

Filipe Marques
Paulo Pinto de Albuquerque *Editors*

Rule of Law in Europe

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Editors

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Preface

This book gathers the vast majority of the speeches and communications given at the conference “Rule of Law in Europe”, held in Lisbon, Portugal, on 9–10 December 2021, co-organised by *MEDEL – Magistrats Européens pour la Démocratie et les Libertés* (together with its Portuguese member associations *ASJP – Associação Sindical dos Juizes Portugueses* and *SMMP – Sindicato dos Magistrados do Ministério Público*) and the *Católica Lisbon School of Law* of the *Universidade Católica Portuguesa*.

The reasons that led MEDEL and the Católica Lisbon School of Law to organise this event are manifest—the Rule of Law crisis that Europe has been facing in the last decade, unforeseeable when the enlargement to the East took place in the beginning of the century, makes the debate on this foundational cornerstone of the European integration more urgent than it has ever been.

The treaties that set the foundations of the European legal system are based on theoretical concepts such as “common constitutional traditions” or “shared values”, but no one thought these vague proclamations could be put to the test in the way they currently are.

Direct attacks against the independence of judges and prosecutors and open attempts of interference in the judiciary by the executive, all masked under a populist rhetoric, are pushing to the limit all the actors in the field—politicians; national and European judges; magistrates and lawyers from all European States.

At the same time, the force and validity of the rules on which European integration has been built in the last seven decades are also put to the test: questions of distribution of competence between national and European authorities arise, overlapping jurisdictions of national and European courts are constantly discussed, decisions of courts are increasingly based on general principles of law instead of positive norms.

In this context, this event tried to contribute to the debate on Rule of Law bringing together magistrates, politicians and academics, in order to have a multifocal dialogue—although always juridical, not exclusively theoretical. We had the honour to count as speakers with the European Commissioner of Justice and the (at the time) Minister of Justice of Portugal and the Prosecutor-General of Spain; the Presidents of the Consultative Councils of European Judges and Prosecutors, of the Council of Europe; renowned members of the academia and magistrates from various European countries.

The Rule of Law is at the crossroad of political and juridical considerations and the ongoing debate in Europe clearly shows that “dual nature”: the actors at the centre of the stage are not only the courts (CJEU and ECtHR), but also the political institutions (European Commission, Parliament and Council; the Committee of Ministers of the Council of Europe). It was therefore a deliberate option of the organisation to gather the inputs of all these players, so the texts that may be found in the following pages are of different nature—some of them offer a more academic perspective, while others may give more attention to the political implications of the debate. We believe that only

through this dialogue between different actors of justice the Rule of Law may be truly and actively defended.

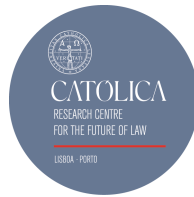
Another of the goals of the conference was to bring together the perspectives of the two main international courts acting in this field: the Court of Justice of the European Union and the European Court of Human Rights. The mutual influence of the jurisprudence of these courts is evident, so the joint analysis of their decisions is crucial for the complete understanding of the development of the Rule of Law crisis.

After reading these pages, there will certainly remain more unanswered questions than solid conclusions on the ways to move forward and the possible solutions to the current situation. In a way, that is precisely the ultimate goal of any open and sincere debate: to bring up new arguments and ways of thinking, forcing the participants to explore uncharted paths that had never before been revealed. If that will be the case, the *Católica Lisbon School of Law* will have accomplished its duty as academic institution and MEDEL will have achieved one of the goals established by its founding members in 1985—the establishment of a common debate among magistrates from different countries in order to support European community integration, in view of the creation of a European political union.

The organisers sincerely hope that the texts published in these pages will contribute to the further development of this debate and influence the jurisprudential and doctrinal work in this field.

Lisboa, Portugal

Filipe Marques
Paulo Pinto de Albuquerque



Introduction: Conference “Rule of Law in Europe”

Didier Reynders

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I would like to thank MEDEL and the Portuguese Catholic University for organising this conference.

It is a great honour for me to take part today.

This type of initiative plays an important part in fostering and promoting a rule of law culture.

Democracy, the rule of law and fundamental rights are the building blocks of the European Union.

The rule of law fulfils a special function when it comes to the values of the EU enshrined in Article 2 of the Treaty. To put it in the words of our President Ursula von der Leyen: It is the glue that binds our Union together. It guarantees the protection of all other fundamental values, on which our Union is founded.

It also plays a crucial role for the functioning of the EU, ensuring that Member States and their citizens can work together in a spirit of mutual trust.

Trust in public institutions, including in the justice system, is indispensable for the functioning of democratic societies.

Under the rule of law, all public powers act on the basis and within the constraints set out by law, in accordance with the values of democracy and fundamental rights. It also requires that exercise of such powers must be subject review by independent and impartial courts irrespective of political majorities.

But in Europe, over the past years, we have seen the erosion of some of our values in certain Member States. It shows that respect for the rule of law cannot be taken for granted, even within the EU.

To address these challenges, we have gradually developed and deployed a variety of instruments.

In 2020, a new tool was added to our rule of law toolbox—the annual Rule of Law Report.

It is conceived as a yearly process and aims at preventing problems from emerging or deepening. It also allows Member States to learn from each other, through an exchange of best practices.

On 20 July 2021, the Commission adopted the second annual Rule of Law Report.

This new edition further deepens the Commission’s assessment. In particular, it follows up on the challenges that the first Report identified and those arising from the COVID-19 pandemic.

To prepare this report, we have collected written input from all Member States and received over 200 written contributions from a large range of stakeholders.

We also conducted virtual country visits during which we had over 400 meetings with national authorities, independent bodies and stakeholders.

This is crucial for deepening our country-specific knowledge.

I would like to thank MEDEL for its important contribution to the stakeholder consultation, and I invite you to take part in the consultation for the 2022 Report, which is ongoing.

As of next year our report will also come with specific recommendations to Member States.

It is important to make the best use of this Report as a basis for a genuine dialogue on the rule of law with a wide variety of actors, both at EU and national level.

We expect the findings of the 2021 report to further feed into discussions between Member States as they work to strengthen the rule of law.

And there is a political will to do this.

I welcome that the Portuguese and the Slovenian Presidencies have continued the dialogue on the basis of the Rule of Law Report in the General Affairs Council, with a horizontal discussion in October and a country-specific discussion on five Member States in November.

I am counting on future Council presidencies to continue this approach.

We also want the report to stimulate debate on national level. In this context, the engagement with parliaments is particularly important for the Commission.

I have presented the first annual Report in many national parliaments. And I will continue to do this also for the second Report—most recently, I have been to Vienna, Budapest, Warsaw and Paris.

I also held many exchanges with other stakeholders, including representatives of the judiciary and civil society organisations as part of these visits. They also have a vital role to play. By fostering discussions on the rule of law and explaining its importance to citizens, they can help build a rule of law culture in the Union.

I know that this is a challenge, and it will require the commitment of all public institutions as well as society at large.

Improving our knowledge of what is happening in all Member States is crucial for making the best possible use of our rule of law toolbox.

I assure you that the Commission remains fully committed to making use of all the tools at its disposal, as necessary to promote and uphold the rule of law.

Where critical situations have an impact on the judicial independence or the independence of regulatory authorities in a Member State, the Commission can launch infringement proceedings against a Member State. This is what we have done in the case of Poland for example.

The Commission will not hesitate to take further action to launch infringement proceedings in order to uphold the rule of law and judicial independence.

In recent years, we have also deployed other instruments, including measures under the European Semester, the annual cycle for aligning economic and fiscal policies in the Union.

In this context, the Commission has made several country-specific recommendations on justice reforms in some Member States, which were then adopted by the Council.

Member States should address these recommendations in their national recovery and resilience plans. These plans set out the reforms and investments they wish to implement when spending funds from the EU’s 670 billion euro Recovery and Resilience Facility.

Since January this year, we also have the new Rule of Law Conditionality Regulation. This is an important achievement: for the first time, the Union will be able to protect its budget from breaches of the rule of law.

This Regulation complements other procedures to protect the EU budget under EU law, including OLAF and EPPO’s investigations.

The Commission will use the conditionality regime if and when all conditions for its application are met to protect the EU budget.

We are fully committed to enforcing the Regulation and are actively working on its concrete implementation.

The Commission—as guardian of the Treaties—has a special responsibility and we will act, whenever our common values are put at risk.

But promoting and upholding the rule of law is also a common responsibility and there is work for everyone to do.

This is why the Rule of Law is also an important topic of discussion in the context of the Conference on the Future of Europe. We need to have this open discussion among European citizens to explore ways to strengthen the rule of law in our Union.

All EU institutions, Member States’ institutions and authorities, courts, civil society organisations and academia also have their role to play in this context.

I thank you for your engagement, and I continue to count on your support.

Thank you for your attention.

Introduction: The Rule of Law in Europe

Filipe César Marques

Judge in Portugal, President of MEDEL (2017–2022)

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I would like to start this conference with a special reference, because of its symbolism, given the subject of the debate that will follow. We have here with us Yavuz Aydın, a Turkish judge who was unlawfully dismissed following the purge carried out by the Turkish authorities and who was forced into exile. In his person, I wish to salute all Turkish magistrates, lawyers and jurists, particularly the members of YARSAV, the Turkish judges' association, a member of MEDEL, who were dismissed and have been persecuted, many of whom have been forced into exile in precarious conditions. I especially recall here Murat Arslan, President of YARSAV, to whom the Parliamentary Assembly of the Council of Europe awarded the Vaclav Havel Human Rights Prize in 2017, who has been in detention since 26 October 2016 serving a 10-year prison sentence, to which he was sentenced after a trial that did not meet any of the internationally recognised minimum standards of a due process. Dear Yavuz, with this greeting I reaffirm MEDEL's unwavering commitment to all those, in Turkey and beyond, who continue to fight for the return of the Rule of Law to your country.

On behalf of MEDEL, I would like to express my gratitude to our Portuguese associations, the Association of Portuguese Judges and the Portuguese Union of Public Prosecutors, for accepting the challenge of organising this conference.

To the Catholic University, in the person of its Rector, Professor Isabel Capeloa Gil, and of Professor Paulo Pinto de Albuquerque, I would like to express my gratitude for the enthusiastic way in which from the very first moment they welcomed the idea of this initiative and did everything they could to make it a reality, highlighting the work of the whole team that collaborated in the organisation, led by Filipa Paiva e Pona.

I would also like to thank you personally, Commissioner Didier Reynders, for the willingness you have always shown to participate in this conference, a testimony of your recognition of the importance of the topic we will be discussing here and of your commitment to defend the Rule of Law in Europe.

