analysis of the post-Brexit EU-UK package.

#### IV. POST-BREXIT LEGAL FRAMEWORK: FROM THE DRAWING BOARD TO THE CHRISTMAS EVE DEAL

##### IV.1. INTRODUCTION

One of the variables that had to be addressed at the outset was what shape the future EU-UK framework should take. Firstly, the question was whether it would comprise a framework agreement, supplemented by flanking agreements, or whether it would follow the patchiness of the Swiss model.<sup>47</sup> Secondly, the issue was also if, on the EU side,

<sup>43</sup> See further on the provisional application of EU agreements with third countries B. DRIESSEN, *Provisional Application of International Agreements by the EU*, in *Common Market Law Review*, 2020, p. 741 *et seq.*; J. HELISKOSKI, *Provisional Application of EU Free Trade Agreements*, in M. HAHN, G. VAN DER LOO (eds), *Law and Practice of the Common Commercial Policy. The First 10 Years after the Treaty of Lisbon*, Boston: Brill, 2021, p. 586 *et seq.*

<sup>44</sup> On the role of the European Parliament in conclusion of international agreements, see, *inter alia*, J. SANTOS VARA, *The European Parliament in the Conclusion of International Agreements post-Lisbon: Entrenched between Values and Prerogatives*, in J. SANTOS VARA, S. RODRÍGUEZ SÁNCHEZ-TABERNERO (eds), *The Democratisation of EU International Relations Through EU Law*, London, New York: Routledge, 2019, p. 63 *et seq.*

<sup>45</sup> See, *inter alia*, D. NICOL, *EC Membership and the Judicialization of British Politics*, Oxford: Oxford University Press, 2001, p. 76 *et seq.*

<sup>46</sup> See, *inter alia*, P. LYNCH, R. WHITAKER, A. CYGAN, *Brexit and the UK Parliament: Challenges and Opportunities*, in T. CHRISTIANSEN, D. FROMAGE (eds), *Brexit and Democracy. The Role of Parliaments in the UK and the European Union*, Palgrave: London, 2019, p. 51 *et seq.*; A. CYGAN, E. ŽELAZNA, *Parliamentary Involvement in the Negotiations on the EU-UK Trade Agreement*, in J. SANTOS VARA, R.A. WESSEL, P.R. POLAK (eds), *The Routledge Handbook on the International Dimension of Brexit*, cit., p. 45 *et seq.*; A. CYGAN, P. LYNCH, R. WHITAKER, *UK Parliamentary Scrutiny of the EU Political and Legal Space after Brexit*, in *Journal of Common Market Studies*, 2020, p. 1605 *et seq.*

<sup>47</sup> See further on the Swiss model, *inter alia*, M. VAHL, N. GROLIMUND, *Integration without Membership. Switzerland's Bilateral Agreements with the European Union*, Brussels: CEPS, 2006; C.H. CHURCH (ed.), *Switzerland and the European Union. A Close, Contradictory and Misunderstood Relationship*, London, New York: Routledge, 2007; R. SCHWOK, *Switzerland – European Union. An Impossible Membership?*, Bruxelles, Bern, Berlin, Frankfurt am Main, New York, Oxford, Wien: P.I.E. Peter Lang, 2009; M. OESCH, *Switzerland and the European Union. General Framework. Bilateral Agreements. Autonomous Adaptation*, Baden-Baden: Nomos,



it should be a mixed or exclusive competence agreement.<sup>48</sup> In hindsight, it is clear that the decision in both respects was in the hands of the European Union, with the United Kingdom left with very little room for manoeuvre. This is further elaborated in turn.

#### IV.2. THE BIG PICTURE: THE EU'S RELATIONS WITH NEIGHBOURS

The *tour de table* of EU relations with its neighbours proves that, with the notable exception of Switzerland, the preference traditionally goes to a general overarching agreement, supplemented by sectoral deals. The first are frequently organised in families of similar agreements with different countries clustered together for historical, geographical, or other reasons. This is the case in relation to the countries of the former Soviet Union,<sup>49</sup> including the European Neighbourhood Policy (ENP) *avant garde*: Ukraine, Moldova, and Georgia,<sup>50</sup> as well as the countries of the Western Balkans<sup>51</sup> and the Mediter-

2018; P. DARDANELLI, O. MAZZOLENI (eds), *Switzerland-EU Relations. Lessons for the UK after Brexit?*, London-New York: Routledge, 2021.

<sup>48</sup> See further, *inter alia*, A. OTT, *EU External Competence*, in R.A. WESSEL, J. LARIK (eds), *EU External Relations Law. Text, Cases and Materials*, Oxford, London, New York, New Delhi, Sydney: Hart, 2020, p. 61 *et seq.*; P. EECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 11 *et seq.*; P. KOUTRAKOS, *EU International Relations Law*, Oxford, Portland: Hart, 2015, p. 17 *et seq.*

<sup>49</sup> Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States and the Russian Federation; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Kazakhstan; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Kyrgyz Republic, of the other part; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan, of the other part. See further, *inter alia*, C. HILLION, *Partnership and Cooperation Agreements Between the EU and the NIS of the ex-Soviet Union*, in *European Foreign Affairs Law Review*, 1998, p. 399 *et seq.*

<sup>50</sup> Association Agreement between the European Union and the European Atomic Energy Community and its Member States, of the one part, and Ukraine, of the other part (hereinafter referred to as EU-Ukraine AA); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (hereinafter referred to as EU-Georgia AA); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (hereinafter referred to as EU-Moldova AA). See further, *inter alia*, G. VAN DER LOO, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration Without Membership*, Leiden-Boston, Brill, 2016.

<sup>51</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the

ranean.<sup>52</sup> The latter usually include tailor-made agreements dedicated to, e.g., readmission,<sup>53</sup> air transport<sup>54</sup> or participation in EU missions to third countries.<sup>55</sup> For the creation of privileged relationships, the preference, at least on the EU side, goes to association agreements. It should be noted at the outset that in EU law, unlike in the case of the Council of Europe, association does not amount to partial membership of the European Union.<sup>56</sup> However, it symbolises enhanced levels of cooperation between the parties.<sup>57</sup> The rule of thumb is as follows: the closer the relationship, the more likely it will

other part; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part. See further, *inter alia*, D. PHINEMORE, *Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?*, in *European Foreign Affairs Review*, 2003, p. 77 *et seq.*

<sup>52</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part; 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; Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part. See further, *inter alia*, K. PIETERS, *The Integration of the Mediterranean Neighbours into the EU Internal Market*, The Hague: T.M.C. Asser Press, 2010.

<sup>53</sup> See, *exempli gratia*, Agreement between the European Union and Georgia on the readmission of persons residing without authorisation.

<sup>54</sup> See, *exempli gratia*, Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part.

<sup>55</sup> See, *exempli gratia*, Agreement between the European Union and Ukraine on the status of the European Union Advisory Mission for Civilian Security Sector Reform Ukraine.

<sup>56</sup> See Art. 5a of Statute of Council of Europe, which provides: "In special circumstances, a European country which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited by the Committee of Ministers to become an associate member of the Council of Europe. Any country so invited shall become an associate member on the deposit on its behalf with the Secretary General of an instrument accepting the present Statute. An associate member shall be entitled to be represented in the Consultative Assembly only".

<sup>57</sup> In accordance with Art. 217 TFEU: "the Union may conclude with one more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure".

be regulated in an association agreement. For instance, the treaties governing free trade areas, even with a degree of market access, have been concluded as association agreements.<sup>58</sup> While they may have several legal bases scattered around the EU Founding Treaties, the use of Art. 217 TFEU would be required. As far as post-Brexit EU-UK relations are concerned, association as a framework for future relations was certainly on the cards. Para. 120 of the Political Declaration provided that the institutional framework could have taken the shape of an association agreement.

As a matter of fact, the Political Declaration is silent as far as the legal nature of the post-Brexit agreements is concerned. This should come as no surprise, bearing in mind that a decision on exclusive competence or a mixed agreement is inextricably linked to its substance. As is well-known, it is not a straightforward affair, with many legal and political factors prone to collide. One thing is certain, though. For the past ten years the EU has battled through contrapuntal tendencies. On the one hand, exclusive competences in external relations were expanded *qua* the reforms introduced by the Treaty of Lisbon.<sup>59</sup> On the other hand, the Member States approached their self-made shift of paradigm from mixity to exclusivity with trepidation. Inevitably, this led to numerous competence battles, some of which reached the Court of Justice. Once again, the *modus operandi* laid down in Art. 218, para. 11, TFEU proved to be a vital tool for the determination of the EU's external competences.<sup>60</sup> The watershed moment came with Opinion 2/15 on the EU-Singapore Free Trade Agreement,<sup>61</sup> where the judges at Kirchberg interpreted the changes introduced by the Treaty of Lisbon in such a fashion as to reinforce the drive towards exclusivity.<sup>62</sup> This, perhaps, was the only time the expansion of EU

<sup>58</sup> More on the concept of association see, *inter alia*, P. VAN ELSUWEGE, M. CHAMON, *The Meaning of 'Association' under EU Law. A Study on the Law and Practice of EU Association Agreements*, Study for the AFCC Committee, European Parliament, 2019, PE 608.861.

<sup>59</sup> See, *inter alia*, M. KRAJEWSKI, *The Reform of the Common Commercial Policy*, in A. BIONDI, P. ECKHOUT, S. RIPLEY (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, 2012, p. 292 *et seq.*; R. LEAL-ARCAS, *The European Union's New Common Commercial Policy after the Treaty of Lisbon*, in M. TRYBUS, L. RUBINI (eds), *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham, Northampton: Elgar, 2012, p. 262 *et seq.*; P. CRAIG, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford: Oxford University Press, 2010, p. 379 *et seq.*, J.-C. PIRIS, *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 238 *et seq.*

<sup>60</sup> See further, *inter alia*, G. BUTLER, *Pre-Ratification Judicial Review of International Agreements to be Concluded by the European Union*, in M. DERLÉN, J. LINDHOLM (eds), *The Court of Justice of the European Union. Multidisciplinary Perspectives*, Oxford, Portland: Hart, 2018, p. 53 *et seq.*

<sup>61</sup> Court of Justice, opinion of 16 May 2017, case 2/15, *EU-Singapore FTA*.

<sup>62</sup> For an appraisal see, *inter alia*, M. CREMONA, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017*, in *European Constitutional Law Review*, 2018, p. 231 *et seq.*; D. KLEIMANN, G. KÜBEK, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15*, in *Legal Issues of European Integration*, 2018, p. 13 *et seq.*; A. ROSAS, *Mixity and the Common Commercial Policy after Opinion 2/15. An Overview*, in M. HAHN, G. VAN DER LOO (eds), *Law and Practice of the Common Commercial Policy*, cit., p. 27 *et seq.*; R. QUICK, A. GERHÄUSER, *EU Trade Policy after Opinion 2/15. Internal and External Threats to Broad and Comprehensive Free Trade Agreements*, M. HAHN, G. VAN DER LOO

competences was received in Whitehall with open arms. It meant that the future EU-UK framework would likely fall within the EU's exclusive competences and, by this token, ratification by all 27 Member States could be avoided. As experience with the EU-Ukraine AA and the CETA proves, it may be a time-consuming and a rocky ordeal.<sup>63</sup>

#### IV.3. TOWARDS THE POST-BREXIT LEGAL FRAMEWORK: THE POLITICAL DECLARATION AND EARLY PROPOSALS

Analysis of the Political Declaration proves that the parties agreed *ab initio* to conclude an overarching general agreement and a selection of sectoral agreements. For a number of reasons, this is hardly surprising. Firstly, it reflected the already discussed patterns of shaping EU relations with third countries, including their immediate neighbours. Secondly, it gave both sides some room for manoeuvre, bearing in mind the number of dossiers that were of interest, and the very tight timeline for the negotiations. Arguably, the *raison d'être* of this choice was rather straightforward: to conclude as fast as possible an agreement on the essential dossiers in order to make sure that it would enter into force at the end of the transitional period. By the same token, other subject areas would be covered in additional negotiations and, possibly, in separate agreements that would enter into force at a later date.

The Withdrawal Agreement, as well the Political Declaration, gave several hints as to the flanking agreements that could be concluded alongside the main post-Brexit deal. To begin with, the Withdrawal Agreement envisaged the conclusion of an agreement on Common Foreign and Security Policy even before the end of the transitional period.<sup>64</sup> The Political Declaration provided for the development of the EU-UK Comprehensive Air Transport Agreement (CATA)<sup>65</sup>, the Euratom-UK Nuclear Cooperation Agreement<sup>66</sup>, as well as the tailor-made EU-UK fisheries agreement<sup>67</sup>, the Framework Participation Agreement for the UK's contribution to CSDP missions and operations<sup>68</sup>, as well as the Security of Information Agreement.<sup>69</sup>

(eds), *Law and Practice of the Common Commercial Policy*, cit., p. 486 *et seq.*; C. KADDOUS, *Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore*, ECLI:EU:C:2017:376, delivered 16 May 2017, in G. BUTLER, R.A. WESSEL (eds), *EU External Relations Law: The Cases in Context*, Oxford, New York: Hart, 2021 (forthcoming).

<sup>63</sup> See, *inter alia*, G. KÜBEK, *The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States*, in *European Foreign Affairs Review*, 2018, p. 21 *et seq.*; G. VAN DER LOO, R.A. WESSEL, *The Non-Ratification of Mixed Agreements: Legal Consequences and Options*, in *Common Market Law Review*, 2017, p. 735 *et seq.*

<sup>64</sup> Article 127, para. 2, EU-UK WA.

<sup>65</sup> Para. 58 of the Political Declaration.

<sup>66</sup> *Ibid.*, para. 66.

<sup>67</sup> *Ibid.*, para. 73.

<sup>68</sup> *Ibid.*, para. 99.

<sup>69</sup> *Ibid.*, para. 116.

The future EU-UK framework started to take shape soon after the commencement of the negotiations. As already mentioned, the European Union had already presented a draft Agreement on the New Partnership between the European Union and the United Kingdom on 12 March 2020. A simple juxtaposition of the draft with the plans sketched in the Political Declaration demonstrates that the EU negotiators opted for the consolidation of some dossiers initially pencilled in for separate agreements into one jumbo agreement. Arguably, such a move had merits at least in two respects. Firstly, it allowed the EU and the UK to avoid unnecessary fragmentation of the legal framework. Secondly, it gave the EU additional leverage in the negotiations, in particular in relation to the contentious fisheries dossier. By linking the portfolios together, the EU could easily follow its mantra that nothing was agreed until all was agreed. It also gave ground to the guillotine clause discussed in section V.2 of this *Article*.

Proposals for the future framework, which were presented by the UK Government, came rather too late to make a breakthrough. Furthermore, by proposing a selection of agreements, the UK asked for something that was not on the menu. Winning the hearts and minds of EU negotiators on such a patchy framework was simply impossible, bearing in mind the experience the EU had gained over the years in its relations with Switzerland.<sup>70</sup> Not surprisingly, the drafts in question became history the moment they were published. For the remainder of the post-Brexit negotiations, it was the EU's Draft Agreement that served as the point of reference.

## V. THE POST-BREXIT EU-UK LEGAL FRAMEWORK: AN OVERVIEW

### V.1. INTRODUCTION

As of 1 January 2021, the EU-UK legal framework comprises four agreements of varied scope and legal character. All are discussed in the analysis that follows. As the starting point, the EU-UK TCA is put under the microscope (section V.2). In turn, the Euratom-UK Agreement on Nuclear Energy and the EU-UK Security Procedures Agreement are presented (sections V.3 and V.4 respectively). Last but not least, a brief recap of the main features of the EU-UK Withdrawal Agreement is a fitting conclusion to the section (V.5).

<sup>70</sup> On the most recent episodes see, *inter alia*, R. SCHWOK, *Switzerland-EU Relations: The Bilateral Way in a Fragilized Position*, in *European Foreign Affairs Review*, 2020, p. 159 *et seq.*; A. ŁAZOWSKI, *Draft EU-Swiss Institutional Agreement: Towards a New Institutional Paradigm?*, in A. BIONDI, G. SANGIUOLO (eds), *EU Law, Trade Agreements, and Dispute Resolution Mechanisms: Contemporary Challenges*, Cheltenham, Northampton: Elgar, 2021 (forthcoming).

## V.2. EU-UK TRADE AND COOPERATION AGREEMENT

The EU-UK Trade and Cooperation Agreement is the core of the post-Brexit legal framework.<sup>71</sup> The other two agreements concluded simultaneously, as well as potential future agreements, are formally referred to as supplementing agreements.<sup>72</sup> In this respect, the bilateral legal framework follows the already discussed, and well-established, pattern in EU external relations. With this in mind, it comes as no surprise that the EU-UK TCA is a rather chunky legal act, spanning hundreds of pages, including protocols, annexes, appendices, all of which form part of the Agreement.<sup>73</sup>

To begin with, the EU-UK TCA was concluded as an exclusive competence agreement. Its parties are the EU and Euratom, on one side, and the United Kingdom, on the other side. Therefore, for its entry into force separate ratifications by each and every Member State of the European Union were not required. The legal basis for its conclusion was Art. 217 TFEU, which is not surprising bearing in mind the scope of the Agreement and the political context in which it was negotiated and signed.<sup>74</sup> Thus, from the point of view of EU law, it is an association agreement. Yet, this factor has not been widely noted. Furthermore, this is reflected neither in the title of the Agreement, nor in its text. Bearing in mind the disproportionate attention that is sometimes paid to the phraseology, it would not come as a surprise if the notion “association with the EU” were too much for the hardest UK Eurosceptics, whose allergy to anything EU related is well-known. The association could have been perceived as a form of subordination or asymmetry in bilateral relations. Arguably, this constitutes a fitting addition to the pantheon of Brexit paradoxes. Over the years, many countries in the EU’s vicinity have become associated with the EU, or still aspire to head in that direction. One of the extreme cases was Ukraine, where more than 100 people were shot dead at Kyiv’s Maidan during pro-EU protests. Yet, at the same time, one of the EU’s former members did whatever possible to prove that “Europe” and “European” were the hardest words. While the formal association with the EU is the most logical way to downgrade the bilateral relations from the EU membership, the notion of “association” has gone missing, and it is nowhere to be seen in EU-UK TCA. Interestingly

<sup>71</sup> It merits attention that EU-UK TCA does not apply to Gibraltar, the status of which will be regulated separately.

<sup>72</sup> Art. COMPROV. 2 EU-UK TCA.

<sup>73</sup> Art. FINPROV.7 EU-UK TCA.

<sup>74</sup> Such an overarching legal basis permitted the EU to avoid institutional battles, which sometimes take place when multiple legal bases are employed (for instance Article 207 TFEU). It merits attention that the European Union did not use this opportunity to employ for the first time Article 8 TEU as one of the legal bases. Ever since the Treaty of Lisbon introduced the neighbourhood clause to the Treaty on European Union, it has remained a *lettre morte*, and it is likely to continue to do so. See further, *inter alia*, R. PETROV, P. VAN ELSUWEGE, *Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?*, in *European Law Review*, 2011, p. 688 *et seq.*; A. LABEDZKA, *The European Union and Shaping of Its Neighbourhood: In Pursuit of Stability, Security and Prosperity*, London: City Law School, 2018, p. 117 *et seq.*

enough, in its drive towards Global Britain, the UK signed post-Brexit trade agreements with many non-EU states. Astonishingly, they largely mirror their originals, that is, the EU association or partnership agreements.<sup>75</sup> The copy-paste frenzy has clearly gone quite far, as some of the newly concluded agreements create a formal association between the UK and the EU's neighbours. So, as of 1 January 2021, the United Kingdom is formally in association with, for instance, Egypt.<sup>76</sup> This factor is reflected both in the title as well as in the text of the UK-Egypt Agreement.

Like all agreements concluded by the European Union with third countries, the EU-UK TCA has a double legal nature. On the one hand, it is an international treaty within the meaning of the Vienna Convention on the Law of Treaties. On the other hand, it is a source of EU law with all the consequences resulting from this. It is binding, in equal measure, on the European Union, Euratom and on the Member States of the EU. This, quite inevitably, brings to the fore a fundamental question about its enforcement. This is pivotal not only for the state authorities but, first and foremost, for natural and legal persons who fall within the scope of the EU-UK TCA. In this respect, Art. COMPROV.16 EU-UK TCA is of relevance. It reads as follows:

“Article COMPROV.16: Private rights

1. Without prejudice to Article MOBI.SSC.67 [Protection of individual rights] and with the exception, with regard to the Union, of Part Three [Law enforcement and judicial cooperation], nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.

2. A Party shall not provide for a right of action under its law against the other Party on the ground that the other Party has acted in breach of this Agreement or any supplementing agreement”.

It is clear from the provision in question that neither the EU-UK TCA nor the current or future supplementing agreements may, in general terms, produce direct effect.<sup>77</sup> The only exceptions are the Protocol on Social Security Coordination and Part Three of the EU-UK TCA, which is dedicated to law enforcement and judicial cooperation in criminal matters. The latter, however, is subject to the caveat that direct effect can only be pro-

<sup>75</sup> See further A. ŁAZOWSKI, *Copy-pasting or Negotiating? Post-Brexit Trade Agreements Between the UK and Non-EU countries*, in J. SANTOS VARA, R.A. WESSEL, P.R. POLAK (eds), *The Routledge Handbook on the International Dimension of Brexit*, cit., p. 117 et seq.

<sup>76</sup> Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Arab Republic of Egypt.

<sup>77</sup> It should be noted that this provision appeared for the first time, albeit differently phrased, already in the Draft Agreement presented by the European Union on 12 March 2020.

duced in the European Union, not the United Kingdom.<sup>78</sup> This provision merits closer attention for a number of reasons. Firstly, the general prohibition of direct effect heavily undermines the effectiveness of the EU-UK post-Brexit framework. It is well known that the doctrine of direct effect, which has its roots in the rich jurisprudence of the Court of Justice, is the key to the private enforcement of EU law.<sup>79</sup> Over the years, the judges at Kirchberg have ruled that the TFEU, the Charter of Fundamental Rights, as well as EU regulations, EU directives and EU decisions may be directly invoked by individuals in national courts.<sup>80</sup> Furthermore, the application of this doctrine has been extended to EU agreements with third countries, which are also capable of producing direct effect, not only vertical but also horizontal.<sup>81</sup> A good example of this is Case C-265/03 *Simutenkov*, where the Court of Justice ruled that Art. 23, para. 1, of the EU-Russia PCA, prohibiting discrimination on grounds of nationality at the workplace, was capable of producing direct effect.<sup>82</sup> Such jurisprudence, however, was not always welcomed with open arms by the Member States. Therefore, in the past years a change of paradigm has become clearly visible. To put it differently, EU agreements with third countries, and/or Council decisions on the conclusion of international agreements, started to contain clauses precluding direct effect. In this respect, the EU-UK TCA is no exception, but rather a confirmation of the new trend.<sup>83</sup> Still, it sits uncomfortably not only with the existing jurisprudence of the Court of Justice but also creates a rather undesired side effect: the legal environment of double standards applicable to EU neighbouring countries. While, for

<sup>78</sup> This caveat was not in the original draft of the provision in questions, which may suggest that it was added on the initiative of the UK negotiators.

<sup>79</sup> Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*. For an academic appraisal see, *inter alia*, W. PHELAN, *Great Judgments of the European Court of Justice. Rethinking the Landmark Decisions of the Foundational Period*, Cambridge: Cambridge University Press, 2019, p. 31 *et seq.*

<sup>80</sup> See further, *inter alia*, J.M. PRINSEN, A. SCHRAUWEN (eds), *Direct Effect. Rethinking a Classic of EC Legal Doctrine*, Groningen: European Law Publishing, 2002; B. DE WITTE, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 323 *et seq.*

<sup>81</sup> For a comprehensive assessment see M. MENDEZ, *The Legal Effects of EU Agreements. Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford: Oxford University Press, 2013; P. EECKHOUT, *EU External Relations Law*, cit., p. 331 *et seq.*; P. KOUTRAKOS, *EU International Relations Law*, cit., p. 257 *et seq.*; J. KLABBERS, *International Law in Community Law: The Law and Politics of Direct Effect*, in *Yearbook of European Law*, 2001, p. 263 *et seq.*; F. MARTINES, *Direct Effect of International Agreements of the European Union*, in *European Journal of International Law*, 2014, p. 129 *et seq.*

<sup>82</sup> Court of Justice, judgment of 12 April 2005, case C-265/03, *Simutenkov* [GC]. For an academic appraisal see, *inter alia*, C. HILLION, *Case C-265/03, Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*, [2005] ECR I-2579, in *Common Market Law Review*, 2008, p. 815 *et seq.*; A. ŁAZOWSKI, *Direct Effect, Non-discrimination and the Beautiful Game: case C-265/03 Simutenkov*, in G. BUTLER, R.A. WESSEL (eds), *EU External Relations Law*, cit.

<sup>83</sup> See also N. GHAZARYAN, *Who Are the Gatekeepers?: In Continuation of the Debate on the Direct Applicability and the Direct Effect of EU International Agreements*, in *Yearbook of European Law*, 2018, p. 27 *et seq.*



instance, Russian, Turkish,<sup>84</sup> or Tunisian citizens/companies<sup>85</sup> may rely directly on the respective agreements with the EU, citizens/companies from the UK (a former Member State), Ukraine, Moldova and Georgia cannot do so. The question remains, however, whether the provision in question is broad enough to preclude the application of the other enforcement doctrines: indirect effect<sup>86</sup> and state liability.<sup>87</sup> Both are well established in the jurisprudence of the Court of Justice and national courts of the EU Member States. On the one hand, it is true that Art. COMPROV.16 provides that EU-UK TCA is not “conferring rights or imposing obligations on persons other than those created between the Parties under public international law” and that its provisions may not be “directly invoked”. On the other hand, legal acrobatics permitting, one could imagine attempts at an interpretation of national law in an EU-UK TCA compliant way, or even state liability claims, should the Member States act in breach of the EU-UK TCA. Firstly, in the case of indirect effect, the claims are built on national, not EU law. Thus, an EU legal act that is relied on does not *per se* create rights or impose obligations. Secondly, national judges have discretion, as the obligation to interpret domestic law in an EU law friendly way applies only as far as this is possible. Thirdly, in state liability claims, plaintiffs do not enforce their rights laid down in the EU legal acts, but claim compensation for breaches of EU law attributable to the Member States. Further, one also needs to bear in mind that the Court of Justice has the jurisdiction to interpret the EU-UK TCA as per Art. 267 TFEU. Art. COMPROV.16 EU-UK TCE will not stop domestic courts in the EU Member States from sending references for a preliminary ruling. This, in the case of courts from which there is no further remedy, is not a right, but an obligation resting on the shoulders of national judges. Should they fail to comply, state liability claims may follow.<sup>88</sup>

Arguably, it is only a matter of time before references start arriving at Kirchberg. One of the reasons why this may happen sooner rather than later is the linguistic ca-

<sup>84</sup> Court of Justice, judgment of 12 September 1990, case C-192/89, *Sevince*. See further, *inter alia*, E. SHARPSTON, *Different but (Almost) Equal – The Development of Free Movement Rights under EU Association, Co-Operation and Accession Agreements*, in M. HOSKINS, W. ROBINSON (eds), *A True European. Essays for Judge David Edward*, Oxford, Portland: Hart, 2003, p. 233 *et seq.*

<sup>85</sup> Court of Justice, judgment of 14 December 2006, case C-97/05, *Gattoussi*. See further, *inter alia*, F. G. JACOBS, *Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice*, in A. DASHWOOD, M. MARESCAU (eds), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, 2008, p. 21 *et seq.*

<sup>86</sup> Court of Justice, judgment of 10 April 1984, case 18/43, *Von Colson*. See further, *inter alia*, S. DRAKE, *Twenty Years after Von Colson: The Impact of “Indirect Effect” on the Protection of the Individual’s Community Rights*, in *European Law Review*, 2005, p. 329 *et seq.*

<sup>87</sup> Court of Justice, judgment of 19 November 1991, joined cases C-6/90 and C-9/90, *Francovich*. See further, *inter alia*, P. AALTO, *Public Liability in EU Law. Brasserie, Bergaderm and Beyond*, Oxford, Portland: Hart, 2011.

<sup>88</sup> Court of Justice, judgment of 30 September 2003, case C-224/01, *Köbler*. See further, *inter alia*, Z. VARGA, *The Effectiveness of the Köbler Liability in National Courts*, Oxford, London, New York, New Delhi, Sydney: Hart, 2020.

cophony caused by the late completion of negotiations, combined with the requirements of the EU multilingual regime. To cut a long story short, the EU translation and publication services were left with no time to polish the 24 different language versions of the EU-UK TCA. As acknowledged in the Council Decision 2020/2252 on signing and provisional application of EU-UK TCA and EU-UK SPCI, and in a separate note to readers, published in the Official Journal of the EU, the text of the EU-UK TCA published on 31 December 2020 is provisional and may contain inaccuracies/mistakes. Furthermore, neither the provisions nor the annexes or protocols are properly numbered. One should also note that hundreds of blank pages have been allocated to annexes, which have yet to be filled with actual text.<sup>89</sup> The final versions are due for publication in the Official Journal of the EU by 30 April 2021 at the latest. The question remains how national authorities should proceed in the case of inconsistencies between different language versions of the EU-UK TCA. As experience proves, they may remain even when the texts are finalised in due course. In the case of the EU-UK TCA, the version in English ought to prevail, even though all language versions are equally authentic.<sup>90</sup> This is for two main reasons. Firstly, the negotiations were conducted chiefly in the language of Shakespeare. Therefore, this particular language version should be as close as possible to the intentions of the negotiators. Secondly, in accordance with Art. FINPROV.9 EU-UK TCA, the English version was the first to be finalised, and therefore the other language versions would be checked against it.

As the final step in this general overview of the EU-UK TCA, it is worth putting under the microscope the rules governing revisions, suspension and termination of the Agreement. The *modi operandi* in relation to modifications of the EU-UK TCA may be divided into two groups. To begin with, the EU-UK TCA may be amended *qua* a formal revision treaty. For entry into force, it would require the “Rolls Royce” procedure governing the conclusion of international treaties by the EU, which – as already mentioned – is laid down in Art. 218 TFEU. Furthermore, the EU-UK TCA in several places envisages simplified procedures permitting decisions of the EU-UK joint institutions to revise the Agreement.<sup>91</sup> This is a pragmatic solution, although not original by any stretch of the imagination. Similar arrangements govern the regular updates of the Agreement on the European Economic Area<sup>92</sup> as well as several association agreements between the EU and third countries.<sup>93</sup>

<sup>89</sup> Annex SSC-8 spans from page 1276 to 1463, all pages were blank on 31 December 2020, the date of publication in the Official Journal of the European Union.

<sup>90</sup> Article FINPROV. 9 EU-UK TCA.

<sup>91</sup> See, *inter alia*, Art. OTH. 8 EU-UK TCA, which gives the competence to the EU-UK Partnership Council to amend parts of the Agreement itself, as well as several annexes.

<sup>92</sup> See further, *inter alia*, D.W. HOLTER, *Legislative Homogeneity*, in C. BAUDENBACHER (ed.), *The Fundamental Principles of EEA Law*, Berlin: Springer, 2017, p. 1 *et seq.*

<sup>93</sup> For example, updates to annexes to the EU-Georgia AA are made by decisions of the EU-Georgia Association Council or other joint bodies. See, *inter alia*, Decision 2/2019 of the EU-Georgia Association Committee in Trade Configuration of 18 October 2019 updating Annex XVI to the Association Agreement.

While the EU-UK TCA has been concluded for an indefinite period,<sup>94</sup> the suspension or termination of parts or of the entire EU-UK TCA is on the cards. The Agreement in several places permits either side to trigger the suspension of its application in relation to specifically listed parts. For instance, a suspension may take the form of a remedial action in the areas of air or road transport.<sup>95</sup> It also contains a guillotine clause in Art. FISH.17 EU-UK TCA. Should the section dedicated to fisheries be terminated, some other parts, including trade and aviation, would share the same fate. Art. INST. 35 EU-UK TCA also provides that “there has been a serious and substantial failure by the other party” to comply with the obligations referred to as essential elements (democracy, rule of law, human rights; fight against climate change; countering proliferation of weapons of mass destruction) either party may decide to suspend or terminate parts, or the entirety of EU-UK TCA or any supplementing agreement. What is more, Art. FINPROV.8 EU-UK TCA allows each party to terminate the EU-UK TCA *in toto*.<sup>96</sup>

### V.3. EURATOM-UK AGREEMENT ON COOPERATION ON THE SAFE AND PEACEFUL USES OF NUCLEAR ENERGY

Alongside the EU-UK TCA, Euratom and the United Kingdom also concluded a tailor-made Agreement dedicated to cooperation on the use of nuclear energy. This also provisionally entered into force on 1 January 2021,<sup>97</sup> arguably as a logical consequence of the fact that by withdrawing from the European Union, the United Kingdom also withdrew from the European Atomic Energy Community. It had no choice in this respect, as the membership of both the EU and Euratom is inextricably linked. However, despite sharing institutions with the European Union, Euratom remains formally a separate international organisation, with legal personality in its own right. It, too, has external competences, which materialise in international agreements concluded as per Art. 101 Euratom.<sup>98</sup> The main aim of the Euratom-UK SPNE is to create a legal framework for cooperation between the two sides in the peaceful uses of nuclear energy. The application of this Agreement is subject to the caveat that items covered by its scope may not be

<sup>94</sup> As per Art. FINPROV. 3 EU-UK TCA, the EU and the UK are expected to review the implementation of the EU-UK TCA, as well as the supplementing agreements in five year intervals.

<sup>95</sup> See, for instance, Art. ROAD. 11 EU-UK TCA, which permits suspension of the part on road transport or Article AIRTRANS. 25 EU-UK TCA that envisages a comparable *modus operandi* applicable to the air transport.

<sup>96</sup> It would lose force on the first day of the twelfth month following the date of notification.

<sup>97</sup> See Exchange of letters on the provisional application of the Agreement between the European Atomic Energy Community and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Safe and Peaceful Uses of Nuclear Energy.

<sup>98</sup> See, *inter alia*, Agreement for Cooperation between the European Atomic Energy Community and the Cabinet of Ministers of Ukraine in the field of nuclear safety; Agreement for Cooperation between the European Atomic Energy Community and the Cabinet of Ministers of Ukraine in the field of controlled nuclear fusion.

used for any nuclear weapon or nuclear explosive device. Furthermore, they may not be used for research on or development of any nuclear weapon or other nuclear explosive device or for any military purpose. Arts 3 and 4 Euratom-UK SPNE are at the heart of the Agreement. They cover, respectively, the scope and the forms of nuclear cooperation.<sup>99</sup> The Agreement in question was concluded by the European Atomic Energy Community on the basis of Art. 101 Euratom, and it is subject to provisional application just like the main EU-UK TCA. As per Art. COMPROV.16 EU-UK TCA, being a supplementing agreement, it cannot produce direct effect. It is interesting to note that the Euratom-UK SPNE was concluded for 30 years, after which it is due for renewal in ten-year intervals. Arts 22 and 24 Euratom-UK SPNE also envisage suspensions and early termination of the Agreement. The linguistic cacophony discussed above has also reached the Euratom-UK SPNE. While the version in English has been finalised, the verification of the text in the remaining official languages of the European Union is yet to be completed. As regulated in Art. 25 Euratom-UK SPNE, this is expected on 30 April 2021 at the latest.

#### V.4. EU-UK AGREEMENT ON SECURITY PROCEDURES FOR THE EXCHANGE OF CLASSIFIED INFORMATION

The third Agreement concluded on 30 December 2020 deals with the exchange of classified information between the EU and the UK. It should be noted at the outset that this is inextricably linked to the EU-UK TCA. Firstly, the Council of the EU signed both Agreements by means of a single decision. Secondly, the legal basis for the EU-UK TCA and EU-UK SPCI is just the same. Thirdly, Arts 19-20 EU-UK SPCI contain a guillotine clause. The entry into force of the EU-UK SPCI was linked to the entry into force of the EU-UK TCA. Furthermore, the termination of the latter would also trigger the termination of the former. This Agreement, too, became applicable on a provisional basis on 1 January 2021. As in the case of the other two Agreements, the version in English was to be the point of reference, while the final versions in the other 23 official languages of the European Union were due for publication by 30 April 2021 at the latest.<sup>100</sup> In terms of substance, this

<sup>99</sup> For instance, the Euratom-UK SPNE covers facilitating trade and commercial cooperation; the supply of nuclear material, non-nuclear material, and equipment; transfer of technology, including supply of information; the procurement of equipment and devices; access to and use of equipment and facilities; safe management of spent fuel and radioactive waste, including geological disposal; nuclear safety and radiation protection, including emergency preparedness and monitoring of levels of radioactivity in the environment; nuclear safeguards and physical protection; use of radioisotopes and radiation in agriculture, industry, medicine and research; in particular, in order to minimise the risks of shortage of supply of medical radioisotopes, and to support the development of novel technologies and treatments involving radioisotopes, in the interest of public health; geological and geophysical exploration, development, production, further processing and use of uranium resources; regulatory aspects of the peaceful uses of nuclear energy; research and development.

<sup>100</sup> Art. 21 EU-UK SPCI.

Agreement is rather brief and provides a basic framework for the exchange of classified information. For instance, in accordance with Art. 5, para. 1, EU-UK SPCI, the EU and the UK should – in relation to classified information shared or provided by the other party – protect it as per domestic laws in a way that own classified information is protected. Furthermore, as per Art. 6, para. 1, EU-UK SPCI, classified information shall be disclosed or released only in accordance with the principle of originators consent.

#### V.5. EU-UK WITHDRAWAL AGREEMENT

Last but not least, one should not forget the EU-UK Withdrawal Agreement. With the new EU-UK legal framework in place, it is likely to be overshadowed. While many solutions envisaged therein were tailor-made to regulate the intertemporal issues related to exit from the EU, several sections of the EU-UK WA will remain applicable for years, if not decades, to come. This, in particular, refers to the Part 2 of the EU-UK WA, which is dedicated to the acquired rights of EU citizens in the UK, and UK citizens in the EU,<sup>101</sup> as well as to the Protocol on Northern Ireland.<sup>102</sup> Furthermore, the rules on dispute settlement are likely to remain relevant, too.<sup>103</sup> While the details of the EU-UK WA have been analysed in the academic literature, and deserve no detailed elaboration in the present *Article*, a number of its features merit a closer look with a view to demonstrating numerous phenomena which become visible when the EU-UK WA is juxtaposed to the EU-UK TCA.<sup>104</sup> First and foremost, the EU-UK WA is destined to produce direct effect. Art. 4 EU-UK WA leaves no doubts in this respect and, without calling a spade a spade, it codifies in paragraph 2 the doctrine of primacy as envisaged by the Court of Justice in

<sup>101</sup> See, *inter alia*, C. BARNARD, E. LEINARTE, *Citizens' Rights*, in F. FABBRINI (ed.), *The Law & Politics of Brexit. Volume II*, cit., p. 107 et seq.; M. MARKAKIS, *Citizens' Rights after Brexit: The Withdrawal Agreement and the Future of Mobility Framework*, in F. KAINERM, R. REPASI (eds), *Trade Relations after Brexit*, Baden-Baden: Nomos, Hart, 2019, p. 293 et seq.; S. SMISMANS, *EU Citizens' Rights post Brexit: Why Direct Effect Beyond the EU is not Enough*, in *European Constitutional Law Review*, 2018, p. 443 et seq.; E. SPAVENTA, *The Rights of EU Citizens under the Withdrawal Agreement: A Critical Analysis*, in *European Law Review*, 2020, p. 193 et seq.

<sup>102</sup> See further, *inter alia*, S. WEATHERILL, *The Protocol on Ireland/Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's*, in *European Law Review*, 2020, p. 222 et seq.; C. HARVEY, *The Irish Border*, in F. Fabbrini (ed.), *The Law and Politics of Brexit. Volume II*, cit., p. 148 et seq.

<sup>103</sup> On the evolution of the dispute settlement *modus operandi* see, *inter alia*, N. FENNELLY, *Brexit: Legal Consequences for the EU. Dispute-settling Between the EU and the UK*, in *ERA Forum*, 2018, p. 493 et seq. On the final solution see, *inter alia*, A. DASHWOOD, *The Withdrawal Agreement: Common Provisions, Governance and Dispute Settlement*, in *European Law Review*, 2020, p. 183 et seq.; J. LARIK, *Decision-Making and Dispute Settlement*, in F. FABBRINI (ed.), *The Law and Politics of Brexit. Volume II*, cit., p. 191 et seq.

<sup>104</sup> For a general overview of the EU-UK Withdrawal Agreement see, *inter alia*, M. DOUGAN, *So Long, Farewell, auf Wiedersehen, Goodbye: The UK's Withdrawal Package*, in *Common Market Law Review*, 2020, p. 631 et seq.; S. PEERS, *The End – or a New Beginning? The EU/UK Withdrawal Agreement*, in *Yearbook of European Law*, 2020 (forthcoming).

case 106/77 *Simmenthal*.<sup>105</sup> The provision in question also attends to the contentious matter of the jurisprudence of the Court of Justice. Any provisions contained in the EU-UK WA which refer to EU law or the concepts laid down therein ought to be interpreted in compliance with the judgments of the Court rendered before 31 December 2020 (that is, the end of the transitional period). However, any post-Brexit judgments should be given due regard.<sup>106</sup> This stands in stark contrast to the EU-UK TCA, which – in Art. COMPROV.13 para. 3 – makes it clear that “an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party”. All of this proves that the assertions of leading Brexiteers that the United Kingdom is now free from the jurisdiction of the Court of Justice amount to half-truths. While this is the case in relation to the EU-UK TCA, it is certainly not so when it comes to the EU-UK Withdrawal Agreement. What is more, the Court of Justice is also at the heart of the dispute settlement procedure laid down therein.<sup>107</sup> Finally, when it comes to the status of Northern Ireland, the centre of gravity is on the EU-UK Withdrawal Agreement and, in all certainty, that part of the United Kingdom remains, at least with one leg, in the European Union. The decisions of the EU-UK Joint Committee, taken in December 2020, are nothing but confirmation in this respect.<sup>108</sup>

## VI. FOUNDATIONS FOR EU-UK COOPERATION

### VI.1. INTRODUCTION

The foundations for post-Brexit cooperation, as well as generally determined areas of shared interest, were outlined in Part I of the Political Declaration. Bearing in mind existing EU practice in external relations, the inclusion of core values and human rights was hardly surprising. As aptly noted by E. Cannizzaro, “the incorporation of *ad hoc* clauses into the terms of agreements with non-Member States represents one of the European Union’s most efficient devices with which to promote compliance with human

<sup>105</sup> Court of Justice, judgment of 9 March 1978, case 106/77, *Simmenthal*. For an academic appraisal see, *inter alia*, W. PHELAN, *Great Judgments of the European Court of Justice*, cit., p. 171 *et seq.*

<sup>106</sup> Art. 4, paras 4-5, EU-UK WA.

<sup>107</sup> As per Art. 174 EU-UK WA, the arbitration panels dealing with EU-UK disputes shall make references to the Court of Justice when issues of interpretations of concepts anchored in EU law arise.

<sup>108</sup> See, *inter alia*, Decision 3/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 amending the Protocol on Ireland and Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community; Decision 6/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 providing for the practical working arrangements relating to the exercise of the rights of Union representatives referred to in Article 12(2) of the Protocol on Ireland/Northern Ireland.

rights".<sup>109</sup> In the case of the post-Brexit EU-UK framework, some of the solutions proposed in the Political Declaration, and later developed in the Draft Agreement of 12 March 2020, either did not survive the negotiations or have been considerably pruned.

## VI.2. THE FUTURE RELATIONSHIP BASED ON SHARED VALUES

As a starting point, it is worth putting under the microscope the notions employed to determine the character of the post-Brexit relationship between the European Union and the United Kingdom. While the term "association" is nowhere to be seen, it is interesting to follow how this politically important description of relations evolved. To start with, the Political Declaration set as the main ambition the creation of "ambitious, broad, deep and flexible partnership". This was reflected in the Draft Agreement, which in Art. COMPROV.1 proclaimed that it was to establish "a comprehensive partnership between the Parties". Accordingly, the full title of the Draft Agreement was: "Draft Text of the Agreement on the New Partnership between the European Union and the United Kingdom". For reasons which were unclear at the time of writing the present *Article*, the nature of the bilateral relationship has been considerably watered down both in the title of the main agreement between the EU and the UK, but also in its opening provision. The latter merely talks about "a broad relationship between the Parties, within the area of prosperity and good neighbourliness".<sup>110</sup> This newly formed relationship is based on the autonomy and sovereignty of each side. One cannot escape the conclusion that such terminological peregrinations are Brexit paraphernalia translated into the language of law. Arguably, it is yet another example, if one were needed, of packaging ruling over content. In the same vein, one can interpret the final location of provisions on the foundations of the bilateral relationship. While in the Political Declaration, and in the Draft Agreement, they took a prominent position in the opening parts, in the EU-UK TCA they are sandwiched between the section dedicated to dispute settlement and the closing provisions.

As per Arts COMPROV.4-12 EU-UK TCA, the basis of cooperation includes democracy, rule of law, human rights, the fight against climate change, countering the proliferation of weapons of mass destruction, the implementation of rules on illicit manufacture, transfer and circulation of small arms, light and other conventional weapons, the fight against the most serious crimes that are of concern to the international community, cooperation in counter-terrorism, data protection and global cooperation on matters of shared economic, environmental and social interest. It beggars belief why such fundamental and systemic provisions have been relegated to remote corners of the EU-UK TCA, even though the matters in question are mentioned in the first recital of the Preamble. The truth remains

<sup>109</sup> E. CANNIZZARO, *The Scope of EU Foreign Power. Is the EC Competent to Conclude Agreements with Third States Including Human Rights Clauses?*, in E. CANNIZZARO (ed.), *The European Union as an Actor in International Relations*, The Hague, London, New York: Kluwer Law International, 2002, p. 297.

<sup>110</sup> Art. COMPROV.1 EU-UK TCA.

behind the doors of the negotiation rooms or Zoom records. However, it is hard to escape the cynical and speculative conclusion that such a move was to make sure that some less diligent readers would not spot such ambitious clauses if they were hidden in a less prominent place than the opening sections of the Agreement.

From the legal point of view, it is worth delving deeper into the provisions dealing with respect for human rights, in particular the status of the European Convention on Human Rights. Paragraph 6 of the Political Declaration made it unequivocally clear that the future relations should be based on shared values, which include the usual mantra of respect for human rights, fundamental freedoms, democratic principles, respect for the rule of law and non-proliferation. Not only was the word “should” employed by the drafters, but it also came with the caveat that “these values are an essential prerequisite for cooperation”. This is not surprising for a number of reasons. Firstly, the EU is committed to shaping its external relations with the outside world on its own values listed in Art. 2 TEU.<sup>111</sup> Secondly, the EU is generally considered to be a leading exporter of values based on human rights and the rule of law.<sup>112</sup> This is against a rather precarious reality, as some countries in the EU’s immediate or remote neighbourhood share these values only figuratively. Furthermore, some of the EU’s own Member States have a rather idiosyncratic relationship with the rule of law, thus undermining the EU’s legitimacy to pursue values-based external activities.<sup>113</sup> Nevertheless, the opening sections of many EU agreements with third countries are dedicated to shared values.<sup>114</sup> Furthermore, relations with the EU’s immediate neighbours are based on strict conditionality, requiring respect for fundamental values (at least at the time when an agreement is concluded).<sup>115</sup> Therefore, it is hardly surprising that this general *desideratum* was reflected in the opening part of the Draft Agreement. Art. COMPROV.4 made it quite clear that the EU and the UK were to continue to uphold the shared values, the rule of law and respect for human rights, including commitment to the European Convention on

<sup>111</sup> Art. 21 TUE. See further, *inter alia*, S. OETER, *Article 21. [The Principles and Objectives of the Union’s External Action]*, in H.-J. BLANKE, S. MANGIAMELI (eds), *The Treaty on European Union (TEU). A Commentary*, Heidelberg, New York, Dordrecht, London: Springer, 2013, p. 833 *et seq.*; T. RAMOPOULOS, *Articles 21-22*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaty and the Charter of Fundamental Rights. A Commentary*, Oxford: Oxford University Press, 2019, p. 200 *et seq.*

<sup>112</sup> See, for instance, S. POLI (ed.), *The European Neighbourhood Policy – Values and Principles*, London and New York: Routledge, 2016.

<sup>113</sup> See, *inter alia*, A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI, M. SCHMIDT (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe’s Actions*, Berlin: Springer, 2021; K. LANE SCHEPPELE, D. VLADIMIROVICH KOCHENOV, B. GRABOWSKA-MOROZ, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook of European Law*, 2021 (forthcoming).

<sup>114</sup> See, for instance, Arts 2-3 EU-Ukraine AA.

<sup>115</sup> For a comprehensive assessment see, *inter alia*, N. GHAZARYAN, *The European Neighbourhood Policy and the Democratic Values of the EU. A Legal Analysis*, Oxford, Portland: Hart, 2014.



Human Rights. Alas, it belongs to the group of already mentioned provisions which have been demoted to the closing parts of the EU-UK TCA.

In the case of post-Brexit EU-UK relations, one of the issues that concerned the negotiators was the UK's on-going adherence to the European Convention on Human Rights and participation in the Strasbourg enforcement system. Such concerns have been perfectly justified on at least two grounds. Firstly, the Euroscepticism of the ruling Conservative Party is not exclusively limited to the European Union but also stretches to the Council of Europe. Secondly, the future EU-UK legal framework was already at the time of drafting of the Political Declaration destined to include arrangements for judicial cooperation in criminal matters. Arguably, the latter could only become operational if it were underpinned by respect for human rights. With the above in mind, para. 7 of the Political Declaration provided as follows: "The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention of Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR".

This proviso clearly made the continued UK participation in the European Convention on Human Rights framework a *conditio sine qua non* for the future relationship and, if one were to read the language of the Political Declaration literally, the commitment in this respect would be written down into the future agreement between the two sides. An attempt in this direction was made by the European Union in the Draft Agreement. Art. LAW.OTHER.44 conditioned cooperation in criminal matters on continued adherence to the European Convention on Human Rights and the maintenance of its effect in the United Kingdom. In respect of the latter, a reminder is fitting that the Human Rights Act 1998 transposed the European Convention on Human Rights with selected protocols to the UK legal orders.<sup>116</sup> With the UK being a dualist country, without such a transposition, the European Convention on Human Rights was only binding at the level of international law, with individuals being deprived of its application in national courts. Since the European Convention on Human Rights and the Human Rights Act 1998 remain in equal measure on the radars of the Brexiteers, the European Commission proposed the discussed solution and introduced two important locks. Firstly, in the event of repeal of the Human Rights Act 1998, or the lowering of levels of protection, the part of the Draft Agreement dedicated to cooperation in criminal matters would be suspended until the *status quo* were restored. Secondly, in the event of denunciation of the European Convention on Human Rights, the same section of the Draft Agreement would be disapplied. It is little wonder that these solutions did not get people dancing in Whitehall. Judging by the final shape of the EU-UK TCA, a compromise was reached and,

<sup>116</sup> See further, *inter alia*, J. WADHAM, H. MOUNTFIELD QC, E. PROCHASKA, R. DESAI, *Blackstone's Guide to the Human Rights Act 1998*, Oxford: Oxford University Press, 2015.

consequentially, the language employed by the drafters became vaguer. Art. LAW.OTHER.136 para. 2 EU-UK TCA provides that the European Union may terminate Part 3 of the Agreement should the United Kingdom denounce the European Convention on Human Rights. The same part of the Agreement may be suspended fully in the case of “serious and systemic deficiencies” of human rights, or, partly, if data protection standards suffer the same fate.<sup>117</sup> As far as the former is concerned, one could arguably claim that the repeal of the Human Rights Act 1998 could, if not followed by a legislative substitute, be potentially considered as a deficiency big enough to trigger the suspension of Part 3 EU-UK TCA. Thus, while the automatism of termination or suspension has been removed from the provision in question, the end result may still be the same. The question remains if deficiencies in the human rights protection could have a wider knock-on effect, going beyond Part 3 EU-UK TCA. Arguably, in extreme cases, they could serve as a catalyst for the termination of EU-UK TCA.

## VII. INSTITUTIONAL SET-UP

### VII.1. INTRODUCTION

Without exception, all association and trade agreements concluded between the European Union and its neighbouring countries provide for some institutional platforms for cooperation.<sup>118</sup> The types of institutions, as well as the *modi operandi* of their functioning, may, however, vary from one agreement to another. In this respect, yet another rule of thumb is detectable: the deeper the desired cooperation, the more comprehensive the institutional framework. Furthermore, for third countries engaged in enhanced bilateralism or enhanced multilateralism, the EU keeps the institutional door ajar, allowing for very modest access to EU decision-shaping,<sup>119</sup> and facilitates participation in selected agencies.<sup>120</sup> With the above in mind, there is no doubt that the European Economic Area stands out with its two-pillar institutional structure, referred to by Cremona as Byzantine.<sup>121</sup> It is comprised of joint EU-EFTA institutions, as well as a tailor-made EFTA Court and an EFTA Surveillance Authority on the EEA/EFTA side. Things are very much more complicated in the EU-Swiss bilateral framework, which is not only very

<sup>117</sup> Art. LAW.OTHER.137 EU-UK TCA.

<sup>118</sup> For a comprehensive analysis see, *inter alia*, S. GSTÖHL, D. PHINNEMORE (eds), *The Proliferation of Privileged Partnerships between the European Union and its Neighbours*, London, New York: Routledge, 2019.

<sup>119</sup> See, in relation to the EEA, G. BAUR, *Decision-Making Procedure and Implementation of New Law*, in C. BAUDENBACHER (ed.), *The Handbook of EEA Law*, Berlin: Springer, 2016, p. 45 *et seq.*; A. ŁAZOWSKI, *Draft EU-Swiss Institutional Agreement*, cit.

<sup>120</sup> T. BEKKEDAL, *Third State Participation in EU Agencies: Exploring the EEA Precedent*, in *Common Market Law Review*, 2019, p. 381 *et seq.*

<sup>121</sup> M. CREMONA, *The “Dynamic and Homogeneous” EEA: Byzantine Structures and Variable Geometry*, in *European Law Review*, 1994, p. 508 *et seq.*

patchy and fragmented, but also short of a coherent and overarching institutional arrangement. The relations between the EU and Switzerland are governed by over 120 bilateral agreements, with some of them envisaging rather standard institutional arrangements built on joint committees.<sup>122</sup> An overarching institutional agreement was expected to serve as a panacea. Alas, despite a successful end to the negotiations, which had been filled with twists and dramas, the agreement in question is yet to enter into force.<sup>123</sup> Nevertheless, it has already served as a model for the EU-UK Withdrawal Agreement, and it was expected to be employed again for the post-Brexit framework.<sup>124</sup> In the case of other treaties between the EU and its neighbours, the institutional arrangements are not as ambitious and generally follow the same pattern. They are comprised of bilateral councils and committees, as well as institutional outlets bringing together parliamentarians from the European Parliament and the legislatures of neigh-

<sup>122</sup> See, in particular, the Bilateral I and Bilateral II packages. The former comprises Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons; Agreement between the European Community and the Swiss Confederation on Air Transport; Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road; Agreement between the European Community and the Swiss Confederation on trade in agricultural products; Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment; Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement. The main components of Bilateral II are: Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis; Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a Member State or in Switzerland; Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments; Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 as regards the provisions applicable to processed agricultural products; Agreement between the European Community and the Swiss Confederation concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network; Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics; Agreement for scientific and technological cooperation between the European Union and European Atomic Energy Community and the Swiss Confederation associating the Swiss Confederation to Horizon 2020 – the Framework Programme for Research and Innovation and the Research and Training Programme of the European Atomic Energy Community complementing Horizon 2020, and regulating the Swiss Confederation's participation in the ITER activities carried out by Fusion for Energy.

<sup>123</sup> See further C. KADDOUS, *Switzerland and the EU. Current Issues and New Challenges under the Draft Institutional Framework Agreement*, in S. GSTÖHL, D. PHINNEMORE (eds), *The Proliferation of Privileged Partnerships Between the European Union and Its Neighbours*, cit., p. 68 et seq.; R. SCHWOK, *Switzerland-EU Relations*, cit., p. 159 et seq.; A. ŁAZOWSKI, *Draft EU-Swiss Institutional Agreement*, cit.

<sup>124</sup> On lessons for Brexit from the EU-Swiss experience, see C. TOBLER, *One of Many Challenges after 'Brexit'. The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 583 et seq.

bouring countries.<sup>125</sup> In the case of some neighbours, with whom relations are particularly dynamic or strategically important, the agreements envisage the regular holding of bilateral summits at the highest political level.<sup>126</sup> Furthermore, the creation of bilateral platforms for NGOs is also common practice.<sup>127</sup> In procedural terms, it is notable that the joint authorities, which make up the institutional fabric of the EU and its neighbours, are traditionally equipped with decision-making powers as well as competences aiming at dispute settlement.<sup>128</sup>

All of the above is reflected in the EU-UK Withdrawal Agreement and in the post-Brexit Agreements. It is notable that as of 1 January 2021 two sets of EU-UK bilateral bodies operate in parallel. On the one hand, the joint institutions envisaged in the EU-UK WA are in charge of the Withdrawal Agreement, including the implementation of the contentious Protocol on Ireland/Northern Ireland. Furthermore, the EU-UK WA provides for complex dispute settlement *modus operandi*, with a special role reserved for the Court of Justice. On the other hand, the EU-UK TCA, EU-UK SPCI and Euratom-UK SPNE contain sets of institutional provisions and, in the case of the EU-UK TCA, general as well as sectoral variations of the dispute settlement procedures. All are presented in turn.

## VII.2. INSTITUTIONAL FRAMEWORK IN THE EU-UK WITHDRAWAL AGREEMENT

As a starting point, a reminder is fitting that the United Kingdom formally ceased its participation in the EU's institutional framework on 31 January 2020. During the transitional period, it did have the hybrid status of a country which was *en route* from EU membership to a future relationship of sorts. In substantive terms, it was business as usual for the duration of the transition. To put it differently, the United Kingdom was bound by EU law in its entirety. In terms of infringement procedures and preliminary rulings, the United Kingdom was treated as if it were still an EU Member State.<sup>129</sup> However, as of the day of Brexit, it no longer benefited from participation in EU decision-making.<sup>130</sup> It is notable that the status of the United Kingdom was downgraded to levels going below what the EEA-EFTA countries and the Swiss authorities are offered. In the

<sup>125</sup> For instance, see in relation to the EU-Ukraine AA, G. VAN DER LOO, *The EU-Ukraine Association Agreement and Deep and Comprehensive Trade Area*, cit., p. 204 *et seq.*

<sup>126</sup> See, for instance, Art. 460 EU-Ukraine AA.

<sup>127</sup> See, for instance, Art. 469 EU-Ukraine AA.

<sup>128</sup> See further, *inter alia*, W. WEIS, *Delegation to Treaty Bodies in EU Agreements: Constitutional Constraints and Proposals for Strengthening the European Parliament*, in *European Constitutional Law Review*, 2018, p. 532 *et seq.*

<sup>129</sup> Art. 131 EU-UK WA.

<sup>130</sup> It is notable that HM Government has already pulled out of the Council and its preparatory bodies as of 1 September 2019. To analyse the political and legal merits of that decision would, however, go beyond the scope of the present analysis.

latter case, participation in so-called decision-shaping is assured.<sup>131</sup> However, in the case of the United Kingdom, such a *modus* for participation was available merely in selected cases and, more importantly, only by invitation.<sup>132</sup> Furthermore, as of the date of Brexit, the United Kingdom no longer had members of the European Parliament or the advisory bodies. The terms of judges at the Court of Justice of the European Union also came to an end. The Advocate General Sharpston continued to work, however she was not permitted to serve her term to the end.<sup>133</sup>

With this in mind, the EU-UK WA contains provisions which, on the one hand, regulate the detachment of the UK from the EU institutions and, on the other hand, provide an institutional framework operational as of 1 February 2020. It is centred on the Joint Committee, which was established as per Art. 164 EU-UK WA.<sup>134</sup> It is co-chaired by both sides and convenes whenever requested, but subject to the caveat that it meets at least once a year. The political level at which the Joint Committee meets is determined *in casu*. To put it differently, it is not predetermined by the EU-UK WA. The tasks of the Joint Committee are, in general terms, to supervise the implementation, the application and the interpretation of the EU-UK WA. This multidisciplinary body is equipped, in equal measure, with powers to take decisions and make recommendations, as well as to serve as a dispute settlement body.<sup>135</sup> As noted earlier in the present *Article*, the Joint Committee is empowered to take decisions in politically explosive matters, including the details of trade between Great Britain and Northern Ireland. Some of its tasks may be delegated to six specialised committees envisaged by the EU-UK WA, as well as other such committees that the Joint Committee may establish depending on needs.<sup>136</sup> Interestingly, the EU-UK WA envisages neither the creation of a joint parliamentary body nor a platform for cooperation between NGOs. This is perplexing bearing in mind that parts of the EU-UK WA are most likely to remain relevant for years following Brexit.

The EU-UK WA also contains carefully crafted provisions governing dispute settlement. They apply as of the end of the transitional period.<sup>137</sup> It is notable that the *modi operandi* in this respect are the only procedural avenues available to the parties. However, as made clear in Art. 168 EU-UK WA, in cases of disputes arising from the application of the EU-UK WA the parties may not have recourse to other dispute settlement methods or outlets. At the initial stages of the dispute settlement, the institution in

<sup>131</sup> See further, *inter alia*, A. ŁAZOWSKI, *Draft EU-Swiss Institutional Agreement*, cit.

<sup>132</sup> Art. 128, para. 5, EU-UK WA.

<sup>133</sup> For a detailed account see D. VLADIMIROVICH KOCHENOV, G. BUTLER, *The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution*, Jean Monnet Working Paper 2/2020, jeanmonnetprogram.org.

<sup>134</sup> Its Rules of Procedure are annexed to EU-UK WA.

<sup>135</sup> Art. 164 EU-UK WA.

<sup>136</sup> *Ibid.*, Art. 164, para. 5.

<sup>137</sup> See, *inter alia*, A. DASHWOOD, *The Withdrawal Agreement*, cit., p. 183 *et seq.*; J. LARIK, *Decision-Making and Dispute Settlement*, cit., p. 191 *et seq.*

charge is – not surprisingly – the Joint Committee. Should a solution not be available, an arbitration panel composed of EU and UK representatives may be established by the Joint Committee.<sup>138</sup> It merits attention that as per Art. 174 WA, in the case of disputes touching upon EU law, the arbitration panel has an obligation to proceed with references for a preliminary ruling to the Court of Justice.<sup>139</sup> Thus, it is clear that the claims of some representatives of the Brexit camp that withdrawal from the European Union ends the jurisdiction of the Court are clearly unfounded.

### VII.3. SKELETON OF THE POST-BREXIT INSTITUTIONAL STRUCTURE ENVISAGED IN THE POLITICAL DECLARATION

While the institutional framework envisaged in the EU-UE WA serves the application of the latter, any future relations agreements were *ab initio* expected to contain the institutional frameworks in their own right. The basic parameters of how this may look were outlined in the Political Declaration. As a general rule, the Political Declaration talked about “an overarching institutional framework”, with tailor-made sectoral arrangements for selected dossiers.<sup>140</sup> The joint institutional outlets were planned to serve the strategic dialogue, as well as the management and supervision of the post-Brexit framework. Not surprisingly, the bilateral Joint Committee was pencilled in to be at the heart of the institutional machinery, including the dispute settlement procedure. As far as the latter was concerned, a role played by the Court of Justice of the European Union was also envisaged, along the lines of the EU-UK WA.<sup>141</sup>

### VII.4. EU-UK JOINT INSTITUTIONS IN THE POST-BREXIT FRAMEWORK

A comprehensive institutional set-up was proposed by the European Union in the Draft Agreement. As per Art. INST.1, the leading role was allocated to the Partnership Council. It would be assisted by specialised committees and working groups. Furthermore, Art. INST.5 provided for the Parliamentary Partnership Assembly. As well-established in the recent treaty practice of the EU, a civil society outlet was also on the cards.<sup>142</sup> Not surprisingly, the proposed dispute settlement *modus operandi* largely followed the footsteps of the EU-UK WA, providing for consultations within the Partnership Council and the creation of arbitration tribunals to settle disputes. Building on what was agreed in the Political Dec-

<sup>138</sup> Decision 7/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 22 December 2020 establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement.

<sup>139</sup> Similar *modi operandi* are provided in EU-Ukraine AA, EU-Georgia AA, EU-Moldova AA.

<sup>140</sup> Para. 118 of the Political Declaration.

<sup>141</sup> *Ibid.*, para. 131.

<sup>142</sup> Art. INST. 8 Draft Agreement.

laration, a special role for the Court of Justice of the European Union was also envisaged in Art. INST.16 of the Draft Agreement. As already alluded to, the latter solution became one of the main bones of contention during the actual negotiations. While the Brexiteers, including Prime Minister B. Johnson, were happy to approve the WA and the Political Declaration, they opted for a reverse ferret before the ink dried.

The EU-UK TCA establishes a comprehensive bilateral institutional framework aiming at proper management of the Agreement and its implementation. While it builds on the Commission proposal made in the Draft Agreement, one feature is striking. The entire title on the institutional framework has been moved forward from the closing parts of the Draft Agreement to the opening sections of the EU-UK TCA. In terms of what it precisely covers, it is fitting to start with a feature, which, in fact, does not exist. Unlike the case with some of the EU's leading partners, the Agreement does not envisage regular bilateral summits. It goes without saying that they may be arranged *ad hoc*, yet it still amounts to a political anomaly that the European Union regularly holds annual summits, for instance with Ukraine, but this will not be the case in a similarly organised fashion with its former Member State. Instead, the highest political institution established on the basis of the EU-UK TCA is the Partnership Council, which on the EU side will be co-chaired by a member of the European Commission, while the UK will be represented by a person at ministerial level.<sup>143</sup> There are a number of factors that make the Partnership Council worth looking at closely. As noted earlier, the word "partnership" has disappeared from the title of the Agreement and from its opening provision outlining the aims of relations. Still, the negotiators found it fitting to keep the original name of the institution in question, just as it was proposed by the European Commission in the Draft Agreement. Labels aside, the Partnership Council is likely to play a leading role as a platform for dialogue between the European Union, its Member States, as well as the authorities in London. Meetings may be called either on the initiative of the EU, or of the United Kingdom. It is important to note that its composition is likely to vary, and it will hinge on the agenda. Although Art. INST.1 EU-UK TCA may seem to imply that only the EU and the UK would be represented, Art. 2, para. 1, of Council Decision 2020/2252 on signing and provisional application of EU-UK TCA and EU-UK SPCI makes it clear that each Member State is also allowed to send one representative.<sup>144</sup> The main role played by the EU-UK Partnership Council is to oversee the implementation of the EU-UK TCA. In particular, it has the competence to adopt binding decisions and soft law recommendations. This includes, whenever specified in the EU-UK TCA, revisions of the Agreement itself. It should be noted that the consequence of Art.

<sup>143</sup> Art. INST 1 EU-UK TCA.

<sup>144</sup> A similar *modus operandi* applies to the joint institutions established as per EU-UK WA. For instance, during the second meeting of the EU-UK Joint Committee a total of 15 Member States was represented. See Press statement by Vice-President Maroš Šefčovič following the second meeting of the EU-UK Joint Committee, Brussels 12 June 2020, Statement/20/1055, ec.europa.eu, p. 1.

COMPROV.<sup>145</sup> EU-UK TCA is that, unlike in the EU-Turkey framework, the decisions of the Partnership Council may not produce direct effect.<sup>145</sup>

The work of the Partnership Council is supported by EU-UK committees established under Art. INST.2 EU-UK TCA.<sup>146</sup> They, too, are empowered to monitor the application of the EU-UK TCA and they are equipped with the power to make binding decisions. Bearing in mind their highly specialised character, they will meet at the technical level. Furthermore, the creation of bilateral working groups is also envisaged.<sup>147</sup> It is interesting to note that the rules on the creation of an EU-UK parliamentary framework were watered down during the negotiations. Its creation is now an option, not a *fait accompli* as per the original proposal laid down in the Draft Agreement. If created, it will serve as a platform for exchange between the European Parliament and the UK Parliament, and it will have the power to make recommendations to the Partnership Council. Finally, a Civil Society Forum is also on the cards.<sup>148</sup>

For the completeness of the present analysis, it should be added that no separate institutional framework is envisaged under the EU-UK SPCI. However, any matters of relevance for its implementation may be discussed by the Partnership Council.<sup>149</sup> In contrast, the Euratom-UK SPNE envisages the creation of a bilateral joint committee.<sup>150</sup>

As already noted, one of the hotly debated and negotiated matters was the dispute settlement *modi operandi*. While they are discussed in detail in the forthcoming second instalment of the present *Article*, a few phenomena are worth noting. Firstly, the system provided by the EU-UK TCA is very patchy. Apart from the general dispute settlement procedure, several tailor-made rules are provided for various parts of the EU-UK TCA.

<sup>145</sup> *Sevince*, cit. See further, *inter alia*, N. CAMBIEN, *Case C-192/89, S. Z. Sevince v Staatssecretaris van Justitie*, ECLI:EU:C:1990:322, delivered 20 September 1990, in G. BUTLER, R.A. WESSEL (eds), *EU External Relations Law*, cit.

<sup>146</sup> This includes the Trade Partnership Committee; the Trade Specialised Committee on Goods; the Trade Specialised Committee on Customs Cooperation and Rules of Origin; the Trade Specialised Committee on Sanitary and Phytosanitary Measures; the Trade Specialised Committee on Technical Barriers to Trade; the Trade Specialised Committee on Services, Investment and Digital Trade; the Trade Specialised Committee on Intellectual Property; the Trade Specialised Committee on Public Procurement; the Trade Specialised Committee on Regulatory Cooperation; the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development; the Trade Specialised Committee on Administrative Cooperation in VAT and Recovery of Taxes; the Specialised Committee on Energy; the Specialised Committee on Air Transport; the Specialised Committee on Aviation Safety; the Specialised Committee on Road Transport; the Specialised Committee on Social Security Coordination; the Specialised Committee on Fisheries; the Specialised Committee on Law Enforcement and Judicial Cooperation; the Specialised Committee on Participation in Union Programmes.

<sup>147</sup> Art. INST. 3 EU-UK TCA provides for creation of the Working Group on Organic Products; the Working Group on Motor Vehicles and Parts; the Working Group on Medicinal Products; the Working Group on Social Security Coordination.

<sup>148</sup> Art. INST. 8 EU-UK TCA provides that the parties have to facilitate its creation.

<sup>149</sup> Art. INST 1, para. 4e, EU-UK TCA.

<sup>150</sup> Art. 19 Euratom-UK SPNE.



This is the case, for instance, in relation to the politically toxic issue of the level playing field. Secondly, at the insistence of the United Kingdom, the arbitration tribunals will not have the jurisdiction to request preliminary rulings from the Court of Justice of the European Union. Thirdly, the role of the Partnership Council, which had a prominent role in the Draft Agreement, has been somewhat reduced. Fourthly, tailor-made, though very much more modest, rules on dispute settlement are also provided in the EU-UK SPCI<sup>151</sup> and the Euratom-UK SPNE.<sup>152</sup>

## VIII. CONCLUSIONS

On 1 January 2021, the European Union and the United Kingdom entered a new phase of their troubled relationship. It was never a marriage of love and passion, accompanied by belief in the aims of the European integration project. In many ways, almost five decades of UK membership in the European Communities, and later in the European Union, represented a classic case of a square peg in a round hole. Now, with the transitional period over and the post-Brexit package in place, the formal framework for bilateral relations is ready. From the point of view of the European Union, relations with the United Kingdom, although idiosyncratic, have entered the path of an external relations exercise. Thus, they should be perceived accordingly. Five years from now, when the first formal review of the EU-UK TCA takes place, the story of EU membership is likely to be a distant memory. One thing is certain. Brexit or, in more general terms, withdrawal from the European Union is akin to peeling an onion. There are many layers to uncover and with every one it is impossible not to shed a tear. The first days of life outside the Internal Market are proving to be rather turbulent, overshadowed by the reality of being away from the European Union. A likely scenario is further negotiations in the hope that the dossiers left out during the post-Brexit talks may find their way back into the EU-UK bilateral framework. This theme, alongside an analysis of the substance of the EU-UK TCA and the dispute settlement *modi operandi* will follow in the next instalment of the present *Article*.

<sup>151</sup> Art. 18 EU-UK SPCI.

<sup>152</sup> Art. 21 Euratom-UK SPNE.





## ARTICLES

# SCHENGEN AND FREE MOVEMENT LAW DURING THE FIRST PHASE OF THE COVID-19 PANDEMIC: OF SYMBOLISM, LAW AND POLITICS

DANIEL THYM\* AND JONAS BORNEMANN\*\*

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ABSTRACT: Initial response to the Covid-19 pandemic capitalised on symbolism of national belonging. Against this background, borders soon took centre stage in the effort to tackle the spread of the virus during the spring of 2020 with Member States enforcing drastic restrictions to inter-state mobility, both at internal and external Schengen borders. As the second wave rolled in, restrictions gained momentum again, even though Member States by and large, did not revert to symbolically relevant border controls and travel bans. This *Article* revisits the measures taken by the Member States and EU institutions at the internal and external borders of the Schengen area until late-October 2020 and draws lessons regarding the interaction of symbolism, law and politics in times of crisis. It focuses on shifts in the perception of borders and the role of different actors in the closure and the subsequent re-opening thereof. We illustrate that the supranational institutions struggled to support the rule of law without the political support of the Member States, even though the rich case law of the Court of Justice on the internal market provides critical doctrinal arguments that can be employed in times of crises.

KEYWORDS: Covid-19 – Schengen – internal border controls – free movement – fortress Europe – border closure.

\* Professor of Public, European and International Law, Co-Director of the Research Centre Immigration & Asylum Law, University of Konstanz, daniel.thym@uni-konstanz.de.

\*\* Research Assistant, University of Konstanz, jonas.bornemann@uni-konstanz.de.



## I. INTRODUCTION: BORDER CLOSURES AS A SOURCE OF SYMBOLIC CAPITAL

It is no coincidence that borders took centre stage in the fight against the Covid-19 pandemic, even though the practical effects of border closures were limited once the virus had spread among the population. Borders have become potent symbols that governments across the world have employed repeatedly in recent years to convey a message of political power. The best-known example may be Donald Trump's rallying call to reinforce existing fences and barriers between the US and Mexico to build an "impenetrable, physical, tall, powerful, beautiful, southern border wall".<sup>1</sup> Such campaign slogans exploit the symbolic function of borders that is deeply enshrined in our collective cultural memory.<sup>2</sup> Ever since times in school, we have got familiarised ourselves with inter-state borders as an organising principle of international relations in the form of fine black lines drawn to separate countries, painted in different colours on maps in school books or in the media. In times of uncertainty, government can utilise the symbolic weight of borders to stimulate a sense of structure and order.

The European Union has a long tradition of exploiting the symbolic potential of borders itself – albeit in the opposite direction of Donald Trump. In the famous White Paper on the completion of the internal market, the Commission recognised that border controls may be a mere formality for most people, hindering mobility less than heavy traffic during rush hour or construction sites on highways. Nevertheless, they should be eliminated, since they are "to the ordinary citizen the obvious manifestation of the continued division of the Community".<sup>3</sup> It is no coincidence that the political initiative for the abolition of border controls was taken at a Franco-German summit in May 1984, when Helmut Kohl and François Mitterrand launched today's Schengen area without even consulting their interior ministries.<sup>4</sup> The Schengen cooperation had always been a beacon of European unity. The United Kingdom never joined it because it rejected, amongst others, the symbolic promise of border-free travel as a step towards an ever-closer union.<sup>5</sup>

<sup>1</sup> BBC News, *Donald Trump's Mexico wall: Who is going to pay for it?*, 6 February 2017, [www.bbc.com](http://www.bbc.com).

<sup>2</sup> See W. BROWN, *Walled States, Waning Sovereignty*, New York: Zone Books, 2010, p. 119 *et seq.*; and N. DE GENOVA, *Spectacles of Migrant "Illegality". The Scene of Exclusion, the Obscene of Inclusion*, in *Journal of Ethnic and Racial Studies*, 2013, p. 1082.

<sup>3</sup> Commission, *Completing the Internal Market. White Paper*, COM(85) 310 final of 14 June 1985, paras 24, 47 and *passim* emphasised the double economic and political objective of eradicating physical barriers to the free movement of goods and people.

<sup>4</sup> Historical studies have confirmed that the German Interior Ministry learnt from the initiative through the media; see A. SIEBOLD, *Zwischen Grenzen. Die Geschichte des Schengen-Raums aus deutschen, französischen und polnischen Perspektiven*, Paderborn: Ferdinand Schöningh, 2013, p. 40 *et seq.*; and R. ZAIOTTI, *Culture of Border Controls. Schengen and the Evolution of European Frontiers*, Chicago: University of Chicago Press, 2011, p. 67 *et seq.*; the initiative of the Franco-German summit built upon a decade of debate about a possible "passport union" and a "people's Europe" among the EU institutions.

<sup>5</sup> This symbolic reason was complemented by practical considerations of better border management of an island nation; see A. WIENER, *Forging Flexibility – The British "No" to Schengen*, in *European Journal of*

It is important to recognise the symbolic potential of borders to apprehend why the reaction to the Covid-19 pandemic may have implications ranging beyond the practical effects on inter-state travel. Times of crises are moments when our view of the world can be transformed in comparatively short periods of time. Social psychology informs us that perceptions of threat tend to reinforce a distinction between “us” and “them”; we aim for protection within our in-group when feeling vulnerable.<sup>6</sup> It is important, therefore, “who” protects us both against the immediate dangers to our health and the broader economic effects of the pandemic. If the European Union wants to be more than a fair-weather construction, it must ensure that its institutions, policies and rules are being upheld and reinforced during the crisis.

It is well-known that the initial reaction of the Member States and the EU institutions did not serve the European project well – as several *Insights* to a Special Focus of the European Forum amply illustrated.<sup>7</sup> Chaotic border closures with Romanian and Bulgarian citizens being prevented from crossing Hungary and occasional hostility towards French citizens in German border regions were a potent reminder that we cannot take the Schengen area for granted.<sup>8</sup> Export restrictions for health equipment upset Member States first and associated countries later, when the EU institutions managed to re-establish unhindered internal circulation by means of external closure.<sup>9</sup> Solidarity measures were limited to bilateral and modest supranational support initially,<sup>10</sup> before the EU agreed on an impressive financial support scheme under the forward-looking heading of “Next Generation EU”. The positive experience with financial solidarity may possibly help explain why the initial reaction to the second wave of the COVID-19 pandemic in autumn 2020 did not result in another round of hectic border closures. Instead, Member States concentrated on quarantine requirements, which carry less symbolic weight and can be easier to justify legally.

*Migration and Law*, 1999, p. 441 *et seq.*; more broadly, on the discursive and symbolic cleavages of various initiatives of multiple-speeds as a precursor for Brexit, see D. THYM, *Legal Solution vs. Discursive Othering: The (Dis)Integrative Effects of Supranational Differentiation*, in *DCU Brexit Institute Working Paper*, no. 7, 2018, p. 17 *et seq.*

<sup>6</sup> See J.F. DOVIDIO, S.L. GAERTNER, *Intergroup Bias*, in S.T. FISKE, D.T. GILBERT, L. GARDNER (eds), *Handbook of Social Psychology*, Hoboken: Wiley, 2010, p. 1084 *et seq.*

<sup>7</sup> See C. BEAUCILLON (ed.), *European Solidarity in Times of Emergency: An Introduction to the Special Focus on COVID-19 and the EU*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 687 *et seq.*

<sup>8</sup> See S. ROBIN-OLIVIER, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 613 *et seq.*

<sup>9</sup> See B. PIRKER, *Rethinking Solidarity in View of the Wanting Internal and External EU Law Framework Concerning Trade Measures in the Context of the COVID-19 Crisis*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 575 *et seq.*

<sup>10</sup> See C. BEAUCILLON, *International and European Emergency Assistance to EU Member States in the COVID-19 Crisis*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 388 *et seq.*; and E. BROSSET, *Quand l'urgence de santé publique fait son entrée parmi les catastrophes en droit de l'UE*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 573 *et seq.*

Against this background, this *Article* will aim at a broader assessment of the measures taken by the Member States and EU institutions at the internal and external borders of the Schengen area as a response to the Covid-19 pandemic. To this end, it will revisit the period between March and October 2020, when restrictions were first frantically introduced, then discontinued or substantially eased, before the pandemic's second wave compelled recourse to stringent restrictions again. While this *Article* concentrates on the legal analysis, it highlights broader shifts in the perception of borders and the role of different actors in their closure and opening.