I dare to say that what we will discuss during these two days at this conference is the topic that will most shape the future of the European Union in the coming decades. In recent years, we have witnessed in several States an attack on the most basic principles that constitute the common foundations on which the Union has been built—the Rule of Law, independence of the judiciary, protection of minority rights, freedom of the press and freedom of expression.

Basic concepts such as the primacy of Union law, which were thought to be solidly accepted, have been called into question, endangering the whole complex edifice that

has been built over the years and that has managed to make the European Union the most successful project of integration of sovereign nations that history has ever seen.

It is on this reality that we will reflect over these two days, trying to answer three questions: how did we get here? Where do we stand? What do we have to do to get out of this situation?

Let us be clear: it is not *only* Poland and Hungary that we will talk about at this conference. We could talk about Spain, where the renewal of the Superior Council has been blocked for over a thousand days due to a lack of political dialogue; about France or Germany, where there is no structure to guarantee the real independence of the Public Prosecutor's Office; about Romania, where the fight against corruption in the judiciary has led to solutions that the CJEU says may be contrary to EU law; about Portugal, where, contrary to all internationally established standards, judges do not represent at least half of the members of their high council and where, on the high councils, non-magistrate members may still be politicians or practising lawyers and may therefore represent parties in legal proceedings and participate in the body that manages careers and punishes magistrates who handle those same proceedings.

But we also have to make it clear: it is *essentially* Poland and Hungary that we will be talking about at this conference. Because while there may be structural problems in all Member States, never before have we seen, as in these two, an organised and deliberate campaign to destroy the independence of the judiciary and subject it to the control of the executive branch. What we have been witnessing in both is the implementation of a populist strategy to destroy democracy from within, gradually and effectively using its own instruments, one of the most important steps of that strategy being the capture of the Judiciary. Nobody would have imagined a little over ten years ago that, today, two of the Member States of the European Union would not be considered functional democracies.

The defence of the common values of democracy and the rule of law is not, however, carried out only at the level of the EU institutions. That is why we will also look at what is happening at the level of the Council of Europe and the challenges it faces.

The European Court of Human Rights, one of the institutions that has most contributed to the sedimentation of a true culture of respect for human rights on the European continent, has been faced with new challenges in recent years. Faced with situations of total breakdown of the rule of law in the member states of the Council of Europe, the ECtHR has found it difficult to adapt and find adequate and timely responses to these situations. As we wrote in a collective article published on the occasion of Europe Day in May this year, it is at times like these that a court like the ECtHR is needed more than ever and perhaps the time has come to reflect on the ECtHR and what needs to be done to preserve its authority: reduce the excessive length of proceedings; seriously reconsider the criteria for assessing the existence of an "effective domestic remedy" or the requirements for issuing interim measures; rethink its funding model, freeing it from the threat of budget cuts resulting from unilateral decisions by member states dissatisfied with the judgments; rethink the selection processes for its judges, taking the choice out of the hands of governments.

Your Excellency, European Commissioner: less than two years have passed since in January 2020 you received in Brussels a MEDEL delegation chaired by me and we told

you of our concerns about the situation of the Judiciary in several Member States. Never before like in these almost two years have the principles underpinning the rule of law been so tested. But also never before has there been such a large and united reaction by European magistrates in defence of this common heritage.

It is symbolic that we are holding this conference in Lisbon, where the Portuguese Judges' Association has its headquarters, an organisation that brought the case before the Court of Justice of the European Union, enabling it to state unequivocally for the first time that respect for the independence of the judiciary is a basic principle of EU law that must be respected by all States.

On 11 January 2020, judges from over 22 European States gathered in Poland and marched side by side through the streets of Warsaw, demanding respect for the separation of powers and the rule of law. Magistrates from countries with different judicial traditions and systems stated with one voice, unequivocally, that they were all, first and foremost, European magistrates. The thousands of citizens throughout Warsaw who followed the demonstration shouted one word: "Constitution".

At heart, they all—magistrates and citizens—spoke one language: the language of the rule of law. That is the only language that can truly unite the whole of Europe.

This conference is but a continuation of that January 2020 march—another step on the road that everyone—judges, prosecutors, lawyers and academics—wants to travel towards full respect for the rule of law and a truly united Europe.

On behalf of MEDEL, and with warm thanks to all the speakers who agreed to share their knowledge with us, I wish you all a good conference and good work.

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Notes on the Independence of the Judiciary

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The conditions under which these notes were prepared reflect the little time that could be devoted to their preparation. Circumstances inherent to my position drastically limited my availability to do better. This explains the erratic tone of my considerations, which I have not had time to organise and systematise properly. Added to this, of course, is the fact that I am not a professional judge, which makes it difficult to have a correct perception of the scale of the problem of the independence of judges, not because I am not aware of its decisive importance, but because I do not have the essential field experience.

The same circumstances explain why I have not been able to include a precise indication of sources in the appropriate places in these notes. I have used mainly documents from the European Commission, the Consultative Council of European Judges, Amnesty International and articles published in the *Journal of International and European Law*, to which I have added news from various European media. I ask your indulgence for any inaccuracies or errors resulting from possible cursory readings and hasty conclusions.

Taking article 203 of the Constitution of the Portuguese Republic (“CPR”) as a starting point to approach judicial power, I will begin by stating that “courts are independent and subject only to the law”. Our Fundamental Law is not limited to this proclamation; the main provision guaranteeing the independence of judges is the provision of article 216(1):

“Judges are irremovable and cannot be transferred, suspended, retired or dismissed except in cases laid down by the law”.

Note that this reference to law refers, under the terms of Article 164(m), to the concept of parliament-made law, that is, to laws enacted by the Portuguese Parliament (“*Assembleia da República*”).

This proclamation of the independence of the courts, accompanied by its main guarantee, is far from being an originality of the CPR. Choosing three countries whose legal systems are close to ours, we find very similar constitutional formulations - two prior to our Constitution and one subsequent. Article 117(1) and (2) of the Spanish Constitution of 1978 also emphasises the independence, subjection to the law and irremovability of judges. The same is true of the Bonn Basic Law, which also guarantees in Article 97 the independence, subjection to the law and irremovability of judges. For its part, Articles 101 and 107 of the Constitution of the Italian Republic of 1947 also emphasise judges’ exclusive subjection to the law and their irremovability.

If this sample is representative of the European situation (and legal and constitutional tradition), as I believe it is, we may safely conclude that the independence of the judiciary, which is a fundamental guarantee of the rule of law, covers, as far as judges are concerned,

three main vectors: their independence, their exclusive subjection to the law and their irremovability.

Let us discern these concepts. Independence should be taken to mean the judge's ability to decide freely - that is, based on his or her convictions, knowledge and experience - on all matters within his or her jurisdiction, not forgetting, of course, that the judge may not abstain from judging, which would constitute a denial of justice. The implementation of this freedom requires, on the one hand, that the judge is not subject to any kind of pressure, "suggestions" or threats - in short, interferences - from anyone, notably from the other powers of the State. On the other hand, it requires judges' immunity from criminal or civil proceedings aimed at holding them liable for decisions taken.

In this regard, the common practice of the Polish Supreme Court's Disciplinary Chamber to lift the immunity of judges in order to allow criminal proceedings to be brought against them is a regrettable method of trying to influence their decisions, and therefore worthy of criticism.

Independence is also jeopardised when state officials promote or allow repeated attacks in the media against judges and their decisions. This has been happening in Hungary, and also happened in Portugal not long ago, when constitutional judges were threatened with "legal sanctions" by members of the government and members of parliament at the time and by the press behind the coalition that supported them, for having decided to invalidate decisions taken by the government during the Troika's intervention in Portugal.¹

The independence of judges is also undermined when a legislative amendment in Slovakia introduces the possibility of holding a judge liable for having issued a "legal opinion expressed in a decision unless a criminal offense has been committed thereby" - whatever this means, which is not clear from the English translation. In any case, the articulation of this norm with the one that defines the new crime of "bending the law" - which determines that this "bending of the law" occurs when the judge supposedly "applies the law arbitrarily" - creates a space of imprecision and doubt that one cannot but criticize. A more obtuse and obscure way of eroding the independence of judges could hardly be discovered.

It is further undermined when intrusive information about judges, particularly about their political past, is made public with the aim of discrediting them for having allegedly collaborated with an authoritarian regime, as is the case in Poland.

The independence of judges is once again impaired when a politically appointed body systematically contradicts a representative body of magistrates, as is the case in Hungary, in the context of the conflict between the National Judicial Office, linked to the government, and the National Judicial Council, an independent body, over the selection

¹ The threat of "legal sanctions", which was quoted in the press at the time, was generally understood, including by myself, to refer to disciplinary sanctions. This is understandable, since, within the framework of the national legal system, no matter how great the imagination and legal ignorance of the authors of the threat, other types of legal sanctions would certainly not be at issue: criminal sanctions (there was no criminal conduct in question), administrative sanctions (there was no administrative offence), political sanctions (motion of censure against the Government), sanctions under international law (retaliation, boycott of imports, freezing of bank deposits, etc.), financial sanctions (compensation responsibility), civil sanctions (compulsory measures).

of court presidents. It should be noted that the President of the National Judicial Office consistently overrules the selection of presidents promoted by the National Judicial Council and appoints interim presidents for the courts, who then remain in office.

The second criteria of independence - subjection to the law - implies that judges must respect and apply the legal norms in force, from different sources, deciding autonomously and in accordance with the principles and rules of interpretation and gap-filling in force in their legal system and with their conscience. We legal professionals know how common it is to diverge in the interpretation of the law. In Portugal, we say that “if you put three lawyers together in a room to discuss the interpretation of a norm, you will obtain four opinions”.

A judge’s autonomy to decide the applicable law is inseparable from his independence - and from his lack of liability. In countries which do not have binding precedents (as is the case in common law countries), however, there are admissible and legitimate instruments which, in the name of legal security and certainty in the application of the law, seek to reduce the divergent interpretations of judges by establishing the “good law”. However, such mechanisms should be contained within the perimeter of the judiciary and, as far as possible, should not offend the autonomy of lower courts (appeals for the standardisation of jurisprudence, in Portugal).

The third criterion - the irremovability of judges - has several facets.

First, it entails that judges may not be transferred from one court to another except in cases expressly laid down by the law. Irremovability is disrespected when the composition of existing judicial panels is changed, as has been or is still being done in Poland, or when judges are unilaterally and compulsorily transferred from one court to another, as in Slovakia.

Second, irremovability implies that judges may not be suspended other than in cases laid down by the law, in particular for disciplinary reasons discovered during a due process procedure, which implies, at the very least, in addition to respect for the adversary procedure and the presumption of innocence, the possibility of appeal.