Our argument will proceed in three steps. While the reintroduction of internal border controls was comparatively easy to justify from a legal perspective, it holds important lessons for the role of law and the relative weight of the Member States and the EU institutions in sustaining the Schengen area (section II). The travel ban at the external borders raises important legal questions, which have not been addressed adequately so far. It also demonstrates that the European Union has embraced, towards the outside world, a conception of borders contrasting markedly with the internal narrative of the supranational taming of the nation-state (section III). Closer inspection of the dramatic restrictions to the free movement of Union citizens during the Covid-19 pandemic shows that the rich case law of the Court of Justice on the internal market provides sound doctrinal arguments that allow us to uphold the rule of law, even in the face of severe crises, with regard to both internal travel bans and quarantine requirements (section IV).

## II. REINTRODUCTION AND TERMINATION OF INTERNAL BORDER CONTROLS

Initial responses to the pandemic were hectic and uncoordinated and resulted in an unprecedented level of border closures among the Member States. When analysing these measures, it must be borne in mind that border controls may be a nuisance to travellers, but they do not *per se* preclude cross-border mobility. Travel restrictions, conversely, go beyond the mere fact that the border police inspect your passport or search your luggage; a travel restriction limits or precludes the crossing of a border altogether. That is precisely what happened during the Covid-19 pandemic, when many Member States combined “simple” border controls with severe travel restrictions that almost equalled full border closures. Some Member States introduced a distinction between essential and non-essential travel. Others confined themselves to internal restrictions but introduced neither border controls nor formal travel restrictions.<sup>11</sup> Somewhat surprisingly, the restrictions were lifted or at least eased substantially by

<sup>11</sup> For an overview, see S. CARRERA, N.C. LUK, *Love Thy Neighbour? Coronavirus Politics and Their Impact on EU Freedoms and Rule of Law in the Schengen Area*, in *CEPS Paper in Liberty and Security in Europe*, no. 4, 2020, p. 2 *et seq.*

most Member States during the month of June 2020.<sup>12</sup> Nonetheless, several Member States maintained or introduced internal border controls. Some Nordic States and Hungary did so for the purpose of combatting the spread of the virus, other Member States, such as France or Austria, resorted to reasons not related to the pandemic, such as fighting terrorism, secondary movement and “the situation at the external border”.<sup>13</sup>

## II.1. LEGALITY OF THE INITIAL SUSPENSION OF BORDER-FREE TRAVEL

It is important to realise that the EU’s grand promise “to offer its citizens an area [...] without internal frontiers”,<sup>14</sup> does not adequately reflect the legal situation at a semantic level. It was never a viable option to internally abolish inter-state borders altogether. To cross an internal border continues to have important implications in terms of defining the legal rules applicable or regarding the competence of state institutions.<sup>15</sup> Art. 77 TFEU describes the situation more adequately when it presupposes the lasting existence of “internal borders”, which are to be crossed, regularly, in the “absence of any controls”.<sup>16</sup>

It is well-known that the former Schengen Implementing Convention and today’s Schengen Borders Code provide for the temporary reintroduction of internal border controls when there “is a serious threat to public policy or internal security”.<sup>17</sup> Secondary legislation also lays down complex procedures distinguishing between foreseeable threats and matters of urgency demanding immediate action. Procedural safeguards include, *inter alia*, a duty to notify the Commission and the other institutions, which may pronounce themselves on the adequacy of state measures and suggest less stringent action. The reintroduction of border control must, moreover, respect the time limits laid down in the Schengen Borders Code.<sup>18</sup>

On the basis of these rules, most Member States had recourse to the procedure for threats requiring immediate action to introduce border controls for recurring periods of

<sup>12</sup> For an illustrated timeline of events, country by country, see the works of *tableau public*, Mobility and Border Control in Response to the Coronavirus Outbreak, [public.tableau.com](https://public.tableau.com).

<sup>13</sup> See M. DE SOMER, *Schengen: Quo Vadis?*, in *European Journal of Migration and Law*, 2020, p. 180, with further references to criticism regarding this argumentative practice.

<sup>14</sup> As is prominently proclaimed in Art. 3, para. 2, TEU.

<sup>15</sup> See U. DI FABIO, *Der Verfassungsstaat in der Weltgesellschaft*, Tübingen: Mohr Siebeck, 2001, p. 51 *et seq.*

<sup>16</sup> See Art. 77, para. 2, let. e), TFEU.

<sup>17</sup> Art. 25, para. 1, of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>18</sup> See the complex distinction between different scenarios in Arts 25, 28 and 29 of the Schengen Borders Code. For a detailed analysis of the different rules, see A. EPINEY, A. EGBUNA-JOSS, *Schengen Borders Code Regulation (EC) No 562/2006*, in K. HAILBRONNER, D. THYM (eds), *EU Immigration and Asylum Law. Commentary*, München, Oxford, Baden Baden: Beck, Hart, Nomos, 2016, p. 52 *et seq.*

10-20 days from early or Mid-March onwards for up-to two months.<sup>19</sup> Thereafter, they had to resort to a different legal basis with more stringent procedural requirements,<sup>20</sup> even though this modification does not seem to have influenced the practice to a noticeable extent. Closer inspection of the notifications indicating the temporary reintroduction of border controls shows that few Member States bothered to comply with their obligations to give reasons indicating “all relevant data detailing the events that constitute a serious threat”.<sup>21</sup> Events during the Covid-19 pandemic illustrated, once again, that the limitations laid down in secondary legislation did not have a lasting effect on state practice.<sup>22</sup> Member States treat border controls as their quasi-sovereign domain, irrespective of whether their behaviour complies with the letter and spirit of the substantive and procedural requirements of the Schengen Borders Code.

Notwithstanding the nonchalant handling of procedural rules, the reintroduction of border controls during the pandemic arguably responded to a “serious threat to public policy or internal security”, even though the EU legislature chose not to list threats to “public health” among the criteria justifying state action at the internal borders — an omission that appears to be deliberate, since the legislature had explicitly included a reference to state measures to tackle threats to public health elsewhere in the Schengen Borders Code.<sup>23</sup> That need not be an insurmountable hurdle, however, since the Court of Justice has traditionally defined “public policy” to refer to an “existence [...] of a genuine and sufficiently serious threat [...] affecting one of the fundamental interests of society”.<sup>24</sup> It would not be difficult to maintain that the severe social, economic and health effects the pandemic caused across the Union meet that rather general threshold.<sup>25</sup>

To maintain that the concept of “public policy” can cover severe threats to public health in light of the ensuing social and economic repercussions does not render the distinction between “public health” and “public policy” irrelevant. Less dramatic public health threats, such as the circulation of people with contagious diseases, may justify individualised travel restrictions, discussed below, but do not authorise Member States

<sup>19</sup> See Art. 28 of the Schengen Borders Code.

<sup>20</sup> *Ibid.*, Art. 27.

<sup>21</sup> *Ibid.*, Art. 27, para. 1, which also applies to situations of urgency in accordance with Art. 28, para. 2, thereof; on the practice in spring 2020, see S. CARRERA, N.C. LUK, *Love Thy Neighbour?*, cit., p. 23 *et seq.*; and the European Parliament Resolution P9\_TA(2020)0175 of 19 June 2020 on the situation in the Schengen area following the Covid-19 outbreak, para. 3.

<sup>22</sup> On previous practice, see M. DE SOMER, *Schengen and Internal Border Controls*, in P. DE BRUYCKER, M. DE SOMER, J.-L. DE BROUWER (eds), *From Tampere 20 to Tampere 2.0. Towards a New European Consensus on Migration*, European Policy Centre, 2019, [www.epc.eu](http://www.epc.eu), p. 119 *et seq.*

<sup>23</sup> Contrast Arts 25, para. 1, and 28, para. 1, with Arts 6, para. 1, let. e), and 8, para. 2, let. b), of the Schengen Borders Code, as well as Arts 36, 45, para. 3, and 52, para. 1, TFEU.

<sup>24</sup> Court of Justice, judgment of 27 October 1977, case 30/77, *Regina v. Bouchereau*, para. 35.

<sup>25</sup> Similarly, albeit without a detailed argumentation, S. MONTALDO, *The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 527 *et seq.*



to reinstitute internal border controls. Even if one doubted that the wording of the Schengen Borders Code authorised border control during the Covid-19 pandemic,<sup>26</sup> the general scheme of primary law arguably argues for a different position justifying the temporary reintroduction of border controls.

Firstly, Art. 35 of the Charter of Fundamental Rights guarantees that “[a] high level of human health protection shall be ensured in the [...] implementation of all the Union’s policies and activities”.<sup>27</sup> It could be relied upon to interpret the Borders Code to include public health concerns to fight an imminent pandemic. Secondly, the Member States could possibly have recourse to Art. 72 TFEU to justify divergence from the rules set out in secondary legislation in line with recent Court of Justice case law.<sup>28</sup> It seems to us, however, that there is no need for recourse to Art. 72 TFEU, if we accept the argument put forward by several Member States and the Commission, which had initially opposed the reintroduction of border controls, that border controls may be necessary to safeguard public policy as a crisis measure.<sup>29</sup>

## II.2. ALTERNATIVES TO SYSTEMATIC INTERNAL BORDER CONTROLS

The formal reintroduction of internal border controls is a measure of high symbolism, and, as such, may often appear as the most viable choice from the perspective of domestic politics. It provides politicians with an easy solution that citizens intuitively understand. That does not mean, however, that border control is the only tool at Member States’ disposal under Union law. To combat the spread of Covid-19, the Commission repeatedly emphasised that there are alternatives to systematic border checks, such as targeted police checks or public health measures.<sup>30</sup> In practice, only quarantine requirements gained practical momentum.

The Schengen Borders Code explicitly states that the absence of internal border control does not preclude the exercise of police powers in border areas, provided that

<sup>26</sup> Note, in that regard, moreover, that the sixth recital states that “border controls should help [...] to prevent any threat to [...] public health”, without distinguishing between internal and external borders.

<sup>27</sup> Art. 4 of the Schengen Borders Code confirms declaratorily that the provisions therein must comply with the Charter.

<sup>28</sup> Court of Justice, judgment of 2 April 2020, joined cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland (Temporary mechanism for the relocation of applicants for international protection)*, paras 143–158; for further comments, see J. BORNEMANN, *Mitgliedstaatliche Gestaltungsspielräume im Schengener Grenzkodex*, in *Integration*, 2018, p. 194 *et seq.*

<sup>29</sup> See Communication C(2020) 1753 final of 16 March 2020 from the Commission, *COVID-19. Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, para. 18 *et seq.*

<sup>30</sup> *Ibid.*, para. 20; and Communication C(2020) 3250 of 13 May 2020 from the Commission, *COVID-19. Towards a phased and coordinated approach for the lifting of internal border controls and restoring freedom of movement*, p. 10.

these measures do “not have an effect equivalent to border checks”.<sup>31</sup> The Court of Justice’s interpretation affords Member States an appreciable margin of manoeuvre for devising national police measures in border areas, which arguably stands uneasy with the objective enshrined in primary law about “ensuring the absence of any controls on persons [...] when crossing internal borders”.<sup>32</sup> They may even engage in checks on persons mirroring border controls in close proximity to internal borders, as long as these checks take place at varying locations, are not systematically applied over a longer period of time and within a national legislative framework that ensures that their effects do not equal those of border checks.<sup>33</sup>

In their response to the pandemic’s second wave, most Member States cautiously refrained from reintroducing sweeping internal border controls in the autumn of 2020. Instead, they resorted to alternative measures of combatting the pandemic, particularly the obligation to go into quarantine or to get a negative test result before departure. Even if such measures are exercised systematically, they genuinely pursue a public health objective, which may render their effects distinct from those of border controls. Whereas a quarantine requirement may be much more severe than the obligation to show your passport, that does not turn it into “border control” for the purposes of the Schengen Borders Code. Pursuant to Art. 2, para. 10, of the Schengen Borders Code, “border control” constitutes an activity “in response *exclusively* to an intention to cross [...] that border [...], consisting of border checks and border surveillance”.<sup>34</sup> It seems to us that quarantine measures cannot be considered as such. This is not to say that quarantine orders are legally unproblematic. They restrict free movement and must be justified in light of the fundamental freedoms,<sup>35</sup> not as measures having equivalent effect as border controls under the Schengen Borders Code.

<sup>31</sup> Art. 23, let. a), of the Schengen Borders Code, which also provides a non-exhaustive list of criteria pursuant to which the effects of police measures can be distinguished from those of border checks.

<sup>32</sup> Art. 77, para. 1, let. a), TFEU; for critical comments, see M. WILDERSPIN, *Article 77 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford: Oxford University Press, 2019, p. 808 *et seq.*

<sup>33</sup> Court of Justice, judgment of 21 June 2017, case C-9/16, A, para. 42, the Court considered checks carried out in a railway station in the German town of Kehl, approximately 500 meters from the French-German border, to qualify as checks “within the territory” of Germany; for further comments, see J. BORNEMANN, *Mitgliedstaatliche Gestaltungsspielräume im Schengener Grenzkodex*, cit., p. 232 *et seq.*; see also Court of Justice, judgment of 19 July 2012, case C-278/12 PPU, *Adil*, paras 62-64, which accepted identity checks to verify whether a person is entitled to enter the Member State territory.

<sup>34</sup> Quarantine requirements mirror neither border checks nor border surveillance as defined in Arts 7, 8 and 13 of the Schengen Borders Code.

<sup>35</sup> See *infra*, section IV.3.

### II.3. RETURN TO NORMALITY: INTERGOVERNMENTAL COOPERATION

It is not surprising that intergovernmental coordination took centre stage in times of severe crises. Emergencies require swift action which the negotiation-based institutions in Brussels were not able to deliver,<sup>36</sup> also considering that personal meetings were replaced by videoconferences for health reasons. The practical success of the intergovernmental approach to lifting border controls during the Covid-19 pandemic was evident. Few people would have thought in early May 2020 that many Member States would have abandoned border controls and travel restrictions completely or eased existing measures substantially by the end of June 2020. The surprisingly rapid recovery of the Schengen area was driven by clusters of Member States. Most notable were the concerted efforts between Germany, Austria, Switzerland and France (together with the Benelux countries) as well as an initial free movement “bubble” between the Baltic States.<sup>37</sup> These preliminary “Mini-Schengen”<sup>38</sup> developed a momentum of their own and included more and more countries within a few weeks. While the second wave saw some countries, such as Denmark or Slovenia, reverting to border controls and travel restriction, a relapse to sweeping border controls did not occur. In most parts of Europe, borders stayed open (often subject to quarantine requirements), even though stringent restrictions were adopted internally. As of late-October 2020, the intergovernmental momentum that breathed life into the Schengen acquis appeared to hold. To emphasise the central role of intergovernmental cooperation does not deny that (virtual) debates among ministers in the Council, the mediating role of the Commission and an *esprit de corps* of pan-European solidarity played a role in the swift return to the default situation of border-free travel during the spring of 2020. Both the Commission and the Council supported the trend towards intergovernmental cooperation, while emphasising that it would have to be integrated into a truly continental outlook in the medium run,<sup>39</sup> which was established to a limited extent in October 2020 when the Council rec-

<sup>36</sup> Generally, on the negotiation-based character of EU decision-making see M. DANI, *Rehabilitating Social Conflicts in European Public Law*, in *European Law Journal*, 2012, p. 621 *et seq.*

<sup>37</sup> See P. VAN ELSUWEGE, *Lifting Travel Restrictions in the Era of COVID-19: In Search of a European Approach*, in *Verfassungsblog*, 5 June 2020, [verfassungsblog.de](https://verfassungsblog.de). Daniel Thym was indirectly involved in the German debate which was driven by MPs and politicians from the border area, emphasising the significance of cross-border cooperation and the Franco-German alliance; note that the specific case of Sweden, which pursued a different policy of fighting the virus, pre-empted a uniform response of the Nordic States.

<sup>38</sup> The term was popularised by the former Dutch Foreign Minister Jeroen Dijsselbloem during the migration and refugee policy crisis of 2015-2016 as an idea how Schengen could be salvaged among a core group of Member States; see the Interview, *Need to Get Refugee Numbers Down*, Bloomberg, 22 January 2016, [www.bloomberg.com](https://www.bloomberg.com).

<sup>39</sup> See Communication C(2020) 3250, cit., p. 10; and the Press Release of the Croatian Ministry of the Interior, chairing the respective Council meeting, that hailed intergovernmental coordination as “the key to success”, Croatian Ministry of the Interior, *Comprehensive coordination among EU Member States – the key to success*, 28 April 2020, [eu2020.hr](https://eu2020.hr).

ommended uniform assessment criteria on the degree of public health threats.<sup>40</sup> In doing so, the supranational institutions countered the danger inherent in regional arrangements in terms of creating clusters of “Mini-Schengen” with a patchwork of blocs without border controls within the European Union. The notable relaxation of the epidemiological situation across the Union and the external travel ban, discussed below, facilitated the return to the *status quo ante* instead of regional division.

From a legal perspective, there is little doubt that intergovernmental cooperation on lifting internal border controls was compatible with primary law. It corresponds to the principle of loyalty that Member States cooperate amongst each other and with the supranational institutions when activating or lifting public policy exceptions enshrined in primary law or secondary legislation.<sup>41</sup> Even if intergovernmental consultations do not result in formally binding agreements, they have to respect the primacy of Union law, i.e. they cannot change the obligations under the Schengen Borders Code or free movement rules in the internal market.<sup>42</sup> EU law allows Member States to cooperate in fulfilling their obligations under the EU Treaties provided that they abide by the requirements of supranational Union law.

While the focus on intergovernmental cooperation in lifting border controls may be counterintuitive for legal academics who tend to focus on the law and the role of the supranational institutions, it should be noted that the approach is not a novelty. The Schengen acquis was originally developed in intergovernmental fora outside the supranational Community framework, ever since the heads of state or government of France and Germany had kickstarted the move towards border free travel. Setting up Schengen depended, in other words, on intergovernmental cooperation – and it seems to us that the Covid-19 pandemic illustrated how important the political commitment on the part of the Member State continues to be. In that respect, intergovernmental cooperation between some Member States necessarily plays an ambivalent role, since it may similarly serve as an avant-garde spearheading a pan-European solution or be a seed of contention leading to rivalry and disputes, even in the case of the original Schengen cooperation.<sup>43</sup> It is a sign of pan-European political solidarity that this risk did not unfold in the case of the Covid-19 pandemic so far.<sup>44</sup>

<sup>40</sup> See *infra* section IV.4.

<sup>41</sup> See Art. 4, para. 3, TEU; and D. THYM, *Ungleichzeitigkeit und Europäisches Verfassungsrecht*, Baden-Baden: Nomos, 2004, [www.ungleichzeitigkeit.de](http://www.ungleichzeitigkeit.de), p. 312 *et seq.*

<sup>42</sup> This is established case law, see Court of Justice: judgment of 27 September 1988, case 235/87, *Matteucci v. Communauté de Belgique*; judgment of 27 November 2012, case C-370/12, *Pringle*, para. 77 *et seq.*; and for informal coordination by the EU institutions, see Court of Justice, judgment of 23 February 1988, case 68/86, *United Kingdom v. Council*, para. 24.

<sup>43</sup> While the original Schengen arrangements are commonly remembered as a laboratory or avant-garde leading to a pan-European venture nowadays, there was a darker narrative present in the original debate, which concerned in particular the symbolically relevant exclusion of Italy, a founding member of the Communities; see S. PAOLI, *France and the Origins of Schengen. An Interpretation*, in E. CALANDRI, S. PAOLI,

#### II.4. INSTITUTIONAL IMPLICATIONS: LIMITED SWAY OF LEGAL SUPRANATIONALISM

There had always been a certain disconnect between the perspectives of legal studies and political science on the driving factors behind the process of EU integration. While legal academics tend to emphasise the role of the supranational institutions, including the Commission and the Court of Justice, political scientists are generally more comfortable accentuating the continued relevance of the Member States.<sup>45</sup> The Covid-19 pandemic provides us with another case study demonstrating that the law-based supranational integration concept exposes noticeable weaknesses in areas beyond the internal market and related policies for which it had originally been developed. It is a common feature of the economic and monetary union, the ongoing rule of law crisis and protracted difficulties of the Common European Asylum System that they expose a limited capacity of legal rules and supranational institutions to steer policy reactions to an unfolding crisis.<sup>46</sup>

The Covid-19 pandemic confirmed this finding in relation to the Schengen area. It was explained above that the complex procedural rules in the Schengen Borders Code, which were meant to constrain state discretion, proved to be practically irrelevant. During the first phase of the pandemic, the Commission proved unable to devise a uniform yardstick to assess existing measures “on a fully objective basis” in light of standards developed by the European Centre for Disease Prevention and Control (ECDC),<sup>47</sup> before Member States finally agreed on a set of standards in a recommendation of October 2020.<sup>48</sup> National governments employed distinct and differing criteria when deciding whether to lift border controls, abandon travel restrictions or discontinue quarantine requirements. The initial

A. VARSORI (eds), *Peoples and Borders. Seventy Years of Migration in Europe, from Europe, to Europe [1945-2015]*, Baden-Baden: Nomos, 2017, p. 258 *et seq.*

<sup>44</sup> While the Commission generally refrained, not only in the context of the Covid-19 pandemic, from bringing infringement proceedings against the Member States for internal border controls, it acted decisively when Hungary introduced discriminatory travel restrictions in September 2020, thereby countering the danger of country-specific restrictions; see *infra* section IV.2.

<sup>45</sup> For a classic account combining both perspectives in terms of Member State influence on the decision-making and regarding the central role of the supranational institutions in enforcing common rules, see J.H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2403 *et seq.*

<sup>46</sup> For asylum policy, see D. THYM, *The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy*, in *Common Market Law Review*, 2016, p. 1554 *et seq.*; and A. JOSÉ MENÉNDEZ, *The Refugee Crisis. Between Human Tragedy and Symptom of the Structural Crisis of European Integration*, in *European Law Journal*, 2016, p. 388 *et seq.*; for economic and monetary union, see N. SCICLUNA, *European Union Constitutionalism in Crisis*, London: Routledge, 2015, p. 120 *et seq.*; and J.C. SUNTRUP, *From Emergency Politics to Authoritarian Constitutionalism? The Legal and Political Costs of EU Financial Crisis Management*, in *German Law Journal*, 2018, p. 391 *et seq.*

<sup>47</sup> See the ideas put forward in Communication C(2020) 3250, cit., pp. 3-5 and 10 which seems to have anticipated a much longer period for lifting border controls before Member States moved comparatively quickly on their own accord.

<sup>48</sup> See *infra* section IV.4.

return to normality in the Schengen area was achieved by virtue of a patchwork of national strategies, methodological standards and policy decisions.

Similarly, it is quite evident that the substantive requirements in the Schengen Borders Code have not played a major role in reintroducing or lifting of border controls. Rather, governments primarily treated these as matters of political good will. Such negligence for legal rules has defined the approach towards internal border controls ever since the terrorist attacks during the 2010s and the migration and refugee policy crisis of 2015/16, when Member States started resorting to “temporary” controls for different reasons on more and more occasions.<sup>49</sup> As a corollary, internal border controls had become a rather permanent feature, but remained questionable from a legal perspective.<sup>50</sup> The Commission may have tried to influence state practice behind the scenes, but it refrained from initiating legal proceedings, even in scenarios where there may have existed sound legal reasons for doing so.

At an intermediate level of abstraction, the events sparked by the Covid-19 pandemic confirmed the absence of a “truly European governance of the Schengen area”.<sup>51</sup> The procedural and substantive rules guiding the reintroduction of border controls do not seem to have noticeably impacted state practice and the Commission played an overly reticent institutional role as “guardian of the treaties” once again. Legal supranationalism seems to have had little sway in sustaining the Schengen area, which depended on intergovernmental political commitment among the Member States. In that respect, it is important to realise that the latter need not necessarily result in a gradual decline and disintegration of the Schengen area, as events during the 2010s and in the first phase of the Covid-19 pandemic suggested.<sup>52</sup> Intergovernmental support and

<sup>49</sup> See K. GROENENDIJK, *Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?*, in *European Law Journal*, 2004, p. 150 *et seq.*; G. CORNELISSE, *What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders*, in *Common Market Law Review*, 2014, p. 757 *et seq.*; E. GUILD, S. CARRERA, L. VOSYLIŪTĖ, K. GROENENDIJK, E. BROUWER, D. BIGO, J. JEANDESBOZ, M. MARTIN-MAZÉ, *Internal Border Controls in the Schengen Area: Is Schengen Crisis-Proof?*, Study for the European Parliament, Directorate General for Internal Policies, PE 571.356, 2016, p. 38 *et seq.*; and in the years before, there had been noticeably less controls; see Commission Report COM(2010) 554 final of 13 October 2010 on the application of Title III (Internal Borders).

<sup>50</sup> See G. CORNELISSE, *What's Wrong with Schengen?*, cit., p. 763 *et seq.*; E. GUILD, S. CARRERA, L. VOSYLIŪTĖ, K. GROENENDIJK, E. BROUWER, D. BIGO, J. JEANDESBOZ, M. MARTIN-MAZÉ, *Is Schengen Crisis-Proof?*, cit., p. 38 *et seq.*; M. DE SOMER, *Schengen and Internal Border Controls*, cit., p. 120 *et seq.*; and this negative verdict includes the practice of consecutive prolongations by shifting legal bases, which was hesitantly supported by the Commission Recommendation (EU) 2017/1804 of 3 October 2017 on the implementation of the provisions of the Schengen Borders Code on temporary reintroduction of border control at internal borders in the Schengen area, recital 2; and criticised by European Parliament Resolution P8\_TA(2018)0228 of 30 May 2018 on the annual report on the functioning of the Schengen area, para. 10.

<sup>51</sup> European Parliament Resolution P9\_TA(2020)0175, cit., para. 17.

<sup>52</sup> See S. MONTALDO, *The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area*, cit., p. 528 *et seq.*

commitment can help to revive the promise of the EU to “offer its citizens an area of freedom, security and justice without internal frontiers”.<sup>53</sup>

### III. “A EUROPE THAT PROTECTS”: CLOSURE OF THE EXTERNAL SCHENGEN BORDER

Unlike the reinstatement of internal border controls, the introduction of a pan-European travel ban towards the outside world at the external Schengen border was an unprecedented move, broadly restricting entry to the Schengen area in its entirety. It seems to originate in political debates at the supranational level among the Presidents of the Commission and the European Council in an attempt to head off an internal collapse of the Schengen area by means of external closure.<sup>54</sup> After the European Council had reached a political agreement, the external travel ban was put into practice by the Member States through parallel domestic practices that were coordinated by non-binding Commission guidance.<sup>55</sup> It raises important legal questions and demonstrates that the EU has embraced, towards the outside world, a conception of borders contrasting markedly with the internal narrative of border-free mobility.

#### III.1. “FORTRESS EUROPE” AS AN AFFIRMATIVE NARRATIVE

The political leadership in Brussels was caught off guard by the resurgence of travel restrictions. After having defended open borders during the first weeks of March, it changed course and recognised the legitimacy of border closures, both internally and externally. The external travel ban was agreed upon less than a week after a joint statement by Presidents Ursula von der Leyen and Charles Michel had “disapprove(d)” the decision of the Trump administration to dramatically restrict the entry of persons coming from much of Europe.<sup>56</sup> While it came as a surprise that the EU institutions directly emulated a policy

<sup>53</sup> Art. 3, para. 2, TEU.

<sup>54</sup> It was mentioned first in a video statement of the Commission President accompanying Communication COM(2020) 115 final of 16 March 2020 from the Commission, *COVID-19. Temporary Restriction on Non-Essential Travel to the EU*, which recognised that such a measure “would also enable the lifting of internal border control(s)”; the Communication covered no more than 3.5 pages and appears to have been written in extreme haste; it was politically agreed upon the next day; see the Conclusions by the President of the European Council of 17 March 2020 following the video conference with members of the European Council on COVID-19, EUCO 164/20.

<sup>55</sup> The original Communication COM(2020) 115, cit., was complemented by a more detailed one two weeks later; see Communication C(2020) 2050 final of 30 March 2020 from the Commission, *COVID-19. Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy*; further details were added in later documents, such as a long list of “Frequently Asked Questions”, published on 8 May 2020.

<sup>56</sup> Joint Statement no. 20/449 by President von der Leyen and President Michel of 12 March 2020 on the U.S. travel ban.

initiative of the disliked US President, the novel emphasis on external closure did not come out of the blue. It resonates with a broader message of a “Europe that protects, empowers and defends”<sup>57</sup> or a Europe “that is fair, protective and ambitious” in “defending its sovereignty”<sup>58</sup> in the face of globalisation and transnational threats.

The EU institutions retain their commitment to international cooperation and effective multilateralism and, yet, they have increasingly embraced neo-realist accounts of autonomy and closure during the Covid-19 pandemic not differently than in external migration policies or regarding international trade and foreign policy. The new “Pact on Migration and Asylum”, which the Commission proposed in September 2020 reiterated the controversial message of border controls as a means of external closure.<sup>59</sup> This emphasis on protection and self-interest arguably responds to a changing geopolitical environment<sup>60</sup> and utilises the symbolic function of borders in times of widespread uncertainties and real or perceived threats.<sup>61</sup> A comparatively uncontroversial element of the protective self-description was the coordinated repatriation of Union citizens from third countries during the first phase of the pandemic.<sup>62</sup> The external travel ban sent a more ambiguous message of closure at a time when Europe had become the global epicentre of the pandemic and could not realistically fear a massive increase of infections as a result of inward travel from countries with comparatively lower infection rates.

Like in the case of intergovernmental cooperation, the protective narrative reminds us of traditional accounts of EU integration, which the widespread focus on international cooperation and globalisation in the period after the end of the Cold War, aptly described as the “end of history”<sup>63</sup>, often failed to recognise. The emphasis on transnational mobility, international cooperation and global values, which defined the period after 1990, signalled a Europe that presented itself as a model for global cooperation.<sup>64</sup> By contrast, the resurgence of protective language mirrors an account of a Europe emulating and rescuing

<sup>57</sup> J.C. JUNKER, *State of the Union Address: Towards a Better Europe*, 14 September 2016, ec.europa.eu.

<sup>58</sup> E. MACRON, *Initiative pour l'Europe, Discours à la Sorbonne*, 26 September 2017, www.elysee.fr.

<sup>59</sup> See the Communication COM(2020) 609 final of 23 September 2020 from the Commission on a New Pact on Migration and Asylum.

<sup>60</sup> Generally, see A. SKORDAS, *The European Union as Post-National Realist Power*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, Cheltenham: Elgar, 2018, p. 394 et seq.

<sup>61</sup> See *supra*, section I; and Z. BAUMAN, *Strangers at Our Door*, Cambridge: Polity Press, 2016, p. 23 et seq.

<sup>62</sup> See A. ILIOPOULOU-PENOT, *Rapatriements en situation d'urgence lors de la pandémie de COVID-19: la solidarité européenne hors sol européen*, in *European Papers*, Vol. 5, 2020, No 1, www.europeanpapers.eu, p. 469 et seq.

<sup>63</sup> See F. FUKUYAMA, *The End of History and the Last Man*, New York: Free Press, 1992.

<sup>64</sup> By way of example, see U. BECK, *Cosmopolitan Vision*, Cambridge, Malden: Polity Press, 2006; and J. HABERMAS, *Zur Verfassung Europas – Ein Essay*, Berlin: Suhrkamp, 2011; this position is widespread among experts of immigration and asylum law, who had hoped that Europeanisation would result in more rights for refugees and migrants.



the nation-state.<sup>65</sup> Taking up a slogan critics of this approach often use, one might say that the travel ban aimed at presenting a positive narrative of “fortress Europe”.<sup>66</sup>

### III.2. INDIVIDUALISED ASSESSMENT AND PROPORTIONALITY

From a legal perspective, the political agreement among heads of state or government on the travel ban presented us with another soft law document through which the EU institutions aimed at swiftly responding to the unfolding pandemic. Neither the political consensus among the members of the European Council nor the Commission Communication had the quality of secondary legislation that could have supplanted the statutory prescriptions in the Schengen Borders Code as a *lex specialis*. Until the end of October 2020, there was no legally binding legislative act or executive regulation underlying the external travel ban, which, rather, emanated from the administrative practices of the Member States on the basis of the Schengen Borders Code, which the Commission Communication coordinated politically.

In June 2020, the travel ban finally received an – albeit informal – legal basis via a non-binding recommendation adopted by the Council.<sup>67</sup> Fifteen third States were added to the initial white-list for regular travel, which the Council agreed to revisit every two weeks.<sup>68</sup> The decision to include or remove a third state from that list is taken by the Council, based on the average of Covid-19 cases, a stable epidemiological situation and the “overall response” to the pandemic in the third state. Whereas these vague standards afford the Council considerable room for appreciation, they are a step towards legal certainty nevertheless, despite the fact that they take the form of a non-binding recommendation.

The obvious attraction of such an approach lied in the practicality of avoiding legislative reform, including political debates with MEPs in the ordinary legislative procedure. However, this benefit comes at a price. The soft law character holds the potential of undermining legal safeguards and cannot guarantee effective and uniform application on

<sup>65</sup> See the classic account by A.S. MILWARD, *The European Rescue of the Nation State*, London: Routledge, 2000; and S. BORG, T. DIEZ, *Postmodern EU?*, in *Journal of Common Market Studies*, 2016, p. 136 *et seq.*

<sup>66</sup> The term had originally been applied to the element of external economic closure inherent in the single market programme, while it is used for border control and migration policies nowadays; see C.M. AHO, *Fortress Europe. Will the EU isolate Itself from North America and Asia?*, in *Columbia Journal of World Business*, 1994, p. 32 *et seq.*

<sup>67</sup> Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, which was adopted on the basis of Art. 292 TFEU without involvement of the European Parliament; it built on the Communication COM(2020) 399 final of 11 June 2020 from the Commission on the third assessment of the application of the temporary restriction on non-essential travel to the EU.

<sup>68</sup> See no. 4 and Annex I to Council Recommendation (EU) 2020/912, *cit.*

the ground by domestic authorities.<sup>69</sup> This may be exemplified with a view to the refusal of entry, which the initial Commission Communication on the travel ban presented as a discretionary act without a single (!) reference to the detailed rules set out in secondary legislation before another communication recognised the need to comply with statutory rules in the Schengen Borders Code two weeks later.<sup>70</sup> Besides procedural requirements, basic legal safeguards defining the rule of law will have to be respected.

Generally speaking, Art. 14, read in conjunction with Art. 6, para. 1, let. e), of the Schengen Borders Code, may serve as the legal basis for a refusal of entry with regard to third country nationals “considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States”.<sup>71</sup> That does not mean, however, that Member States have *carte blanche* to refuse entry, since the Schengen Borders Code requires domestic authorities to take a formal decision in line with a standard form in the Annex of the Regulation.<sup>72</sup> Third country nationals have a statutory right to appeal any administrative decision refusing entry, albeit without suspensive effect.<sup>73</sup> We do not know whether domestic authorities followed these rules during the pandemic.

In line with general principles of Union law, any refusal of entry will, moreover, have to be proportionate, non-discriminatory and in full respect of human rights – even though we should be careful not to overstate the significance of these requirements for the travel ban, since third country nationals do not generally benefit from a human right to entry and courts tend to apply the non-discrimination guarantee generously in immigration cases.<sup>74</sup> For that reason, the major legal impediment will be the principle of proportionality, which the Commission considers to be met if health authorities confirmed the necessity and suitability of entry restrictions.<sup>75</sup> This suggests that the Commission considered a generalised travel ban to be proportionate if, prior to its adoption, the suitability of the measure was confirmed by the public health authority.

This is a low bar. In particular, it eschews the intricate legal question to what extent the refusal of entry of third country nationals can be based on a generalised propor-

<sup>69</sup> These drawbacks are a general character of soft law instruments, see O. STEFAN, *On the COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 667 *et seq.*

<sup>70</sup> Contrast the initial Communication COM(2020) 115, cit., with the subsequent Communication C(2020) 2050, cit., p. 3.

<sup>71</sup> Art. 2, para. 21, of the Schengen Borders Code specifies that the term should be interpreted to mean any disease with epidemic potential as defined by the International Health Regulations – a criterion the Covid-19 virus met.

<sup>72</sup> See Art. 14, para. 2, of the Schengen Borders Code; and the reference to these requirements in the second Communication C(2020) 2050, cit., p. 3 *et seq.*

<sup>73</sup> See Art. 14, para. 3, of the Schengen Borders Code.

<sup>74</sup> For further comments, see D. THYM, *Legal Framework for Entry and Border Controls*, in K. HAILBRONNER, D. THYM (eds), *EU Immigration and Asylum Law Commentary*, cit., p. 47 *et seq.*; and D. THYM, *Ungleichheit als Markenzeichen des Migrationsrechts*, in *Zeitschrift für Öffentliches Recht*, 2019, p. 916 *et seq.*

<sup>75</sup> See the Communication C(2020) 2050, cit., p. 3.

tionality assessment distinguishing categories of (il)legitimate travel. The requirement, set out in Art. 4 of the Schengen Borders Code, that any decision must be taken “on an individual basis” does not necessarily answer the question, since national authorities considered each individual case when determining whether someone qualified for legitimate entry on the basis of the standard form. Despite this, the individualised assessment was based on an abstract determination that, for instance, entry for touristic purposes should be generally prohibited, since public health concerns generally outweighed individual interests of third country nationals in entering the European Union.

It will be discussed below, in the context of free movement rules, whether, and if so, to what extent an abstract assessment can be compatible with the EU Treaties.<sup>76</sup> When applying these findings to the external travel ban, we should acknowledge that rules for third country nationals can be stricter than those for Union citizens. This generic conclusion may extend to the interpretation of the public health exception. In a series of cases over the past decade, the Court of Justice recognised that similar wording need not mean identical outcome.<sup>77</sup> In December 2019, this position was reinforced by a judgment on Art. 6, para. 1, let. e), of the Schengen Borders Code,<sup>78</sup> which similarly serves as the legal basis for the external travel ban. While these arguments sound abstract, they can have tangible repercussions for the implementation of the travel ban at the external border, since Member States have more leeway when applying the public health exception towards third country nationals.

### III.3. EXEMPTION OF TRAVELLERS WITH AN “ESSENTIAL FUNCTION OR NEED”

The travel ban affected a large group of third country nationals, but it did not amount to a complete closure of the external border. Rather, the Commission proposed a list of exceptions. They include, to start with, an established principle of international law, expressed *inter alia* in Art. 3 of Additional Protocol no. 4 to the European Convention on Human Rights, that Member States cannot refuse entry to their own nationals.<sup>79</sup> In light of Art. 18 TFEU, Member States can be expected to similarly exempt nationals of other Member States and their family members for the purposes of returning home.<sup>80</sup> The same holds

<sup>76</sup> See *infra*, section IV.1.

<sup>77</sup> See in particular, in the context of the EU-Turkey Association Agreement, Court of Justice, judgment of 8 December 2011, case C-371/08, *Ziebell*.

<sup>78</sup> Court of Justice: judgment of 12 December 2019, case C-380/18, *E.P. (Threat to public policy)*, paras 31-43; similarly, judgment of 12 December 2019, joined cases C-381/18 and C-382/18, *G.S., V.G. (Threat to public policy)*, paras 53-55; and judgment of 4 April 2017, case C-544/15, *Fahimian* [GC], paras 40-43; on the doctrinal background, see D. THYM, *A Bird's Eye View on ECJ Judgments on Immigration, Asylum and Border Control Cases*, in *European Journal of Migration and Law*, 2019, p. 179 *et seq.*

<sup>79</sup> For the EU context, see Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*, para. 29.

<sup>80</sup> See the Communication COM(2020) 115, cit., p. 2.

true for third country nationals legally residing in the territory of a Schengen state.<sup>81</sup> In addition, the Commission proposed that any third country national “with an essential function or need” should equally be allowed to enter the Schengen area from abroad.

In the context of “essential travel”, the Commission’s guidelines remained decidedly vague regarding some of the categories that should qualify as such. It did not specify the meaning of “imperative family reasons” or whether the reference to “persons in need of international protection” would effectively exclude those arriving from an assumedly safe country.<sup>82</sup> Concerning the former, an interpretation of “imperative family reasons” should comprise at least situations in which Art. 8 of the European Convention on Human Rights and Art. 7 of the Charter grant a human right to family reunification, noting that the latter is recognised by the European Court of Human Rights jurisprudence only in exceptional cases.<sup>83</sup> With regard to “persons in need of international protection”, the EU asylum *acquis* provides that, once an asylum application is lodged at the border, asylum seekers must be allowed to temporarily enter the territory of the Member States irrespective of whether their protection needs are real.<sup>84</sup>

In the Commission communications, the exemptions had originally been presented in an enumerative but non-exhaustive manner.<sup>85</sup> This had raised the question whether domestic authorities should accept additional grounds for entry not mentioned by the Commission. When the Council formalised the travel ban by way of a non-binding recommendation, it extended the list of categories of travellers with an essential function or need and transformed it into an exhaustive one.<sup>86</sup> In any case, the practical effects of abstract criteria like “imperative family reasons” stand out. Such vague formulations effectively leave the

<sup>81</sup> Art. 12, para. 4, of the International Covenant on Civil and Political Rights can be interpreted to cover long-term residents, see Human Rights Committee (CCPR), General Comment no. 27 on Article 12 (Freedom of Movement) of 2 November 1999, UN Doc. C/21/Rev.1/Add.9, para. 20; for a more cautious position, see Human Rights Committee (CCPR), views of 16 December 1996, communication no. 538/1993, *Stewart v. Canada*.

<sup>82</sup> This approach was reproduced in equally abstract language by Council Recommendation (EU) 2020/912, cit., no. 5, third indent.

<sup>83</sup> In addition, Art. 8 of the European Convention on Human Rights is subject to an explicit “public safety” caveat, which can include the social and economic repercussion of public health concerns; on the rather restrictive case law, see Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council* [GC], paras 59-60; C. SMYTH, *The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled is the Court’s Use of the Principle?*, in *European Journal of Migration and Law*, 2015, p. 70 et seq.; and P. CZECH, *Das Recht auf Familienzusammenführung nach Art. 8 EMRK in der Rechtsprechung des EGMR*, in *Europäische Grundrechte-Zeitschrift*, 2017, p. 229 et seq.

<sup>84</sup> See Art. 3 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). Member States may resort to a border procedure in line with Art. 43 thereof.

<sup>85</sup> Note that the list in Communication C(2020) 2050, cit., p. 5, began with the word “including” in the introductory paragraph.

<sup>86</sup> See Council Recommendation (EU) 2020/912, cit., Art. 5, third indent, which makes no reference to Member States’ faculty to provide additional categories.

decision to authorise or to reject entry with individual border guards, thereby undermining the objective of uniform application of the travel ban as well as legal certainty for people concerned. A particularly sensitive question in several Member States was whether non-married partners were to be allowed entry. It is disappointing that the EU institutions shied away from addressing such pertinent legal issues in a field which is generally defined by a high degree of harmonisation enshrined in the Schengen Borders Code.

It seems to us that the model of the Council recommendation could be developed further to enhance legal certainty, institutional accountability and the rule of law. The legislature should consider conferring on the Commission – or, exceptionally, the Council<sup>87</sup> – the power to adopt legally binding delegated acts without the involvement of the other institutions in situations of urgency.<sup>88</sup> Mirroring the model of the non-binding recommendations, travel restrictions could be agreed upon by means of implementing legislation subject to a committee procedure,<sup>89</sup> while exceptionally urgent action could still be dealt with by domestic practices that are coordinated politically at the EU level. Thus, the opaque nature of the original travel ban, which had been based on purely political documents without legal force, would give way to measures enhancing the political accountability of the decision-making process, facilitating appeals and supporting uniform application on the ground.

#### IV. RESTRICTING THE FREE MOVEMENT OF UNION CITIZENS

While travel bans are a matter of executive discretion and limited judicial review elsewhere, including in the United States,<sup>90</sup> EU law has unearthed mobility within the single market and the Schengen area from the arcane sphere of state sovereignty.<sup>91</sup> Union citizens benefit from a constitutional guarantee to cross-border movement whose limitations are subject to judicial supervision. That is not to say that Member States cannot resort to extraordinary measures in exceptional crises, but they are not free to do as they please from a legal perspective. In that respect, the legal analysis of the response to the COVID-19 pandemic treads a tightrope. It must recognise, on the one hand, the degree of factual uncertainty and time-constraints put on decision-makers, while ensur-

<sup>87</sup> Court of Justice, judgment of 6 May 2008, case C-133/06, *Parliament v. Council* [GC], paras 45-47, confirmed, in accordance with today's Art. 291, para. 2, TFEU, that the EU legislature can entrust, in exceptional circumstances, the adoption of implementing legislation to the Council.

<sup>88</sup> Cf. Art. 290, para. 1, TFEU, which does not require the involvement of committees or other institutions in contrast to implementing acts under Art. 291, para. 2, TFEU; delegated acts are substantively limited to "supplement or amend non-essential elements of the legislative act".

<sup>89</sup> For the different options, see Arts 290 and 291 TFEU, which differ in terms of inter-institutional dialogue and, hence, typical length of procedure.

<sup>90</sup> Cf. US Supreme Court, judgment of 26 June 2018, *Trump v. Hawaii*.

<sup>91</sup> For an early overview, see E. GUILD, *The Legal Elements of European Identity*, Alphen aan den Rijn: Kluwer, 2004, p. 35 *et seq.*

ing, on the other hand, compliance with legal standards. It will be demonstrated below that rich case law of the Court of Justice on the internal market allows us to do precisely this – both with regards to travel bans, which defined the first phase of the pandemic, and in relation to quarantine requirements that took centre stage later.

#### IV.1. THE PRINCIPLE OF PROPORTIONALITY: BETWEEN INDIVIDUAL CASES AND ABSTRACT CONSIDERATIONS

Art. 29 of the Free Movement Directive prescribes that the public health derogation only applies to “diseases with epidemic potential”.<sup>92</sup> It should be quite clear that Covid-19 qualified as such and that, accordingly, restrictions to free movement may be justified as a matter of principle. At closer inspection, however, the application of the public health standard is less clear-cut than it may seem at first. In practice, many Member States have restricted free movement in a generalised manner, restricting the entry of vast categories of persons. Could broad blanket restrictions be justified by virtue of Art. 29 of the Free Movement Directive?

The wording and the general scheme of the Directive support such a generous interpretation. Unlike Art. 27, para. 2, on the public policy exception, Art. 29 does not limit restrictions to a person’s individual conduct or explicitly requires a proportionality assessment. It is reasonable to assume *a contrario* that the Union legislature wanted to award Member States a wider margin of discretion with a view to epidemic threats to public health, as compared to individualised threats to public policy or security.<sup>93</sup> Besides, the very idea of fighting “diseases with epidemic potential” suggests that restrictions to mobility may in themselves cater to the containment of an epidemic. Indeed, the Court of Justice has occasionally accepted generalised justifications in other free movement cases, in which it recognised that even though it had required an individualised assessment in other scenarios, “no such individual assessment is necessary in circumstances such as those at issue in the main proceedings”.<sup>94</sup>

<sup>92</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612 and repealing Directive 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

<sup>93</sup> S. CARRERA, N.C. LUK, *Love Thy Neighbour?*, cit., p. 24 considered travel restriction to contradict judgments on today’s Art. 28 of the Directive 2004/38, cit., without considering the difference in wording and the legal context; similarly, S. COUTTS, *Citizenship, Coronavirus and Questions of Competence*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 431.

<sup>94</sup> Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC], para. 59; unfortunately, the Court of Justice case law does not establish clear standards when an individualised assessment is (not) necessary; for further comments on the underlying question, see van den M. VAN DEN BRINK, *Bold, but Without Justification? Tjebbes*, in *European Papers*, 2019, Vol. 4, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 413 *et seq.*; and for an overview of the almost bewildering variations in the judicial practice, see D. THYM,

Even if we accept that the public health exception can cover generalised travel restrictions, that need not be the end of the legal analysis. The assessment of the abstract suitability of a restriction usually commands a degree of certainty about potential effects. In the context of the free movement of goods, the Court of Justice has adopted a “reasonability test” for the review of factual errors. National courts should examine “whether it may reasonably be concluded from the evidence submitted”<sup>95</sup> that it was possible to protect public health by virtue of the restriction.<sup>96</sup> In doing so, domestic authorities benefit from enhanced leeway in response to an unfolding epidemic of a previously unknown virus, on which they lack reliable scientific data.<sup>97</sup> Thus, the German Constitutional Court recognised the proportionality of abstract internal restrictions irrespective of the individual case during the Covid-19 pandemic.<sup>98</sup> Similarly, the Court of Justice accepted the adoption of emergency measures by the Commission in response to the BSE (or mad cow) disease after an independent scientific advisory body had considered that there was a “probable link” between BSE and the deadly Creutzfeldt-Jakob disease.<sup>99</sup> Moreover, it emphasised the precautionary principle holding that “[w]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent”.<sup>100</sup> This seems to be a viable approach, which also implies that new findings require Member States to reassess the proportionality of any restriction anew.<sup>101</sup>

*The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, in *Common Market Law Review*, 2015, p. 45 *et seq.*

<sup>95</sup> Court of Justice: judgment of 19 October 2016, case C-148/15, *Deutsche Parkinson Vereinigung*, para. 36; similarly, judgment of 23 December 2015, case C-333/14, *Scotch Whiskey Association*, para. 56, which also required national governments to provide statistical data.

<sup>96</sup> The standards of review of factual error may vary depending on the field of Union law in which it is applied; see P. CRAIG, *European Administrative Law*, Oxford: Oxford University Press, 2018, p. 469 *et seq.*

<sup>97</sup> In such a situation, reviewing courts can normally be expected to ensure that “any relevant information, evidence or other material” has been duly considered, without, however, requiring scientific certainty where there is none; see A. WÜRDEMANN, *The Corona Crisis and the Overall Imperative of Precaution*, in *European Law Blog*, 6 April 2020, europeanlawblog.eu.

<sup>98</sup> See German Federal Constitutional Court, judgment of 29 April 2020, 1 BvQ 44/20, para. 14

<sup>99</sup> See Court of Justice, judgment of 5 May 1998, case C-180/96, *United Kingdom v. Commission*, paras 52 and 61, which, based on the advice of the committee, distinguished a “probable link” without certainty from a purely “theoretical hypothesis”.

<sup>100</sup> Court of Justice, judgment of 5 May 1998, case C-157/96, *The Queen v. Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others*, para. 63; judges equally accepted the principle of precaution in the context of restrictions to free movement of goods; see Court of Justice, judgment of 28 January 2010, case C-333/08, *Commission v. France*, para. 93.

<sup>101</sup> This was recently emphasised by the German Federal Constitutional Court, judgment of 10 April 2020, 1 BvQ 28/20, para. 14.

#### IV.2. DISTINGUISHING DIFFERENT CATEGORIES OF FREE MOVEMENT

An abstract proportionality assessment does not exempt Member States from balancing countervailing interests. Absolute bans on cross-border mobility are more difficult to justify than differentiated constraints that allow certain categories of Union citizens to cross inter-state borders based on abstract criteria. The same applies to quarantine measures, which can foresee exceptions for certain categories of “free movers”. A first exception will usually be foreseen for Union citizens residing in a Member State of which they do not hold the nationality. In line with the basic equal treatment guarantees, Member State should allow them to return “home” in the same way as they permit nationals to enter the country.<sup>102</sup> The same can be said about potential restrictions on returning nationals, which were considered to be the embodiment of the coronavirus in Romania.<sup>103</sup> Of course, Member States can send homecoming nationals or Union citizens into quarantine, but the prohibition to return to the place of habitual residence can usually be expected to fail an abstract proportionality assessment.<sup>104</sup> Other Member States should facilitate the transit of Union citizens to States where they reside.<sup>105</sup>

In order to find a reasonable middle ground between generalised public health concerns and individual rights, the proportionality principle may equally demand recourse to other exceptions. In the view of the Commission, frontier workers should thus be exempted from travel restrictions, especially those who carry out essential jobs.<sup>106</sup> This exemption reiterates the central importance of the free movement of workers, which the Court has repeatedly recognised as a “fundamental principle” in relation to which exceptions have to be interpreted narrowly.<sup>107</sup> While such exceptions from Covid-19-related travel restrictions benefitting frontier workers are an important confirmation of core single market principles, they can similarly be said to conceptually call into question free movement as an individual right, instead reconceptualising it as the contribution of “essential” work in pursuit of the public interest.<sup>108</sup>

<sup>102</sup> See *supra*, section III.3.

<sup>103</sup> See S. MANTU, *EU Citizenship and Covid-19: A Crisis of Citizenship?* in *EU Law Live*, 5 May 2020, eu-lawlive.com.

<sup>104</sup> In the case of nationals returning to their home State, the fundamental freedoms apply in line with established Court of Justice case law for restrictions upon return; see Court of Justice, judgment of 12 March 2014, case C-456/12, O. [GC]; it is reinforced by the principles of public international law on return to home countries mentioned *supra*, section III.3.

<sup>105</sup> See Communication, C(2020) 2050, cit., p. 5.

<sup>106</sup> See Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, point 19; and Communication C(2020) 2051 final of 30 March 2020, *Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak*, paras 1 and 2.

<sup>107</sup> See *Bouchereau*, cit., para. 33.

<sup>108</sup> Insightfully, see S. ROBIN-OLIVIER, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis*, cit.



It is apparent that non-discrimination on grounds of nationality serves as a central legal yardstick for any assessment of travel restrictions. While it can be legitimate to exempt nationals and Union citizens residing in another Member States from entry bans in light of previous comments, quarantine requirements should apply irrespective of nationality.<sup>109</sup> It seems as if domestic practices follow that requirement: entry from a high-risk area usually results in a self-isolation obligation for everyone under the same conditions. By contrast, the Hungarian government reintroduced sweeping entry restriction in September 2020, from which it exempted the citizens of the other Visegrád-4 countries later.<sup>110</sup> This raises serious doubts regarding the principle of non-discrimination on the ground of nationality, since the distinction did not appear to be warranted by the epidemiological situation in the region. It is to be welcomed, therefore, that the Commission countered the threat of internal division by starting infringement proceedings.

Finally, it should be remembered that Union citizens benefit from a generic guarantee to free movement pursuant to Art. 21 TFEU, even if they are economically inactive. While the interests in crossing borders for reasons of leisure or tourism may weigh less than frontier work and can thus be restricted more easily, it should be recognised that public health concerns do not automatically prevail. There may be scenarios, such as people visiting a second home, in which free movement rights should be given greater weight in the proportionality assessment.<sup>111</sup> Similarly, limitations on cross-border movements affect those living in border areas much more than those residing in capital cities that are often centrally located. Member States can show respect for the specific significance of free movement for people in the border-area by introducing specific exemptions from travel restrictions which facilitate local frontier traffic.<sup>112</sup> Such differentiated solutions are warranted to ensure that the idea enshrined in the fundamental freedoms is not lost when fighting a previously unknown virus.

#### IV.3. GRADED APPROACHES TOWARDS QUARANTINE AND OTHER ALTERNATIVES

Initial responses to the unfolding first wave of the pandemic were stringent and effectively threatened to do away with the fundamental freedoms altogether. It is a welcome sign of commitment to the single market that the reaction to the pandemic's second

<sup>109</sup> This was reconfirmed by Council Recommendation (EU) 2020/1475, cit., point 21.

<sup>110</sup> The Hungarian Government Decree 450/2020 exempted nationals of the Czech Republic, Poland and Slovakia from the initial restrictions under the Hungarian Government, Decree of 30 August 2020, no. 408/2020 on travel restrictions during the period of state of epidemiological preparedness, section 5 *et seq.*, which had applied equally to all nationalities.

<sup>111</sup> When Slovenia reintroduced entry restrictions towards Italy in late October 2020, it exempted those having property in the country.

<sup>112</sup> Belgium, for instance, does not require quarantine for those who stay in the country for less than 48 hours; similarly, some German regions exempt from quarantine obligations those visiting a neighbouring region for less than 24 hours.

wave shifted the focus away from border controls and entry bans, even though some countries reintroduced outright travel bans.<sup>113</sup> Instead, most Member States promote alternative means to limit the spread of the virus, *inter alia* through quarantine requirements or the need to get a negative test result prior to departure or after arrival, oftentimes in combination with self-isolation in the meantime.<sup>114</sup> It has already been noted that the requirement to go into quarantine upon arrival cannot be considered a measure equivalent to border controls in the meaning of the Schengen Borders Code.<sup>115</sup> Rather, quarantine obligations must be assessed in the light of free movement law, as they effectively restrict the right to move and reside freely within the European Union. Tourism, in particular, often comes to a standstill, once incoming foreigners are obliged to spend the first days of their stay isolated in a hotel room.

In October 2020, diverse practices of the Member States were the subject of an – albeit half-hearted – political coordination when the Council adopted the non-binding Recommendation (EU) 2020/1475.<sup>116</sup> It established a colour-based “traffic light” system, according to which regions are classified either as green, orange or red, depending on the prevalent epidemic situation. The system rests on objective parameters and will be assessed by the ECDC, relying on data provided by the Member States. Whereas travel from “green” regions should not be limited, the Recommendation authorises Member States to restrict travel from yellow or red regions with a focus on quarantine and/or testing requirements, subject to the requirements of proportionality and non-discrimination.<sup>117</sup> It should be noted that the Recommendation opted for a regional approach instead of classifying Member States holistically as either safe or unsafe, which, in itself, can be considered to promote compliance with the principle of proportionality.

The practical effects of the Recommendation depend on the epidemiological context. While it effectively supports free movement if many regions are “green”, the degree of harmonisation remains limited when most of Europe qualifies as “orange” or “red”. In the latter case, the Member States retain the responsibility to determine which measures they deem appropriate. In that respect, the Recommendation was overtaken by events on the ground, since it was designed during the summer of 2020 when few regions were categorised “orange” or “red”. In such a context, the EU institutions could hope that the Recommendation would support travel without restrictions along “green corridors”. This changed quickly when the second wave spread across Europe in late summer and early

<sup>113</sup> Besides Hungary described *supra*, section IV.2, Slovenia and Denmark reinstated sweeping entry bans at the end of October 2020.

<sup>114</sup> For an overview of these measures, see S. CARRERA, N.C. LUK, *In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU*, Study for the European Parliament’s LIBE Committee, PE 659.506, 2020, p. 25 *et seq.*

<sup>115</sup> See *supra*, section II.2.

<sup>116</sup> Council Recommendation (EU) 2020/1475, *cit.*

<sup>117</sup> *Ibid.*, points 17-24.

autumn. In late October 2020, only a few regions in Scandinavia or Greece were still “green”. At that point, the harmonising effect of the Recommendation remained limited, since it did not prescribe a uniform response to the ensuing travel restrictions.

#### IV.4. PRACTICAL IMPLICATIONS OF TRAVEL RESTRICTIONS

Where Member States introduce travel restrictions, this often necessitates administrative formalities such as documentation requirements which may cause considerable difficulties in practice. This may particularly apply to assessments of complex scenarios by state officials that are habitually implemented at short intervals and require swift judgment, such as decision on entry on the occasion of border controls.<sup>118</sup> Legal certainty ideally requires a clear set of criteria police officers can apply in a consistent and transparent manner. In practical terms, it is crucial that citizens know what kind of documentation they need to demonstrate legitimate reasons to travel.

In this respect, the Covid-19 pandemic reminded us of basic principles of free movement law, which the Court of Justice has established over the years by requiring, for instance, that, notwithstanding the need for clear standards, Union citizens should retain flexibility “that evidence may be adduced by any appropriate means”.<sup>119</sup> The German federal police, for instance, invites people to bring written evidence, such as a work contract or marriage certificate, while not excluding other means of *prima facie* evidence. Similarly, it can be cumbersome to show a negative test result.<sup>120</sup> While the Council calls for the mutual recognition of test results from within the Member States, Hungary continues to insist on the use of laboratories which are accredited by domestic law, the German quarantine requirements mutually only recognise test results that are provided in either English or German.

In any case, Member States should refrain from requiring *ex ante* authorisation which would establish a *de facto* visa requirement in violation of Art. 5, para. 1, of the Free Movement Directive 2004/38/EC. In this regard, it may be noted that the Commission itself advocated for “specific burden-free and fast procedures for border crossings” for frontier workers, and, to this end, proposed “stickers recognised by neighbouring Member States to facilitate [...] access to the territory of the Member State of employment”.<sup>121</sup> Whereas this was a pragmatic solution in times of crisis, it would be highly problematic if such stickers were produced and distributed after a formal involvement

<sup>118</sup> On the position of administrative science, see R. WAHL, *Die Aufgabenabhängigkeit von Verwaltung und Verwaltungsrecht*, in E. SCHMIDT-ABMANN, W. HOFFMANN-RIEM, G. FOLKE SCHUPPERT (eds), *Reform des Allgemeinen Verwaltungsrechts – Grundfragen, Schriften zur Reform des Verwaltungsrechts*, Baden-Baden: Nomos, 1993, p. 192.

<sup>119</sup> Court of Justice: judgment of 17 February 2005, case C-215/03, *Oulane*, para. 25; similarly, judgment of 5 February 1991, case C-363/89, *Roux v. Belgian State*, para. 14 *et seq.*

<sup>120</sup> See Council Recommendation 2020/1475, cit., point 18.

<sup>121</sup> Communication C(2020) 2051, cit., para. 3.

of public authorities. For these reasons, other solutions should be prioritised, such as self-declaratory statements.

#### IV.5. COHERENCE OF DOMESTIC AND BORDER RESTRICTIONS

EU law does not necessarily require a uniform response by all Member States. Whereas coordination may be warranted politically, the Court of Justice emphasised early on that “the particular circumstances justifying recourse to the concept of public [health] may vary from one country to another” and that it was “necessary in this matter to allow the competent national authorities an area of discretion”.<sup>122</sup> In times of severe public disturbances, that discretion can be reinforced by the safeguard clauses in Arts 72 and 347 TFEU mentioned above.<sup>123</sup> Taken together with the margin of appreciation of the Member States in deciding how to respond to an unfamiliar health crisis, the legal requirement did not lay down insurmountable hurdles for Member States during a serious pandemic.

One way to indirectly control the behaviour of the Member States is the concept of policy coherence, which the Court of Justice has developed and which requires Member States to treat internal and cross-border situations in a comparable manner. When restricting the free movement of Union citizens, a Member State must “adopt with respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct”.<sup>124</sup> On that basis, judges developed a generic concept of policy coherence in their gambling case law that prevented States from effectively laying down rules favouring their own nationals on the basis of the margin of appreciation.<sup>125</sup>

It seems to us that the principle of coherence can serve as a corrective mechanism to state discretion. It implies, more specifically, that Member States can restrict travel from high risk areas for as long the domestic situation is comparably safe. By contrast, it is difficult to justify severe restrictions to cross-border movement when domestic mobility remains by and large unrestricted. Why should a journey from Berlin to Frankfurt be permitted, while travelling from Luxembourg to Frankfurt is not, even though both destinations currently constitute high-risk areas? In such situations, cross-border travel restrictions would be prime examples of symbolic gesture politics, projecting a sense of security that buttresses feelings of national belonging rather than protecting public health, even though their practical impact does not differ substantially from do-

<sup>122</sup> Court of Justice, judgment of 4 December 1974, case 41/74, *Van Duyn v. Home Office*, para. 18.

<sup>123</sup> See *supra*, at footnote 287 and accompanying text.

<sup>124</sup> *Oulane*, cit., para. 34; similarly, see Court of Justice, judgment of 18 May 1982, joined cases 115/81 and 116/81, *Adoui and Cornuaille v. Belgian State*, para. 8.

<sup>125</sup> See in particular Court of Justice: judgment of 6 November 2003 case C-243/01, *Gambelli and Others*, para. 67; and judgment of 6 March 2007 joined cases C-338/04, C-359/04 and C-360/04, *Placanica, Palazzese and Sorricchio* [GC], para. 53; see also T. KINGREEN, *Grundfreiheiten*, in A. VON BOGDANDY, J. BAST (eds), *Europäisches Verfassungsrecht*, Heidelberg: Springer, 2009, p. 718 *et seq.*

mestic travel. The principle of policy coherence allows courts to intervene in such scenarios without undoing the political decision of the Member State concerned whether it pursues a more liberal or a more restrictive policy in response to the pandemic.

If that is correct, a crisis like the Covid-19 pandemic will be subject to an evolving set of legal rules, which can differ between the Member States, but must treat internal and external scenarios in a similar way as long as the epidemiological situation is comparable. Against this background, the Council's traffic light system can serve as an empirical benchmark for the comparability of health risks. The effects of the principle of coherence would be as follows: Member States remain free whether to opt for a "liberal" or "strict" policy regime, provided that internal and external restrictions go hand in hand. Member States cannot have one without the other, unless epidemiological reasons warrant it. If travel from domestic high-risk areas continues unabated, it is difficult to justify generalised entry bans or quarantine requirements for people coming from high-risk areas abroad with a similar infection rate. Similarly, it is difficult to justify quarantine requirements for those coming from countries with similar infection rates.<sup>126</sup> The ultimate expression of policy coherence may be to renounce at specific cross-border measures, once the virus has taken hold of a country. Internal restrictions apply to everyone equally. That is the line the French government has generally followed since the first wave of the pandemic.

## V. CONCLUSION

An unfolding global pandemic may call for swift and resolute responses. Public health considerations are important when human lives are at risk and Member States benefit from a principled discretion when deciding how to fight a previously unknown virus in a situation of uncertainty. Our legal analysis should not, therefore, find restrictive measures to fall foul of the Schengen Borders Code or free movement rules single-handedly. We cannot apply existing case law without taking account of the specificities of an unprecedented health crisis. Nevertheless, Union law would lose its claim to control and constrain state behaviour if it was unable to develop appropriate legal standards in times of crises. It seems to us that the Covid-19 pandemic holds three important lessons in this respect.

Firstly, the substantive and procedural requirements in the Schengen Borders Code on the temporary reintroduction of border controls have proven, once again, unfit for purpose. Member States do not seem to be willing to accept extensive legal constraints and the supranational institutions appear unwilling or unable to exercise meaningful

<sup>126</sup> Germany, for instance, requires quarantine for those coming from regions abroad with a one-week infection rate of more than 50 positive test results per 100,000 inhabitants, *i.e.* quarantine can be mandatory even if the regional infection rate abroad is lower than or similar to the ratio in the German destination; by contrast, Switzerland decided in late-October 2020 to limit quarantine to those coming from countries with a significantly higher infection ratio; Italy had applied similar criteria for some time.

oversight. That does not mean that internal border controls were necessarily illegal. It indicates, however, that the survival of the Schengen area depends primarily on the political will of the Member States. In that respect, the surprisingly swift and coordinated lifting of border controls reinvigorated the political commitment to border-free travel within Europe in early summer 2020. Fewer Member States reverted to border controls when the second wave hit Europe in the autumn.

Secondly, the implementation of travel restrictions resulted in a patchwork of legal rules and administrative practices, which created much uncertainty and endangered the effective application of Union law. These differences cannot be undone on the basis of free movement case law, since courts are badly placed to correct or replace political decisions in times of crises. In order to avoid excessive discrepancies among the Member States, the EU institutions could, however, support “positive integration” by means of developing common standards on how to assess risks to public health. The Council’s traffic light system to assess the degree of health risks moved in that direction even though it did not harmonise the travel restriction to which Member States may revert. In this regard, the rich case law on the single market embraces important restrictions that can be employed in novel scenarios, such as the Covid-19 pandemic. This applies, by means of example, to documentation requirements regarding the reasons of travel or the concept of policy coherence which can serve as a corrective mechanism to ensure that States generally treat domestic and transnational situations in a comparable manner.

Thirdly, the reaction to the Covid-19 pandemic showed that border controls and travel restrictions can serve important symbolic functions that transcend their practical effects. They convey a message of political determination and a sense of security when the population feels insecure and threatened. It seems to us that the initial closure of the internal Schengen borders had implications which considerably transcended the immediate effects on inter-state travel. It signalled a general distance from the European project – in the same way as the lifting of border controls coincided with a policy environment in which the Member States and the EU institutions finally agreed on a joint way forward. The unprecedented external travel ban may have supported this internal liberalisation; it resonated with broader narratives of protection against globalisation that have spread in recent years. In light of the symbolic function, free movement is much more than a technical question. Measures taken by the Member States in response to the pandemic are thermometers of the European project more broadly. Against this background, it is relevant that the second wave of the pandemic during the autumn of 2020 did not result in extensive border controls and entry bans with Member States focusing on quarantine or testing requirements instead. These restrictions to the free movements can be legally problematic, but they carry less symbolic weight. It seems as if the Schengen area will not relapse into another near-death experience.



## ARTICLES

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

*edited by Grażyna Baranowska and León Castellanos-Jankiewicz*

#### WAKING UP DEMONS: BAD LEGISLATION FOR AN EVEN WORSE CASE

MIROSŁAW WYRZYKOWSKI\*

TABLE OF CONTENTS: I. Introduction. – II. The legislative initiatives of 2006. – III. The 2018 amendments to the Act on the Institute of National Remembrance. – IV. Submitting the 2018 Act to the Constitutional Tribunal. – V. The amendments in practice. – VI. Amending the amendments. – VII. Judgment of the Constitutional Tribunal. – VIII. Conclusions.

**ABSTRACT:** Recent history knows few cases of national legal regulations which receive such a negative echo as the Polish Act on the Institute of National Remembrance of 14 February 2018 amending the Act on the Institute of National Remembrance. This Act introduces criminal liability for attributing responsibility or co-responsibility for Nazi crimes committed by the Third Reich to the Polish State or Nation. One of the objectives of the Act was to create a mechanism to prevent the use of the term “Polish death camps” to describe Nazi concentration camps. This direct objective is also an element of the Polish authorities’ persistent and consistent historical policy to prevent the falsification of Polish history and to protect the good name of the Republic of Poland and the Polish Nation. One of the unusual aspects of the Act was its immediate signing into law by the President of the Republic of Poland who, on the day of its promulgation, submitted a motion to the Constitutional Tribunal to consider its most important regulations as violating the Polish Constitution. However, the Constitutional Tribunal had no chance to consider the President’s motion in the part concerning criminal responsibility because the Polish Parliament overturned the most controversial regulations concerning criminal responsibility in June 2018. The legislative process now over, the President’s request for control of constitutionality regarding other parts of the Act is currently pending. Meanwhile, the dispute over the essence of Poland’s “historical policy” is ongoing.

**KEYWORDS:** anti-semitism – Nazi crimes – defamation of a nation – memory laws – memory governance – Institute of National Remembrance.

\* Professor of Law, University of Warsaw, m.wyrzykowski@wpia.uw.edu.pl.



## I. INTRODUCTION

Happy is a society that is able to evaluate the history of its own nation as objectively and neutrally as possible, with its most beautiful (which is easy) and most dramatic events (which is not). This applies both to distant history and, what is more difficult, recent history. Polish society, like other societies, has a serious problem with this. This is particularly true concerning the Second World War, when Poland was occupied first since 1939 by Germany and the Soviet Union (1939-1941), and, from June 1941, only by Germany. The problem concerns, among others, various behaviors – some of them criminal – of certain members of society towards their fellow citizens, the fight against the occupation authorities, but also – as it happened – the cooperation of individual citizens with the occupier. A special element of the war's drama was the establishment by the Germans of several large extermination camps in occupied Poland, in which millions of European citizens, in particular Polish and European Jews, were murdered.<sup>1</sup> The fact that the death camps were located on German-occupied territories belonging to Poland resulted in the creation of the term "Polish death camps", which had no justification in the facts or in the language describing the events of the Second World War. These were German death camps, located on the territory of Poland occupied by the Germans. Poland, which did not exist as a State in 1939-1945, had nothing to do with German death camps. However, the language cliché was surprisingly durable: the death camps were located in occupied Poland, so they were "Polish" death camps. This inaccurate language *cliché* was also defamatory, for it presupposed the responsibility or co-responsibility of the Polish nation or the Polish State for crimes committed by the German or Soviet occupiers.<sup>2</sup>

## II. THE LEGISLATIVE INITIATIVES OF 2006

The authorities of the Republic of Poland reacted in different ways to public allegations – made both in the mainstream press and social media – that the Polish nation and State were complicit in the participation of German and Soviet crimes during the Second World War. One such reaction in 2006 was the amendment of the Penal Code by adding Art. 132a. This provision provided that "anyone who publicly accuses the Polish Nation of participating in, organising, or being responsible for communist or Nazi crimes may be imprisoned for up to 3 years". At the same time, the Penal Code was amended in such a way

<sup>1</sup> T. SNYDER, *Bloodlands: Europe Between Hitler and Stalin*, New York: Basic Books, 2012. On Holocaust memory in Eastern Europe, including Poland, see J. SUBOTIĆ, *Yellow Star, Red Star. Holocaust Remembrance after Communism*, Ithaca, London: Cornell University Press, 2019.

<sup>2</sup> See Nikolay's Koposov's discussion on the special form of self-victimisation in Eastern Europe in the first part of this Special Section: N. KOPOSOV, *Historians, Memory Laws, and the Politics of the Past, in European Papers*, 2020, Vol. 5, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 107 *et seq.*



that not only Polish citizens, but any person could be liable for slander, regardless of the provisions in force in the place where the crime was committed.<sup>3</sup>

The justification for the 2006 Penal Code's amendment – a provision that was originally contained in the Act on the Institute of National Remembrance (IPN), and was then transferred to the penal code by the Senate – highlighted the necessity of prosecuting slander, because: “very often in the international arena we witness false accusations directed against both the Nation and Polish citizens about alleged help or collaboration with criminal regimes – Nazi and communist. The proposed change is to equip the Institute of National Remembrance with new tools aimed at improving and accelerating the prosecution of such crimes and defending historical truth”.<sup>4</sup> It is interesting that there is no reference to the notion of “Polish death camps” in the explanatory memorandum to this draft legal regulation. The explanation is simple – the parliamentary legislative initiative (20 members of the League of Polish Families) was a reaction to the publication of Tomasz Gross's book *Neighbors* describing the crime committed in 1941 in Jedwabne.<sup>5</sup> The inhabitants of the village of Jedwabne, under the supervision of the German authorities occupying the territory of Poland, took part in the murder of about 300 neighbors of Jewish origin. This was the reason why this initiative was named “lex Gross” in journalism, including legal journalism.<sup>6</sup>

The Ombudsman contested the Act's constitutionality before the Constitutional Tribunal by alleging that legislators violated Art. 54, para. 1, of the Polish Constitution, which guarantees to everyone the freedom to express opinions, to acquire and to disseminate information, as well as Art. 73 of the Constitution which guarantees to everyone the freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture. The Ombudsman linked the violation of the aforementioned constitutional provisions with the violation of the principle of proportionality in the operation of public authority (Art. 31, para. 3, of the Constitution). The Ombudsman further argued that the regulation contained in the Criminal Code may lead to a situation in which awareness of the threat of criminal sanctions will produce the effect of refraining from public statements and sci-

<sup>3</sup> See K. WIERCZYŃSKA, *Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation as a Ground for Prosecution of Crimes against Humanity, War Crimes and Crimes against Peace*, in *Polish Yearbook of International Law*, 2017, p. 275 et seq.; I.C. KAMIŃSKI, *Kontrowersje prawne wokół przestępstwa polegającego na pomawianiu narodu o popełnienie zbrodni*, in *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, 2010, p. 5 et seq.

<sup>4</sup> Poselski projekt ustawy o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu oraz o zmianie niektórych innych ustaw, druk 334 (Parliamentary print no. 334/V kad.).

<sup>5</sup> T. GROSS, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland*, Princeton: Princeton University Press, 2001.

<sup>6</sup> I.C. KAMIŃSKI, *Kontrowersje prawne wokół przestępstwa polegającego na pomawianiu narodu o popełnienie zbrodni*, cit., p. 7.

entific research on communist and Nazi crimes, which may lead to the limitation of public debate on the recent history of Poland.<sup>7</sup>

In its ruling in 2008, the Constitutional Tribunal did not assess the compliance of the contested provisions against freedom of speech and freedom of scientific research and artistic creation as enshrined in the Constitution. Instead, the Tribunal found procedural violations in the legislative process, which it found was a sufficient reason for rendering the relevant provisions unconstitutional. The procedural violations consisted in the introduction of a provision to the penal code which was not subject to the full legislative procedure required to incorporate changes to the codes, but was added to the penal code at the last stage of legislative work (an amendment of the Senate approved by the Sejm).<sup>8</sup>

### III. THE 2018 AMENDMENTS TO THE ACT ON THE INSTITUTE OF NATIONAL REMEMBRANCE

Twelve years after the 2008 Constitutional Tribunal's decision concerning the 2006 amendments, the issue of accusing the Polish Nation of committing a specific type of crime has again become the subject of legislative work. In January 2018, a law amending the Act on the Institute of National Remembrance came into force, which introduced a new crime to the act, punishable by imprisonment of up to three years: publicly and falsely "attributing responsibility or co-responsibility to the Polish Nation or to the Polish State for the crimes committed by the German Third Reich" as specified in the Charter of the International Military Court or "for any other crimes that are crimes against peace, crimes against humanity or war crimes, or who otherwise glaringly trivializes the responsibility of their actual perpetrators" (Art. 55, let. a). The amendment further expanded the list of crimes covered by the Act on the Institute of National Remembrance to "crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich" (Art. 1, let. a) and labelled as genocide crimes committed by "Ukrainian nationalists" against Polish citizens on the territory of Volhynia and eastern Lesser Poland (Art. 2).<sup>9</sup>

The similarity begins and ends with the fragment of the regulation which concerns Nazi or communist crimes and extends responsibility to all persons, regardless of nationality and place of residence, who committed the crime.

Let us therefore consider the differences between the 2006 Act and the 2018 Act, which are both formal in nature and are primarily related to the scope and substance of the 2018 Act.

<sup>7</sup> Substantiation of the Appeal of the Ombudsman of 15 January 2007, RPO-545868-II-06/ST.

<sup>8</sup> Constitutional Tribunal, judgment of 19 September 2008, K5/07.

<sup>9</sup> See P. GRZEBYK, *Amendments of January 2018 to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes Against the Polish Nation in Light of International Law*, in *Polish Yearbook of International Law*, 2017, p. 287 et seq.

First of all, the 2018 Act, which is the subject of the current legal and political controversy, provides for criminal liability for the crimes specified in it, but does not, as in the previous Act, change the Penal Code. Legislators seem to have learned a lesson from the previous regulation and, by decodifying the penal code once again, amended the Act on the Institute of National Remembrance and other acts, and not the Penal Code.

Secondly, although the original proposal was drafted by a group of parliamentarians, the final draft of the 2018 law was delivered to Parliament by the government. Indeed, the government took over the parliamentarian's initiative and extended the scope of the proposed regulation. The government's legislative initiative is related to the need for meeting requirements related to, among others, justifying the need for the proposed change in the existing legislation, subjecting the draft legislation to inter-ministerial agreements, and indicating the effects of regulations and other requirements aimed at, among others, reducing the initial level of irrationality and unconstitutionality of the legislative initiative.