Third, it implies that judges may not be retired other than for reasons of age or certified health reasons, as established by law, or as a result of disciplinary misconduct for which they are convicted, after completion of a due process procedure.

Lastly, it implies that judges may only be removed from office for disciplinary reasons, also determined according to due process.

It should be noted that this requirement of due process in proceedings likely to affect the work of a judge is not always respected, as seems to be the case in proceedings before the Polish Supreme Court’s Disciplinary Chamber.

In cases where a judge performs his or her duties for a predetermined period of time, the end of the term of office may not be brought forward except in cases laid down by the law. Bringing forward the end of the term of office for reasons of political expediency or convenience seriously jeopardises the judge’s irremovability. This seems to be the situation in Slovakia after the last constitutional amendment.

My understanding of the legal framework of the independence of the judiciary - or the courts, or the judges, depending on one’s preferred wording – leads me to make four other recommendations.

First, judges should not be appointed by, or with any intervention from, the Government, and should advance in their careers on the basis of merit, duly assessed by other judges or by a body on which they are represented.

Second, presidents of higher courts should be chosen by their peers, without any intervention from another sovereign body.

Third, the judiciary should have its own governing bodies.

Lastly, these bodies should not have the majority of their members appointed by the Government or according to political criteria. Regrettably, the latter seems to be occurring in Poland.

By way of an epilogue, I would like to leave a message to judges. To ensure their independence, in my view, judges should maintain a cautious distance from those who influence public opinion and should keep their opinions to themselves. I am not particularly fond of judges appearing on prime-time television answering journalists' questions on court problems. When a judge takes on the role of a commentator in the media or on social media, he is endangering his or her independence. The duty to inform the public should be performed in an institutional manner, by the appropriate governing bodies of the judiciary or by associations representing magistrates, and should not be used to feed gossip or satisfy morbid curiosity².

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² When I wrote these lines, I was not yet aware of the work, which subsequently came into my hands, “Portuguese Judges’ Pledge of Ethics, Principles for Quality and Responsibility”, authored by the Portuguese Judges’ Trade Union Association and published in Lisbon in 2009. It includes, on page 53, a principle which demonstrates that Portuguese judges are aware of this problem. This principle, relating to the duty of confidentiality, states that “judges shall refuse to make statements or comments which imply value judgements with regard to judicial or investigative proceedings, including on matters which it is reasonable to foresee may be the subject of proceedings”.



EU Fiddling While the Rule of Law Burns

Laurent Pech^(✉)

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Imagine a Country Where, Due to the Cumulative Effect of Repeated and Grossly Unconstitutional Legislative Changes Targeting the Judiciary, the Executive and Legislative Powers Can “Interfere Throughout the Entire Structure and Output of the Justice System”;¹

Imagine a country whose government routinely refuses to “publish and implement fully”² multiple rulings of the national constitutional court regarding judicial independence matters;

Imagine a country whose national authorities appoint an acting president of the constitutional court in manifest breach of the constitution;³

Imagine a country whose national authorities appoint several individuals to the constitutional court at 1.30am, a few hours before the same constitutional court was due hear a case regarding this very issue, to create an unconstitutional *fait accompli*;⁴

Imagine a country whose ruling party also forces a legislative change “in the early hours of Friday morning”, even though the change “had not even been on the agenda” of the Parliament the day before, so as to void pending cases challenging the legality of the manifestly irregular judicial appointments made by the ruling coalition via a manifestly unconstitutionally re-established national council of the judiciary; J. Shotter (2019).

Imagine a country whose president openly disregards several freezing orders of the national supreme administrative court in order to force dozens of unlawful appointments to the national supreme court, in particular but not only to two new chambers which are themselves manifestly in violation of the right to an independent tribunal established by law;⁵

¹ European semester report for Poland, 27 February 2019, SWD (2019) 1020 final, p. 42: https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-poland_en.pdf

² European Commission, Reasoned Proposal in accordance with Article 7(1) TEU regarding the rule of law situation in Poland, para. 101.

³ *Ibid.*, para 102 et seq.

⁴ PACE, The functioning of democratic institutions in Poland, Report Doc. 15025, 6 January 2020, para. 28.

⁵ See ECtHR judgment of 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719; Judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, CE:ECHR:2021:1108JUD004986819; Judgment of 3 February 2022, *Advance Pharma SP. Z O.O v Poland*, CE:ECHR:2022:0203JUD000146920.

Imagine a country whose president's re-election was subsequently validated by the same individuals he unlawfully appointed to the supreme court in "blatant defiance of the rule of law"⁶ notwithstanding the obvious "risk of setting up an unlawful court";⁷

Imagine a country whose national authorities forcibly retire the president of a supreme court on the basis of a retroactive lowered retirement age notwithstanding the constitutional provision providing for a fixed term of six years;⁸

Imagine a country whose national authorities issue official instructions to ignore national supreme court's rulings; E. Ivanova (2018).

Imagine a country whose national authorities organise the mass dismissal of presidents and vice-presidents of ordinary courts "without any specific criteria, without justification and without judicial review";⁹

Imagine a country whose national authorities hide behind a patently unlawful decision of the captured office of the supposedly independent data protection authority J. Zajądło (2019) to refuse to comply with a final ruling of the national supreme administrative court to prevent the disclosure of information establishing the unlawful composition of the national council for the judiciary;¹⁰

Imagine a country whose prime minister equates independent judges with Nazi-era collaborators¹¹ while the ruling coalition promotes a "vision" whereby judges are expected to be always "on the side of the state", with the conduct of judges being described as "dangerous" when they "turn against the legislative and executive authorities";¹²

Imagine a country where a secret "troll farm" is set up within a ministry of justice so as to organise smear campaigns via for instance criminal acts such as the provision of confidential and/or personal information to an anonymous Twitter account in respect of most vocal and/or senior judges who defend judicial independence M. Pankowska (2019)

⁶ See Dolińska-Ficek and Ozimek v. Poland, *ibid.*, paras. 338 and 349.

⁷ *Ibid.*, para. 330.

⁸ See W. Sadurski (2018) and Case C-619/18 Commission v. Poland (Independence of the Supreme Court), EU:C:2018:1021.

⁹ European Commission contribution for the hearing of Poland on 11 December 2018, Council document 15197/18, 5 December 2018, p. 15. See also ECtHR judgment of 29 June 2021, Broda and Bojara v Poland, CE:ECHR:2021:1108JUD004986819 (removal by the Minister of Justice of vice-presidents of Kielce Regional Court did not respect their right of access to a court).

¹⁰ See ENCJ letter to the speaker of the Poland's Sejm and the head of the chancellery dated 8 August 2019 asking for the publication of the support lists of the judicial members of Poland's KRS (National Council for the Judiciary) as ordered by the Supreme Administrative Court of Poland: <https://www.encj.eu/node/534>.

¹¹ See Statement of the Board of Polish Judges Association Iustitia concerning the words of Prime Minister Mateusz Morawiecki, 24 April 2019: <https://www.iustitia.pl/en/activity/informations/3012-statement-of-the-board-of-polish-judges-association-iustitia-concerning-the-words-of-prime-minister-mateusz-morawiecki>.

¹² Batory Foundation and European Stability Initiative, "Poland's deepening crisis. When the rule of law dies in Europe", 14 December 2019: https://www.esiweb.org/index.php?lang=en&id=156&document_ID=196.

all the while the government is claiming that they “have never undermined the legitimacy of the Supreme Court, ordinary courts or judges – individually or collectively”;¹³

Imagine a country where authorities adopt a grossly unconstitutional law so as to give themselves the opportunity to discipline judges at will for the content of their rulings;¹⁴

Imagine a country where national authorities routinely harass and threaten judges for complying with ECJ orders and/or judgments; open disciplinary investigations against judges who submit requests for a preliminary ruling to the ECJ and actually suspend them and/or cut their wages for doing so; do the same against judges who apply EU and/or ECHR rule of law related judgments;¹⁵

Imagine a country where prosecutors are instructed to immediately report any judges doing so¹⁶ and where captured prosecutors also launch bogus criminal proceedings against judges disliked by the prosecutor general who is also simultaneously the minister of justice on the back of a legislation described by the Venice Commission as organising “a system with such wide and unchecked powers” that such a system “is unacceptable in a state governed by the rule of law”;¹⁷

Imagine a country where prosecutors who participate to a congress of prosecutors during which abusive interferences with their independence were denounced, are subsequently investigated by those abusively interfering with their independence; M. Jałoszewski (2019).

Imagine a country where independent minded prosecutors are “posted to places that are far from where they live in circumstances that bear the signs of harassment”,¹⁸ what’s more, in the midst of a pandemic and without any advance notice;

Imagine a country where the prosecutor general “wants to prosecute 1,278 judges”¹⁹ at once for signing a letter to the OSCE to highlight the planned holding of manifestly irregular presidential elections;

¹³ Polish government document submitted to the Council dated 28 January 2019, “Summary of actions undertaken by Poland in order to address European Commission’s recommendations concerning the reform of the Polish judiciary”, pp. 5–6. This confidential document was revealed by Oko.press on 5 February 2019: <https://oko.press/rzad-do-rady-europejskiej-komisji-i-panstw-ue-arogancka-samoobrona-ujawniamy-dokument/>

¹⁴ See e.g. Iustitia, (2019). See also Case C-791/19, Commission v Poland (Disciplinary regime for judges), EU:C:2021:596 (holding i.a. that Poland’s new disciplinary regime allows the content of judicial decisions adopted by judges of the ordinary courts to be classified as a disciplinary offence).

¹⁵ See most recently, and without being exhaustive, M. Jałoszewski, (2021) Jałoszewski, (2021) M. Jałoszewski, (2022).

¹⁶ See letter from Poland’s National Prosecutor dated 16 December 2019 reproduced and translated by THEMIS: <http://themis-sedziowie.eu/materials-in-english/a-letter-from-the-prosecutor-national-to-subordinate-prosecutors/>.

¹⁷ Opinion on the Act on the Public Prosecutor’s Office as amended, Opinion 892/2017, para. 97 (2016 Polish Act has created a system with ‘wide and unchecked powers’ which ‘is unacceptable in a state governed by the rule of law as it could open the door to arbitrariness’).

¹⁸ Declaration of retired judges of the Constitutional Tribunal of 24 January 2021, Rule of Law in Poland, 25 January 2021: <https://ruleoflaw.pl/declaration-of-retired-judges-of-the-constitutional-tribunal-of-24-january-2021/>

¹⁹ M. Jałoszewski (2020).

Imagine a country where the same prosecutor general is investigating “several dozen old Supreme Court judges, including the former president of the Supreme Court” M. Jałoszewski (2021) and the current president of the criminal chamber of the Supreme Court so as to bring bogus criminal charges against them;

Imagine a country where a judge has been unable to adjudicate and see his pay cut by 25% for over 700 days following his attempt to implement a CJEU ruling; M. Jałoszewski (2020) and Reichters voor Reichters (2020) Imagine a country where national judgments reinstating unlawfully suspended judges are routinely ignored M. Jałoszewski (2021), And M. Jałoszewski(2022) and a special relief fund²⁰ has to be set up to provide financial assistance to judges suspended by an unlawful body on the basis of unlawful rules for inter alia adjudicating in compliance with ECJ and ECtHR rule of law related rulings;²¹

Imagine a country whose authorities routinely and deliberately provide misleading information and accounts to EU institutions,²² including to the ECJ as regards the actual aims of their so-called judicial “reforms” or the reality of their actions;²³

Imagine a country where national authorities routinely violate rulings of the national courts applying ECJ and/or ECtHR judgments relating to judicial independence matters and consider them “non-existent” R. Lawson (2021);

Imagine a country whose national authorities make repeated use of an unlawfully composed and unlawfully presided²⁴ local puppet A. Wądołowska (2020) constitutional court to give a veneer of legality to the systemic violation of national constitutional, EU and ECHR rule of law requirements; to find EU and ECHR fundamental provisions regarding the right to an independent tribunal established by law “unconstitutional” and do so in the name of the “rule of law” and the primacy of the national constitution, both of which are in fact repeatedly violated in plain sight See generally L. Pech, P. Wachowiec and D. Mazur (2021);

²⁰ <http://www.domsedziegoseniora.pl/fundusz-pomocy/>

²¹ See in particular ECJ judgment of 15 July 2021 in Case C-791/19, *Commission v Poland* (Disciplinary regime for judges), EU:C:2021:596 and ECtHR judgment of 22 July 2021 in *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719.

²² See e.g. Council of the EU, Report on the hearing held by the Council on 22 June 2021, 9 July 2021, 103346/21, pp. 3 and 4 versus the reality of the situation outlined in L. Pech and P. Bard, *The Commission’s Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU values*, Study for the European Parliament, PE 727/551, February 2022, p. 42.

²³ See e.g. L. Pech and S. Platon (2019) (“Not unsurprisingly, the ECJ easily came to the conclusion that the forced early retirement of Supreme Court judges is not compatible with the principle of irremovability, which is a guarantee of independence. While phrasing this delicately, the Court all but explicitly states that the Polish government has deliberately sought to mislead it when it refers to the information contained in the “explanatory memorandum to the draft New Law on the Supreme Court” and on the basis of which one may have “serious doubts as to whether the reform of the retirement age” was not in fact made “with the aim of side-lining a certain group of judges of that court”).

²⁴ See ECtHR judgment of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, CE:ECHR:2021:0507JUD000490718 and European Commission, Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal, Press release IP/21/7070, 22 December 2021.

This country is not a fictional one. This country is a member state of the EU. This country is Poland under the rule of the Orwellian-named “Law and Justice” party.

As observed on 16 October 2019 by the then First President of Poland’s Supreme Court, “The end result is that the rule of law in Poland is not simply at risk: it is being erased”.²⁵

What has been the EU’s reaction in the face of this sustained, deliberate annihilation of judicial independence in a broad context of systemic dismantlement of all checks and balances making Poland’s the most autocratizing country in the world in 2020 according to the leading V-DEM Institute?²⁶

Well, we have seen a grand total of five infringement actions launched by the Commission since the beginning of Poland’s rule of law breakdown six years ago, with the Commission also activating Article 7(1) procedure in December 2017 on the back of which the Council has organised a grand total five formal hearings, that is, a grand total of one hearing per year on average.²⁷

By contrast, Polish judges, have submitted a total of 40 preliminary ruling requests raising the most serious judicial independence issues, at the price of their careers, livelihood and safety.

Writing in 2018, I warned that the situation in Poland “has deteriorated further to the point of threatening the functioning of the whole EU legal order and therefore, the future of the EU’s internal market itself L Pech and P Wachowiec (2019).” This is no longer a mere threat but a clear and present danger.

Poland should now be considered, to borrow an expression from the financial world, as a country in default from a judicial independence point of view.

Following the “constitutionalisation” of lawlessness post 7 October 2021 via their puppet constitutional “court”, Polish authorities should now be considered as having de facto positioned Poland outside the EU’s legal order.²⁸

Looking beyond Poland, the consolidation of the EU’s first authoritarian member state, that is, Orbán’s Hungary,²⁹ has simultaneously created the foundation for the

²⁵ Public address at the conference of the Norwegian Association of Lawyers, “Restricting Judicial Independence and the Rule of Law in Poland”, Oslo, 16 October 2019: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/2019.10.16_Referat%20PPSN%20w%20Oslo%20-%20wersja%20ang.pdf.

²⁶ V-Dem Institute, Autocratization Turns Viral. Democracy Report 2021, March 2021.

²⁷ For further details, see L. Pech and P. Bard, (2022) pp. 40–41 and pp. 50–53.

²⁸ See Editorial comments, “Clear and present danger: Poland, the rule of law & primacy” (2021) 58 Common Market Law Review 1635, p. 1643: “With this ruling [of 7 October 2021], Poland de facto positions itself in the outer margins of, or even outside, the EU’s legal order.”.

²⁹ V-Dem Institute, Autocratization Changing Nature. Democracy Report 2022, March 2022, p. 25: “Yet, six of the EU’s 27 member states are autocratizing. With more than 20% of EU members autocratizing, the union is starting to face its own wave of autocratization (Fig. 16). Among the union members, Hungary and Poland are among the top autocratizers in the world over the last decade. Hungary turned into an electoral autocracy in 2018. Autocratization is now also affecting Slovenia, which is one of the top autocratizers in the world over the last three years (Fig. 15). Croatia, Czech Republic, and Greece are also newly autocratizing countries. In addition, the EU’s neighbors on the eastern flank are becoming increasingly autocratic.”.

progressive autocratic gangrenisation of the EU's decision-making processes, not to forget the EU institutions themselves.

On current trajectory, it is only a matter of time before the ongoing and worsening process of democratic and rule of law backsliding eventually triggers a knock-on process of legal disintegration, a process which is bound to accelerate further due to growing instances where autocratic forces use captured constitutional “courts” to disregard EU but also constitutional and ECHR requirements relating to judicial independence but also to disregard any value, right or body of rules disliked by the local autocrat.

One may only hope the Commission and the Council will stop denying this unforgiving reality and continuing to pretend for instance that the Union is a union of democracies and that dialogue coupled with reports will help address what is a “clear and present danger” L Pech and P Wachowiec (2018) for the survival of the EU legal order.

The President of the CJEU could not have been clearer when he publicly and unprecedentedly stated on 4 November 2021 that:

“[...] it is no exaggeration to say that its foundations as a Union based on the rule of law are under threat and that the very survival of the European project in its current form is at stake. [...] while the EU does not impose any particular model on the judicial systems of the Member States, it does lay down red lines. Respect for those red lines and for the rule of law in general is the foundation for mutual trust. The European project – and the solidarity among Member States that this project entails – depends on that trust K Lenaerts (2021).

One may only hope the Commission and the Council will heed this unprecedented warning before we “reach a tipping point” L Pech and P Wachowiec (2020) and see the EU's interconnected legal ecosystem collapsing due to the accelerating destruction of the independence of the judiciary we are witnessing in Poland.

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“Sentimento do Mundo” – On the Endless Battle for a Justice System

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1 A Warning from the Past

In the summer of 1787, New Yorkers were about to ratify a constitution for the US. In a series of 85 essays written by Alexander Hamilton, John Jay, and James Madison between October 1787 and May 1788 urged New Yorkers to ratify the proposed United States Constitution, which was drafted in Philadelphia in the summer of 1787. The essays (commonly referred to as the Federalist Papers) were published anonymously, under the pen name “Publius,” in various New York state newspapers of the time. On May 28, 1788, Alexander Hamilton published Federalist 78, titled “The Judicial Department.” In this famous essay, he offered a powerful defense of judicial review. Hamilton argued that only a federal judge could guarantee constitutional rights and provide an effective check on state power. At the same time, Hamilton had to convince his political opponents that the unelected judiciary would never dominate the other branches of government. Drawing on the ideas of Montesquieu, he deliberately portrayed the judiciary as “the least dangerous branch of government”. A branch that is inherently weak because it can control neither the country’s financial resources nor the army.

Hamilton’s reassurance to his opponents can easily be turned into a warning. The rule of law is rarely safe in the hands of politicians alone. The independence of the judiciary is a principle which, by its very nature, can only be poorly protected by legal provisions; such provisions can all too easily be changed by the legislature, or misinterpreted or even ignored by an ambitious government which feels secure and confident if it can count on a comfortable majority in parliament.

The practical relevance of Hamilton’s insights should not be underestimated. Too often we take for granted the proper functioning of democracy and our legal system and the fundamental values that underpin them. Yet, the past five years have shown that even in Member States belonging to the European Union, judicial independence is no longer guaranteed. To everyone’s surprise, we have witnessed the rapid erosion of the rule of law in Poland. It is hard to understand how quickly a great and admired country, which played a leading role in overcoming the former division between “Eastern” and “Western” Europe, could fall back in so little time. Who would have expected that, after the proclamation of the Universal Declaration of Human Rights in New York exactly 73 years ago tomorrow, the courts in Europe should remind the Member States once again of the principles of justice which are also the basis and the essence of the Council of Europe and the EU?

Alexander Hamilton's warnings are today more appropriate than ever. If, as we have seen in Poland, a Member State gets to the point where a government abuses an election victory by introducing LGBT-free zones for populist reasons, and judges are not supposed to protect the rights of the people concerned, then the judiciary indeed has become the least dangerous branch of government. These insights from the past expose the nasty face of a legal system that shows little interest in justice. On October 7th 2021 the Polish Constitutional Court further damaged the already fragile relationship with the EU and the other Member States, by denying primacy and precedence of EU law over national law.¹ But we can be equally concerned about the Hungarian case decided less than a month later by the Court of Justice.² In this case the ECJ had to remind the Hungarian Supreme Court that no disciplinary proceedings can be brought against a lower national court on the sole ground that it has referred a question to the Court for a preliminary ruling under that provision. Even more disturbing, perhaps, is that the referring court had originally intended to draw the ECJ's attention to inappropriate external and internal pressure within the Hungarian judiciary.