Thirdly, the drafters changed the scope of the IPN's tasks, by specifying in Art. 1, para. 1, of the 2018 Act which provides for the recording, collection, storage, preparation, security, access to and publication of documents of security authorities of the Polish State, which have been created and collected from 22 July 1944 to 31 July 1990. Importantly, that article also addresses access to and publication of documents of security authorities of the Third German Reich and the Union of Soviet Socialist Republics "concerning crimes on the persons of Polish nationality or Polish citizens of other nationalities committed between 8 November 1917 and 31 July 1990: Nazi crimes; communist crimes; crimes committed by the Ukrainian nationalists and the members of Ukrainian formations collaborating with the Third German Reich as well as other crimes constituting crimes against peace, humanity or war crimes".

The legislators defined the above-mentioned notion of "crimes committed by Ukrainian nationalists and members of Ukrainian formations collaborating with the Third German Reich" as:

"acts committed by Ukrainian nationalists between 1925 and 1950, consisting in the use of violence, terror or other forms of human rights violations against individuals or groups of people. The crime of Ukrainian nationalists and members of Ukrainian formations collaborating with the Third German Reich means also participation in the extermination of the Jewish population and genocide against the citizens of the Second Republic of Poland in the areas of Volhynia and Malopolska".<sup>10</sup>

Fourthly, the legislature introduced the concept of protection of the good name of the Polish Nation, but also added the protection of the good name of the Polish State, in

<sup>10</sup> Malopolska Wschodnia was a geographical and administrative term describing the part of the territory of Poland in the years 1918 and 1939 in the the east-south part of Poland.

such a way that the provisions of the Act of 23 April 1964 concerning the protection of personal rights are applicable to the protection of the good name of the Republic of Poland and the Polish Nation. A legal claim for the protection of the good name of the Republic of Poland or the Polish Nation may therefore be brought by a non-governmental organisation within the scope of its statutory tasks. In this case, the State Treasury shall be entitled to compensation or reparation. Legal claims for the protection of the good name of the Republic of Poland or the Polish Nation may also be brought by the Institute of National Remembrance, which has judicial capacity in these matters. This regulation applies regardless of which state law is applicable, and therefore in fact extends the scope of application to the whole world.

Fifthly, and this is particularly important from the standpoint of the Constitutional Tribunal's decision analyzed in the following sections, a new type of offence has been introduced into the system of Polish law, stipulating that whoever publicly and contrary to the facts attributes to the Polish Nation or the Polish State responsibility or co-responsibility for Nazi crimes committed by the Third German Reich as defined in Art. 6 of the Charter of the International Military Tribunal annexed to the International Agreement on the Prosecution and Punishment of the Basic War Criminals of the European Axis, signed in London on 8 August 1945, or for other crimes constituting crimes against peace, humanity or war crimes, or otherwise grossly diminishes the responsibility of the actual perpetrators of these crimes, shall be subject to a fine or imprisonment for up to three years (Art. 55, let. a) of the Act).

Legislators did not, as before, use the notion of "slander" but introduced the notion of "imputation". It is important to mention that under the Penal Code the notion of slander is known, especially in connection with the crime of defamation (Art. 212 of the Penal Code). Established jurisprudence allows for a relatively precise definition of the term, thus limiting the risk of abuse of a norm of criminal law in the process of its application. However, criminal law does not know the notion of "imputation".

The 2018 Act, in order to determine the essence of the crime, refers to the Charter of the International Military Tribunal. Art. VI of the Charter defines the notions of crimes against peace, war crimes and crimes against humanity.

A crime against peace, as defined in the Nuremberg Charter, is "the planning, preparation, initiation or conduct of a war of aggression or war in violation of international treaties, agreements or guarantees, or complicity in a plan or collusion to commit one of the acts mentioned". The Nuremberg Charter further defines war crimes as:

"violations of laws and customs of war. Such violation shall include, but is not be limited to, the murder, wrongful handling or deportation for forced labour or other purposes of the civilian population in or from the occupied territory, the murder or wrong handling of prisoners of war or persons at sea, the killing of hostages, the robbery of public or

private property, the thoughtless demolition of settlements, towns and villages or the havoc not justified by the necessity of war”.<sup>11</sup>

Finally, crimes against humanity, as defined in the Nuremberg Charter, comprise “murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during war or persecution for political, racial or religious reasons in connection with the commitment of any crime within the jurisdiction of, or in connection with the competence of the Tribunal, whether consistent with or contrary to the law of the country in which the crime was committed”.

Furthermore, the Nuremberg Charter provided that “leaders, organisers, instigators and accomplices participating in or complicit in the formulation or implementation of a common plan, or in a conspiracy to commit any of the above crimes, are liable for any acts committed by or in connection with the implementation of any such plan”.<sup>12</sup>

Sixth, the 2018 Act allows for the possibility of committing an act of imputation of responsibility or co-responsibility for the aforementioned crimes to the Polish Nation or the Polish State as an unintentional act. In such a case, the perpetrator of the act shall also be subject to a fine or a penalty of restriction of liberty. Moreover, the judgment for the crime described above is to be made public by law.

Seventh, the Act stipulates that liability for the crimes referred to in Arts 55 and 55, let. a), is not only borne by natural persons, but also extends to “collective entities”. A collective entity is a legal entity as well as an organisational unit without legal personality, to which other provisions grant legal capacity; at the same time, the State Treasury, territorial self-government units and their associations are not considered as collective entities. Moreover, a collective entity is also a commercial company with Treasury shareholding, a local government unit or an association of such units, a capital company in an organisation, an entity in liquidation and an entrepreneur who is not a natural person, as well as a foreign organisational unit. The Act also envisages the responsibility of the collective entity for: 1) acting on behalf of or in the interest of the collective entity in the framework of a power or obligation to represent it, to make decisions on its behalf or to exercise internal control, or if this power or obligation is exceeded or not fulfilled; 2) be allowed to act as a result of the exceeding of rights or failure to fulfil obligations by the persons mentioned above; 3) acting on behalf of or in the interest of a collective entity, with the consent or knowledge of the aforementioned person; 4) being an entrepreneur who directly cooperates with a collective entity to achieve a legitimate aim, if the conduct has resulted or could have resulted in the conduct of the entity.

Eighth, the 2018 Act contains an exception stating that anyone attributing responsibility or co-responsibility for acts specified in Art. 55, let. a), of the Act on the Institute of

<sup>11</sup> Charter of the International Military Tribunal of 8 August 1945, reproduced in UN Doc. A/CN.4/5 (1949), p. 4.

<sup>12</sup> *Ibid.*

National Remembrance to the Polish Nation or the Polish State does not commit a crime if they act within the framework of artistic or scientific activities.

Moreover, in the course of legislative work, two new elements of regulation were added, which were not included in the draft Act. Firstly, the Act changed the scope of activity of the INP by specifying in its Art. 1, para. 1, that it regulates the recording, collection, storage, preparation, security, access to and publication of documents of state security authorities created and collected from 22 July 1944 to 31 July 1990 as well as of security authorities of the Third German Reich and the Union of Soviet Socialist Republics "concerning persons of Polish nationality or Polish citizens of other nationalities committed in the period from 8 November 1917 to 31 July 1990", Nazi crimes, communist crimes, crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the Third German Reich, other crimes constituting crimes against peace, humanity or war crimes. Secondly, the law introduces a definition of the crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the Third German Reich.

#### IV. SUBMITTING THE 2018 ACT TO THE CONSTITUTIONAL TRIBUNAL

The Act of 26 January 2018 amending the Act on the IPN was signed by the President of the Republic of Poland on 12 February 2018 and published on 14 February 2018. The Act entered into force on 1 March 2018.

On the day the Act was published, the President of the Republic of Poland submitted a request to the Constitutional Tribunal to examine its constitutionality in the following terms:

1) whether Art. 55, let. a), of the Act meets the requirement of Art. 2 of the Constitution (democratic State ruled by law) and Art. 42, para. 1, (principles of criminal responsibility), in conjunction with Art. 31, para. 3, (proportionality) and Art. 54, para. 1, (freedom of expression), in conjunction with Art. 31, para. 3, (proportionality) of the Constitution, *i.e.* the constitutionality of criminal liability of up to three years imprisonment for acts specified in that provision, and

2) Art. 1, point (a), as replaced by the following Art. 1, let. a), third indent, in the part covering the words "Ukrainian nationalists" and Art. 2, let. a), in the part covering the words "Ukrainian nationalists" and the words "and Eastern Małopolska" in Art. 2 (democratic State ruled by law) and Art. 42, para. 1, (principles of criminal responsibility) in conjunction with Art. 31, para. 3, (proportionality) of the Constitution.<sup>13</sup>

The President challenged the amendment to the Act on the Institute of National Remembrance before the Constitutional Tribunal using his constitutional power to request the examination of the constitutionality of the Act (Art. 191, para. 1, in conjunction with Art. 188 of the Constitution).

<sup>13</sup> See the request of the President of 14 February 2018, case K1/18, available at [ipo.trybunal.gov.pl](http://ipo.trybunal.gov.pl).

One of the most significant circumstances is that the request was made two days after the President signed the law. The weight of the arguments suggesting the violation of constitutional norms by the legislators is such that it is difficult to imagine that they were formulated within a dozen or so hours between the signing of the law and sending the request for control of its constitutionality. The President's control of constitutionality prerogative is well-known to both lawmaking bodies and public opinion. The Chancellery of the President monitors all legislative work on an ongoing basis, in particular through the prism of its constitutionality. Constitutional compliance analyses are carried out at each drafting stage from the start of the legislative process. The deadline of 21 days for signing a law (or applying a constitutional veto or political veto) set out in Art. 122, para. 2, is a regulation that creates temporary and situational premises, in the form of possible consultations and analyses, for the final reflection preceding the President's decision.

The President, as one of the guardians of the Constitution, has the duty to give the fullest effect to the essence of the constitutional order and has a number of measures at his disposal to discharge this duty. The analysis of the constitutionality of the laws submitted to the President for signature is one of the most representative tasks of the President under this heading. In doing so, the office of the President has various instruments at its disposal, which the Constitution defines in terms of substance, gradation and order of application. One of these instruments is the proposal to review the constitutionality of laws before they are signed (known as preventive control of constitutionality). Its application is intended to prevent the occurrence of irreversible consequences stemming from an unconstitutional law, and from the consequences of a potential statement of unconstitutionality in the form of e.g. resumption of proceedings or claims for compensation for illegal activities of public authorities.

Once again, it is significant that the President has not used his powers to refer the law to the Constitutional Tribunal in the form of preventive control. After all, the nature and burden of the arguments indicating the incompatibility of the challenged provisions with the indicated constitutional norms (patterns of control of constitutionality) is so serious that it raises a question about the rationality of the internal decision-making process concerning the control of constitutionality of law by the President.

It should be assumed that, prior to the signing of the law, there were no serious doubts as to the constitutionality of the law to warrant referral to the Court. However, several hours after the signing of the law, there was no longer any doubt that the law was unconstitutional. The President was confident that Parliament violated the Constitution. The courtesy formulae in the text of the motion for control of the constitutionality of the law ("emerging doubts about the scope [...] of application", "may raise doubts") do not change either the content or the pronouncement of the motion of the President. After all, in the part constituting the essence of the motion, the President uses the wording: "I accuse this law of incompatibility of the indicated statutory norms with the indicated constitutional norms". Doubts may be raised before signing, and if these doubts are sufficiently

justified, the President has no other option, from the perspective of the Constitution, than to submit a motion to the Constitutional Tribunal by way of preventive control of the constitutionality of laws. After all, during the several dozen hours between the signing of the law and the sending of the motion to the Tribunal, no new circumstances arose which would justify a motion of the President in the mode of follow-up control. Moreover, at the time the motion was submitted to the Tribunal, the Act had not yet entered into force, and by not applying it, it could not cause any situations that would indicate that during its application doubts arose as to its constitutionality. No new circumstances, unknown at the time of signing the law, have arisen either. During these hours, the jurisprudence of the Constitutional Tribunal or the Supreme Court, quoted in the motion, did not change, nor was there any judgment of the European Court of Human Rights, which was not known or binding at the time of the act's signing.

There would have to be other compelling reasons why the President has set in motion a mechanism to control the constitutionality of the law in a way that deviates from its essence, which is enshrined in the Constitution. Such a conclusion is also indicated by the justification of the motion, which disqualifies the constitutionality of results of the legislator.

Two days after the signing of the Act, the President of the Republic of Poland had no constitutional doubts: the challenged norms are unconstitutional. The argumentation of the motion, in the form of a confrontation of the provisions of the Act with the constitutional models, leaves no doubt that, in the President's opinion, the indicated provisions of the law grossly violated the Constitution. The President's argumentation in the motion submitted to the Constitutional Tribunal complains of a lack of "decent legislation" in the field of criminal law in line with the established jurisprudence of the Constitutional Tribunal; unacceptable use of evaluation terms; inability to determine the meaning of terms used by the legislator by way of binding rules of law interpretation; irrationality of extending the scope of the unlimited protective principle (allowing for the extraterritorial prosecution of offenders); breach of the standard of required caution in the event of extending the scope of penalisation to unintentional acts; the "cascading" use of evaluation terms by the legislator to define the features and essence of a criminal act, which prevents proper decoding of the criminal norm (the President politely formulates "may cause difficulties"), and which is a deadly sin of criminal law regulations; blatant violation of the principle of proportionality as one of the most important constitutional principles, both in terms of blatant criminal sanctions and blatant violation of freedom of speech, clearly creating a whole mechanism causing a "freezing effect" on public debate, and access by the public to information.

As if that were not enough, the Act uses concepts unknown to the legal system, but what is more – impossible to define precisely. For example: "Eastern Małopolska" and the motion of the President: "[T]he sanctioning norm, reconstructed from Article 55 in conjunction with Article 1.1.1.a third indent and Article 2a of the Act on the Institute of National Remembrance, does not meet the standard resulting from the principle of *nul-*



*lum crimen sine lege* [...] Precise delimitation of the borders of Eastern Małopolska is necessary for a comprehensive identification of the type of a prohibited act". However, it is impossible to precisely define the borders of Eastern Małopolska, even for the Sejm of the Republic of Poland.

One more quotation from the motion of the President is in order: "[F]ailure to define precisely the notion of 'Ukrainian nationalists' may lead to freedom of interpretation of the type of prohibited act under Art. 55 of the Act on the Institute of National Remembrance, which goes far beyond the framework permitted by the requirement of specificity of criminal law norms". A more serious accusation is difficult to find. And yet, all this could have been easily avoided if the President had not signed the law and sent it to the Constitutional Tribunal in the mode of preventive control of the constitutionality of law.

The argumentation of the President's motion was fully supported by the Ombudsman, who joined the proceedings before the Constitutional Tribunal. Two other participants in the proceedings, the Sejm and the Prosecutor General, expressed a view on the full compliance of the challenged provisions with the Constitution.<sup>14</sup>

## V. THE AMENDMENTS IN PRACTICE

Following the entry into force of the amendment to the Law on the Institute of National Remembrance, a lively debate has begun, both in Poland and internationally.<sup>15</sup> It should be remembered that in the justification of the January 2018 amendment, the most important source of the proposed regulation was to be situations when the terms "Polish death camps", or "Polish concentration camps" appeared in public circulation. Such statements, contrary to historical truth, cause significant results, harm the good name of the Republic of Poland and the Polish Nation and have a destructive effect on the image of the Republic of Poland, especially abroad. In order to protect these values in criminal law, the legislator is to introduce a new type of crime (Art. 55, let. a), extending the scope of criminalisation to include unintentional acts. The existing measures in the form of reactions of Polish citizens, non-governmental organisations or the use of diplomatic means of intervention have been ineffective. In this state of affairs "it is necessary to create effective legal tools allowing to conduct a persevering and consistent historical policy of the Polish authorities in the field of counteracting counterfeiting of

<sup>14</sup> See the opinion of the Prosecutor General of 20 March 2018, case K1/18, available at [ipo.trybunal.gov.pl](http://ipo.trybunal.gov.pl).

<sup>15</sup> See for example M. BUCHOŁOC, *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.; A. GLISZCZYŃSKA-GRABIAS, G. BARANOWSKA, A. WÓJCIK, *Law-Secured Narrative of the Past in Poland in Light of International Human Rights Law Standards*, in *Polish Yearbook of International Law*, 2018, p. 59 et seq.; U. BELAVUSAU, 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.; U. BELAVUSAU, *The Rise of Memory Laws in Poland: An Adequate Tool to Counter Historical Disinformation*, in *Security and Human Rights*, 2019, p. 36 et seq.

Polish history and protection of the good name of the Republic of Poland and the Polish Nation".<sup>16</sup> Due to the official explanatory memorandum of the bill, this "effective" measure was to be criminalisation of behaviours specified in Art. 55, let. a), of the Act, while the threat of a fine or a penalty of up to three years' imprisonment was to be "adequate to the degree of social harmfulness of this crime and corresponding to current norms on penalties for crimes of a similar nature". At the same time, the scope of criminalisation was extended not only to include acts specified in Art. 55, let. a), committed unintentionally, but the draft amendment to the January amendment assumed:

"the extension of the absolute protection principle resulting from Art. 112 of the Penal Code, according to which the Polish Penal Act applies to perpetrators of crimes that particularly harm Polish interests, regardless of the nationality of the perpetrator and provisions in force at the place where the crime was committed. Considering that potentially many of the offences referred to in the proposed Art. 55a of the Act on the Institute of National Remembrance will be committed abroad, the proposed regulation should be considered necessary to ensure the effectiveness of their prosecution".

An important systemic novelty was to be the regulation concerning the recovery of claims arising from the infringement of the good name of the Republic of Poland and the Polish Nation. Potential legal bases for civil law claims against entities using the term "Polish concentration camps" in the public space may be provisions providing for: a claim for compensation for damage to property; claims for the protection of personal rights, including claims for compensation and claims arising from the press law. In order to ensure that "Polish provisions on the protection of the good name of the Republic of Poland and the Polish Nation apply in any case, regardless of which law is applicable under the Act – Private International Law, it is proposed to add a provision [...] explicitly determining that these are the so-called mandatory provisions".

Immediately after the adoption of the new law on the Institute of National Remembrance in January 2018, the negative reaction of foreign public opinion and top-level political authorities, in particular in Israel and the USA, as well as the outrage of public opinion in Ukraine, were pointed out. Incidentally, the Ministry of Foreign Affairs warned against such a reaction from abroad, noting that, as regards the January amendment, "the justification of the act does not include a discussion of the compliance of the act with the freedom of expression regulated both by the Constitution of the Republic of Poland (Article 54) and the European Convention for the Protection of Human Rights and Fundamental Freedoms".<sup>17</sup> The freezing effect of the Act was pointed out as a deterrent to researching and debating the co-responsibility of Poles for murdering Jews and looting their property during and immediately after the Second World War,

<sup>16</sup> Government draft law amending the Act on the Institute of National Remembrance of 29 August 2016, (druk sejmowy 806), orka.sejm.gov.pl.

<sup>17</sup> Ł. WARZECHA, *Bicz na własne plecy*, in *DoRzeczy*, 19-25 March 2018, dorzeczy.pl, p. 56.

deteriorating the reputation of Poland and exposing them to allegations of falsifying the historical truth about the Holocaust. Moreover, “the imposition of criminal sanctions on the possibility of exercising freedom of speech not only reinforces feelings of anti-Semitism and encourages all those who deny the Holocaust, but also damages Poland and its relations with the Jewish community”.<sup>18</sup>

However, the “public debate” signalled by the government as a source of reflection on the senselessness of the January amendment is also a direct and immediate increase in interest in the issue of “Polish death camps” and an increase in the symptoms of anti-Semitism, especially online. Opinion polls and analyses of public statements, which took place immediately after the adoption of the January amendment, indicate an increase in “classical conspiracy anti-Semitism” and the domination of “secondary anti-Semitism”, which is characterized by, among others, putting the martyrdom of Poles and the extermination of Jews during the Second World War on an equal footing, or criticizing the behaviour of Israelis towards Poles. What is more worrying, “this anti-Semitism directly appeared in public statements and media reports, where until now anti-Semitic prejudices were rather a taboo subject that excluded the person using such a language from public debate”.<sup>19</sup>

The analysis of online content in the days following the adoption of the January amendment proves that not only was the goal of the novella not achieved, but we were dealing with a phenomenon that the designers probably could not predict, and certainly did not want to cause. Firstly, the frequency of online searches of the phrase “Polish death camp” and “German death camp” has increased nine times in comparison to the period before January 2018. Secondly, the Act “most likely, contrary to the assumptions of its authors, has led to an increase in the number of searches for the phrase”. Thirdly, and most generally, the bill, which, in the intention of the initiators, as expressed in the justification for the draft bill, was to limit the use of defective memory codes – paradoxically, it led to an increase in the universality of their use. The number of people searching for the phrase “Polish concentration camps” in Google increased significantly (more than five times as compared to the period preceding the introduction of the Act, while the number of searches for the phrase “Nazi concentration camps” did not increase significantly). Among American, Canadian or British Google search engine users, who until recently most often searched for the term “German death camps”, nowadays the search for a faulty memory code dominates: “Polish death camps”. The increase in the frequency of using the defective memory code in the world is nine-fold – despite the fact that the percentage of people searching for information about Nazi death camps has not increased.<sup>20</sup>

<sup>18</sup> M. LINZEN, *Keep speech free, keep the history of the Holocaust alive*, in [www.intjewishlawyers.org](http://www.intjewishlawyers.org).

<sup>19</sup> M. BABIŃSKA, M. BILEWICZ, D. BULSKA, A. HASKA, M. WIŚNIEWSKI, *Stosunek do Żydów i ich historii po wprowadzeniu ustawy o IPN*, in *Centrum Badań nad Uprzedzeniami (analiza przygotowana na zlecenie Rzecznika Praw Obywatelskich)*, 2018, [www.rpo.gov.pl](http://www.rpo.gov.pl), p. 11.

<sup>20</sup> *Ibid.*, p. 45.

The experience of the six-month application of the January amendment shows that the effect of the regulation is limited in terms of quantity. The Institute of National Remembrance received only a few more than 80 notices of crimes, and some of them were self-incrimination notices. It turned out that prosecutors did not undertake any investigation in any case and in ten cases refused to start an investigation.<sup>21</sup>

The period of six months of the Act's validity cannot be conclusive for drawing general conclusions on the meaning of criminal law regulations, but the indicated information on the fact that the analysed provision is not applied in practice confirms the assumption concerning the impact of the Act on prosecutors of the Institute of National Remembrance, contained in Parliamentary Paper no. 806.<sup>22</sup> The government states that "an increase in the number of criminal proceedings initiated by the Institute of National Remembrance in connection with suspicion of crimes under Article 55a of the Act may be expected. Due to a small number of such cases, the impact of the Act on these entities will not be significant. A noticeable increase in cases against collective entities is also not expected". A surprising addition to this forecast is the statement of the Council of Ministers that "due to the small overall number of criminal cases concerning crimes provided for in the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (3 convictions within the last 14 years), the expected increase in the number of such cases conducted pursuant to the amended provisions of the said Act will have a negligible impact on the costs of functioning of law enforcement agencies and the judiciary, as well as on revenues related to, for example, the execution of financial penalties imposed".

Three problems that were not highlighted either in the parliamentary legislative procedure or in the positions of the participants in the proceedings by the Constitutional Tribunal should also be mentioned.

Firstly, the scope of the exception, which covered situations in which the perpetrator of the offence did not commit a crime, was the one who committed the acts specified in Art. 55, let. a), within the framework of artistic or scientific activity. However, this exception did not cover other types of public activity, such as journalistic or political activity. Consequently, such a person "had to take account of criminal liability when presenting his or her personal point of view".<sup>23</sup>

<sup>21</sup> A. ŁUKASZEWICZ, *Prokuratorzy nie rwą się do wszczynania śledztw*, in *Rzeczpospolita*, 4 July 2018, [www.rp.pl](http://www.rp.pl).

<sup>22</sup> Government draft law amending the Act on the Institute of National Remembrance of 29 August 2016, cit.

<sup>23</sup> P. BACHMAT, *Odpowiedzialność karna za przestępstwa z art. 55a ust. 1-2 oraz kontratyp z art. 55a ust. 3 ustawy o Instytucji Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*, in *Zeszyty Prawnicze BAS Kancelarii Sejmu*, no. 3, 2018, [orka.sejm.gov.pl](http://orka.sejm.gov.pl), p. 121.

Secondly, the case of committing the act specified in Art. 55, let. a), because the act could have been committed both in the case of direct and possible intent and in the case of conscious unintention and unconscious unintention.<sup>24</sup>

Thirdly, the effects of the Act in the period between the entry into force of the January amendment and the entry into force of the June amendment on persons who at that time engaged in conduct that constituted prohibited acts as defined in Art. 55, let. a), paras 1 and 2, of the Act are relevant. In particular, if such persons have been subject to criminal proceedings but no conviction has taken place, then the proceedings should be discontinued (or, depending on the stage of the case, a decision should be taken to refuse to initiate criminal proceedings). Second, if the person(s) were subject to conviction, the conviction would be erased by virtue of law. These consequences are spelled out in Art. 4, para. 1, let. b), of the Directive 1 of the Penal Code due to the fact that the new act (the June amendment), having a decriminalising effect on the alleged act, is more lenient and will be applicable to facts committed during the period of validity of the January amendment.<sup>25</sup>

## VI. AMENDING THE AMENDMENTS

The above circumstances, in particular the surprisingly strong negative stance of international opinion, prompted the Polish political authorities to reflect on and withdraw from that part of the statutory regulation which provided for criminal liability for acts specified in the law. The Polish Parliament quickly amended the law in force since January 2018.

On the morning of 27 June 2018, the Sejm received a governmental draft amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and the Act on the Liability of Collective Entities for Acts Prohibited under Criminal Proof. On the day of the amendment, the government bill was published on the website of the Government Legislative Centre with the notice that comments on the bill would be accepted by 10 p.m., of the previous day (the documents were dated 26 June 2018). On the day of the receipt of the bill in the Sejm, the first reading of the bill was held, after which the motion to proceed immediately to the second reading was accepted. The Speaker of the Sejm ruled out any discussion in the second reading, which enabled him to move on to the immediate third reading, which concerned the entire bill. Less than three hours passed between the submission of the draft law to the Sejm and the completion of the parliamentary legislative procedure.<sup>26</sup>

The law was immediately notified to the President and the Senate for further legislative action. The Senate did not amend the law and the law was formally handed over to the President for signature. The President was in Latvia on the day of the adoption of

<sup>24</sup> *Ibid.*, pp. 121-122.

<sup>25</sup> *Ibid.*, pp. 115-116.

<sup>26</sup> M. KOLANKO, *Legislacyjny ekspres*, in *Rzeczpospolita*, 28 June 2018, [archiwum.rp.pl](http://archiwum.rp.pl).

this amendment and – “after consultations with the law office and the system of the Presidential Chancellery, after additional legal opinions”<sup>27</sup> placed an electronic signature under the law.

The explanatory memorandum to the draft amendment of June 2018 refers to the “conduct of public debate”. Another element of the “public debate” is the joint declaration of the Prime Ministers of Poland and Israel, signed by everyone in their country, but coordinated timewise, shortly after the signing of the bill by the President. The declaration refers directly to the January amendment and its justification, stating that:

“[W]e do not agree with the actions of blaming Poland or the entire Polish nation for the atrocities committed by the Nazis and their collaborators from various countries. The sad truth is, unfortunately, that at that time, some people – irrespective of their origin, religion or belief – revealed their darkest face. [...] We advocate freedom of expression about history and freedom of research into all aspects of the Holocaust so that it can be carried out without any fear of legal obstacles by students, teachers, researchers, journalists, and certainly also by Survivors and their families – they will not be liable for the exercise of the right to freedom of speech and academic freedom in relation to the Holocaust”.<sup>28</sup>

This is a purely political reference to the accusations made against the regulation contained in the January amendment. Immediately after its adoption, the negative reaction of public opinion and representatives of the highest level of political authorities, especially in Israel and the USA, and the outrage of public opinion in Ukraine was pointed out.<sup>29</sup> Incidentally, the Ministry of Foreign Affairs warned against such a reaction abroad, pointing out in regards to the January amendment that “the justification of the act does not include a discussion of the compliance of the act with the freedom of expression regulated both by the Constitution of the Republic of Poland (Art. 54) and by the European Convention for the Protection of Human Rights and Fundamental Freedoms”. The freezing effect of the Act was pointed out as a deterrent to researching and debating the co-responsibility of Poles for murdering Jews and looting their property during and immediately after the Second World War, deteriorating the reputation of Poland and exposing them to allegations of falsifying the historical truth about the Holocaust. Moreover, “the imposition of criminal sanctions on the possibility of exercising freedom of speech not only reinforces feelings of anti-Semitism and encourages all those who deny the Holocaust, but also damages Poland and its relations with the Jewish community”.<sup>30</sup>

<sup>27</sup> Statement of Minister K. Szczerski, see Prezydent podpisał nowelizację ustawy o IPN, 27 June 2018, [www.prezydent.pl](http://www.prezydent.pl).

<sup>28</sup> See the declaration on the webpage of the Prime Minister of Poland, [www.premier.gov.pl](http://www.premier.gov.pl).

<sup>29</sup> For a broader perspective on Ukraine and its memory laws, see the *Article* by Cherviatsova in the first part of this Special Section: A CHERVIATSOVA, *On the Frontline of European Memory Wars: Memory Law: Memory Laws and Policy in Ukraine*, in *European Papers*, Vol 5, No 1, 2020, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 119 *et seq.*

<sup>30</sup> M. LINZEN, *Keep Speech Free, Keep the History of the Holocaust Alive*, cit.

## VII. JUDGMENT OF THE CONSTITUTIONAL TRIBUNAL

At the time of the amendment of the Act on the Institute of National Remembrance in June 2018, the President's request to control the constitutionality of the January amendment was pending. As a result of the June amendment, the provisions of Arts 55, let. a), and 55, let. b), of the Act on the Institute of National Remembrance, which contained provisions on criminal liability for public acts and contrary to the facts denying Nazi, communist or other crimes constituting crimes against peace, humanity or war crimes committed against Polish nationals or Polish citizens of other nationalities in the period from 8 November 1918 to 31 July 1990, were removed from the applicable law (defamation of the Polish State or the Polish Nation).

Almost a year after the President's request to control the constitutionality of the amendment to the Act on the Institute of National Remembrance was received, the Constitutional Tribunal issued a verdict on the amendment of the law. The ruling had to take into account the effects of the June amendment, which was the repeal of the provisions of Arts 55, let. a), and 55, let. b), of the Act. An obvious consequence of this state of affairs was the discontinuance of proceedings in the scope of criminalisation of behaviours specified in these provisions. The situation known a dozen or so years ago was repeated: the Tribunal did not express its substantive opinion on the compliance with the Constitution (in particular, the constitutional principle of determination of criminal law regulations and the limits of freedom of speech) by discontinuing proceedings in the scope of substantive control of the compliance of the contested provisions with constitutional norms.

The only subject of the proceedings before the Tribunal was therefore the question of the unconstitutionality of the terms "Ukrainian nationalists" and "Eastern Małopolska". The President of the Republic of Poland argued in his application to the Constitutional Tribunal that these concepts, by failing to meet the requirements of a sufficiently precise legal regulation, violate the principle of a democratic state of law and the constitutional requirement for the necessary determination of a criminal law norm. The latter allegation stems from the fact that failure to precisely define the notion of "Ukrainian nationalists" may lead to freedom of interpretation of the type of act prohibited in Art. 55 of the Act on the Institute of National Remembrance, which "goes far beyond the framework permitted by the requirement of the definition of a criminal law norm".

Using the concept of the crimes of Ukrainian nationalists, legislators used the concept of Eastern Małopolska, which has no legal definition. By not defining the territory of the Second Republic of Poland in a sufficiently precise manner, legislators led to a situation where the sanctioning norm does not meet the standard resulting from the principle of *nullum crimen sine lege*; precise delimitation of the boundaries of Eastern Małopolska is, in the opinion of the President, necessary for a comprehensive identification of the characteristics of the type of prohibited act.

The President's view was shared by the Ombudsman, who stated that on the one hand it was not possible to unambiguously define the term "Ukrainian nationalist", and

on the other hand it was not possible to precisely define, on the basis of the contested regulations, the geographical boundaries of Eastern Małopolska. The other participants in the proceedings – the Sejm and the Prosecutor General – took the view that the use of these terms by the legislator was consistent with Art. 2 and Art. 42 in connection with Art. 31, para. 3, of the Constitution of the Republic of Poland.

The Constitutional Tribunal ruled that the use of the terms “Ukrainian nationalists” and “Eastern Małopolska” is inconsistent with the principle of certainty of the law derived from Art. 2 of the Constitution of the Republic of Poland and from Art. 42, para. 1, of the Constitution.

The justification of the judgment states that the Constitutional Tribunal shared the doubts of the President of the Republic of Poland and ruled, firstly, that the provisions in question are inconsistent with the principle of lawfulness derived from Art. 2 of the Constitution and from Art. 42, para. 1, of the Constitution, expressing the principle that a ban or order with a criminal sanction should be formulated in a precise and strict manner. Moreover, the judgment stated that the terms “Ukrainian nationalists” and “Eastern Małopolska” were not defined by the legislator in the Act on the Institute of National Remembrance. This is important in so far as the questioned provisions are closely related to Art. 55 of the Act on the Institute of National Remembrance, *i.e.* a provision containing a criminal law rule according to which whoever publicly denies crimes referred to in Art. 1, para. 1, of this Act, despite facts, is subject to a fine or imprisonment for up to three years. Finally, the judgment pointed out that it is impossible to unambiguously reconstruct the meaning of the questioned notions on the basis of either normative acts from the period of the Second Republic or binding legislation. Furthermore, in the common language, these notions do not evoke unambiguous, undisputed connotations.

Therefore, in the opinion of the Tribunal, there was a justified assumption that in practice, the application of the challenged provisions of law enforcement agencies and courts could have serious problems with determining the scope of criminal liability provided for in Art. 55 of the Act on the Institute of National Remembrance. Thus, the provisions questioned by the President of the Republic of Poland violate Art. 2 and Art. 42, para. 1, of the Constitution.

The consequence of the Court’s ruling is that the contested provisions remain in the legal system without the indicated words “Ukrainian nationalists” and “by Ukrainian nationalists” as well as “and Eastern Małopolska”. This means that the disputed regulations concern “crimes of members of Ukrainian formations collaborating with the Third German Reich”, and that:

“Crimes of Ukrainian formations collaborating with the Third German Reich, within the meaning of the Act, are acts committed [by members of these formations] in the years 1925-1950, involving the use of violence, terror or other forms of human rights violations against individuals or groups of people, and in particular against the Polish population. The crime of Ukrainian formations collaborating with the Third Reich is also



participation in the extermination of the Jewish population and genocide against the citizens of the Second Republic of Poland in the Volhynia area”.

## VIII. CONCLUSIONS

The amendment of the Act made in June 2018 resulted in an extremely narrowed scope of the subject matter of the President’s motion and of the patterns of control over the constitutionality of the contested provisions. The subject of the decision was only the use of the terms “Ukrainian nationalists” and “Eastern Małopolska”, and out of the four constitutional models, only two remained – in the Court’s opinion: Art. 2 and Art. 42 of the Constitution. This does not mean, however, that the whole process of amending the law and controlling the constitutionality could be reduced to a known “much ado about nothing”. On the contrary: the effects of Parliament’s ill-considered actions are dramatic. Demons of anti-Polonism, anti-Semitism and anti-Ukrainianism have revived.





## ARTICLES

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

*edited by Grażyna Baranowska and León Castellanos-Jankiewicz*

## MISJUDGING THE HISTORY AT THE ICTY: TRANSITIONAL AND POST-TRANSITIONAL NARRATIVES ABOUT GENOCIDE IN BOSNIA AND HERZEGOVINA

NEVENKA TROMP\*

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ABSTRACT: This *Article* explores the transitional, post-transitional and strategic narratives about the wars in the former Yugoslavia, more specifically in Bosnia and Herzegovina. The criminal justice narrative created by the International Criminal Tribunal for the former Yugoslavia (ICTY) dominates the transitional narratives about the Yugoslav wars. It is not uncommon that both sides – the victims and the perpetrators – express dissatisfaction with the justice outcome depending on the verdict. Transitional narratives based on the criminal trials are expected to provide clarity on the distinction between "bad" and "good" guys; between perpetrators and victims; between the criminality of the perpetrating side and the response of the victim's side. With the passage of time, all transitional narratives will be challenged by post-transitional narratives, launched by various societal and political actors for different reasons with specific objectives behind them. For example, the ruling post-conflict elites can decide to create a post-transitional narrative in which they will try to re-interpret or counter the existing transitional narratives with the goal to exonerate the policies of the predecessor regime that led to the violence by reintroducing the "politics of the past" into the "politics of the present" in the perusal of the still to be achieved political objectives of the predecessor regime. Using the example of the ICTY genocide judgments, this *Article* will explore how its transitional narrative of genocide

\* Lecturer, Department of European Studies, University of Amsterdam, n.tromp-vrkic@uva.nl.



has been undermined by the post-transitional narratives launched by the Serbian post-conflict elites in the perusal of the unfulfilled strategic goals of the predecessor regimes.

KEYWORDS: disintegration of Yugoslavia – ICTY – genocide – Bosnia-Herzegovina – Srebrenica – transitional justice.

## I. INTRODUCTION

In August 2018, the *Republika Srpska* Assembly revoked the “Report of the Commission about the events in Srebrenica in 1995”, a document adopted in 2004. The *Republika Srpska* (RS) is a territorial entity of the sovereign State of Bosnia-Herzegovina (BiH), as stipulated in the Dayton Peace Agreement of 1995.<sup>1</sup> The gravity of the crimes in Srebrenica had been confirmed in several judgments rendered at the International Tribunal for Former Yugoslavia (ICTY), an *ad hoc* court established in 1993 by the UN Security Council. The first ICTY judgment for the Srebrenica genocide was rendered in 2001 in the case against Radislav Krstić, a general in the RS Army (the VRS – *Vojska Republika Srpske*). Ultimately, the Srebrenica genocide became a symbol of the tragic and destructive nature of the war in BiH that lasted from 1992 to 1995. It also underlined the narrative of collective suffering of the Bosnian Muslims as the principal victims of genocide; and the Serb side as the principal perpetrator of genocide.<sup>2</sup> Krstić’s 2001 judgment was confirmed in the appeals’ judgment of 2004, the same year in which the RS parliament adopted the Report of the Commission about the events in Srebrenica. The Report prompted the then President of RS – Dragan Čavić – to issue a public apology, stating that the massacre of thousands of Bosnian Muslims at Srebrenica was “a black page in the history of the Serb people”.<sup>3</sup>

The announcement of the Report’s revocation 14 years later by the same Assembly was followed by the formation of two international commissions with the official man-

<sup>1</sup> *Serb leader’s Srebrenica regret*, in *BBC News*, 11 July 2004, [news.bbc.co.uk](http://news.bbc.co.uk), summarised the main points of the Report as follows: “According to the report: Bosnian Serb forces planned a three-stage operation: the attack on the town, the separation of women and children and the execution of the men; military and police units, as well as special units of the interior ministry, took part in the murders; four new graves are original sites while the other 28 are sites where bodies were reburied to hide traces of the massacre; the commission has data on 7,779 people missing in Srebrenica and has so far identified 1,332 of them”; T. TOPIĆ, *Otvaranje najmračnije stranice*, in *VREME*, 1 July 2004, [www.vreme.com](http://www.vreme.com). On the withdrawal of the Report see D. KOVAČEVIĆ, *Bosnian Serb MPs Annual Report Acknowledging Srebrenica*, in *The Balkan Insight*, 14 August 2018, [balkaninsight.com](http://balkaninsight.com); A. SORGUĆ, *Bosnian Serbs’ War Commissions: Fact-Seeking or Truth-Distortion?*, in *The Balkan Insight*, 25 February 2019, [balkaninsight.com](http://balkaninsight.com).

<sup>2</sup> See, e.g., the ICTY press release of 2 August 2001, *Prosecutor v. Radoslav Krstić*, [www.icty.org](http://www.icty.org);

<sup>3</sup> ICTY judgment summaries: of 10 June 2010, *Prosecutor v. Popović et al.*, [www.icty.org](http://www.icty.org); of 26 March 2016, *Prosecutor v. Radovan Karadžić*, [www.icty.org](http://www.icty.org); of 22 November 2017, *Prosecutor v. Ratko Mladić*, [www.icty.org](http://www.icty.org); of 12 December 2012, *Prosecutor v. Zdravko Tolimir*, [www.icty.org](http://www.icty.org). See e.g. *Serb leader’s Srebrenica regret*, cit.

date to contextualise the crimes committed in the Sarajevo and the Srebrenica areas.<sup>4</sup> The appointment of the commissions to re-investigate these two particular crime sites was telling: the Sarajevo siege and the Srebrenica genocide gained global notoriety, as sites of unimaginable brutality of the Serb forces. These crimes occurred in front of the global audience from the first day of the war in 1992, carving the Serb side as the principal wrongdoer into the world's collective memory.<sup>5</sup> Sarajevo and Srebrenica became symbols of senseless suffering of the Bosnian Muslim civilian population for what were perceived as the cynical geostrategic ambitions of Serbia<sup>6</sup> under the leadership of Slobodan Milošević and in concert with the Bosnian Serb leadership.<sup>7</sup>

The Sarajevo commission consists of seven members who were asked to investigate the suffering of Serbs in Sarajevo from 1991 to 1995.<sup>8</sup> The Srebrenica commission consists of nine members who were asked to investigate suffering of all peoples in the Srebrenica region from 1992 to 1995.<sup>9</sup> Gideon Greif, its chairman, opened the first meeting in February 2019 stating that the aim of the commission was to establish the truth, of which there could be only one. He affirmed the commission's moral obligation to be true to the facts and to the victims.<sup>10</sup>

Russia's and Serbia's governments lauded the initiative as being long overdue after the anti-Serb bias that had been ongoing since the 1990s.<sup>11</sup> International diplomats reacted with apprehension, warning of the possible negative impact of this initiative in the

<sup>4</sup> The official names of the commissions are: "The Independent International Commission for investigation of the suffering of Serbs in Sarajevo from 1991 to 1995" and "The International Independent Commission for investigation of suffering of all peoples in the Srebrenica region from 1992 to 1995".

<sup>5</sup> See e.g. S. TANNER, *The Mass Crimes in the Former Yugoslavia: Participation, Punishment and Prevention?*, in *The International Review of the Red Cross*, 2008, p. 273 et seq.

<sup>6</sup> Serbia is a successor State of the Federal Republic of Yugoslavia (FRY) that existed between 1992 and 2003. It continued to exist as Serbia-Montenegro from 2003 to 2006. In 2006, Montenegro declared independence, leaving Serbia as the only legal successor of FRY.

<sup>7</sup> See e.g. I. TRAYNOR, *Srebrenica genocide: worst massacre in Europe since the Nazis*, in *The Guardian*, 10 June 2010, [www.theguardian.com](http://www.theguardian.com); C. LESLIE, *Sarajevo: A Portrait of the City 20 years after the Bosnian war*, in *The Guardian*, 14 December 2015, [www.theguardian.com](http://www.theguardian.com); I. SCARAMUZZI, *Pope Francis: Sarajevo, from a symbol of war to a place of unity between faiths*, in *Abouna.org*, 7 June 2015, [en.abouna.org](http://en.abouna.org); S. BROCKLEHURST, *Peter Howson returns to "hell" of Bosnian war with new painting*, in *BBC News*, 9 December 2019, [www.bbc.com](http://www.bbc.com).

<sup>8</sup> Rafael Isreali (chairman), Walter Manoschek (Austria); Darko Tanasković (Serbia); Laurence Armand French (US); Giuseppe Zaccaria (Italy); Viktor Bezruchenko (Russian Federation); Patrick Barriot (France).

<sup>9</sup> Gideon Greif (chairman), Adenrele Shinaba (Nigeria); Juki Osa (Japan); Roger Bayard (Australia); Cheng Ji (China); Giuseppe Zaccaria (Italy); Marcus Goldbach (Germany); Laurens Armand French (USA); and Marija Đurić (Serbia). Greif is a professor of Jewish and Israeli History at the University of Texas and a leading researcher at the Israeli Holocaust Institute, Shem Olam.

<sup>10</sup> See the interview with Gideon Grajf: *Cilj međunarodne komisije je doći do istine o Srebrenici koja je samo jedna*, in *Srpskainfo*, 7 February 2019, [srpskainfo.com](http://srpskainfo.com).

<sup>11</sup> See *Rusija pozdravila formiranje komisije o istraživanju zločina u Srebrenici i stradanju Srba u Sarajevu*, in *Klix*, 4 April 2019, [www.klix.ba](http://www.klix.ba).

reconciliation processes of the still fragile Bosnian society. At the same time, Bosnian media expressed scepticism about the sincerity of the expressed mandate of these commissions, suggesting that they had been created in order to produce a “more convenient truth” or “truth on demand” to serve Serbia and the RS’s geopolitical interests.

The human rights activists and other long-time observers of the Yugoslav conflicts see the commissions’ emphasis on the Serb victims as a carefully conceived plan aimed at the “equalisation” of criminal responsibility for the atrocities of all sides, and an attempt to “relativise” the Serb responsibility for the criminal plan that led to the commission of crimes against non-Serbs in BiH.<sup>12</sup> The effect of the initiative to reassess the crimes is to send a message to the outside world that the Bosnian Muslims were not just victims; they were also perpetrators of the crimes against the Serbs in Sarajevo and Srebrenica. This “relativisation” of the crimes would recast the Serb side from “principal wrongdoer” to “warring party” in the BiH war – alongside the Bosnian Croats and the Bosnian Muslims.<sup>13</sup>

Could there be a legitimate reason for the existence of the commissions? For example, are there new authoritative sources that were unavailable during the ICTY’s trials that need to be scrutinised? If persuasive enough evidence had existed during the ICTY trial to counter the genocide and other criminal charges, why did the defence lawyers in the Sarajevo and Srebrenica trials not use it to counter the prosecution’s case? Have these commissions simply been created to give a new interpretation of the already existing and well-known facts in order to produce yet another version of the Bosnian war narrative?

In a recent study on genocide denial, Monica Hanson Green made an inventory of the genocide denial narratives. She listed the following issues as relevant: contestation of the numbers of the victims; reversal of the “perpetrator-victim” role by stressing the need of their own group to “self-defence” from the “other group” that they cast as “rebels” or “terrorists”.<sup>14</sup>

Will these new interpretations be weaved into the tapestry of the already existing historical and legal narratives of the past events in order to create more confusion with the purpose of strengthening the already existing denial narrative?<sup>15</sup>

Transitional justice periods produce multiple narratives of what happened, how and by whom and the question is how the competition between multiple truths will reflect

<sup>12</sup> For the reactions by human rights and transitional justice experts and activists, see: D. TORCHE, *Prvi sastanak spornih komisija za Srebrenicu i Sarajevo krajem marta 2019*, in *Oslobodjenje*, 25 March 2019, [www.oslobodjenje.ba](http://www.oslobodjenje.ba).

<sup>13</sup> *Ibid.*

<sup>14</sup> L. NETTELFIELD, S. WAGNER, *Srebrenica in the Aftermath of Genocide*, Cambridge: Cambridge University Press, 2013; see also M. HANSON GREEN, *Srebrenica Genocide Denial Report 2020*, Potočari: Srebrenica Memorial, 2020, p. 31.

<sup>15</sup> K. BART, M. ZUVELA, *Bosnian Serb Leader: Srebrenica was 20th century’s “Greatest Deceptio”*, in *Reuters*, 25 June 2015, [www.reuters.com](http://www.reuters.com). See for example of genocide denial: Z. RAHIM, *Srebrenica Genocide is “Fabricated Myth”*, *Bosnian Serb Leader Says*, in *The Independent*, 14 April 2019, [www.independent.co.uk](http://www.independent.co.uk).

on the ways in which facts will be memorialised. The post-transitional justice period will often create a narrative in reaction to the transitional narratives for the purpose of correcting and adapting them to the concrete political agenda of the post-conflict societies and state elites. For example, the post-conflict state elites might decide to (re)introduce the “politics from the past” into the “politics of the present”.<sup>16</sup>

This *Article* will place the discourse of genocide in the framework of transitional and post-transitional justice dynamics. We shall argue that by attempts to re-evaluate the transitional narrative of the genocide in BiH – of which the creation of the two commissions in 2018 has been an example, the post-conflict state elites in Serbia and the RS aim to: 1) undermine the transitional narrative of genocide as produced at the ICTY; 2) relativise the criminal responsibility of the Serb side in the 1990s war by stressing the suffering of the Serb victims in the war in BiH; and 3) legitimise the reintroduction of “the politics of the past” to “the politics of the present” by returning to the geopolitical designs of the war time regime, which included the expansion of the post-Yugoslav Serbian State in the territory of the RS.

To investigate these propositions this *Article* shall first explore the conceptual framework of the transitional justice concepts of “the transitional narrative”, “post-transitional narrative,” and “the strategic narrative”. Second, it will analyse the transitional narrative of genocide as produced by the ICTY trial judgments and their impact. Finally, the *Article* will investigate the post-transitional narrative by exploring when, how and why did post-conflict Serb elites decide to engage in revisionism by introducing the “politics of the past” in the “politics of the present”.

### 1.1. THEORETICAL FRAMING OF TRANSITIONAL, POST-TRANSITIONAL JUSTICE AND STRATEGIC NARRATIVES

Transitional narratives based on international criminal trials for mass atrocities deal with individual criminal responsibility and as such memorise past events by addressing the questions: what exactly happened; why and how it happened; and who is responsible for it. It is a narrative about the criminality of the political plan; about the individual responsibility for the planning and execution of the mass atrocities to achieve concrete (geo)political objectives. These narratives are expected to distinguish victims from wrongdoers and to record convictions as well as acquittals.

Analysing the role played by the law in “periods of radical political transformation”, Transitional justice scholar Ruti Teitel argues that transitional legal proceedings create “transitional narratives”, which she describes as processes of “collective memory”. Tran-

<sup>16</sup> For discussion on post-transitional justice see C. COLLINS, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador*, University Park: Pennsylvania University Press, 2010; F.A. RAIMUNDO, *Post-Transitional Justice?: Spain, Poland and Portugal Compared*, doctoral thesis, European University Institute, 2012.

sitional narratives are likely to be challenged and replaced in the future.<sup>17</sup> The transitional justice field of research has expanded rapidly since the 1990s due to the establishment of the legal regime where the breaches of human rights and the commission of mass atrocities were prosecuted and tried at the international and national criminal tribunals in the post-Cold War world. Transitional justice narratives emerging from the Yugoslav wars have overwhelmingly relied on the ICTY trials. Yet, the transitional justice narrative is broader than the texts contained in the judgments and the verdicts: it includes *inter alia*: the indictments – who is indicted and why – and who has not been indicted and why not; the trial evidence made public during the proceedings; and, finally, the texts of judgments and verdicts that convict or acquit. Transitional justice narratives will impact the collective memory and historiography of the violent break-up of Yugoslavia in regard to a number of important topics, such as: which side started the violence; which side is responsible for mass atrocities; which side is the victim side? All sides in the conflict will try to influence the transitional narrative in the post-conflict period. This *Article* will address the issue of when, why and how did the post-conflict elites in Serbia and *Republika Srpska* challenge the transitional justice narrative of genocide.<sup>18</sup> In order to address this question, the theoretical approach of the transitional justice narrative will be expanded with the post-transitional justice approach. The post-transitional justice researchers deal with the questions of how, why, when and by which actors the transitional narrative can – or inevitably will be – challenged.

Post-transitional justice scholars argue that a post-transitional justice period can produce a narrative of unity, consensus, forgiveness and reconciliation, but that it can also lead to attempts to reshape the memory of the conflict as articulated by the transitional narratives. When societal or political actors on all sides of the spectrum – perpetrating and victimised side – express dissatisfaction with the way the crimes, injustices and harms of the past have been depicted in the transitional narrative – they will try to correct, distort, or upend it.

One of the pioneers in the field of the post-transitional justice is Cath Collins, a scholar who studied the transitional justice processes in El Salvador and Chile who introduces the term “post-transitional justice” as a concept that evaluates “the comprehensiveness and sufficiency of transitional accounts of a conflict”.<sup>19</sup> Collins sees post-transitional justice as being rooted in transitional justice, while at the same time trying

<sup>17</sup> See for the discussion R. TEITEL, *Transitional Justice*, New York: Oxford University Press, 2000, pp. 4, 20, 70-117, 115.

<sup>18</sup> The term “post-conflict elites” will be applied to: 1) the state actors with access to political decision-making and with institutional support for the implementation of the decisions; 2) the public and private media outlets with shared or overlapping ideologies or political and societal interests; 3) the national and international intellectuals and professionals who promote the image of Serbia as a victim of globalisation, with the ICTY as the instrument of the globalisation.

<sup>19</sup> C. COLLINS, *Post-Transitional Justice*, cit., p. 22.



to depart from it.<sup>20</sup> Collins identified six ways in which post-transitional justice differs from transitional justice: 1) post-transitional justice is interested in “questions of the quality, reach, and perfectibility” of post-conflict or post-dictatorship democratic orders, while transitional justice focuses on the “minimum institutional requirements” for the establishment of such a democracy; 2) post-transitional justice questions “the comprehensiveness and sufficiency” of transitional justice; 3) post-transitional justice is mainly advocated and influenced by private actors working from “above” and “below” the State; 4) post-transitional justice is “multi-sited, multi-actor and multi-referential”; 5) different actors attribute different goals and meanings to the term; 6) post-transitional justice is likely to be more internationalised than transitional justice.<sup>21</sup>

For the present *Article*, the concepts developed by Filipa Raimundo, a scholar who studied post-transitional justice in Spain, Portugal, and Poland, are more applicable. Raimundo defines the concept of “post-transitional justice” as “the re-emergence of the issues of the authoritarian past onto the political agenda after the democratic consolidation”.<sup>22</sup> Raimundo links the success of transitional period mechanisms to political willingness and institutional capacity and concludes that on a longer run the institutional capacity will be decisive for a transitional narrative’s success.<sup>23</sup> When exploring the link between the “politics of the past” and the “politics of the present” Raimundo argues that “the past returns to the political agenda because parties aim to change the dominant narrative of the past, but also the narrative of the transition and of the transitional justice process”.<sup>24</sup>

The post-conflict elites can decide to re-interpret the already existing transitional narratives or to create new ones in order to put forward a more convenient truth. For that purpose, the strategic narratives will be created according to which political actors attempt to “create a shared understanding of the world, of other political actors, and of policy [...]”.<sup>25</sup> A strategic narrative will be used by the post-conflict elites to produce strong counternarratives, to strengthen the legitimacy of their rule and to reaffirm its power position.<sup>26</sup> The strategic narrative will use the language with the aim to – for example – rehabilitate the wrongdoers, discredit political rivals, and undermine the victims’ narrative in order to affirm and continue implementing unfulfilled political goals as legitimate and justified.

<sup>20</sup> *Ibid.*, pp. 22-24.

<sup>21</sup> *Ibid.*

<sup>22</sup> F.A. RAIMUNDO, *Post-Transitional Justice?*, cit., pp. xv, 10, 23.

<sup>23</sup> *Ibid.*, pp. 10, 42-44.

<sup>24</sup> *Ibid.*, pp. xv, 23, 95, 176.

<sup>25</sup> A. MISKIMMON, B. O’LOUGHLIN, L. ROSELLE, *Introduction*, in A. MISKIMMON, B. O’LOUGHLIN, L. ROSELLE (eds), *Forging the World: Strategic Narratives and International Relations*, Ann Arbor: University of Michigan Press, 2017, p. 1.

<sup>26</sup> *Ibid.*

This *Article* argues that the process of the disintegration of Yugoslavia has not finished for Serbia, because the country's state elites do not accept the current borders of Serbia as final and permanent. In doing so, the *Article* will show the post-transitional narratives which are being put forward to legitimise the return to the geopolitical designs of the predecessor regime that were not achieved during the wars of the 1990s.

By investigating the transitional and post-transitional justice processes in Serbia, we shall consider the period between 2008 and 2012 as a turning point for the state elites to shift from a transitional to a post-transitional justice agenda. This shift was marked by the Socialist Party of Serbia's (SPS) return to power as one of the parties in a coalition government of Serbia, after eight years of being in the opposition. This is the party formed by Serbia's war time President Slobodan Milošević in 1990, the political reactivation of which led to the return to irredentist politics, and to the reintroduction in 2011 of an official governmental "strategy for preserving and strengthening the relations between the home country and the diaspora and the home country and Serbs in the region".<sup>27</sup>

Since the formation of a populist government in 2012, consisting of a coalition with the two nationalist parties – the Serbian Progressive Party (SNS – *Srpska napredna stranka*) and the SPS – the borders of the post-Yugoslav Serbia have become an open political question. Serbia's geopolitical goals in BiH aim at the expansion of the post-Yugoslav Serbian State with the territory of the RS; Serbia still has territorial claims in the north of Kosovo; in Montenegro the attempts by Serbia to regain political control in the area by mobilising its ethnic Serb population through the Serbian Orthodox Church against the Montenegrin pro-Western government led to a narrow victory of the pro-Serbia coalition at the August 2020 parliamentary elections with a pro-Serbia government for the first time since the independence of Montenegro as of 2006.<sup>28</sup> This has been considered as a victory for Serbia's nationalist agenda according to which the territory of Montenegro belongs to "Serbia's world".<sup>29</sup>

## II. TRANSITIONAL NARRATIVE OF GENOCIDE IN BOSNIA AND HERZEGOVINA

Given the efforts of Serbia's and RS's political elites to re-address the responsibility for genocide we shall first investigate the transitional narrative of genocide. The main fea-

<sup>27</sup> Ministry of the Religion and Diaspora of Republic of Serbia, *Strategija očuvanja i jačanja odnosa matične države i dijasporne i matične države i Srba u regionu*, Belgrade, 2011, dijaspora.gov.rs. In translation: "The Strategy for preserving and strengthening the relations between the home country and the diaspora and the home country and Serbs in the region", pursuant to Art. 12 of the Law on Diaspora and Serbs in the Region and Art. 45, para. 1, of the Government Law.

<sup>28</sup> M. Jovičević, *Bugajski: Vučić uz podršku Kremlja pokušava da ostvari Miloševićev projekt*, in *POBJEDA*, 24 September 2020, www.pobjeda.me.

<sup>29</sup> See the TV Interview with President of Montenegro Milo Đukanović, *Đukanović šokira: Idemo u šumu i oružjem ako treba braniti Crnu Goru! Rat u CG je rat u regionu!*, in *FACE TV*, 18 September 2020, www.youtube.com.

tures of this narrative in Bosnia and Herzegovina shall be investigated by looking into the temporal and spatial scope of the genocide charges in the ICTY indictments and what has been proved in the related judgments; and by looking into the perpetrators and co-perpetrators from Serbia and the RS, who were named as members of the joint criminal enterprise (JCE) networks in the genocide indictments and whose ties have been proved in the related judgments.

## II.1. THE GENOCIDE CHARGES FOR FACTS OCCURRING IN 1992

The ICTY indictments for the 1992 genocide covered seventeen municipalities in the northern part and two in the eastern part of Bosnia. Seven ICTY indictees were charged for crimes of genocide committed in 1992 (Table 1); eleven have been charged with the crime of genocide in Srebrenica in 1995 (Table 2). Slobodan Milošević, Radovan Karadžić, and general Ratko Mladić were the only indictees who were charged with genocides for acts committed in both 1992 and 1995. Because of the temporal scope of genocide charges in their respective indictments, as well as because of the JCE doctrine – of found guilty of genocide – these three trials constitute the crux of the general understanding of the genocidal plan though the links between Serbia and RS.

Table 1 shows seven individuals were indicted for genocide in 19 municipalities in northern and eastern Bosnia in 1992. Radislav Brđanin was charged with genocide in 12 municipalities, followed by Radovan Karadžić in ten and Slobodan Milošević in seven municipalities. Most municipalities featured in six genocide indictments.

| INDICTEE →<br>1992 MUNICIPALITY ↓ | Goran Jelisić | Radislav Brđanin | Momčilo Krajišnik | Biljana Plavšić | Slobodan Milošević | Radovan Karadžić | Ratko Mladić | Number of indictees<br>per municipality |
|-----------------------------------|---------------|------------------|-------------------|-----------------|--------------------|------------------|--------------|---|
| 1. Banja Luka                     |               | +                |                   |                 |                    |                  |              | 1                                       |
| 2. Bijeljina                      |               |                  |                   |                 | +                  |                  |              | 1                                       |
| 3. Bosanska Krupa                 |               | +                |                   |                 |                    |                  |              | 1                                       |
| 4. Bosanski Novi                  |               | +                | +                 | +               | +                  |                  |              | 4                                       |
| 5. Bosanski Petrovac              |               | +                |                   |                 |                    |                  |              | 1                                       |
| 6. Bratunac                       |               |                  |                   |                 |                    | +                |              | 1                                       |
| 7. Brčko                          | +             |                  | +                 | +               | +                  | (+)              |              | 5                                       |
| 8. Foča                           |               |                  |                   |                 |                    | +                | +            | 2                                       |
| 9. Donji Vakuf                    |               | +                |                   |                 |                    |                  |              | 1                                       |
| 10. Ključ                         |               | +                | +                 | +               | +                  | +                | +            | 6                                       |

|  |   |    |   |   |   |     |   |           |
|--|---|----|---|---|---|-----|---|-----------|
| 11. Kotor Varoš                              |   | +  | + | + | + | (+) | + | 6         |
| 12. Prijedor                                 |   | +  | + | + | + | +   | + | 6         |
| 13. Prnjavor                                 |   | +  |   |   |   |     |   | 1         |
| 14. Sanski Most                              |   | +  | + | + | + | +   | + | 6         |
| 15. Teslić                                   |   | +  |   |   |   |     |   | 1         |
| 16. Šipovo                                   |   | +  |   |   |   |     |   | 1         |
| 17. Višegrad <sup>30</sup>                   |   |    |   |   |   | (+) |   | 1         |
| 18. Vlasenica                                |   |    |   |   |   | +   | + | 2         |
| 19. Zvornik                                  |   |    |   |   |   | +   |   | 1         |
| <b>Number of municipalities per indictee</b> | 1 | 12 | 6 | 6 | 7 | 10  | 6 | <b>48</b> |

TABLE 1. 1992 genocide charges in the ICTY indictments per indictee and per municipality.

Table 2 shows that none of the seven indictees were found guilty of genocide for 1992. It also shows that five of seven indictees were politicians; one was a high-level military; and one was a low-level policeman.

| <b>JCE links between the indictees from Serbia and RS for 1992 genocide charges ⇒</b> |  |  |            |   |
|---|--|--|------------|---|
| <b>Indictees ↓</b>  | Indicted for genocide as a RS official | JCE links between individuals from Serbia and RS charged in the indictment | Politician | Bosnian Croats, included in the indictment as the protected group |
| Slobodan Milošević  | -                                      | +  | +          | +   |
| Radovan Karadžić  | +                                      | +  | +          | +   |
| Ratko Mladić  | +                                      | +  | -          | +   |
| Momčilo Krajšnik  | +                                      | -  | +          | -   |
| Biljana Plavšić   | +                                      | -  | +          | -   |
| Goran Jelisić   | +                                      | -  | -          | -   |
| Radoslav Brđanin  | +                                      | -  | +          | +   |

TABLE 2. 1992 Genocide Indictments. The JCE Links with Serbia; Protected groups.

<sup>30</sup> Three municipalities – Brčko, Kotor Varoš and Višegrad – were mentioned in the third amended indictment of Radovan Karadžić but then crossed out in the prosecution's marked-up indictment. See ICTY, third amended indictment of 27 February 2009, IT-95-5/18-PT, *Prosecutor v. Radovan Karadžić*, para. 38.

In four of seven 1992 genocide indictments, the prosecution did not link the accused from the *Republika Srpska* – Biljana Plavšić, Momčilo Krajišnik, Radoslav Brđanin and Goran Jelisić - with the co-perpetrators from Serbia. In three other indictments - Milošević's, Karadžić's and Mladić's - there was a list of the alleged co-perpetrators, *i.e.* the named members of the JCE, of which not all named co-perpetrators were indicted; and from the named co-perpetrators who were indicted not all were indicted for the crime of genocide.<sup>31</sup>

## II.2. BOSNIAN MUSLIMS AND BOSNIAN CROATS: TWO PROTECTED GROUPS TARGETED BY THE SERB FORCES IN GENOCIDAL CRIMES IN 1992

The genocide indictments for 1992 covered the area where Bosnian Muslims and Bosnian Croats lived along with their Serb neighbours in the ethnically mixed municipalities that were claimed by Serbs as a part of the six strategic objectives identified in May 1992 by the RS Assembly: the northwest of BiH was identified as Posavina Corridor.<sup>32</sup> The ICTY genocide charges for 1992 extended to Bosnian Croats as a protected group alongside the Bosnian Muslims. When the first ICTY genocide indictments were filed in July 1995 against Radovan Karadžić and Ratko Mladić for crimes that took place in 1992, the Bosnian Croats were also identified as a protected group targeted in the genocidal campaign conducted by the Serb forces.<sup>33</sup> (see Table 2) In the 1999 amended indictments against Radoslav Brđanin, the wartime President of the Autonomous Republic of Krajina (ARK, a region in northwest Bosnia that was a part of the RS) was charged with genocide for crimes committed from May to June 1992 in 12 municipalities. Just like in Milošević's, Karadžić's and Mladić's indictments, the prosecution charged Brđanin for the commission of genocide in 1992 against Bosnian Muslims and the Bosnian Croats.<sup>34</sup>

<sup>31</sup> E.g., the named JCE members in Karadžić indicted for genocide were: Momčilo Krajišnik, Ratko Mladić, Slobodan Milošević, Biljana Plavšić, Nikola Koljević, Mićo Stanišić, Momčilo Mandić, Jovica Stanišić, Franko Simatović, Željko Ražnatović "Arkan", and Vojislav Šešelj. Only Krajišnik, Mladić, Plavšić and Milošević were indicted for genocide. Koljević has never been indicted at all and the rest were indicted for crimes other than genocide. *Prosecutor v. Radovan Karadžić*, cit., para. 11.

<sup>32</sup> The Six Strategic Goals has been one of the crucial documents that was originated by a political institution in which the Serb claimed territories have been identified at the very beginning of the war in BiH. It made the Serbian military campaigns in the named areas in BiH premediated and criminal because it was aimed against non-Serb population. The Serb forces engaged in ethnic separation, ethnic cleansing and ethnic homogenization that led to mass atrocities against non-Serbs, including the crime of genocide.

<sup>33</sup> E.g., ICTY: indictment of 24 July 1995, IT-95-5-I, *Prosecutor v. Radovan Karadžić and Ratko Mladić*, para. 14, 18, 19 and 20; indictment of 14 March 1999, IT-99-36-T, *Prosecutor v. Radislav Brđanin*, paras 27-29.

<sup>34</sup> *Ibid.*, paras 18, 19, 20.

### II.3. RELEVANCE OF THE ICTY JUDGMENTS ON SERBIA'S INVOLVEMENT IN THE INTERNATIONAL ARMED CONFLICT IN BOSNIA AND HERZEGOVINA

The very first ICTY judgment, the one rendered in the trial of Duško Tadić, a camp commander who was tried for crimes in the Prijedor area committed between 23 May and 31 December 1992, determined that Serbia was involved in the international armed conflict in BiH until 19 May 1992, the date when the former Yugoslav army – the JNA – formally withdrew from BiH. After the disintegration of Yugoslavia, the JNA split into three Serb armies: the VJ – the official army of the Federal Republic of Yugoslavia (FRY) – the newly formed Yugoslav federation consisting of Serbia and Montenegro; the VRS – the Bosnian Serb Army; and the SVK – the Croatian Serb army. The judges wrote that the question whether after 19 May 1992 the Bosnian conflict continued to be international or became instead exclusively internal was an issue of determining “whether Bosnian Serb forces – in whose hands the Bosnian victims in this case found themselves – could be considered as *de iure* or *de facto* organs of a foreign Power, namely the FRY”.<sup>35</sup> No other ICTY judgment determined that the FRY, *i.e.* Serbia, was involved in the international armed conflict in BiH from 19 May 1992 onwards. This stands in contrast to the political reality, given that the UN Security Council imposed sanctions against the FRY as of 24 May 1992 because of its involvement in the war in BiH, which were partially lifted once the war in BiH was over in 1995, but continued in the form of the “outer wall” sanction until October 2000, when the FRY became a UN Member State.<sup>36</sup>

### II.4. TRANSITIONAL NARRATIVE OF THE SREBRENICA GENOCIDE

The ICTY genocide judgments for Srebrenica and Žepa determined that the genocide was planned and committed in eastern Bosnia during the period between March and the end of July 1995. The ICTY judgments determined that the genocidal intent was first expressed in the Supreme Command Directive 7, issued by RS President Radovan Karadžić in March 1995. This document shows that Karadžić ordered the VRS to create “an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa”.<sup>37</sup> Ratko Mladić, the commander of the VRS, was in charge of the implementations of Directive 7 and the VRS Drina Corps were the major force on the ground tasked with the military operations in Srebrenica and Žepa. In the genocide judgments against the Drina Corps perpetrators – the *Popović* case – the ICTY judges found that genocidal intent was conceived in the morning of 12 July, when the VRS leadership ordered the separation of the Bosnian Muslim men in the UN compound in Potočari and executed them. The judgment states that on that same day the

<sup>35</sup> ICTY, judgment of 15 July 1999, IT-94-1-I, *Prosecutor v. Duško Tadić*, para. 89.

<sup>36</sup> See e.g. E. HASANI, *The “Outer Wall” of Sanctions and the Kosovo Issue*, in *Perceptions: Journal of International Affairs*, 1998, sam.gov.tr.

<sup>37</sup> See ICTY, judgment of 15 October 1999, IT-05-88-T, *Prosecutor v. Vujadin Popović et al.*, para. 199.

VRS sent some 50 buses to Potočari where members of the Bosnian Serb Forces, the VRS Forces, police forces from the Ministry of the Interior in Republika Srpska (MUP), boarded all men aged 15 to 65 on the buses.<sup>38</sup>

The criminal plan at issue aimed at driving the Bosnian Muslims from the Srebrenica and Žepa enclaves. The judgment goes on to state that on 13 July “there were several random killings of Bosnian Muslims by members of the Serb forces”.<sup>39</sup> On the evening of 13 July, about thirty thousand Bosnian Muslims had been transferred on buses to Bosnian Muslim territory: no Bosnian Muslims were left in Potočari or Srebrenica. On 12 and 13 July, the VRS units attacked the column of Bosnian Muslims who were moving from Srebrenica to Tuzla, the town that was under the control of the BiH Army.

The judges found that “the murder plan originally directed at the men in Potočari was extended to Bosnian Muslim men who were captured or surrendered from the column”.<sup>40</sup> By 13 July, Bosnian Serb Forces had detained approximately six thousand Bosnian Muslim prisoners in the Bratunac area.<sup>41</sup> Some 7,826 persons died or went missing after the fall of Srebrenica.<sup>42</sup> The ICTY indictments did not connect in a consistent way the RS indictees with the network of co-perpetrators from Serbia, which was also reflected in the ICTY judgments according to which the genocide in Srebrenica and Žepa were incidents that happened in the heat of the combat for which the individuals from the RS political and military institutions bear all the responsibility.

Contrary to the expectation that the RS leaders were linked in evidence with their counterparts from Serbia, the ICTY judgments have not determined that the evidence presented by the prosecution was sufficient to prove the JCE links between the individuals from RS who were found guilty of genocide with the JCE members from Serbia who were named in the indictments. For that purpose, the JCE links with Slobodan Milošević would be the most effective given that he was the only person from Serbia indicted for the crime of genocide. Following the ICTY indictment, only Radovan Karadžić and Ratko Mladić were indicted for genocide in 1992 and 1995; in their indictments there was a JCE network of the named co-perpetrators, among whom Slobodan Milošević also appeared. However, in the ICTY judgments for Karadžić and Mladić, both defendants were acquitted for the genocide charges in 1992; the judges also determined that the prosecution did not prove Milošević’s participation in the planning and executing of the crime of genocide in 1995 during Karadžić or Mladić trials.

Table 3 shows the indicted tried for the crime of genocide in Srebrenica in July 1995.

<sup>38</sup> See judgment summary Prosecutor v. Popović et. al., cit.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

| <b>JCE links between<br/>the indictees from Serbia<br/>and RS ⇒</b> |                                      |   |   |                     |                                 |
|---|--------------------------------------|---|---|---------------------|---------------------------------|
| <b>Indictees ↓</b>  | Indicted as a RS<br>soldier/official | JCE links with Serbia/RS<br>charged in the indictment | JCE links with Serbia/RS<br>proved in the judgments | Genocide conviction | Sentence                        |
| S. Milošević died in 2006   | -                                    | +   | -   | -                   | No judgment                     |
| R. Karadžić   | +                                    | +   | -   | +                   | Life*                           |
| R. Mladić   | +                                    | +   | -   | +                   | Life – appeals judgment pending |
| R. Krstić   | +                                    |   |   | +                   | 35 years                        |
| Z. Tolimir  | +                                    | -   |   | +                   | Life                            |
| V. Popović  | +                                    | -   |   | +                   | Life                            |
| Lj. Borovčanin  | +                                    | -   |   | -                   | 17 years for other crimes       |
| V. Pandurović   | +                                    | -   |   | -                   | 13 years for other crimes       |
| Lj. Beara   | +                                    | -   |   | +                   | Life                            |
| D. Nikolić, died in 2011  | +                                    | -   |   | +                   | 35 years                        |
| V. Blagojević   | +                                    | -   |   | -                   | 15 years for other crimes       |
| <b>Summary</b>  | <b>10</b>                            | <b>3</b>  | <b>0</b>  | <b>7</b>            | <b>615 years</b>                |

TABLE 3. The list of indictees and the convictions for the 1995 genocide crimes and the JCE links between the RS and Serbia. \*The life sentence counts for 100 years in prison.

## II.5. IMPORTANCE OF THE GENOCIDE CHARGES IN SLOBODAN MILOŠEVIĆ'S TRIAL

Slobodan Milošević, who was the President of Serbia from 1990 to 1998 and of the Federal Republic Yugoslavia from 1998 to 2000, was indicted for the crime of genocide. Milošević was put on trial in 2002, charged for crimes committed in Croatia, BiH and Kosovo in the period between 1990 to 1999. The Milošević trial was also of great importance for the post-conflict elites in Serbia. If found guilty of genocide, the findings in the judgment would have been used by the State of BiH in the genocide lawsuit filed at the International Court of Justice (ICJ) against the State of Serbia in 1993.

His trial never led to a final judgment because Milošević died before its completion. Although unfinished, Milošević's trial serves as an important legal archive for the issues concerning the evidence and legal procedures. At the core of the Milošević trial were the genocide charges in eight municipalities on the territory of northern and eastern Bosnia in 1992 and 1995.



Milošević was charged as President of Serbia for the genocide in BiH in 1992 and 1995. The evidence on the genocidal intent in his case was linked to the history of the Serbian State Ideology, also known as “Greater Serbia”, which had its origins in the 19<sup>th</sup> century.<sup>43</sup> This ideology initially propagated the creation of a Serbian State in its historical and ethnic borders. It was reinvented during the Milošević’s regime as the solution for a post-Yugoslav Serbia conceptualised in one simple sentence: “All Serbs in a Single State”.<sup>44</sup>

Milošević was the only official from Serbia indicted and tried for the crime of genocide in BiH. He was indicted for the genocide charges in seven municipalities in 1992: Brčko, Prijedor, Sanski Most, Bijeljina, Ključ, and Bosanski Novi; and for the genocide in Srebrenica in 1995.<sup>45</sup> In his Bosnian indictment, Bosnian Muslims and Bosnian Croats were recognised as the protected groups targeted by genocide in 1992. However, in the pre-trial brief, the prosecution decided to pursue the genocide charges only against the Bosnian Muslims.

In the Milošević case the ICTY prosecution put together a genocide case: Milošević’s alleged responsibility for the genocide in BiH was to be proved via the JCE links with the co-perpetrators from the RS institutions. The Bosnia indictment alleged that Milošević had participated in a JCE from at least 1 August 1991 to 31 December 1995, the purpose of which was to forcibly remove non-Serbs from large areas of BiH. The indictment also alleged that Milošević in concert with others had “planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation and execution of the destruction” of thousands of Bosnian Muslims beginning on or around 1 March 1992. In some places, the JCE was said to have specifically targeted “educated and leading members”<sup>46</sup> of the Bosnian Muslim community for extermination. Further, it was alleged that thousands more had been detained in the most inhumane conditions, “calculated to bring about [their] partial physical destruction”,<sup>47</sup> and had been tortured, raped, and starved as part of the genocidal process. Milošević was said to have effectively controlled other members of the JCE as well as various armed forces – including paramilitary groups – and was therefore responsible for the murder and forced transfer of non-Serbs in Bosnia, as well as for the intentional destruction of large numbers of cultural and religious institutions, historical monuments, and sacred sites.<sup>48</sup>

<sup>43</sup> See: N. TROMP, *Prosecuting Slobodan Milošević*, London: Routledge, 2016, pp. 60-75.

<sup>44</sup> *Ibid.*, pp. 74-75.

<sup>45</sup> ICTY, decision of 22 November 2001, IT-01-51-I, *Prosecutor v. Slobodan Milošević*, para. 32.

<sup>46</sup> *Ibid.*, para. 32 *a*.

<sup>47</sup> *Ibid.*, para. 32 *d*.

<sup>48</sup> *Ibid.*, para. 35 *j*.