2 ECJ Case Law

The sad conclusion today is that we are still in the midst of a crisis of the rule of law and not in its aftermath. Yet, there is also good news. For both courts in Europe have acted swiftly and built up an impressive body of case law in order to respond to the crisis in Poland. We should be grateful to the Portuguese Association of Judges for the opening move in Luxembourg. The case of *Associação Sindical dos Juizes Portugueses*³ gave the Court the opportunity to bring the independence of the judiciary in the Member States under the protective mechanism of the TEU. For the reasoning behind its judgment on judicial independence, it relied on its previous case law, which had always leaned heavily on the ECtHR's earlier findings in this regard. By doing so the court provided itself with the legal framework that it would apply six months later in its *Celmer* judgment⁴.

In retrospect, none of this was a coincidence. It is an open secret that in the Portuguese case the ECJ had sent a strong signal to Poland (and others) and was preparing for a future engagement with what might be independent Polish courts. The 'Celmer' case was in turn followed by a flood of judgments from the courts in Europe. Among these are landmark

¹ Constitutional Tribunal: The activities of the EU authorities, which extend beyond the limits of their competence that has been delegated by Poland are in conflict with the Constitution (communiqué) – Themis (themis-sedziowie.eu) I will not turn a blind eye to those Polish officials pointing out at the German Constitutional Court in Karlsruhe, that ruled in 2020 that the ECJ had acted beyond its competence in a case relating to the European Central Bank. It is true that the European Commission took legal action in June against Germany. But unlike the Polish government claims, the German court was not challenging the supremacy of the law or the court. What it did was questioning the way the ECJ had applied EU law. I will not take a stance on this matter, since it requires extensive reflection, but in my view this subject can legitimately be debated within the boundaries of existing European case law.

² Case C-564/19 (2021) ECLI:EU:C:2021:949.

³ Case C-64/16 (2018) ECLI:EU:C:2018:117.

⁴ Case C-216/18 (2018) PPU, ECLI:EU:C:2018:586.

decisions on the lowering of the retirement age of judges and public prosecutors (case C-192/18) and on the newly created Disciplinary Chamber of the Polish Supreme Court (joined Cases C-585/18, C-624/18 and C-625/18)⁵.

In 2021 also the ECtHR stepped into the ring to stop the further backsliding of the rule of law in Poland. In a short period of time, it found numerous violations of the Convention. First in its *Xero Flor* judgment⁶, on the composition of the Polish Constitutional Tribunal, then in its *Broda* ruling⁷, on the premature termination of Polish court (vice) presidents. In the *Reczkowicz* case⁸ the court found, together with the ECJ, that the Polish Disciplinary Chamber did not meet the standard of a “court established by law”, and in its *Dolinska* judgment⁹ it urged Poland (again) to take rapid action to resolve the lack of independence of the National Council of the Judiciary. An impressive long list of newly communicated cases from Poland, is waiting now for decision or judgment in the Strasbourg Court.

3 Effects on the National Level

The strong messages from both the Luxembourg and Strasbourg courts were welcomed in the Member States and satisfied moral indignation. In the following, the difficulties encountered by the national courts in applying the case-law of the Court, particularly in cases of surrender, will be discussed, as the consequences of the Polish crisis of the rule of law have become particularly apparent there.

In *Celmer* the ECJ instructed the national courts to make a multi-layered assessment in surrender cases. The executing authority must determine, specifically and precisely, whether there are substantial grounds for believing that a person will run a real risk if he is surrendered to a Member State. The Court does so on account of systemic or generalised deficiencies of the independence of the issuing Member State’s judiciary, having regard to his or her personal situation, as well as to the nature of the offence in question, and the factual context, and – this is remarkable - in the light of “the information provided by the issuing Member State”.

The court sets the bar very high in *Celmer*. Only to a very limited extent can an executing authority refuse to execute an EAW. In practice, requests for surrender from Poland are rarely refused. There is widespread concern, also among judges, that the *Celmer* test falls short. The Court ‘responded’ to these concerns last year but not to

⁵ Also see the judgment in Joined Cases C-748/19 to C-754/19: EU law precludes the regime in force in Poland which permits the Minister for Justice to second judges to higher criminal courts; secondments which that minister – who is also the Public Prosecutor General – may terminate at any time without stating reasons.

⁶ ECtHR, judgment of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, ECLI:CE:ECHR:2021:0507JUD000490718.

⁷ ECtHR, judgment of 29 June 2021, *Broda and Bojara v. Poland*, ECLI:CE:ECHR:2021:0629JUD002669118.

⁸ ECtHR, judgment of 22 July 2021, *Reczkowicz v. Poland*, ECLI:CE:ECHR:2021:0722JUD004344719.

⁹ ECtHR, judgment of 8 November 2021, *Dolińska-Ficek an Ozimek v. Poland*, ECLI:CE:ECHR:2021:1108JUD004986819.

everyone's satisfaction. It ruled that even in the case of established systemic shortcomings, a concrete assessment of the case is necessary. Such an assessment should not assume that there are substantial grounds for believing that a person would face a real risk of not receiving a fair trial following his surrender. (Joined Cases C-354/20 PPU and C-412/20 PPU).

In light of the strong position the ECJ takes on surrender (to Poland), the decision of the Vestfold District Court in Norway Of 27 October 2021 is worth noting. The court refused surrender in that case on the grounds of general deficiencies in judicial independence in Poland. The Norwegian court adapted the Celmer test in that "the greater the general risk of a breach, the less specific grounds for a violation of the right to a fair trial should be required in the particular case".¹⁰ According to the Norwegian court, the ECJ does not leave the national court sufficient discretion to provide effective legal protection in surrender cases; therefore, the Court's strict line is adjusted to a more realistic approach of a "real risk" of an unfair trial. The Vestfold judge's decision has been appealed in Norway. But it is certainly not the first time that a national court has disagreed with the ECJ on the level of legal protection in human rights matters.

It goes without saying that the Vestfold court goes far beyond the ECJ and that its ruling is, to put it mildly, not even in the spirit of the ECJ. But the Irish Supreme Court and the Court of Amsterdam have also asked the ECJ whether the shortcomings of the Polish judiciary are not such that they in themselves pose a real risk to the right to a fair trial.

It is important to point out here that a difference of opinion between judges is not in itself a cause for concern. On the contrary, I would call it a valuable feature of jurisprudence. Let us not forget that in many Member States the development of law is often initiated by lower judges. A reasoned dissent from a first instance court and the subsequent reconsideration by a higher court have an intrinsic value for the administration of justice. In this way, the law remains a living constitution.

In this connection, there is often talk of the famous 'dialogue' between judges at European and national level, but on closer inspection it is not yet very substantial. The preliminary ruling procedure is not in itself a dialogue if it is limited to a Q&A format. A real dialogue between courts presupposes reciprocity and requires a serious exchange of arguments, with a willingness not only to listen to each other but also to change position if necessary, on the basis of reasonableness and preferably conviction.

However, we have to conclude that this dialogue between judges, which should lead to progressive insight in surrender cases, does not function well. Exemplary is the fact that some national surrender judges do not find sufficient resonance with the ECJ on the workability of its jurisprudence. If true this is a serious matter. When signals come from member states that the ECJ provides insufficient guidance for effective legal protection and when its jurisprudence is called 'unrealistic', the Court cannot let this pass without providing a convincing counter argument.

¹⁰ Vestfold tingrett - Kjennelse: TVES-2021-144871.

4 How About us, National Courts?

Let us not forget that dialogue with the ECJ also serves a legitimate self-interest of national courts. Involvement and responsibility in the development of the Court’s jurisprudence also contributes to the credibility of judges at the national level and strengthens public confidence in judicial fairness and justice. After all, it is the national judges who have to apply European law as interpreted by the ECJ in concrete cases. This is sometimes not an easy task. For many in the Member States, it is difficult to grasp how a systemic weakness in another country’s legal system can be ‘remedied’ in an individual case, under the Celmer test, by reassuring statements from authorities in that country who are themselves part of the problem. Justice should not demand the utmost of people’s imagination.

Admittedly, the input of national judges into this dialogue is still very limited. That is a shortcoming and we need to change it. With an anticipated further integration of the Member States into the EU, the ECJ will have to rule much more than before on fundamental shortcomings in one of the Member States. In this respect, the ECJ cannot do without the critical input of national courts. If only for the sake of its legitimacy and the cooperation at national level that it needs. Therefore, dissent from the national courts should be valued positively and not considered too easily as rebellion or disobedience. This puts great responsibilities on the shoulders of national judges. They will have to develop a proactive and strategic attitude in order to contribute effectively to the development of European law.

Meanwhile, the ECJ is not to be envied in the role it has to play. It is quite understandable that it does not want to be tempted, as a judicial authority, to make a general political judgment on the rule of law in Poland. After all, a crisis of the rule of law in a Member State is essentially a political issue for the EU, not a legal problem to be solved first and foremost by judges, insofar as there is a role for judges here. The Court would certainly be stronger if the political European institutions not only spoke out strongly against violations in the Member States, but also took full responsibility for acting accordingly and effectively.

The crisis of the rule of law in Poland has led to a flood of preliminary references and cases before the European courts. The ‘juridification’ of the political problem with Poland plays into the hands of the Polish Government and is being misused as a negotiating tactic, leading to further destabilisation of the EU. The mere fact that these cases are ‘sub iudice’ should not become a false argument for European politicians to further postpone necessary decisions in the current crisis.

5 Sentimento Do Mundo

In 1940, the famous Brazilian poet, Carlos Drummond de Andrade, expressed his deepest concern and anxiety about what awaited him in the coming years. My reflection on the endless battle for a justice system could have the same sad effect. My reflection on the endless struggle for a legal system could have the same sad effect. But that is not my intention and it would also be wrong. For the inherent fragility of the legal system should not be confused with weakness. The sensation of vulnerability serves a purpose.

It warns us of nearing danger, it defines what is essential, it encourages us to choose which side we are on, and it unites in times of crisis. The courts must protect the rights of the individual; the European political institutions must lead the community to a secure future. Let us respect their responsibilities, and above all, encourage them to put words into action.

What is heartening and reassuring today is that in the current crisis almost the entire European community is speaking out fearlessly about the protection of human rights. That is why I am tempted to read Carlos de Andrades' poem, in a spirit that may not quite reflect his sad feelings at the time. But why couldn't a poem, like the law, be a living document and help us move forward? After all, "two hands and the sense of the world" (as the poem reads) may not seem much, but it is certainly a good start to building Europe's promising future.

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The Twilight of the Gods: Independence of the Judiciary and the Rule of Law in Europe

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1 Introduction

Gazing upon today's European judicial landscape, one may have the feeling that the final battle of the ancient gods of democracy is about to make itself heard. When that gaze extends itself through History, as the title of this paper suggests, we might even hear the notes of Wagner's *magnum opus* and all that comes with it, including the eternal return of the same, but strangely different. Different actors in different situations but with the same type of utterances.