## II.6. MILOŠEVIĆ, MENS REA AND CRIMINALITY OF THE PLAN

The prosecution argued that Milošević's political plans derived from his attempt to create a State that would incorporate all Serbs, also known as the Greater Serbia ideology, which is associated with territorial expansionism. The ICTY prosecution argued that the history of efforts to achieve this enlargement has been marked with mass atrocities against non-Serb populations. To establish that Milošević's state of mind was a criminal one, the prosecution presented evidence of his adoption of this ideology. Milošević promoted the Greater Serbia ideology without using the term, but his rhetoric in the late 1980s and the platform of his party in 1990 identified the protection of Serbs living outside of Serbia as a priority and espoused "the right of the Serb people to self-determination". Arguing that self-determination for Serbs would indeed expand the territory of a Serb State, the prosecution introduced the term "*de facto* Greater Serbia" to describe the variant of this ideology espoused by Milošević. In its prosecution of Slobodan Milošević, the ICTY dealt with Serbia's role in planning and committing the crime of genocide in BiH in the most thorough way. It was in the Milošević trial that the prosecution reconstructed the criminal plan and dealt with the evidence of premeditated planning by Serbia's leadership to create a Serb ethnic State on the Croatian and Bosnian territories.<sup>49</sup> The Serb leadership first carved out the claimed territories in the process called "ethnic separation"; subsequently the claimed territories were "ethnically homogenised". These policies led to the commission of crimes against the non-Serb population and the creation of the *Republika Srpska Krajina* (RSK) in Croatia and the *Republika Srpska* (RS) in BiH. The goal for creating the Serb territories in Croatia and BiH was to join these territories with Serbia. The prosecution argued that Milošević and his collaborators were aware that their plan to carve out the Serb territories in Croatia and BiH based on the ethnic separation and homogenisation in Croatia and BiH could be achieved only by violence and the commission of crimes against the non-Serbs living on

<sup>49</sup> See e.g. N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 119-121. The prosecution's evidence and arguments about the criminality of the plan have been summarised at the end of the prosecution case in the Slobodan Milošević's trial. See the Prosecution Response of 24 March 2004 to *Amici Curiae* Motion for Judgment of Acquittal Pursuant to Rule 98 bis, quoted in ICTY, decision on motion for judgment of acquittal of 16 June 2004, IT-02-54-T, *Prosecutor v. Slobodan Milošević*, also known as "half-judgment", para. 4. In para. 144 of the decision, the prosecution's position has been stated as: "According to the Prosecution, the evidence supports a finding that there was a systematic pattern according to which municipalities in Bosnia and Herzegovina targeted for inclusion in the Serbian state were taken over by the Bosnian Serbs and that a systematic pattern developed according to which Serb forces set the framework for the commission of and committed genocidal and persecutory crimes". Two documents detail the premeditated way the ethnic separation was planned and executed. The first document was "Instructions issued by the SDS for the Organization and Activity of the Organs of the Serbian people in Bosnia and Herzegovina in Extraordinary Circumstances" of 19 December 1991 Exhibit P434.3a. The second document is "The Six Strategic Objectives" of May 1992. See *ibid.*, paras 146, 147.

the territories claimed by Serbia.<sup>50</sup> The prosecution argued that the worst crime - including the crime of genocide - was committed in BiH in those municipalities which the Serbs claimed for geostrategic reasons of territorial congruity, but where they did not constitute the majority of the population.<sup>51</sup>

## II.7. GENOCIDE IN THE HALF-JUDGMENT OF THE MILOŠEVIĆ TRIAL

When Slobodan Milošević died in 2006, some three weeks before the end of his trial, the decision on motion of acquittal (hereinafter the Half-Time Judgment) of June 2004 was the only official document that assessed the genocide charges against Milošević.<sup>52</sup> The Half-Time Judgment is a decision by the judges on the evaluation of the evidence tendered by the prosecution to prove the concrete counts in the indictment.<sup>53</sup> Namely, after the prosecution concluded its part of the trial, the defence filed a motion for acquittal arguing that the charges for the 1992 and 1995 genocide should be dropped from the case. The prosecution replied with counterarguments and the judges determined that: "A Trial Chamber could be satisfied beyond reasonable doubt that there existed a joint criminal enterprise, which included members of the Bosnian Serb leadership, whose aim and intention was to destroy a part of the Bosnian Muslim population, and that genocide was in fact committed in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi". The judges wrote that: "The scale and pattern of the attacks, their intensity, the substantial number of Muslims killed in the seven municipalities, the detention of Muslims, their brutal treatment in detention centres and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group are all factors that point to genocide".<sup>54</sup> The judges reserved their position to deliver a different judgment at the end of the case: the test of proof in the Half-Time Judgment was based on the standard of whether there was "a case to answer"; the trial judgment needs to satisfy the standard of proving "beyond reasonable doubt" the charges in the indictment. The judges concluded that their decision "does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge; that is so because the standard for determining sufficiency is not evidence on which a tribunal should convict, but evidence on which it could convict".<sup>55</sup>

<sup>50</sup> N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 141, 152, 155, 157, 161, 167. See also IT-02-54-T, *Prosecutor v. Slobodan Milošević*, cit., paras 249-253.

<sup>51</sup> N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 32, 141.

<sup>52</sup> See also IT-02-54-T, *Prosecutor v. Slobodan Milošević*, cit.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, para. 424. At the end of the prosecution case in 2004, the Trial Chamber considered there to be evidence sufficient to require a defense from Milošević for genocide in the following eight territories: Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kotor Varoš, Ključ, and Bosanski Novi, "the specified territories", see IT-02-54-T, *Prosecutor v. Slobodan Milošević*, cit., para. 138.

<sup>55</sup> *Ibid.*

During the defence's presentation of its case, which lasted from September 2004 to March 2006, Milošević – who represented himself in the court – did not even start presenting evidence for the Bosnian part of the indictment. At the time of his death, he had finished his defence for the Kosovo indictment and had just started to deal with the Croatian part of the indictment. During the presentation of the defence evidence, Milošević called as witnesses some of his most loyal collaborators, who were cross-examined by the prosecution, which procured additional important evidence of the genocide. The telling and memorable cross-examinations about the genocidal crimes in Srebrenica unfolded when the prosecution cross-examined Vladislav Jovanović, the former Foreign Minister of Serbia and the FRY, who was the *chef de charge* at the FRY's diplomatic mission at the UN at the time that the Srebrenica genocide took place. When the prosecution confronted Jovanović with the text of the letter that Serbia prepared for the UN Security Council in which it was stated that the Bosnian Muslim leadership killed its own people in Srebrenica in order to trigger military intervention against the Serb forces, Jovanović answered that the content of the letter was based on the information provided by the RS leadership. The Jovanović testimony in 2005 demonstrated that Serbia, thus Milošević, could not offer a convincing defence for the genocide that the Serb forces had committed in Srebrenica.<sup>56</sup>

## II.8. SERBIA, SREBRENICA AND CRIMES AGAINST HUMANITY

The qualification of crimes in an indictment is of essential importance. Practitioners as well as academics stress a high threshold for proving the criminal intent – *dolus specialis* – to “destroy in whole or in part” a protected group, which is needed to prove the crime of genocide. To secure a conviction for the same criminal acts, if qualified as crimes against humanity, the prosecution needs to show the “widespread and systematic” nature of the crimes, which is generally considered easier to prove in court. This is one of the reasons why the prosecution often includes both genocide and crimes against humanity in its indictments for the same factual complex. Another, more realistic, reason is because the criminal intent varies from perpetrator to perpetrator, depending on their *de jure* or *de facto* power or position of authority: some perpetrators were actively involved in planning and executing the crime of genocide – others were not. Accordingly, not every crime in Srebrenica was qualified as genocide by the ICTY:<sup>57</sup> nine indictees were charged for crimes against humanity; war crimes; and/or violations of the laws and customs of war.

Table 4 shows the ICTY indictees who were charged for the crimes in Srebrenica under the qualification of war crimes and crimes against humanity.

<sup>56</sup> ICTY, letter signed by Vladislav Jovanović to the UNSC of 18 December 1995, trial transcript T36363, IT-02-54, *Prosecutor v. Slobodan Milošević*.

<sup>57</sup> It concerns indictments where the following crimes have been charged: crimes against humanity; breaches of the Geneva Conventions; and violations of the laws and customs of war.

| Indictee ↓             | Indicted<br>as RS officials | Indicted<br>as Serbia officials | JCE links charged<br>in the indictment | JCE links proved<br>in the judgment | Sentenced                   |
|------------------------|-----------------------------|---------------------------------|--|-------------------------------------|-----------------------------|
| D. Erdemović           | +                           |                                 | -                                      | -                                   | 5 years                     |
| D. Jokić               | +                           |                                 | -                                      | -                                   | 9 years                     |
| R. Miletić             | +                           |                                 | -                                      | -                                   | 18 years                    |
| M. Gvero, died in 2013 | +                           |                                 | -                                      | -                                   | 5 years                     |
| D. Obrenović*          | +                           |                                 | -                                      | -                                   | 17 years                    |
| M. Nikolić*            | +                           |                                 | -                                      | -                                   | 20 years                    |
| F. Simatović           |                             | +                               | +                                      | -                                   | Acquitted; re-trial pending |
| J. Stanišić            |                             | +                               | +                                      | -                                   | Acquitted; re-trial pending |
| M. Perišić             |                             | +                               | -                                      | -                                   | Acquitted                   |

TABLE 4. Srebrenica judgments for crimes other than genocide.

Among the individuals who were charged for crimes against humanity in Srebrenica were three high-level state officials from Serbia – Jovica Stanišić, Franko Simatović and General Momčilo Perišić. Stanišić and Simatović were senior officials at the Serbian Ministry of Foreign Affairs and as such in charge of its Unit for Special Operations (JSO – *Jedinica za specijalne operacije*), also known as the Red Berets. In their indictment, there is a JCE that includes Serb and RS officials.<sup>58</sup> The fact that they were acquitted of all charges at the ICTY in 2013 made the JCE links as charged in the indictment irrelevant. Stanišić and Simatović were also named as members of the JCE in the indictments against Milošević, Karadžić and Mladić, but Milošević's trial did not produce a judgment: in Karadžić's or Mladić's judgments the judges did not find that the prosecution proved that they were members of the JCE that planned and executed crimes in BiH.<sup>59</sup> The Stanišić and Simatović's cases were called for a re-trial by the ICTY appeals judgment of 2015 on all counts of the initial ICTY indictment that was filed in 2003. The retrial started at the International Residual Mechanism for Criminal Tribunals (MICT), the successor

<sup>58</sup> ICTY, Prosecution notice of filing of Third Amended Indictment of 10 July 2008, *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-PT, para. 11. The JCE members named are: Slobodan Milošević, Veljko Kadijević, Blagoje Adžić, Ratko Mladić, Radmilo Bogdanović, Radovan Stojičić, also known as "Badža"; Mihalj Kertes, Milan Martić, Goran Hadžić; Milan Babić, Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić, Mićo Stanišić, Željko Ražnatović also known as "Arkan", Vojislav Šešelj.

<sup>59</sup> *Ibid.*

institution of the ICTY. This sequence of trials will make the Stanišić and Simatović trial the longest trial in the history of the ICTY and the MICT: 17 years have passed since the two accused were indicted in 2003; 11 years have passed since the beginning of their ICTY trial in 2009; three years have passed since the beginning of the retrial at the MICT in 2017.<sup>60</sup> Regardless of the judgment of the retrial – conviction or acquittal – the importance of the MICT judgment will be in its evaluation of the evidence by the judges, namely whether the prosecution can prove the charges related to the JCE between the accused with the named co-perpetrators representing the state initiations of Serbia and the RS. If JCE is affirmed in the judgment, there will be no consequence for the legal and historical narrative of genocide, given the fact that Stanišić and Simatović were not charged with genocide for the crimes committed in Srebrenica. Instead, they were charged with committing crimes against humanity. If the JCE with the RS officials is established, that will be the first ICTY or MICT judgment that would implicate Serbia in the war in BiH in the period after 19 May 1992.

In the indictment of General Momčilo Perišić, who was Chief of Staff of the VJ from 1993 to 1998, the JCE doctrine was not mentioned at all. Moreover, his name was not included in the JCE of any of the related indictments of Milošević, Karadžić or Mladić. Due to his function as Chief of Staff of the VJ, Perišić was a superior to all indictees who were officers in the VRS, who at the same time were members of the 30th Personnel Centre of the VJ. In November 1993, General Perišić signed an order to create the 30th and 40th personnel centres, which in fact were the administrative names for the armies of the Bosnian Serbs (the VRS) and the army of the Croatian Serbs (the SVK). The VRS officers who were found guilty of genocide – Ratko Mladić, Radislav Krstić, Vujadin Popović, Milan Gvero, Drago Nikolić and Zdravko Tolimir – were all members of the 30th Personnel Centre of the VJ. Ratko Mladić was also administrated as the commander of the 30th Personnel Centre. If the prosecution had made this connection by explaining the functions of these individuals within the VJ, the 30th Personnel Centre, and the VRS, this could have led to a very different judgment that might have explained the *de jure* and *de facto* links between Serbia and the RS leaderships.<sup>61</sup>

### III. POST-TRANSITIONAL AND STRATEGIC NARRATIVE OF GENOCIDE IN BOSNIA AND HERZEGOVINA

There is a growing scholarly literature on the interplay between the legal, political and historical impact of mass atrocity trials that offers some of the answers concerning

<sup>60</sup> ICTY, indictment of 1 May 2003, IT-03-69, *Prosecutor v. Jovica Stanišić and Franko Simatović*.

<sup>61</sup> See e.g.: N. TROMP, *The Unfinished Trial of Slobodan Milošević: Justice Lost, History Told*, doctoral thesis, University of Amsterdam, 18 September 2015, pp. 251-259; A. GÜNAL, *Strategic Europeanization of Serbia and the EU Impact: The Case of Cooperation with International Criminal Tribunal for the Former Yugoslavia*, in *EGE Strategic Research Journal*, 2016, p. 20 et seq.

when and why the post-conflict elites will adopt the policy of avoiding to determine the criminal, political and historical responsibilities of its predecessor regime. To understand why States behave the way they do, and, in particular, to apprehend why Serbia cooperated with the ICTY, rational choice institutionalism theory (RCI)<sup>62</sup> can offer some answers. According to RCI, political actors apply instrumental and strategic logic in achieving their pre-determined policy targets, such as membership to an international institution. In the political cost/benefit analysis, political actors – a State, for example – will accept the conditions imposed on them by delivering what is formally requested from them but at the same time they will try to maximise their interests.<sup>63</sup> The signatories of the Dayton Peace Agreement – the presidents of Serbia, Croatia and BiH – committed their States to cooperate with the ICTY in which evaluation of that cooperation became one of the conditions for the accession process to the European Union. In the case of post-Milošević Serbia, the EU conditionality approach – also known as “carrot and stick” strategy – obscured the clarity between genuine compliance and conditionality-driven compliance.<sup>64</sup> In the case of a conditionality-driven compliance, the States such as Serbia will not always cooperate with the purpose to contribute to the justice and truth-finding processes. Serbia’s governing elite seemed not to be interested in meeting a State’s obligation to cooperate with the ICTY for the purpose of contributing to the transitional justice narrative. Instead, the obligation to cooperate with the ICTY to achieve a variety of political, historical, and legal goals.<sup>65</sup> We shall turn now to Serbia’s effort to influence the transitional narrative of the genocide, the crime charged only for the crimes against the non-Serb population on the territory of BiH.

Genocide trials are always of great interest to a State whose officials have been charged with the crime of genocide. A State will be motivated to use all mechanisms at its disposal to prevent the legal confirmation of genocide in a judgment, regardless of whether it is a criminal trial against an individual or a genocide claim against the respective State for at least three reasons. First, a court’s finding that genocide has been

<sup>62</sup> See e.g. I. KATZNELSON, B. WEINGAST, *Intersections Between Historical and Rational Choice Institutionalism*, and J. ELSTER, *Preference Formation in Transitional Justice*, in I. KATZNELSON, B. WEINGAST (eds), *Preferences and Situations: Points of Intersection Between Historical and Rational Choice Institutionalism*, New York: Russell Sage Foundation, 2005, p. 1 et seq. and pp. 247-279.

<sup>63</sup> See: A. GÜNAL, *Strategic Europeanization of Serbia And the EU Impact*, cit.

<sup>64</sup> M. DOBBELS, *Serbia and the ICTY: How effective Is EU Conditionality?*, in *EU Diplomacy Papers*, 2009, p. 4 et seq.; B. STAHL, *Another “Strategic Accession”? The EU and Serbia (2000-2010)*, in *Nationalities Papers*, 2013, p. 447 et seq.; S. ECONOMIDES, J. KER-LINDSAY, *Pre-Accession Europeanization: The Case of Serbia and Kosovo*, in *Journal of Common Market Studies*, 2015, p. 1027 et seq.; A. ZHELYAZKOVA, I. DAMJANOVSKI, Z. NECHEV, F. SCHIMMELFENNIG, *European Union Conditionality in the Western Balkans: External Incentives and Europeanisation*, in J. ĐANKIĆ, K. SOEREN M. KMEZIĆ (eds), *The Europeanisation of the Western Balkans. A Failure of EU Conditionality?*, Basingstoke: Palgrave Macmillan, 2018, p. 15 et seq.

<sup>65</sup> See e.g. J. SUBOTIĆ, *Hijacked Justice: Dealing with the Past in the Balkans*, Ithaca: Cornell University Press, 2009; K. BACHMAN, A. FATIĆ (eds), *The UN International Criminal Tribunals: Transition without Justice?*, London: Routledge, 2015.

committed becomes a permanent historical record, which will forever tarnish that State's national history. Second, any evidence of genocide that implicates a state official might be used against the State in question before the ICJ, and if found responsible for the genocide, the State will likely be ordered to pay substantial reparations to the damaged parties. Third, refusal to admit mass atrocities committed by a former regime – and in particular the crime of genocide – frees the successors' regime to pursue the "unfinished" geopolitical objectives that its predecessor failed to achieve despite the commission of mass atrocities.<sup>66</sup>

In the next section we shall investigate how the genocide charges against the individuals at the ICTY and the genocide lawsuit that BiH filed against the State of Serbia at the ICJ have influenced Serbia's cooperation with the ICTY.

### III.1. FROM TRANSITIONAL TO POST-TRANSITIONAL JUSTICE NARRATIVE, 2000-2020

In this section, we shall argue that post-conflict Serbia engaged in a conditionality driven cooperation with the ICTY: on the one hand, Serbia started handing over the evidence from its state archives, while on the other hand Serbia was very concerned with protecting its own national and vital state interests. The dynamic of the cooperation with the ICTY in the period from 2000 to 2020 have been determined by a variety of internal and external political circumstances. The year 2007 has been depicted as the starting point because it represents the end of the Milošević rule in Serbia. The year 2020 is the closing year despite the fact that the ICTY closed its doors in December 2017: the work of the ICTY has been continued by the MICT; and also because the shift from transitional justice to post-transitional justice agenda has been a slow process that started in 2008 and has been gaining political importance since 2011; in 2020 the most visible result of the post-transitional political agenda has been the victory of the pro-Serb coalition at the elections in Montenegro. This victory has been a part of a political campaign of the populist nationalist government coalition in Serbia that introduced its own version of Greater Serbian ideology articulated "Serbian world", an effort to use the Serbian Orthodox Church, *i.e.* the soft power of religion in order to rally Serbs in the neighbouring post-Yugoslav States where Serbia still has territorial ambitions to expand its current borders.

We shall now look into the development of Serbia's post-conflict political agenda in order to detect when and by whom the "politics of the past" was introduced into "the politics of present". For that purpose, we shall identify five stages, in which we shall be searching for the turning points that represent the change in the Serbia's state elite transitional justice agenda. The five stages are: *a)* transitional justice interlude, 2000-2003; *b)* damage control of the transitional justice narrative of genocide, 2003-2007; *c)* closure of the transi-

<sup>66</sup> G. NICE, N. TROMP, *International Criminal Tribunals and Cooperation with States: Serbia and the Provision of Evidence for the Slobodan Milošević Trial at the ICTY*, in M. DE GUZMAN, D. AMANN (eds), *Arcs of Global Justice: Essays in Honor of William A. Schabas*, Oxford: Oxford University Press, 2017, p. 445 *et seq.*, p. 463.



tional justice period, 2008-2011; d) defining the post-transitional justice agenda, 2012-2017; e) Serbia's post-transitional strategy: return to geo-politics, 2018-ongoing.

a) Transitional justice interlude, 2002-2003.

The first stage covered the period of the first post-conflict government in Serbia under Prime Minister Zoran Đinđić. During this short period of two and a half years, Đinđić's government engaged in a balancing act between what was needed and what was possible in Serbia during the first years after the fall of Milošević's regime. Đinđić's political realism was based on his understanding that democratic consolidation in Serbia had to be linked to pro-Western policies. Serbia's political, economic, and financial recovery depended very much on its re-integration into the international economic and financial processes from which Serbia was cut out since UN sanctions were imposed on the FRY in May 1992. One of the conditions for reintegration into the international community was cooperation with the ICTY. The international obligation of Serbia to cooperate with the ICTY was based on the Dayton Peace Agreement, which was signed by then President Slobodan Milošević.<sup>67</sup> Paradoxically, the first concrete demonstrations of the Serbian government's cooperation were the transfer of Slobodan Milošević to the ICTY in June 2001. This was a bold political deed that triggered a domestic outcry against Đinđić's policies and antagonised many of the still active individuals loyal to the former regime, who feared for their own position. The real challenge for the government began after the transfer of Milošević to The Hague when the prosecution started sending requests for assistance to Belgrade requesting the documentary, audio, video, and electronic evidence from the state archives needed for Milošević's trial. Moreover, when the ICTY investigators started to uncover the severity of the involvement of Serbia's Ministry of Internal Affairs in the wars in Croatia, BiH and Kosovo, the members of the special units got nervous and they turned against Đinđić's policy of cooperation, fearing that they could be indicted and tried at the ICTY.<sup>68</sup> Once the ICTY investigators started calling also on retired and active members of Serbia's Ministry of Internal Affairs for interrogation, the security situation in Serbia deteriorated rapidly. In March 2003, Đinđić was assassinated. His assassins were apprehended, put on trial and convicted. They were all members of the JSO (Unit for Special Operations), a para-state unit of the Serbian Internal Affairs whose members were deployed in the territories of Croatia, BiH and Kosovo to fight alongside the local Serb forces. It turned out that the assassins and the network of co-conspirators were concerned with Đinđić's policy of cooperation with

<sup>67</sup> Art. 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter the Dayton Peace Agreement).

<sup>68</sup> See e.g. M. VASIĆ, *Sponzori i teoretičari zavere*, in *VREME*, 10 April 2003, [www.vreme.com](http://www.vreme.com); see also the parts of Zvezdan Jovanović's testimony in the Court published under the title "Likvidirao sam ga zbog Haga", in *Blic*, 26 December 2003, [www.blic.rs](http://www.blic.rs).

the ICTY and they organised under the code name "Stop The Hague" with the goal to stop Serbia's Prime Minister from cooperating with the ICTY.<sup>69</sup>

b) Control of the transitional justice narrative of genocide, 2003-2007.

The second stage, between 2003 and 2007, covers the period between the assassination of Đinđić and the death of Milošević. In that period of time, Đinđić's successors imposed a state of emergency in which his assassins were apprehended, but in which they also uncovered more crimes committed by the same veteran JSO members.<sup>70</sup> It seemed that the assassins achieved the opposite of what they originally had planned: in the aftermath of the assassination and the investigation into the members of the JSO, many of them were indicted, tried and convicted for the past crimes, which were previously unresolved.

When it comes to cooperation with the ICTY, the assassination of Đinđić was a turning point in which his successors redefined the nature of this cooperation.<sup>71</sup> The primacy of the national interests and vital state interests was articulated in terms of protecting the evidence from the state archives that could expose the role of the individuals and state institutions in committing mass atrocities and genocide in BiH before the ICJ. In the aftermath of Milošević's transfer to The Hague in 2001, the prosecution team requested a large number of documents in order to prove the charges of the genocide against Milošević that – once public – could also be used by BiH in the ICJ genocide lawsuit against Serbia that was pending since 1993. Belgrade did continue to cooperate for pragmatic political reasons, while at the same time trying to withhold and control the evidence that could expose Serbia's involvement in the genocide in BiH.

After Đinđić's assassination, Serbia's cooperation agenda with the ICTY changed. It was directed to shielding the documents requested from the ICTY's Office of the Prosecutor (OTP) from the public view. The correspondence between the ICTY's Chief Prosecutor and Serbia's Minister of Foreign Affairs of May 2003 documents an agreement whereby the OTP will respect the requests made by Serbia to redact the pages and sentences from the documents that were equally important to prove Milošević's criminal responsibility for genocide, but that could have been also used in the genocide lawsuit at the ICJ to prove the responsibility of Serbia as a State for the crime of genocide. By engaging in the negotiation process about the terms of handing over the documents

<sup>69</sup> N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 130-133.

<sup>70</sup> See e.g. S. BISERKO (ed.), *Human Rights and Accountability: Serbia 2003*, Belgrade: Helsinki Committee for Human Rights Serbia, 2004, pp. 49-54 and 87-90. The same assassins who conspired to kill the Prime Minister Đinđić turned out to be involved in the assassination of Ivan Stambolić, a former political mentor of Milošević who later on became a political rival. Stambolić was assassinated by Milorad Luković Legija, a member of the notorious para-state unit, officially known as JSO (Unit for Special Operations) that was unofficially referred to as Red Berets. See: N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 132-133.

<sup>71</sup> See e.g. S. BISERKO (ed.) *Human Rights and Collective Identity: Serbia 2004*, Belgrade: Helsinki Committee for Human Rights Serbia, 2004, pp. 146-154.

with the OTP management, Serbia successfully protected thousands of pages of relevant documents from the public and from the other courts. The immediate reason for requesting the protection were the stenographic notes of the Supreme Defence Council (SDC), the highest political body of the FRY, a federation between Serbia and Montenegro that existed from 1992 to 2003. The SDC was a collective presidency consisting of three voting members: the president of Serbia, the president of Montenegro and the President of the FRY. Slobodan Milošević was, as president of Serbia, its voting member from 1992 to 1998. Any evidence coming from the SDC that would be used to prove his individual criminal responsibility for genocide in the period between 1992 and 1995 would implicate Serbia as well.<sup>72</sup> The Serbian leadership was very much aware of this and the 2003 agreement concluded between Serbia and the OTP allowed Serbia to redact all potentially damaging pages from the SDC so that the potentially damaging parts of the SDC could not be used against Serbia at the ICJ. The OTP extended in 2005 the request of Serbia to protect all other documents coming from its state archives to all other ICTY cases. This was an important breakthrough for Serbia.

From 2003, Serbia was engaged in the pursuit of EU membership and this process was conditional on cooperation with the ICTY. By controlling the production of evidence at the ICTY, Serbia also was able to exercise significant influence on the genocide narrative at both international courts – the ICTY and the ICJ. The fact that Milošević died before the end of his trial with no judgment on genocide charges rendered, and the fact that the ICJ judgment of February 2007 did not find Serbia directly responsible for planning and executing genocide in BiH, were the results of the dedicated policy of Serbia to protect its national and vital state interest.<sup>73</sup>

Milošević died in March 2006, and in February 2007 the ICJ judges issued the judgment which found that Serbia was not responsible for genocide.<sup>74</sup> The outcome of both trials constituted an important turning point for Serbia's leadership: both trials dealt with Serbia's responsibility for the crime of genocide and both ended without legal consequences for Serbia. What followed was a political change, which constituted a return to the politics of the past: at the elections of 2008 the Milošević political party returned back in the government after eight years of absence.

c) Closure of the transitional justice period: introduction of the "politics of the past" into the "politics of the present," 2008-2011.

The third transitional stage began with the installation of the nationalist populist government in 2008. After eight years of exclusion from power – the Socialist Party of Serbia (the SPS, was formed by Milošević in 1990) returned to government. While still engaged in

<sup>72</sup> G. NICE, N. TROMP, *International Criminal Tribunals and Cooperation with States*, cit.

<sup>73</sup> *Ibid.*

<sup>74</sup> S. BISERKO (ed.), *Human Rights: Hostage to the State's Regression*, Belgrade: Helsinki Committee for Human Rights Serbia, 2006, pp. 100-116.

the process of the accession to the EU, Serbia's state elites engaged in the process of complying with the EU conditions by apprehending and transferring the remaining fugitives while at the same time controlling the transitional narrative of genocide. With Milošević's trial ending without a judgment, the pressure from the ICTY was directed to the apprehension and transfer to The Hague of the remaining ICTY fugitives,<sup>75</sup> and of Radovan Karadžić and Ratko Mladić in particular.<sup>76</sup> In 2008, Karadžić was apprehended in Belgrade and transferred to The Hague; in 2010 Mladić was also apprehended on the territory of Serbia and transferred to The Hague. This allowed Serbia to close the chapter of cooperation with the ICTY. After the trials of Radovan Karadžić and Ratko Mladić started, Serbia's state elite remained concerned about the judgments: would these trials produce a judgment that would confirm the 1992 genocide charges; and would their judgments link the Srebrenica genocide to the individuals from Serbia who were named as members of the JCE? If these judgments would confirm that in 1992 the genocide occurred in the north of Bosnia and that the individuals from Serbia were linked to the genocide in Srebrenica, these adjudicated facts could have been used by the State of BiH to file a request for revision of the 2007 ICJ judgment: the deadline for the revision was within the ten-year period and was set to expire in February 2017.<sup>77</sup>

In 2011, Serbia's intellectuals close to the Serbian Academy of Science and Arts (SANU), published an unofficial document dubbed SANU Memorandum II, as an analogy to the SANU Memorandum of 1986 that has been deemed to be the blueprint of the rise of Slobodan Milošević to power and the wars that followed in the 1990s. The SANU Memorandum was written by a number of prominent Serb academics and their diagnosis of the political, economic and cultural crisis of communist Yugoslavia concentrated on the position of the Serbs in Yugoslavia. The recommendations of these prominent Serb academics on how to deal with the crisis became an unofficial programme for Milošević's politics in the late 1980s.<sup>78</sup> Milošević's proclaimed objective was "to rescue" the Serbs living in Kosovo, Croatia and BiH from "yet another genocide". This was to be achieved by changing Serbia's Constitution to "restore" the territorial integrity of Serbia by revoking the status of its autonomous provinces – Vojvodina and Kosovo. Milošević's crusade as "savior" of the Serb people across the Yugoslav republics was in retrospect an excuse for a more cynical political agenda that was directed to the centralization of the Yugoslav federation with Serbia emerging as the dominant political force.<sup>79</sup> This pol-

<sup>75</sup> *Ibid.* Three remaining fugitives were: Goran Hadžić (the war time Croatian Serb leader), Radovan Karadžić and Ratko Mladić.

<sup>76</sup> S. BISERKO (ed.), *Human Rights, Democracy and Violence*, Belgrade: Helsinki Committee for Human Rights Serbia, 2008, pp. 40-54, 90-110.

<sup>77</sup> S. BISERKO (ed.), *European Option Obstructed*, Belgrade: Helsinki Committee for Human Rights Serbia, 2011, pp. 33-57, 85-121, 639-656.

<sup>78</sup> See e.g. N. TROMP, *Prosecuting Slobodan Milošević*, cit., pp. 70-80.

<sup>79</sup> *Ibid.*

icy failed and it triggered the disintegration of the Yugoslav State. The authors of the SANU Memorandum II declared that Serbia's military defeats in the 1990s wars should not be considered as being final: according to which the battles lost in war should be won in peace. Twenty-five years after the SANU Memorandum appeared in public and eleven years after the end of the war hostilities, the post-conflict Serbian political elites revived the issue of the Serbian diaspora.

The disclosure about the existence of this document came from Europa magazine, published by the Bosnian diaspora in the USA. The Europa magazine also states that the SANU Memorandum II was created by the same group of the Serbian intellectuals who authored the original SANU Memorandum with the goal "of saving Serbia after all the Balkan defeats and putting it on an equal footing with all the countries it attacked". In the description of the document, it was stated that "several chapters set out the basic directions and goals of how Serbia should and can be saved in international court proceedings. Also, how to reduce Serbia's responsibility for committed crimes and destruction."<sup>80</sup> The document sets out the strategy of how to use the dissatisfaction and unrest in the neighbouring States in order to "weaken the blade of accusations against Serbia".<sup>81</sup> The text of this document has appeared in several publications, including a facsimile of the entire document that was published in 2013 in a Bosnian magazine.<sup>82</sup>

When it comes to the introduction of "politics of the past" into the "politics of the present", 2008 and 2012 are the crucial years for post-conflict Serbia. Kosovo's declaration of independence in February 2008 and the formation of the new Serbian government in July 2008 as a coalition government with the participation of Milošević's SPS party returned the topic of borders of the post-Yugoslav State to the political agenda of Serbia. In 2011, the Assembly of Serbia adopted the Strategy for preserving and strengthening the relations between the home country and the diaspora and the home country and Serbs in the region. The Strategy announced the return to the political agenda from Milošević's era that concerned itself with the Serbs living outside of the borders of Serbia. In 2011, the Government of Serbia also adopted a strategy which stated that about four million Serbs, or one third of the Serbian population, lived outside the borders of the Republic of Serbia.<sup>83</sup>

The term "Serbs in the region" was used in the document for the Serbian people living in the Republic of Slovenia, the Republic of Croatia, BiH, Montenegro, North Macedonia, Romania, Albania, and Hungary, whereas the most telling paragraphs refer to the

<sup>80</sup> See E. SUBAŠIĆ, *Drugi Memorandum SANU-a: Upute za udar na BiH*, in *Aljazeera Balkans*, 3 March 2019, balkans.aljazeera.net.

<sup>81</sup> *Ibid.*

<sup>82</sup> See M. DEDIĆ, *Memorandum 2 predviđa ujedinjenje Republike Srpske i Srbije za jednu deceniju*, in *Slobodna Bosna*, 21 March 2013, www.helsinki.org.rs.

<sup>83</sup> See *Strategija za očuvanja i jačanja odnosa matične države i dijaspore i matične države i Srba u region*, cit., pp. 5-6.

Serbs living in the BiH, Croatia and Montenegro. Kosovo was not mentioned at all in the document. The Serbs living in BiH received plenty of attention. *Republika Srpska* has been described as the most important area of interest for Serbia given that almost half of the Serbs from the diaspora live in the RS territory. A whole range of the concrete measures for cooperation between the relevant institutions has been proposed: the Ministry of Economy and Regional Development of Serbia has been stimulated to encourage investment in areas of *Republika Srpska*; the Ministry of Education of Serbia should work on integrating their education systems. The document assigns a special role to the Ministry of Religion and the Orthodox faith clergy in the RS to work on the preservation of the national identity of the Serbs.<sup>84</sup>

d) Defining the post-transitional justice agenda, 2012-2017.

In the period between 2012 and 2017, the political changes in Serbia announced the return of the Serb nationalist parties to power. In 2012, the Serbian Progressive Party (SNS – *Srpska napredna stranka*) led by Aleksandar Vučić won the general election and subsequently formed a populist nationalist government in coalition with the SPS led by Ivica Dačić, the party's leader known for his unwavering support of Slobodan Milošević and his political legacy.

In 2013 General Momčilo Perišić as well as Jovica Stanišić and Franko Simatović were acquitted by the ICTY. General Perišić stated upon arrival in Belgrade that it was not just his personal exoneration but also that the State of Serbia was exonerated as well. Stanišić and Simatović have returned to court to face re-trial at the MICT but whichever way the judgment goes, given the limited indictment charges, it will have no capacity to sustain the change that already existed in the transitional narrative about Serbia's involvement in the BiH war. In 2018, Vojislav Šešelj, the ultra-nationalist politician from Serbia was acquitted of all charges for the crimes on the territory of Croatia and BiH, and was found guilty of the crimes of expulsion of Croats from the territory of Serbia in 1991. The trials of Karadžić and Mladić ended with judgments that were very favourable to Serbia. In both Karadžić's judgments – the 2016 Trial Chamber judgment and in his 2019 Appeals Chamber judgment – the judges found that Milošević was not part of the JCE that was responsible for the common plan for BiH. Karadžić judgment of 2016 was described by the Serbia's politicians as exoneration of Milošević and Serbia from any involvement in the war of BiH.<sup>85</sup> The subsequent Appeals Chamber decision confirmed in 2019 the genocide judgment for Srebrenica but it added that there was no evidence to find that any of the named individuals from Serbia were members of the JCE.<sup>86</sup> Similarly, the Mladić first instance judgment of November 2017 did not find evidence that Milošević was a member of

<sup>84</sup> *Ibid.*

<sup>85</sup> See e.g. Ivica Dačić claimed that the Karadžić's judgment means that Serbia is not guilty of committing war crimes. *Dačić: Presuda Karadžiću je dokaz da je Srbija nije kriva za ratne zločine*, in *Telegraph.rs*, 7 September 2016, [www.telegraf.rs](http://www.telegraf.rs).

<sup>86</sup> See ICTY, IT-95-5/18-PT, *Prosecutor v. Radovan Karadžić*, cit., para. 3460.

the JCE.<sup>87</sup> The State of BiH, or rather its Bosnian Muslim representative in the BiH Presidency, failed to file the request for revision of the genocide ICJ judgment by February 2017, which allowed Serbia to finish the proceedings at both international courts – the ICJ and the ICTY – without a legal finding of state responsibility for genocide.

e) Serbia's post-transitional strategy: return to the geo-politics, 2018-ongoing.

Concern for the cultural, economic, and human rights of the Serb nationals living in the neighbouring States could be seen as the legitimate concern of a nation state interested in the well-being and prosperity of its people living in the neighbouring States. However, when put in the historical and political context of the recent wars and the mass atrocities that the Serb forces committed against non-Serbs when they engaged in the creation of the RS, this renewed interest from Belgrade was met with due caution. It displayed an overwhelming concern for the cultural, economic and other human rights of the Serbs in BiH, with no concern for other national groups nor for the victims of the Serb violence in BiH. The Strategy could be seen as the introduction of a "soft power" approach, *i.e.* a de-politicised way of keeping the ideology of "endangerment of Serbdom" alive in the territories to which Serbia still aspires and use the cultural and religious networks to mobilise the Serbs when necessary from the point of view of Belgrade.<sup>88</sup> This has been recently demonstrated in the mass protests organised by the Serbs in Montenegro that started in 2019 as a reaction to the Law on Religious Communities that directly affected the property of the Serbian Orthodox Church.<sup>89</sup> Soon, the demonstrations turned against the President Milo Đukanović and his Euro-Atlantic policy, threatening to undermine the Montenegrin political institutions.<sup>90</sup>

### III.2. "BORDER CORRECTION" INITIATIVE: HOW LARGE WILL THE POST-YUGOSLAV SERBIA BE?

Serbia's post-conflict narrative can be fully understood when analysed through the prism of still existing geopolitical ambitions to extend the state borders of post-Yugoslav Serbia. As of recently, it has also become clear that Serbia aspires to regain control of Montenegro, despite the fact that Montenegro has been an independent State since 2006 and a NATO Member State since 2017.

Since Kosovo proclaimed its independence in 2008, Serbia has been insisting on the territorial autonomy of the northern Kosovo municipalities by supporting the creation of the Assembly of the Serb Municipalities, which became in 2013 Community of Serb

<sup>87</sup> See ICTY, judgment of 22 November 2017, IT-09-92-T, *Prosecutor v. Ratko Mladić*, para. 4238.

<sup>88</sup> N. GRABEŽ, *Preformulisana regionalne aspiracije*, in *Radio Free Europe*, 19 March 2011, [www.slobodnaevropa.org](http://www.slobodnaevropa.org).

<sup>89</sup> See e.g. *Ecclesiastical Dispute: Yet Another Point of Clash between Serbia and Montenegro*, in *Helsinki Bulletin*, 2019, [www.ceeol.com](http://www.ceeol.com).

<sup>90</sup> See e.g. *The Elections in Montenegro from Belgrade's Perspective*, in *Helsinki Bulletin*, 2020, [helsinki.org.rs](http://helsinki.org.rs).

Municipalities. The constitution of the community of these municipalities resembles the formula applied by Serbia for carving out the Serb designated territories in BiH – the RS. The Community of Serb Municipalities in the north of Kosovo is now exactly the territory that Serbia aspires to include in its state borders.

“Border Correction” or *korekcija granica* is an administrative term that has been introduced by the international community in order to stress its “consensual” nature. The term “border correction” has been first used in public during the negotiations between Serbia and Kosovo in 2018. The politicians, commentators, human rights activists, and academics have been using it. However, there is no policy paper made public that delineates the principles of the re supposed to be agreed by the parties involved. In 2019, the “territorial swap” deal between Kosovo and Serbia was leaked to the press. The deal has been supported by the Trump administration and the EU: Serbia was willing to swap the territory of the Preševo valley with two towns containing an overwhelming Kosovo Albanian majority – Preševo and Bujanovac – in exchange for the territory of the Community of Serb Municipalities, situated in the north of Kosovo.<sup>91</sup>

The US and the EU have been supporting Serbia’s geopolitical designs, but Kosovo’s political institutions have been fiercely divided on the issue of the territorial swap. Kosovo’s President Hashim Thaci was a proponent of this solution because it could oblige Serbia to recognise Kosovo as an independent State, which in turn could lead to UN membership for Kosovo in a foreseeable future.<sup>92</sup> According to this calculation, Kosovo would not lose on the size of its territory or its population – only the shape of the state borders would change. The opposing position comes from the Kosovo political opposition led by Albin Kurti and his party *Vetëvendosje* (Self-determination).<sup>93</sup>

Despite the willingness of Kosovo’s President Thaci to work on the “border corrections” with Serbia, the swap of the territories has not taken place yet. Not least for the reason that the “border corrections” initiative has also divided the international community, diplomats, human rights activists, scholars and other Balkan watchers. The proponents of this strategy saw this initiative as a way forward to end a political standoff between Belgrade and Prishtina and the only way for Kosovo to become a UN member.<sup>94</sup> The opponents of the initiative saw this as a dangerous precedent that will inevitably open the

<sup>91</sup> See for discussion: S. BISERKO, *Ima li plana za Kosovo*, in *Pobjeda Daily*, 13 April 2020, pobjeda.me; F. BYTYCI, I. SEKULARAC, *Kosovo, Serbia consider a land swap, an idea that divides the Balkans*, in *Reuters-UK*, 6 September 2018, uk.reuters.com.

<sup>92</sup> S. DRAGOJLO, X. BAMI, *Land Swap Idea Resurfaces to Haunt Serbia-Kosovo Talks*, in *Balkan Insight*, 16 June 2020, balkaninsight.com.

<sup>93</sup> *Kurti denounces land-swap proposal in phone calls with the regional leaders*, in *European Western Balkans*, 27 May 2020, europeanwesternbalkans.com.

<sup>94</sup> See e.g. T. LESS, *The Next Balkan War*, in *New Statesman*, 6 June 2016, www.newstatesman.com; T. LESS, *Dysfunction in the Balkans: Can the Post-Yugoslav Settlement Survive?*, in *Foreign Affairs*, 20 December 2016, www.foreignaffairs.com; S. BISERKO (ed.), *Serbian Community in Kosovo – Frozen Life in a Frozen Conflict*, Belgrade: Helsinki Committee for Human Rights Serbia, 2019, pp. 7-21.



question of the state borders of BiH and encourage the leadership of the RS to demand the secession of the RS to join Serbia.<sup>95</sup> Even if the “border correction” strategy had worked out for Serbia and Kosovo, it could not be treated as an isolated territorial issue: it could have opened the geopolitical issue of the border between Serbia and BiH.

Indeed, the RS political leadership with Milorad Dodik in the lead has been openly and persistently promoting the unification of the RS and Serbia.<sup>96</sup> Belgrade has been leaving the initiative to the RS leadership on how to justify its secession. Serbia’s interest in the RS territory has survived many challenges. In fact, already in 2013, Serbia’s then Prime Minister Dačić publicly reiterated the importance of Serbia for ensuring preservation of the Republika Srpska, calling it even more important for Serbia than Kosovo.<sup>97</sup> The continuity of the policy of the Serbia’s government in relation to the Republika Srpska has been underlined in the Strategy for the National Security for Republic of Serbia, a document adopted in December 2019, according to which one of its national interests has been identified as preservation of the existence and protection “of Republika Srpska as an entity within Bosnia and Herzegovina in accordance with the Dayton Agreement”.<sup>98</sup>

#### IV. CONCLUSIONS

The case study of Serbia, as discussed in this *Article*, demonstrates that despite the robust effort that the UN and the international community invested in determining criminal responsibility for the crimes committed in the wars fought on the territory of Yugoslavia, the outcome of the transitional justice will be contested by one or more parties.

The transitional justice narrative of genocide that took place on the territory of BiH encapsulates all inherent shortcomings of such narratives: the legal narrative of genocide will remain narrower than political and historical narratives; despite its limits the transitional justice narrative of genocide will last for a limited period of time; it will be contested by post-transitional narratives as produced by one or more interested parties.

The transitional narrative of genocide as produced by the ICTY confirmed that genocide took place in BiH. The finding that the crime of genocide took place on the territory of BiH was also confirmed in the 2007 ICJ genocide judgment. The authority of these two UN courts carved the genocide narrative into the collective memory of the world with the

<sup>95</sup> See e.g. US House of Representatives, *Engel & Menendez Express Concern about Trump Administration Approach to Serbia & Kosovo*, Committee on Foreign Affairs Press Releases, 13 April 2020, [foreignaffairs.house.gov](https://foreignaffairs.house.gov).

<sup>96</sup> See e.g. M. EDWARDS, *The President Who Wants to Break Up His Own Country*, in *The Atlantic*, 2 January 2019, [www.theatlantic.com](https://www.theatlantic.com).

<sup>97</sup> Dačić: *Opstanak Republike Srpske mnogo važniji državni interes nego opstanak Kosova u okviru Srbije*, in *Blic*, 26 April 2013, [blic.rs](https://www.blic.rs).

<sup>98</sup> *Strategija nacionalne bezbednosti Republike Srbije*, 27 December 2019, [www.pravno-informacioni-sistem.rs](https://www.pravno-informacioni-sistem.rs), para. 3 (Nacionalni interesi).

Bosnian Muslims as the victims and the Serbs as perpetrators. However, the transitional narrative has determined that the genocide was planned and executed at the RS level, whereas individuals from Serbia do not feature in the genocide narrative. Slobodan Milošević was the only Serbian official who was indicted for genocide and his trial did not reach completion. All other ICTY genocide indictments concerned individuals who held official positions at the level of the RS. The fact that all the VRS officers who were indicted for genocide were also the officers of the Army of Yugoslavia (the VJ) and were paid salaries and pensions by Serbia, did not feature in their indictments, in the evidence during their trial; and it thus never made it to the text of their respective judgments.

The genocide convictions were limited in time to July 1995 and in space to Eastern Bosnia, *i.e.* to Srebrenica and Žepa. The ICTY genocide convictions for Srebrenica and Žepa were rendered for the individuals who were charged and convicted as officials of the RS with no JCE links proved with the individuals from Serbia. With Milošević dying before the end of his trial, no other indictee from Serbia was indicted on genocide charges: four other ICTY indictees from Serbia who were charged for the crimes committed in Srebrenica as crimes against humanity or any other crime committed in Srebrenica or in BiH – have been acquitted. In several ICTY genocide indictments for 1992, there three municipalities where the genocide was charged against the Bosnian Muslims and Bosnian Croats; with no convictions for 1992, the Serb side has also been exonerated for the genocide against the Bosnian Croats.

According to the ICTY judgments, Serbia has been involved in an international armed conflict in BiH from 6 April to 19 May 1992. With no genocide convictions handed down at any court for crimes occurring in 1992, Serbia as a State was not found responsible for the crime of genocide. Moreover, with ICTY convictions for genocide handed down for the crimes occurring in Srebrenica and Žepa in the summer of 1995 – even if any of the individuals would have been connected via JCE to Belgrade – Serbia would have had a strong defence on its side by citing the determination by the ICTY judges that Serbia was not involved in an international armed conflict beyond the date of 19 May 1992.

Political, diplomatic, and legal efforts of a sovereign State be concerned about the historical, political and legal responsibility for the crime of genocide can be explained in the light of the obligations of all UN States to comply with the UN Convention on Prevention and Punishment of the Crime of Genocide of 1948. If States fail to fulfil that obligation, there will be consequences: no State will be willing to admit to the crime of genocide without facing the legal scrutiny. The formation of the Sarajevo and Srebrenica commissions by the RS Assembly will inevitably offer the new narrative with counter arguments that will serve the already active deniers and apologists of the genocide.

The post-transitional justice period has already been inaugurated across the region: the already incomplete transitional justice narrative of genocide in BiH has been challenged with a strategic purpose in mind, such as the return to the geo-political objectives that had led to the genocidal crimes in the 1990s – but which despite the commis-

sion of genocidal crimes had not been achieved. Serbia's current geo-political aspirations – when analysed from the perspective of transitional and post-transitional justice narratives – show the determination to continue the interrupted process of carving out the borders of the post-Yugoslav Serbia. The incorporation of the territory of the *Republika Srpska* remains an important goal.





## ARTICLES

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

edited by Grażyna Baranowska and León Castellanos-Jankiewicz

#### HOW CAN STATES POSSESS HISTORY VIA MEMORIALS?

In the 12<sup>th</sup> district of Budapest, on 64-65 Városmajor Street, at the site of an old sanatorium, a memorial has stood since 2007 dedicated to the “Jewish victims who lost their lives here in 1945”. However, on further analysis, the sign misses several crucial historical details. 1) It fails to mention that the Hungarian authorities harmed the victims, 2) several of the victims of the killings – local nurses – were not Jews, and 3) the memorial does not specify exactly how many people were killed and who they were. This story, recounted in *Budapest in the Shadow of Dictatorships*,<sup>1</sup> points out how those who constructed the memorial must have known all these details, but did not consider it necessary to mention them. Consequently, the authors ask: what exactly is the intention of this memorial, and how is history instrumentalised by states? While the book does not wholly answer this question, a reply could be hypothesized by reviewing it in tandem with *The Palgrave Handbook of State-Sponsored History after 1945*.<sup>2</sup> Due to the differing nature of the two books, this review focuses on questions relating to the instrumentalisation of memorials – the claiming of places of memory.

These volumes both engage in analysis of state practices in the treatment of historical memory. *The Palgrave Handbook* is devoted to the state’s involvement in history in as many areas as possible, such as legal provisions, truth commissions, monuments, education, archives and so forth. It provides an encompassing view spanning around the world. *Budapest in the Shadow of Dictatorships* offers a more intimate look into one specific country and city: Hungary and Budapest. It walks the reader through Budapest’s monuments with a historical perspective, presenting the attitude towards history by governments and citizens throughout 20<sup>th</sup> and 21<sup>st</sup> century Hungary. Simultaneous analysis of these two books offers the opportunity to delve into the big picture of histo-

<sup>1</sup> K. UNGVÁRY, G. TABAJDI, *Budapest a Diktatúrák Árnyékában: Titkos Helyszínek, Szimbolikus Terek és Emlékhelyek – Budapest in the Shadow of Dictatorship: Secret Places, Symbolic Spaces and Places of Memory*, Budapest: Jaffa, 2013.

<sup>2</sup> B. BEVERNAGE, N. WOUTERS (eds), *The Palgrave Handbook of State-Sponsored History after 1945*, London: Palgrave Macmillan, 2018.



ry's instrumentalisation by states, as well as to discover the impact of states' interference in the specific, delicate environment of post-transitional Hungary.

*Budapest in the Shadow of Dictatorships* presents the city as reminiscent of Troy – possessing many different layers reflecting its ruling regimes. The book provides an extraordinarily thorough description of the city's monuments, even including those not officially state-sanctioned – some privately owned, some lost in the shadows, not claimed by anyone, neither State nor citizens. Such streets and buildings remind the reader of the ever-changing regimes of Hungary's 20<sup>th</sup> century. While the book does not delve into the analysis of the politics of memory in great detail, it does outline a significant question – considering how memorial sites are claimed and utilized by various actors, are the erection of monuments and other commemorative symbols the obligation of the state?

Such a question leads me to my analysis of *The Palgrave Handbook*. This book casts an undeniably wider net, but, in my view, they both lead to the same conclusion. Is it the state's obligation to address historical memory, and is there a choice for the state whether to engage in history at all? The book introduces the idea of state-sponsored history – an encompassing term including the creation of official history via state initiatives and memory regimes. It traces state-sponsored history in a very wide area: in the creation of memory laws, archives, research institutes, textbooks, museums, memorials, court proceedings, truth commissions, historical expert commissions and apologies. *The Palgrave Handbook* concludes that state-sponsored history involves instrumentalisation, but such instrumentalisation possesses both positive and negative values. It discerns the well-meaning efforts in memory law-making, such as criminalizing Holocaust denial; preserving the past via archives; providing plausibly neutral, expert viewpoints on sensitive historical events; and satisfying the victims of historical atrocities. However, the studies also demonstrate that no matter how good intentions are, all of these attempts result in some form of controversy.

The two volumes provide proof that the past permeates a wide variety of policy areas and really cannot be left behind. *The Palgrave Handbook* speaks of state-sponsored history, but I would rather describe the processes analysed in the book as the instrumentalisation of history, because it results in various extents of control over the construction of historical memory. The case studies illustrate the need of the state to be careful with its meddling in the creation for historical narratives. *Budapest in the Shadow of Dictatorships* further shows that even when the state does not attempt to interfere in the treatment of the past, they may be possessed by other means, for example by the erection of monuments on private initiatives.

Pierre Nora claimed that by the 1990s, we were living in an “age of commemoration” – society's naturally integrated commemoration of history via oral stories and legends had disappeared, replaced by artificially engineered narratives of collective

memory.<sup>3</sup> *Budapest in the Shadow of Dictatorships* explains the most obvious symbols of this process – the memorial and the monument. Nowadays, commemoration has become an obligation, further inviting the question of whether selected tragedies in history imply a duty to remember. In other words, asking whether instrumentalisation of state-sponsored history can possess different, mandatory moral connotations.

Spaces selected for memorial sites are occupied in several ways and the state may erect a memorial led by various motives. Firstly, the duty element must be considered – monuments to fallen soldiers or victims of atrocities – as the idea of the present generation owing a recognition of their dignity, is widespread. Second, the construction of memorials contains an aspect of illustration of the national consciousness and national historical education. For example, *Budapest in the Shadow of Dictatorships* highlights the Heroes Square as a pantheon of historical figures, old kings, and revolutionary politicians. It was built as an exhibition of Hungarian history, aimed at both insiders and outsiders. The idea is that Hungarian children can learn the names and deeds of the figures depicted on their school field for history class, whereas tourists can be amazed by the magnificence of the achievements of Hungarian history.

If the state leaves memorial spaces unclaimed, they can still be filled – whether by groups intending to display revisionism or by groups intending to reckon with the past honestly, even without state action. The star houses in Budapest intend to commemorate and raise awareness of the magnitude of Jewish deportations in Hungary, because state memorials do not provide this picture. Gertjan Plets' chapter in *The Palgrave Handbook* analyses another situation in Russia, where in the Altai Republic and Tatarstan, global corporations have become involved in memorialisation.

Yet, unclaimed spaces of memory are just as suspicious as claimed memorial spaces. A way of determining the official state narrative of a historical event is by analysing what is chosen for glorification and commemoration, and what is not. For example, there are few to no memorials dedicated to the victims of the Armenian genocide to be found in Europe. Even if memorials are built, how they look and the message they transmit is subject to significant debate – a question analysed in the chapter by Shanti Sumartojo in *The Palgrave Handbook*.

Such problems relate to a crucial inquiry on memorials. What is their aim exactly? Are they constructed to blind spectators with the magnificence of history, to draw a curtain over the historical truth and hide it like the Wizard of Oz? Or are they constructed to educate the public, to show respect and honour towards those who cannot speak for themselves and to inform the younger generation that what has passed can happen again?

<sup>3</sup> P. NORA (ed.), *Les Lieux de Mémoire, Tome 3*, Paris: Gallimard, 1997, pp. 609-610.

In an episode of *Last Week Tonight with John Oliver*, Oliver showed a clip of a debate meeting on the local confederate monument in a US town.<sup>4</sup> Participants of the meeting claimed that such memorials are necessary, because their removal would amount to the erasure of history. However, as John Oliver points out, monuments are not the principal means of history education. A well-organized and informative museum can provide much deeper and more contextualized knowledge about historical events. In contrast, there is no room for nuance in memorials. They cannot convey a lengthy backstory on how the depicted figure served a regime built on exploitation and how the legacy of the regime still affects and lingers to the present day. They are inconvenient means of communicating the context around their own construction, which may tell just as interesting a story regarding backlash towards progress. Such memorials make neither lesson possible. Although museums have the potential for similar problems of instrumentalisation as memorials, even in states struggling with the gradual deterioration of democracy, one can still find museums inspired by historical truths and not official state narratives.<sup>5</sup>

In conclusion, do we need memorials? I would argue yes – but with caution. The same is true for all forms of instrumentalisation and state-sponsored history, a message clearly relayed by both *The Palgrave Handbook* and *Budapest in the Shadow of Dictatorships*. It can be observed in both volumes how history is instrumentalised by states. Although the existence of memorials may not directly affect the lives of citizens, they are both tools and symbols used to transmit official state narratives. Moreover, they can easily become symbols of states' control over history and symbols of the groups included in or excluded from state-sponsored narratives. Nonetheless, memorials should not be abandoned entirely, as their symbolic nature also provides means to reckon with history and express respect.

History cannot be excluded from analysis of the rule by the state over the lives of citizens, and it cannot be excluded from the rule of law either. In fact, states are expected to take stands on their history, and, if necessary, inculcate themselves or their legal predecessors in the commemoration of historical events. *The Palgrave Handbook* highlights this issue with several case studies and makes it abundantly clear that state-sponsored history is not perfect. Interestingly, and perhaps to the slight detriment of the book, it does not contain a full study on Hungary – thus *Budapest in the Shadow of Dictatorships* complements the book's narrative fittingly.

Furthermore, *Budapest in the Shadow of Dictatorships* emphasizes the lack of state occupation in memory spaces, which leaves local history able to be possessed by other

<sup>4</sup> See the TV show, *Last Week Tonight with John Oliver – Confederacy*, in HBO, 8 October 2017, available at [www.youtube.com](http://www.youtube.com).

<sup>5</sup> For example, the Polin Museum in Warsaw demonstrates this phenomenon. See B. KIRSHENBLATT-GIMBLETT, *Inside the Museum: Curating between Hope and Despair: POLIN Museum of the History of Polish Jews*, in *East European Jewish Affairs*, 2015, p. 215 et seq.



groups. The state may, in fact, even be blamed for the lack of commemoration. The decades-long analysis of *Budapest in the Shadow of Dictatorships* also exposes how easily interpretations of state-sponsored history change, and the overhaul and transformation of memorials is a pattern that enables to track this process.

These two volumes clarify that if and when states must intervene in history, then state-sponsored history must be a balancing act. The instrumentalisation of history cannot be avoided, but the difference lies in the aims. It matters whether this instrumentalisation is done with the intention of honest reckoning with the past, or with the intention of strengthening governmental control over history, to the detriment of historical accuracy. If the latter is the case, such volumes, both examining local situations on a more intimate level and encompassing a wide selection of different case studies, are absolutely timely and necessary. They provide insight and initiate crucial questions on the relationship between state control over historical narratives, deteriorating democracy, and rule of law around the world.

**Marina Bán\***

\* Postdoctoral Researcher, University of Copenhagen, marina.ban@jur.ku.dk.





## ARTICLES

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

*edited by Grażyna Baranowska and León Castellanos-Jankiewicz*

## EPILOGUE: MNEMONIC CONSTITUTIONALISM IN CENTRAL AND EASTERN EUROPE

ULADZISLAU BELAVUSAU\* AND ALEKSANDRA GLISZCZYŃSKA-GRABIAS\*\*

TABLE OF CONTENTS: I. Introduction: the Special Section and the MELA Project. – II. Mnemonic constitutionalism and a wider challenge of mnemocracy. – III. Mnemonic constitutionalism in Hungary. – IV. Mnemonic constitutionalism in Poland. – V. Conclusions.

ABSTRACT: This *Article* summarizes the conclusions for the Special Section on memory laws that was published by *European Papers* in two parts over 2020, and explores the nexus between the emerging phenomenon of mnemonic constitutionalism and democratic backsliding. It looks at their interactions through the lens of the legal governance of history and the historical policy implemented by the Central and East European (CEE) States, with Poland and Hungary as the prime subjects of consideration and analysis. The mushrooming of memory laws in CEE throughout the 2010s, which went hand-in-hand with democratic backsliding in the region, is well documented in the Special Section. Memory laws (*lois mémorielles*) initially emerged as a specific phenomenon within criminal law in Western Europe almost three decades ago. However, the recent wave of memory laws in CEE transcends criminal legislation and has acquired constitutional significance, which this *Article* analyses under the heading of mnemonic constitutionalism. After setting out an analytical framework of mnemonic constitutionalism, the *Article* focuses on the two specific CEE examples of Hungary and Poland. In the last decade, both countries have promulgated either constitutional (in case of Hungary) or quasi-constitutional (in case of Poland) provisions that indicate a strong turn towards mnemonic constitutionalism. The *Article* concludes that Fidesz (in Hungary) and PiS (in Poland) regimes perceive mnemonic constitutionalism not only as an ideological basis for the governance of historical memory but also as an ontological foundation to justify “illiberal democracies”.

\* Senior Researcher, T.M.C. Asser Institute, University of Amsterdam, u.belavusau@asser.nl.

\*\* Senior Researcher, Polish Academy of Sciences, aggrabias@gmail.com. The Authors would like to thank Katharine Booth and Chianna Shah for their assistance on this *Article*, as well as the editors of the Special Section, Grażyna Baranowska and León Castellanos-Jankiewicz, for their endeavour and helpful feedback.



KEYWORDS: mnemonic constitutionalism – memory laws – rule of law – illiberal democracy – Hungary – Poland.

## I. INTRODUCTION: THE SPECIAL SECTION AND THE MELA PROJECT

This Special Section has abundantly testified to the mushrooming of memory governance in Central and Eastern Europe (CEE) throughout the 2010s, which ran parallel to democratic decline in the region.<sup>1</sup> Hungary and Poland currently stand at the crosshairs of EU institutions for the violation of the rule of law standards.<sup>2</sup> Beyond the EU, Russia has been identified as the main agent provoking mnemonic propaganda and the white-washing of Stalinism – an *enfant terrible* – also accused of stirring up major “memory wars” in the region.<sup>3</sup> Such wars over historic narratives have led to the adoption of counteractive legislation in the Baltic States and Ukraine.<sup>4</sup> While memory laws emerged in the Western European context almost three decades ago<sup>5</sup> as a specific phenomenon in criminal law,<sup>6</sup> the recent wave of memory laws in CEE transcend criminal legislation and have acquired a constitutional significance, which we frame as *mnemonic constitutionalism*. Yet before we proceed to outline our perspective on mnemonic constitutionalism, a few words have to be said about the wider research project behind this Special Section – an endeavour that led us to identify the tectonic constitutional metamorphoses at stake.

<sup>1</sup> For the review of recently-growing literature on memory laws, see U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS, *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. 325 *et seq.*

<sup>2</sup> See *Articles* by Wyrzykowski (on Poland) in this second part of the Special Section, and by Könczöl and Kevevári (on Hungary) in the first part of the Special Section: M. WYRZYKOWSKI, *Waking up Demons. Bad Legislation for an Even Worse Case*, in *European Papers*, 2020, Vol. 5, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 1171 *et seq.*; M. KÖNCZÖL, I. KEVEVÁRI, *History and Interpretation in the Fundamental Law of Hungary*, in *European Papers*, 2020, Vol. 5, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 161 *et seq.*

<sup>3</sup> On the phenomenon of memory wars via memory laws, see: M. MÄLKSOO, *Memory Must Be Defended: Beyond the Politics of Mnemonical Security*, in *Security Dialogue*, 2015, p. 221 *et seq.*; N. KOPOSOV, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2017; A. WÓJCIK, *Memory Laws and Security*, in *Verfassungsblog*, 5 January 2018, [www.verfassungsblog.de](http://www.verfassungsblog.de); 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.*

<sup>4</sup> See *Articles* by Cherviatsova and Bruskina in the first part of this Special Section: A. CHERVIATSOVA, *On the Frontline of European Memory Wars: Memory Law: Memory Laws and Policy in Ukraine*, in *European Papers*, 2020, Vol. 5, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 119 *et seq.*; N. BRUSKINA, *The Crime of Genocide Against the Lithuanian Partisans: A Dialogue Between the Council of Europe and the Lithuanian Courts*, in *European Papers*, 2020, Vol. 5, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 137 *et seq.*

<sup>5</sup> 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.*

<sup>6</sup> E. FRONZA, *Memory and Punishment, Historical Denialism, Free Speech and the Limits of Criminal Law*, The Hague: Springer, 2018.

In 2016, we launched a research consortium entitled “Memory Laws in European and Comparative Perspective” (MELA) supported by a European Commission research grant, HERA (Humanities in the European Research Area).<sup>7</sup> The MELA Project was run by four research teams based in Italy (University of Bologna), the Netherlands (T.M.C. Asser Institute – University of Amsterdam), Poland (Polish Academy of Sciences), and the UK (Queen Mary University of London, the latter being represented by the Project Leader of our research consortium, Eric Heinze). During 2016-2019, the editors of this Special Section, Grażyna Baranowska and León Castellanos-Jankiewicz, were postdoctoral researchers in, respectively, the Polish and Dutch teams, which were led by the authors of this *Article* as Principal Investigators. Apart from several books and various articles, book chapters, policy documents and essays,<sup>8</sup> the project has resulted in two doctoral theses,<sup>9</sup> the compilation of the first-ever database of memory laws,<sup>10</sup> and a Framework Declaration on Law and Historical Memory.<sup>11</sup> The Declaration summarizes the best practices developed by the MELA Project over the course of three years and recommends modes for the legal governance of history that tend to be less detrimental to fundamental rights.<sup>12</sup> In 2018, the Project also delivered its first special journal issue for MELA, focusing on memory laws and policies mostly in Western Europe and Latin America.<sup>13</sup> In contrast, this second Special Section focuses on memory laws in the post-communist space.

Following the introductory explanation of the research background preceding this Special Section, the second part of this *Article* will detail our understanding of mnemonic constitutionalism and the wider analytical framework of *mnemocracy*. The third part will

<sup>7</sup> For materials and the wider output of the project, see the MELA webpage: [www.melaproject.org](http://www.melaproject.org).

<sup>8</sup> See in particular, U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, Cambridge: Cambridge University Press, 2017; special issue of the *Res Publica Nowa*, *Pamięć i bezpieczeństwo*, 2017 (in Polish); E. FRONZA, *Memory and Punishment*, cit.; E. FRONZA, P. CAROLI (eds), *Special Issue on Memory Laws*, in *Diritto Penale Contemporaneo*, 2018, p. 114 *et seq.* See also the 2017 joint Asser Institute – Verfassungsblog symposium, “Memory Laws” with thirteen contributions: *Memory Laws*, in *Verfassungsblog*, [www.verfassungsblog.de](http://www.verfassungsblog.de). See also a policy brief regarding street-renaming: A. WÓJCIK, U. BELAVUSAU, *Street Renaming after a Change of Political Regime: Legal and Policy Recommendations from Human Rights Perspective*, T.M.C. Asser Institute for International and European Law, Policy Brief, 2018, [papers.ssrn.com](http://papers.ssrn.com).

<sup>9</sup> See doctoral dissertations by Marina Bán (M. BÁN, *Historical Memory and the Rule of Law in France and Hungary*, defended in October 2020) and Anna Wójcik (A. WÓJCIK, *Polish Laws Affecting Historical Memory from the Human Rights Perspective*, expecting her defense in spring 2021). The manuscripts of both unpublished dissertations are with the Authors.

<sup>10</sup> For the first database of memory laws covering all EU Member States and some non-EU countries, along with major EU legislation in the area and the jurisprudence of the European Court of Human Rights and United Nations Human Rights Committee, see the legal database on the MELA website, [www.melaproject.org](http://www.melaproject.org).

<sup>11</sup> For the Declaration of the MELA Project with the accompanying explanatory comments, see the MELA website: [www.melaproject.org](http://www.melaproject.org).

<sup>12</sup> *Ibid.*

<sup>13</sup> See the special journal issue guest edited by N. KEBRANIAN, P. PARIGI, *Memory Laws in European and Comparative Perspective*, in *Journal of Comparative Law*, 2018, p. 13 *et seq.*

focus on mnemonic constitutionalism in Hungary, while the fourth will unpack the idea of mnemonic constitutionalism in Poland, which has unfolded without a change in the actual constitutional text. In our conclusions, we will summarise the repercussions that mnemonic constitutionalism has for the rise of populism and the decline of the rule of law in the region. In doing so, we will also touch on Lithuanian, Russian (recently expanding its mnemonic constitutionalism in the summer 2020 via a referendum) and Ukrainian examples.

## II. MNEMONIC CONSTITUTIONALISM AND A WIDER CHALLENGE OF MNEMOCRACY

One can be critical or positive about the the *naïveté* embedded in memory laws adopted in France, Germany and elsewhere in Western Europe during the 1990s.<sup>14</sup> Their justification, especially with regard to the criminalisation of Holocaust denial, was strongly embedded into the paradigm of militant democracy, i.e. an ethical political outlook that a liberal democracy should have teeth capable of defending itself even if that requires biting through the core of freedom of speech, assembly and other fundamental rights.<sup>15</sup> It was, therefore, undoubtedly a rather noble paradigm that guided their legislators at the time, leading to the adoption of so-called *self-inculpatory* memory laws, in the words of Eric Heinze.<sup>16</sup> Central to that paradigm was the dignity of Holocaust victims. The recent wave of mnemonic constitutionalism in CEE, to the contrary, underlines the victimhood of national States and majority nations. Such – in contrast, *self-exculpatory* – memory laws serve as both a shield and a sword in the context of memory wars unfolding in the region.<sup>17</sup>

<sup>14</sup> For the purpose of this *Article*, we define memory laws as various forms of legal measures governing history, including punitive measures against the denial of historical atrocities and bans prohibiting the use of totalitarian symbols of the past. Our broad notion of memory laws also covers legal acts recognising and commemorating historical events and figures, including laws establishing state holidays, celebrations and dates of mourning, street (re-)naming and monument installations in honour of historical figures, status and access to historical archives, as well as regulations regarding museums and school curricula on historical subjects. See U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS, *Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 1 *et seq.*

<sup>15</sup> See A. SAJÓ (ed.), *Militant Democracy*, Utrecht: Eleven International, 2004; U. BELAVUSAU, *Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant (Czech Republic, Hungary and Poland)*, in *Israel Law Review*, 2014, p. 27 *et seq.*

<sup>16</sup> See E. HEINZE, *Theorizing Law and Historical Memory*, in *Journal of Comparative Law*, 2018, p. 1 *et seq.* Regarding self-inculpatory and self-exculpatory memory laws, see a fascinating intellectual exchange between Antoon de Baets and Eric Heinze: E. HEINZE, *Should Governments Butt Out of History?*, in *Free Speech Debate*, 12 March 2019, [freespeechdebate.com](https://freespeechdebate.com); A. DE BAETS, *Criminal Regimes are Never Soft on History*, in *Free Speech Debate*, 23 December 2019, [freespeechdebate.com](https://freespeechdebate.com).

<sup>17</sup> See also G. SOROKA, F. KRAWATZEK, *Nationalism, Democracy and Memory Laws*, in *Journal of Democracy*, 2019, pp. 157-160, who refer to self-inculpatory and self-exculpatory memory laws as, respectively, prescriptive and proscriptive, similarly focusing on the intentions and motivations of the States introducing such regulations.

In our *Article*, we focus on the paradigmatic case of two CEE countries, Hungary and Poland, that have been on the radar of European institutions as well as numerous academic and civil society organisations, testifying to a rule of law crisis.<sup>18</sup> The rule of law backsliding in Hungary and Poland has followed the rise of nationalist memory politics and so-called “memory wars” in CEE.<sup>19</sup> The populist politics of memory have articulated themselves in what we address as “mnemonic constitutionalism”, that is, the elevation of the legal governance of historical memory to the constitutional level.<sup>20</sup> While only the Hungarian case can be *stricto sensu* attributed to the introduction of the new Basic Law, the deterioration of democracy in both Hungary and Poland have been intertwined with an explicitly populist “commemorative law-making”.<sup>21</sup> We therefore define “mnemonic constitutionalism” as a form of legal governance that encompasses, yet transcends, pure measures against genocide denialism and statutory memory laws. The heading of constitutionalism replicates the idea that government can and should be limited in its powers, and that its authority or legitimacy depends on its observing these limitations.<sup>22</sup> Mnemonic constitutionalism in this regard places the authority and legitimacy of a State into the boundaries of a certain historical paradigm, whereas current and future attitudes and behaviours of state actors derive from and are limited by moral lessons of the past. Within mnemonic constitutionalism, the historical past becomes the foundation of collective identity prescribed by either the basic law itself, or by legal provisions which traditionally shape the substructure of national constitutional law such as, for example, citizenship laws or statutes shaping collective identities by virtue of imposing specific understandings of historical past.

Without consciously or explicitly identifying this area of law-making and without necessarily changing the constitutional text itself, the new populist regimes in CEE clearly perceive this invisible mnemonic constitution as a certain ontological foundation for their “illiberal democracies” and as a basis for an entire governance of historical memory, to justify their current political choices. It is obvious that various forms of

<sup>18</sup> See W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford: Oxford University Press, 2019; G. HALMAI, *The Alternatives to a Bite or a Bark: After Launching Article 7 TEU Against the Hungarian Government*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Constitutionalism Under Stress: Essays in Honour of Wojciech Sadurski*, Oxford: Oxford University Press, 2020.

<sup>19</sup> N. KOPOSOV, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge: Cambridge University Press, 2017; 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.* See also M. BĂN, *Memory Wars of Commercial Worth: The Legal Status of the Red Star in Hungary*, in *Verfassungsblog*, 11 January 2018, [www.verfassungsblog.de](http://www.verfassungsblog.de).

<sup>20</sup> U. BELAVUSAU, *Final Thoughts on Mnemonic Constitutionalism*, in *Verfassungsblog*, 15 January 2018, [www.verfassungsblog.de](http://www.verfassungsblog.de).

<sup>21</sup> M. BUCHOLC, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland after 2015*, in *Hague Journal of Rule of Law*, 2018, p. 85 *et seq.*

<sup>22</sup> See W. WALUCHOW, *Constitutionalism*, in E.N. ZALTA (ed.), *The Stanford Encyclopedia of Philosophy*, 2018, [plato.stanford.edu](http://plato.stanford.edu).

mnemonic constitutionalism existed before the current epoch characterised by the decline in the rule of law. It certainly has not been uncommon for constitutional preambles, for example, to briefly narrate historical milestones of the evolution of a state, especially in the context of post-colonial or transitional democracies distancing themselves from their dependent or totalitarian past via new constitutional texts.<sup>23</sup> Likewise, certain liberal democratic regimes without a formal constitution can be characterised by a strong – albeit invisible – mnemonic constitution, as for example in Israel with its idea of a historic State and religious community attributed to a certain territory and fortified by a powerful “law of return”, that is, a specific citizenship paradigm privileging Jews as citizens of a “reborn” state.<sup>24</sup> Furthermore, the way citizenship – a central subject of constitutional texts – is distributed in many States can be highly dependent on historical lineage.<sup>25</sup> From the way we teach history in schools to the way we impose national holidays, street names and monuments,<sup>26</sup> this mnemonic constitutionalism surrounds us from childhood and shapes our identities through various legal measures, a fraction of which are criminal prohibitions. The majority of such regulations amount to the soft governance of memory. Yet the recent threat of mnemonic constitutionalism, which we also address as *mnemocracy*, manifests itself in the outright populist abuse of historical narratives to justify a new regime that is hostile to the rule of law standards of equality, judicial independence, and the pluralism of opinions.<sup>27</sup> In this regard, Hungary and Poland stand as vivid examples, even though the manifestations of this mnemonic constitutionalism, and the subsequent populism around this legal governance of historical memory, somewhat differ.

<sup>23</sup> See H. NYSSÖNEN, J. METSÄLÄ, *Highlights of National History? Constitutional Memory and the Preambles of Post-Communist Constitutions*, in *European Politics and Society*, 2019, p. 323. According to the Authors, constitutional preambles often “highlight[s] historical events, canonise[s] an interpretation of the past as the basis of the whole legal and political system”.

<sup>24</sup> D. ERNST, *The Meaning and Liberal Justification of Israel's Law of Return*, in *Israel Law Review*, 2009, p. 564 *et seq.*

<sup>25</sup> In this regard, it is remarkable that Spanish and Portuguese naturalisation laws grant citizenship to the descendants of the Sephardic Jews expelled in the Medieval period. See H.U. JESSURUN D'OLIVEIRA, *Iberian Nationality Legislation and Sephardic Jews: “With Due Regard to European Law?”*, in *European Constitutional Law Review*, 2015, p. 13 *et seq.* See also Y. HARPAZ, *Citizenship 2.0: Dual Nationality as a Global Asset*, Princeton: Princeton University Press, 2019; M. GANCHER, *Hungarians Outside Hungary – The Twisted Story of Dual Citizenship in Central and Eastern Europe*, in *Verfassungsblog*, 8 October 2014, [www.verfassungsblog.de](http://www.verfassungsblog.de).

<sup>26</sup> The 2020-wave of “Black Lives Matter” in the USA and Europe, for example, has manifested in a controversial monument iconoclasm demanding to revisit certain historical understandings in public space. See L. ZANNIER (OSCE High Commissioner on National Minorities), *Open Letter on Symbols in Public Spaces*, 16 June 2020, [www.osce.org](http://www.osce.org).

<sup>27</sup> See U. BELAVUSAU, *Final Thoughts on Mnemonic Constitutionalism*, cit. For the term “mnemocracy” (or “memocracy”), we would like to thank Maria Mälksoo, with whom we had numerous intellectual exchanges about this subject in the recent years and who first coined this term for our analytical framework to study the migration and distortion of constitutional concepts in Europe. This analytical framework may be particularly suitable for exploring the debate on militant democracy to new conceptual and empirical grounds.



The numerous accounts in this Special Section have illustrated a growing density in the network of memory laws, policies, state commissions and institutes of national remembrance, leading to the effective rise of mnemocracy in CEE. The relevant legislation, adjudication and policies of mnemocracy can be classified into five clusters: 1) constitutional provisions prescribing certain understandings of the past and distributing guilt for past atrocities; 2) punitive measures of memory governance (imposing criminal responsibility for the denial of Nazi or communist crimes, or prescribing the “correct” attribution of atrocities to a singular perpetrator); 3) non-punitive measures of memory governance (e.g., memory laws and policies prescribing re-naming of streets or the place of historical monuments); 4) quasi-memory laws (e.g., citizenship laws that permit naturalisation based on historical belonging); and 5) judgments of national tribunals relating to the (legitimate) remembrance of the past.

While *stricto sensu* only the first group of this mnemocratic governance is based on constitutional provisions, all five elements, especially citizenship policies,<sup>28</sup> can be seen as being part and parcel of mnemonic constitutionalism. All five groups have been applied to secure a politically preferable version of the past and prescription of an ontological foundation of respective CEE societies. Such foundation mirrors an idealised constitutional understanding of a transitional nation seeking to postulate its self-exculpation from the atrocities committed by the dystopian regimes of the 20<sup>th</sup> century. Yet, as this Special Section has demonstrated, such militant memory laws and policies are equally capable of eroding the foundational elements of liberal democracy, weakening constitutional orders and adding fuel to populist tendencies. For the sake of our Epilogue in the Special Section, we have opted to focus on Hungary and Poland, as both these countries testify to the remarkable rise of mnemonic constitutionalism.<sup>29</sup>

### III. MNEMONIC CONSTITUTIONALISM IN HUNGARY

Pre-1949 Hungarian constitutionalism looked somewhat similar to the British organisation of the state – both emerged from collected foundational documents and dispensed

<sup>28</sup> In Hungarian context, see, for example, 2010/XLIV törvény a magyar állampolgárságról szóló 1993. évi LV. törvény módosításáról. This law grants a fast-track access to citizenship to those with Hungarian ancestry, especially aimed at Hungarian minorities living in the “Trianon territories”. For a wider analysis of how citizenship laws often perform the function of quasi-memory laws, in particular in Hungary, France, Spain, Portugal and Ukraine, see the doctoral dissertation by M. BÁN, *Historical Memory and the Rule of Law in France and Hungary*, cit. See also C. JOPPKE, *The Instrumental Turn of Citizenship*, in *Journal of Ethnic and Migration Studies*, 2019, p. 858 et seq.

<sup>29</sup> This account should be also read in conjunction with the *Articles* by Könczöl and Kevevári (on Hungary) in the first part of the Special Section (M. KÖNCZÖL, I. KEVEVÁRI, *History and Interpretation in the Fundamental Law of Hungary*, cit.) and Wyrzykowski (on Poland) in this second part (M. WYRZYKOWSKI, *Waking Up Demons*, cit.). Both respective accounts testify to the rise of mnemocracy in these two CEE countries. Furthermore, the current political regimes in Hungary and Poland tend to mimic their socio-legal trajectories regarding the ongoing erosion of their liberal democracies.

with a single constitutional charter. However, the concept of “historical constitution” in Hungary was also connected with the medieval doctrine of the “Holy Crown”. This doctrinal mythology stressed both the symbolic and actual role of the Holy Crown in guarding the independence of Hungary.<sup>30</sup> After World War II, in 1949, Hungary adopted its constitutional text, which was promulgated by the communist regime and, unlike in most other CEE transitional democracies, existed (albeit with substantial amendments that have transformed it into a democratically spirited constitution) until the 21<sup>st</sup> century. After the victory of Fidesz in the 2010 elections, the government for the first time received a parliamentary supermajority, sufficient to immediately initiate the drafting of a new constitution. The preamble of the new Hungarian Fundamental Law (2010) is truly unique as compared to the constitutional preambles of other EU Member States with written constitutions (which are currently twenty-two out of twenty-seven in number) in terms of the scope of historical depth and references. The new constitutional text starts with the National Avowal, which refers to King Saint Stephen I as founder of the Hungarian state, proclaims Christianity as historically central “in the preservation of nationhood”<sup>31</sup> and, most importantly, reinforces the narrative of Hungarian victimhood following the post-World War I Treaty of Trianon. This contradictory account of national division helps justify Hungary’s role in the protection of “Hungarians beyond the borders”.<sup>32</sup> In addition, the Avowal praises the “achievements of the historical constitution” and the Holy Crown as symbols of the independence and continuity of the Hungarian State, and condemns the Nazi and communist occupations of the country. It also claims that the State lost its self-determination on 19 March 1944, the date on which Hungary’s German occupation began, and regained it after the fall of the communist dictatorship on 2 May 1990, the day of assembly of the first freely elected Hungarian parliament. This characterizes the 1949 constitution of Hungary as unlawful and as the basis for “tyrannical rule”. As aptly explained by Miklós Könczöl, by adopting a detailed constitution with a preamble, rather than merely a charter of rights, the constitution framers made it possible for themselves to take ideological positions on a number of controversial questions related to the past.<sup>33</sup> Gábor Halmai further exposed how the preamble rec-

<sup>30</sup> See the doctoral dissertation by M. BÁN, *Historical Memory and the Rule of Law in France and Hungary*, cit. On the doctrine of the Holy Crown, see K. LANE SCHEPPELE, *The Constitutional Basis of Hungarian Conservatism*, in *East European Constitutional Review*, 2000, p. 51 *et seq.*

<sup>31</sup> Seventh Amendment to the Fundamental Law (September 2018). This amendment references the struggles of the Hungarian State to keep its independence and fight for its existence throughout several invasions and revolutions, including the Turkish wars and the revolutions of 1848-49 and 1956. Since 2018, the Seventh Amendment has provided for an obligation of state authorities to protect Hungary’s “self-identity” and Christian culture.

<sup>32</sup> See M. BÁN, *Historical Memory and the Rule of Law in France and Hungary*, cit.

<sup>33</sup> 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.*

ognizes only the positive pre-1944 years of Hungarian history, not the acts and failures that give cause for self-criticism:

“[The] Constitution failed to acknowledge that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents during World War II, but also between 1920 and 1944 by extreme right-wing “free troops” and the security forces of the independent Hungarian state, not only against “the Hungarian nation and its citizens” but also against other peoples. Nor does it acknowledge that the continuity of Hungary’s statehood was not interrupted: restrictions were placed on government agencies’ freedom to act, but the government was not shut down”.<sup>34</sup>

In April 2013, the Hungarian government also adopted Art. U as a constitutional provision, stating *inter alia* that the pre-1989 Communist Party (the Hungarian Socialist Workers’ Party) and its satellite organisations that supported the communist ideology were “criminal organisations” whose leaders carry a liability that is “without a statute of limitations”. Furthermore, the Fundamental Law includes a very broad and general liability for a number of past acts, including: destroying post-World War II Hungarian democracy with the assistance of Soviet military power; the unlawful persecution, internment, and execution of political opponents; the defeat of the 1956 October Revolution; destroying the legal order and private property; creating national debt; “devastating the value of European civilization”; and liability for all criminal acts that were committed with political animus and which have not been prosecuted by the criminal justice system for purely political motives.<sup>35</sup> As was further concluded by Gábor Halmai with regard to the Fundamental Law of Hungary, “the current Hungarian government’s attitude towards public discussion of history [is] similar to that of the Polish one, [as it] reflects the position of these illiberal populist regimes towards the rights of their citizens”.<sup>36</sup>

#### IV. MNEMONIC CONSTITUTIONALISM IN POLAND

When confronted with a recent rise of right-wing politics in CEE, in particular in Hungary and Poland, the core question inevitably arises: how is it possible for this type of populist, xenophobic government to continue to hold power and repeatedly win parliamentary elections? As observed by Patterson and Monroe: “For the community to construct self-image means choosing interpretations of specific events from the past in a way that will allow it to create a coherent and understandable vision of their own identity. By

<sup>34</sup> G. HALMAI, *Memory Politics in Hungary: Political Justice Without Rule of Law*, in *Verfassungsblog*, 10 January 2018, [www.verfassungsblog.de](http://www.verfassungsblog.de).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

shaping a specific story about the past, the community can also refer to the presently surrounding events and design its future".<sup>37</sup>

In this respect, Poland and Hungary constitute a suitable case study to further explore the phenomenon of mnemonic constitutionalism and memory laws. In fact, some commentators see the very craving for a positive, proud self-image, unfettered by recent norms of belonging to the universe of liberal democracies, as the main force that propelled the Prawo i Sprawiedliwość (Law and Justice) – PiS party to power in Poland in 2015 and which keeps it there despite what would normally be seen as unacceptable behaviour.<sup>38</sup>

The development of a specific historical narrative and an official historical policy that we have witnessed over the past few years in Poland has occurred together with the creation of a vision of a grand country and nation; a vision of proud sovereignty and moral superiority over others who are almost invariably portrayed as alien and hostile. Over time, efforts to promote this vision have created an environment in which a large portion of the public has found palatable the words uttered loudly and emphatically by Poland's president during one of his election rallies in response to the criticism of foreign experts regarding the changes forced through by the ruling party and which have demolished the independent judicial system in Poland.<sup>39</sup> Xenophobic tones have again resurfaced in the rhetoric of the ruling camp in Poland, suggesting that the country's sovereignty is once more under attack by "alien forces" – this time by EU institutions and advisory bodies such as the Venice Commission.<sup>40</sup> These messages, designed to justify the need to defend Poland and its people against their "enemies", have become one of the means of convincing Poles to accept the unlawful actions taken by those in power. There is one other distinctive aspect to note about Poland: one of the most common justifications for the assault on the judiciary is that judges need to undergo "decommunization". With no factual

<sup>37</sup> M. PATTERSON, K. RENWICH MONROE, *Narrative in Political Science*, in *Annual Review of Political Science*, 1998, pp. 315-316.

<sup>38</sup> For a detailed account of the most recent manifestations of such behaviour, see L. PECH, R. DANIEL KELEMEN, *If You Think the U.S. is Having a Constitutional Crisis, You Should See What is Happening in Poland*, in *Washington Post*, 25 January 2020, [www.washingtonpost.com](http://www.washingtonpost.com).

<sup>39</sup> As reported in the Rule of Law blog on President Duda's remarks: "On 17 January, he claimed that the European Union's resistance to the courts being taken over by politicians was a threat to Poland's sovereignty. He said: 'Today, they are pulling out all the stops to deprive us of our right to have an honest and good justice system, to fix it. We will not let others decide for us. We Poles have the right to decide about our own country, our own laws – that is why we fought for democracy. They will not come here and impose on us in foreign languages the political system we are supposed to have in Poland, or tell us how Polish matters are to be handled. Yes, we are in the European Union, and we are very happy that this is so, but first and foremost we are in Poland'". D. FLIS, *Duda Shocks with Hate Speech Attack on Polish Judges*, in *Rule of Law*, 24 January 2020, [www.ruleoflaw.pl](http://www.ruleoflaw.pl).

<sup>40</sup> The official statement by the Venice Commission issued in January 2020 was treated by the Polish authorities as "a private opinion" of the monitoring body. See the official document: Venice Commission, Poland – Urgent Joint Opinion on the amendments to the Law on organization on the Common Courts, the Law on the Supreme Court and other Laws, 16 June 2020, [www.venice.coe.int](http://www.venice.coe.int).

grounding, it is claimed that judges who were appointed or started their careers when the communist regime was in place must be removed from their benches.<sup>41</sup> In addition, several memory laws have been adopted in Poland in recent years, adding fuel to the vetting and decommunization narrative.<sup>42</sup> As noted by Anna Wójcik, legislation of the kind introduced in Poland, notably the Law of 16 December 2016 to amend the law on social security of the former employees of the various branches of the communist state-controlled organs,<sup>43</sup> has little to do with genuine mechanisms of transitional justice and should rather be understood as purely political instruments.<sup>44</sup>

The calculated and political motivations of the current Polish ruling elites, masked by an otherwise legitimate call for the protection of historical truth, has also been used to promulgate regulations serving to create an image of Poland and the nation as saviours and never as perpetrators of past atrocities.<sup>45</sup> The Polish legislation introduced in January 2018 (and partly repealed in June 2018) penalising the defamation of the Polish State and nation through claims of its responsibility or co-responsibility for crimes committed by German Nazis in occupied Poland, triggered a massive crisis in Polish–Israeli and Polish–US relations, and was criticized by numerous experts and institutions as infringing on individual rights and freedoms.<sup>46</sup> Additionally, the legislative process to

<sup>41</sup> For detailed factual data concerning the claims of the government, see: Iustitia Judges Association, *The Arguments of Polish Judges Association Iustitia Related to the PM Mateusz Morawiecki Statements at the Meeting with Foreign Journalists on January 10th 2018*, in *Iustitia*, 27 January 2018, [www.iustitia.pl](http://www.iustitia.pl).

<sup>42</sup> U. BELAVUSAU, *The Rise of Memory Laws in Poland: An Adequate Tool to Counter Historical Disinformation?*, in *Security and Human Rights*, 2019, p. 36 *et seq.*

<sup>43</sup> These controversial laws include: Ustawa z dnia 1 kwietnia 2016 r. o zakazie propagowania komunizmu lub innego ustroju totalitarnego przez nazwy jednostek organizacyjnych, jednostek pomocniczych gminy, budowli, obiektów i urządzeń użyteczności publicznej oraz pomniki [Law of 1 April 2016 on prohibiting the propagation of communism or other totalitarian regime through names of buildings, objects, and public service devices] Dz. U. 2016 no. 744; Ustawa z dnia 16 grudnia 2016 r. o zmianie ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [Law of 16 December 2016 to amend the Law on social security of the functionaries of the Police, Internal Security Agency, Intelligence Agency, Counterintelligence Bureau, Central Anti-corruption Bureau, Border Guards, Government Protection Bureau, National Fire Service and Prison Service and their families] Dz.U. 2016 poz. 2270.

<sup>44</sup> For a detailed account of these laws, see A. WÓJCIK, *Reckoning with Communist Past in Poland Thirty Years After Regime Change and European Convention on Human Rights*, in *Polish Yearbook of International Law*, 2019, p.135 *et seq.*

<sup>45</sup> U. BELAVUSAU, *Rule of Law in Poland: Memory Politics and Belarusian Minority*, in *Verfassungsblog*, 21 November 2017, [www.verfassungsblog.de](http://www.verfassungsblog.de). See also A. WÓJCIK, U. BELAVUSAU, *Posponer los Cambios de Nombre de las Calles Tras la Transición de la Democracia: Lecciones Legales de Polonia*, in J. GUIXÉ, I. CORONMINES, J. ALONSO CARBALLES, R. CONESA SÁNCHEZ (eds), *Diez Años de Leyes y Políticas de Memoria (2007–2017)*, Madrid: Ediciones La Catarata, 2019, p. 27 *et seq.*

<sup>46</sup> For a detailed account of Polish memory law (often erroneously – as we argue elsewhere – referred to as the “Holocaust Bill” or “Holocaust Law”) see: A. GLISZCZYŃSKA-GRABIAS, *Deployments of Memory with the Tools of*

promulgate this law left much to be desired. Although this law remains dormant for all practical purposes, which only underscores the senselessness of its introduction, there are regulations in Poland which, if interpreted in a particular manner by courts, pose a realistic threat to freedom of speech and freedom of scientific research. We are referring here to regulations governing the protection of so-called “personal goods”, which are occasionally abused to convince a court that certain historical statements may hurt a person’s “sense of Polish national pride”. However:

“[W]hat really is at stake here is the risk of whitewashing the uncomfortable truths. Even greater risk, however, arises from the temptation of the governments to leave the legal battles over history to individuals or organisations close to the ruling circles. This way the governments may avoid entering into diplomatic disputes that can turn into open international conflicts. This in turn can even open space for potential politically inspired actions restricting free speech (or at least causing a ‘chilling effect’), supported and, sometimes, informally directed by the government, while formally being still just individually pursued claims”.<sup>47</sup>

The fact that PiS is consistently relying on laws to impose its narrative in the areas of memory and history is telling. The authority of the law has been exploited to put a stamp of credibility on one particular vision of how the past should be remembered and interpreted, setting up a specific form of mnemonic constitutionalism, even without amending or changing the constitutional text *per se*, as in the Hungarian case. Poland’s rulers are also attempting to use “the law” in much the same manner as Hungary’s own to eliminate the tripartite division of power and negate the principles of liberal democracy and constitutional order. Unlike its Hungarian counterpart, the Polish strain of mnemonic constitutionalism relies heavily on an institution called the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (IPN), which promotes and implements various memory laws.<sup>48</sup> One telling fact is that the Institute – effectively the offspring of PiS electoral patriotism and guardian of the ontological security of its voters – enjoys a budget several times higher than the Polish Academy of Sciences.<sup>49</sup> The apparent (or even false) nature of this mnemocracy – constitutionalizing historical narratives – is obvious to lawyers but not to the general public, and this is why this abuse of law and its authority must be categorically con-

*Law – the Case of Poland*, in *Review of Central and East European Law*, 2019, p. 464 et seq.; U. BELAVUSAU, *The Rise of Memory Laws in Poland*, cit.; U. BELAVUSAU, 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.

<sup>47</sup> M. JABŁOŃSKI, A. GLISZCZYŃSKA-GRABIAS, *Is One Offended Pole Enough to Take Critics of Official Historical Narratives to Court?*, in *Verfassungsblog*, 12 October 2019, [www.verfassungsblog.de](http://www.verfassungsblog.de).

<sup>48</sup> Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu, in Polish (hereinafter IPN).

<sup>49</sup> See H. ORZECZOWSKI, *IPN – Ukochane Dziecko PiS. Rekordowe Finansowanie z Budżetu*, in *Gazeta Wyborcza*, 24 February 2020, [wyborcza.pl](http://wyborcza.pl).

demned as a dangerous drive to quash all reliable and honest legal analysis, and as an attempt to legitimise arbitrary legal interpretations of history.<sup>50</sup>

## V. CONCLUSIONS

“A Pole and a Hungarian are two brothers, both up to share drinks and a sword”.<sup>51</sup> It is hard to read the aforementioned proverb today without a sad sense of irony. The romanticized Polish-Hungarian amity and a certain resemblance in mentality of the nations, to which this saying from the 18<sup>th</sup> century refers, manifests itself today in a similar dismantling of the rule of law, the trampling over fundamental democratic values, an undermining of EU law and principles, and an uncritical attitude towards the history of one’s own state and nation. In the latter context, this convergence also applies to the instrumental treatment of the past as a tool to secure and sanction only a “righteous”, state-sponsored version where “we” could only be the victims of (or rescuers for) others, and never perpetrators of atrocities and injustices.

In using and abusing history for the sake of building a “new constitutional order”, Poland and Hungary undoubtedly differ in some respects. First of all, it should be emphasised that in Poland, mnemonic constitutionalism has proceeded without a fully-fledged change or novelisation of the constitutional text *per se*. Instead, a number of “minor” legal steps and legislative initiatives have occurred there. Nonetheless, the Polish mode of constitutionalizing the historical past via controversial memory laws involving adjudication of the Constitutional Court<sup>52</sup> and a powerful Institute of National Remembrance,<sup>53</sup> with its quasi-parliamentary functions, has had the same effect as in Hungary, thereby reinforcing mnemocracy. However, the reaction of other States towards the legal governance of the past, including above all the United States and Israel, was more visible in the case of Poland. This was perhaps caused by historical implications regarding the fact that Polish memory laws referred directly to the Holocaust. Yet it seems that equally the administration and propaganda of the Hungarian government simply coped better with repelling criticism. In this context, however, the most disappointing development is probably the

<sup>50</sup> For examples of seemingly unbelievable abuses of law, see: L. PECH, P. WACHOWIEC, *1460 Days Later: Rule of Law in Poland R.I.P. (Part I and Part II)*, in *Verfassungsblog*, 13 and 15 January 2020, [www.verfassungsblog.de](http://www.verfassungsblog.de).

<sup>51</sup> This is a historic, self-praising saying that exists in both the Polish and Hungarian languages: *Lengyel, magyar – két jó barát, együtt harcol, s issza borát* (Hungarian); *Polak, Węgier, dwa bratanki, i do szabli, i do szklanki* (Polish).

<sup>52</sup> See judgment of the Polish Constitutional Tribunal of 17 January 2019, case *K/18*. The Tribunal considered the provisions of the Polish memory law (Law from 26 January 2018 Amending the Law of 18 December 1998 on the Institute of National Remembrance), in particular with regard to “Ukrainian nationalists” in the context of the inter-war Polish history, to be incompatible with the principle of specificity of law derived from Art. 2 and the principle *lex retro non agit* derived from Art. 42, para. 1, of the Polish Constitution.

<sup>53</sup> On the role and quasi-parliamentary powers of the Institute, see doctoral dissertation by A. WÓJCİK, *Polish Laws Affecting Historical Memory from the Human Rights Perspective*, cit.

blind eye that the EU has turned to the rise of mnemocracy in Hungary and Poland. The degree to which the EU institutions can challenge the reinforcement of mnemonic constitutionalism in its Member States remains questionable, in particular regarding the rule of law mechanism of Art. 7 TEU. The uncertainty emerges primarily in light of the esoteric defence of “national identity [...] inherent in constitutional [...] self-government” afforded to Member States in the post-Lisbon set-up of Art. 4, para. 2, TEU. Yet the current reinforcement of such mnemonic constitutionalism in CEE clearly weakens attempts at building consensus within European historical narratives and accompanies the decline of democracy in both Hungary and Poland.

Other countries in the region have also been keen to translate historic mythologies and righteous self-images into their law and historical policy, including via international judicial matters. As this Special Section has demonstrated, this was the case, in particular, in Lithuania, which sought recognition before the European Court of Human Rights of the fact that the crime of genocide had been committed by the Soviets against the Lithuanian partisans.<sup>54</sup> Another vivid example of building up a mnemocracy is the case of Ukraine with its package of memory laws, comprehensively discussed in this Special Section by Alina Cherviatsova.<sup>55</sup> As noted by the Author: “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”.

This process coincides with a rebuilding of the constitutional and political order in Ukraine, revealing a close nexus between the implementation of memory laws and the attempt to establish a Ukrainian form of mnemocracy. Furthermore, the Ukrainian model of mnemonic constitutionalism – with its strong package of de-communization laws and involvement of the Constitutional Court<sup>56</sup> – partially copied its Polish analogue

<sup>54</sup> See Article by Nika Bruskina in the first part of the Special Section, N. BRUSKINA, *The Crime of Genocide Against the Lithuanian Partisans*, cit. For a similar account of the Latvian case study at the European Court of Human Rights and national courts, see M. MÄLKSOO, *Konov v. Latvia as an Ontological Security Struggle over Remembering the Second World War*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 91 et seq.; I. MILUNA, *Adjudication in Latvian Deportation Cases: References to International Law*, in U. BELAVUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Law and Memory*, cit., p. 216 et seq. For a broader overview of memory laws in Lithuania and Latvia, see D. BUDRYTĖ, *Memory, War, and Mnemonical In/Security: A Comparison of Lithuania and Ukraine*, in E. RESENDE, D. BUDRYTĖ, D. BUHARI-GULMEZ (eds), *Crisis and Change in Post-Cold War Global Politics*, 2018, p. 155 et seq.; E.C. PETTAI, *Protecting Memory or Criminalizing Dissent? Memory Laws in Lithuania and Latvia*, [www.academia.edu](http://www.academia.edu).

<sup>55</sup> See Article by Alina Cherviatsova in the first part of this Special Issue, A. CHERVIATSOVA, *On the Frontline of European Memory Wars*, cit.

<sup>56</sup> See A. NIKOLIAK, *Ukraine’s Constitutional Court, Historical Narrative-Making, and the Law*, in MELA-Blog, 2019, [www.melaproject.org](http://www.melaproject.org).



in establishing a vocal (Ukrainian) Institute of National Remembrance.<sup>57</sup> The proliferation of memory institutes in CEE is at times ironic. Such entities essentially mimic each other in their remembrance of the totalitarian past despite their varying – sometimes mutually contradictory, as the Polish-Ukrainian comparison clearly demonstrates – engineering of national identities.

It is also particularly emblematic for the rise of mnemonic constitutionalism along memory wars in CEE that Vladimir Putin has justified his latest constitutional project with a plea towards historical memory and “historical truth”. In June 2020, Putin stressed that voting for amendments to the Russian Constitution was tantamount to “preserving the memory of their ancestors and expressing respect for the defenders of the Fatherland”.<sup>58</sup> Somewhat similar to Hungary and Poland, the newest wave of Russian mnemonic constitutionalism disguises broader amendments contrary to rule of law standards, for example, on the “nullification” of presidential terms and the expansion of presidential powers on the right to initiate the dismissal of judges of the Constitutional Court. Furthermore, one of the proposed changes to the Russian Constitution formalises the protection of “historical truth” and respect for the “memory of the defenders of the Fatherland”. A novel Art. 67 of the Russian Constitution (2020) will prohibit “diminishing the importance of the heroism of the people in the defense of the Fatherland”.<sup>59</sup> Obviously, this provision targets mainly the Soviet past and its commemoration, in particular the glorification of the Soviet army. However, as clearly shown by the contributors of this Special Section, this Russian sample of mnemonic constitutionalism has broader implications for the entire area of memory governance in CEE and will undoubtedly deepen the divisions and disputes that already exist. To give but one apt example, Nikolay Koposov has shown how countries such as Czechia, Hungary, Latvia, Lithuania and Poland criminalised communist misdeeds, both as a reaction to Putin’s neo-imperial ambitions, and as part and parcel of memory wars with Moscow.<sup>60</sup> Ironically, this novel – Putin’s – version of the Constitution (2020) is mimicking the preceding – Orbán’s – constitutional provisions (2011) about his-

<sup>57</sup> Ukraïnski Instytut Natsional'noï Pam'yati, in Ukrainian (shortly UINM).

<sup>58</sup> I. Nuzov, *Biez Prava na Pravdu: o Popravkakh v Konstitutsiju*, in *Radio Svoboda*, 29 June 2020, [www.svoboda.org](http://www.svoboda.org).

<sup>59</sup> For a full text of constitutional amendments to the Russian Constitution (in Russian), see the official page of the Russian Parliament: [www.duma.gov.ru](http://www.duma.gov.ru). The amendments to the Constitution added provisions as follows: “(A) The Russian Federation, united by a thousand-year history, preserves the memory of our ancestors who transmitted to us our ideals and faiths in God, as well as continuity in developing the Russian state, along with recognizing the historically established state unity. (B) The Russian Federation honours the memory of the defenders of the Fatherland, ensures the protection of historical truth. Diminishing the significance of the feat of the people in the defense of the Fatherland is not allowed”.

<sup>60</sup> See the *Article* of Nikolay Koposov to the first part of this Special Section, N. KOPOSOV, *Historians, Memory Laws, and the Politics of the Past*, in *European Papers*, 2020, Vol. 5, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 107 *et seq.*

torical continuity of a “thousand-year” statehood and references to deity reminiscent of the Hungarian constitutional avowal.<sup>61</sup>

In recent years, therefore, mnemonic constitutionalism has been used, on the one hand, as a sword of democratic backsliding and, on the other, as a shield during memory wars welded in CEE. It is also indisputable that the entanglement of memory and history in the politics of countries with authoritarian ambitions is an extremely attractive tool for controlling not only social moods, but also narratives incorporating all other elements of the state. Sadly, the examples of Poland and Hungary remain tempting role models for many other countries in the region. These trends can also be apprehended as another step towards the dismantling of European integration: overt disregard and violation of European law are reinforced by departing from the efforts to consolidate the European *demos* started decades ago.<sup>62</sup> Such EU *demos* builds its community values on various historical memories, but nevertheless seeks to overcome differences, animosities and wounds from the past.

As demonstrated by the various authors in this Special Section, memory laws encompass legal, political, historical, sociological, linguistic, economic and even artistic facets meritorious of comparative study. The continuous exploration of growing mnemonic constitutionalism as it embraces and transcends memory laws leaves fascinating enigmas for further research and critical exploration.

<sup>61</sup> For a detailed analysis of mnemonic constitutionalism in Russia, see U. BELAVUSAU, *Mnemonic Constitutionalism and Rule of Law in Hungary and Russia*, forthcoming in *The Interdisciplinary Journal of Populism*, 2020.

<sup>62</sup> J.H.H. WEILER, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, in *European Law Review*, 1995, p. 219 *et seq.*



## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

*edited by Araceli Turmo*

#### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW: AN INTRODUCTION

As European Union competences gradually increase, criminal law is one of the areas of EU law on which most attention is focused. At the heart of this field, criminal procedural law is made particularly interesting by its position at the intersection of two sectors that were traditionally excluded from the European Union's harmonisation competences: criminal law and procedural law. It also remains an area of significant discrepancies among the Member States. Still, the interest of national authorities in the practical advantages of cooperation in criminal matters continues to increase. Pragmatic considerations are powerful incentives to transcend the difficulties inherent in the development of EU competences in such a sensitive policy area, which is still perceived as an essential component of the core sovereign powers of the state.<sup>1</sup>

Harmonisation and the "cross-fertilisation" of criminal procedural law is happening firstly through the influence of technical and institutional adjustments necessary to improve communication and cooperation between judicial authorities or to accommodate new actors such as the European Public Prosecutor's Office (EPPO). Such adjustments are increasingly accepted as the necessary conditions for useful cooperation mechanisms. Eurojust has registered approximately 17 per cent more requests for assistance every year.<sup>2</sup> Its operational capabilities are increased regularly in order to meet this growing demand. The resources allotted to the operational and financial support of Joint investigation teams by Eurojust are also being significantly expanded.<sup>3</sup> Concurrently, there has also been progress in the establishment of common (or, in any case, compatible) procedural standards as a necessary complement in order to ensure the

<sup>1</sup> F.-X. ROUX-DEMARE, *L'inaboutissement des mécanismes de coopération opérationnelle*, in C. BILLET, A. TURMO (eds), *La coopération opérationnelle en droit pénal de l'Union européenne*, Bruxelles: Bruylant, 2019, p. 31 et seq.

<sup>2</sup> European Union Agency for Criminal Justice Cooperation, Eurojust Annual Report 2019, 16 April 2020, [eurojust.europa.eu](http://eurojust.europa.eu), p. 7.

<sup>3</sup> Eurojust funding allocated to Joint investigation teams was increased to 1,44 million euro in 2019 and 1,95 million euro in 2020, *ibid.*, p. 14.



efficiency of these cooperation mechanisms. This has, of course, first involved judicial dialogue between the two European legal systems and their supreme courts, as well as across national legal systems. Within the EU, national implementation measures for the “procedural rights” directives<sup>4</sup> have entered into force and, as a result of the ensuing preliminary references, the Court of Justice has started developing case law<sup>5</sup> which is allowing it to construct its own interpretation of the standards set out in these instruments. The EU legislator has also turned its attention to other necessary additions to the existing judicial cooperation instruments, for instance regarding freezing and confiscation orders<sup>6</sup> and evidence.<sup>7</sup>

Although the agenda set in the Tampere<sup>8</sup> and Stockholm<sup>9</sup> programmes remains the main source of inspiration for EU interventions in criminal procedural law, the changing political landscape has led to greater importance being given to topics such as terrorism, which has a significant influence on the way in which Member States perceive the functions of EU criminal procedural law.<sup>10</sup> More importantly, the need to preserve the

<sup>4</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings; Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

<sup>5</sup> See, *inter alia*, Court of Justice: judgment of 19 September 2019, case C-467/18, *Rayonna prokuratura Lom* (on Directive 2012/13, Directive 2013/48 and Directive 2016/343) and judgment of 14 May 2020, case C-615/18, *Staatsanwaltschaft Offenburg* (on Directive 2012/13).

<sup>6</sup> Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

<sup>7</sup> Commission Proposal for a Regulation of the European Parliament and the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final, and Commission Proposal for a Directive of the European Parliament and the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM(2018) 226 final.

<sup>8</sup> European Council, Presidency conclusions of 15-16 October 1999.

<sup>9</sup> European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, 2 December 2009, p. 5.

<sup>10</sup> President of France Emmanuel Macron stated in a speech on his “Initiative for Europe” on 26 September 2017 that he wanted the European Public Prosecutor’s competences to be expanded to include terrorism. As part of the preparation of the Leaders’ meeting in Salzburg on 9-20 September 2018, the Commission presented a Communication proposing the same: Communication COM(2018) 641 final of 12

rule of law across the Member States has become a major political and legal priority for all EU institutions after the constitutional reforms introduced in certain States. President von der Leyen's mission letter to the new Commissioner for Justice, Didier Reynders, places upholding the rule of law as his first priority.<sup>11</sup> The limits of mutual recognition, which had been perceived as a useful tool to achieve the goals set in Tampere, are fast becoming apparent. Criminal procedural law cannot function at an EU level if national authorities do not trust that their counterparts in other Member States do not operate under the same standards of judicial independence and impartiality. The urgent need to find solutions in order to preserve judicial cooperation in criminal matters is apparent in the growing case law of the Court of Justice, which is being asked to monitor compliance with such basic guarantees in national judicial systems at the same time as it tries to maintain trust in the existing mechanisms.

This Special Section is the result of a conference held at the University of Nantes on 6 and 7 February 2020, titled *Towards European Criminal Procedural Law*. It is structured around two main themes. The first is related to the systemic requirements for a European law of criminal procedure and focuses on the gradual construction of EU and European Convention standards, especially related to fundamental rights and the rule of law, which create the conditions for European criminal procedural law. Julia Burchett's *Article* examines the Court of Justice's case law on judicial independence and its impact on judicial cooperation in criminal matters. In his *Article*, Tony Marguery analyses the case law on mutual trust and mutual recognition as revealing the development of European values through demands related to the individual treatment of litigants as well as to the overall structure and functioning of national judicial systems. Konstantinos Zoumpoulakis focuses on the concept of minimum rules as a feature of EU criminal procedural law and argues that the balance between the goals of police and judicial cooperation versus the discretion of Member States must be redefined. Ariadna Ochnio argues in favour of a new definition of the concept of "judicial authority" within European arrest warrant proceedings in view of the inadequacies of the current system under which national authorities must undertake a case-by-case review of their counterparts' compliance with standards related to fundamental rights and the rule of law. In their *Article*, Joost Nan and Sjarai Lestrade examine the potential for a recognition of a right to claim innocence in EU law and argue that it would facilitate both horizontal judicial cooperation and the oversight by the Court of Justice. The last *Article* presents the evolving case law of the Court of Justice and the European Court of Human Rights on *ne bis in*

September 2018 from the Commission, *A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes*.

<sup>11</sup> U. VON DER LEYEN, Mission Letter to the new Commissioner for Justice, 1 December 2019, ec.europa.eu, p. 4.

*idem* as an illustration of the difficult path towards common standards for fundamental rights in criminal procedure.

The second part of this Special Section explores different instruments and rules which contribute to the emergence of criminal procedure as a specific field of EU law. Three *Articles* examine the future European Public Prosecutor's Office. Louise Seiler presents a detailed criticism of the procedural guarantees offered to the defence within the EPPO Regulation and presents a number of possible improvements. Ana Laura Claes, Anne Werding and Vanessa Franssen make a case for the compatibility of the structure set out in the Regulation with the *juge d'instruction* (investigative judge), a central feature of criminal procedure in Belgium, France and Luxembourg. Maria Ludwiczack Glassey presents a comparative perspective, analysing the construction of the EPPO through a Swiss lens, establishing parallels with the Office of the Attorney General of Switzerland created in 2011. The next three *Articles* examine the specific issues related to data protection and digital services. Maxime Lassalle's *Article* establishes the inadequacies of EU standards related to data protection in the field of criminal procedural law, despite the legal basis in the Treaty and the Court of Justice's ambitious case law. Hélène Christodoulou, Laetitia Gaurier and Alice Mornet defend a somewhat favourable analysis of the "E-evidence" proposal, explaining its potential and advantages over the current situation and mutual recognition. Marine Corhay presents a more critical view of the same, focusing on the risks resulting from direct cooperation between judicial authorities and online service providers. The last three *Articles* offer perspectives on the emergence of EU criminal procedural law as a phenomenon whose impact reaches areas beyond criminal policy within the European Union. Frédérique Michéa and Laurent Rousvoal show how the European Travel Information and Authorisation System, although not strictly within the realm of criminal law, in fact has an impact on national criminal procedural law. Chloé Brière examines the extraterritorial impact of EU criminal procedural law with a particular focus on the negotiations for new international agreements in which the European Commission is playing an important role. Last, An-negret Engel's paper explains the current state of EU-UK relations in the area of criminal procedure and tries to predict the forms of cooperation that could follow.

**Araceli Turmo\***

\* Associate Professor, University of Nantes, araceli.turmo@univ-nantes.fr. I would like to thank *European Papers*, and in particular Gareth Davies and Stefano Montaldo, for their interest in this project and all their help and valuable feedback throughout the publication process.



## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

*edited by Araceli Turmo*

## LA COUR DE JUSTICE DE L'UNION EUROPÉENNE ET L'EXIGENCE D'INDÉPENDANCE DE LA JUSTICE

JULIA BURCHETT\*

TABLE OF CONTENTS: I. La question de l'indépendance des juges et des procureurs. – II. L'indépendance comme exigence primordiale pour la coopération judiciaire pénale. – II.1. Une garantie essentielle pour la protection des droits fondamentaux. – II.2. Un gage de confiance mutuelle entre autorités judiciaires. – III. L'indépendance comme exigence conditionnant l'exécution d'un MAE: les limites posées à la confiance mutuelle entre États membres. – III.1. Un risque réel de violation du droit fondamental à un tribunal indépendant justifiant l'inexécution d'un MAE: l'arrêt *LM*. – III.2. Un lien de subordination à l'égard de l'exécutif non nécessairement invalidant pour l'émission d'un MAE: l'arrêt *OG et PI* et ses suites. – IV. Conclusion.

ABSTRACT: As a core requirement of the fundamental right to a fair trial, judicial independence is of fundamental importance to ensure the proper conduct of criminal procedure and to uphold the rule of law. In this respect and despite their distinctive status, it is essential that national judges and prosecutors can act without influence during their mission. The requirement of independence has recently received increasing attention at EU level, notably in the context of the European Arrest Warrant mechanism following a series of preliminary rulings. This *Article* analyses the requirement of independence in the light of recent Court of justice rulings concerning judges and prosecutors, two key players in the criminal procedural law and judicial cooperation in criminal matters.

KEYWORDS: independence – prosecutors – judicial authority – judicial cooperation in criminal matters – European Arrest Warrant – Court of justice.

### I. LA QUESTION DE L'INDÉPENDANCE DES JUGES ET DES PROCUREURS

Ce sont des contextes différents qui ont amené la Cour de justice à se prononcer sur l'épineuse question de l'indépendance, d'une part des juges, de l'autre des procureurs, dans le cadre du mécanisme du mandat d'arrêt européen (MAE). A noter que ces ques-

\* Doctorante, co-tutelle de thèse entre l'Université Grenoble-Alpes (CESICE) et l'Université libre de Bruxelles (CDE-ULB), [julia.burchett@ulb.ac.be](mailto:julia.burchett@ulb.ac.be).



tions ne sont pas indépendantes l'une de l'autre du fait de la complémentarité des fonctions assumées par ces deux acteurs. S'il est depuis longtemps reconnu que l'indépendance du ministère public est indissociable de l'indépendance du pouvoir judiciaire,<sup>1</sup> ce lien a pu être mis en exergue dans le cadre d'une affaire récemment portée devant la Cour européenne des droits de l'homme.<sup>2</sup> Celle-ci est venue rappeler à quel point l'indépendance du pouvoir judiciaire est centrale pour le respect des droits fondamentaux, et pour la préservation de l'intégrité des fonctions de ceux qui exercent un rôle de premier plan dans la justice pénale.

C'est également ce qu'est venue rappeler la Cour de justice dans plusieurs affaires récentes. Dans l'arrêt *Minister for Justice and Equality (LM)*<sup>3</sup> du 25 juillet 2018, la Cour de justice a été amenée à examiner la question du sort à réserver à un MAE émis par l'État polonais dont le système judiciaire est en proie à des défaillances systémiques menaçant, entre autres, l'indépendance de ses juridictions. La question préjudicielle posée à la Cour prend ici racine dans le contexte sensible de crise de l'État de droit que traverse actuellement l'Union européenne en raison de la fragilisation de l'indépendance du pouvoir judiciaire dans plusieurs de ses États membres.

Dans un autre contexte venant raviver des débats anciens – du moins dans certains États membres comme la France – la question de l'indépendance s'est également posée à l'égard de certains procureurs nationaux, en raison des doutes soulevés quant à leur capacité d'émettre valablement un MAE compte tenu du lien de subordination auquel ils sont soumis à l'égard du pouvoir exécutif. Les décisions rendues, de nature à impacter l'organisation judiciaire au niveau national, ont provoqué une onde de choc dans les États membres concernés, et au-delà. A titre liminaire, il convient de rappeler que les arrêts de la Cour ont une portée qui dépasse bien souvent l'affaire ayant donné lieu au renvoi préjudiciel, et qu'ils sont susceptibles d'avoir un impact au-delà des États membres parties à l'affaire.

Dans la mesure où le choix du présent *Article* est d'examiner l'exigence d'indépendance appliquée à ces deux contextes, il importe de préciser que le degré d'indépendance requis n'est pas le même à l'égard de ces deux autorités. Alors que la garantie d'indépendance est inhérente à la mission de juger<sup>4</sup> et s'applique de manière stricte à l'égard des juges, il n'en va pas ainsi des magistrats du parquet du fait de leur subordination au pouvoir exécutif. Il

<sup>1</sup> V. Avis conjoint du Conseil consultatif de juges européens (CCJE) et Conseil consultatif de procureurs européens (CCPE), Déclaration de Bordeaux, *Juges et procureurs dans une société démocratique*, 20 janvier 2010, [search.coe.int](http://search.coe.int); avis n° 13(2018) du CCPE sur l'indépendance, la responsabilité et l'éthique des procureurs, 23 novembre 2018.

<sup>2</sup> Cour européenne des Droits de l'Homme, arrêt du 5 mai 2019, n° 3594/19, *Kövesi c. Roumanie*, par. 159 et seq.

<sup>3</sup> Cour de justice, arrêt du 25 juillet 2018, affaire C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC].

<sup>4</sup> Cour de justice, arrêt du 27 février 2018, affaire C-64/16, *Associação Sindical dos Juizes Portugueses* [GC], par. 42.



n'en demeure pas moins que cette exigence leur est applicable dans la mesure où ceux-ci ont été désignés par le droit national de plusieurs États membres comme "autorité judiciaire d'émission" compétente pour émettre un MAE.<sup>5</sup>

La question de l'indépendance de ces deux acteurs clés de la procédure pénale, que sont les juges et les magistrats du parquet, se pose en des termes différents dans les arrêts soumis devant la Cour. L'une est liée aux conditions que doit remplir l'autorité judiciaire d'émission pour pouvoir valablement émettre un MAE au sens, principalement, de l'art. 6, par. 1, de la décision-cadre de 2002.<sup>6</sup> L'autre tient aux conditions permettant à l'autorité judiciaire d'exécution de s'abstenir d'exécuter un MAE sur le fondement de l'art. 1, par. 3, de cette même décision-cadre. Dans les deux cas, le problème du défaut d'indépendance a pour corollaire l'importance que soit garantie une protection effective des droits et libertés fondamentaux de l'individu concerné et témoigne de l'instauration d'un climat de défiance entre les autorités nationales s'agissant des garanties offertes par leur systèmes judiciaires respectifs.

Le présent *Article* se propose d'examiner la question de l'indépendance à l'aune des décisions rendues récemment par la Cour relativement à ces deux acteurs. Si l'attention consacrée à cette exigence a été particulièrement mise en relief dans le contexte du MAE, elle retient une attention grandissante dans l'espace judiciaire pénal<sup>7</sup> et pèse considérablement dans les discussions entourant l'entrée en fonction imminente du futur parquet européen. Il est intéressant de constater que cette exigence a été au cœur des débats relatifs à la nomination du futur chef du Parquet européen et que plusieurs garde-fous ont été prévus au sein du règlement applicable à ce futur organe pour préserver l'indépendance de ses membres.<sup>8</sup>

<sup>5</sup> *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 55.

<sup>6</sup> Décision-cadre 2002/584/JAI du Conseil du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre États membres.

<sup>7</sup> A titre d'exemple, plusieurs formations ont été organisées par le Réseau européen de formation judiciaire (REFJ) entre 2018 et 2020 sur des thèmes relatifs à l'indépendance des juges et des procureurs.

<sup>8</sup> Pour une analyse approfondie des enjeux entourant la nomination du chef du parquet européen v. C. BRIERE, *The Nomination of the European Chief Prosecutor: A Saga Highlighting the Importance of the EPPO for the Rule of Law in the EU*, in A. WEYEMBERGH, C. CHEVALLIER-GOVERS (dir.), *La création du parquet européen: simple évolution ou révolution au sein de l'espace judiciaire européen?*, Bruxelles: Larcier, 2020, en cours de publication. Les conséquences éventuelles découlant du manque d'indépendance fonctionnel de certains procureurs nationaux n'ont pas manqué d'être relevées pour le fonctionnement de ce futur organe supranational. Pour des débats relatifs au statut des parquets français v. V. SIZAIRE, *Pour l'honneur du procureur "à la française". A propos de l'arrêt de la Cour de justice de l'Union européenne du 12 décembre 2019*, in *La Revue des droits de l'homme, Actualités Droits-Libertés*, 2020, journals.openedition.org, p. 5. Dès lors que cet organe supranational a vocation à être secondé par les autorités de poursuites nationales, dont le degré d'autonomie à l'égard de l'exécutif varie considérablement d'un État à l'autre, John Vervaele entrevoit le risque que les procédures diligentées au niveau central du parquet européen puissent être influencées par des intérêts politiques v. J. VERVAELE, *Judicial and Political Accountability for Criminal Investigations and Prosecutions by a European Public Prosecutor's Office in the EU: the Dissymmetry of Shared Enforce-*

L'analyse cherchera tout d'abord à examiner l'importance que revêt l'exigence d'indépendance pour la coopération judiciaire en matière pénale tout en cherchant à mieux saisir son contenu (II). Elle s'attachera ensuite à analyser les conséquences pratiques qui découlent du défaut de cette exigence dans le contexte du mécanisme du MAE, instrument emblématique de la coopération judiciaire en matière pénale car de loin le plus utilisé (III). Il s'agira de tirer les enseignements de ces récentes décisions, afin d'examiner dans quelle mesure l'exigence d'indépendance est susceptible de renverser la présomption selon laquelle les ordres juridiques nationaux offrent une protection équivalente et effective des droits fondamentaux reconnus au niveau de l'Union, et par conséquent, de remettre en cause la confiance mutuelle entre États.

## II. L'INDÉPENDANCE COMME EXIGENCE PRIMORDIALE POUR LA COOPÉRATION JUDICIAIRE PÉNALE

Si l'exigence d'indépendance est au cœur des débats actuels, c'est qu'elle revêt une fonction primordiale au sein de l'ordre juridique de l'Union. Cette exigence est indispensable pour assurer la protection effective des droits que les justiciables tirent du droit de l'Union (II.1) et, par extension, pour préserver le respect de la valeur de l'État de droit sur laquelle l'Union repose, notamment lorsque sont mis en œuvre certains mécanismes de coopération judiciaire en matière pénale. Dans la mesure où ces mécanismes reposent sur une présomption de confiance mutuelle entre les États, c'est également sous cet angle que doit s'analyser l'exigence d'indépendance, tant elle conditionne la confiance que les autorités judiciaires nationales sont tenues de se témoigner (II.2).

### II.1. UNE GARANTIE ESSENTIELLE POUR LA PROTECTION DES DROITS FONDAMENTAUX

Dans l'arrêt *LM*, la Cour rappelle que l'indépendance des juges “relève du contenu essentiel du droit fondamental à un procès équitable, lequel revêt une importance cardinale en tant que garant de la protection de l'ensemble des droits que les justiciables tirent du droit de l'Union et de la préservation des valeurs communes aux États membres énoncées à l'art. 2 TUE, notamment, de la valeur de l'État de droit”.<sup>9</sup> Cet extrait reflète le lien indissociable qui existe entre ces différentes notions – indépendance, protection juridictionnelle effective et État de droit.<sup>10</sup>

ment, in M. SCHOTLEN, M. LUCHTMAN (eds), *Law Enforcement by EU Authorities – Implications for Political and Judicial Accountability*, Cheltenham: Elgar, 2017, p. 254.

<sup>9</sup> *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 48.

<sup>10</sup> Pour des développements approfondis sur l'exigence d'indépendance du juge au sein de l'ordre juridique de l'Union v. S. ADAM, P. VAN ELSUWEGE, *L'exigence du juge, paradigme de l'Union européenne comme Union de droit*, in *Journal de droit européen*, 2018, p. 334 et seq.

L'indépendance de la justice est une composante essentielle du droit fondamental au procès équitable consacré à l'art. 47 de la Charte des droits fondamentaux (la Charte) qui a pour équivalent l'art. 6, par. 1, de la Convention européenne des droits de l'homme (CEDH). La garantie d'indépendance est consacrée dans plusieurs constitutions nationales et revêt une fonction primordiale pour assurer que dans l'exercice de leurs fonctions, les juges et les procureurs ont la possibilité de prendre des décisions à l'abri de toute influence ou pression. C'est de cette garantie que va dépendre la protection effective des droits des justiciables. Comme le souligne Tony Marguery, dès lors que l'indépendance de la justice ne peut être assurée dans un État membre, les justiciables ne sont pas en mesure de contester en justice la légalité des actes, notamment trouvant leur origine dans le droit de l'Union.<sup>11</sup> De fait, cet État ne respecte plus l'obligation imposée par l'art. 19 TUE d'assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union qui concrétise la valeur de l'État de droit affirmée à l'art. 2 TUE.<sup>12</sup> Cette protection est d'autant plus importante dans le cadre du mécanisme de remise institué par le MAE que celui-ci est de nature à porter atteinte aux droits et libertés fondamentales de l'individu concerné. Au-delà des mesures privatives de liberté susceptibles d'être prises dans le cadre de l'exécution du MAE, une série de droits procéduraux garantis par la Charte et le droit dérivé de l'UE mais aussi par la Convention européenne des droits de l'homme et/ou les constitutions nationales, tel que le droit d'accès à un avocat ou encore, le respect de la présomption d'innocence est également susceptible d'être affectée par une telle mesure. Ce dont il découle que l'autorité en charge de l'émission/l'exécution d'un MAE doit être en mesure d'assurer une protection judiciaire suffisante des droits de l'individu concerné conformément aux exigences dont dépend sa validité.<sup>13</sup>

L'exigence d'indépendance du juge, habituellement présenté comme le garant des droits et libertés, revêt deux aspects selon une jurisprudence constante de la Cour.<sup>14</sup> Le premier, d'ordre externe, suppose que l'instance concernée exerce ses fonctions en toute autonomie, sans être soumise à aucun lien hiérarchique ni à des ordres ou instructions de quelque origine que ce soit afin de la protéger de toute influence ou toute pression extérieure susceptible de mettre en péril l'indépendance de jugement de ses membres et

<sup>11</sup> T. MARGUERY, *Confiance mutuelle, reconnaissance mutuelle et crise de valeurs: la difficile équation entre justice pénale européenne et diversité nationale*, in *European Papers*, 2020, Vol. 5, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 1271 et seq.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 56; Cour de justice, arrêt du 1<sup>er</sup> juin 2016, affaire C-241/15, *Bob-Dogi*, par. 55-57.

<sup>14</sup> Cour de justice: arrêt du 16 février 2017, affaire C-503/15, *Margarit Panicello*, par. 37; arrêt du 19 septembre 2006, affaire C-506/04, *Wilson* [GC], par. 51; *Associação Sindical dos Juizes Portugueses* [GC], cit., par. 44; *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 63.

d'influencer leurs décisions.<sup>15</sup> Cela implique l'existence d'un certain nombre de règles, parmi lesquelles l'inaliénabilité, ou encore, la perception d'un certain niveau de rémunération en adéquation avec l'importance des fonctions exercées par les juges.<sup>16</sup>

La seconde composante, d'ordre interne, rejoint la notion d'impartialité et vise l'égalité de distance par rapport aux parties au litige et à leurs intérêts respectifs au regard de l'objet de celui-ci. Cet aspect exige le respect de l'objectivité et l'absence de tout intérêt dans la solution du litige en dehors de la stricte application de la règle de droit.<sup>17</sup> Ce qui implique l'existence de règles qui permettent d'écarter tout doute légitime, dans l'esprit des justiciables quant à l'imperméabilité de ladite instance à l'égard d'éléments extérieurs et à sa neutralité par rapport aux intérêts qui s'affrontent.<sup>18</sup> La Cour précise enfin que l'exigence d'indépendance impose également que le régime disciplinaire de ceux qui ont pour tâche de juger présente les garanties nécessaires afin d'éviter tout risque d'utilisation d'un tel régime en tant que système de contrôle politique du contenu des décisions judiciaires.<sup>19</sup>

La préservation de l'exigence d'indépendance est primordiale aux yeux de la Cour non seulement à l'égard des juridictions nationales, mais aussi à l'égard des "autorités judiciaires" – notion plus englobante incluant les autorités du parquet<sup>20</sup> amenées à jouer un rôle clé dans le cadre du système de remise institué par le mécanisme du MAE. Elle répond au besoin d'assurer que la personne qui a fait l'objet d'un MAE a pu bénéficier d'une protection effective de ses droits conformément au double niveau de protection offert par cet instrument.<sup>21</sup> Dans ce schéma, tant l'émission du mandat d'arrêt national que celle du mandat d'arrêt européen doivent faire l'objet d'un contrôle juridictionnel de proportionnalité visant à protéger les individus concernés contre toute action excessive.

Lorsque l'autorité émettrice d'un MAE est un parquet, cette exigence est dès lors consubstantielle à la bonne réalisation du contrôle de proportionnalité qui pèse sur elle au stade de l'émission dudit mandat, dans l'objectif de garantir que celui-ci a pu être émis à l'abri de toute ingérence du pouvoir exécutif. Conformément aux exigences posées par la Cour dans l'arrêt de principe *OG et PI*, cela implique que l'autorité d'émission soit "en mesure d'exercer cette fonction de façon objective, en prenant en compte tous les éléments à charge et à décharge, et sans être exposée au risque que son pouvoir

<sup>15</sup> *Associação Sindical dos Juizes Portugueses* [GC], cit., par. 51; *Margarit Panicello*, cit., par. 37; *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 63.

<sup>16</sup> *Associação Sindical dos Juizes Portugueses* [GC], cit., par. 45; *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 64.

<sup>17</sup> *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 65.

<sup>18</sup> *Ibid.*, par. 66.

<sup>19</sup> *Ibid.*, par. 67.

<sup>20</sup> Cour de justice: arrêt du 10 novembre 2016, affaire C-452/16 PPU, *Poltorak*, par. 33 et 35; arrêt du 10 novembre 2016, affaire C-477/16 PPU, *Kovalkovas*, par. 34 et 36.

<sup>21</sup> *Bob-Dogi*, cit., par. 55; Cour de justice, arrêt du 27 mai 2019, affaires jointes C-508/18 et C-82/19 PPU, *OG (Parquet de Lübeck) et PI (Parquet de Zwickau)* [GC], par. 71.

décisionnel fasse l'objet d'ordres ou d'instructions extérieurs, notamment de la part du pouvoir exécutif, de telle sorte qu'il n'existe aucun doute quant au fait que la décision d'émettre le mandat d'arrêt européen revienne à cette autorité et non pas en définitive audit pouvoir".<sup>22</sup> Pour la Cour "cette indépendance exige qu'il existe des règles statutaires et organisationnelles propres à garantir que l'autorité judiciaire d'émission ne soit pas exposée, dans le cadre de l'adoption d'une décision d'émettre un tel mandat d'arrêt, à un quelconque risque d'être soumise notamment à une instruction individuelle de la part du pouvoir exécutif".<sup>23</sup>

Outre que l'indépendance de ces deux acteurs incontournables de la justice pénale revêt une fonction primordiale pour assurer une protection effective des droits et libertés fondamentaux garantis par l'ordre juridique de l'Union et pour préserver le fonctionnement de celle-ci sur la base de la valeur d'État de droit, cette exigence est tout aussi importante pour maintenir une confiance mutuelle entre les autorités judiciaires amenées à collaborer dans le domaine de l'espace de liberté, de sécurité et de justice (ELSJ).

## II.2. UN GAGE DE CONFIANCE MUTUELLE ENTRE AUTORITÉS JUDICIAIRES

La Cour a déjà eu l'occasion de souligner l'importance que revêt l'exigence d'indépendance pour la coopération entre autorités judiciaires au sens large du terme. Elle a en ce sens reconnu que l'indépendance des juridictions nationales est, en particulier essentielle au bon fonctionnement du système de coopération judiciaire qu'incarne le mécanisme de renvoi préjudiciel prévu à l'art. 267 TFUE, en ce que, selon une jurisprudence constante, ce mécanisme ne peut être activé que par une instance, chargée d'appliquer le droit de l'Union, qui répond, notamment, à ce critère d'indépendance.<sup>24</sup> Cette exigence revêt également une importance toute particulière dans le système de coopération judiciaire pénale instauré entre les États membres eu égard à la confiance mutuelle sur laquelle celle-ci repose.

Ainsi que le rappelle la Cour à titre liminaire dans ses récentes décisions, le principe de reconnaissance mutuelle, sur lequel est fondé le système du MAE, repose lui-même sur la confiance réciproque entre les États membres quant au fait que leurs ordres juridiques nationaux respectifs sont en mesure de fournir une protection équivalente et effective des droits fondamentaux reconnus au niveau de l'Union, en particulier dans la Charte. A cet égard, il importe de préciser que le respect de la Charte s'impose aux États membres et, par conséquent à leurs juridictions, lorsque celles-ci mettent en œuvre le droit de l'Union, ce qui est le cas lorsque les autorités judiciaires d'émission et

<sup>22</sup> *OG et PI* [GC], cit., para 73.

<sup>23</sup> *Ibid.*, par. 74.

<sup>24</sup> *Associação Sindical dos Juizes Portugueses* [GC], cit., par. 43.

d'exécution appliquent les dispositions nationales adoptées en exécution de la décision-cadre relative au MAE.<sup>25</sup>

La confiance mutuelle permet une coopération entre les États membres en raison des valeurs communes qu'ils sont supposés partager et respecter, valeurs au rang desquelles se trouvent la dignité humaine, l'égalité, l'État de droit et les droits fondamentaux.<sup>26</sup> Elle impose, à chacun de ces États de considérer, sauf circonstances exceptionnelles, que tous les autres États membres respectent le droit de l'Union et, tout particulièrement, les droits fondamentaux reconnus par ce droit.<sup>27</sup> Du fait de cette présomption, le mécanisme du MAE aboutissait jusqu'à il y a peu à une quasi-automaticité de la coopération en réduisant considérablement les motifs de nature à justifier un refus d'exécution d'un MAE. Dans ce schéma, les autorités nationales d'exécution d'un MAE sont en droit de présumer que la procédure d'émission dudit mandat conduite par son homologue répond aux exigences d'une protection juridictionnelle effective, au nombre desquelles figure, notamment, l'indépendance.

Cette présomption est d'autant plus importante que, comme il a été rappelé précédemment, le mécanisme de remise institué par la décision-cadre de 2002 est attentatoire aux droits et libertés de la personne concernée. Dès lors, l'indépendance apparaît non seulement comme une condition essentielle pour assurer que la coopération mise en place dans le cadre du MAE puisse s'établir sur la base d'une procédure respectueuse des droits et libertés de l'individu concerné, mais aussi et corrélativement, pour préserver la confiance mutuelle que les autorités nationales sont tenues de se témoigner dans le cadre de celle-ci. Cette vision de l'indépendance comme pré-condition pour que s'établisse une confiance mutuelle entre les juridictions nationales amenées à coopérer dans l'ELSJ est reflétée dans les propos du président Lenaerts: "From a transnational perspective, mutual trust between courts can only take place where those courts are independent, as only will those courts see each other as equals".<sup>28</sup>

Il convient en outre de rappeler que la caractéristique essentielle du mécanisme de remise que constitue le MAE<sup>29</sup> est d'exclure les considérations d'opportunité politique qui pouvaient émailler l'extradition pour établir une procédure entre autorités judiciaires.<sup>30</sup> Le mandat d'arrêt européen remplace ainsi la procédure classique d'extradition par un système de remise simplifiée entre autorités judiciaires conformé-

<sup>25</sup> Cour de justice, arrêt du 5 avril 2016, affaires jointes C-404/15 et C-659/15 PPU, *Aranyosi et Căldăraru* [GC], par. 34.

<sup>26</sup> Cour de justice, avis 2/13 du 18 décembre 2014.

<sup>27</sup> *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 36.

<sup>28</sup> K. LENAERTS, *The Court of Justice and National Courts: A Dialogue Based on Mutual Trust and Judicial Independence*, discours d'ouverture à la Conférence scientifique "Application du droit européen dans la jurisprudence", Cour administrative suprême de Pologne, 19 mars 2018, [www.nsa.gov.pl](http://www.nsa.gov.pl).

<sup>29</sup> Décision-cadre 2002/584/JAI, cit.

<sup>30</sup> V. MICHEL, *Coopération judiciaire en matière pénale – Autorité judiciaire d'émission*, in *Revue Europe*, juillet 2019, p. 1 et seq.

ment à la volonté du législateur de dépolitiser la procédure du MAE par rapport à l'extradition classique. D'où l'importance que l'autorité judiciaire chargée de l'émission/l'exécution d'un MAE puisse offrir à son homologue des garanties d'indépendance suffisantes de nature à préserver ses décisions de toute influence politique conformément à la logique voulue par le MAE.

Or, la désignation des parquets comme autorité judiciaire compétente pour émettre un MAE nourrit d'importants débats compte tenu de la structure hiérarchique caractéristique du ministère public. De même que le risque que des réformes judiciaires initiées dans certains États membres puissent aboutir en pratique à un contrôle politique des décisions judiciaires soulève des inquiétudes légitimes, surtout lorsque l'on sait que les mécanismes de coopération judiciaire pénale, dont fait partie le MAE, fonctionnent sur la base d'une confiance réciproque entre États. Plusieurs décisions préjudicielles récentes démontrent en effet que de plus en plus, cette présomption tend à être renversée.

### III. L'INDÉPENDANCE COMME EXIGENCE CONDITIONNANT L'EXÉCUTION D'UN MAE: LES LIMITES POSÉES À LA CONFIANCE MUTUELLE ENTRE ÉTATS MEMBRES

Depuis quelques années, la Cour a développé des lignes jurisprudentielles permettant à l'autorité judiciaire d'exécution de s'abstenir d'exécuter un MAE dans certaines situations où les droits fondamentaux de la personne concernée sont menacés. Cette évolution jurisprudentielle a d'abord concerné des situations où les conditions de détention concrètes peuvent constituer un traitement inhumain et dégradant contraire aux droits fondamentaux protégés par l'art. 4 de la Charte et par l'art. 3 de la Convention.<sup>31</sup> Notre étude se concentrera sur deux autres types de situations, celles dans lesquelles l'exigence d'indépendance fait défaut,<sup>32</sup> que ce soit en raison de défaillances systémiques affectant le système judiciaire de l'État d'exécution (section III.1) ou en cas de subordination de l'autorité d'émission au pouvoir exécutif d'une manière incompatible avec l'exigence d'indépendance (section III.2).

<sup>31</sup> *Aranyosi et Căldăraru* [GC], cit.; Cour de justice, arrêt du 15 octobre 2010, affaire C-128/18, *Dorobantu* [GC].

<sup>32</sup> Sur les limites à la confiance mutuelle dans le cadre du MAE v. L. BAY LARSEN, *L'espace judiciaire européen: évolutions récentes et perspectives – Quelques remarques sur la place et les limites de la confiance mutuelle dans le cadre du mandat d'arrêt européen*, Dossier spécial, in *L'observateur de Bruxelles*, n°112, avril 2018, p. 10 et seq.

### III.1. UN RISQUE RÉEL DE VIOLATION DU DROIT FONDAMENTAL À UN TRIBUNAL INDÉPENDANT JUSTIFIANT L'INEXÉCUTION D'UN MAE: L'ARRÊT *LM*

Dans l'arrêt *LM*,<sup>33</sup> était soulevée la question délicate de savoir si des indices sérieux de menaces structurelles affectant l'indépendance de la magistrature d'un État membre, pouvant faire craindre une violation du droit fondamental de l'intéressé à un procès équitable, sont de nature à justifier une suspension de l'exécution d'un MAE, et si oui, à quelles conditions. Il est à noter que cette affaire intervient dans un contexte particulièrement sensible du fait qu'à cette période, la Commission européenne avait déjà entrepris des initiatives visant à mettre en cause les récentes réformes du système judiciaire polonais sur le fondement de l'art. 7 TUE. Il était pour la première fois question d'un risque d'atteinte aux exigences d'un procès équitable, consacrées respectivement à l'art. 47, deuxième alinéa, de la Charte et à l'art. 6 de la Convention, comme motif pouvant justifier la non-exécution d'un MAE.<sup>34</sup> Si la juridiction de renvoi nourrit des doutes quant au respect des droits fondamentaux par l'État d'émission, il convient de rappeler que la décision-cadre relative au MAE qui énumère exhaustivement les motifs de refus d'exécution admissibles, ne prévoit pas explicitement qu'un risque de violation des droits fondamentaux puisse justifier un tel refus d'exécution.

Cette absence de base légale n'a pas empêché la Cour, dans un arrêt du 5 avril 2016, *Aranyosi et Căldăraru*,<sup>35</sup> d'admettre, même en dehors des hypothèses de refus de remise expressément prévues par la décision-cadre, des limites au principe de confiance mutuelle, et par voie de conséquence, à l'obligation d'exécution quasi automatique du MAE qui en découle. Conformément à la volonté d'encadrer strictement les possibilités de refus, ces limitations ne peuvent intervenir que dans des circonstances exceptionnelles, matérialisées par exemple par un contexte avéré de défaillances systémiques ou généralisées duquel découlerait un risque individuel que la personne concernée subisse un traitement inhumain ou dégradant dans l'État d'émission au sens de l'art. 4 de la Charte. Par analogie au raisonnement adopté dans l'arrêt *Aranyosi*, la Cour va ainsi considérer que de telles circonstances exceptionnelles peuvent également résulter d'un risque avéré que la personne concernée n'aura pas accès à un tribunal indépendant et impartial dans l'État d'émission. C'est donc logiquement que la Cour va

<sup>33</sup> Pour une analyse de l'arrêt *Minister for Justice and Equality v. C. RIZCALLAH*, Arrêt "LM": un risque de violation du droit fondamental à un tribunal indépendant s'oppose-t-il à l'exécution d'un mandat d'arrêt européen?, in *Journal de droit européen*, 2018, p. 348 et seq.

<sup>34</sup> V. M. WENDEL, *Indépendance judiciaire et confiance mutuelle: à propos de l'arrêt LM*, in *Cahiers de droit européen*, 2019, p. 189 et seq.

<sup>35</sup> *Aranyosi et Căldăraru* [GC], cit., par. 88 et seq. Pour une analyse de cet arrêt v. E. BRIBOSIA, A. WEYEMBERGH, Arrêt *Aranyosi et Căldăraru*: imposition de certaines limites à la confiance mutuelle dans la coopération judiciaire pénale, in *Journal de droit européen*, 2016, p. 225 et seq.



transposer le test en deux étapes issu de l'arrêt de principe *Aranyosi*<sup>36</sup> au contrôle incombant à l'autorité d'exécution dans la présente espèce.

Dans ce schéma, l'autorité judiciaire d'exécution est tout d'abord tenue d'apprécier l'existence d'un risque réel que la personne concernée subisse une violation de ce droit fondamental, lorsqu'elle doit décider de sa remise aux autorités dudit État membre. Sur ce point, la Cour considère que les risques d'atteinte préalablement constatées dans la proposition motivée adressée par la Commission sur le fondement de l'art. 7, par. 1, TUE constituent des éléments particulièrement pertinents aux fins de cette évaluation mais non suffisants. Ainsi, l'enclenchement par la Commission de la procédure prévue à l'art. 7, par. 1, TUE n'est pas de nature, aux yeux de la Cour, à remettre à lui seul en cause le postulat qui justifie le principe de confiance mutuelle à l'égard de cet État membre. Et ce, alors même que le risque de violation des droits fondamentaux par ledit État est *a priori* plus apparent, compte tenu des procédures en cours à l'encontre de la Pologne pour non-respect des valeurs de l'Union et des principes de l'État de droit et des avis de la Commission de Venise.<sup>37</sup>

Dans un deuxième temps, si l'autorité d'exécution constate qu'il existe un risque réel de violation du contenu essentiel du droit fondamental à un procès équitable de nature à compromettre l'indépendance des juridictions dudit État, celle-ci doit apprécier de manière concrète et précise, si, dans les circonstances de l'espèce il existe des motifs sérieux et avérés de croire que la personne recherchée courra effectivement un risque de subir un procès inéquitable en cas de remise.<sup>38</sup> Ceci suppose en particulier que cette autorité, le cas échéant, sollicite auprès de l'autorité judiciaire d'émission toute information complémentaire à celles dont elle dispose déjà et qu'elle juge nécessaire pour apprécier l'existence d'un tel risque concret. Cette exigence n'a pas manqué d'être critiquée par la doctrine dans la mesure où il peut sembler paradoxal de faire appel au concours de l'autorité judiciaire affectée par les défaillances systémiques préalablement établies afin de constater la concrétisation individuelle du péril allégué.<sup>39</sup> Cette seconde étape n'est toutefois pas applicable – et le refus d'exécuter le mandat devient donc automatique – dans l'hypothèse où le Conseil européen, statuant au titre de l'art. 7 TUE, a déjà constaté une violation grave et persistante par l'État membre concerné du prin-

<sup>36</sup> Dans l'arrêt *Aranyosi et Căldăraru*, la Cour a admis l'interdiction de remise, tout au moins temporairement, dans l'hypothèse d'un risque réel de traitement inhumain ou dégradant au sens de l'art. 4 de la Charte dans l'État d'émission moyennant la réalisation d'un contrôle en deux temps incombant à l'autorité d'exécution.

<sup>37</sup> European Commission for Democracy through Law (Venice Commission), Opinion no. 904/2017, [www.venice.coe.int](http://www.venice.coe.int).

<sup>38</sup> *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 68.

<sup>39</sup> V. C. RIZCALLAH, *Arrêt "LM"*, cit., p. 350.

cipe de l'État de droit et lorsque le Conseil a suspendu en conséquence l'application de la décision-cadre relative au MAE.<sup>40</sup>

Au regard des exigences imposées à l'autorité d'exécution dans le cadre du contrôle qui lui incombe, il ressort que la possibilité de faire échec à l'exécution d'un MAE pour des considérations tenant à la protection des droits fondamentaux est mise en balance avec le souci de préserver l'efficacité du mécanisme du MAE, dont l'utilité n'est plus à démontrer.<sup>41</sup> En l'espèce, la Cour Suprême d'Irlande, après avoir souligné la difficulté d'appliquer la seconde étape du test imposé par la Cour de justice,<sup>42</sup> est parvenue à la conclusion que le niveau de preuve exigé pour établir la présence d'un risque réel n'était pas satisfait.<sup>43</sup> L'arrêt *LM* envoie néanmoins un signal fort en confirmant que la confiance mutuelle entre les États membres, depuis longtemps considérée comme la "pierre angulaire" de la coopération judiciaire en matière pénale, ne rime pas avec confiance aveugle. Une vision récemment défendue par le président Koen Lenaerts, affirmant peu de temps après que le Parlement polonais ait approuvé un projet de loi autorisant des mesures disciplinaires à l'égard des juges réfractaires aux réformes judiciaires en Pologne, qu'il n'y a pas de place au sein de l'Union européenne pour des pays ne disposant pas de cours judiciaires indépendantes.<sup>44</sup>

L'exigence d'indépendance devient dès lors un des points cruciaux d'examen au stade de l'exécution d'un MAE, ce qui illustre encore une fois à quel point les autorités judiciaires nationales jouent un rôle essentiel en droit européen pour assurer en première ligne le respect des valeurs et principes fondamentaux de l'ordre juridique européen.

Une autre question, non liée à des risques de défaillances systémiques, mais tout autant révélatrice d'une certaine défiance entre États membres à l'égard des garanties offertes par leurs systèmes judiciaires réciproques, est celle de l'indépendance de certains procureurs nationaux. Cette dernière a également surgi comme une possible limite à la confiance mutuelle entre États dans le contexte de l'exécution d'un MAE.

<sup>40</sup> *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 72.

<sup>41</sup> Pour une analyse critique tendant à démontrer la prévalence des considérations d'effectivité du MAE sur la protection du droit fondamental à un tribunal indépendant dans le cadre de l'arrêt *LM v. M.-A. SIMONELLI*, "... And Justice for All?" *The Right to an Independent Tribunal after the Ruling of the Court of Justice in LM*, in *New Journal of European Criminal Law*, 2019, p. 329 et seq.

<sup>42</sup> Cour suprême d'Irlande, arrêt du 12 novembre 2019, *Minister for Justice & Equality v. Celmer*.

<sup>43</sup> *Ibid.*

<sup>44</sup> V. A. PTAK, *EU's top judge warns Poland over overhaul of judiciary*, in *Reuters*, 9 January 2020, [www.reuters.com](http://www.reuters.com). Dans cette même veine Christophe Hillion soutient que les réformes engagées en Pologne sont incompatibles avec les conditions d'adhésion à l'Union européenne v. C. HILLION, *Poland and Hungary Are Withdrawing from the EU*, in *Verfassungsblog*, 27 avril 2020, [verfassungsblog.de](http://verfassungsblog.de).

### III.2. UN LIEN DE SUBORDINATION À L'ÉGARD DE L'EXÉCUTIF NON NÉCESSAIREMENT INVALIDANT POUR L'ÉMISSION D'UN MAE: L'ARRÊT *OG ET PI* ET SES SUITES

Certains mécanismes de coopération dans l'ELSJ, à l'instar du MAE, sont formellement limités aux autorités judiciaires. L'arrêt *OG et PI*<sup>45</sup> du 27 mai 2019, a donné l'occasion à la Cour de clarifier les contours et le contenu de cette notion en rapport avec les conditions auxquelles doivent satisfaire les ministères publics des États membres pour émettre valablement un MAE. Cette décision est le point de départ d'une série de décisions rendues à titre préjudiciel relatives à la capacité de certains parquets nationaux à satisfaire à la notion d'"autorité judiciaire d'émission", notamment au regard de la condition d'indépendance requise par cette notion.

Dans l'arrêt de principe *OG et PI* des doutes avaient été soulevés par la juridiction de renvoi irlandaise quant à la question de savoir si les parquets allemands de Lübeck et de Zwickau peuvent être considérés comme "autorité judiciaire d'émission", au sens de l'art. 6, par. 1, de la décision-cadre 2002/584. Dans ses arrêts concernant les affaires *Poltorak* et *Kovalkovas*, la Cour avait eu l'opportunité d'exclure de la notion d'"autorité judiciaire d'émission" les ministères ou les services de police qui relèvent du pouvoir exécutif. L'affaire *OG et PI* était particulièrement attendue car c'est dans ce contexte que la Cour de justice a été amenée à clarifier pour la première fois une question ouverte depuis longtemps,<sup>46</sup> celle de savoir si les parquets remplissent la condition d'indépendance à laquelle doit satisfaire l'autorité judiciaire d'un MAE.

Parmi les enseignements à tirer de cette décision, mais aussi de celles qui suivront et qui s'inscrivent dans sa lignée, il ressort d'une jurisprudence constante que cela ne pose, *a priori*, pas de problème que plusieurs États aient désigné un parquet comme autorité judiciaire compétente pour l'émission d'un MAE dans leur droit national, ce qui concerne une majorité d'États membres d'après les réponses fournies dans le cadre d'un questionnaire Eurojust.<sup>47</sup> Conformément à une jurisprudence constante de la Cour, la notion d'"autorité judiciaire", requiert une interprétation autonome et uniforme qui ne peut être laissée à l'appréciation de chaque État membre, indépendamment de l'autonomie procédurale dont ils disposent pour désigner, selon leur droit national, l'"autorité judiciaire"

<sup>45</sup> *OG et PI* [GC], cit. Pour une analyse de cet arrêt v. A. WEYEMBERGH, F. CATTEAU, Arrêt "*OG et PI*": la notion d'autorité judiciaire d'émission et l'exigence d'indépendance à la lumière de la décision-cadre relative au mandat d'arrêt européen, in *Journal de droit européen*, 2019, p. 363 et seq.

<sup>46</sup> La question de la capacité des parquets à émettre un mandat d'arrêt avait déjà été soulevée indirectement dans l'affaire *Özcelik* sous l'angle des notions de "mandat d'arrêt" et de "décision judiciaire" tout en concédant qu'à la différence de la présente affaire, c'était leur capacité à émettre un mandat d'arrêt national qui était en jeu et non celle relative à un mandat d'arrêt européen. V. Cour de justice, arrêt du 10 novembre 2016, affaire C-453/16 PPU, *Özcelik*.

<sup>47</sup> V. Eurojust, Questionnaire on the CJEU's judgments in relation to the independence of issuing judicial authorities and effective judicial protection, Updated compilation of replies and certificates, 12 mars 2020, [www.eurojust.europa.eu](http://www.eurojust.europa.eu).

ayant compétence pour émettre un MAE.<sup>48</sup> Suivant cette conception, la notion d'autorité judiciaire visée à l'art. 6, par. 1, de la décision-cadre 2002/584 ne se limite pas à désigner les seuls juges ou juridictions d'un État membre, mais doit s'entendre comme désignant, plus largement, les autorités participant à l'administration de la justice pénale,<sup>49</sup> dont font partie les autorités du parquet à n'en pas douter selon la Cour.<sup>50</sup> Autrement dit, par principe, la Cour ne s'oppose pas à ce qu'une entité obéissant à une certaine hiérarchie puisse être qualifiée d'autorité judiciaire pour les besoins de l'émission d'un MAE. Une telle interprétation s'écartant ainsi des conclusions de l'Avocat général Campos Sánchez-Bordona qui préconisait de ne pas leur reconnaître cette qualité.<sup>51</sup>

Si les parquets répondent ainsi à la condition de participer à l'administration de la justice pénale pour satisfaire aux exigences que requiert la notion d'"autorité judiciaire d'émission", demeure la question de savoir si leur statut permet également de satisfaire à la condition d'indépendance requise par cette notion. C'est dans le cadre de l'appréciation de cette seconde exigence que la Cour est amenée à rappeler la philosophie qui sous-tend le mécanisme du MAE, lequel par contraste à la procédure d'extradition classique faisant intervenir le pouvoir politique, institue une procédure de remise simplifiée directement entre autorités judiciaires.

Cette judiciarisation du mécanisme du MAE implique que des garanties procédurales et de protection des droits fondamentaux propres aux décisions judiciaires puissent bénéficier à l'individu concerné, de sorte qu'il incombe aux autorités judiciaires de l'État membre d'émission d'assurer une telle protection.<sup>52</sup> Se référant à son arrêt antérieur *Bob-Dogi*, la Cour rappelle que le système du MAE repose sur une protection juridictionnelle à un double niveau: d'une part, au niveau de la délivrance du mandat d'arrêt national et, d'autre part, au moment de l'émission du MAE. Pour que cette protection soit jugée satisfaisante, la Cour exige qu'une décision répondant aux exigences inhérentes à une protection juridictionnelle effective soit adoptée, à tout le moins, à l'un des deux niveaux de ladite protection.<sup>53</sup> Ce qui suppose, lorsque l'autorité judiciaire désignée comme compétente par le droit national pour émettre un MAE est un parquet, que celle-ci "doit être en mesure d'exercer cette fonction de façon objective, en prenant en compte tous les éléments à charge et à décharge, et sans être exposée au risque que son pouvoir décisionnel fasse l'objet d'ordres ou d'instructions extérieurs, notamment de la part du pouvoir exécutif, de telle sorte qu'il n'existe aucun doute quant au

<sup>48</sup> V. en ce sens *Poltorak*, cit., par. 30 et 31; *Kovalkovas*, cit., par. 31 et 32.

<sup>49</sup> *Ibid.*

<sup>50</sup> V. en ce sens *OG et PI* [GC], cit., par. 60.

<sup>51</sup> V. conclusions de l'AG Campos Sánchez-Bordona présentées le 30 avril 2019, affaires jointes C-508/18 et C-82/19 PPU, *OG et PI*, par. 44 et 51.

<sup>52</sup> *Bob-Dogi*, cit., par. 55 et 56.

<sup>53</sup> *OG et PI* [GC], cit., par. 68. Pour des développements au sujet du manque de clarté relatif l'exigence de ce double niveau de protection v. A. WEYEMBERGH, F. CATTEAU, *Arrêt "OG et PI"*, cit., p. 363 et seq.

fait que la décision d'émettre le mandat d'arrêt européen revienne à cette autorité et non, pas en définitive, audit pouvoir".<sup>54</sup> Autrement dit, l'exigence d'indépendance est essentielle pour assurer la validité du contrôle qui doit être mené au stade de l'émission du MAE, et *in fine*, pour préserver la confiance mutuelle des autorités amenées à coopérer dans le cadre de cette procédure, eu égard aux garanties qu'est en droit d'attendre l'autorité d'exécution de la part de son homologue.

En l'espèce, sur la base des informations qui lui ont été transmises, la Cour relève que le ministre de la justice allemand dispose d'un pouvoir d'instruction "externe" à l'égard de ces parquets de sorte que ce ministre a la faculté d'influer directement sur la décision d'un parquet d'émettre ou de ne pas émettre un MAE.<sup>55</sup> Cet élément s'avère déterminant dans la décision de la Cour de ne pas considérer les parquets allemands en cause comme suffisamment indépendants pour pouvoir être qualifiés d'autorité judiciaire d'émission, au sens de l'art. 6, par. 1, de la décision-cadre 2002/584.<sup>56</sup> Les garanties prévues par le droit allemand tendant à encadrer très strictement l'usage de ce pouvoir d'instruction en le limitant à des cas extrêmement rares, de même que l'existence d'une voie de recours permettant de contester la décision d'un parquet d'émettre un MAE ne sont pas suffisantes aux yeux de la Cour pour renverser une telle constatation.

Comme cela a été relevé par plusieurs commentateurs,<sup>57</sup> cet arrêt paraît s'inscrire dans une évolution jurisprudentielle marquée par la recherche d'un équilibre plus juste entre l'efficacité recherchée du MAE et le respect des droits de la personne qui en fait l'objet.

Si cette décision a eu pour conséquence d'invalidier les MAE émis par les parquets allemands, d'autres décisions s'inscrivant dans la lignée de cet arrêt démontrent que le lien de subordination auquel sont soumis certains parquets nationaux n'est pas de nature à les disqualifier automatiquement de la qualité d'autorité judiciaire d'émission au sens de l'art. 6, par. 1, de la décision-cadre 2002/584, de sorte qu'un tel lien n'est pas nécessairement invalidant pour l'émission d'un MAE.<sup>58</sup> La Cour développe ainsi une véritable analyse au cas par cas, sans compter que l'arrêt *OG et PI* fait surgir de nouvelles questions juridiques.

Dans l'arrêt *NJ*<sup>59</sup> rendu le 9 octobre 2019, la Cour a été invitée à se prononcer sur l'indépendance du parquet de Vienne non pas sur la base de l'art. 6, par. 1, de la déci-

<sup>54</sup> *OG et PI* [GC], cit., par. 73.