Maybe the battle is already lost. Who knows? Not even the gods. So let us leave the land of the old gods (if possible) and let us look closer at what is happening across Europe, taking the independence (or lack of) of the judiciary as a symptom for the social unrest that anxiously awaits some kind of deliverance.

Attacks on the independence of the judiciary are self-evident in more than one European country and have been for almost a decade now. In some countries this collective event does not seem to be slowing its pace but maintaining its momentum or even increasing it. As we shall see, the two main European Courts, the European Court of Human Rights (hereinafter "ECtHR") and the Court of Justice of the European Union (hereinafter "CJEU") have been frequently confronted with these attacks and, albeit their natural differences, their discourse has much in common.

It should also be noted that, although the attacks have become more obvious in some countries than in others, we think that this common discourse should be used to strengthen judicial independence all across Europe and not only in this or that country. Maybe the real battle is against overlooking, where justice is concerned, that there is still much to do. If Democracy is to be not only morally superior but an important factor in improving our collective performance, it is required that all public institutions overcome their natural biases and partiality, in a continuous learning process. The institution of an independent justice system, even if it fails in this or that particular case, serves society as a whole. It does so by counteracting the volatile variations of individual sympathies with calmer and more stable points of view. The rules of law and our institutions embody those common values and remind each and everyone of us of the public interest. This interest is often more remote than our personal preferences and, due to that distance, is all the more impotent in the determination of our actions. It is by creating and maintaining

tribunals, with their inherent independence and impartiality, that we make sure there are persons whose immediate interest is to uphold those laws when we go astray. In David Hume's wise words, it is "in the *execution* and *decision* of justice [that] men [and women] acquire a security against each others weakness and passion, as well as against their own".¹

2 A Positivized System of Natural Law

As we all know, after the second world war and the atrocities of the Nazis, a process for the institutionalization of Human Rights took place all around the world, giving birth from within the United Nations to the Universal Declaration of Human Rights (1948). Shortly after, in Europe, the Council of Europe was established (1949). Two years later, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") was opened for signature by the members of the Council of Europe (hereinafter "CoE"). As has been readily recognized, the institutionalization of Human Rights by the ECHR is even deeper than that of the Universal Declaration and, in trying to state basic rights clearly, "the ECHR goes into considerably greater detail than most such instruments".²

Furthermore, the European Union's primary law added strength to the ECHR, for entry into the Union and continuing membership thereof is conditional upon the commitment to due observance of human rights, as laid down in the ECHR and result from the constitutional traditions of the member states.³ This commitment is reinforced by the Charter of Fundamental Rights of the EU (hereinafter "CFREU"), that came into force in 2009 along with the Treaty of Lisbon.⁴

Even for the most entrenched positivistic mindset, these forms of institutionalization of Human Rights have significantly transformed the old natural rights debate. If in 1945 Hans Kelsen could write that "Legal norms may have any kind of content"⁵ and that proposition could uphold its claim of validity at least in the realm of sovereign nation states, with the advent of the institutionalization of Human Rights at an international level and, in particular, at the European regional level or at the EU transnational level, such a claim can only be read in the context of the ECHR and EU primary law, its Treaties and the CFREU.

Where Europe is concerned, it then becomes obvious that no national law is legitimately binding, regardless of the amount of popular support the executive or the legislature have, if it is judged by the European Court of Human Rights (hereinafter "ECtHR")

¹ D. Hume (1739) 589.

² N. MacCormick (2007) 196.

³ Cf. Article 6(3) of the Treaty of the European Union. Sustaining the interpretation exposed in the text, Neil MacCormick, *ibid.* To the same effect, judgement of the CJEU in Case C-791/19, *Commission v. Poland* [2021] ECLI:EU:C:2021:596, para 52.

⁴ Article 52(3) of the Charter states, "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

⁵ H. Kelsen, (1945) p. 113. As is well known H.L.A Hart, as late as 1961, also stood by this bold assertion (H.L.A. Hart (1994) p. 207).

or by the Court of Justice of the European Union (hereinafter “CJEU”) to infringe the rights enshrined in the aforementioned regional and transnational legal instruments. Of course this may cause some natural discomfort, for a previous democratic majority, which adopted or signed up for those legal instruments, may not be in accord with a future and present majority. Albeit this possible state of affairs, derived from the mere passage of time and sociological variations, the (institutional) fact remains that, as MacCormick puts it, “Only states willing to cut themselves loose from the Council of Europe and the European Union, and to forgo the advantages that membership brings, can evade this positivized system of natural law”.⁶ Of course, if these States do cut loose, that would leave their populations, in particular their minorities, even more exposed to the follies of power.

Notwithstanding such considerations, in the referred positivized system of natural law we “naturally” encounter in article 6(1) of the ECHR the fundamental right to a fair and public hearing by an “independent and impartial tribunal established by law”. On the other hand, in the field of EU primary law, article 2 of the Treaty on the European Union (hereinafter “TEU”) clearly states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the *rule of law and respect for human rights*, including the rights of persons belonging to minorities. These values are declared to be common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. As the CJEU has impressively stated, “it must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States”.⁷ Furthermore, according to the first paragraph of Article 49 of the TEU, the respect of these values and a commitment to promote them are necessary conditions to become a member of the EU. Article 19(1) of the TEU, obliges Member States to provide for remedies sufficient to ensure effective legal protection in the fields covered by Union law. To that effect, in accordance with article 47(2) of the CFREU, everyone is entitled to a fair and public hearing by an “independent and impartial tribunal previously established by law”.

3 The Separation of Powers and the Independence of the Judiciary and the Rule of Law, as Fundamental *De Jure* Principles

Even taking into account the above-mentioned positivized system of Human Rights, a purely positivistic perspective may still be insufficient to understand the complexities at issue in the independence of the judiciary. We will try to make this point clear in what follows.

The independence of the judiciary is inevitably intertwined both with the principle of separation of powers and the rule of law, sometimes referred to as the *Rechtsstaat*, *l’Etat de droit* or law-state. As we all know, since Montesquieu, this most basic of principles was

⁶ N. MacCormick (2007) p. 274.

⁷ Case C-156/21, Hungary v Parliament and Council [2022] ECLI:EU:C:2022:97, para 232.

conceived to be essential to the maintenance of a free government and to avoid despotic power. It is hard to conceive an unbiased application of the Law without the separation of powers. It could be stated, in a Kantian vein, that the separation of powers is an *a priori* condition of the possibility of justice. However, where the principle of separation of powers is concerned, as noted by the CJEU, “the European Court of Human Rights has repeatedly stated that, although the principle of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law, neither Article 6 nor any other provision of the ECHR requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State, nor requires those States to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction”.⁸ It follows from the case-law of both these Courts (the CJEU and the ECtHR), in what is here relevant, that Member States have “discretion” as regards the principle of separation of powers. The principle is therefore not binding in itself as would be expected from the point of view of a positivist, who may even question if it forms part of Law at all.

On the other hand, according to the rule of law, laws should be previously enacted instruments of general application. Furthermore, these laws, so as to avoid arbitrariness and promote legal certainty, should be clearly defined and, as the ECtHR puts it, “foreseeable in [their] application”.⁹ Obviously, it is not always easy to establish general rules in a clear and foreseeable manner. That is why it is difficult to conceive a legal system as a mere body of rules telling us, for example, if in situation X, then do P or Q. Many a time it is necessary to make the rule clear or even, when it was not thought of beforehand, to make the rule itself, deriving it from well-established principles.¹⁰ Of course it is in these cases that the borders between the juridical and the political may become controversial and the rivalry for the power of decision most visible. This situation then begs the question on what differentiates Law from Politics.

In addition, the rule of law poses other important problems. First, the rules themselves, although clear and foreseeable, may be invalid. But invalid in relation to what standard, one may ask. On the other hand, if the rules pertain to a certain national system, one may ask who has the power to recognize their invalidity? Thirdly, rules may suffer changes in the middle of an ongoing case, by the hand of a strong legislature, by interpretations of national Constitutional Courts or even, as we shall see, by way of the Constitution-maker. This is where the mentioned system of positivized natural law and the primacy of the ECHR and EU law show themselves to be all the more problematic. Here, as may be recalled, for some authors, *de facto* acceptance of authority is the ultimate binding force or “rule of recognition” of Law.¹¹ As we shall also see, the acceptance

⁸ Joined Cases C-585/18, C-624/18 and C-625/18 A.K. and Others [2019] ECLI:EU:C:2019:982, para 130.

⁹ Guðmundur Andri Ástráðsson v. Iceland App no 26374/18 (ECtHR, 1 December 2020), para 238.

¹⁰ R.M. Dworkin(1977).

¹¹ This rule of recognition, as is well known, cannot be valid or invalid. See H.L.A. Hart (1994), 107–110.

of the mentioned primacy is in fact problematic, at least for some Member States.¹² But, taken from a different perspective, if the ultimate test of what is the Law is not *de facto* acceptance but its *de jure* grounding in well-established principles that, although not positivized, form part of the Law, then its attractiveness and force lies within itself and not elsewhere in its mere acceptance. And therein lies its important difference from the Political.

4 Independence and Impartiality: Institution-Agencies and Institution-Arrangements

If independence means to be solely under one's own jurisdiction, in the case of the judiciary's independence, it cannot be understood without the principles of separation of powers and the rule of law. The independence of the judiciary is therefore necessarily a complex guarantee with a multiplicity of aspects. For example, the well known Recommendation CM/Rec(2010)12 of the Venice Commission,¹³ wishing to promote the independence of judges by Member States of the CoE, divides itself into seven broad categories: (i) external independence; (ii) internal independence; (iii) Councils for the judiciary; (iv) Independence, efficiency and resources [of judges and judicial systems]; (v) status of the judge; (vi) Duties and responsibilities [of judges]; (vii) ethics of judges.¹⁴

On the other hand, in the case-law of the ECtHR, it is common to distinguish between “independence”, including the appearance of independence, and “impartiality”, including objective and subjective tests of evaluation.¹⁵ From our point of view, “independence” has more of an objective character, more to do with institutional architecture (external and internal), that is to say the way the courts (the adjudicating bodies) have been constructed to relate to other “outside” bodies and between themselves. “Impartiality” is more related to personal qualities of the judge (bias). One may say that independence is a precondition of impartiality and that for a judge to be impartial or at least have an (objective) appearance of impartiality it is foremost necessary, but not sufficient, for her to be independent. Albeit these abstract distinctions, in actuality, it is admittedly difficult to isolate “independence” and “impartiality” so they are mostly conceived of as an *ensemble*.¹⁶

¹² Maybe due to this problem, some decisions of the Courts observed below, in particular those of the ECtHR, instead of powerful utterances of *juris dictio* that aim at bringing about transformations in the institutional order, seem to fall short of the finishing line.

¹³ The Venice Commission is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. For more details < https://www.venice.coe.int/WebForms/pages/?p=01_Presentation > accessed 27 January 2024.

¹⁴ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, < https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78 > accessed 27 January 2024.

¹⁵ See *Denisov v. Ukraine* App no 76639/11 (ECtHR, 25 September 2018), paras 60–64.

¹⁶ Cf. S. Guinchard (2021) 876.

In this paper we will first focus our attention on institution-agencies (or bodies),¹⁷ for example High Councils for the Judiciary or special disciplinary chambers, so as to make visible the courts perviousness to external forces. As we shall see, this potential influence occurs through the way these specific bodies, including special sections of the courts themselves, have been composed by the legislature or executive. Here our focus will therefore be on the institutional agencies concerning the judiciary that at least in appearance open it up to the influence of other powers, in particular to the legislature or executive, but also to any other *de facto* powers (for example, political parties, the media, corporate entities or even experts).

We will then move on to institution-arrangements, in particular rules that are directly aimed at the judge as a professional and a person, such as disciplinary offences, criminal proceedings and personal liability, thus relating to the status of the judge and the inherent principles of irresponsibility and irremovability. Obviously, institution-agencies and institution-arrangements are more often than not bundled together, for the agencies act through the legal arrangements that have been enshrined in the laws of the land and thus serve as power tools or institutional weapons, to be wielded between their holders, whatever the specific motivation or strategy may be.

Thirdly, we will focus our attention on what seems to us to be a highly atypical procedure, enacted through the ordinary law and the national Constitution, to silence one single judge in Hungary, due to his defence of the independence of the judiciary.

Last but not least, we further deepen our analysis relating to the appointment of judges to strategic courts, in particular, to Courts of Appeal and Constitutional Courts, that is to say to positions in the adjudicating bodies themselves.

Of course, the essential purpose of the guarantee of independence of the judiciary is to avoid any risk of pressure on the content of judicial decisions and thus to dispel, in actuality and in the minds of individuals and the public, any reasonable doubts as to the imperviousness of the judges concerned and their neutrality with respect to the interests before them. Although the immediate effect of the lack of judicial independence may be the lack of public trust in the judicial system,¹⁸ when combined with other phenomena, like encroachments on the freedom of the press and the downgrading of certain citizens based, for example, on their gender, sexual orientation or religion, the long-term effect becomes the elimination of difference and freedom and the occultation of the true nature of power. On the other hand, by not ensuring an independent judiciary (courts and public prosecution), the state forfeits the means that may serve to fight, inter alia, high-level corruption. Without independence, instead of the judiciary assuming its “natural” place in the play of checks and balances, it becomes the extension of a friend or foe policy. Through the bridling of the multitude, democracy a ghost in the shell, justice a charade.

¹⁷ Obviously we are here indebted to Neil MacCormick’s legal theory.

¹⁸ Evidently this lack of trust may be caused by other factors, like the inefficiency of the courts, for example when handling high level corruption cases. These kinds of factors also have a high potential to cause public dissatisfaction and may be used as triggers for the interference of a given executive. Inefficiency may be due, among others, to the lack of resources afforded to the judiciary, legal loopholes or human mistakes.

5 Institution-Agencies: The Indirect Control of the Judiciary Through the Composition of Related Bodies

It is quite common in Europe to find Councils of the judiciary with important powers, in particular, concerning the appointment, disciplining and dismissal of judges. Due to the sensitive nature of these functions, the composition and mode of appointment of the members of Councils of the judiciary, in view of accessing their independence, have been questioned in cases before the ECtHR and the CJEU.

A clear-cut case in this respect was *Oleksandr Volkov v. Ukraine*,¹⁹ adjudicated by the Fifth Section of the ECtHR. The same standards for evaluating the independence of these bodies were later reiterated by the Grand Chamber of the same Court in the case *Denisov v. Ukraine*.²⁰ In the first of these cases, the applicant, a Supreme Court Judge, had been dismissed from the post of judge by a recommendation of the High Council of Justice later confirmed by Parliament. In the second case, the applicant had been dismissed from the position of president of a court of appeal also following a recommendation of Ukraine's High Council of Justice in disciplinary proceedings.

While evaluating if the Ukraine's High Council could be considered a "independent and impartial tribunal" under article 6(1) of the ECHR, the ECtHR found very serious structural deficiencies in the composition, modes of appointment and administrative and financial workings of that institutional agency.

Where the deficiencies concerned the composition of the High Council, the ECtHR underlined the small minority of judges represented in the High Council in contrast with half of the High Council being composed of members directly originating from the political or prosecution authorities. In particular, of a total of twenty members, in addition to the Minister of Justice and the Prosecutor General being *ex officio* members, six members were chosen by Parliament and by the President of the Republic (three each) and two were chosen by the All-Ukrainian Conference of Prosecutors. Only three members were chosen by judges, in addition to the President of the Supreme Court being an *ex officio* member.²¹ But, as further pointed out in *Oleksandr Volkov*,²² even if half of the members of the High Council were to be judges, that fact alone would not be enough to guarantee the independence and impartiality of that body. On this point the ECtHR stressed the importance of judges being appointed by their peers and not by external powers.²³

The ECtHR further noted that the weighty presence of elements originating from prosecution authorities was a manifest vulnerability of the High Council, in view of the functional role of prosecutors in domestic judicial proceedings, namely where criminal

¹⁹ *Oleksandr Volkov v. Ukraine* App no 21722/11 (ECtHR, 9 January 2013).

²⁰ *Denisov v. Ukraine* (n 14).

²¹ The remaining six members were designated by the Assembly of Advocates of Ukraine, and the Assembly of Representatives of Higher Legal Educational Establishments and Scientific Institutions.

²² *Oleksandr Volkov v. Ukraine* (n 18), para 112.

²³ According to the Venice Commission's Recommendation CM/Rec(2010)12, not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.

investigations are concerned. Indeed, underscoring the presence of authorities responsible for criminal investigations in a body where the disciplining of judges is an important part of the job, might not be such a good idea.

Finally, the ECtHR pointed out that the fact that members of the disciplinary body participated in the final determination of disciplinary cases, after playing an important role in the preliminary inquiry of those same cases, could also cast doubt on the impartiality of those members.

In another case, *Ramos Nunes de Carvalho e Sá v. Portugal*, first brought before a Chamber of the ECtHR (Fourth Section), the independence and impartiality of the Portuguese High Council of Judges (*Conselho Superior da Magistratura*, hereinafter, CSM), was also evaluated in connection with disciplinary procedures.²⁴ Here, the Chamber concluded that the independence and impartiality of the CSM “may be open to doubt”.²⁵ These doubts were related to the fact that the CSM was composed by the President of the Supreme Court and another 7 judges elected by their peers, in contrast with 9 members of which 2 were designated by the President of the Republic and 7 elected by Parliament (in accordance with Article 218 of the Constitution of the Portuguese Republic). In this respect, the Chamber underlined “the majority of non-judicial members appointed directly by the executive and legislative authorities”.²⁶ This reasoning is in line, it must be noted, with Recommendation no 6 of the evaluation report on Portugal by the Group of States against Corruption (GRECO), adopted on 4 December 2015, where it was recommended that “the role of the judicial councils as guarantors of the independence of judges and of the judiciary is strengthened, in particular, by providing in law that not less than half their members are judges elected by their peers”.²⁷

The case of *Ramos Nunes de Carvalho e Sá v. Portugal*, on the request of the Portuguese Government, was subsequently adjudicated by the Grand Chamber of the ECtHR.²⁸ However, on the specific point of the alleged lack of independence and impartiality of the CSM, the Grand Chamber considered that it lacked jurisdiction to adjudicate on it, due to the untimely manner in which this particular complaint had been brought to the Court.²⁹ In spite of this, it is interesting to hear Judge Pinto de Albuquerque on this matter, in his concurring opinion: “It is my firm belief that the CSM’s composition, according to the constitutional framework from 1982 to 1997 and the subsequent presidential practice of appointing one judge, is in line with the role of judicial councils as guarantors of judicial independence. The moral authority and political representativeness of the President of the Republic are in and of themselves a solid guarantee of a

²⁴ *Ramos Nunes de Carvalho e Sá v. Portugal* Apps nos 55391/13, 57728/13 and 74041/13 (ECtHR, 21 June 2016).

²⁵ *Ibid*, para 80.

²⁶ *Ibid*, para 77.

²⁷ GRECO, Evaluation Report Portugal, adopted on the 4 December 2015, para 96 < <https://www.coe.int/en/web/greco/evaluations/portugal> >, accessed 27 January 2024. GRECO reiterated its view in its Second Interim Compliance Report, adopted on the 25 March 2021, paras 45–49 < <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a21605> > accessed 27 January 2024.

²⁸ *Ramos Nunes de Carvalho e Sá v. Portugal* Apps nos 55391/13, 57728/13 and 74041/13 (ECtHR, 6 November 2018).

²⁹ *Ibid*, paras 106–107.

fair balance between the democratic and judicial components in the Portuguese judicial governance body”.³⁰ To fully understand this statement, it helps to recall that the Portuguese President of the Republic is elected by universal and direct suffrage (in contrast with systems where the President is chosen by Parliament) and is therefore conceived of as an autonomous body (from the executive and legislative).³¹

Despite the position of Pinto de Albuquerque regarding the CSM, this judge, together with judges Yudkivska (Ukraine), Vučinić (Montenegro), Turković (Croatia), Dedov (Russia) and Hüseyinov (Azerbaijan), were of the opinion that the decision of the Grand Chamber had fallen short in respect of the lack of independence of the Judicial Division of the Portuguese Supreme Court, regarding its jurisdiction on appeals against disciplinary decisions taken by the CSM. To put it into context, the decisions of this High Council were subject to an appeal to the Judicial Division of the Supreme Court. The President of the Supreme Court could thereby participate in the decisions of the High Council under appeal and, although not participating in the referred Judicial Division, could determine, to a certain extent, the composition of that division. Due to the shortcomings of this institutional architecture, the appearance of impartiality could not be said to have been obtained and the composition of the tribunal (in this case the Supreme Court viewed in its relation to the CSM) did not pass the test of objective impartiality. Indeed, hierarchical or other links could not be ruled out *a priori*, even if no subjective bias was to be found in the specific members of the adjudicating body. The dissenting opinion therefore stressed the importance of complete institutional integrity of the bodies whose powers included the disciplining of judges, starting at the level of objective appearances.³² This separate opinion further underlined that the High Council was simultaneously the body with jurisdiction to decide on disciplinary actions concerning Supreme Court judges, that is to say that the judicial review of disciplinary sanctions was performed by judges who were also under the disciplinary jurisdiction of the body whose decisions were being reviewed. As had been noted in *Oleksandr Volkov* this also jeopardised the “independence and impartiality” of the reviewing court. On this last point, however, the Grand Chamber considered that the standards applied in *Oleksandr Volkov* should not be applicable to the case at hand for no serious issues had been established in terms of structural deficiencies or an appearance of bias within the Portuguese CSM. This last argument comes somewhat as a surprise for, as we may recall, earlier in its reasoning, the Grand Chamber had considered that it had no jurisdiction to rule on the alleged lack of independence of the CSM.³³

At this point it will be interesting to turn our attention to the EU and case-law of the CJEU, starting with the Grand Chamber’s judgement of 19 November 2019, in the preliminary ruling procedure under Article 267, Joined Cases C-585/18, C-624/18 and

³⁰ Ramos Nunes de Carvalho e Sá v. Portugal (n 27), concurring opinion of Judge Pinto de Albuquerque, para 21.