<sup>55</sup> *Ibid.*, par. 76 et 77.

<sup>56</sup> *Ibid.*, par. 88.

<sup>57</sup> V. A. WEYEMBERGH, F. CATTEAU, *Arrêt "OG et PI"*, cit., p. 365.

<sup>58</sup> Pour une analyse des décisions rendues à l'égard des parquets français, belge et suédois v. L. BAUDRIHAYE-GERARD, *Can Belgian, French and Swedish Prosecutors issue European Arrest Warrants? The CJEU Clarifies the Requirement for Independent Public Prosecutor*, in *EU Law Analysis*, 2 January 2020, eulawanalysis.blogspot.com.

<sup>59</sup> Cour de justice, arrêt du 9 octobre 2019, affaire C-489/19 PPU, *NJ* (*Parquet de Vienne*).

sion-cadre mais sur la base de son art. 1, par. 1, concernant la question de savoir si un MAE émis par cette autorité satisfait à la notion même de “mandat d’arrêt européen”. Ce à quoi la Cour a répondu par l’affirmative et ce, en dépit des ordres ou instructions que le parquet de Vienne est susceptible de recevoir de la part du pouvoir exécutif. La raison tient au fait que la situation est différente de celle de l’arrêt *OG et PI*. Même si les parquets autrichiens sont exposés au risque d’être soumis, directement ou indirectement, à des ordres ou à des instructions individuelles de la part du pouvoir exécutif dans le cadre de l’émission d’un MAE, le droit autrichien prévoit que celui-ci ne peut être valablement émis qu’après avoir fait l’objet d’une homologation par un tribunal chargé de contrôler les conditions de son émission ainsi que la proportionnalité de celui-ci de manière indépendante.<sup>60</sup> Ainsi, des parquets qui ne peuvent être considérés comme répondant à l’exigence d’indépendance, ne sont pas pour autant empêchés d’émettre valablement un MAE puisque cette décision ne peut produire des effets juridiques, qu’après avoir fait l’objet d’un contrôle judiciaire préalable réalisé par un tribunal indépendant et impartial. Par cet arrêt, la Cour invite à déplacer l’attention des autorités judiciaires d’exécution sur la régularité de la procédure d’émission d’un MAE et moins sur la qualité de celui qui l’émet.

D’autres arrêts ultérieurs confirment que le lien de subordination auquel sont soumis les parquets n’est pas nécessairement de nature à remettre en cause l’indépendance qui est exigée d’eux pour émettre un MAE. Dans l’arrêt *JR et YC* du 12 décembre 2019,<sup>61</sup> faisant suite aux doutes soulevés quant à la capacité des parquets français (de Tours et de Lyon) à satisfaire les conditions pour être valablement qualifiés d’“autorité judiciaire d’émission” d’un MAE au sens de l’art. 6, par. 1, de la décision-cadre de 2002, notamment au regard de la condition d’indépendance, la Cour considère cette exigence comme remplie au regard de plusieurs règles prévues par la législation française. La Cour a notamment été attentive à l’abrogation de la possibilité pour le pouvoir exécutif d’adresser des instructions individuelles aux magistrats du parquet, une garantie qui faisait défaut dans l’arrêt rendu à l’encontre des procureurs allemands et qui s’est avérée déterminante dans la décision de ne pas les considérer comme suffisamment indépendants. L’on retiendra de cette nouvelle décision que le lien de subordination obligeant les parquets à se conformer aux instructions émanant de leurs supérieurs hiérarchiques n’est pas en soi problématique du point de vue de l’exigence d’indépendance.<sup>62</sup> Dans la lignée de son arrêt *PF*<sup>63</sup> rendu à l’égard des parquets litua-

<sup>60</sup> *Ibid.* par. 43 à 47.

<sup>61</sup> Cour de justice, arrêt du 12 décembre 2019, affaires jointes C-566/19 PPU et C-626/19 PPU, *JR et YC*; pour une analyse critique de cet arrêt v. V. SIZAIRE, *Pour l’honneur du procureur*, cit., p. 1 et seq.

<sup>62</sup> *JR et YC*, cit., par. 56. V. également Cour de justice, ordonnance du 21 janvier 2020, affaire C-813/19 PPU, *MN*.

<sup>63</sup> Cour de justice, arrêt du 27 mai 2019, affaire C-509/18, *PF* [GC]. Dans l’affaire *PF*, rendue à l’égard des parquets lituaniens, la Cour a considéré que le procureur général de Lituanie peut être qualifié d’“autorité

niens, la Cour de justice rappelle que si l'exigence d'indépendance prohibe que le pouvoir décisionnel des parquetiers puisse faire l'objet d'instructions extérieures émanant, notamment du pouvoir exécutif, celle-ci n'interdit pas pour autant qu'ils puissent faire l'objet d'instructions internes de la part de leur supérieur hiérarchiques.<sup>64</sup>

Si le ministère de la justice français se félicitait d'une telle décision rendue en sa faveur, celle-ci peut néanmoins apparaître surprenante du point de vue de l'Avocat général Campos Sánchez-Bordona qui ne partageait pas cette position,<sup>65</sup> mais aussi au regard de la jurisprudence de la Cour européenne des droits de l'homme qui avait disqualifié le modèle français dans le célèbre arrêt *Medvedyev c. France*,<sup>66</sup> en estimant que le parquet français n'est pas une "autorité judiciaire" au sens de la Convention, car il lui manque en particulier l'indépendance à l'égard du pouvoir exécutif pour pouvoir être ainsi qualifié. L'Avocat général, s'appuyant sur les critères dégagés par la Cour dans l'arrêt *OG et PI* estimait pour sa part que l'indépendance de l'autorité judiciaire émettant un MAE suppose que celle-ci exerce ses fonctions en toute autonomie et sans recevoir la moindre instruction, qu'elle soit individuelle ou générale.<sup>67</sup> Se référant à la conception de l'indépendance telle que retenue par la Cour dans l'arrêt *LM* à l'égard des juges, il faisait valoir qu'une telle exigence est incompatible avec tout lien hiérarchique ou de subordination. En d'autres termes, l'exigence d'indépendance serait selon lui inconciliable avec les ordres que les procureurs français sont amenés à recevoir de la part de leurs supérieurs hiérarchiques.<sup>68</sup> De manière générale, l'approche formaliste suivie par la Cour à l'égard de la notion d'indépendance a pu apparaître décevante aux yeux de la société civile en ce qu'elle ne permettrait pas d'appréhender toutes les formes d'influence qui peuvent s'exercer en pratique.<sup>69</sup>

Les parquets belge et suédois, eux aussi en proie à des doutes émis quant à leur capacité à émettre un MAE, ont fait l'objet de décisions rendues à titre préjudicielle le 12 décembre 2019<sup>70</sup> qui leurs sont favorables. Néanmoins les doutes soulevés à leur encontre ne portaient pas sur la question de leur indépendance suffisante pour émettre un MAE mais plutôt sur les conditions dans lesquelles doit s'exercer un recours juridic-

judiciaire d'émission", au sens de la décision-cadre, dans la mesure où son statut, dans cet État membre, assure non seulement l'objectivité de sa mission mais lui confère également une garantie d'indépendance par rapport au pouvoir exécutif dans le cadre de l'émission d'un mandat d'arrêt européen.

<sup>64</sup> *Ibid.*

<sup>65</sup> V. conclusions de l'AG Campos Sánchez-Bordona présentées le 26 novembre 2019, affaires jointes C-566/19 PPU et C-626/19 PPU, *JR et YC*.

<sup>66</sup> Cour européenne des Droits de l'Homme, arrêt du 29 mars 2010, n° 3394/03, *Medvedyev et autres c. France*, par. 124.

<sup>67</sup> Conclusions de l'AG Campos Sánchez-Bordona, *JR et YC*, cit., par. 35 à 42.

<sup>68</sup> *Ibid.*, par. 43 à 48.

<sup>69</sup> L. BAUDRIHAYE-GERARD, *Can Belgian, French and Swedish*, cit.

<sup>70</sup> Cour de justice: arrêt du 12 décembre 2019, affaire C-627/19 PPU, *Openbaar Ministerie (Procureur du Roi de Bruxelles)*; arrêt du 12 décembre 2019, affaire C-625/19 PPU, *Openbaar Ministerie (Parquet Suède)*.

tionnel contre une telle décision pour satisfaire aux exigences d'une protection juridictionnelle effective au sens de l'arrêt *OG et PI*.

Au-delà du climat de défiance entre États qui se dégage de ces décisions préjudicielles, c'est aussi leur retentissement à l'échelle des États et de l'Union qui a pu être relevé par une partie de la doctrine.<sup>71</sup> Suite à l'arrêt rendu à l'égard des parquets allemands dans l'affaire *OG et PI*, s'est évidemment posée la question des conséquences d'une telle décision sur le sort à réserver aux nombreux MAE allemands émis et en attente d'exécution. La délégation allemande a immédiatement indiqué au Conseil de l'Union européenne que la procédure d'émission du MAE allait être ajustée afin que les décisions d'émission soient prises par des juridictions, sans qu'une modification législative soit nécessaire.<sup>72</sup> En France, la réponse à la question préjudicielle concernant les parquets français était particulièrement attendue compte tenu de son incidence potentielle sur les nombreuses procédures en cours.<sup>73</sup> Les remous qu'a provoqué cette décision se sont faits ressentir jusque dans certains États qu'elle ne mettait pourtant pas en cause.<sup>74</sup>

Face aux nombreuses questions que ces décisions ont suscité dans la pratique, Eurojust a élaboré un questionnaire afin d'apporter un éclairage sur les règles prévues au sein des États membres et de sonder la conformité de celles-ci avec les exigences posées par la Cour.<sup>75</sup> S'il ressort des réponses fournies que la plupart des législations nationales garantit aux procureurs une indépendance vis-à-vis du pouvoir exécutif, s'observe par ailleurs une grande diversité de règles entre les systèmes judiciaires nationaux. En tout état de cause, les préoccupations liées à l'indépendance des juges et des procureurs sont loin d'avoir disparu et ont amené à une prise de conscience que cette exigence conditionne non seulement le bon fonctionnement de l'Union mais aussi la confiance des citoyens dans celle-ci.<sup>76</sup>

#### IV. CONCLUSION

La question de l'indépendance des procureurs et des juges a pris de l'ampleur dans le contexte du MAE suite à une série de décisions préjudicielles récentes. Si les réponses

<sup>71</sup> A. WEYEMBERGH, F. CATTEAU, *Arrêt "OG et PI"*, cit., p. 365 et seq.

<sup>72</sup> Council, Paper by the Presidency, Judgment of the Court of Justice of the European Union of 27 May 2019 in joined cases C-508/18 and C-82/19 PPU, and in case C-509/18: public prosecutors offices acting as judicial authorities – Exchange of views on the follow-up, 18 June 2019, data.consilium.europa.eu.

<sup>73</sup> P. DUFOURQ, *Selon la CJUE, le parquet français peut émettre un mandat d'arrêt européen*, in *Actualité Dalloz*, 16 décembre 2019. D'après les chiffres relevés par la doctrine, en 2017, 14.491 mandats d'arrêt européen avaient été émis par la France.

<sup>74</sup> V. A. WEYEMBERGH, F. CATTEAU, *Arrêt "OG et PI"*, cit., pp. 365-366.

<sup>75</sup> Questionnaire Eurojust, cit.

<sup>76</sup> V. S. ADAM, P. VAN ELSUWEGE, *L'exigence du juge, paradigme de l'Union européenne comme Union de droit*, cit., p. 343; communication COM(2020) 306 final du 10 juillet 2020 de la Commission, *Tableau de bord 2019 de la justice dans l'UE*.



apportées par la Cour s'inscrivent dans la recherche d'un équilibre plus juste entre l'efficacité du système de remise institué par le MAE et la protection des droits fondamentaux des individus concernés, celles-ci n'ont pas épuisé toutes les questions qui peuvent surgir en pratique. Il y a donc fort à parier que la question de l'indépendance nourrira encore d'importants débats, même en dehors du contexte du MAE. D'autant que la soumission de la procédure pénale aux exigences du droit européen n'a de cesse de se renforcer.





## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

*edited by Araceli Turmo*

## CONFIANCE MUTUELLE, RECONNAISSANCE MUTUELLE ET CRISE DE VALEURS: LA DIFFICILE ÉQUATION ENTRE JUSTICE PÉNALE EUROPÉENNE ET DIVERSITÉ NATIONALE

TONY MARGUERY\*

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ABSTRACT: This *Article* discusses the impact of the Court of Justice's case law on EU criminal justice through the prism of mutual trust and mutual recognition. EU criminal justice is one of the fields of EU law that rapidly develops. Such developments can only happen within a context of mutual trust between EU Member States and, more particularly between national judicial authorities. In this respect, it is essential that these authorities abide by the common values upon which the EU is founded. Although these values are not clearly defined in the Treaty, the *Article* reveals how the Court of Justice actually shapes cooperation in criminal matters. Two distinct (r)evolutions are taking place. Firstly, in exceptional circumstances, the Court of Justice allows judicial authorities to refuse the execution of foreign decisions that seriously undermine a fundamental right which, for its part, gives expression to a common value. The exceptional circumstances doctrine operates like a judicial sanction against States which do not respect the EU values. Secondly, a quieter revolution is underway through the application to criminal matters of the doctrine of autonomous concepts of Union law. While defining essential concepts of criminal justice, the Court of Justice also defines certain common values. The message here is preventive. If a Member State wishes to benefit from effective judicial cooperation, it must make sure that its criminal justice system respects EU values. If a criminal justice system remains

\* Professeur assistant, Université d'Utrecht, t.p.marguery@uu.nl.



an instrument of the nation State necessary for the protection of domestic values, as soon as it enters the European sphere national values, however, it must align with European values.

KEYWORDS: criminal justice – mutual trust – mutual recognition – common values – fundamental rights – judicial authorities.

## I. INTRODUCTION

Il n'est un secret pour personne que l'UE s'est construite sur des crises successives, pour ne pas dire grâce à celles-ci. Toutefois, l'UE fait aujourd'hui face à une crise d'une magnitude particulière car il s'agit d'une crise de valeurs comme en témoignent bien malheureusement le Brexit, et la montée du populisme et des nationalismes. L'Union sortira-t-elle renforcée de cette crise? Rien n'est sûr, d'autant que la justice pénale loin d'échapper au phénomène se trouve précisément au centre de la tourmente.

Or, mettant en avant la sauvegarde de valeurs européennes nécessaires à la confiance mutuelle entre États membres, l'Union, en particulier sa CJUE, s'immisce de manière croissante dans l'organisation interne de la justice pénale des États. Étant donné que cette justice protège traditionnellement les valeurs fondamentales sur lesquelles les États sont fondés, dans quelle mesure l'Union peut-elle se permettre une confrontation entre valeurs européennes et valeurs nationales parfois divergentes? Cette contribution dresse un état des lieux de la difficile équation que la Cour doit résoudre, à savoir: sauvegarder, voire construire la justice pénale Européenne tout en ménageant la justice pénale nationale.

En effet, c'est sous l'impulsion du principe constitutionnel de confiance mutuelle base nécessaire à la reconnaissance mutuelle, elle-même pierre angulaire de la coopération judiciaire pénale, que la Cour de justice met au jour une justice pénale européenne qui serait respectueuse et protectrices des valeurs européennes.

La confiance mutuelle impliquerait, entre autres, que chaque État membre partage et respecte certaines valeurs qui leurs seraient communes. A défaut, la reconnaissance mutuelle ne pourrait être correctement mise en œuvre et la lutte contre la criminalité en pâtirait. Toutefois, la notion de valeur est imprécise et le lien entre reconnaissance et confiance mutuelles n'est pas évident. Qui plus est, alors que le principe de reconnaissance mutuelle est encadré par les Traités et le droit secondaire de l'Union, la confiance mutuelle, quant à elle, se construit au gré de la jurisprudence de la Cour de justice dont l'application peut se heurter non seulement aux pratiques mais aussi aux normes et institutions nationales. Deux courants convergents vers une définition judiciaire des valeurs européennes semblent émerger de cette construction.

Premièrement, en reconnaissant que la confiance mutuelle n'est pas illimitée, la Cour de justice développe une exception d'ordre public au principe de reconnaissance mutuelle basée sur l'existence de défaillances dans le système pénal d'un État membre, en particulier à l'égard des droits fondamentaux de la personne. Un État qui viendrait violer

certaines de ces droits s'expose à l'opprobre et risque de voir ses demandes de coopération refusées par les États voisins. Tel est ainsi le cas du refus d'exécuter un mandat d'arrêt européen (MAE) en cas de non-respect par l'État émetteur de la prohibition des traitements dégradants ou de l'essence du droit à un procès équitable. Cette exception pourrait être invoquée alors même que les conditions de mise en œuvre de la reconnaissance mutuelle seraient réunies. Le mécanisme agirait comme une sanction *a posteriori* du non-respect de certaines valeurs européennes.

Deuxièmement, alors même qu'un État ne serait pas en faute, il lui est demandé de mettre son système judiciaire en accord avec les exigences imposées par la confiance mutuelle au nom des valeurs européennes. Tant que ces exigences ne sont pas respectées, les conditions de forme de la reconnaissance mutuelle ne seraient pas réunies ce qui entraverait *a priori* la lutte contre la criminalité. Tel est le cas des conditions que l'autorité nationale devrait respecter afin de pouvoir émettre un MAE ainsi que le respect d'une protection juridictionnelle effective.

Ces évolutions jurisprudentielles se trouvent précisément au carrefour entre valeurs nationales et valeurs européennes. La question se pose de savoir dans quelle mesure ces valeurs convergent ou pas? Si divergence il y a, celles-ci sont-elles autorisées dans un système multi-constitutionnel comme celui de l'Union sans risquer l'effondrement de celui-ci?

## II. LA CONFIANCE MUTUELLE FACE AUX VIOLATIONS DES VALEURS EUROPÉENNES

### II.1. LA MISE EN PLACE DE LA CONFIANCE MUTUELLE DANS LA COOPÉRATION JUDICIAIRE PÉNALE COMME BASE CONSTITUTIONNELLE DE LA RECONNAISSANCE MUTUELLE

L'une des principales obligations imposées par la reconnaissance mutuelle concerne la réduction des contrôles de l'autorité d'exécution sur la décision judiciaire à exécuter. La plupart des contrôles doivent être mis en œuvre dans le pays où le procès a eu ou doit avoir lieu. Le rôle de l'autorité d'exécution doit rester marginal et ne pas entraver la libre circulation des décisions judiciaires dans l'espace de liberté, de sécurité et de justice (ELSJ). On le sait, les exceptions à la reconnaissance mutuelle sont exhaustivement énumérées par le droit de l'Union mettant en œuvre le principe.<sup>1</sup>

Ainsi dans le cadre du MAE,<sup>2</sup> les autorités d'exécution sont tenues de remettre de manière quasi-automatique aux autorités d'émission la personne concernée dans les plus

<sup>1</sup> Voir par exemple, V. MITISLEGAS, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, in *Yearbook of European Law*, 2012, p. 319 et seq.; J. SPENCER, *The Principle of Mutual Recognition*, in R. KOSTORIS (eds), *Handbook of European Criminal Procedure*, Cham: Springer, 2018, p. 281 et seq.

<sup>2</sup> Le raisonnement est similaire pour d'autres instruments de mise en œuvre du principe de reconnaissance mutuelle, quoique la nature des exceptions peut être différente, voir par exemple sur la décision-

courts délais. La justice entre États membres serait plus rapide et plus efficace car le pouvoir d'appréciation de l'autorité d'exécution ne doit se limiter qu'aux conditions de forme de la demande, et éventuellement, à la possible application de l'un des motifs de refus limitativement énumérés dans la décision-cadre.<sup>3</sup> Un telle (r)évolution dans le droit de la coopération pénale ne peut avoir lieu qu'à la condition d'une confiance renforcée entre les États membres de l'Union. Comme l'avait déjà indiqué la Commission en 2001, cette confiance n'existerait, à son tour, qu'en raison de valeurs que ces États partageraient.<sup>4</sup>

Dans le contexte du MAE, mais cela est valable dans d'autres domaines,<sup>5</sup> la Cour de justice lie d'abord droits fondamentaux, confiance mutuelle et reconnaissance mutuelle. La reconnaissance mutuelle suppose que la confiance au sein de l'Union est présumée car chaque État membre fournirait à tout moment une protection équivalente des droits fondamentaux de l'individu.<sup>6</sup> L'art. 6 TUE impose d'ailleurs une place centrale aux droits de l'homme dans l'édifice Européen. Le respect des droits fondamentaux par les États membres n'est pas seulement une obligation liée au champ d'application de ce droit, car en dehors de ce champ la CJUE impose aussi à ceux-ci de respecter les droits fondamentaux consacrés par la Convention Européenne des Droits de l'Homme (CEDH) ou leur droit national. Tel doit être le cas dans la procédure pénale de poursuite ou d'exécution de la peine ou de la procédure pénale au fond.<sup>7</sup>

Or, le respect des droits fondamentaux est l'un des éléments caractérisant la notion d'État de droit,<sup>8</sup> et aux termes de l'art. 2 TUE, tant le premier que la seconde sont considérés comme des valeurs sur lesquelles l'Union est fondée. Le respect des droits fondamentaux vient donc lier reconnaissance mutuelle et valeurs communes. Être membre de l'Union implique le respect de valeurs communes (art. 49 TUE), dont celui des droits fondamentaux et de l'État de droit. Leur violation peut entraîner la mise en œuvre du mécanisme de surveillance politique précisé à l'art. 7 TUE. A son tour, le respect de ces valeurs justifie l'existence d'une confiance entre États membres sur laquelle la reconnaissance mutuelle repose.

Peut-on toutefois conclure qu'en l'absence de conformité par un État membre avec une valeur commune, l'obligation de reconnaissance mutuelle viendrait à disparaître ou

cadre 2008/909 et la décision-cadre 2008/947, T. MARGUERY (ed.), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, 2018, Oisterwijk: Wolf Legal Publishers, pp. 60 et 62.

<sup>3</sup> Voir art. 3, 4 et 4a de la décision-cadre 2002/584/JAI sur le MAE, telle que modifiée par la décision-cadre 2009/299/JAI. En application de l'art. 5, l'autorité d'exécution peut assortir l'exécution du MAE au respect de certaines conditions par l'État d'émission.

<sup>4</sup> Programme de mesures destiné à mettre en œuvre le principe de reconnaissance mutuelle des décisions pénales (2001/C 12/02).

<sup>5</sup> Voir T. MARGUERY (ed.), *Mutual Trust under Pressure*, cit.

<sup>6</sup> Cour de justice, arrêt du 30 mai 2013, affaire C-168/13 PPU, F., par. 50.

<sup>7</sup> *Ibid.*, par. 48.

<sup>8</sup> J. RAZ, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in L. ALEXANDER (ed.), *Constitutionalism: Philosophical Foundations*, Cambridge: Cambridge University Press, p.152 et seq.

à s'atténuer? Au-delà des mentions esthétiques de la confiance mutuelle dans les déclarations politiques et les préambules des législations,<sup>9</sup> et en l'absence de définition précise du concept et de son interaction avec la reconnaissance mutuelle et les valeurs communes, ce fut à la Cour de justice d'élever au rang constitutionnel la relation entre valeurs, droits fondamentaux et reconnaissance mutuelle et, en particulier, d'affiner les contours du principe de confiance mutuelle.<sup>10</sup> La Cour de justice a ainsi mis en place une exception d'ordre public à l'obligation de reconnaissance mutuelle.

C'est à l'occasion de l'Avis rendu sur le projet d'accord portant adhésion de l'Union à la CEDH,<sup>11</sup> que la Cour de justice a pour la première fois ouvertement lié confiance mutuelle et valeurs communes. La Cour de justice décide que la construction européenne est fondée sur la prémisse que les États membres partagent et respectent ces valeurs. "Cette prémisse implique et justifie l'existence de la confiance mutuelle entre les États membres dans la reconnaissance de ces valeurs et, donc, dans le respect du droit de l'Union qui les met en œuvre".<sup>12</sup> Au centre de ces valeurs se trouve le respect de la dignité humaine et, plus généralement, de la Charte des droits fondamentaux de l'Union européenne.<sup>13</sup> Dans une formule désormais bien connue, la Cour de justice décide que "ce principe [de confiance mutuelle] impose, notamment en ce qui concerne l'espace de liberté, de sécurité et de justice, à chacun de ces États de considérer, sauf dans des circonstances exceptionnelles, que tous les autres États membres respectent le droit de l'Union et, tout particulièrement, les droits fondamentaux reconnus par ce droit".<sup>14</sup>

Il ne peut être fait exception au principe constitutionnel de confiance mutuelle qu'en cas de "circonstances exceptionnelles". L'exception judiciaire à une confiance mutuelle présumée naissait officiellement; il ne restait plus qu'à en définir les conditions, le contenu et les effets.

## II.2. L'EXCEPTION D'ORDRE PUBLIC À LA RECONNAISSANCE MUTUELLE: ENTRE ORDRE PUBLIC NATIONAL ET ORDRE PUBLIC EUROPÉEN

Là encore, c'est dans le contexte du MAE que les contours du principe de confiance mutuelle se sont développés. Contrairement, au domaine de la coopération civile et commerciale, en l'absence d'une clause d'ordre public expressément précisée dans la législation et autorisant une exception à la reconnaissance mutuelle en cas de violation manifeste d'une règle de droit considérée comme essentielle dans l'ordre juridique de l'État

<sup>9</sup> Voir par exemple considérant 10 de la décision-cadre 2002/584/JAI sur le MAE, cit.

<sup>10</sup> S. PRECHAL, *Mutual Trust Before the Court of Justice of the European Union*, in *European Papers*, Vol. 2, 2017, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 75 et seq.

<sup>11</sup> Cour de justice, avis 2/13 du 18 décembre 2014.

<sup>12</sup> *Ibid.*, par. 167-168.

<sup>13</sup> *Ibid.*, par. 169.

<sup>14</sup> *Ibid.*, par. 191.

d'exécution,<sup>15</sup> on l'a dit, seul un recours à l'un des motifs de non-exécution pouvait enrayer la reconnaissance.<sup>16</sup> Créer une exception à l'obligation d'exécution du MAE semblait enfreindre le texte même de la loi.

Dans le domaine pénal, c'est à partir des affaires jointes *Aranyosi et Căldăraru*,<sup>17</sup> et les affaires subséquentes,<sup>18</sup> que la Cour de justice va appliquer sa jurisprudence des circonstances exceptionnelles au domaine de la reconnaissance mutuelle pour sanctionner le non-respect de la prohibition absolue des traitements dégradants et de la torture prévue tant par l'art. 3 CEDH que l'art. 4 de la Charte. La CJUE décide qu'en présence d'éléments objectifs, fiables, précis et dûment actualisés sur les conditions de détention du pays d'émission, en l'espèce la Hongrie et la Roumanie, démontrant l'existence de défaillance systémiques ou généralisées, l'autorité d'exécution, ici l'Allemagne, doit remettre l'exécution du MAE et vérifier qu'il n'existe pas des motifs sérieux et avérés de croire que la personne concernée courra un risque réel de traitements dégradants en raison des conditions de sa détention dans l'État émetteur.<sup>19</sup>

En l'espèce, le fait tant pour la Hongrie que pour la Roumanie d'être membre de l'Union et partie à la CEDH ne suffit pas à justifier la confiance que les tribunaux allemands devaient avoir à leurs égards. La confiance, donc le respect des droits fondamentaux, doivent aussi exister dans la pratique. D'un côté, la décision-cadre sur le MAE n'autorise pas le refus d'exécution de ces mandats pour cette raison, mais d'un autre, son art. 1, par. 3, impose la mise en œuvre du MAE dans le respect des droits fondamentaux précisés à l'art. 6 TUE. Bien que la Cour n'aille pas jusqu'à considérer l'art. 1, par. 3, comme une clause expresse d'exception d'ordre publique,<sup>20</sup> il y a lieu de comprendre cette disposition *de facto* comme telle dans la mesure où "si l'existence de ce risque ne peut pas être écarté dans un délai raisonnable, cette autorité doit décider s'il y a lieu de mettre fin à la procédure de remise".<sup>21</sup> Dès lors, une exception au principe de reconnaissance mutuelle est autorisée en dehors du strict cadre législatif du MAE. L'existence de cette exception est justifiée par le fait que

<sup>15</sup> Par exemple, Cour de justice, arrêt du 6 septembre 2012, affaire C-619/10, *Trade Agency*, par. 51.

<sup>16</sup> Cour de justice, arrêt du 29 janvier 2013, affaire C-396/11, *Radu* [GC], par. 36.

<sup>17</sup> Cour de justice, arrêt du 5 avril 2016, affaires jointes C-404/15 and C-659/15 PPU, *Aranyosi et Căldăraru* [GC].

<sup>18</sup> En particulier, Cour de justice, arrêt du 15 octobre 2019, affaire C-128/18, *Dumitru-Tudor Dorobantu* [GC], qui précise les conditions de mise en œuvre du test décidé dans les affaires jointes *Aranyosi et Căldăraru* [GC], cit.

<sup>19</sup> *Aranyosi et Căldăraru* [GC], cit., par. 92.

<sup>20</sup> Et la Cour de confirmer sa jurisprudence constante concernant l'aspect exhaustif des motifs de non-exécution, *ibid.*, par. 80.

<sup>21</sup> *Ibid.*, par. 104; la Cour ne donne malheureusement pas d'indication comment résoudre l'équation consistant, d'un côté à ne pas considérer qu'il existe un nouveau motif de non-exécution du MAE basé sur la violation grave d'un droit fondamental, et de l'autre, la possibilité de mettre fin à la procédure de remise. A cet égard, les juridictions nationales devront faire preuve d'inventivité et avoir recours à leur autonomie procédurale, voir par exemple Tribunal d'Amsterdam, jugement du 26 janvier 2017, qui décide que le ministère public est irrecevable dans ses réquisitions visant à l'exécution d'un MAE vers la Roumanie.



la protection prévue à l'art. 4 de la Charte revêt un caractère absolu "en tant qu'elle est étroitement liée au respect de la dignité humaine visée à l'art. 1<sup>er</sup> de la Charte".<sup>22</sup> Or, "[l]es articles 1<sup>er</sup> et 4 de la Charte ainsi que l'article 3 de la CEDH consacrent l'une des valeurs fondamentales de l'Union et de ses États membres [...]"<sup>23</sup>

Le lien avec les valeurs communes est ainsi fait.

L'arrêt *LM* vient ajouter une pièce à l'échiquier.<sup>24</sup> L'affaire concernait de récentes réformes du système judiciaire polonais considérées par de nombreux universitaires et institutions comme portant gravement atteinte à l'indépendance du pouvoir judiciaire et, partant, à l'État de droit, valeur de l'UE.<sup>25</sup> La Commission avait non seulement déclenché pour la première fois la procédure prévue à l'art. 7 TUE contre la Pologne en raison de l'existence d'un risque manifeste de violation de cette valeur,<sup>26</sup> mais elle avait également lancé plusieurs procédures d'infraction à l'encontre de ce pays.<sup>27</sup> Considérant le rôle crucial joué par l'indépendance de la justice dans le domaine pénale et, partant, dans la coopération judiciaire mise en place par le MAE, la Haute Cour de justice d'Irlande interrogea la Cour de justice sur les conséquences de ces réformes sur l'exécution de trois MAE polonais contre LM émis à la suite d'une procédure pénale ouverte dans le cadre d'un trafic de drogue.<sup>28</sup>

La Cour de justice rappelle que le droit à un procès équitable est garanti par l'art. 47, par. 2, de la Charte, qui correspond à l'art. 6, par. 1, de la CEDH. Contrairement à l'art. 4 de la Charte, le droit à un procès équitable n'est pas absolu. Toutefois, la Cour décide que "l'exigence d'indépendance des juges relève du contenu essentiel du droit fondamental à un procès équitable, lequel revêt une importance cardinale en tant que garant de la protection de l'ensemble des droits que les justiciables tirent du droit de l'Union et de la préservation des valeurs communes aux États membres énoncées à l'article 2 TUE, notamment, de la valeur de l'État de droit".<sup>29</sup> Dès lors que l'indépendance de la justice ne peut être assurée dans un État membre, les justiciables ne sont pas en mesure de contester en justice la légalité des actes, notamment trouvant leur origine dans le droit de l'Union. De fait, cet État ne respecte plus l'obligation imposée par l'art. 19 TUE d'assurer

<sup>22</sup> *Aranyosi et Căldăraru* [GC], cit., par. 85.

<sup>23</sup> *Ibid.*, par. 87.

<sup>24</sup> Cour de justice, arrêt du 25 juillet 2018, affaire C-216/18 PPU, *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC].

<sup>25</sup> Commission de Venise, Avis n° 904/2017; voir aussi K. LANE SCHEPPELE, L. PECH, *Is the Rule of Law Too Vague a Notion?*, in *Verfassungsblog*, 1 mars 2018, [verfassungsblog.de](http://verfassungsblog.de); M. LUINING, *The EU's Anxieties of Guaranteeing the Rule of Law*, in *Clingendael Spectator*, 11 juin 2018, [spectator.clingendael.org](http://spectator.clingendael.org).

<sup>26</sup> Commission, Proposition de Décision du Conseil relative à la constatation d'un risque clair de violation grave, par la République de Pologne, de l'état de droit, COM(2017) 835 final.

<sup>27</sup> Par exemple, Cour de justice, arrêt du 5 novembre 2019, affaire C-192/18, *Commission c. Pologne (Indépendance des juridictions de droit commun)* [GC]; arrêt du 24 juin 2019, affaire C-619/18, *Commission c. Pologne (Indépendance de la Cour suprême)* [GC].

<sup>28</sup> Haute Cour d'Irlande, jugement du 12 mars 2018, *The Minister for Justice and Equality v. Celmer*, IEHC 119, par. 135-137.

<sup>29</sup> *Minister for Justice and Equality (Défaillances du système judiciaire)* [GC], cit., par. 48.

une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union qui "concrétise la valeur de l'État de droit affirmée à l'article 2 TUE".<sup>30</sup>

L'autorité d'exécution doit s'abstenir de donner suite au MAE si la personne recherchée court un risque réel de violation du contenu essentiel du droit à un procès équitable en raison d'un manque d'indépendance des tribunaux de l'État d'émission dû à des déficiences systémiques ou généralisées. En particulier, l'autorité judiciaire compétente après la remise, quel que soit la nature de la procédure pénale en cours, doit être indépendante et impartiale.<sup>31</sup>

Cette autorité ne peut être soumise à aucun lien hiérarchique ou de subordination à l'égard de quiconque et ne doit recevoir aucun ordre ou instruction de quelque origine que ce soit. Cette indépendance interne et externe ne doit, semble-t-il, n'être garantie qu'à l'égard de ceux qui ont reçu la mission de juger.<sup>32</sup> Les juges doivent ainsi voir leur inamovibilité et leur rémunération assurées et leur régime disciplinaire exempt de tout détournement du pouvoir politique.<sup>33</sup>

Enfin, ces autorités doivent rester objectives et garder une distance par rapport aux parties au litige. En d'autres termes, elle ne doit pas être juge et partie dans le cadre du dossier ayant donné lieu au MAE.<sup>34</sup>

La Cour de justice applique au droit à un procès équitable le test en deux étapes conçues dans les affaires jointes *Aranyosi et Căldăraru*. L'existence d'un risque réel et une appréciation concrète au cas d'espèce sont donc nécessaires. En l'occurrence, la mise en œuvre de l'art. 7 TUE revêt une importance particulière.<sup>35</sup> Outre l'existence d'un risque réel, les autorités d'exécution doivent être convaincues que la juridiction de l'État d'émission est indépendante eu égard à la situation personnelle de la personne recherchée, à la nature de l'infraction pour laquelle cette personne est poursuivie et au contexte factuel sur lequel se fonde le mandat d'arrêt européen. A cette fin, l'autorité d'émission doit répondre aux interrogations que l'autorité d'exécution pourrait avoir quant à l'indépendance des premières. La solution trouvée par la Cour de justice semble, en l'occurrence, critiquable car c'est un peu comme si l'on demandait à un pâtissier si les gâteaux qu'il vend sont frais. Si les juges ne sont pas indépendants et qu'ils subissent des pressions, il

<sup>30</sup> *Ibid.*, par. 50.

<sup>31</sup> *Ibid.*, par. 58.

<sup>32</sup> *Ibid.*, par. 63.

<sup>33</sup> *Ibid.*, par. 67.

<sup>34</sup> *Ibid.*, par. 65.

<sup>35</sup> *Ibid.*, par. 61. Le considérant 10 de la décision-cadre 2002/584/JAI relative au MAE, cit., précise que seule une violation grave et persistante par un État membre des valeurs visées à l'art. 2 TUE, et en conformité avec la procédure prévue à l'art. 7 TUE ne pourrait justifier la suspension la mise en œuvre du mécanisme du MAE.

semble difficile de croire qu'ils s'en ouvriront ouvertement à leurs collègues étrangers dans le cadre d'une procédure judiciaire écrite.<sup>36</sup>

Ces arrêts ont naturellement fait couler beaucoup d'encre et il ne s'agit pas ici d'en faire le commentaire.<sup>37</sup> Quelques précisions retiendront toutefois notre attention.

Premièrement, le lien entre reconnaissance mutuelle pénale, confiance mutuelle et valeurs communes est affirmé judiciairement. En dehors du cadre législatif autorisé, une entrave à la reconnaissance mutuelle ne peut être justifiée que par une exception d'ordre public Européenne mettant en péril l'une des valeurs communes Européennes. A ce jour, deux valeurs ont été judiciarisées, à savoir la dignité humaine et l'État de droit. Ces deux valeurs se caractérisent par la protection qui doit être garantie à l'interdiction absolue de la torture et des peines ou traitements inhumains ou dégradants, et au contenu essentiel du droit à procès équitable caractérisé par l'indépendance judiciaire. Le seuil imposé par la Cour de justice est dès lors très élevé. Il s'agit d'un contrôle sanctionnant un risque réel, direct et concret de violation des droits fondamentaux véhiculés par ces valeurs.

Deuxièmement, afin de pouvoir invoquer cette exception d'ordre public, l'autorité d'exécution devra se fonder sur le "standard de protection des droits fondamentaux garanti par le droit de l'Union".<sup>38</sup> Dès lors, seul le niveau de protection Européen des droits fondamentaux informerait sur le contenu des valeurs communes. Par voie de conséquence, il semblerait, au premier abord, qu'une exception à la reconnaissance mutuelle ne peut être fondée que sur la violation de la Charte.

Les États membres peuvent-ils toutefois autoriser une entrave à la reconnaissance mutuelle en invoquant l'ordre public national? Autrement dit, doit-on comprendre que seule une violation de la Charte telle qu'interprétée par la Cour de justice ou des principes généraux du droit de l'Union pourrait remettre en cause la confiance que les autorités

<sup>36</sup> Voir sur le sujet P. BARD, J. MORIJN, *Luxembourg's Unworkable Test to Protect the Rule of Law in the EU*, in *Verfassungsblog*, 18 avril 2020, [verfassungsblog.de](http://verfassungsblog.de); voir toutefois P. BARD, J. MORIJN, *Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU*, in *Verfassungsblog*, 19 avril 2020, [verfassungsblog.de](http://verfassungsblog.de).

<sup>37</sup> Concernant les affaires jointes *Aranyosi et Căldăraru* [GC], cit., voir par exemple E. BRIBOSIA, A. WEYEMBERGH, *Arrêt "Aranyosi et Căldăraru": imposition de certaines limites à la confiance mutuelle dans la coopération judiciaire pénale*, in *Journal de droit européen*, 2016, p. 225 et seq.; L. NAVEL, *Principe de reconnaissance mutuelle et protection des droits fondamentaux au sein du mécanisme du mandat d'arrêt européen: l'émergence d'un nouvel équilibre*, in *Revue des affaires européennes*, 2016, p. 275 et seq.; S. PRECHAL, *Imaginaire tegens-trijidigheden*, in *Asiel en Migrantenrecht*, 2016 p. 255 et seq.; et concernant l'affaire *LM*, cit., voir par exemple D. SIMON, *Faculté de refuser l'exécution d'un mandat d'arrêt européen en cas de risques systémiques d'atteinte aux valeurs de l'Union et aux droits fondamentaux en Pologne et en Hongrie*, in *Europe*, 2018, p. 25 et seq.; C. RIZCALLAH, *Arrêt "LM": un risque de violation du droit fondamental à un tribunal indépendant s'oppose-t-il à l'exécution d'un mandat d'arrêt européen?* in *Journal de droit européen*, 2018, p. 348 et seq.; D. SARMIENTO, *A Comment on the CJEU's Judgment in LM*, in *Maastricht Journal of European and Comparative Law*, 2018, p. 385 et seq.; T. KONSTADINIDES, *Judicial Independence and the Rule of Law in the Context of Non-Execution of a European Arrest Warrant: LM*, in *Common Market Law Review*, 2019, p. 743 et seq.

<sup>38</sup> *Aranyosi et Căldăraru* [GC], cit., par. 88.

judiciaires d'un État membre peuvent avoir dans les autres États membres? La réponse à cette question n'est pas simple.

Dès lors qu'une autorité nationale agit dans le champ d'application du droit de l'Union, ce qui est automatiquement le cas dans le contexte de la reconnaissance mutuelle, la jurisprudence *Melloni* impose le respect de la Charte ce qui peut entraîner la non-application d'un standard de protection national plus élevé si celui-ci vient compromettre la primauté, l'unité et l'effectivité du droit de l'Union.<sup>39</sup>

Ainsi les aspects non essentiels du droit au procès équitable qui auraient une valeur plus importante dans le système constitutionnel d'un État membre ne peuvent faire échec à la reconnaissance mutuelle. Tel était par exemple le cas du droit de comparaître en personne au procès contre une condamnation *in absentia* dans l'affaire *Melloni*.

Dans cette affaire, la Cour de justice décide que la décision-cadre impose un standard uniforme du droit de comparaître en personne au procès. Ce standard ne laisse pas de marge d'appréciation aux États membres. Accepter la norme constitutionnelle nationale venait compromettre l'unité du standard de protection qu'elle précise dans le respect de la Charte et l'effectivité de la décision-cadre.<sup>40</sup>

En revanche, lorsque le droit de l'Union n'impose pas d'unité et laisse une marge d'appréciation aux États membres, un recours à l'ordre public national semble possible, quand bien même celui-ci offrirait une protection plus élevée que le standard Européen à la condition que l'effectivité du droit de l'Union ne soit pas affaiblie. L'effectivité résiderait alors dans l'objectif de sécurité et de rapidité poursuivi par le MAE. Ainsi, dans l'affaire *F*, le respect du principe du droit à un double degré de juridiction, aspect non-essentiel du droit au procès équitable, tel que protégé dans l'ordre juridique français était autorisé. Faisant référence à la marge d'appréciation concernant ce droit laissée aux États membres tant par le droit de la CEDH (art. 5, par. 4 et 13), auquel l'art. 47 de la Charte fait référence, que par la décision-cadre elle-même, la Cour de justice en déduit que la France restait libre d'autoriser un nouveau contrôle de la décision de remise de *F* aux autorités britanniques. Toutefois, ce contrôle ne devait en aucun cas venir allonger les délais précisés à l'art. 17 MAE pour prendre la décision<sup>41</sup> autrement l'objectif général du MAE qui est de remplacer le système de l'extradition par un système de remise simplifié et plus efficace ne serait pas respecté.<sup>42</sup> La confiance mutuelle vient ici au soutien de l'effectivité du droit de l'Union et la valeur nationale de protection juridictionnelle effective se combine avec son pendant Européen.

<sup>39</sup> Cour de justice, arrêt du 26 février 2013, affaire C-399/11, *Melloni* [GC], par. 60.

<sup>40</sup> *Ibid.*, par. 63.

<sup>41</sup> *F.*, cit., par. 65 et 74.

<sup>42</sup> *Ibid.*, par. 57 et 58.

La notion d'effectivité du droit de l'Union en matière pénale demeure cependant difficile à cerner, surtout au regard des décisions *Taricco* et *M.A.S.*<sup>43</sup> Si ces décisions ne concernent pas à proprement parler la reconnaissance mutuelle, elles permettent de s'interroger sur l'influence que les valeurs nationales peuvent avoir sur l'effectivité du droit de l'Union.<sup>44</sup> Dans ces affaires, il s'agissait de sanctionner une fraude de type "carrousel à la TVA".<sup>45</sup> Celle-ci portant notamment atteintes aux intérêts financiers de l'Union au titre de l'art. 325 TFUE. Or, en application du droit italien, les poursuites contre les prévenus étaient prescrites. Dans son premier arrêt, l'affaire *Taricco*, la Cour de justice décide qu'en raison de l'effet direct de l'art. 325 TFUE, le juge italien était sommé de laisser inappliquées les dispositions pénales nationales autorisant cette prescription sauf à ce qu'il soit démontré une violation du principe de légalité protégé par l'art. 49 de la Charte et 7 de la CEDH. L'arrêt *M.A.S.* fait, quant à lui, suite à une référence de la Cour constitutionnelle italienne qui s'interrogeait sur les conséquences de l'arrêt *Taricco* sur le respect du principe de légalité tel que protégé par la Constitution italienne. La Cour de justice confirme qu'une mise en œuvre effective de l'art. 325 ne doit pas entraîner une violation du principe de légalité. Toutefois, sans faire référence directe à une valeur nationale comme limite à la condition d'effectivité, la Cour de justice basant son raisonnement principalement sur l'art. 49 de la Charte, reconnaît aux juges italiens le droit d'appliquer le principe de légalité tel que protégé par la Constitution italienne.<sup>46</sup> Or, le champ d'application de ce dernier couvre le droit de la prescription de l'action publique, ce qui n'est pas le cas de l'art. 49 ou même de l'art. 7 CEDH. Cette interprétation aboutit à rendre totalement ineffective la mise en œuvre de l'obligation imposée par l'art. 325 TFUE puisque de ce fait les juges italiens n'étaient plus tenus de laisser inappliqué le droit national. Un État membre ne pourrait-il pas, désormais, mettre en avant un niveau national de protection d'un droit fondamentaux qui serait présenté comme essentiel et représenterait de ce fait une valeur nationale, afin de s'opposer à, ou de retarder, une remise dans le cadre d'un MAE? Si ce droit fondamental n'est pas uniformisé par la décision-cadre (situation *Melloni*) pourquoi l'application effective d'une disposition de droit primaire ayant effet direct telle que l'art. 325 TFUE, pourrait-elle être écartée et non à celle d'une disposition de droit secondaire dépourvu d'un tel effet?<sup>47</sup> Un éclaircissement de la portée de l'arrêt *M.A.S.* serait souhaitable.

<sup>43</sup> Cour de justice: arrêt du 8 septembre 2015, affaire C-105/14, *Taricco e.a.* [GC]; arrêt du 5 décembre 2017, affaire C-42/17, *M.A.S. et M.B.* [GC].

<sup>44</sup> Voir par exemple, dans l'affaire *M.A.S. et M.B.* [GC], cit., par. 13 à 15, la référence aux principes supérieurs de l'ordre constitutionnel italien et l'analyse de V. MITSILEGAS, *Judicial Dialogue in Three Silences: Unpacking Taricco*, in *New Journal of European Criminal Law*, 2018, p. 38 et seq.

<sup>45</sup> Grace à cette fraude une société X dans un État membre A achète des produits (en l'occurrence du champagne) exempts de TVA (taxe sur la valeur ajoutée) à une société Y dans un État membre B sans avoir à payer de TVA, puis les revends avec TVA dans le pays A sans reverser cette TVA aux services fiscaux de ce dernier pays.

<sup>46</sup> *M.A.S. et M.B.* [GC], cit., par. 58 et 59.

<sup>47</sup> Cour de justice, arrêt du 24 juin 2019, affaire C-573/17, *Poplawski* [GC], par. 69.

Cette interrogation mise à part, les États membres ne semblent pouvoir déroger à l'obligation de reconnaissance mutuelle seulement lorsque l'une des valeurs communes telle que reconnue et définie par le droit de l'Union est violée ou risquerait de l'être. Le judiciaire des valeurs communes par le prisme de la confiance mutuelle opère avant tout comme une sanction vis-à-vis des États dont le système judiciaire est défaillant. Dans ce contexte, une valeur nationale ne peut s'opposer à une valeur commune.

En parallèle, un second mouvement de cette judiciaire vient dégager une autre fonction des valeurs communes, en particulier celle de l'État de droit, qui devient moteur de la justice pénale Européenne. Cette fonction opère *a priori* alors même qu'il n'existerait aucune défaillance dans le système judiciaire d'un État membre susceptible d'entraîner un risque réel de violation d'un droit fondamental et d'affecter la coopération judiciaire dans le domaine pénal. Au nom du principe de confiance mutuelle, la Cour de justice conditionne la coopération judiciaire à l'existence de règles de procédure nationale voire de règles constitutionnelles compatibles avec la valeur commune d'État de droit.

### III. LA VALEUR COMMUNE D'ÉTAT DE DROIT FONDEMENT DE LA CONFIANCE MUTUELLE ET MOTEUR D'UNE (NOUVELLE) JUSTICE PÉNALE EUROPÉENNE

#### III.1. LA NOTION D'AUTORITÉ JUDICIAIRE DANS LE CADRE DU MAE

Conformément au principe d'autonomie procédurale, la décision-cadre sur le MAE laisse aux États membres le soin de déterminer les autorités judiciaires compétentes pour émettre et exécuter un MAE. Or, chacune de ces institutions n'occupe pas nécessairement une place équivalente dans le système judiciaire, et ne dispose pas de pouvoirs équivalents. Compte-tenu des incidences qu'un MAE peut avoir la liberté des personnes, il est impératif que les droits de celles-ci soient effectivement garantis contre toute décision arbitraire. C'est dans ce contexte que la Cour de justice a été amenée à interpréter la décision-cadre sur le MAE et à apporter des limites à l'autonomie procédurale des États membres en imposant que les autorités judiciaires chargées de la procédure relative au MAE répondent à certaines exigences d'indépendance.

La Cour de justice vient d'abord imposer aux autorités nationales participant à cette procédure qu'elles aient toute la qualité d'autorité judiciaire. Le MAE se distingue en deux phases: celle de la décision nationale exécutoire et celle de la prise de décision sur l'émission du MAE. Les deux phases, qui peuvent être concomitantes, doivent demeurer distinctes. La procédure pénale nationale ne peut pas confondre celles-ci si cela aboutit à l'adoption d'une seule et unique décision exécutoire. En application de l'art. 8, par. 1, litt. c), un MAE doit être fondé sur une décision judiciaire nationale, c'est-à-dire soit un jugement exécutoire, soit un mandat d'arrêt ou tout autre décision judiciaire ayant la même force et dont l'objet est l'arrestation d'une personne suspectée d'avoir commis une infraction pénale ou condamnée pour sa commission. Dans l'affaire *Bob Dogi*, la Cour de

justice décide qu'est incompatible avec l'art. 8, par. 1, litt. c), la procédure pénale hongroise simplifiée permettant à un tribunal d'émettre un MAE fondé sur lui-même et non sur une décision nationale spécifique.<sup>48</sup> Qui plus est, tant la décision nationale fondement du MAE que le MAE lui-même doivent avoir les caractéristiques d'une décision judiciaire, c'est-à-dire qu'elles doivent toutes deux être prises par une autorité judiciaire.

La Cour de justice vient ensuite imposer des exigences spécifiques auxquelles la notion d'"autorité judiciaire" doit répondre. Cette notion doit recevoir une interprétation autonome et uniforme dans toute l'Union.<sup>49</sup> Au soutien de cette intrusion dans la souveraineté nationale, la Cour de justice met en avant la valeur de l'État de droit qui impose le respect de la séparation des pouvoirs qui "caractérise le fonctionnement de l'État de droit".<sup>50</sup> La nature judiciaire de l'autorité compétente pour émettre et exécuter un MAE interdit à celle-ci de relever du pouvoir exécutif. Cela explique que ne peuvent être considérées comme autorité judiciaire la police,<sup>51</sup> l'autorité centrale désignée par chaque État membre pour assister les autorités émettrices et exécutantes<sup>52</sup> ou le ministre de la justice.<sup>53</sup>

Le mot "judiciaire" doit toutefois se comprendre dans une acception large puisqu'il couvre "les autorités participant à l'administration de la justice, à la différence, notamment, des ministères ou des autres organes gouvernementaux, qui relèvent du pouvoir exécutif".<sup>54</sup> Plus précisément en matière pénale, l'administration de la justice concerne tous les stades du procès pénal y compris la phase d'exécution de la décision définitive.<sup>55</sup> Ainsi, dans la mesure où il dispose de la compétence pour exercer des poursuites à l'égard d'une personne soupçonnée d'avoir commis une infraction pénale aux fins qu'elle soit attraitée devant une juridiction, un membre du ministère public peut être considéré comme participant à l'administration de la justice.<sup>56</sup>

En d'autres termes, la notion d'autorité judiciaire en droit de l'Union couvre tant les juges que les procureurs. A cet égard, la Cour de justice laisse une certaine marge de manœuvre aux États membres pour organiser le rôle de ces autorités dans la prise de décision relative au MAE. Par exemple, le pouvoir de la police pour établir un mandat d'arrêt national sur lequel le MAE sera fondé peut-être maintenu à condition que cette

<sup>48</sup> Cour de justice, arrêt du 1er juin 2016, affaire C-241/15, *Bob-Dogi*, par. 46-49.

<sup>49</sup> Cour de justice: arrêt du 10 novembre 2016, affaire C-452/16 PPU, *Poltorak*, par. 32; arrêt du 10 novembre 2016, affaire C-477/16 PPU, *Kovalkovas*, par. 33.

<sup>50</sup> *Poltorak*, cit., par. 35; *Kovalkovas*, cit., par. 36.

<sup>51</sup> *Poltorak*, cit., par. 34.

<sup>52</sup> *Kovalkovas*, cit., par. 39.

<sup>53</sup> *Ibid.*, par. 47.

<sup>54</sup> *Poltorak*, cit., par. 35; *Kovalkovas*, cit., par. 36.

<sup>55</sup> Cour de justice, arrêt du 27 mai 2019, affaire C-509/18, *PF* [GC], par. 33.

<sup>56</sup> En ce qui concerne le parquet comme autorité émettant le MAE, voir Cour de justice, arrêt du 27 mai 2019, affaires jointes C-508/18 et C-82/19 PPU, *OG et PI* [GC], par. 60 et en ce qui concerne le parquet comme autorité émettant la décision nationale voir arrêt du 10 novembre 2016, affaire C-453/16 PPU, *Özçelik*, par. 30.

décision soit validée par un juge ou un procureur.<sup>57</sup> Le mandat d'arrêt national sera alors considéré comme pris par le parquet.

La décision d'inclure le ministère public dans la notion d'autorité judiciaire est naturellement respectueuse de la tradition judiciaire dans certains pays,<sup>58</sup> mais cela ne va pas sans poser problème car le ministère public est dans de très nombreux cas lié au pouvoir exécutif qui peut parfois posséder un pouvoir d'instruction dans les dossiers.<sup>59</sup> En effet, la fonction de deux pouvoirs converge puisqu'il s'agit de défendre l'intérêt général. Par ailleurs, il existe des systèmes où la victime peut agir en qualité d'accusateur privé et exercer les pouvoirs dévolus au ministère public.<sup>60</sup> La Cour de justice impose donc des limites à l'autonomie nationale. L'autorité d'émission doit être "en mesure d'exercer cette fonction de façon objective, en prenant en compte tous les éléments à charge et à décharge, et sans être exposée au risque que son pouvoir décisionnel fasse l'objet d'ordres ou d'instructions extérieurs, notamment de la part du pouvoir exécutif, de telle sorte qu'il n'existe aucun doute quant au fait que la décision d'émettre le mandat d'arrêt européen revienne à cette autorité et non pas, en définitive, audit pouvoir".<sup>61</sup>

L'indépendance du parquet doit être précisée par des "règles statutaires et organisationnelles propres à garantir que l'autorité judiciaire d'émission ne soit pas exposée, dans le cadre de l'adoption d'une décision d'émettre un tel mandat d'arrêt, à un quelconque risque d'être soumise notamment à une instruction individuelle de la part du pouvoir exécutif".<sup>62</sup> Ces règles doivent garantir qu'aucun représentant de l'exécutif n'ait le pouvoir d'enjoindre au procureur des instructions écrites dans un dossier spécifique.<sup>63</sup> En revanche, sont autorisées les instructions générales de politique pénale nécessaires à la cohérence de cette politique sur le territoire national ainsi que les instructions internes nécessaires au bon fonctionnement du parquet.<sup>64</sup>

Cette exigence d'indépendance rappelle bien entendu les critères externes et internes d'indépendance dégagés par la Cour de justice dans l'affaire *LM*, mais certaines différences existent. Elles sont discutables. En premier lieu, le ministère public reste tenu par la politique pénale décidée par l'exécutif. Or, selon l'Avocat général Manuel Campos

<sup>57</sup> Özçelik, cit., par. 29-30.

<sup>58</sup> Voir par exemple P. TAK, *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen: Wolf Legal Publishers, 2004-2005.

<sup>59</sup> Voir par exemple T.P. MARGUERY, *Unity and Diversity of the Public Prosecution Services in Europe. A Study of the Czech, Dutch and Polish Systems*, thèse doctorale, Université de Groningue, 2008, [www.gbv.de](http://www.gbv.de).

<sup>60</sup> Par exemple l'art. 236 de la loi n° XIX de 1998, relative à la procédure pénale hongroise qui a donné lieu à l'arrêt du 9 octobre 2008, affaire C-404/07, *Katz*.

<sup>61</sup> *OG et PI* [GC], cit., par. 73.

<sup>62</sup> Cour de justice, arrêt du 12 décembre 2019, affaires jointes C-566/19 PPU et C-626/19 PPU, *JR et YC*, par. 52.

<sup>63</sup> Ainsi au moment des affaires *OG et PI*, cit., le parquet allemand n'était pas compatible avec la décision-cadre puisque le ministre de la justice disposait du pouvoir de transmettre de telles instructions aux procureurs.

<sup>64</sup> *JR et YC*, cit., pour le parquet français par. 54-56.



Sánchez-Bordona, la possibilité pour l'exécutif de donner des instructions générales est de nature à restreindre l'autonomie des procureurs en leur imposant d'émettre des MAE pour une catégorie de délinquant ou d'infraction plutôt qu'une autre.<sup>65</sup> En second lieu, dans l'affaire *LM*, la Cour de justice impose au pouvoir judiciaire de l'État membre d'émission de n'avoir aucun intérêt dans la solution du litige en dehors de la stricte application de la règle de droit.<sup>66</sup> Il s'avère toutefois, que dans certains pays, telle la France où un principe d'impartialité existe,<sup>67</sup> un membre du parquet peut à la fois instruire un dossier et requérir à l'audience contre le suspect dans ce même dossier, ce qui en fait une partie au procès. Or, tant la Cour de justice<sup>68</sup> que la CEDH<sup>69</sup> reconnaissent que, dans ces conditions, ce procureur a intérêt dans la solution du litige.

Cette divergence d'interprétation ne laisse aux États membres qu'une liberté restreinte dans l'organisation de la séparation des pouvoirs, et par conséquent, de la valeur commune d'État de droit. Le système doit avant tout protéger la personne contre les décisions arbitraires qui pourraient être prises à son encontre par le pouvoir politique. Dans l'affaire *LM*, l'accent est sur l'indépendance des juridictions de jugement, lesquelles doivent assurer une protection juridictionnelle effective.<sup>70</sup> Dans le cadre de l'émission d'un MAE, la Cour de justice exige aussi une protection juridictionnelle effective, mais il importe seulement que celle-ci ait lieu durant l'une des deux phases caractérisant la procédure d'émission puisque l'objectif du MAE n'est pas de juger une personne. L'indépendance du ministère public compétent pour émettre un MAE est avant tout nécessaire pour assurer aux autorités étrangères en charge de l'exécution d'un MAE que celui-ci a été émis dans le respect des conditions de forme et du principe de proportionnalité.

### III.2. L'EXIGENCE D'UNE PROTECTION JURIDICTIONNELLE EFFECTIVE

Comme l'indique tant la Cour de justice que ses avocats généraux,<sup>71</sup> le MAE est susceptible de limiter gravement les droits fondamentaux garantis aux personnes par le droit de l'Union. L'art. 6 de la Charte concernant le droit à la liberté revêt une importance particulière. A cet art., combiné avec l'art. 52, par. 3, de la Charte, correspond l'art. 5 CEDH.<sup>72</sup>

<sup>65</sup> Conclusions de l'AG Campos Sánchez-Bordona présentées le 26 novembre 2019, affaires jointes C-566/19 PPU et C-626/19 PPU, *JR et YC*, par. 37-42.

<sup>66</sup> *LM*, cit., par. 65.

<sup>67</sup> *JR et YC*, cit., par. 54.

<sup>68</sup> Cour de justice, arrêt du 12 décembre 1996, affaires jointes C-74/95 et C-129/95, *Procédures pénales c. X*, par. 19.

<sup>69</sup> Par exemple, Cour Européenne des Droits de l'Homme, arrêt du 23 octobre 1990, n° 12794/87, *Huber c. Suisse*, par. 43; voir aussi arrêt du 5 mai 2020, n° 3594/19, *Kövesi c. Roumanie*.

<sup>70</sup> Ainsi aux par. 63 et 64 la Cour de justice évoque respectivement la mission et la tâche de juger; la notion de protection juridictionnelle effective est mentionnée par. 52, 56 et 58.

<sup>71</sup> Par exemple, Cour de justice, arrêt du 9 octobre 2019, affaire C-489/19 PPU, *NJ (Parquet de Vienne)*, par. 35 et les conclusions de l'AG Sharpston dans cette affaire, par. 89.

<sup>72</sup> Voir Explications ad art. 6 relatives à la Charte des droits fondamentaux et *OG et PI* [GC], cit., par. 68.

L'autorité d'exécution d'un MAE n'est tenue qu'au contrôle restreint imposé par l'art. 5, par. 1, litt. f), CEDH qui impose seulement qu'une procédure d'expulsion ou d'extradition soit en cours pour justifier la privation de liberté.<sup>73</sup>

En application du principe de reconnaissance mutuelle c'est à l'autorité judiciaire d'émission de contrôler que la détention d'une personne est raisonnablement nécessaire. Cette autorité doit respecter le principe de sécurité juridique y compris le principe de légalité des délits et des peines.<sup>74</sup> L'essentiel du respect des droits fondamentaux de la personne sujette au MAE se faisant dans l'État d'émission, il est impératif que, conformément à l'art. 47 de la Charte ces droits soient protégés de manière effective par le droit de cet État.

Or, comme nous l'avons vu l'émission d'un MAE se fait en deux phases. L'existence d'un contrôle lors de chacune de ces deux phases contribuent à assurer une protection judiciaire complète.<sup>75</sup> Toutefois, les exigences inhérentes à une protection juridictionnelle effective doivent être respectées "à tout le moins" à l'un des deux niveaux de ladite protection.<sup>76</sup> Parmi ces exigences, il est nécessaire qu'un juge ou une juridiction intervienne durant la procédure. L'objet de cette intervention sera de veiller au respect des droits fondamentaux de la personne sujette au mandat.<sup>77</sup> Cette intervention peut donc avoir lieu au moment de la prise de décision judiciaire nationale fondant le MAE ou au moment de l'émission du MAE lui-même.

Dans l'hypothèse où le MAE est délivré pour l'exécution d'une peine, une protection juridictionnelle effective est réalisée par le jugement exécutoire de condamnation, donc au premier niveau de la protection imposée dans le contexte du MAE.<sup>78</sup> Dans ce cas, le respect du droit à un juge indépendant est présumé dans les limites de la jurisprudence *LM*. Le caractère proportionné de l'émission du MAE l'est aussi puisque seules les condamnations à une peine privative de liberté d'au moins quatre mois peuvent faire l'objet d'un tel mandat. Le contrôle effectué au deuxième niveau devra au minimum concerner les conditions de forme nécessaires à l'émission du MAE.

<sup>73</sup> La Cour Européenne des Droits de l'Homme décide que cette disposition s'applique au MAE, voir arrêt du 17 avril 2018, n° 21055/11, *Pirozzi c. Belgique*, par. 45. Voir aussi les conclusions de l'AG Sharpston présentées le 18 octobre 2012, affaire C-396/11, *Radu*, et arrêt du 16 juillet 2015, affaire C-237/15 PPU, *Lanigan* [GC], par. 57-58. L'autorité d'exécution est simplement tenue de mener la procédure avec diligence et de s'assurer que la privation de liberté est régulière selon le droit national. La détention ne doit pas être arbitraire et doit être mise en œuvre de bonne foi. C'est-à-dire que les conditions et la durée de détention doivent être appropriés et raisonnables pour mettre en œuvre la remise, Cour Européenne des Droits de l'Homme, arrêt du 19 février 2009, n° 3455/05, *A. et Autres c. Royaume-Uni*, par. 164.

<sup>74</sup> Cour Européenne des Droits de l'Homme, arrêt du 29 mars 2010, n° 3394/03, *Medvedyev et autres c. France*, par. 80; voir aussi Cour de justice, arrêt du 3 mai 2007, affaire C-303/05, *Advocaten voor de Wereld* [GC], par. 51.

<sup>75</sup> *Bob-Dogi*, cit., par. 56.

<sup>76</sup> *OG et PI* [GC], cit., par. 68.

<sup>77</sup> En ce sens, les conclusions de l'AG Campos Sánchez-Bordona présentées le 30 avril 2019, affaires jointes C-508/18 et C-82/19 PPU, *OG et PI*, cit., par. 66-68.

<sup>78</sup> Cour de justice, arrêt du 12 décembre 2019, affaire C-627/19 PPU, *ZB*, par. 33-35.

Dans l'hypothèse où le MAE est délivré à des fins de poursuites, la décision d'émettre ce mandat doit être soumis, dans ledit État membre, à un recours juridictionnel qui satisfait pleinement aux exigences inhérentes à une protection juridictionnelle effective.<sup>79</sup> La forme de cette intervention est toutefois laissée à la discrétion des États membres.<sup>80</sup> L'intervention du juge peut avoir eu lieu au moment de la prise de décision judiciaire nationale fondant le MAE ou à celui de l'émission du MAE. Si le MAE est émis par un procureur, il est alors nécessaire qu'un juge soit intervenu au premier stade de la procédure.<sup>81</sup> Le contrôle du juge peut se détacher de la prise de décision. Ainsi, un mandat national peut être émis par un procureur mais il devra être homologué par un tribunal. En tout état de cause, le contrôle effectué par le juge doit avoir lieu systématiquement d'office.<sup>82</sup> Ainsi la protection juridictionnelle effective dans le cadre de l'émission d'un MAE se distingue de l'existence d'une voie de recours contre la décision d'émettre ce mandat et qui serait ouverte au suspect poursuivi. Les conséquences d'une protection juridictionnelle effective défaillante restent toutefois à préciser. Il semblerait qu'une telle défaillance concerne la procédure d'émission<sup>83</sup> et qu'il appartient aux autorités judiciaires d'exécution de vérifier qu'un contrôle d'office effectué par un juge ou une juridiction a bien eu lieu dans le pays émetteur.<sup>84</sup> Un certain nombre de questions restent cependant à éclaircir. Par exemple, à quel moment les autorités d'exécution peuvent douter du respect de cette protection, de quels éléments de preuve doivent-elles être en possession pour considérer que la procédure d'émission ne respecte pas le principe de protection juridictionnelle effective? Et surtout, quelles sont les conséquences pour l'exécution du MAE si le principe n'est pas respecté?

#### IV. REMARQUES CONCLUSIVES

Le recours à la justice pénale est non seulement destiné à protéger les valeurs propres à chaque pays, mais il est surtout de nature à causer d'importantes restrictions aux droits et libertés fondamentales des personnes. A ce titre, la justice pénale est un *ultimum remedium* qui doit être adéquatement encadré par la loi et exempt de toute décision arbitraire. La coopération judiciaire pénale dans l'Union Européenne a subi une mutation profonde ces dernières années. Cela est en particulier dû à la mise en œuvre du principe de reconnaissance mutuelle qui impose un haut degré de confiance présumée entre États membres, et plus particulièrement entre les autorités chargées des procédures pénales. Celles-ci sont, en effet, privées de la quasi-totalité de leur pouvoir discrétionnaire de contrôle des décisions judiciaires émises dans un État voisin dont elles ne connaissent

<sup>79</sup> *OG et PI* [GC], cit., par. 75.

<sup>80</sup> Cour de justice, arrêt du 12 décembre 2019, affaire C-625/19 PPU, *XD*, par. 43-44; *JR et YC*, cit., par. 64.

<sup>81</sup> *OG et PI* [GC], cit., par. 69.

<sup>82</sup> *NJ (Parquet de Vienne)*, cit., par. 46.

<sup>83</sup> *JR et YC*, cit., par. 48.

<sup>84</sup> *PF*, cit., par. 56.

ni la langue ni la procédure. Ainsi, la présomption de validité et de conformité des MAE a sans nul doute eu le mérite de faciliter la lutte contre le crime dans l'espace européen. Toutefois, l'absence de conditions et de limites encadrant la confiance mutuelle a révélé une importante crise de valeurs entre les États membres de l'Union et l'Union elle-même. L'équivalence dans le respect par tous les États membres des droits fondamentaux est l'une des valeurs communes de l'Union. La justice pénale n'est pas seulement destinée à protéger les valeurs nationales de chaque pays qui la met en œuvre, mais elle doit aussi respecter voire protéger les valeurs communes.

C'est dans ce contexte que la Cour de justice est venue donner au principe de confiance mutuelle une nature constitutionnelle en lui imposant des conditions et des limites et en rattachant les obligations résultant de la reconnaissance mutuelle à celui-ci. Confiance mutuelle et valeurs communes sont ainsi étroitement liées. En particulier, en sanctionnant les violations de l'interdiction de la torture et de l'essence du droit à un procès équitable caractérisé par l'indépendance judiciaire, la Cour a judiciarisé les valeurs de dignité humaine et d'État de droit. Ce faisant, certaines divergences entre valeurs nationales et valeurs communes sont mises au jour. Au travers d'une jurisprudence évolutive, la Cour de justice est à la recherche d'un équilibre difficile entre les premières et les secondes. D'un côté, la violation de certaines valeurs communes peut constituer une sanction à l'encontre de l'État fautif qui se voit ainsi privé du bénéfice de la coopération entre États. Toutefois, les seuils imposés par la Cour afin de justifier un refus de coopération demeurent assez élevés.

D'un autre côté, si les États veulent bénéficier d'une coopération pénale, les valeurs communes imposent à ceux-ci d'adapter le fonctionnement et l'organisation des institutions nationales chargées de cette coopération. Tel est le cas de la valeur d'État de droit caractérisée par la séparation des pouvoirs et l'indépendance de la justice.

D'aucun pourront toutefois regretter que la Cour de justice laisse le soin aux autorités judiciaires nationales de constater la mise en œuvre ou non des conditions imposées par sa jurisprudence et partant de décider sur la violation concrète d'une valeur commune.



## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

*edited by Araceli Turmo*

#### FROM THE GROUND UP: THE USE OF MINIMUM RULES IN EU PROCEDURAL CRIMINAL LAW AND THE QUESTION OF MEMBER STATES' DISCRETION

KONSTANTINOS ZOUMPOULAKIS\*

TABLE OF CONTENTS: I. A brief journey to the world of minimum rules. – I.1. The origins of minimum rules. – I.2. The current legal framework. – II. Orchestrating the harmonisation of procedural criminal norms in the EU. – III. Minimum rules and the question of national discretion. – IV. Raising barriers to national discretion. – V. Conclusion.

**ABSTRACT:** The concept of minimum rules is inextricably linked to the approximation of criminal norms in the European Union. In the field of procedural criminal law, the adoption of minimum rules supports the need to facilitate mutual recognition and police and judicial cooperation in criminal matters. This *Article* seeks to introduce the reader to the world of minimum rules. In order to understand what it means to have minimum rules in a criminal law context, it is necessary to discuss about the origins, the development, the use and the role of minimum rules within this particular context. Following a complete depiction of the way in which minimum rules function in the field of procedural criminal law, the question arises: can Member States go beyond minimum rules? This *Article* attempts a comprehensive answer to the question of national discretion, arguing for the existence of different limits that can confine the discretion of the national legislator to go beyond minimum rules, and advocating the need for an *ad hoc* assessment of Member States' discretion.

**KEYWORDS:** EU criminal law – minimum rules – minimum harmonisation – Art. 82 TFEU – police and judicial cooperation – national discretion.

\* PhD Candidate, Leiden Law School, k.zoumpoulakis@law.leidenuniv.nl.



## I. A BRIEF JOURNEY TO THE WORLD OF MINIMUM RULES

Despite constituting for many years *terra incognita* for the European Union, the area of criminal law has known a flourishing legislative production over the past years. The efforts of the European legislator to approximate criminal norms in the EU have given rise to a substantial body of legislation that signals a shift from the initial reluctance of Member States to confer the relevant competence to the EU.<sup>1</sup> In this context, the concept of minimum rules has become central to the harmonisation of both the substantive and procedural criminal law in the EU, as well to the approximation of criminal sanctions.<sup>2</sup>

Minimum rules are part of the efforts to create the common legal language of the European Union. In the field of EU criminal law, they have known a life of more than twenty years, but still it remains unclear what it means to have minimum rules in a criminal law context. This *Article* seeks to introduce the reader to the world of minimum rules, focusing predominantly on procedural criminal law. As a point of departure, the emergence of minimum rules in the field of procedural criminal law is being discussed, offering an overview of the different functions that they fulfil within this particular context. From there, the focus is shifted towards the question of the discretion of Member States to go beyond minimum rules. Answering the question of national discretion and revealing the limits that apply to the discretionary powers of the national legislator is a necessary step towards the better understanding of the vague concept of minimum rules that guides the criminal law competence of the EU.

### I.1. THE ORIGINS OF MINIMUM RULES

The concept of minimum rules is inextricably linked to the European integration process. Originating from the early days of the internal market, minimum rules are frequently adopted in all different areas of EU law.<sup>3</sup> In the context of EU criminal law, minimum rules represent the youngest member of the family, as their first treaty-based appearance can be traced in the text of the Treaty of Amsterdam.<sup>4</sup> Since then, the use of minimum rules has gained a central position in the criminal law competence of the

<sup>1</sup> J. ÖBERG, *EU Procedural Criminal Law after Lisbon*, in J. OUWERKERK, J. ALTENA, J. ÖBERG, S. MIETTINEN (eds), *The Future of EU Criminal Justice Policy and Practice*, Leiden: Brill, Nijhoff, 2019, p. 228.

<sup>2</sup> In this *Article*, the terms “harmonisation” and “approximation” are used interchangeably. Despite the subtle differences between these two terms, the EU legislator does not seem to acknowledge different connotations. See further, A. KLIP, *European Criminal Law, An Integrative Approach*, Cambridge: Intersentia, 2016, p. 38.

<sup>3</sup> The use of minimum rules originated in the internal market context. In fact, the first traces of the concept of minimum rules date back to the 1960s, when the adoption of common minimum provisions sought to establish a common market for fruits and vegetables. Subsequently, the use of minimum rules spread quickly to all different areas of EU law before entering the field of criminal law.

<sup>4</sup> Art. K.3 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.

European Union, constituting the steering wheel for the harmonisation of both substantive and procedural criminal law.

Since the first days of the competence of the EU to intervene in the sphere of criminal law, the need to ground a common understanding among Member States and thereby facilitate mutual recognition and judicial and police cooperation in criminal matters was seen as an essential step.<sup>5</sup> To that end, bringing forward a certain degree of harmonisation of national norms was perceived as the necessary prerequisite for mutual recognition.<sup>6</sup> However, the reluctance of Member States to confer the relevant competence to the EU and the concerns about preserving the national identity of criminal law,<sup>7</sup> resulted in limiting the competence of the EU to the adoption of minimum rules.<sup>8</sup>

Following the adoption of the Treaty of Maastricht that provided the necessary legal basis for the Union's competence to legislate in criminal matters,<sup>9</sup> the first initiatives that referred to the concept of minimum rules appeared in the mid-1990s.<sup>10</sup> Despite the fact that the concept of minimum rules was not explicitly mentioned in the text of the Treaty, the European Commission already acknowledged since that time the need to establish a "set of minimum rules for the establishment of direct and efficient judicial collaboration".<sup>11</sup> This statement constitutes one of the first references to the concept of minimum rules in the field of criminal law, representing an attempt on behalf of the European Commission to push Member States to proceed with the development of cross-border judicial cooperation in criminal matters.

Subsequently, the Treaty of Amsterdam codified the adoption of minimum rules as regards the definition of criminal offences, leaving however out of the picture the rele-

<sup>5</sup> European Council, conclusions of the Presidency, Tampere European Council, 15-16 October 1999.

<sup>6</sup> M. KLAMERT, *What We Talk About When We Talk About Harmonisation*, in *Cambridge Yearbook of European Legal Studies*, 2015, p. 360 *et seq.*

<sup>7</sup> See J. OUWERKERK, J. ALTENA, J. ÖBERG, S. MIETTINEN (eds), *The Future of EU Criminal Justice Policy*, cit.

<sup>8</sup> On the relation between European criminal law and national identity, see M. HILDEBRANDT, *European Criminal Law and European Identity*, in *Criminal Law and Philosophy*, 2007, p. 57 *et seq.*

<sup>9</sup> Art. K.1 TEU, 1992. However, this was not the first time that the European authorities decided to intervene in the sphere of criminal law. References to the need for cross-border cooperation in criminal matters date long before the entry into force of the Treaty of Maastricht, and can be traced back to the TREVI group, which put in 1975 on the agenda the need for cross-border cooperation to effectively combat crime.

<sup>10</sup> For instance, in 1996 the European Commission issued a communication with regards to the illegal and harmful content on the internet, where the non-territorial nature of the offence called for a solution that would go beyond the borders of Member States. The Commission underlined the necessity for Member States to define certain minimum common standards in their criminal legislation, in order to "avoid loopholes for criminal activities". See Communication COM(1996) 487 final of 16 October 1996 from the Commission on Illegal and harmful content on the Internet.

<sup>11</sup> The Commission's annual report for the year 1994 notes that there is a need for a "minimum platform of basic principles" that would efficiently protect the Community's finances. See Commission, Annual Report COM(1995) 98 final of 29 March 1995, *Protecting the Community's financial interests. The fight against fraud*, p. 18.

vant competence for procedural criminal law.<sup>12</sup> Hence, despite the fact that the criminal law competence of the EU was narrower at that time, the European authorities acknowledged the need for a common response to crime. Regardless of this nuance, the entry into force of the Treaty of Amsterdam signals major developments in the field of EU criminal law, with the establishment of the Area of Freedom, Security and Justice, and the codification in the text of the Treaty of the previous legislative practice with regards to the adoption of minimum rules. Since then, the proliferation of EU documents that deal with matters of criminal law is indisputable, while the concept of minimum rules is being widely used as the main legislative tool towards the harmonisation of criminal norms and therethrough the effective combat of crime.<sup>13</sup>

## 1.2. THE CURRENT LEGAL FRAMEWORK

The current legal framework is shaped by the provisions of the Treaty of Lisbon, which was meant to beckon a new era for criminal legislation in Europe.<sup>14</sup> In particular, Arts 82 and 83 TFEU dictate that the harmonising competence of the EU in the field of substantive and procedural criminal law can be exercised only through the adoption of minimum rules, making, thus, minimum rules the sole harmonising tool at the hands of the European legislator.<sup>15</sup> Focusing on procedural criminal law, the competence of the European legislator to adopt minimum rules that approximate criminal procedural norms and seek to harmonise procedural safeguards in the EU, constitutes a novelty in relation to the previous EU Treaties. Therefore, it is crucial to have a closer look at the legal basis of Art. 82 TFEU, in an attempt to pave the way towards a better understanding of the use of minimum rules in this particular context. Additionally, reciting the provisions

<sup>12</sup> Indeed, the criminal law competence of the European Union was much narrower under the provisions of Art. K.3 of the Treaty of Amsterdam, allowing only for the establishment of minimum rules in the field of substantive criminal law and only in relation with specifically mentioned crime areas. In particular, Art. K.3 was referring to “progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking”.

<sup>13</sup> See, for instance, the 1999 Action Plan of the Council and the Commission on how to best implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, where it is noted that criminal behaviour should be approached in an “equally efficient way throughout the Union” and that major criminal areas “should be subject of minimum common rules relating to the constituent elements of criminal acts and should be pursued with the same vigour wherever they take place”. See Council and Commission Action Plan of 23 January 1999 on how to best implement the provision of the Treaty of Amsterdam on an area of freedom, security and justice.

<sup>14</sup> Among the most important structural changes that the Treaty of Lisbon brought forward in this field, was the abolishment of the complex cross-pillar character of EU criminal law. See E. HERLIN-KARNELL, *EU Competence in Criminal Law after Lisbon*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds), *European Union Law after the Treaty of Lisbon*, Oxford: Oxford University Press, 2012, p. 329 *et seq.*

<sup>15</sup> Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community. In particular, Arts 82 and 83 TFEU provide the legal basis for the harmonisation of substantive and procedural criminal law in the EU.



of Art. 82, para. 2, TFEU allows us to pinpoint the components that are essential to answering the question about the discretion of Member States to go beyond minimum rules. Art. 82, para. 2, TFEU reads as follows: “To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States”,<sup>16</sup> whereas the last fragment of Art. 82, para. 2, TFEU adds that: “Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals”.<sup>17</sup>

The first thing that becomes apparent is that the envisaged approach towards the harmonisation of procedural criminal law in the EU is limited to the adoption of minimum rules, which may only be adopted to the extent necessary to facilitate mutual recognition and cooperation. This means that the scope of adopting minimum rules in the field of procedural criminal law is being significantly narrowed down by the text of the Treaty, which attributes a supportive role to minimum rules.<sup>18</sup> In other words, with the primary objective in the field of procedural criminal law being the facilitation of mutual recognition and cross-border cooperation, the use of minimum rules has an auxiliary purpose to fulfil. The exact role and the position of minimum rules within this particular context will be discussed further below.

## II. ORCHESTRATING THE HARMONISATION OF PROCEDURAL CRIMINAL NORMS IN THE EU

The use of minimum rules in the context of procedural criminal law reflects the need for a common set of procedural safeguards that would be equally respected throughout the Union. By creating a common legal language, minimum rules build the ground that supports the elimination of obstacles in mutual recognition and cross-border cooperation in criminal matters. Bearing this in mind, there is a tight relationship between minimum rules and mutual recognition, with the former being justified in light of the latter. In fact, minimum rules were initially conceived as a tool that would merely remove the obstacles in cross-border cooperation that could arise from the divergences

<sup>16</sup> Art. 82, para. 2, TFEU.

<sup>17</sup> *Ibid.*

<sup>18</sup> The use of minimum rules in procedural criminal law is further limited by the Treaty, given that the adoption of minimum rules may be pursued only with regards to three legislative areas: *i)* the mutual admissibility of evidence between Member States; *ii)* the rights of individuals in criminal proceedings; *iii)* the rights of the victims of crime. Despite the fact that an additional, all-embracing area, allows the adoption of minimum rules with regards to “any other specific aspects of criminal procedure”, this has not been invoked yet.

in national law.<sup>19</sup> However, throughout the development of EU criminal law, minimum rules were soon transformed into a harmonising tool that seeks to bring forward an “ever closer Union” and strengthen procedural guarantees in the EU.<sup>20</sup>

It stems from the above that the adoption of minimum rules in the field of procedural criminal law has a strong functional character.<sup>21</sup> More specifically, this functional character means that the European legislator adopts minimum rules in relation to further objectives of the EU, which in the case of procedural criminal law is primarily the facilitation of mutual recognition and cooperation. As a result, the harmonisation of procedural norms through the adoption of minimum rules does not represent an autonomous, self-standing objective of the European Union.<sup>22</sup> On the contrary, it is justified only to the extent necessary to facilitate mutual recognition and cross-border cooperation, as Art. 82, para. 2, TFEU clearly dictates.

Acknowledging that minimum rules constitute a key harmonising tool in the legislator’s toolbox, with a strong functional character, is essential in order to understand what it means to have minimum rules in a criminal law context. Overall, the establishment of minimum rules in the field of procedural criminal law seeks to close the gap between diverse national provisions and establish an equal level of protection throughout the European Union, guaranteeing that a minimum set of procedural safeguards are respected in all the Member States. This need to guarantee a level-playing field in the EU is essential to the functioning of the Area of Freedom, Security and Justice.

Furthermore, the adoption of minimum rules satisfies a series of ancillary objectives that are adjunct to their primary role as a harmonising tool. For instance, having common minimum standards across the EU impedes the creation of safe-havens and delimits the risk of forum-shopping phenomena.<sup>23</sup> Most importantly, the adoption of minimum rules in the field of criminal law showcases the desire to preserve the national character of criminal law, which, as already mentioned, is considered a sensitive issue of national sov-

<sup>19</sup> J. ÖBERG, *Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure*, in *European Constitutional Law Review*, 2020, p. 33 et seq.

<sup>20</sup> European Council Resolution of 30 November 2009 on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

<sup>21</sup> J. OUWERKERK, *EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-Standing Approximation of Procedural Rights and their Progressive Effect on the Charter’s Scope of Application*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2019, p. 89 et seq.

<sup>22</sup> Ouwerkerk argues that despite some recent developments in the field of EU criminal procedural law that indicate the tendency of the EU legislator to adopt minimum rules also for autonomous reasons, “a self-standing body of EU procedural rights cannot legitimately be realized under the too limited functionalist scope of Article 82(2) TFEU”. See *ibid.*, p. 94.

<sup>23</sup> Although this aspect might seem more relevant to the harmonisation of substantive criminal law, it is equally important for procedural norms. Within the borderless Area of Freedom, Security and Justice and due to the non-territorial character of several offences, it is crucial to avoid circumstances where various forms of criminal behaviour can benefit from loopholes in the national criminal justice system and take advantage of the differences in local legislations, in an attempt to, *inter alia*, avoid prosecution.

ereignty. The need for a balanced and respectful approach towards the harmonisation of procedural criminal law is enshrined in the text of the Treaty of Lisbon, which notes that the establishment of common minimum rules “shall take into account the differences between the legal traditions and systems of the Member States”.<sup>24</sup> In that sense, minimum rules are able to compromise the need for the establishment of a borderless Area of Freedom, Security and Justice, while at the same time preserve national identity and the fundamental aspects of domestic criminal law.<sup>25</sup> The adoption of minimum rules is a way to acknowledge the fact that national diversity is a reality that often calls for different solutions. In fact, the concept of minimum rules constitutes the sole harmonising option that allows for the preservation of national identity.<sup>26</sup> Contrary to the rest of the aforementioned functions, which in theory could be also pursued through the adoption of maximum harmonisation provisions, the establishment of minimum rules is the only available option that ensures respect for the diversity in national penal traditions. Hence, the adoption of minimum rules establishes a common level of understanding within the European Union, without burying national differences in the sand.

### III. MINIMUM RULES AND THE QUESTION OF NATIONAL DISCRETION

Following a closer look at the concept of minimum rules, it is now time to focus on the question of national discretion, namely the question of whether Member States can go beyond EU wide minimum rules.<sup>27</sup> National discretion is here understood as the amount of freedom that the national legislator has – or should have – when implementing minimum rules in domestic legislation.<sup>28</sup> Indeed, during the implementation of minimum rules in national criminal law, the national legislator is able to go beyond the common minimum provisions and exceed the wording of the Directive, in an attempt to

<sup>24</sup> Art. 82, para. 2, TFEU.

<sup>25</sup> See also Art. 4, para. 2, TEU that establishes the need to respect national identities and, therefore, national penal traditions as well. In particular, Art. 4, para. 2, TEU states that “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”. Additionally, in the field of procedural criminal law, the significance of preserving national identity is further enshrined in Art. 83, para. 3, TFEU that provides for an “emergency break”, in cases where Member States consider that a proposed draft affects fundamental aspects of their criminal justice system.

<sup>26</sup> The establishment of minimum rules is the least intrusive option available, especially in relation to the alternatives of maximum harmonisation and the unification of national laws.

<sup>27</sup> Following Arts 82 and 83 TFEU, read together with Art. 288 TFEU, minimum rules in the field of EU criminal law may be adopted only in the form of directives that are binding to the result to be achieved, but leave to national authorities the choice of forms and methods.

<sup>28</sup> A second level of national discretion refers to the discretion of national judicial authorities to interpret minimum rules and grant them a broader (or narrower) content than the one intended by the European legislature. This *Article* discusses only the first level of national discretion, *i.e.* legislative discretion, and not judicial discretion.

enhance procedural safeguards. This kind of legislative discretion, which is inherent to the concept of minimum rules, should not be confused with the leeway that the legal instrument of the directive awards in any case to the national legislator to adapt the transposition of EU law into national legislation.<sup>29</sup>

It is crucial to identify the element of national discretion in all the instruments that introduce minimum rules, in a sense that we cannot talk about the existence of minimum rules without discussing about the amount of discretion they award to Member States. As already mentioned, minimum rules provide the common ground upon which Member States are able to build. Hence, without being able to imagine, *at least in principle*, the fact that Member States have the discretion to go beyond minimum rules, then we are no longer talking about minimum rules, but instead we are referring to maximum rules. In other words, if the rule adopted by the European legislator does not allow the national legislator to exceed it, then it is not a minimum rule, but a maximum one, setting both the regulatory floor and ceiling at the same time. What would be the point of differentiating between minimum and maximum rules, if we strip the first ones of the element of national discretion, *i.e.* if we deprive the national legislator of the possibility to go beyond the minimum common ground?

Additionally, it is worth reminding that the term “minimum” does not refer to the content of the rule, but to the fact that the adopted rule sets the common ground for all Member States. In other words, the word “minimum” serves as a reminder of the discretion of Member States to build upon this common ground, which represents the least that should be done, without imposing *a priori* an upper limit.

The argument in favour of the discretion of Member States to go beyond minimum rules has its strongest foundation in the Treaty of Lisbon. A close reading of Art. 82, para. 2, TFEU suggests that the discretion of Member States is granted by the text of the Treaty itself. More specifically, Art. 82, para. 2, TFEU makes it clear that the establishment of minimum rules “shall not prevent Member States from maintaining or introducing a higher level of protection for individuals”.<sup>30</sup> This is a clear-cut provision that introduces a one-way requirement, a unidirectional obligation.<sup>31</sup> It obliges Member States to establish the prescribed minimum level of protection, but at the same time it provides the possibility to exceed that minimum level and introduce higher standards. This grammatical interpretation of the text of the Treaty constitutes the first line of interpretation and provides an initial answer to the question of national discretion.

<sup>29</sup> J. HARTMANN, *Discretion in EU Directives: Enhancing Political Legitimacy Within the EU's Multi-Level Legal System*, presented at the Sixth Pan-European Conference on EU Politics, 13-15 September 2012, available at [ssrn.com](http://ssrn.com).

<sup>30</sup> Art. 82, para. 2, TFEU.

<sup>31</sup> P. ASP, *The Substantive Criminal Law Competence of the EU*, Stockholm: Skrifter utgivna av juridiska fakulteten vid Stockholms universitet, 2012, p. 117.

Moreover, the wording of Art. 82, para. 2, TFEU differentiates between “maintaining” and “introducing” a higher level of protection. The first instance acts as a confirmation of the non-regression clause, which reminds to Member States that the implementation of EU law cannot serve as an excuse for lowering the national standards of protection, and, at the same time, allows Member States with higher procedural safeguards to preserve those higher standards. In other words, Member States that provided for a high level of procedural rights before the adoption of the common minimum rules, they cannot lower their established level of protection in the excuse of streamlining their legislation with the EU-wide minimum rules. Hence, the text of the Treaty acknowledges the fact that existing national procedural safeguards may be higher than the common minimum rules and, therefore, recognizes implicitly the discretion of Member States to deviate in that direction. However, the second instance, *i.e.* the possibility of “introducing” a higher level of protection, is an explicit confirmation of the discretion of Member States to go beyond minimum rules, even when there is no prior national legislation on the matter. The text of the Treaty notes loud and clear that the adoption of minimum rules should not impede the desire of the Member States to guarantee a higher level of procedural safeguards and defence rights in their respective jurisdictions.

The above viewpoint that understands minimum rules as allowing Member States to go beyond them in the field of procedural criminal law is widely accepted by several authors in the field of EU criminal law. Indeed, it seems that there is an agreement about the possibility of Member States to go beyond minimum rules in this particular context.<sup>32</sup> Specifically, most contributions seem to agree that minimum rules in the field of procedural law should be interpreted as establishing a common set of procedural safeguards that allows Member States to exceed them in order to award a higher level of protection. For instance, according to Hans Nilsson, “real minimum rules” exist in the field of procedural criminal law,<sup>33</sup> allowing for a higher level of procedural safeguards to be adopted by the Member States. Accordingly, Valsamis Mitsilegas places himself on the same side of the debate, advocating for the freedom of Member States to adopt higher provisions in the field of procedural criminal law.<sup>34</sup>

All in all, minimum rules in the field of procedural criminal law are commonly interpreted as allowing Member States to go beyond them and introduce higher procedural safeguards in their respective jurisdictions. However, is the question of national discretion in the field of procedural criminal law such a straightforward case?

<sup>32</sup> The question of national discretion has troubled EU criminal law scholars mostly with regards to substantive criminal law, where antipodal points have been supported. See, *inter alia*, the contributions of H.G. NILSSON, *How to Combine Minimum Rules with Maximum Legal Certainty*, in *Europarättslig Tidskrift*, 2011, p. 665 *et seq.*; V. MITSILEGAS, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Oxford: Hart, 2016, pp. 62-63; P. ASP, *The Substantive Criminal Law Competence*, cit., p.110 *et seq.*

<sup>33</sup> H.G. NILSSON, *How to Combine Minimum Rules with Maximum Legal Certainty*, cit., p. 675.

<sup>34</sup> V. MITSILEGAS, *EU Criminal Law after Lisbon*, cit., p. 63.

#### IV. RAISING BARRIERS TO NATIONAL DISCRETION

The uncertainty about what constitutes a minimum rule inevitably gives rise to the uncertainty about whether Member States can go beyond them. The lines around the question of national discretion seem to be thin and urge us to approach this topic with cautiousness. One may reasonably ask whether the aforementioned textual interpretation of the concept of minimum rules is enough to provide a definitive answer to the question of national discretion. Accordingly, the question arises whether there are any factors that tend to limit the discretion of Member States to go beyond minimum rules in EU criminal procedural law.

Alas, providing an answer to the question of national discretion has to penetrate several lines of interpretation that go well beyond the text of the Treaty. In general, the grammatical interpretation is only one way of reading and understanding a legal document. Although it serves as the first line of interpretation, what needs to be added here is the scope of the adoption of minimum rules in the field of procedural criminal law, i.e. a teleological interpretation of the concept of minimum rules.

If one departs from the text of the Treaty and takes a closer look at the rationale behind the adoption of minimum rules, alongside the way they function within the context of procedural criminal law, then it becomes apparent that the discretion of Member States to go beyond minimum rules is not without certain limits. These limits arise from the functional character of minimum rules in the context of procedural criminal law,<sup>35</sup> and their position within the overall architecture of the European legal order.

As already discussed, the adoption of minimum rules under the legal basis of Art. 82 TFEU does not have an autonomous character; it is justified only when it serves the purpose of the facilitation of mutual recognition and cross-border cooperation in criminal matters. As a result, the functional character of minimum rules introduces a first limit to the discretion of Member States to unequivocally surpass the common minimum provisions. Although Member States remain *in principle* free to go beyond minimum rules, any supplementary provisions have to fulfil the same objective as the one that justified their adoption in the first place. Indeed, when the reason for the adoption of minimum rules is the facilitation of mutual recognition, it would be odd to advocate for the right of Member States to go beyond minimum rules in a way that would undermine mutual recognition and cooperation. Hence, *a contrario sensu*, the discretion of Member States needs to be confined within the limited scope defined by minimum rules and, thus, any supplementary national provisions may not raise disproportionate obstacles to the facilitation of mutual recognition and cooperation. In other words, the *raison d'être* of a given rule dictates how far the rule can go and how far Member States can exceed the wording of that rule.

<sup>35</sup> See *supra*, section II.

The conclusion that the rationale behind the adoption of minimum rules dictates the limits to national discretion reflects the position of the Court of Justice. In illustration of the position of the Court of Justice, two cases are discussed here, in an attempt to show how the Court weights the scope and the extent of national discretion against the forum where minimum rules are going to be applied.

In *Melloni*,<sup>36</sup> the Court of Justice issued a judgement that sparked a lot of debate and generated abundant commentaries in the field of EU law.<sup>37</sup> Dealing with the question of the relation between EU standards and higher national (constitutional) standards, the *Melloni* case has a role to play in answering this *Article's* question: Can Member States go beyond minimum rules in the field of procedural criminal law? Spoiler alert: the Luxembourg Court argued against the higher national standards of protection.

The *Melloni* case is significant for the constitutional architecture of the European Union as it provides a firm answer in favour of the primacy of EU law.<sup>38</sup> In particular, the Court was asked to judge whether the higher standards of protection provided by the Spanish Constitution with regard to the right to a fair trial and *in absentia* judgements, were compatible with the common standards of the EU, or whether they were raising obstacles to mutual recognition and judicial cooperation, vis-à-vis the execution of a European Arrest Warrant. In other words, the question referred to the Court was, *inter alia*, a question about the primacy of EU law, asked this time in the context of mutual recognition and judicial cooperation in criminal matters.<sup>39</sup>

The decision of the Court of Justice was pretty straightforward: the existence of higher national standards of protection cannot violate the effectiveness of EU law, by raising obstacles that undermine the efficiency of judicial cooperation and thereby undermine the principle of supremacy of EU law.<sup>40</sup> Leaving aside the constitutional implications of the judgement, it becomes clear that the Court does not see with a friendly eye the discretion of Member States to deviate from minimum rules, even when such deviation consists in maintaining prior constitutional standards. In fact, the significance that the Court of Justice attributes to the primacy of EU law and the desire to circumscribe any higher standards that might raise obstacles to the effective application of EU law, reflects a move from an intergovernmental way of government to supranational-

<sup>36</sup> Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni* [GC].

<sup>37</sup> See, *inter alia*, V. FRANSEN, *Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection*, in *European Law Blog*, 10 March 2014, europeanlawblog.eu; N. DE BOER, *Addressing Rights Divergences under the Charter: Melloni*, in *Common Market Law Review*, 2013, p.1083 *et seq.*

<sup>38</sup> L.F.M. BESSELINK, *The Parameters of Constitutional Conflict after Melloni*, in *European Law Review*, 2014, p. 531 *et seq.*

<sup>39</sup> L. BACHMAIER WINTER, *Bypassing or Intensifying the Dialogue between Courts? The impact of Melloni at the National Level*, in V. MITSILEGAS, A. DI MARTINO, L. MANCANO (eds), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis*, Oxford: Hart, 2019, p. 404 *et seq.*

<sup>40</sup> *Melloni* [GC], cit., para. 55 *et seq.*

ism, this time in the field of criminal law, with new principles and obligations coming into play that inevitably limit the margin of national discretion.

On a different occasion, in the *Covaci* case,<sup>41</sup> the Court was asked to interpret the provisions of Directive 2010/64/EU<sup>42</sup> and Directive 2012/13/EU.<sup>43</sup> More specifically, the questions referred to the Court of Justice were relevant to the conformity of the German legislation with the requirements of Directive 2010/64/EU on the right to interpretation and translation vis-à-vis the language of the proceedings. Additionally, under the German law, a person without a fixed address in Germany was obliged to appoint someone with a German address in order to receive formal documents, and the referring court was in doubt about the conformity of this particular provision with the requirements of Directive 2012/13/EU on the right to information.<sup>44</sup>

In examining the case at hand, the Court of Justice was called to determine whether Arts 2 and 3 of Directive 2010/64/EU allow the German legislator to provide that the filling of written objections can be done only in the German language, excluding thus the possibility for foreigners to lodge a complaint in another language. Although such a restriction was permissible under Art. 3 of the Directive,<sup>45</sup> the Court took a step further and referred to the broader context and the objectives that the Directive seeks to fulfil, namely the establishment of high procedural safeguards throughout the EU.<sup>46</sup> According to Advocate General Bot,<sup>47</sup> the concept of minimum rules should not be understood as meaning “minor rules”, namely rules that enclose low regulatory levels and have a minimum content. In his view, what minimum rules actually mean is that they constitute rules that encapsulate the fundamental principles of procedural criminal law and reflect the shared values that should be equally respected throughout the European Union.<sup>48</sup> Following the same line of reasoning, the Court explicitly noted that the provi-

<sup>41</sup> Court of Justice, judgment of 15 October 2015, case C-216/14, *Covaci*.

<sup>42</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

<sup>43</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

<sup>44</sup> For a detailed analysis of the case, see S. LAMBERIGTS, *Case C-216/14 Covaci – Minimum Rules, yet Effective Protection?*, 13 November 2015, available at [europeanlawblog.eu](http://europeanlawblog.eu).

<sup>45</sup> Art. 3 of Directive 2010/64/EU, cit., mainly refers to the right of the suspects or accused persons to receive a written translation of the documents that are essential to the criminal proceedings and therefore crucial for the effective application of the right to a fair trial. On the contrary, Art. 3 does not make any reference to the possibility to file a complaint in a different language than the language of the official proceedings.

<sup>46</sup> *Covaci*, cit., para. 29.

<sup>47</sup> Opinion of AG Bot delivered on 7 May 2015, case C-216/14, *Covaci*.

<sup>48</sup> *Ibid.*, para. 55: “First, the expression ‘minimum rules’, to which I personally prefer the expression ‘non-derogable rules’, must not be interpreted, as is too often the case, and not without ulterior motives, in a simplistic manner as referring to minor rules. As has just been explained, they are in fact an essential foundation for procedural principles which, in criminal proceedings, ensure the application of and re-



sions of Directive 2010/64/EU – which is adopted under Art. 82, para. 2, TFEU – contain only minimum rules and, therefore, Member States are free to go beyond those rules. In the Court's own words: "Directive 2010/64 lays down only minimum rules, leaving the Member States free, as recital 32 in the preamble to that directive states, to extend the rights set out in that directive in order to provide a higher level of protection also in situations not explicitly dealt with in that directive".<sup>49</sup>

In light of the above, although Mr. Covaci was not *in principle* entitled to the right to file an objection in a language other than German, the need for high procedural safeguards in the EU that would truly safeguard the right to a fair trial, asks for a broader interpretation of the minimum provisions of the Directive. Nonetheless, the Court avoids to provide a definitive answer to the question of higher national standards, leaving the final word to the national judge.<sup>50</sup>

In comparing the two cases, what seems to matter the most for the Court of Justice is the forum of application of minimum rules, and most importantly, the forum of application of any higher national provisions. In particular, it is important to examine whether there is a risk in threatening the principle of mutual recognition and the smooth cooperation between national authorities. In the *Melloni* case, the request for a preliminary ruling is located in the heart of a European Arrest Warrant proceeding, which is the cornerstone of judicial cooperation in criminal matters. According to the Court, the effective application of EU law and the need to respect the principle of mutual recognition render any higher national standards inadmissible, as they raise disproportionate obstacles to the fulfilment of the Union's objectives.

On the contrary, in the *Covaci* case, the question asked to the Court of Justice did not entail any elements of mutual recognition or cross-border cooperation. The preliminary question was focused on the interpretation of EU law in light of existing national provisions, and whether the latter were compatible with EU law. Therefore, the risk to undermine the principle of mutual recognition or impede police and judicial cooperation was non-existent. As a result, the Court of Justice considered that Member States are free to go beyond minimum rules and provide for higher procedural safeguards, given the fact that the purpose of the Directive is to enhance the protection of procedural rights in the EU.

Building on the *Melloni* judgement, it becomes apparent that there are certain limits that inevitably hold back Member States from exercising their discretion to go beyond

spect for fundamental rights which are the underlying shared values that make the European Union a system founded on the rule of law".

<sup>49</sup> *Covaci*, cit., para. 48.

<sup>50</sup> *Ibid.*, para. 50: "It is therefore for the referring court, taking into account in particular the characteristics of the procedure applicable to the penalty order concerned in the main proceedings, which were noted in paragraph 41 of this judgment, and of the case brought before it, to establish whether the objection lodged in writing against a penalty order should be considered to be an essential document, the translation of which is necessary".

minimum rules. Apart from the teleological interpretation of minimum rules, which narrows down significantly the discretion of Member States, the discretionary powers of the national legislator can be eventually circumscribed by a series of factors that arise from the position of minimum rules within the European legal order. More specifically, the Court of Justice, by referring to the effectiveness of EU law in the *Melloni* case, refers to a set of limits that do not have their foundation in the wording a particular EU instrument, but they relate to the position of minimum rules within the broader constitutional architecture of the European Union. This category of limits represents the “external” limits to the discretion of Member States. The term “external” should be understood in relation to the source of these limits, as it refers to limits that exist outside the wording of a specific instrument.

Under the category of external limits, one may include all those factors that derive from the broader EU law obligations of the Member States. Apart from the aforementioned need to respect the effectiveness of EU law, limits to the discretion of Member States arise from the need to respect the fundamental principles and values of the European Union, as well as the need to respect the Charter of Fundamental Rights. Especially since the entry into force of the Treaty of Lisbon and the “constitutionalisation of EU criminal law”, the general principles of EU law have a much stronger and influential role to play in the field of criminal law.<sup>51</sup> For instance, the principle of proportionality and the adherence to the Charter, point towards the direction that Member States can take when they exercise their discretion, meaning that any higher standards can neither contradict the provisions of the Charter, nor disrespect the principle of proportionality.

Subsequently, the discretion of Member States may be subjected to another set of limits, which may be called “internal” limits. What should be understood by internal limits is that the text of a particular instrument contains factors that tend to restrict the discretion of Member States. To put it in another way, the internal limits refer to situations in which the text of a directive delimits the discretion of Member States, without the need to rely on the aforementioned teleological interpretation, not even to invoke the general principles of EU law. This can be done either by *de lege* limitations, or by *de facto* limitations. The former refers to specific textual provisions that could impede the discretion of Member States to go beyond minimum rules. The latter derives from the possibly broad and vague wording of a directive that makes the possibility to go beyond minimum rules theoretically possible, but practically unrealistic. In that case, Member States remain *in principle* free to exercise their discretion to go beyond minimum rules, but they cannot do so, simply because there is nothing that is not already captured by the broad and all-embracing content of that particular directive.

<sup>51</sup> V. MITSILEGAS, *EU Criminal Law after Lisbon*, cit., p. 4 et seq.

## V. CONCLUSION

The world of EU minimum rules in the field of criminal law is a small, yet unexplored one. The concept of minimum rules has a central role to play in the harmonisation of procedural criminal law in the EU, constituting a useful and versatile tool at the hands of the European legislator. Unfortunately, despite the fast-growing body of literature in the field of EU criminal law, minimum rules and the question of national discretion have gained little attention over the years. This *Article* thus tried to answer one of the fundamental questions about the concept of minimum rules, namely the question of the discretion of Member States to go beyond them.

In procedural criminal law, minimum rules seek to bring forward the approximation of procedural safeguards in the EU and, thereby, facilitate mutual recognition and police and judicial cooperation in criminal matters. The moment minimum rules are being introduced, they seek to build a solid common ground. Upon this common ground, Member States can build their own set of procedural safeguards and go higher than the minimum EU standards. Nonetheless, things are not as clear and straightforward as they seem to appear at first sight. In fact, the most appropriate answer to the question of national discretion seems to be cagey: Member States should be *in principle* able to exercise their discretion to go beyond minimum rules and adopt provisions that establish a higher level of procedural safeguards in their respective jurisdictions. This conclusion does not only follow from the wording of Art. 82 TFEU, but it is justified by the core characteristics of the concept of minimum rules.

The key word in the above answer is the word *in principle*. Member States should be *in principle* awarded the envisaged discretion, but they cannot exercise it unequivocally and in all cases. Even though the concept of minimum rules fails to introduce in itself an upper limit, it does not mean that such a limit is not there. In fact, the ceiling that delimits the discretion of Member States is a rather robust and solid one. The broader context within which minimum rules are being adopted, the rationale behind their adoption, and the overall constitutional architecture of the European Union are factors that draw some unbreakable lines. Depending on the instrument at hand and the purpose that minimum rules are called to fulfil in each particular case, the final assessment of whether Member States can go beyond minimum rules should be made *ad hoc*. As Sir Arthur Conan Doyle used to say, there is nothing more deceptive than an obvious fact. Despite the initial intuition that urges us to answer the question of national discretion in the affirmative, based primarily on the clear wording of Art. 82 TFEU, this *Article* showed that such an answer should be offered with excessive care.





## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

*edited by Araceli Turmo*

## WHY IS A REDEFINITION OF THE AUTONOMOUS CONCEPT OF AN “ISSUING JUDICIAL AUTHORITY” IN EUROPEAN ARREST WARRANT PROCEEDINGS NEEDED?

ARIADNA H. OCHNIO\*

TABLE OF CONTENTS: I. The importance of defining the concept of an “issuing judicial authority”. – II. The unclear purpose of modifying the definition of an “issuing judicial authority” in the second draft Framework Decision on the EAW – III. The broad concept of an “issuing judicial authority” in the case law of the Court of Justice. – IV. The consequences of the case law of the Court of Justice. – V. Final remarks.

**ABSTRACT:** Defining the concept of an “issuing judicial authority” in European Arrest Warrant (EAW) proceedings is one of the starting points for formulating the principles of effective judicial protection in emerging “European criminal procedure”. There is no potential for this concept to be homogeneous for all instruments of cross-border cooperation in criminal matters, as the EAW mechanism may result in consequences for the individual incomparably more severe than other instruments. The uniqueness of the EAW mechanism has not yet been properly addressed, both by EU legislative policy and in the jurisprudence of the Court of Justice. Given the deficiencies of effective judicial protection of the individual at the stage of issuing the EAW, the principle of mutual recognition seems to have taken too much priority in the approach adopted. The EAW procedure should be more individual-centred at the initial stage, otherwise the national courts executing an EAW will face an ongoing problem with imperfect assessment of the qualities necessary for an “issuing judicial authority”. Removing the concept of an “issuing judicial authority” from the procedural autonomy of Member States, and placing it within the scope of the EU’s minimum standards on effective judicial protection of the individual could be helpful in solving this problem.

**KEYWORDS:** issuing judicial authority – European Arrest Warrant – judicial protection of the individual’s rights – cross-border cooperation in criminal matters – principle of mutual recognition – European criminal procedure.

\* Assistant Professor, Institute of Law Studies, Polish Academy of Sciences (Warsaw), [ariadnaochnio@gmail.com](mailto:ariadnaochnio@gmail.com).



## I. THE IMPORTANCE OF DEFINING THE CONCEPT OF AN "ISSUING JUDICIAL AUTHORITY"

The concept of an "issuing judicial authority" in the European arrest warrant (EAW) procedure has an impact on judicial protection of an individual's rights in cross-border criminal proceedings, because its understanding determines the scope of procedural autonomy of a Member State in choosing a state authority entitled to issue an EAW.<sup>1</sup> The attributes of judicial authority are required to enable the case to be examined in an independent and impartial manner. Depending on the interpretation of the concept of an "issuing judicial authority", the decision to issue an EAW may either be taken by a strictly judicial authority, *i.e.* a court having all the attributes of a judicial authority, or by a judicial authority in a broader sense, for example a prosecutor having some attributes of judicial authority. The latter interpretation is applied in the Court of Justice's case law.

The purpose of this *Article* is to answer the question of whether the broad interpretation of the concept of an "issuing judicial authority" is correct, and if not, what are the reasons for adopting a narrow interpretation of this concept, limiting its understanding to strictly judicial authorities? This is all the more important, because determining the correct meaning of this concept is one of the starting points for formulating the principles of judicial protection of an individual's rights in emerging "European criminal procedure". The scope of this *Article* is limited to considerations of the concept of "judicial authority" within the meaning of the "issuing judicial authority" referred to in Art. 6, para. 1, of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.<sup>2</sup> This issue will be examined in two research layers. The first is a layer of EU legislative policy. In order to determine whether the development of the concept of an "issuing judicial authority" was preceded by an in-depth analysis, the legislative path for the adoption of Framework Decision 2002/584 will be analysed. The second layer is the case law of the Court of Justice. In order to assess whether the minimum attributes of an "issuing judicial au-

<sup>1</sup> Judicial protection exists on two levels: at the level of issuing the national arrest warrant, and at the level of issuing the European arrest warrant, see Court of Justice, judgment of 1 June 2016, case C-241/15, *Bob-Dogi*, paras 55-57. See also S. PRECHAL, *Mutual Trust Before the Court of Justice of the European Union*, in *European Papers*, 2017, Vol. 2, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 80 *et seq.*; A.P. VAN DER MEI, *The European Arrest Warrant System: Recent Developments in the Case Law of the Court of Justice*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 884; L. MANCANO, *European Arrest Warrant and Independence of the Judiciary. Evolution or Revolution?*, in *Diritti Comparati*, 2 September 2019, [www.diritticomparati.it](http://www.diritticomparati.it).

<sup>2</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

thority" in a broad sense are sufficient for an independent and impartial examination of the case, representative positions of the Court on this concept will be analysed.

## II. THE UNCLEAR PURPOSE OF MODIFYING THE DEFINITION OF AN "ISSUING JUDICIAL AUTHORITY" IN THE SECOND DRAFT FRAMEWORK DECISION ON THE EAW

The legislative path preceding the adoption of Framework Decision 2002/584 raises doubts about defining the concept of an "issuing judicial authority" in a thoughtful and reasoned manner, because there were two versions of the draft framework decision, with significantly different determinations of this concept, and at the same time the legislative process does not reflect the purpose of modifying the determination of this concept in the second version of the draft (which is close to the concept finally adopted in Framework Decision 2002/584). The purpose of this section is to show that failure to present the justification for the modification of the definition in the legislative process gives room for adopting different interpretations of the concept, depending on the assessment of the purpose of the change, which can be assessed as tending to either narrow or expand the understanding of the concept of an "issuing judicial authority". Nevertheless, EU legislative policy supports the procedural autonomy of Member States to determine an "issuing judicial authority". And only based on this policy position can it be assumed that the purpose of the modification was not, however, to narrow the concept, but at a minimum to not close the possibilities for broad interpretation that could develop in the future practice of the EAW.

The original version of the proposal was submitted by the Commission on 19 September 2001.<sup>3</sup> According to Art. 3, let. b), "issuing judicial authority" meant: "the judge or the public prosecutor of a Member State, who has issued a European arrest warrant". A similar definition was proposed in Art. 3, let. c), for the expression "executing judicial authority" that meant: "the judge or the public prosecutor of a Member State in whose territory the requested person sojourns, who decides upon the execution of a European arrest warrant". The proposal for a Council Framework Decision on the EAW from the first version was in favour of the procedural autonomy of the Member States as to the choice of the state entity authorised to issue the EAW. As indicated in Art. 4, let. a), Member States were to be entitled to designate, according to their national law, the judicial authorities competent to issue the EAW.

The explanatory memorandum accompanying the Proposal, in the commentary concerning Art. 3, let. b), only attempts to clarify the expression "issuing judicial authority" by pointing to its similarity to the expression "competent authorities" used in the Eu-

<sup>3</sup> Commission Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM(2001) 522 final.

ropean Extradition Convention of 13 December 1957.<sup>4</sup> Art. 1 of this Convention uses the term “competent authorities” whose explanation can be found in the Explanatory Report to this Convention. According to this Report, the term “competent authorities” includes “the judiciary” and “the Office of the Public Prosecutor”. Only “the police authorities” were explicitly indicated as being outside the scope of the conventional term “competent authorities”.<sup>5</sup>

Despite the reference to the 1957 European Extradition Convention, the explanatory memorandum to the proposal for a Council Framework Decision on the EAW makes it difficult to interpret the expression “issuing judicial authority”, because at the same time it associates the EAW mechanism with “the principle of mutual recognition of court judgment” and “court-to-court relations between judicial authorities”.<sup>6</sup> Through such wording, one gets the impression that the issue of the EAW is intended to be reserved for the strictly judicial authorities. The justification in this respect did not change during the legislative process. This is important because the concept of an “issuing judicial authority” (*sensu largo*) finally adopted in Framework Decision 2002/584 is close to that which has not been substantiated.

Examination of the legislative procedure for adopting the Framework Decision on the EAW does not allow identification of the motives for the redefinition of the term “issuing judicial authority” in the second version of the draft framework decision. The second version contains a different meaning of the term, and a different scheme of the provisions. As a result of the legislative work of various EU internal bodies, the corrected version of the text was sent to the Council by the Permanent Representative Committee and annexed to the “interinstitutional file” of 4 December 2001.<sup>7</sup> The determination of the authorities competent to issue the EAW in the second version of the draft has been transferred to Art. 6, para. 1, and amended by removing the public prosecutor from its wording. According to this version: “the issuing judicial authority shall be the judicial authority of the issuing State which is competent to issue an arrest warrant by virtue of the law of the issuing State”. After the Presidency stated on 6 December 2001 that this version of the draft was approved by the delegations, the amended text was annexed to “the outcome of the proceedings” of 10 December 2001 and submitted to the European Parliament for reconsultation.<sup>8</sup>

<sup>4</sup> Council of Europe, 1957 European Convention on Extradition.

<sup>5</sup> Council of Europe, Explanatory Report to the European Convention on Extradition of 13 December 1957.

<sup>6</sup> Proposal for a Council Decision COM(2001) 522 final, cit., p. 7.

<sup>7</sup> Permanent Representatives Committee, Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, Interinstitutional File 2001/0215 (CNS) of 4 December 2001, data.consilium.europa.eu.

<sup>8</sup> Council, Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, Interinstitutional File 2001/0215 (CNS) of 10 December 2001, data.consilium.europa.eu.



The meaning of the expression "issuing judicial authority" in the final version of Framework Decision 2002/584 is close to the one proposed in its second draft of 10 December 2001. According to Art. 6, para. 1: "The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State". What draws attention is the reference to "European arrest warrant" instead of the generally understood "arrest warrant" and maintaining the approach supporting the procedural autonomy of the Member States as to the choice of the state entity authorised to issue the EAW.

The insufficiently substantiated amendment of the term "issuing judicial authority" during the legislative procedure by removing the public prosecutor from its wording makes its meaning difficult to interpret and makes it difficult to understand the assumptions of the whole concept of "judicial authority". The incomprehensibility of reasons for the redefinition of the term "issuing judicial authority" opens divergent interpretative paths, as it seems, depending on the adopted assumptions about the primary goals of the EAW mechanism. The problem boils down to whether the definition of "issuing judicial authority" has been expanded or narrowed by excluding one entity from its wording, *i.e.* the public prosecutor. The explanatory memorandum to the proposal for a Council Framework Decision on the EAW has not been modified simultaneously with the changes to its second version in question and only applies to the first version of the draft in this respect. In view of these factors, it should be recognised that the EU legislative policy developing the concept of "issuing judicial authority" is affected by lack of a clear explanation of policy objectives and lack of proper justification for how to achieve them.

The legislative procedure for adopting Framework Decision 2002/584 was executive and the determination of the judicial authority competent to issue an EAW may have caused controversy during the legislative work. This hypothesis is indirectly confirmed for example by the Sixteenth Report of 26 February 2002 of the UK Select Committee appointed to consider European Union documents and other matters relating to the European Union, which expressed concern over the absence of a reference to Arts 5 and 6 of the European Convention of Human Rights in the text of the Framework Decision on the EAW. The report contains a recommendation to the UK government that this issue should be clearly regulated in this Framework Decision. The cited report states: "It may, by virtue of Article 1(3) of Framework Decision, be *implicit* that the national authorities can apply any relevant provision of the ECHR. If so, a court in the executing State could refuse execution of a warrant where, for example, it believed the individual concerned would not receive a fair trial in the issuing State (Art. 6 European Convention of Human Rights) or the request came from a 'judicial authority' not possessing the degree of independence needed to satisfy Article 5 ECHR. We proposed to

the Government that the Framework Decision should make this *explicit*”.<sup>9</sup> However, the UK government did not accept to make any further amendment to the text of the Framework Decision on the EAW.

These circumstances only allow for the assumption that the change of definition of “issuing judicial authority” in the second version of the draft was the result of an unofficial political compromise, even if so, it is not reflected in the documents published in the legislative process preceding the adoption of Framework Decision 2002/584. Therefore, a hypothesis, that the concept of an “issuing judicial authority” was not well thought out in the legislative policy and is not the result of a conscious political compromise in this field, is also likely.

Difficulties in interpreting the concept of an “issuing judicial authority” are also reflected in the recent case law of the Court of Justice, but the Court is not alone in encountering difficulties. One example of such interpretation difficulties is the judgment of the Supreme Court of the United Kingdom of 30 May 2012 in *Assange v. The Swedish Prosecution Authority*.<sup>10</sup> The UK Supreme Court eventually adopted a broad definition of judicial authority, but it was preceded by considerable interpretation problems reflected in the reasoning of that judgment. This case concerned the possible invalidity of the EAW as a result of its issuing by a non-judicial authority (the Swedish Prosecution Authority) in the context of the narrow understanding of the term “judicial authority” in the Extradition Act (2003).<sup>11</sup> In examining the meaning of the concept of a “judicial authority” in Framework Decision 2002/584, the UK Supreme Court began from the natural meaning, then passed through a teleological interpretation and examined the historical background. However, in the end the judgment was not issued unanimously (without sharing the appellant’s position).<sup>12</sup> Despite different domestic laws, the UK Supreme Court finally adopted a broad definition of judicial authority, but by reference to a general rule of interpretation in Art. 31, para. 3, let. b), of the 1969 Vienna Convention on the Law of Treaties.<sup>13</sup> The interpreta-

<sup>9</sup> UK Parliament, Sixteenth Report by the Select Committee on European Union, *The European Arrest Warrant*, 26 February 2002, publications.parliament.uk.

<sup>10</sup> UK Supreme Court, judgment of 30 May 2012, *Assange v. The Swedish Prosecution Authority*, [2012] UKSC 22, paras 14-15, 245-248 and 266.

<sup>11</sup> Section 2, para. 2, of the Extradition Act 2003, see [www.legislation.gov.uk](http://www.legislation.gov.uk).

<sup>12</sup> Cf. A. ERBEŽNIK, *Mutual Recognition in EU Criminal Law and Fundamental Rights – The Necessity for a Sensitive Approach*, in C. BRIÈRE, A. WEYEMBERGH (eds), *The Needed Balances in EU Criminal Law: Past, Present and Future*, Oxford, Portland: Hart, 2017, p. 185 *et seq.*; M. PLEIĆ, *Challenges in Cross-border Transfer of Prisoners: EU Framework and Croatian Perspective*, in D. DUIĆ, T. PETRAŠEVIĆ (eds), *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement*, Osijek: Josip Juraj Strossmayer University of Osijek, 2018, pp. 387-388; opinion of AG Campos Sánchez-Bordona delivered on 30 April 2019, case C-509/18, *PF (Prosecutor General of Lithuania)*, paras 40-46.

<sup>13</sup> See Art. 31, para. 3, let. b), of the 1969 Vienna Convention on the Law of Treaties. The judgment in *Assange v. The Swedish Prosecution Authority*, cit., received some critical remarks in the literature, see for example: E. BJORGE, *Domestic Application of the ECHR. Courts as Faithful Trustees*, Oxford: Oxford University Press, 2015, p. 99.

tion of the treaty, according to this convention, should take into account the context, together with any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. The practice of participation of non-judicial authorities in the EAW procedure was illustrated in the Section 3.1. of the Final report on the fourth round of mutual evaluations.<sup>14</sup>

Interpretative difficulties were also raised in the European Parliament Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant.<sup>15</sup> The European Parliament signalled the problem of “the lack of a definition of the term ‘judicial authority’ in Framework Decision 2002/584/JHA and other mutual recognition instruments, which has led to a variation in practice between Member States causing uncertainty, harm to mutual trust, and litigation”.<sup>16</sup>

According to the recommendations annexed to the cited Resolution concerning the validation procedure for EU mutual legal recognition instruments, the term “issuing authority” shall be defined as: “a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned” or “any other competent authority as defined by the issuing Member State, provided that the act to be executed is validated, after examination of its conformity with the conditions for issuing the instrument, by a judge, court, investigating magistrate or a public prosecutor in the issuing Member State”.<sup>17</sup> What draws attention is that the Resolution recommends using a broad definition of an “issuing authority” in a uniform manner throughout “EU criminal legislation”, without recognising the EAW procedure as requiring a special, narrow definition.

The cited Resolution shows that the specificity of the EAW mechanism, when compared against the background of other EU instruments of mutual cooperation in criminal matters, has not been duly considered. None of the instruments of EU cooperation in criminal matters (like a European investigation order, or mutual recognition of freezing orders and confiscation orders) leads to such a serious limitation of the individual's fundamental rights as the application of an EAW.<sup>18</sup> Therefore, the definition recommended by the European Parliament is not structured to cope with the interpretative problems signalled in this *Article*. The Commission in response did not share the Euro-

<sup>14</sup> Final report on the fourth round of mutual evaluations – The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States, 28 May 2009, [www.eumonitor.eu](http://www.eumonitor.eu).

<sup>15</sup> See European Parliament Resolution P7\_TA(2014)0174 of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant, Section F, para. vi, and Annex.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Cf. the significantly different definition of “issuing authority” in Art. 2, let. c), of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, and in Art. 8 of the Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

pean Parliament's opinion on the need to improve the EAW mechanism through changes in EU law, *i.e.* within the Framework Decision on the EAW itself or together with other instruments of mutual recognition. In the opinion of the Commission, the problem of the lack of a common definition of "judicial authority", as identified by the European Parliament, should instead be solved by improvements in "the practical implementation and operation" of the EAW.<sup>19</sup> Assessing the Commission's position from the point of view of problems that have recently emerged (after the set of cases of 27 May 2019 before the Court of Justice), such pathways for solving problems have proved ineffective.

A comprehensive picture of the legislative procedure for adopting the Framework Decision on the EAW shows one consistent position of EU policy in this area: respect for the procedural autonomy of Member States as to the choice of the state entity authorised to issue the EAW. However, such an approach does not simplify interpretation of the term "issuing judicial authority" at all, as one might suppose. The Member States' differing approaches to understanding this concept have made it difficult to cooperate in cross-border criminal matters, since in the EAW procedures the executing national courts began to submit requests for preliminary rulings to the Court of Justice questioning whether a non-strictly judicial issuing authority is "competent" to issue a warrant in the light of EU law (see section III of this *Article*).

Therefore, it is worth shifting the considerations from the level of the existing state of affairs to the level as it should be. Are there any arguments in favour of limiting the procedural autonomy of Member States as to the choice of the "judicial authority" entitled to issue the EAW? Assuming that among all EU instruments of cross-border cooperation in criminal matters, the EAW mechanism may result in the most serious consequences for the individual: a deprivation of liberty for an extended period,<sup>20</sup> strengthening judicial protection at the initial stage of issuing an EAW is an argument in favour of narrow interpretation of the concept of an "issuing judicial authority" in EU law. Long-term cooperation under the EAW mechanism has revealed differences in the understanding of this concept in the law of the Member States, which negatively affected mutual cooperation in this field. This circumstance constitutes an argument for reserving the competence to issue an EAW to strictly judicial authorities. Such a reservation of competences can be seen as a desirable added value in EU law standards relating to the EAW procedure, allowing for

<sup>19</sup> Follow up to the European Parliament resolution P7\_TA-PROV(2014)0174 of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014, on file with the Author.

<sup>20</sup> For a period of 120 days adding up the maximum time limits for the decision to execute the EAW (Art. 17, paras 3 and 4, of Framework Decision 2002/584, *cit.*) and time limits for surrender of the person (Art. 23, paras 2 and 4, of Framework Decision 2002/584, *cit.*), and in exceptional cases also for a longer period. See the remarks on the length of pre-trial detention: P.H. VAN KEMPEN, *Pre-Trial Detention in National and International Law and Practice: A Comparative Synthesis and Analyses*, in P.H. VAN KEMPEN (ed.), *Pre-Trial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law*, Cambridge, Antwerp, Portland: Intersentia, 2012, pp. 20-23.

overcoming inter-state differences in the interpretation of the term “issuing judicial authority” and strengthening the procedural position of the individual.

Given the separation of powers in states governed by the rule of law, a court gives the best systematic guarantees for the attribute of independence, as required when deciding whether to limit the freedom of an individual for a longer period of time. But not only is the quality of independence important, the attribute of impartiality cannot be omitted. Impartiality cannot be required of non-judicial entities, in particular those who act as parties in a criminal trial, such as public prosecutors pursuing interests arising from their procedural position different from that of the court.<sup>21</sup>

Staying on considerations relating to *lege ferenda*, the rationale for redirecting EU law to a narrow interpretation of the concept of an “issuing judicial authority” is the severity of the potential consequences of the EAW mechanism for the individual. The autonomy of the concept of “judicial authority” in the field of the EAW mechanism should be considered exceptional and justified by special reasons. The signalled lack of potential for this concept to be homogeneous across all EU instruments of cross-border cooperation in criminal matters results from the uniqueness of the EAW mechanism. It should be remembered that extending the modified concept of an “issuing judicial authority” to other EU cooperation instruments could weaken the current state of multifaceted cooperation in criminal proceedings (for example in the field of the mutual recognition of freezing orders and confiscation orders, or a European investigation order). The principle of mutual recognition is a factor conditioning this cooperation. Its importance was emphasized in recital 6 of Framework Decision 2002/584: “The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial cooperation”.<sup>22</sup>

### III. THE BROAD CONCEPT OF AN “ISSUING JUDICIAL AUTHORITY” IN THE CASE LAW OF THE COURT OF JUSTICE

The case law of the Court of Justice concerning the concept of an “issuing judicial authority” in the EAW procedure is in accordance with the 1957 European Extradition Convention, which was a prototype of the significance of the concept of an “issuing judicial authority”, because it includes prosecution authorities in this concept and excludes police authorities. In addition, it excludes executive authorities. The Court’s approach, to give a general overview, can be described as “prudential”, because it is highly in favour of maintaining

<sup>21</sup> Noteworthy references to the impartiality of the issuing authority can be found in the judgment of UK Supreme Court, *Assange v. The Swedish Prosecution Authority*, cit., paras 5, 37, 102, 105, 117, 119, 221, 234 and 240 and opposite comments: paras 148 and 223.

<sup>22</sup> See also L. KLIMEK, *European Arrest Warrant*, Cham: Springer, 2015, p. 68. The Author indicates this principle as “a major principle of the surrender procedure”.

wide mutual recognition of the EAW, while at the same time being insufficiently focused on the rights of the individual at the stage of issuing the warrant. The latter perspective seems to be more desirable at the initial stage of an EAW procedure, in the context of effective judicial protection of the individual. The open question is whether the Court's approach corresponds with EU legislative policy concerning the concept of an "issuing judicial authority". As indicated in the previous section, policy in this regard has certain deficiencies, which cause interpretative difficulties that can be reduced to a straightforward question: does the authority entitled to issue an EAW cover only judicial ones in the strict sense, or does it also extend to other authorities participating in the administration of justice, in the broader sense? In addition, there is some doubt whether, given the extensive autonomy of the Member States to determine the "judicial authority" competent to issue the EAW, one can still talk about the autonomous concept of EU law, *i.e.* the concept whose meaning and scope defines EU law. An analysis of the Court's representative positions can lead to the conclusion that the current approach restrains too little of Member States' autonomy in choosing the authority competent to issue an EAW.

To illustrate the position taken by the Court of Justice on the necessary qualities of the "issuing judicial authority" in EAW proceedings, the set of cases of 10 November 2016: *Poltorak*,<sup>23</sup> *Kovalkovas*<sup>24</sup> and *Özçelik*<sup>25</sup> is representative. The next chapter in the Court's case law on this issue is the set of cases of 27 May 2019: *PF (Prosecutor General of Lithuania)*<sup>26</sup> and the joined cases *OG and PI*.<sup>27</sup> Afterwards, the Court expressed significant positions in *NJ (Parquet de Vienne)* of 9 October 2019<sup>28</sup> and in the triad of cases of 12 December 2019: *XD*,<sup>29</sup> *ZB*<sup>30</sup> and the joined cases *JR and YC*.<sup>31</sup>

The Court of Justice ruled in *Poltorak* that the term "judicial authority", within the meaning of Art. 6, para. 1, of Framework Decision 2002/584, is an autonomous concept of EU law. The request for a preliminary ruling had been made by the District Court in Amsterdam in the proceedings relating to the execution of the EAW. According to the Court of Justice, Art. 6, para. 1, must be interpreted as not including a police service (in this case it was the Swedish National Police Board).<sup>32</sup> In the Court's assessment, an EAW issued by the police service for execution of a judgment imposing a custodial sentence cannot be regarded as a "judicial decision", within the meaning of Art. 1, para. 1, of

<sup>23</sup> Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*.

<sup>24</sup> Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas*.

<sup>25</sup> Court of Justice, judgment of 10 November 2016, case C-453/16 PPU, *Özçelik*.

<sup>26</sup> Court of Justice, judgment of 27 May 2019, case C-509/18, *PF (Prosecutor General of Lithuania)* [GC].

<sup>27</sup> Court of Justice, judgment of 27 May 2019, joined cases C-508/18 and C-82/19 PPU, *OG and PI* [GC].

<sup>28</sup> Court of Justice, judgment of 9 October 2019, case C-489/19 PPU, *NJ (Parquet de Vienne)*.

<sup>29</sup> Court of Justice, judgment of 12 December 2019, case C-625/19 PPU, *XD*.

<sup>30</sup> Court of Justice, judgment of 12 December 2019, case C-627/19 PPU, *ZB*.

<sup>31</sup> Court of Justice, judgment of 12 December 2019, joined cases C-566/19 PPU and C-626/19 PPU, *JR and YC*.

<sup>32</sup> *Poltorak*, cit., para. 52.

Framework Decision 2002/584. This ruling is in line with the known interpretation of Framework Decision 2002/584 referring to the European Extradition Convention. The Court pointed out the assisting role of central authorities, including central police services, and their inability to take over key competences in the EAW procedure (Art. 7, recital 9 of Framework Decision 2002/584).<sup>33</sup>

In *Kovalkovas* the Court of Justice confirmed that the term “judicial authority” used in Art. 6, para. 1, of Framework Decision 2002/584 is an autonomous concept of EU law.<sup>34</sup> Similarly, the request for a preliminary ruling had been made by the Amsterdam District Court in the proceedings relating to the execution of the EAW. The Court of Justice adopted the interpretation that “an organ of the executive” is excluded from the meaning of the term “judicial authority”. The EAW under consideration was issued by the Ministry of Justice of the Republic of Lithuania for execution of a court judgment imposing a custodial sentence. The Court took into account that supervision over the observance of the conditions of the EAW and discretion regarding its proportionality falls within the competence of this Ministry. In the Court’s assessment, an EAW issued by such an authority cannot be regarded as a “judicial decision”, within the meaning of Art. 1, para. 1, of Framework Decision 2002/584. The interpretation adopted in this ruling, as in the previous one, strengthens the starting position of the individual at the stage of issuing the EAW.

In *Özçelik* the Court of Justice referred to the public prosecutor involved in the two-stage procedure for issuing the EAW. However not in the context of Art. 6, para. 1, of Framework Decision 2002/584, but in the context of Art. 8, para. 1, let. c), concerning the content and form of the EAW. The request for a preliminary ruling had again been made by the Amsterdam District Court in proceedings relating to the execution of the EAW. Although the EAW was issued by a judicial authority in a narrow sense (the District Court in Veszprém, Hungary) for the purpose of conducting prosecutions, the executing court had doubts as to the content of section b) of the form contained in the Annex to Framework Decision 2002/584 with information about the decision on which the EAW is based (the arrest warrant or judicial decision having the same effect). The reference in this section was made to the arrest warrant of the Police Department of Ajka confirmed by the decision of the Public Prosecutor’s Office of Ajka. The Court of Justice took the position that: “a confirmation [...] by the public prosecutor’s office, of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a ‘judicial decision’, within the meaning of that provision”.<sup>35</sup> In the Court’s opinion, a decision by the public prosecutor’s office falls within the concept of a “judicial decision” because the public prosecutor’s office (unlike the police service) is responsible for administering criminal justice in a Member State.

<sup>33</sup> *Ibid.*, paras 42 and 45.

<sup>34</sup> *Kovalkovas*, cit., paras 47-48.

<sup>35</sup> *Özçelik*, cit., paras 33-34.

The Court of Justice then issued judgments in two cases of 27 May 2019 directly concerning the powers of the public prosecutor in the context of Art. 6, para. 1, of Framework Decision 2002/584. The Court considered the status of the Prosecutor General of Lithuania in *PF (Prosecutor General of Lithuania)* and the status of the public prosecutor's office in Lübeck and in Zwickau (Germany) in joined cases *OG and PI*.

In *PF (Prosecutor General of Lithuania)* the Court of Justice referred to the minimum attributes that a non-strictly judicial issuing authority should have within the meaning of Art. 6, para. 1, of Framework Decision 2002/584, to be recognised as entitled to issue an EAW. The request for a preliminary ruling had been made by the Irish Supreme Court in proceedings relating to the execution of an EAW issued by the Prosecutor General of Lithuania for the purpose of conducting prosecutions. In the opinion of the Court of Justice, the concept of an "issuing judicial authority" includes: "the Prosecutor General of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant".<sup>36</sup> In *PF (Prosecutor General of Lithuania)* the Court based its view on the fact that the Prosecutor General of Lithuania is a public prosecutor, who acts independently of external influence, including from the executive.<sup>37</sup> The necessary attributes of the issuing judicial authority, that can be deduced from the judgment issued in *PF (Prosecutor General of Lithuania)*, include: independence, objectivity and participation in the administration of criminal justice.<sup>38</sup>

Advocate General Campos Sánchez-Bordona, in the opinion of 30 April 2019 delivered in *PF (Prosecutor General of Lithuania)*, rightly raised the problem of the variation in the level of autonomy of the public prosecutor's offices in Member States. Adoption of the interpretation that a prosecutor may be entitled to issue an EAW if he has certain attributes of judicial authority (in the strict sense) creates an obligation for the national executing judicial authority to examine the level of his autonomy in each case regarding the execution of the EAW. The Advocate General also raised the point that examinations in this area would impact the length of the procedures and the measures involving deprivation of liberty.<sup>39</sup>

In the joined cases *OG and PI* the Court of Justice adopted an interpretation of the "issuing judicial authority" within the meaning of Art. 6, para. 1, of Framework Decision 2002/584, that excludes the public prosecutor's office of a particular Member State be-

<sup>36</sup> *PF (Prosecutor General of Lithuania)* [GC], cit., para. 57.

<sup>37</sup> *Ibid.*, para. 55.

<sup>38</sup> *Ibid.*, paras 29-30, 41-42, 56-57.

<sup>39</sup> Opinion of AG Campos Sánchez-Bordona, *PF (Prosecutor General of Lithuania)*, cit., paras 33-34. See also: opinion of AG Campos Sánchez-Bordona delivered on 30 April 2019, joined cases C-508/18 and C-82/19 PPU, *OG and PI*, para. 99, indicating the problems concerning the differentiation in terms of the institutional and functional autonomy of the public prosecutor's office in Member States.



cause of the lack of certain features of judicial authority. The request for a preliminary ruling had been made by the Supreme Court (Ireland) and the High Court (Ireland) in proceedings relating to the execution of EAWs issued by the Public Prosecutor’s Office in Lübeck and the Public Prosecutor’s Office in Zwickau (Germany) for the purposes of conducting prosecutions. According to the position adopted by the Court of Justice, the concept of an “issuing judicial authority” does not include: “public prosecutors’ offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant”.<sup>40</sup> Thus, it can be concluded that the concept of an “issuing judicial authority” includes public prosecutors’ offices which are not affected by the above exclusionary features. In the Court’s opinion, the public prosecutor’s offices in Lübeck and in Zwickau are exposed to the risk of being influenced by the executive when making their decision to issue the EAW, therefore they do not meet the requirement of independence in issuing the EAW. The judgment issued in *OG and PI* is another example, after the judgment issued in *PF (Prosecutor General of Lithuania)*, of reasoning assuming the preliminary admission of a non-judicial authority to issue the EAW and subsequent verification by the executing judicial authority of its attributes necessary to recognise its judicial character in accordance with Framework Decision 2002/584. It should be added that, in the Court’s opinion, competence to issue the EAW by a non-judicial authority requires the effective legal protection of the individual, which means ensuring that a decision on the validity of an EAW and its proportionality can be challenged in court.<sup>41</sup>

After expressing its position in the cases of 27 May 2019, the Court of Justice has considered similar requests for preliminary rulings from national courts asking about the necessary attributes of the judicial authority.<sup>42</sup> It can be anticipated that there will be more similar requests, because after the ruling in joined cases *OG and PI*, the national courts acting as the “executing judicial authorities” will face a continuing problem when assessing the qualities of “issuing judicial authorities”.

The Court of Justice expanded its current interpretation of the concept of an “issuing judicial authority” in *NJ (Parquet de Vienne)*.<sup>43</sup> The request for a preliminary ruling had been made by the Higher Regional Court in Berlin, in the proceedings relating to the execution of the EAW issued by the Public Prosecutor’s Office in Vienna for the purpose of prosecuting. The prosecutorial EAW was endorsed by the Regional Court in Vi-

<sup>40</sup> *OG and PI* [GC], cit., paras 88-90.

<sup>41</sup> *Ibid.*, para. 75. See also para. 67 and the judgment in *Bob-Dogi*, cit., para. 56.

<sup>42</sup> See also Court of Justice, pending case C-510/19, *Openbaar Ministerie (Faux en écritures)*. The request for a preliminary ruling had been made by the Court of Appeal in Brussels (Belgium). This case concerns the public prosecutor in the Netherlands acting as the “executing judicial authority” within the meaning of Art. 6, para. 2, of Framework Decision 2002/584, cit.

<sup>43</sup> *NJ (Parquet de Vienne)*, cit.

enna. The concept of an “issuing judicial authority” was examined in the context of Art. 1, para. 1, of Framework Decision 2002/584. The Court of Justice held that a public prosecutor’s office which lacks the attribute of independence may issue a court-endorsed EAW, provided that the endorsing court has full access to the case file, which according to the Court should reflect: any specific directions or instructions, the conditions of issue and the proportionality of the EAW. The Court therefore assumed that the case file can give a full picture of the case and is sufficient to draw categorical conclusions about the independence of a non-strictly judicial issuing authority.

The next development of case law was the judgment of 12 December 2019 in joined cases *JR and YC*. The request for a preliminary ruling had been made by the Luxembourg and Netherlands courts concerning the execution of EAWs issued by the public prosecutors in Lyon and Tours (France) for the purposes of conducting criminal proceedings. The Court of Justice presented the view that public prosecutors placed under the direction and control of hierarchical superiors are covered by the concept of an “issuing judicial authority” (Art. 6, para. 1, of Framework Decision 2002/584) if their status gives them a guarantee of independence when issuing the EAW, in particular in relation to the executive power and when national law provides effective judicial protection for the individual. In the Court’s assessment, this protection in national law should provide for judicial review of the conditions for issuing the EAW and its proportionality. In this regard, the Court took into account the participation of the investigating judge (and the possibility of challenging his acts) in the two-stage procedure for issuing the EAW (Arts 131 and 170 of the French Code of Criminal Procedure). However, it is for the national court (executing the EAW) to verify the existence of effective judicial protection.<sup>44</sup>

In terms of effective judicial protection, the Court of Justice ruled similarly in *XD*.<sup>45</sup> The request for a preliminary ruling concerning the public prosecutor’s office in Sweden acting as the “issuing judicial authority” (Art. 6, para. 1, of Framework Decision 2002/584) had been made by the District Court in Amsterdam for the purpose of conducting the criminal proceedings. The information from the Swedish authorities, gathered in the main proceedings, confirmed the independence of the Swedish public prosecutor’s office. In the two-step procedure for issuing the EAW, the Court of first instance in Göteborg issued the base decision for the subsequent prosecution’s decision on the EAW. In *XD*, the Court of Justice confirmed that the judicial review should cover the conditions of the EAW and its proportionality, however the existence of effective judicial protection should be assessed in the light of the entire two-stage national procedure for issuing an EAW. The decisive factor in *XD*, was that the Swedish criminal procedure guarantees the right to challenge the base decision of a strictly judicial authority on pre-trial detention. If the court order on pre-trial detention is set aside as a result of an ap-

<sup>44</sup> *JR and YC*, cit., paras 49, 54-58, 67 and 74.

<sup>45</sup> *XD*, cit., paras 39-56.

peal, the prosecutor’s decision on the EAW is automatically annulled because its issuance is based on the existence of that court order.

The purpose of the prosecutorial EAW considered by the Court of Justice in *ZB* was not to conduct prosecutions, but to enforce a custodial sentence imposed by the Court of first instance in Brussels. The EAW in question was issued by the Belgian public prosecutor’s office. In *ZB* the Court of Justice expressed the view that Framework Decision 2002/584 does not preclude national legislation which does not provide for an appeal to the court against the EAW issued by a non-strictly judicial authority, like a public prosecutor’s office, if the purpose of such a decision is to execute a sentence imposed by a strictly judicial authority, like a court.<sup>46</sup> The problematic element was that Belgian legislation does not provide for a separate appeal against the decision to issue the EAW. As regards the independence of the public prosecutor’s office, the referring court relied mainly on information from Belgian authorities gathered in the main proceedings. In the opinion of the Court of Justice expressed in *ZB*, the judicial review, referred to in para. 75 of the judgment in joined cases *OG and PI*, is implemented by an enforceable judgment (the EAW considered was issued to enforce the custodial sentence). It can therefore be concluded from the judgment in *ZB* that the procedural guarantees for an individual regarding the correctness of issuing the EAW are “equivalent” to the guarantees for an individual in proceedings in which a custodial sentence has been imposed. The Court of Justice did not take into account the fact that the latter proceedings considered the issue of criminal liability and that the domains of such proceedings and the EAW proceedings are separate, and each of them has procedural guarantees appropriate to their specificity. Similarly, a distinction is made between the main proceedings (on criminal liability) and enforcement proceedings (for example on the EAW to enforce the judgment), each being characterised by certain procedural guarantees. In *ZB* the loosening of the EAW procedure in terms of the individual’s guarantees was justified mainly by the purpose of the EAW, which was to enforce the court judgment.

#### IV. THE CONSEQUENCES OF THE CASE LAW OF THE COURT OF JUSTICE

Unfortunately, the consequences of the Court of Justice’s judgments are not a resolution to the interpretative problem, concerning whether to include or not to include the public prosecutor in the scope of the term “issuing judicial authority” within the meaning of Art. 6, para. 1, of Framework Decision 2002/584, but a transfer of this ongoing problem to the national courts. Given the specialty of the EAW in the context of other EU instruments of cooperation in criminal matters, the situation arising from the Court’s judgments of 27 May 2019 should be viewed negatively. Examination by a national court, acting as an “executing judicial authority”, of the criteria excluding the independence of the public prosecu-

<sup>46</sup> *ZB*, cit., paras 35-36.

tor who issued the EAW, could lengthen and distance the EAW procedure, thereby weakening the position of the individual to whom the EAW applies.

Challenges by the national courts executing the EAW to the independence of the authorities of other Member States entitled by national law to issue an EAW is a delicate matter, requiring the examination of complex systemic connections in the administration of justice, and sometimes also requiring insight into the current political situation in the country of origin of the EAW. In this regard, relying only on a dogmatic analysis of national law, the case file, and information obtained in the course of the proceedings from the government of a Member State in which the EAW was issued, cannot be regarded as sufficient. Such an assessment may be defective or impossible because of a multiplicity of factors to be examined and their dynamics. It is also unclear what tools should be involved in a judicial examination of the exclusionary features of a non-strictly judicial issuing authority. Similarly, in *LM* the Court of Justice formulated a test for assessing the status of a strictly judicial authority, but did not consider with which tools the national court should carry out this test, and whether an authority such as a court may have the appropriate tools for this examination at all.<sup>47</sup> Ultimately, negative findings constitute a risk of creating unnecessary diplomatic tensions. However, the most important consequence of the Court of Justice's view, that under certain conditions a non-strictly judicial authority can issue an EAW, is the weakening of the procedural position of the individual at the stage of issuing the EAW (including the national base decision) and at the stage of executing the EAW, when the individual as the subject of the warrant cannot do much more than wait for the results of the examination of the systemic position of a non-strictly judicial issuing authority.

In order to release the national courts from executing EAWs through uncertain proceedings, the concept of an "issuing judicial authority" should be redefined in EU law and fitted to the EAW mechanism. The solution would be to introduce a competence reservation for issuance of an EAW, limited to strictly judicial authorities, such as a court or judge, while restricting the use of this redefined concept to the EAW procedure (without extending to other EU instruments of cooperation in criminal matters). The expected further result should be a change in those national legal orders in which non-

<sup>47</sup> Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)* [GC], paras 33-79. On the assessment expressed in this judgment see P. BÁRD, W. VAN BALLEGOIJ, *Judicial independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM*, in *New Journal of European Criminal Law*, 2018, p. 353 et seq.; D. KOCHENOV, P. BÁRD, *The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU*, in E.H. BALLIN, G. VAN DER SCHYFF, M. STREMLER (eds), *European Yearbook of Constitutional Law 2019. Judicial Power: Safeguards and Limits in a Democratic Society*, The Hague: Springer, 2019, p. 274; M.A. SIMONELLI, "...And Justice for All?" *The Right to an Independent Tribunal after the Ruling of the Court of Justice in LM*, in *New Journal of European Criminal Law*, 2019, p. 329 et seq.

strictly judicial authorities have been authorised to issue an EAW (regardless of its purpose, whether for prosecution or enforcement of a sentence).

According to the analysis prepared by Eurojust after the Court of Justice's judgments of 27 May 2019, the legislations of the following Member States involve the prosecutor's office in issuing the EAW (in various ways and at various stages of the initial procedure): Denmark,<sup>48</sup> Austria, Luxembourg, Belgium, Bulgaria, Croatia, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, Portugal, Sweden, Germany.<sup>49</sup> This analysis also contains references to differentiation between the attribute of independence of the prosecution service in the Member States. Firstly, in light of the Court's position in *PF (Prosecutor General of Lithuania)* and in the joined cases *OG and PI*, the procedure for issuing EAWs adopted in Germany, Denmark and the Netherlands proved to be the most problematic due to the absence of the required independence of the prosecutor's office from the executive. As a consequence of the Court's rulings, the state authority empowered to issue an EAW in these national legal orders needed to be changed.<sup>50</sup> Secondly, it should be recognised that the regulations adopted in Luxembourg, authorising the Prosecutor General to issue an EAW for the purpose of executing a custodial sentence, are also problematic. The Prosecutor General in Luxembourg is subordinate to the Minister of Justice with regard to instituting criminal proceedings, so the systemic position does not guarantee independence.<sup>51</sup> Thirdly, there is room for doubt about whether the national regulations providing for judicial authorisation of the non-independent prosecutor's decision on an EAW should be altered in the direction of entrusting the entire competence to issue a warrant to strictly judicial authorities. One example of such a legal solution is the Austrian procedure for issuing an EAW, which provides for the judicial authorisation of the non-independent prosecutor's decision on an

<sup>48</sup> It should be noted that the Danish and German regulations have already been changed.

<sup>49</sup> The analysis related to the legislative changes planned in Germany and already introduced in the Netherlands. Eurojust, Questionnaire on the impact of the CJEU judgments in Joined Cases *OG* (C-508/18) and *PI* (C-82/19 PPU) and Case *PF* (C-509/18), 2019/00094, 26 November 2019, p. 10, [www.eurojust.europa.eu](http://www.eurojust.europa.eu). See also: Council, Decisions of the Court of Justice of 27 May 2019 in Joined Cases C-508/18 and C-82/19 PPU, Amendment of Germany's notification under Article 6(3) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States of 4 December 2019, 14444/19, [data.consilium.europa.eu](http://data.consilium.europa.eu).

<sup>50</sup> The legal changes regarding the authority empowered to issue an EAW have already been implemented by Germany, the Netherlands and Denmark. See Council, Decisions of the Court of Justice of 27 May 2019 in Joined Cases C-508/18 and C-82/19 PPU, cit.; Council, Modification by the Netherlands of its statement under Art. 6, para. 3, of Framework Decision 2002/584/JHA on the European Arrest Warrant of 10 December 2019, 14979/19, [data.consilium.europa.eu](http://data.consilium.europa.eu); Council, Implementation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States – Notification by Denmark of 21 April 2020, 7430/20, [ejn-crimjust.europa.eu](http://ejn-crimjust.europa.eu).

<sup>51</sup> See Luxembourg legislation: Law of 17 March 2004 on the European Arrest Warrant and surrender procedures between Member States of the European Union, as amended (Art. 26, para. 2) and the Code of Criminal Procedure, as amended (Art. 19).

EAW.<sup>52</sup> Finally, despite the position taken by the Court of Justice, some domestic legal solutions are also controversial, specifically those in which the right to issue an EAW has been assigned to formally independent prosecutor's offices, as the evaluation of their independence will usually be problematic for an "executing judicial authority", given the overly complicated set of elements that should be examined. This reflection concerns to some extent the legal solutions adopted in Belgium, Bulgaria, Croatia, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, Portugal and Sweden.<sup>53</sup> One should not lose sight of the fact that the institutions involved in a prosecution participate to some extent in the implementation of internal criminal policy whose impetus for development is, however, provided by the executive power. This aspect is important not only at the stage of criminal prosecution, but also at the stage of enforcement of a court judgment.

The question arises as to how long this type of analysis will be valid. Given the dynamics of internal processes in Member States, it cannot be excluded that such analysis will be valid only on the date of issue. In addition, it is unclear whether this analysis will be updated and by what entity. This weakness means that national courts acting as "executing judicial authorities" cannot fully rely on this type of external analysis, and they do not have the appropriate tools to investigate the non-legal aspects of the status of a public prosecutor's office in the system of a foreign Member State. Their examination may be based only on insufficient data derived from the analysis of law, case files and information provided by the authorities of the Member State in which the EAW was issued. The national court is not able, due to the way it acts, to make a categorical assessment of the systemic position of a state body of a foreign state. This assessment is burdened with too great a risk of error. Involving the national court in making such an assessment results in the indirect politicization of the EAW mechanism. Ultimately, this legal uncertainty negatively affects the position of the individual in the EAW procedure.<sup>54</sup>

From the perspective of the importance of the proper choice of decision-makers in the initial stage of the EAW procedure for effective judicial protection of the individual,

<sup>52</sup> See Austrian legislation: Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG), as amended, Section 29, para. 1.

<sup>53</sup> See Council, Implementation of Council Framework Decision 2002/584/JHA, cit., p. 3 *et seq.*; Euro-just, Questionnaire on the impact of the CJEU judgments in Joined Cases OG (C-508/18) and PI (C-82/19 PPU) and Case PF (C-509/18), cit., p. 6 *et seq.*

<sup>54</sup> Cf. the relevant remarks on the aspect of freedom and crime control in criminal justice policies: A. SANDERS, *A Fair Trial for the Suspect?*, in A. ESER, C. RABENSTEIN (eds), *Strafjustiz im Spannungsfeld von Effizienz und Fairness / Criminal Justice between Crime Control and Due Process: Konvergente und divergente Entwicklungen im Strafprozessrecht / Convergence and Divergence in Criminal Procedure Systems*, Berlin: Duncker & Humblot, 2004, p. 194 *et seq.*; G. DI CHIARA, *The Protection of the Right of Freedom on the European Union Level: The European Arrest Warrant and Non-custodial Pre Trial Measures. The Guideline of the Principle of Proportionality: An Interpretive Perspective*, in S. RUGGERI (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings. A Study in Memory of Vittorio Grevi and Giovanni Tranchina*, Berlin, New York: Springer, 2013, p. 242 *et seq.*

aligning national criminal procedures with a desirable clear EU definition of an "issuing judicial authority" would strengthen the protection of the individual. There are two solutions to the situation. The first is the introduction into EU law of a reservation of competence to issue the EAW to strictly judicial authorities. The second solution is the introduction of changes in domestic legislation, without reference to EU law, to reserve the power to issue an EAW for strictly judicial authorities, regardless of the level of independence of the prosecution service within the internal legal order, and regardless of the purpose of the EAW. This would ensure that a foreign court does not extend the execution of the EAW in order to examine the status of a non-strictly judicial issuing authority. This remark is based on the assumption that only a judicial authority in the narrow sense should be competent to issue an EAW, since any subsequent examination of the attribute of independence of a judicial authority in the broader sense is predisposed to too much risk of error, and undermines the procedural situation of the individual. Both solutions would release national courts from dealing with defective assessments and avoid prolonging the EAW procedure. The second solution, based on Member States' own initiatives in changing their national regulations, seems simpler. Nevertheless, the concept of an "judicial authority" entitled to issue an EAW should be considered in terms of the desirable minimum standard of EU law, and thus this issue should be excluded from the scope of procedural autonomy of the Member States.

## V. FINAL REMARKS

If the EAW mechanism was designed to depoliticize previous extradition procedures, the current state of affairs, transferring to national courts the obligation to assess the independence of the "issuing judicial authority", constitutes, to some extent, a return to the politicisation of this mechanism. This is the result of both a not entirely thought out EU legislative policy concerning the concept of judicial authority in the EAW mechanism, and also of the Court of Justice's case law, which gives too much priority to the principle of mutual recognition at the expense of effective judicial protection of the individual at the stage of issuing the EAW.

The obligation to examine the independence of the "issuing judicial authority" by the "executing judicial authority" includes in advance a certain impossibility of complying with it. This impossibility is the result of too many factors that need to be assessed in order to make categorical statements about the independence of the foreign authority entitled to issue the EAW, in particular regarding system dependencies, institutional frameworks, and the current political situation, affecting how laws are enacted and applied. Neither EU law nor Court of Justice case law clearly indicates in which areas of the Member State's functioning, and with what tools, the "executing judicial authority" should carry out the examination of independence of the "issuing judicial authority". In the light of these circumstances, there is space for action at the level of EU law. Defining a coherent and clear concept of an "issuing judicial authority" within the meaning of Art.

6, para. 1, of Framework Decision 2002/584, and also limited to this area, without hasty extensions to other EU instruments of cross-border cooperation in criminal proceedings, should be seen as a desirable added value of EU law.

The current state of affairs and the seriousness of the EAW mechanism justify keeping the concept of an “issuing judicial authority” independent from national laws. Only then could one speak of a truly autonomous EU concept in this regard.





## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

*edited by Araceli Turmo*

## TOWARDS A EUROPEAN RIGHT TO CLAIM INNOCENCE?

JOOST NAN\* AND SJARAI LESTRADE\*\*

TABLE OF CONTENTS: I. EU law and revision. – II. The nature of revision and (Western) European grounds. – II.1. The nature of revision: striking a balance between legal certainty and justice. – II.2. Different approaches on the grounds for revision in (Western) Europe. – III. Harmonisation of criminal revision procedure law. – III.1. Competence for harmonisation in general. – III.2. Criminal matters having a cross-border dimension. – III.3. Improving mutual recognition. – III.4. The principle of subsidiarity. – IV. Conclusion.

ABSTRACT: Although there is a European right to fair trial, a presumption of innocence, and a right to appeal, there is no European human rights norm that obligates Member States to allow former suspects to contest their convictions. In a time of growing harmonisation and comparison of criminal procedure approaches between European countries, and in a time in which new scientific options to gather and analyse evidence were developed, the question rises whether there should also be an EU right to claim innocence. And if so, what should it entail? A common European (Union) right to claim innocence could further strengthen the faith Member States have in each other's legal system and therefore have a positive influence on mutual cooperation in criminal matters. This *Article* explores the justification for an EU directive on this topic. It is concluded that an EU procedural right to overturn wrongful convictions could be justified (by the EU legislator), but further research on the various differences and (in)adequacy in practice of the existing mechanisms across the Member States is needed to substantiate the necessity of such an EU instrument.

KEYWORDS: revision – claim of innocence – miscarriages of justice – mutual recognition – mutual trust – minimum rights.

\* Associate Professor of Criminal (Procedural) Law, Erasmus School of Law, Erasmus University Rotterdam, [nan@law.eur.nl](mailto:nan@law.eur.nl).

\*\* Assistant Professor of Criminal (Procedural) Law, Radboud University Nijmegen, [s.lestrade@jur.ru.nl](mailto:s.lestrade@jur.ru.nl).



## I. EU LAW AND REVISION

A main goal of the EU is to constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. From the end of the last century on, the criminal (procedural) law agenda of the EU has, for that part, been focused on mutual recognition of judgments and other decisions of judicial authorities of Member States. This would enhance judicial cooperation in criminal matters across borders. Mutual recognition is based on mutual trust of Member States in each other's (criminal) legal order.<sup>1</sup> Therefore, it is needed that all Member States respect a certain minimum of fundamental rights of citizens. The EU has the legislative power to set minimum rules, for instance on rights of suspects in the criminal procedure, taking into account the differences between the legal traditions and systems of the Member States. If these minimum rules are upheld EU-wide, there is no reason not to cooperate in criminal matters across borders, even though the executing state may have dealt with a certain case differently. On the basis of mutual trust, the executing State can only rarely refuse to recognise and execute a decision of the issuing State.<sup>2</sup> It is up to the issuing State to ensure that it conducts the administration of justice properly in theory and in practice, on which other Member States need to be able to rely.<sup>3</sup> This is not automatically the case.<sup>4</sup>

When formulating human rights, preventing miscarriages of justice is explicitly mentioned within the European legal framework. Two good examples where this topic is present in the case law of the European Court of Human Rights are the right to access to a lawyer in criminal proceedings<sup>5</sup> and the right to remain silent as part of the right to

<sup>1</sup> Council Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. See, for instance, the various contributions to E. BOUWER, D. GERARD (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, in *EUI Working Papers*, no. 13, 2016.

<sup>2</sup> See for a recent example of those principles: Court of Justice, judgment of 5 December 2019, case C-671/18, *Centraal Justitieel Incassobureau (and exécution des sanctions pécuniaires)*.

<sup>3</sup> See Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>4</sup> As Satzger has stated for that matter, mutual trust is not something that can just be created or ordered to exist. Trust has to be deserved and permanently watched, for it is also not a static given. The legal and factual situation in Member States should be observed continuously and if necessary, trust and cooperation should be revoked if there is a certain lack of respecting fundamental rights in a Member State. H. SATZGER, *Is Mutual Recognition a Viable General Path for Cooperation?*, in *New Journal of European Criminal Law*, 2019, p. 44 *et seq.*

<sup>5</sup> European Court of Human Rights, judgment of 26 April 2007, no. 36391/02, *Salduz v. Turkey* [GC], para. 53.

a fair trial and the presumption of innocence.<sup>6</sup> These fundamental rights are, among many others of course, also acknowledged by the EU legislator.<sup>7</sup> However, even when all minimum rules, human rights and (procedural) regulations are followed fairly and to the letter, a final criminal conviction of the person concerned can turn out to be wrong. Judges, laymen and juries can simply appreciate the evidence in such a way that the verdict does not reflect reality. With new (forensic) investigative techniques and other experiences from the past (such as the improper interrogation of suspects), judicial errors have come to light more regularly and the need to address wrongful convictions is felt globally.<sup>8</sup> Without prejudice to the interests of legal certainty and finality, all Member States have, we safely assume, some form of remedy to redress a final conviction that turns out to be wrong.<sup>9</sup> They may, however, vary to quite an extent.

The EU has formulated ambitions on guaranteeing and developing human rights repeatedly and quite unequivocally this century.<sup>10</sup> Contemplating minimum standards for post-conviction redress to correct a wrongful conviction would be appropriate for a community that wants to constitute an area of freedom, justice and security, as it can be seen as a right of individuals in criminal procedure, also after they have ended.<sup>11</sup>

In this *Article* we will examine if we should move towards a European right to claim innocence. We ask ourselves if a right to claim innocence would be feasible in the EU as a minimum rule that could further enhance mutual trust between Member States, leading to (even) better mutual recognition and cooperation in criminal matters. In section II we explore the concept of revision (what is its nature and why is there a need for revision in general?) and the grounds for it in various (Western European) Member States. In section III we discuss the legal possibilities and justification to harmonise revision in

<sup>6</sup> European Court of Human Rights, judgment of 8 February 1996, no. 18731/91, *John Murray v. the United Kingdom*, para. 45. See Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings and Art. 48 of the Charter of Fundamental Rights of the European Union.

<sup>7</sup> See respectively Directive 2013/48 and Directive 2016/343 and Art. 48 of the Charter.

<sup>8</sup> See, for instance, B.L. GARRETT, P.J. NEUFELD, *Invalid Forensic Science Testimony and Wrongful Convictions*, in *Virginia Law Review*, 2009, p. 1 *et seq.*; G.J.A. KNOOPS, *Redressing Miscarriages of Justice, Practice and Procedure in (International) Criminal Cases*, Leiden: Nijhoff, 2013; D. HAMER, *Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission*, in *University of New South Wales Law Journal*, 2014, p. 270 *et seq.*; B.L. GARRETT, *Towards an International Right to Claim Innocence*, in *California Law Review*, 2017, p. 1173 *et seq.*

<sup>9</sup> See for an indication of the universal existence of remedies and their development, B.L. GARRETT, *Towards an International Right*, cit.

<sup>10</sup> See as an example Directive 2013/48, Preamble no 6: "Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter, the ECHR and the ICCPR. It also requires, by means of this Directive and by means of other measures, further development within the Union of the minimum standards set out in the Charter and in the ECHR".

<sup>11</sup> It has been on the EU legislative agenda at least once before, albeit informal at a luncheon of the secretaries of justice on 9 July 2014, in Brussels.

criminal procedural law. In section IV, we come to a conclusion on the justification of overturning wrongful convictions as a potential EU procedural right.

## II. THE NATURE OF REVISION AND (WESTERN) EUROPEAN GROUNDS

### II.1. THE NATURE OF REVISION: STRIKING A BALANCE BETWEEN LEGAL CERTAINTY AND JUSTICE

The extraordinary remedy of claiming innocence (revision) concerns a post-conviction right to start a procedure where a conviction has already become final, is wrong and must be overturned. When it comes to revision, two competing interest are at stake: legal certainty, finality and *res judicata* (the case has been decided) on the one hand, and justice for the individual in specific and exceptional cases on the other. This *Article* is meant to gain some familiarisation with the extraordinary remedy that is usually called revision and focusses on the character of the remedy and the various grounds in several (Western European) Member States. While we think that all Member States have some form of revision in their criminal law system with certain similarities, major differences exist, even if we only compare the systems of especially the Western European Member States on grounds for revision.<sup>12</sup> We will not discuss in depth the origins of judicial errors, nor how to prevent them. We accept miscarriages of justice, or to put it more mildly, judicial mistakes, as a given in any legal system, just as the need to correct them. We want to focus on the possibility of revision in connection with improving mutual trust and therefore mutual recognition and cooperation in criminal matters between the Member States. We limit this to a review on behalf of the convicted person and leave the revision *ad malam partem* (a re-opening of proceedings to the disadvantage of the accused) outside the scope of this *Article* (although that review mechanism could also influence mutual trust in each other's criminal judicial systems).

When designing a revision procedure, the above-mentioned interests must be taken into account: the importance of finality and the importance of justice. With regard to the first interest, it is widely accepted that finality in criminal law is relevant because otherwise, there would be no certainty to the meaning of the law, or the outcome of any legal process. A case has to end sometime (*litis finiri oportet*). Therefore, revision is an extraordinary remedy in probably all jurisdictions. The grounds for reopening a criminal case are usually narrowly defined and restricted in practice, because of the principles of legal certainty, finality and *res judicata*.<sup>13</sup> It is truly an exceptional procedure.<sup>14</sup>

<sup>12</sup> B.L. GARRETT, *Towards an International Right*, cit., p. 1196, who denotes that there is a real or remarkable variation among civil law and common law countries in their approach towards claims of innocence.

<sup>13</sup> See on the importance of the principle of finality and practice in England, K. MALLESON, *Appeals Against Conviction and the Principle of Finality*, in *Journal of Law and Society*, 1994, p. 151 *et seq.* More authors are sceptical about the room the law leaves and the judicial attitude to only reluctantly overturning a conviction. See for

The aforementioned principles are often also connected to the principle of double jeopardy (*ne bis in idem*).<sup>15</sup> When it comes to reopening (criminal) cases it is, simply put, a matter of choice between the interests of *res judicata* and legal certainty to uphold the criminal justice system all together and the interest of justice in the case at hand. Only in exceptional cases, the latter interest wins.<sup>16</sup> If we keep doubting verdicts, proceedings never come to an end and no authority can be derived from them to enforce them. However, always holding on to apparently unjust convictions just because they are final harms the legitimacy of legal systems too, of course.

Finality of legal proceedings that have come to an end and the authority they have, are principles that have been recognised in the case law of the Court of Justice and the European Court of Human Rights. In 2018, the Court of Justice firmly reiterated this in the case of *XC and Others*.<sup>17</sup> In addition, the European Court of Human Rights has stated repeatedly that one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires – among other things – that where the courts have finally determined an issue, their ruling should not be called into question. Reopening (criminal) proceedings after they are concluded “are justified only when made necessary by circumstances of a substantial and compelling character”, according to the European

Germany K. MARXEN, F. TIEMANN, *Die Wiederaufnahme in Strafsachen*, Heidelberg: Müller, 2006, p. 1 and M. HEGHMANN, U. SCHEFFLER, *Handbuch zum Strafverfahren*, München: Beck, 2008, p. 1087.

<sup>14</sup> B.L. GARRETT, *Towards an International Right*, cit., p. 1218: “all systems include some form of finality that attaches to a conviction after the appeal is complete”. See for an earlier comparison on France, Germany and England J. HATCHARD, B. HUBER, R. VOGLER (eds), *Comparative Criminal Procedure*, London: British Institute of International and Comparative Law, 1996, pp. 57, 82-83, 134-135, 205 and 218.

<sup>15</sup> See J.A.E. VERVAELE, *European Criminal Law and General Principles of Union Law*, in *Research Papers in Law*, 2005, p. 131 et seq. See on this principle W.B. VAN BOCKEL, *The ne bis in idem Principle in EU Law*, doctoral thesis, University of Leiden, 2009, available at [openaccess.leidenuniv.nl](http://openaccess.leidenuniv.nl).

<sup>16</sup> We don't think this meets any opposition. See for instance A. GRÜNEWALD, *Die Wiederaufnahme des Strafverfahrens zuungunsten des Angeklagten*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2008, p. 545 et seq.; M. HEGHMANN, U. SCHEFFLER, *Handbuch zum Strafverfahren*, cit., p. 1087. See also J. LEROY, *Procédure Pénale*, Paris: Librairie générale de droit et de jurisprudence, 2009, p. 543; V. CONWAY, J. SCHWEPPE, *What Is a Miscarriage of Justice? The Irish Answer to an International Problem*, in *Dublin University Law Journal*, 2012, pp. 1 and 4; Z. VARGA, *Retrial in the Member States on the Ground of Violation of EU Law*, in *ELTE Law Journal*, 2017, p. 57 et seq.; S. BAYER, *Die strafrechtliche Wiederaufnahme im deutschen, französischen und englischen Recht*, Baden-Baden: Nomos, 2019, p. 24 et seq.

<sup>17</sup> “Furthermore, attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question”. Court of Justice: judgment of 24 October 2018, case C-234/17, *XC and Others* [GC], para. 52, with reference to judgment of 16 March 2006, case C-234/04, *Kapferer*, para. 20; judgment of 29 June 2010, case C-526/08, *Commission v. Luxembourg* [GC], para. 26; judgment of 29 March 2011, case C-352/09 P, *ThyssenKrupp Nirosta v. Commission* [GC], para. 123; judgment of 10 July 2014, case C-213/13, *Impresa Pizzarotti*, para. 58. See also Z. VARGA, *Retrial in the Member States on the Ground of Violation of EU Law*, cit., p. 55 et seq.

Court of Human Rights. If courts have finally determined an issue, their ruling should not be called into question and only correcting fundamental defects can justify going back on binding and enforceable judicial decisions: "That power must be exercised so as to strike, to the maximum extent possible, a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of justice".<sup>18</sup>

As for the second interest, the interests of justice, we consider mistakes during criminal proceedings – that is, including regular appeal and cassation – which have become final, are a given. They can result from an honest mistake to fraud, made by investigators (such as interrogators), witnesses, experts or the court itself in assessing the evidence it has in front of it; new techniques such as DNA testing make those judicial faults especially visible. The existence in all the Member States (we assume) of some sort of revision mechanism to address them, both acknowledges that mistakes are made and proves the need for it besides a regular appeal.<sup>19</sup> Especially where a conviction is not based on the truth or a fair trial, there can be no justice. One might say that for any system to be righteous, a procedure to revise an incorrect criminal conviction, which has already become final, *must* exist notwithstanding the principles of legal certainty, finality and *res judicata*.<sup>20</sup>

That there is such a need for any justice system to have a revision clause can also be derived from the case law of the European Court of Human Rights. Although legal certainty and finality are important principles, there should be an instrument to correct miscarriages of justice.<sup>21</sup> Although the European Court of Human Rights underlines the

<sup>18</sup> There can be no revision merely for the purpose of a rehearing and a fresh decision on the case. The mere possibility of there being two views on the subject is not a ground for re-examination, according to the European Court of Human Rights. The principle of legal certainty is, however, not absolute and reopening closed criminal proceedings to someone's detriment is not *prima facie* incompatible with the Convention (notably not with Art. 6). While the Convention does not guarantee a right to have a terminated case reopened, it is clear that it does not prevent it either to correct judicial errors or a miscarriage of justice. Art. 6 is applicable in criminal proceedings if the national court is called upon to determine the charge. See, among many other judgments, European Court of Human Rights, judgment of 29 January 2009, no. 28730/03, *Lenskaya v. Russia*, para. 30, and further and more recently judgment of 11 July 2017, no. 19867/12, *Moreira Ferreira v. Portugal* (No. 2) [GC], both with further references.

<sup>19</sup> See G.J.A. KNOOPS, *Redressing Miscarriages of Justice*, cit., and B.L. GARRETT, *Towards an International Right*, cit. See, for recent studies also S. BAYER, *Die strafrechtliche Wiederaufnahme im deutschen, französischen und englischen Recht*, cit.; C. HOYLE, M. SATO, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission*, Oxford: Oxford University Press, 2019, pp. 6-7: "In all Western democracies, appeals processes may fail to identify wrongful convictions: appeals solicitors do not have adequate resources to investigate cases; judges fail to recognise when the system has erred; or at the time of direct appeal forensic science was insufficiently developed to be of probative value. Thus, elsewhere procedures have been established to review cases which have failed to find relief at the appeal court".

<sup>20</sup> As do V. CONWAY, J. SCHWEPPE, *What is a Miscarriage of Justice?*, cit., p. 1.

<sup>21</sup> "Considerations such as the emergence of new facts, the discovery of a fundamental defect in the previous proceedings that could affect the outcome of the case, or the need to afford redress, particularly in the context of the execution of the Court's judgements, all militate in favour of the reopening of pro-

importance of a revision possibility, an international or European extraordinary right to a remedy after an accused or suspected person has been irrevocably convicted of a crime does not exist currently. Only the right to a review by a higher tribunal and a claim for compensation after a wrongful conviction are internationally acknowledged so far.<sup>22</sup> Assuming that all Member States have some form of review in their criminal justice system, and given the case law of the European Court of Human Rights, it is interesting to see no right to review has been erected in the European context.

With respect to violations of the European Court of Human Rights, there is a recommendation of the Committee of Ministers that it seems best to put the injured party "as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum*)". The committee deems it appropriate that national legal systems have adequate opportunities of re-examination of the case, including reopening of proceedings.<sup>23</sup> However, this is not mandatory and the European Court of Human Rights has acknowledged this in *Moreira Ferreira v. Portugal No. 2*, although it does favour reopening proceeding in certain cases as the best redress.<sup>24</sup> It should be noted here, that the Court of Justice does not require Member States to extend this option to violations of EU law.<sup>25</sup> This case law may change, of course, if the frequency and scope of violations of EU law makes it too hard to stick to this line of reasoning (which has the uneasy effect that possibly unjust convictions are upheld).

The European Court of Human Rights thus on the one hand emphasises the relevance of finality, but on the other hand underlines the importance of justice. There must be some way to redress a wrongful conviction for the prevention of a breach of the right to a fair trial, or to end it. Reviewing criminal cases that have resulted in a conviction cannot, however, take place too easily.

## II.2. DIFFERENT APPROACHES ON THE GROUNDS FOR REVISION IN (WESTERN) EUROPE

The different jurisdictions in Europe show a wide variation of grounds for revision, such as conflicting convictions (*i.e.* two persons convicted of the same crime), the fact that

ceedings [...] a conviction ignoring key evidence constitutes a miscarriage of criminal justice, and that leaving such errors uncorrected may seriously affect the fairness, integrity and public reputation of judicial proceedings [...]. Similarly, the Court has found that the upholding, after review proceedings, of a conviction which breached the right to a fair trial amounted to an error of assessment which perpetuated that breach". *Moreira Ferreira v. Portugal (No. 2)*, cit., paras 62-63, with further references.

<sup>22</sup> See Arts 2-3 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Art. 14, paras 5-6, of the International Covenant on Civil and Political Rights.

<sup>23</sup> Committee of Ministers of the Council of Europe, Recommendation R(2000)2 of 19 October 2000 on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights.

<sup>24</sup> *Moreira Ferreira v. Portugal (No. 2)*, cit.

<sup>25</sup> *XC and Others [GC]*, cit.

the alleged victim of a murder turned out to be still alive, the fact that a witness committed perjury, a judge was bribed, the provision of criminal law was declared unconstitutional, new information came to light that would possibly (significantly) change the outcome of the case (*novum*), etc. More recently, a judgment of an international authority such as the European Court of Human Rights has also been seen as a ground for revision in all Member States whose revision mechanism we address in this *Article*. There could, thus, be several reasons to have a final verdict reviewed. A substantial divergence in the grounds for revision could support the need for harmonisation, setting a minimum standard for this important right and therefore facilitate judicial cooperation.

For example, Portugal has no less than seven grounds for a review (*Fundamentos e admissibilidade da revisão*): invalid evidence on which the final judgment was based, one of the judges or jurors who took part in the proceedings that led to the final judgment has been convicted with final effect of an offence linked to the performance of his or her duties, the facts of another judgment are incompatible with the conviction (where such discrepancy casts serious doubt on the validity of the conviction), a *novum* (the discovery of fresh evidence that casts serious doubt on the validity of the conviction), the conviction was based on unlawfully obtained evidence, the Constitutional Court has declared unconstitutional one of the provisions on which the conviction was based or a judgment by an international authority (with which the conviction is irreconcilable, or such a judgment casts serious doubt on the validity of the conviction in question, see Art. 449, para. 1, of the Portuguese Code of Criminal Procedure).

Germany also has six separate grounds for revision (*Wiederaufnahme*). Art. 359 of the German Code of Criminal Procedure (StPO) stipulates that a final judgment in a criminal case can be reviewed if in the main proceedings false documents have been used to the detriment of the convicted person, in case of perjury by a witness in detriment of the convicted person, in case of misfeasance by a judge or layman, when a civil judgment on which the conviction was based is annulled, in case of a *novum* or a judgment by the European Court of Human Rights.<sup>26</sup>

In Poland, a case can be reopened for four reasons.<sup>27</sup> If in connection with the proceedings an offence has been committed, and there is good reason to believe that this might have affected the contents of such a decision, and/or in case of a *novum* the case can be reviewed (see Art. 540, para. 1, of the Polish Code of Criminal Conduct). However, reopening is also possible if the relevant provision is, in short, declared unconstitutional or if that it is needed because of a judgment by an international authority.<sup>28</sup> Bel-

<sup>26</sup> See S. BAYER, *Die strafrechtliche Wiederaufnahme im deutschen, französischen und englischen Recht*, cit., pp. 123-190.

<sup>27</sup> Many thanks to Dr. Karolina Kremens, University of Wrocław.

<sup>28</sup> See Art. 540, paras 2-3. See on the Polish law of reopening proceedings W. JASINSKI, K. KREMENS, *Criminal Law in Poland*, Alphen aan den Rijn: Wolters Kluwer, 2019, p. 276.



gium also has four grounds for revision: conflicting convictions, a conviction for perjury by a witness, a *novum* and a judgment by the European Court of Human Rights.<sup>29</sup>

There are also Member States with an even more compact system, such as the Netherlands, who simplified its legislation on revision (*herziening*) in 1899 from several fragmentary grounds to just two grounds (conflicting convictions or a *novum*). In 2003 a third reason was added, through a judgment by the European Court of Human Rights.<sup>30</sup> France used to have four of the aforementioned “classical” grounds for review (*révision*): the murder victim turned out to be alive, conflicting verdicts, false witness statements and new evidence. France simplified these grounds to just one, a *novum*, in 2014 and has added a judgment by the European Court of Human Rights as the second basis for revision.<sup>31</sup> In Ireland there is just one basis to apply for revision (which could also be grounds for a pardon): a miscarriage of justice.<sup>32</sup> This broad term has not been defined exclusively, but does encompass not only a *novum*, but also certain other procedural defects.<sup>33</sup>

This brief and incomplete overview already shows that a conviction can be deemed wrong or unjust; not only because there is new evidence casting doubts on the culpability of the convicted person, but also because the proceedings leading up to the conviction were in one way or the other unfair or because the relevant provision of criminal law was invalid or unconstitutional. Even if it might be clear that the person involved committed the crime under review, there are still several reasons not to uphold the final verdict because it is unjust. So, what entails the right to claim innocence? When should there be grounds to overturn a final conviction? In other words, when is the conviction “wrong” or a “miscarriage of justice”?

<sup>29</sup> See Art. 443, Belgian Code of Criminal Procedure (although the reopening of proceedings in case of a judgment by the European Court of Human Rights has been separately codified in Art. 442 *bis* and further).

<sup>30</sup> See Art. 457, para. 1, Dutch Code of Criminal Procedure.

<sup>31</sup> Art. 622 of the French Code of Criminal Procedure reads: “La révision d’une décision pénale définitive peut être demandée au bénéfice de toute personne reconnue coupable d’un crime ou d’un délit lorsque, après une condamnation, vient à se produire un fait nouveau ou à se révéler un élément inconnu de la juridiction au jour du procès de nature à établir l’innocence du condamné ou à faire naître un doute sur sa culpabilité”. See Art. 622-1 for a ruling of the European Court of Human Rights as a ground for review. See further S. BAYER, *Die strafrechtliche Wiederaufnahme im deutschen, französischen und englischen Recht*, cit., pp. 191-253.

<sup>32</sup> Art. 2, para. 1, of the Criminal Procedure Act 1993 reads: “A person – (a) who has been convicted of an offence either – (i) on indictment, or (ii) after signing a plea of guilty and being sent forward for sentence under section 13 (2) (b) of the Criminal Procedure Act, 1967, and who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and (b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive, may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence”.

<sup>33</sup> See D. LANGWALLNER, *Miscarriages of Justice in Ireland*, in *The Bar Review*, 2011, pp. 50-55 and V. CONWAY, J. SCHWEPPE, *What is a Miscarriage of Justice?*, cit.

One of the common denominators is, despite the different approaches, that all of the above-discussed jurisdictions have a *novum* as grounds for review, as well as a judgment by the European Court of Human Rights and other procedural defects. This shows that revision is usually not only possible in case it turns out the convicted person is actually innocent, but also if there is (serious) doubt about his culpability or if the proceedings were not conducted fairly. This would call for a broad approach to revision. For an error *de iure* this similarity is not the case. For instance, in the Netherlands the legislator and the Supreme Court unequivocally deny any legal argument as grounds for revision, even if a substantive law provision is later declared invalid or interpreted differently. It would be up for discussion how broadly the grounds for revision should be formulated.

It will, we think, therefore not be easy to agree upon the grounds for review that every Member State should have to enhance mutual trust. Member States have quite different portals to revision and in general, the grounds for revision also differ in the severity of the applicable criterion. This shows that in some countries getting a conviction reviewed could be much easier than in other countries, even though similarities also exist. Aligning all Member States to set minimum standards on all aspects of revision might be appropriate but could take a while.

### III. HARMONISATION OF CRIMINAL REVISION PROCEDURE LAW

#### III.1. COMPETENCE FOR HARMONISATION IN GENERAL

Having determined the nature of a revision procedure, the question rises whether an EU right could be justified. According to Art. 82, para. 2, TFEU, the EU is competent to harmonise criminal procedural law only for the purpose of facilitating mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters having a cross-border dimension. The harmonisation of criminal procedural law is thus not a goal in itself (as opposed to the harmonisation competence of the EU in the field of substantive criminal law, Art. 83 TFEU), but has to support mutual recognition within the Union. Harmonisation rules concern the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime and any other specific aspects of criminal procedure which the Council has identified in advance by a decision (for the adoption of such a decision, the Council has to act unanimously after obtaining the consent of the European Parliament).

The term mutual recognition is already listed in the beginning of Title V, Chapter 1, TFEU, regarding the area of freedom, security and justice. Art. 67, para. 3, TFEU states that: "The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws".

However, it goes even beyond application in the context of cooperation in criminal matters alone. Art. 70 TFEU implies that the EU shall strive for “full application of mutual recognition”.<sup>34</sup> Even before the TFEU came into force in 2009, mutual recognition was already formulated by the Tampere Council of 1999 as a cornerstone principle for cooperation in civil and criminal matters.<sup>35</sup> Although the principle of mutual recognition has reached the status of the cornerstone for the area of freedom, security and justice, the concept has never been defined.<sup>36</sup> In a communication report to the European Parliament, the Commission described the principle as follows:

“Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one’s own state, the results will be such that they are accepted as equivalent to decisions by one’s own state. Mutual trust is an important element, not only trust in the adequacy of one’s partners rules, but also trust that these rules are correctly applied”.

Based on this idea of equivalence and the trust it is based on the results the other State has reached are allowed to take effect in one’s own sphere of legal influence. On this basis, a decision taken by an authority in one State could be accepted as such in another State, even though a comparable authority may not even exist in that State, or could not take such decisions, or would have taken an entirely different decision in a comparable case.<sup>37</sup>

Recognising a foreign decision in criminal matters could be understood as giving it effect outside the State in which it has been rendered, be it by according it the legal effects foreseen for it by the foreign criminal law, or be it by taking it into account in order to make it have the effects foreseen by the criminal law of the recognising State. “Not always, but often, the concept of mutual recognition goes hand in hand with a certain degree of standardization of the way states do things. Such standardization indeed often makes it easier to accept results reached in another state. On the other hand, mutual recognition can to some degree make standardization unnecessary”.<sup>38</sup>

With regard to the question whether the EU is competent to harmonise criminal review law, the following question must be answered: would the harmonisation of criminal review law within the EU Member States facilitate mutual recognition of judgments

<sup>34</sup> See also A. KLIP, *European Criminal Law*, Cambridge: Intersentia, 2016, p. 394.

<sup>35</sup> European Council, conclusions of the Presidency of 15-16 October 1999, SN 200/99, paras 33 *et seq.*

<sup>36</sup> See also A. KLIP, *European Criminal Law*, cit., p. 400.

<sup>37</sup> Court of Justice, judgment of 11 February 2003, case C-187/01, *Gözütok and Brügge*.

<sup>38</sup> Communication COM (2000) 495 final of 26 July 2000 from the Commission on mutual recognition of Final Decisions in criminal matters. See also I. ARMANDA, A. WEYEMBERGH, *The Mutual Recognition Principle and EU Criminal Law*, in M. FLETCHER, E. HERLIN-KARNELL, C. MATERA (eds), *The European Union as an Area of Freedom, Security and Justice*, New York: Routledge, 2017, p. 115.

and judicial decisions, and police and judicial cooperation in criminal matters having a cross-border dimension?

However, EU legislation is also bound by the principle of subsidiarity; see correspondingly Art. 5 TEU and more specifically with regard to legislative initiatives in the field of criminal matters, Art. 69 TFEU. Respect for the principle of subsidiarity can be seen as a safeguard for respecting national legal diversity, which is one of the aims of evolution of the EU as an area of freedom, security and justice, such as mentioned in Art. 67 TFEU.<sup>39</sup>

Taking these considerations into account, this leaves several questions open. First, what is a criminal matter having a cross-border dimension? Second, when does an EU instrument improve mutual recognition of judgments and judicial decisions, and police and judicial cooperation? Third, how should the principle of subsidiarity be taken into account in this perspective?

### III.2. CRIMINAL MATTERS HAVING A CROSS-BORDER DIMENSION

First of all, it is difficult to define a criminal matter having a cross-border dimension. Öberg distinguishes three explanations: the first one is a broad definition that includes any case which has any transnational element, however remote or indirect it is. The second one is a narrow definition and applies only to “pure” cross-border scenarios where either a victim or a suspect are involved in a trial in another State than the State in which they are citizens. The third one, which Öberg opts for, is a middle-way explanation which involves situations where the defendant or the victim is not from the Member State where the trial is held: situations where evidence must be mutually recognised for a trial in another Member State than where it is collected, and situations where the offence at issue was committed in another Member State than the one where the trial is held.<sup>40</sup> Using these definitions to justify the implemented EU instruments for strengthening the procedural rights of suspected persons in criminal proceedings, whatever definition is taken, a criminal procedural right can concern a criminal matter without any transnational element, but it could also very well relate to a “pure” cross-border crime. The same applies to a right on revision: the criminal case in which revision would be desirable can involve a cross-border element, but it can also be of (only) national nature. Since there are always cases with a pure transnational element, this criterion is not an obstacle for legislation. The European Commission also considers that Art. 82, para. 2, TFEU provides the legal basis for directives on procedural rights of suspects and accused persons; those rules are not only applicable to cross-border criminal proceedings (*i.e.* proceedings with a link to another Member State or a third country) but also to domestic cases as a precise, *ex ante*

<sup>39</sup> See also V. MITSILIGAS, *Criminal Law after Lisbon*, Oxford: Hart, 2016, p. 40.

<sup>40</sup> J. ÖBERG, *Subsidiarity and EU Procedural Criminal Law*, in *European Criminal Law Review*, 2015, pp. 25-27.

categorisation of criminal proceedings as cross-border or domestic is impossible in relation to a significant number of cases.<sup>41</sup>

### III.3. IMPROVING MUTUAL RECOGNITION

The second point of investigation relates to the question of whether the EU instrument improves mutual recognition of judgments and judicial decisions, and police and judicial cooperation. The EU instruments based on Art. 82, para 2, TFEU that have been developed related to fundamental rights were founded on the idea that the harmonisation of procedural rights (for both suspects and accused persons, as for victims) strengthens the mutual trust Member States have in each other's legal systems and this facilitates mutual recognition.<sup>42</sup> It is not exactly demonstrated *how* the instruments increase mutual recognition. However, in the analysis in 2008 of the future of mutual recognition in criminal matters in the EU, it was emphasised that the relationship between the level of harmonisation of procedural law and the level of mutual trust as a condition for successful mutual recognition is not in dispute.<sup>43</sup> With regard to the measures on the rights of the individual in criminal procedure, Mitsilegas also emphasises the legitimacy. In his opinion, EU legislation in this field will have a transformative effect for the protection of human rights in Europe's area of criminal justice. EU legislative intervention will ensure widening the scope and raising the level of protection of human rights in criminal procedures across the EU; it will ensure effective enforcement and monitoring of the implementation of these rights at national level and it will overcome obstacles to the protection of human rights arising from divergences in protection at national level.<sup>44</sup> This would imply that the threshold to introduce a right to claim innocence is low. The EU is able to formulate law as soon as it can argue that a directive on revision would facilitate mutual recognition of judgments and judicial decisions, and police and judicial coopera-

<sup>41</sup> Commission staff working document SWD(2013)478 final of 27 November 2013, *Impact assessment accompanying the document Proposal for measures on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings*, p. 29.

<sup>42</sup> See for example the Preamble no. 1-12 in Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; the Preamble no. 1-14 in Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; the Preamble no. 1-7 in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA and the Preamble no. 1 and 2 in Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

<sup>43</sup> G. VERNIMMEN-VAN TIGGELEN, L. SURANO, *Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union (European Commission)*, in *European Criminal Law Academic Network*, 2008, available at [www.advokatsamfundet.se](http://www.advokatsamfundet.se), p. 10.

<sup>44</sup> V. MITSILEGAS, *Legislation for Human Rights after Lisbon, The Transformative Effect of EU Measures on the Rights of the Individual in Criminal Procedure*, in M. FLETCHER, E. HERLIN-KARNELL, C. MATERA (eds), *The European Union as an Area of Freedom, Security and Justice*, cit., p. 202.

tion in criminal matters having a cross-border dimension. Because the relationship between harmonisation of procedural law and the level of mutual trust is not called into question, the EU has the competence.

#### III.4. THE PRINCIPLE OF SUBSIDIARITY

Here we arrive at the third question we have to answer: is legislation in accordance with the principle of subsidiarity? Öberg stresses the importance of this principle – next to the conditions in Art. 82, para. 2, TFEU – in order to prevent EU regulation from being adopted too quickly. He introduces two criteria to test the compliance of EU law with the subsidiarity principle. First, there has to be adequate reasoning. Second, there has to be relevant evidence to justify legislation. With regard to the reasoning test, there has to be an explanation of why it is necessary to have a general right – in this context on revision law – to regulate purely internal situations, where the suspects are tried in their own Member State and where the judicial proceedings have taken place in that Member State alone. He adopted this test to the EU Victims Directive and argues that the harmonisation of *all* victim rights, also in cases where victimisation has no cross-border implication, cannot be based on the free movement and the mutual recognition argument and is thus not in conformity with the subsidiarity principle.<sup>45</sup> Furthermore, with regard to the second criterion, to justify EU legislation there must be concrete evidence to support that divergences in the protection of suspects' rights have already had negative consequences for the building of mutual trust among Member States' judicial authorities. The Commission would have to show that national diversities – in this case concerning a right to claim innocence – create such problems of mutual trust, that there would be a serious risk that Member States would refuse a mutual recognition instrument, such as the European Arrest Warrant. In the opinion of Öberg, the Victims Directive does not pass this test of "relevant evidence" and also infringes the subsidiarity principle on this ground.<sup>46</sup>

In the (final) impact assessment of the EU directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings,<sup>47</sup> the EU considered that there is a need for EU action, respecting the subsidiarity principle. This is because: 1) the directive would enhance mutual trust between judicial authorities, and 2) it involves the movement of EU citizens because persons can be involved in criminal proceedings outside their own EU Member State, and the needs of those suspected and accused persons need to be tackled at EU level. In the EU, people are constantly travelling and moving across borders. Because of this continuing movement, it is important to ensure proper, effective action on the rights of those who become involved in criminal proceedings, in their own country or while travelling or liv-

<sup>45</sup> J. ÖBERG, *Subsidiarity and EU Procedural Criminal Law*, cit., pp. 39-40.

<sup>46</sup> *Ibid.*

<sup>47</sup> Directive 2016/343, cit.

ing abroad. Furthermore, the EU considers, that the European Court of Human Rights enforcement mechanisms are not sufficient to ensure that the European Court of Human Rights standards are applied in practice throughout the EU. They have not prevented EU Member States from repeatedly violating Art. 6, para. 2, of the European Court, in spite of the fact that they undertook to abide by the judgments of the European Court of Human Rights in any case to which they are parties.<sup>48</sup> This deliberation by the EU implies a less stringent test than Öberg argues for. If we apply these impact assessment arguments to an EU right on revision, we can say that such a right would also improve mutual trust. It involves moving EU citizens and, even more important, there is no right to claim innocence in the European Court or in other universal or European treatments yet (as we pointed out in section II), so an EU right would definitely be of added value in this regard.

We also see a number of disadvantages of a right to claim innocence, however. First, minimum rules with regard to a revision system risks reducing existing standards in Member States to the EU minimum.<sup>49</sup> Members which offer more opportunities for convicted suspects could use an EU instrument to revise their regulations to the detriment of convicted persons. Second, if the review procedure in another Member State is below the required level, it might create an extra obstacle to cooperation in other criminal cases (for instance, it might block the extradition of surrenders; because the review procedure is inadequate, this would hinder cooperation in general). Furthermore, a right to claim innocence might not be a prior concern of the EU. It could be argued that it is in general better to invest in EU cooperation in the phase of criminal investigation itself than in the post-trial phase (the review process). Compared to other EU instruments, a right to claim innocence would then not have priority. Finally, if an EU right is to be implemented, there has to be an opportunity to control the compliance with this rule, otherwise it would be an empty case.

#### IV. CONCLUSION

In this *Article* we examined the question of whether we should move towards a European right to claim innocence. The EU is only competent to harmonise criminal procedural law if it facilitates mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters having a cross-border dimension and if it is in accordance with the principle of subsidiarity. It can be argued that a fundamental right to claim innocence meets those requirements. The EU instruments that have been developed related to fundamental rights so far, were all funded on the idea that the harmonisation of procedural rights (for suspects and accused persons as for victims) strengthens the mu-

<sup>48</sup> Commission staff working document SWD(2013)478 final, cit., pp. 29-30.

<sup>49</sup> G. VERNIMMEN-VAN TIGGELEN, L. SURANO, *Analysis of the Future of Mutual Recognition in Criminal Matters*, cit., p. 25.

tual trust Member States have in each other's legal systems and this facilitates mutual recognition. The same would go for a post-procedural right to claim innocence, especially since the grounds for revision vary in the Member States we discussed.

But enacting an EU right to claim innocence will come with inherent dangers. In general, it will have to serve two competing interests, namely that of legal certainty, finality and *res judicata* on the one hand, and justice in specific and exceptional cases on the other. If this mechanism is set up too narrowly, justice might not prevail. If it is set up too broadly though, the right would seriously endanger legal systems as a whole and the instrument might cave in under all the (unjust) applications. In both situations, mutual trust in a legal system can be affected negatively if a fair balance is not struck in the existing mechanisms, and this could hinder mutual recognition and cooperation. If convictions are overturned too regularly, the executing Member State might feel tempted or obligated to refuse recognition or cooperation. A high number of revisions would show that the requesting Member States may not have the required functioning criminal justice system. Trust diminishes if it could very well be that the person involved is, after all, innocent or there is at least (serious) doubt on his culpability, or fundamental human rights are not respected in the requesting Member State. If convictions cannot be reviewed or if they are rarely reviewed, even though that might seem appropriate in certain cases, the reluctance of the executing Member State to cooperate may also grow. If the requesting or issuing Member State does not have an adequate (functioning) mechanism to redress a wrongful conviction, the executing Member State may in that case set higher standards in order to cooperate. Doubts on revision are therefore a threat to the cornerstone of EU criminal procedural law.

Our conclusion is that an EU procedural right to overturn wrongful convictions could be justified by the EU legislator, in the same way as other minimum procedural rights have been justified, namely by arguing that harmonising criminal procedural law will enhance mutual trust. We think, however, that further research on the various differences and (in)adequacy in practice of the existing mechanisms across the member States is needed to substantiate the necessity more soundly. That would prevent critique on the condition of subsidiarity on this EU instrument.





## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

*edited by Araceli Turmo*

## *NE BIS IN IDEM* IN EUROPEAN LAW: A DIFFICULT EXERCISE IN CONSTITUTIONAL PLURALISM

ARACELI TURMO\*

TABLE OF CONTENTS: I. A principle of European law. – II. Building coherence across European legal systems. – II.1. The challenging construction of compatible European standards. – II.2. The problem of the *idem*: what is criminal? – III. The attempted compromise. – IV. The revived schism. – V. Conclusion.

**ABSTRACT:** This *Article* analyses the recent divergence between the two European Courts on the application of *ne bis in idem* to double-track procedures from the perspective of judicial dialogue and constitutional pluralism. Although major efforts have been made towards convergence over the past decades, recent case law shows that the potential for conflict – and, possibly, incompatibility – remains wherever the incentive to follow the lead of one authority is insufficient. Pushed to find solutions by the resistance of certain national courts to their converging standards, the European Court of Human Rights and the Court of Justice have chosen very different paths to reach a similar, but not identical, compromise solution. The *Article* examines the causes of this divergence and its consequences for the protection of this fundamental right in EU Member States.

**KEYWORDS:** *ne bis in idem* – double-track enforcement – fundamental rights – European criminal law – judicial dialogue – criminal procedure.

### I. A PRINCIPLE OF EUROPEAN LAW

Judge Pinto de Albuquerque of the European Court of Human Rights<sup>1</sup> has described *ne bis in idem* as a “fundamental principle in European legal culture”.<sup>2</sup> This principle can

\* Associate Professor, University of Nantes, araceli.turmo@univ-nantes.fr.

<sup>1</sup> The terms European Court will hereafter be used to refer to the European Court of Human Rights, but the plural “European Courts” will be used to refer to the European Court of Human Rights and the CJEU concurrently.



indeed be found in similar, if not identical, terms in both European regional fundamental rights systems (that of the European Convention and that of EU law) and across all European national legal systems. Derived from the Roman law maxim *bis de eadem re ne sit actio*, the principle common to civil law systems is roughly equivalent to the doctrine of double jeopardy found in common law systems. It means that a person cannot be tried or punished twice for the same criminal offence. Its importance in the daily practice of litigation and diverse applications mean that ample bodies of case law have developed in national and European systems. This has created numerous opportunities for dialogue and interpenetration of standards across legal orders, making *ne bis in idem* an interesting topic through which to examine judicial dialogue on fundamental rights standards across Europe.<sup>3</sup>

Courts have tried to work towards similar or, at any rate, compatible standards when interpreting and implementing this principle. The case law of the Court of Justice and the European Court of Human Rights (hereafter European Court) provides many examples of cross-references to the other European system, evidencing their efforts to build a common understanding of the principle.<sup>4</sup> However, these judicial attempts have had varying success and areas of conflict remain. *Ne bis in idem* thus provides an interesting example of the limits of constitutional pluralism, defined as “the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them”.<sup>5</sup> Although national and European courts may agree on (and actively work to promote) similar interpretations of important principles, the devil is, as ever, in the detail. When working on the finer points of the construction of a principle, absent a sufficient incentive to comply with a single interpretation, divergences reappear.

This *Article* focuses on one recent example of conflict between national and European courts over *ne bis in idem*. This issue appeared as a result of the growing trend in a number of European countries to resort to double track enforcement, combining administrative and criminal procedures, in order to punish certain types of offences. This trend raises questions in relation to *ne bis in idem* due to the extension of its scope beyond the strict bounds of criminal law as defined in a national legal system. The two European Courts had tried to build coherence and reach common standards which, be-

<sup>2</sup> European Court of Human Rights, judgment of 15 November 2016, nos 24130/11 and 29758/11, *A and B v. Norway*, dissenting opinion of judge Pinto de Albuquerque, para. 79.

<sup>3</sup> G. LASAGNI, S. MIRANDOLA, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, in *Eucrim*, 2019, p. 127.

<sup>4</sup> K. LENAERTS, J. A. GUTIÉRREZ-FONS, *The Place of the Charter in the EU Constitutional Edifice*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart, 2014, p. 1582.

<sup>5</sup> M. POIARES MADURO, *Three Claims of Constitutional Pluralism*, in M. AVBELJ, J. KOMÁREK (eds), *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart, 2012, p. 70.

cause they expanded the scope of the fundamental right, eventually led to conflict with several national supreme courts (section II). As the Member States lobbied in favour of a more restrictive approach which would allow double track enforcement, the two European Courts took different paths, thus creating a new rift between European fundamental rights standards. The European Court of Human Rights seemed to favour dialogue with national courts rather than the Court of Justice (section III). In response, the Court of Justice chose to find its own compromise and in so doing confirmed the rift and the potential for conflict with European Court of Human Rights standards (section IV). The result is an unsatisfactory situation which confirms the limits of constitutional pluralism in building convergence across European legal systems (section V).

## II. BUILDING COHERENCE ACROSS EUROPEAN LEGAL SYSTEMS

*Ne bis in idem* is perceived as an essential component of criminal law and criminal procedure in both European systems. In the European Convention system, the right not to be tried or punished twice appears in Art. 4 of Protocol no. 7<sup>6</sup> alongside, *inter alia*, the right of appeal in criminal matters and the right to compensation for wrongful conviction. In European Union Law, the same principle is now established in Art. 50 of the Charter of Fundamental Rights but it had previously been protected as a general principle<sup>7</sup> and as a “fundamental principle” of EU law.<sup>8</sup> Based on this common recognition of a well-established fundamental right, the European Court and the Court of Justice have worked towards compatible standards for its implementation (section II.1). One result of this convergence was a common conflict with several Member States, on the compatibility of double track enforcement with that principle (section II.2).

### II.1. THE CHALLENGING CONSTRUCTION OF COMPATIBLE EUROPEAN STANDARDS

Contrary to what may be expected considering the long history of *ne bis in idem* in European legal systems and the broad agreement over its basic components, reaching common ground in order to ensure the compatibility of standards across European and national legal systems is not an easy task. As B. van Bockel explains,<sup>9</sup> the way in which *ne bis in idem* is understood varies significantly and it has many rationales in different legal traditions, such as the protection of human rights, the protection of the individual from state abuses, justice, proportionality, legal certainty, due process, respect for res

<sup>6</sup> Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984.

<sup>7</sup> General Court, judgment of 18 October 2001, case T-333/99, *X v. European Central Bank*, para. 149.

<sup>8</sup> Court of Justice, judgment of 15 October 2002, joined cases C-238/99, 244/99, 245/99 P, 247, 250, 251, 252 and 254/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission*, para. 59.

<sup>9</sup> B. VAN BOCKEL, *The Ne Bis In Idem Principle in EU Law*, Alphen aan den Rijn: Kluwer Law International, 2010, p. 25.

judicata, procedural efficiency, and the interest of social peace and order. *Ne bis in idem* is both an essential guarantee to prevent an individual from being repeatedly prosecuted for the same facts and an important contributor to the stability of the legal system through the finality of judicial acts.

For instance, its relationship with *res judicata* is evidenced by the fact that the maxim *nemo debet bis vexari pro una et eadem causa*<sup>10</sup> can alternatively be linked to the doctrine of *res judicata*<sup>11</sup> or to *ne bis in idem*<sup>12</sup> – a specific version of the maxim has been used in the context of criminal law: *nemo debet bis vexari pro uno et eodem delicto*.<sup>13</sup> In practice, implementing this principle will of course contribute to protecting *res judicata* by preventing further litigation of matters on which the courts have already ruled. One of the main differences is, of course, that *ne bis in idem* is generally perceived as a fundamental right, guaranteed in and of itself at the highest level of the legal order and which does not require further justification by reference to broader principles, whereas *res judicata* forms the basis for procedural mechanisms and is generally justified by general interest aims such as legal certainty. However, the proximity between the two principles can have significant consequences because the perceived (main) rationale for *ne bis in idem* has a significant impact on its normative content.

If *ne bis in idem* is associated with *res judicata* and primarily seen as ensuring the finality of a judicial decision, the “idem” will be construed narrowly as related to a specific assessment of the facts. If, on the contrary, the principle is understood primarily as a fundamental right protecting the defendant from further litigation or excessive sanctions, the tendency will naturally be a broader interpretation which allows the principle to prevent a higher number of judicial actions. This is why the Court of Justice has held that Art. 54 of the Convention Implementing the Schengen Agreement applies whenever the same set of facts is at issue, regardless of their legal assessment.<sup>14</sup> On the contrary, in the line of case law related to competition law,<sup>15</sup> the Court of Justice has introduced a “triple identity” cri-

<sup>10</sup> The maxim can be translated as: no-one shall be twice troubled for one and the same cause.

<sup>11</sup> See, for instance, England and Wales High Court, Chancery Division, judgment of 1977, *Gleeson v. J. Wippell & Co.*, and F. FERRAND (dir.), *L'étendue de l'autorité de chose jugée en droit comparé, Étude annexée au rapport de M. le conseiller rapporteur Charruault, pour l'arrêt de la Cour de cassation, Assemblée plénière, du 7 juillet 2006*, Paris: Cour de Cassation, 2006, p. 19.

<sup>12</sup> B. VAN BOCKEL, *The Ne Bis In Idem Principle*, cit., p. 31. For a discussion of the historical debate on the distinction between *res judicata* and *ne bis in idem*, see J. LELIEUR-FISCHER, *La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive*, thèse soutenue à l'Université Panthéon-Sorbonne (Paris I), 2005.

<sup>13</sup> G. SPENCER BOWER, A. K. TURNER, *The Doctrine of Res Judicata*, London: Butterworth, 1969, p. 325 *et seq.*

<sup>14</sup> Court of Justice, judgment of 9 March 2006, case C-436/04, *Van Esbroeck*, para. 27 *et seq.* This interpretation was confirmed by later case law, see e.g. Court of Justice, judgment of 18 July 2007, case C-367/05, *Kraaijenbrink*.

<sup>15</sup> See for example: Court of Justice, judgment of 7 January 2004, joined cases C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland and Others v. Commission*, para. 338 *et seq.* See also Court of Justice, judgment of 7 June 2011, case C-520/09 P, *Arkema v. Commission*, para. 292.

terion<sup>16</sup> based on the one which applies to inadmissibility claims based on *res judicata*.<sup>17</sup> This difference may be understood as an illustration of the weight of the presuppositions and rationales associated with *ne bis in idem* in different areas of the law: the closer the issue is to the traditional scope of criminal law, the more important its status as a fundamental right, protecting the individual, becomes.

Indeed, as with all general principles, the major issues and potential for incoherence in a multilevel constitutional system reside in the standards and rules that allow their implementation. What is “the same criminal offence”? What constitutes a second trial or punishment in criminal proceedings? Those are two of the main issues which courts have to wrestle with. One major factor leading to differentiation between the two European standards is that they started out in very different contexts and very different areas of the law. Most issues related to *ne bis in idem* in EU law were initially related to cross-border situations (e.g., a person is charged in one Member State after having been sentenced in another) or multilevel issues related to the decentralised implementation of many areas of EU law (e.g., national competition authorities and the European Commission both investigating the same cases). Cases which go beyond the confines of a single legal order have been repeatedly excluded from the scope of Art. 4 of Protocol 7 whereas they are precisely the object of Art. 54 of the Convention Implementing the Schengen Agreement.<sup>18</sup>

More generally, while the European Court can be perceived as having a broader fundamental rights-centric approach, not all Member States have agreed to a full applicability of Art. 4 of Protocol 7, therefore the acceptance of its case law is potentially limited. By contrast, the CJEU was until very recently unable to delve into criminal law except in very limited exceptions. For this reason, the case law on *ne bis in idem* in EU law started to develop in separate strands related to, on the one hand, competition law and, on the other hand, judicial cooperation in criminal matters in particular with Art. 54 of the Convention Implementing the Schengen Agreement. The content of the principle

<sup>16</sup> In *Aalborg Portland and Others*, cit., para. 338, the Court of Justice holds that: “as regards observance of the principle *ne bis in idem*, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected”.

<sup>17</sup> CJEU case law has drawn inspiration from civil law traditions, in particular French civil law, in establishing the criteria for inadmissibility claims based on *res judicata*. Such claims are possible only if the proceedings disposed of by the previous judgment “were between the same parties, had the same purpose and were based on the same submissions” as the present case: General Court, judgment of 5 June 1996, case T-162/94, *NMB France and Others v. Commission*, para. 37. For other examples and an analysis of the relevant case law, see A. TURMO, *L'autorité de la chose jugée en droit de l'Union européenne*, Bruxelles: Bruylant, 2017, p. 159 *et seq.*

<sup>18</sup> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

in these two strands remains somewhat different.<sup>19</sup> However, within the scope of EU competences, the Court of Justice has an increasingly clear ambition to impose uniform fundamental rights standards across national legal systems. The CJEU may therefore set itself more ambitious goals than the European Court of Human Rights in terms of uniform implementation of its standards before national courts.

The two European Courts naturally developed somewhat different standards for *ne bis in idem*, influenced by the different contexts in which they operate. However, the past decades showed significant efforts on both sides to work towards a common understanding of the principle. Unfortunately, those efforts were not entirely successful from the point of view of the compatibility of national standards with European law.

## II.2. THE PROBLEM OF THE *IDEM*: WHAT IS CRIMINAL?

Despite their different starting points, the convergence of the two European Courts towards a similar understanding of what constitutes criminal charges and what must be considered “*bis in idem*” has made significant progress over the past decades. Unfortunately, this convergence led to results which did not convince all national authorities and thus reinforced the potential for resistance to these common standards in the Member States.

The issue of the compatibility of double track procedures with *ne bis in idem* gained importance because of tendencies that are common to both systems, such as the effects of the expansion of the notion of “criminal” charges on the scope of the principle under Art. 4 of Protocol 7 and EU law. When trying to determine whether a given sanction should be considered “criminal” in nature, the Court of Justice relies heavily on the *Engel* criteria set by the European Court of Human Rights in 1976.<sup>20</sup> Under this approach, now common to both European Courts,<sup>21</sup> one must look not only to the legal qualification of the offence under the internal law of a given State, but also to the nature of the offence, the repressive and deterring character of the penalty, and the type and the degree of severity of the penalty for which a given individual is liable. A similar convergence has occurred concerning the “*idem*”. Since its *Zolotukhin* judgment,<sup>22</sup> the European Court of Human Rights has followed a similar approach to the Court of Justice

<sup>19</sup> The extent to which *ne bis in idem* is applied differently in different areas of EU law is beyond the scope of this Article. For further analysis, see *inter alia*: D. SARMIENTO, *Ne Bis in Idem in the Case Law of the European Court of Justice*, in B. VAN BOCKEL (ed.), *Ne Bis in Idem in EU Law*, Cambridge: Cambridge University Press, 2016, p. 103 *et seq.*

<sup>20</sup> European Court of Human Rights, judgment of 8 June 1976, no. 5100/71, *Engel and Others v. the Netherlands*.

<sup>21</sup> With the exception of the Court of Justice's case law on competition law.

<sup>22</sup> European Court of Human Rights, judgment of 7 June 2007, no. 14939/03, *Sergey Zolotukhin v. Russia*.

(in criminal law) in holding that *ne bis in idem* applies to charges and procedures concerning the same set of facts regardless of their legal assessment.

As Luchtman argues, this expansion of the definition of the "*idem*" and of criminal charges and proceedings is related to an understanding of the principle that increasingly focuses on the rights of the defendant and on their ability to establish defence strategies, taking into account the risk of multiple proceedings for the same set of events.<sup>23</sup> It also allows for the application of *ne bis in idem* to prevent double procedures where both are criminal under the *Engel* criteria although one might be considered administrative under national law. This is highly problematic for a number of EU Member States, which have been expanding the use of double-track enforcement, for example concerning tax-related offences. The European Court found in several judgments that administrative proceedings for the imposition of tax surcharges were "criminal" for the purposes of Art. 4 of Protocol 7, meaning that *ne bis in idem* was, in principle, applicable if criminal charges were also brought.<sup>24</sup> In EU law, too, some rulings seemed to indicate a similar attitude where coexisting national and EU competition authorities may both be required to make a decision on a single set of facts, and are expected to take into account any previous sanctions as well as core principles such as the primacy of EU law.<sup>25</sup>

From the perspective of constitutional pluralism and the convergence of standards across European legal systems, a gradual evolution towards an identical European standard seemed to be a positive development. However, a major difficulty arises out of the asymmetrical relationships between both European systems and their Member States. In European Union law, the question of the scope of the EU's competence to define fundamental rights standards and impose them upon its Member States' is far from being clear-cut. The Court of Justice has nevertheless shown a clear ambition to construct its own standards and enforce them within its legal order.<sup>26</sup> The European Court is, however, dependent upon the signatures and ratifications of Protocol 7 in or-

<sup>23</sup> M. LUCHTMAN, *The ECJ's Recent Case Law on ne bis in idem: Implications for Law Enforcement in a Shared Legal Order*, in *Common Market Law Review*, 2018, p. 1722.

<sup>24</sup> European Court of Human Rights: judgment of 8 April 2003, no. 41265/98, *Manassson v. Sweden*; judgment of 20 May 2014, no. 35232/11, *Pirttimäki v. Finland*, paras 45-48; judgment of 27 November 2014, no. 7356/10, *Lucky Dev v. Sweden*, para. 51. The judgment of 15 November 2016, *A and B v. Norway*, cit., in fact confirms this at paras 136-139.

<sup>25</sup> Court of Justice, judgment of 13 February 1969, case 14/68, *Walt Wilhelm and Others v. Bundeskartellamt*, para. 11. On this topic, and on *ne bis in idem* in EU competition law, see R. NAZZINI, *Parallel Proceedings in EU Competition Law*, in B. VAN BOCKEL (ed.), *Ne Bis in Idem in EU Law*, cit., p. 131 et seq.

<sup>26</sup> The Court of Justice has held that the application of national standards of fundamental rights must not compromise the standard which it and other EU institutions have set under the Charter or other constitutional principles of the EU legal order, such as primacy, unity and effectiveness of EU law: Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni* [GC], para. 60. This ambition is also apparent in Court of Justice, opinion 2/13 of 18 December 2014 on the EU's Accession to the European Convention on Human Rights, in which the Court refuses to let the European Court "interfere" (para. 225) with the division of powers between the EU and its Member States in matters related to fundamental rights.

der to enforce its own standard for *ne bis in idem* across its Member States. Not all EU Member States have ratified Protocol 7. Germany and the Netherlands signed it but never ratified it.<sup>27</sup> A number of Member States have also made reservations and declarations specifically aimed at restricting the scope of this provision to that of criminal law and/or criminal offences, as defined in their own legal systems.<sup>28</sup>

The resistance with which the expansion of the scope of application of *ne bis in idem* was immediately met at the national level was not only problematic from the point of view of the enforcement of Convention standards across the continent or of convergence of standards between European States. It also meant that, even if the Court of Justice tried to uphold the same standard as its Strasbourg counterpart, it would actually be enforcing a standard through EU law which some of its Member States have effectively rejected in the context of the Convention. Nevertheless, the Court of Justice remained on a path favourable to compatible European standards and held in *Åkerberg Fransson*<sup>29</sup> that *ne bis in idem* applies to double proceedings, where both tracks can be considered criminal under the *Engel* criteria. EU case law remained unclear concerning the compatibility of such practices with the principle. However, the criteria given in EU precedents, taking into account most European Court case law, clearly leaned towards incompatibility. This is why the European Court's decision to shift the Convention standard in 2016 in fact re-opened a chasm between the two European systems.

### III. THE ATTEMPTED COMPROMISE

In a clear overruling of its previous case law, in case *A and B v. Norway*, the European Court yielded to the pressure exercised by a number of Member States and offered them a solution which makes it possible to maintain double track enforcement, even where (or rather paradoxically, insofar as!) both proceedings are criminal under the *Engel* criteria. This ruling appears to be an attempt to solve the problem posed by national authorities' resistance by proposing an interpretation of *ne bis in idem* which both retains the broad understanding of criminal charges *and* excludes many cases of double track enforcement from the scope of application of *ne bis in idem*. Thus, even if some Member States refuse to recognise the Court's definition of the scope of the principle, a number of cases of double track enforcement become compatible with the Protocol.

<sup>27</sup> Germany signed the Protocol on 19 March 1985, the Netherlands on 22 November 1984. The United Kingdom was the only EU Member State never to have signed the Protocol.

<sup>28</sup> These States are: Austria (Second Declaration contained in the instrument of ratification, deposited on 14 May 1986), France (Reservation contained in the instrument of ratification, deposited on 17<sup>th</sup> February 1986), Germany (First Declaration made at the time of signature, on 19 March 1985), Italy (Declaration contained in a letter, dated 7 November 1991, handed to the Secretary General at the time of deposit of the instrument of ratification, on 7 November 1991), and Portugal (Declaration contained in the instrument of ratification deposited on 20 December 2004).

<sup>29</sup> Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC].



To achieve this result, the European Court chose to rely on a specific strand of case law related to administrative measures taken to withdraw driving licences concurrently with criminal charges and trials for traffic offences.<sup>30</sup> In this line of cases, the Court had held that although withdrawing a driving licence could be considered a criminal sanction, if it concerned the same matter and there was a sufficiently close connection between it and the criminal sanction *per se*, there was no violation of *ne bis in idem*. However, as mentioned above, other judgments concerning different policy areas went in the opposite direction. In *A and B v. Norway*, the European Court expanded on the cases related to traffic offences and held that *ne bis in idem* is not violated, because there are not two separate charges and sanctions, in cases where both tracks of enforcement have been “sufficiently closely connected in substance and in time”.<sup>31</sup> This connection is established on the basis of a non-exhaustive list of factors,<sup>32</sup> such as: whether the different proceedings pursue complementary purposes addressing different aspects of the social misconduct, whether this double track enforcement is a foreseeable consequence of the misconduct, whether the different “tracks” are conducted so as to avoid duplication and assessment of evidence and, above all, to avoid creating an excessive burden by taking into account the first sanction that is imposed when setting the second one. A “connection in time” is also an important factor: if the two proceedings are too distant in time, they are less likely to be considered sufficiently closely connected to constitute a single whole.

The European Court’s new approach appears to be a compromise with Member States such as Italy, Sweden or Norway. It must, however, be noted that this approach is not without its critics and that, in particular, judge Pinto de Albuquerque presented a very convincing dissenting opinion in *A and B v. Norway*. One significant problem was the compatibility of what was clearly an overruling with Court of Justice case law,<sup>33</sup> after such significant efforts from both Courts towards convergence. Indeed, later case law proved that the compromise reached in *A and B v. Norway* was not compatible with the Court of Justice’s approach to fundamental rights.

Although the European Court presented this ruling as firmly based on its previous case law, judge Pinto de Albuquerque was right to insist that this was at least a partial overruling since it was impossible to read all of the Court’s previous case law as a coherent whole. One of the most problematic aspects of this new approach is the idea, based notably on *Jussila v. Finland*,<sup>34</sup> that some areas of the law can be considered part

<sup>30</sup> See, e.g., European Court of Human Rights, judgment of 13 December 2005, no. 73661/01, *Nilsson v. Sweden*.

<sup>31</sup> *A and B v. Norway*, cit., para. 130.

<sup>32</sup> *Ibid.*, para.132.

<sup>33</sup> *Ibid.*, dissenting opinion of judge Pinto de Albuquerque, cit. paras 67 and 80.

<sup>34</sup> European Court of Human Rights, judgment of 23 November 2006, no. 73053/01, *Jussila v. Finland*. The concept of a “core” of criminal law can be read as an *obiter* in this judgment, as judge Pinto de Albuquerque points out in his dissenting opinion (*A and B v. Norway*, cit., dissenting opinion, paras 29-30).

of criminal law but not of its “core” and thus do not require the highest degree procedural guarantees.<sup>35</sup> As judge Pinto de Albuquerque noted, in doing so the Court “distinguished between disposable and non-disposable Convention procedural guarantees”<sup>36</sup> while not providing a clear and coherent approach as to the distinction between the supposed “core” and the rest of criminal law. In the context of *ne bis in idem*, this notion allows Member States to implement a more restrictive interpretation of the principle, a lower standard of protection, to cases that are not considered part of the “core” of criminal law. This is a significant reversal of the reasoning which is at the root of this problematic case law, namely that States have created administrative proceedings and sanctions so strict that they must be considered criminal in nature.

Despite the criticisms levelled at it by the dissenting judge and the opposition of the Court of Justice, the European Court has confirmed this new approach to *ne bis in idem* in double track enforcement in several rulings. However, the criteria set out in *A and B v. Norway* are not easy to implement. The Court found, in cases concerning tax-related offences and market manipulation, that there was a lack of sufficient “connection” between proceedings that led to largely independent collection and assessment of evidence and did not sufficiently overlap in time.<sup>37</sup> It also held, in a judgment concerning proceedings before a prosecutor and a court after a traffic offence,<sup>38</sup> that the two sets of proceedings were not sufficiently “integrated” because they were not conducted simultaneously and the penalties imposed were not combined, that they pursued the same general purpose, were based on the same legal provision and were partly conducted by the same authority on the basis of the same evidence.

The quick succession of cases before the European Court on the interpretation of the criteria set out for the new approach to the “bis” in some cases of double track enforcement gives an indication of the difficulty in utilising these criteria in order to set out which types of double track enforcement are acceptable under Protocol 7. More case law will be necessary in order to determine whether the criteria set out in *A and B v. Norway* are, in fact, a workable compromise solution to allow Member States to pursue the path of repressive administrative enforcement within the bounds of Convention standards. However, one major hurdle to overcome is the incompatibility between this compromise and the approach chosen by the Court of Justice. In trying to find a compromise solution to ensure greater convergence between Member States’ standards and its own, the European Court has unfortunately chosen a path which would prove difficult to follow for the Court of Justice and thus endangered convergence between European standards.

<sup>35</sup> *A and B v. Norway*, cit., para. 133.

<sup>36</sup> *Ibid.*, dissenting opinion, cit., para. 28.

<sup>37</sup> European Court of Human Rights, judgment of 18 May 2017, no. 22007/11, *Johannesson and Others v. Iceland*, para. 53.

<sup>38</sup> European Court of Human Rights, judgment of 8 July 2019, no. 54012/10, *Mihalache v. Romania* [GC], para. 84.

#### IV. THE REVIVED SCHISM

*A and B v. Norway* can be read as a reasonable attempt at finding a compromise solution between the European Court's standards for *ne bis in idem* and the positions of certain Member States. However, although the European Court of Human Rights tried to pretend otherwise, this judgment puts a stop to an ongoing effort in both European Courts to develop compatible standards for this principle. In *Åkerberg Fransson*, the Court of Justice had tried to follow what seemed to be the European Court's main approach in double track enforcement cases. The incompatibility between the approach chosen in *Åkerberg Fransson* and that adopted in *A and B v. Norway* was made all too clear by the European Court's choice to quote,<sup>39</sup> not the ruling, but the opinion of AG Cruz Villalón which the Court of Justice had *not* followed.<sup>40</sup> Indeed, as judge Pinto de Albuquerque notes, the European Court's own interpretation of *Åkerberg Fransson* in *Grande Stevens* was precisely that, under EU law, *ne bis in idem* prevented such double track enforcement for a single set of facts.<sup>41</sup>

The Court of Justice had two options: follow the compromise solution set out by the European Court or confirm this divergence. It chose the latter, following suit in setting a new standard which also allows Member States some freedom to pursue double track enforcement, but rejecting the *ratio decidendi* of the *A and B v. Norway* judgment. In three judgments published on 20 March 2018 in cases *Menci*,<sup>42</sup> *Garlsson Real Estate and Others*<sup>43</sup> and *Di Puma*,<sup>44</sup> the Court of Justice held that double track enforcement such as the Italian *doppio binario* was, in principle, contrary to *ne bis in idem* if both tracks were criminal in nature.

*Menci* was the most similar to the case that gave rise to *Åkerberg Fransson*. After an administrative procedure against Mr Menci for failure to pay VAT had led to a final decision, requiring him to pay not only the amount owed but also an extra 30 per cent as a sanction, criminal proceedings had been opened for the same factual conduct. *Garlsson Real Estate and Others* concerned market manipulation. In this case, one of the litigants in the national proceedings was held to be jointly and severally liable for an administrative fine and later received a criminal conviction which had become final while the appeal against the fine was still pending. In the two joined cases, Mr Di Puma and Mr Zecca had also been sentenced by criminal courts, for insider dealing, and the preliminary reference was made by the court ruling on their appeals against administrative fines for the same facts. All the national proceedings fell within the scope of EU law provisions,

<sup>39</sup> *A and B v. Norway*, cit., para. 118.

<sup>40</sup> Opinion of AG Cruz Villalón delivered on 12 June 2012, case C-617/10, *Åkerberg Fransson*, cit.

<sup>41</sup> European Court of Human Rights, judgment of 4 March 2014, no. 18640/10, *Grande Stevens and Others v. Italy*, para. 229.

<sup>42</sup> Court of Justice, judgment of 20 March 2018, case C-524/15, *Menci* [GC].

<sup>43</sup> Court of Justice, judgment of 20 March 2018, case C-537/16, *Garlsson Real Estate and Others* [GC].

<sup>44</sup> Court of Justice, judgment of 20 March 2018, joined cases C-596 et C-597/16, *Di Puma* [GC].

and therefore of Art. 50 of the Charter according to Art. 51, para. 1, as interpreted by the Court of Justice.<sup>45</sup> In all three judgments, the Court found that the administrative sanctions were of a criminal nature according to the *Engel* criteria and that both procedures were related to the same facts (*idem factum*). The core issue was therefore whether there was, indeed, a “*bis*” incompatible with *ne bis in idem*.

The Court of Justice held that, in principle, such procedures are incompatible with the fundamental right, but that exceptions are permitted, under Art. 52, para. 1, of the Charter, so long as they are justified by a legitimate objective under EU law, established by legislation, and that they are compatible with the essential content of the principle and with the proportionality requirement. The Court of Justice thus confirmed the lowering of the protection granted by *ne bis in idem* under European law<sup>46</sup> as well as the conflict between the two European standards.

The simplest criticism that can be formulated against these rulings is also one of the most powerful ones from the point of view of the nature of principles and the hierarchy of norms: *ne bis in idem* is supposed to provide absolute protection and limitations cannot, in principle, be justified – especially by budgetary necessities such as ensuring that taxes are collected. As AG Campos Sánchez-Bordona notes in his opinion in *Menci*, both EU and ECHR law seemed to guarantee this absolute protection: they did not allow the kind of exception which the Court of Justice has introduced.<sup>47</sup> For instance, Art. 4, para. 2, of Protocol 7 states that *ne bis in idem* does not prevent the reopening of a case where newly discovered facts justify it, but no derogation is possible under Art. 15 of the Convention.<sup>48</sup>

The Court of Justice quotes a precedent as a basis for this ruling although, as usual, it does so without providing any justification for the choice of precedent and the reference is not entirely convincing. *Spasic*<sup>49</sup> can easily be distinguished from the cases that gave rise to the 2018 rulings. The question referred to the Court in that case had to do with the compatibility with *ne bis in idem* of the requirement that a penalty “has been enforced” or is “actually in the process of being enforced” under Art. 54 of the Convention implementing the Schengen Agreement. The Court relied on the Explanations relating to the Charter in particular, to hold that the limitation which results from this additional condition for the application of *ne bis in idem* is compatible with Art. 50 of the Charter, adding that this condition met the criteria of being provided for by law, re-

<sup>45</sup> See, *inter alia*, *Åkerberg Fransson* [GC], cit., paras 21-22.

<sup>46</sup> M. VETZO, *The Past, Present and Future of the Ne Bis In Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma*, in *Review of European Administrative Law*, 2018, p. 76.

<sup>47</sup> Opinion of AG Sánchez Bordona delivered on 12 September 2017, case C-524/15, *Menci*, para. 78.

<sup>48</sup> See, e.g., European Court of Human Rights, *Mihalache v. Romania* [GC], cit., para. 47.

<sup>49</sup> Court of Justice, judgment of 27 May 2014, case C-129/14 PPU, *Spasic* [GC]. This judgment is quoted at paras 40 of the judgment in *Menci* [GC], cit., 42 of *Garlsson Real Estate and Others* [GC], cit., and 41 of *Di Puma* [GC], cit.

specting the essence of the right and being proportionate in view of the objective being pursued.<sup>50</sup> This objective plays a major part in the *ratio* of the *Spasic* judgment. The Court explains that the enforcement requirement aims to prevent the principle from being applied in a way that allows persons who have been definitively convicted in one Member State where the sentence has not been executed, to obtain impunity simply by moving to another Member State within the area of freedom, security and justice. The aim of this provision is therefore highly specific to cross-border issues, and the balancing act set out in the Convention on the implementation of the Schengen Agreement between freedom of movement and the need to ensure the execution of criminal convictions. These elements are entirely absent from the 2018 cases.

AG Campos Sánchez-Bordona makes a convincing argument that the reasoning used in *Spasic* cannot be applied in these three judgements. The question whether the essence of the fundamental right is affected cannot be answered in the same way in a case that concerns separate proceedings taking place in two different Member States and in a case concerning a double repressive response to the same conduct in a single State. Freedom of movement or the effective enforcement of a penalty imposed in a Member State are not at issue in *Menci*, *Garlsson Real Estate and Others* and *Di Puma*. This should have some bearing on the evaluation of the necessity of the exception to *ne bis in idem*, in the context of the proportionality review. The very fact that several Member States do not have double-track procedures shows that they are not truly necessary – moreover, Member States can freely introduce double-track enforcement where one of the tracks cannot be considered *criminal*.<sup>51</sup> Considering the range of options available to Member States to ensure an effective criminal and/or administrative response to offences, double criminal enforcement in a single Member State could certainly be deemed excessive.

The Court of Justice's approach is nonetheless relatively predictable. First of all, the way in which the reasoning is set out in the rulings follows the classic model of the EU approach to exceptions to general principles, including fundamental rights. If one accepts the Court's position that exceptions to *ne bis in idem* must be allowed, allowing EU public interest to justify such exceptions, e.g. in order to protect the EU budget, is not a stretch. *Åkerberg Fransson* clearly indicates that, according to the Court, such considerations can be balanced with fundamental rights. Using the proportionality test as the main tool for this balancing act is also unsurprising, although the way in which the test is carried out here leaves a lot to be desired. The Court of Justice's test does have one significant advantage over the European Court's: the importance given, within the proportionality test, to *res judicata*<sup>52</sup> and, more generally, the question of the existence of a

<sup>50</sup> *Spasic* [GC], cit., paras 57-74.

<sup>51</sup> Opinion of AG Sánchez-Bordona, *Menci*, cit., paras 83 and 89.

<sup>52</sup> In particular, in *Di Puma*, the Court of Justice insists on the importance of *res judicata* and holds that it prevents administrative proceedings from continuing after a final judgment ordering acquittal for the same factual conduct: *Di Puma* [GC], cit., para. 31 *et seq.*

final decision in one of the tracks being pursued. It also seems to indicate that the Court wants the EU standard to be stricter and more protective of the fundamental right at issue,<sup>53</sup> thanks in particular to the principle/exception reasoning and the somewhat stringent proportionality test. However, the Court of Justice simply avoids answering many of the Advocate General's points regarding the incompatibility of this new approach with previous case law.

The main factor, however, remains that the Court of Justice was under significant pressure to modify its case law. Since *A and B v. Norway* was clearly incompatible with EU law as it stood, the Court of Justice was put in a difficult position. It had to choose whether to modify its own case law in response to the European Court as well as to national authorities, and whether to follow the European Court's reasoning or not. The Court of Justice clearly rejected the *ratio* of *A and B v. Norway*, which is based on the idea that the "*bis*" does not exist in certain double procedures. The reasoning based on recognising that such procedures do constitute limitations on *ne bis in idem* but that such limitations can be justified allowed it to grant Member States the leeway to pursue such policies under EU law. Another advantage of the chosen approach results from the limitation of Member States' ability to pursue dual track enforcement, within the scope of application of the Charter, to cases where it is justified by EU public interest objectives and proportionate. This could allow the Court of Justice to ensure that similar standards are set across Member States for the necessity and functioning of such procedures.

The fact remains that the Court of Justice has chosen a very different path from the European Court in order to enable Member States to retain or introduce dual track enforcement. To this day there has been no further case law from the Court of Justice on this aspect of *ne bis in idem*. The compatibility of this case law with the standard set by the European Court is doubtful. While the result was, in both cases, to make certain types of double-track enforcement compatible with both European standards, and thus to a certain extent to work towards a more uniform approach to *ne bis in idem* across national, EU and ECHR law, the *ratios* are very explicitly incompatible. It remains unclear whether national authorities can comply with both European standards simultaneously. Thus, although the European Courts have tried to create rules which take into account the desiderata of national courts, the result is clearly not convergence towards a common standard.

The difficulties raised by this new case law from both European Courts is evident in a recent request for a preliminary ruling, made by the Tribunal correctionnel de Bordeaux (France)<sup>54</sup>. This criminal court has referred three questions related to *ne bis in idem*. The first question asks the Court of Justice to state whether Art. 50 of the Charter

<sup>53</sup> G. LASAGNI, S. MIRANDOLA, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, cit., p. 132.

<sup>54</sup> Request for a preliminary ruling from the Tribunal correctionnel de Bordeaux (France) lodged on 20 February 2020, case C-88/20, *Procureur de la République v. ENR Grenelle Habitat SARL, EP, FQ*.

precludes a combination of criminal proceedings and administrative proceedings of a criminal nature whose subject matter is a single act prosecuted under two different classifications, when “interpreted in the light of Article 4 of Protocol No 7”. The French court is clearly asking the Court of Justice to respond not only on the basis of its own case law but also to keep in mind European Court case law and take a stand on its compatibility with the new EU standard. The second and third questions clearly show the influence of the new categorisations established by the European Court, between “real” double-track enforcement and other cases where the two tracks must be treated as one, and between a “core” of criminal law and the other, less serious cases – but also of the proportionality test introduced by the Court of Justice. Both questions ask the Court of Justice to reflect on the consequences of the answer given to the first question, in particular in view of the principles of legality and proportionality of criminal offences and penalties, enshrined in Art. 49 of the Charter. If *ne bis in idem* does preclude such duplication, the court asks, should the conditions and criteria for the single set of proceedings allowed in such cases be defined in advance? If it does not, shouldn’t this possibility of double-track enforcement be restricted to the most serious cases and, if so, how and when should the criteria determining gravity be defined?

## V. CONCLUSION

As the questions raised by the Bordeaux court show, the attempt at a halfway compromise by the Court of Justice, and the tacit overruling by the European Court which it follows, perhaps raise more problems than they solve. Certainly, they allow national authorities some leeway in pursuing stricter policies and sanctions against certain acts. In ceding ground to the Member States that wish to maintain or increase the use of double-track, the European Courts have made their own standards more compatible with those of national supreme courts. However, in creating at least partly incompatible standards that require further elaboration, they do not present a clear picture of the extent of these new exceptions or the applicable criteria.

It can be argued that the European Court should have held their ground: the simultaneous trend towards “decriminalising” certain offences and intensification of administrative sanctions, which has led to offences which have serious impacts on society being dealt with through administrative law, must be re-examined. As judge Pinto de Albuquerque noted, this tendency has resulted in very significant financial sanctions, sometimes coupled with other measures such as the suspension or the withdrawal of certain rights, being imposed outside the realm of criminal procedure.<sup>55</sup> Administrative authorities have acquired intrusive powers related to the investigation of these offences. The consequence of this evolution is that, in the name of efficiency, individuals are being

<sup>55</sup> Dissenting opinion of judge Pinto de Albuquerque, *A and B v. Norway*, cit., paras 18-22.

subjected to a form of criminal policy without the procedural and substantive safeguards of criminal law. The problems posed by these trends include the situations where individuals end up being subjected to two sets of proceedings and sanctions for the same conduct, but they go much further and require a reappraisal of the distinction between administrative and criminal policy and law enforcement. The choices made by both European Courts do not address the broader policy issues and can feel like an abdication of their responsibility to protect the rights of litigants.

However, in a context of constantly evolving fundamental rights standards across European legal systems and mutual influences through judicial dialogue, this case law also shows the limits of constitutional pluralism. If national courts resist a change in European case law, should European Courts reconsider? Which European Court should have the last say on the specific standards attached to a principle? The fact remains that, insofar as these questions have no firm answer, the potential for divergence exists.





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