³¹ See J. J. Gomes Canotilho (2003) 620.

³² Ramos Nunes de Carvalho e Sá v. Portugal (n 27), joint partly dissenting opinions of Judges Yudkivska (Ukraine), Vučinić (Montenegro), Pinto de Albuquerque (Portugal), Turković (Croatia), Dedov (Russia) and Hüseyinov (Azerbaijan), paras 4–7.

³³ *Ibid*, para 9.

C-625/18, *A.K. and Others*.³⁴ The questions to be answered here by the CJEU, by referral of the Polish Supreme Court, the *Sąd Najwyższy*, were primarily related to the creation of a new Disciplinary Chamber within that “same” Supreme Court. This new Disciplinary Chamber had been provided with a somewhat extensive jurisdiction, including not only the exclusive jurisdiction to adjudicate on disciplinary proceedings concerning Supreme Court judges, but also for proceedings in the field of labour law and social security and those regarding the already controversial issue of the retirement of those judges.³⁵ Not surprisingly, at the centre of the main proceedings, were cases related to the compulsory retirement of three Supreme Court judges.

The issues relating to the (lack of) independence of this new Disciplinary Chamber were, in turn, connected to the question of the (lack of) independence of the Polish High Council for Justice, the *Krajowa Rada Sądownictwa* (hereinafter “KRS”). This connection with the KRS was necessarily raised for the judges of the new Disciplinary Chamber were all, without exception, to be appointed by the President of the Republic by proposal of the KRS.

It should be noted that the CJEU, due to the very nature of the preliminary ruling procedure (where it is only called upon to resolve problems of interpretation concerning EU Law), did not have the power to declare that the KRS was not independent and that this lack of independence necessarily affected the independence of the new Disciplinary Chamber, for that power belonged to the national courts. Within its legitimate powers, however, the CJEU did not miss the chance to advance legal interpretations that would allow the referring Court to form a correct understanding on this issue.³⁶ Indeed, on the point relating to the concept of an “independent and impartial tribunal”, foreseen in the second paragraph of Article 47 of the CFREU, the CJEU underlined that the interpretation of that concept should safeguard a level of protection that does not fall below the level of protection established in Article 6 of the ECHR, as interpreted by the European Court of Human Rights.³⁷ In its understanding of the independence and impartiality requirements, the CJEU therefore aligned itself with the case-law of the ECtHR, stressing the importance, *inter alia*, of the mode of appointment of the members of a given body, the existence of guarantees against outside pressures, and the appearance of independence.

³⁴ Joined Cases C-585/18, C-624/18 and C-625/18 (n 7).

³⁵ The CJEU on the 24 July 2019, in an infringement procedure under Article 258 TFEU, declared that the Republic of Poland, by lowering the retirement age of the judges of the *Sąd Najwyższy* (Supreme Court, Poland), notably without any transitional provisions and, at the same time, giving discretionary powers to the President of the Republic to allow certain judges to continue in duties after the new retirement age, had failed to ensure effective legal protection in the fields covered by Union law as foreseen in second subparagraph of Article 19(1) TEU (Case C-619/18, *Commission v Poland* [2019] EU:C:2019:531). On the unequal treatment of women and men where the retirement age of Polish judges and Public Prosecutor’s were concerned, see Case C-192/18, *Commission v Poland* [2019] ECLI:EU:C:2019:924.

³⁶ On the CJEU’s assertion of its own powers on the subjects of the rule of law and the independence of the judiciary, under Article 19(1) of the TEU, beginning with the case *Associação Sindical dos Juízes Portugueses* (Case C-64/16, EU:C:2018:117), see A. T. Pérez (2020).

³⁷ Joined Cases C 585/18, C 624/18 and C 625/18 (n 7), para 118.

In this context, and regarding the role of the KRS in the appointment process - a role that, in the absence of judicial review of its decisions, surely necessitated its own independence -, the CJEU could not but underline certain alleged facts that clearly indicated risks of influence from the legislature and the executive. In the first place, as it was newly composed (following amendments to the law in late 2017), the KRS was formed by reducing the ongoing four-year term in office of the former members of that body. In other words, the KRS had been expunged of its former members. Secondly, whereas previously the 15 members of the KRS belonging to the judiciary were elected by their peers, they were now elected by a branch of the legislature. In sum, members directly originating from or elected by the political authorities now amounted to 23 of the 25 members of that body.³⁸

The CJEU also stressed the potential for irregularities, which could have adversely affected the process of appointment of certain members of the newly formed KRS, namely the lack of transparency and possible illegality of the election.³⁹ In this regard, according to the CJEU, particular attention should also be taken to the actual conduct of the newly formed KRS, specially its silence regarding the independence of the judiciary, in spite of very controversial ongoing legislative reforms.⁴⁰ In addition to that silence, according to what was stated by the referring court, the KRS, or members thereof, had instead publicly criticised members of the *Sąd Najwyższy* (Supreme Court), including for having referred questions to the CJEU for a preliminary ruling.

A little more than a year after this ruling (2 March 2020), in Case C-824/18, *A.B. and Others*,⁴¹ another preliminary ruling procedure, the Grand Chamber of the CJEU was confronted with similar issues concerning the KRS. This case related not to disciplinary issues but to appeals lodged before the referring court, the Polish Supreme Administrative Court, by candidates for judicial positions within the Civil and Criminal Chambers of the *Sąd Najwyższy* (Supreme Court). These candidates were now challenging resolutions by which the KRS did not accept their applications and, instead, submitted, to the President of the Republic, other candidates for appointment to those same positions.

As pointed out in this case, the act by which the KRS put forward a candidate for appointment to a position of judge at the Supreme Court was an essential condition for such a candidate to be appointed. The situation was even more problematic due to the fact that neither the decisions of the KRS nor of the President of the Republic were subject to an effective judicial review. In effect, regarding the appeal regime applicable to the resolutions of the KRS (forwarded to the referring Supreme Administrative Court), it was constructed in such a way to be a mere travesty of a right. Indeed, any individual appeal did not prevent another candidate to be appointed for the same vacancy if all the other candidates had not also appealed, including the successfully proposed candidate. In other words, candidates would have to appeal against their own interests for the appeal to have any real effect.

³⁸ Joined Cases C 585/18, C 624/18 and C 625/18 (n 7), para 143.

³⁹ *Ibid*, paras 43 and 143.

⁴⁰ It should be recalled that according to Article 186(1) of the Polish Constitution, the KRS “shall be the guardian of the independence of the courts and of the judges”.

⁴¹ Case C-824/18, *A.B. and Others* [2019] ECLI:EU:C:2021:153.

These issues were all the more important because the recent legal reforms (for the most part advanced during 2018) included a law that reduced the retirement age of the judges of the Polish Supreme Court, from 70 to 65 years, while making the possibility of continuing to hold office beyond that age subject to authorisation by the President of the Republic.⁴² Put in simple and concise terms, by compulsively retiring judges of the Supreme Court and, at same time, giving powers to the KRS (which was now under the influence of the legislature and the executive) to propose new judges for positions in the Supreme Court as well as judges to sit in the Disciplinary Chamber (which, in its turn, had the power to adjudicate on cases related to the compulsory retirement of Supreme Court judges), the Government was turning the highest ordinary court of the land, at least in appearance, if not in substance, notoriously pervious to outside influence. The Supreme Court would therefore lose any hope of being an independent and impartial tribunal within the meaning of EU Law and the ECHR.

Lastly, it should also be mentioned that the jurisdiction of the referring Supreme Administrative Court to adjudicate on cases of appointment of judges to the Supreme Court was subsequently declared unconstitutional by the Polish Constitutional Court, entailing the termination of all pending cases. This decision led to a further amendment of the Law on 26 April 2019, that stated that there was to be no future right of appeal in individual cases regarding the appointment of Supreme Court judges. In other words, the powers of the referring Court to decide on the ongoing cases had been taken away, including the power to pose preliminary questions to the CJEU. These new (institutional) facts obliged the CJEU to go even further in its interpretation of EU Law, leading it to state that the Constitutional Court's judgment did not call into question the need for judicial review of appointments to judicial positions at the Supreme Court and, in particular, of the resolutions of the KRS adopted in the framework of such a process. Moreover, noted the CJEU, in light of the principle of primacy of EU Law, not even constitutional provisions could be allowed to undermine the unity and effectiveness of EU Law and, if need be, the jurisdiction of the referring Court should thus be maintained, in spite of the Constitutional Court's decision and subsequent amendments of the law depriving it of that same jurisdiction.

The principle of primacy of EU Law was reaffirmed by the Grand Chamber of the CJEU in its judgement of the 6 October 2021, in the preliminary ruling case C-487/19, also regarding Poland. In this case, at issue in the main proceedings was a decision to transfer a judge to a lower capacity, that is, from a position of appeal to functions of first instance. That decision had been taken by a president of a court appointed, through the use of discretionary powers, by the Minister of Justice. Furthermore, the judge to be transferred belonged to the former composition of the KRS and was known for public criticisms of the ongoing judicial reforms. The transfer decision was contested by the targeted judge before the KRS, who brazenly ruled that there was no need to adjudicate on the case. The concerned judge then appealed the KRS's (non) ruling to the Supreme Court, just to find that his case was to be decided by the newly created Chamber of Extraordinary Control and Public Affairs. At this point the appellant requested that the judges of that Chamber be recused for they did not offer sufficient guarantees of independence and impartiality. Indeed, those judges had been appointed to the Chamber,

⁴² On this particular aspect see Case C-619/18, *Commission v Poland* (n 34).

following a resolution of the KRS that, in turn, had been subject to an appeal by candidates whose applications had been ignored in the very same way as in the proceedings underlying Case C-824/18, *A.B. and Others*. In spite of the pending appeal against the appointment of the judges to the Chamber, a single judge of that Chamber dismissed the case on inadmissibility grounds, without even having access to the respective case-file (that was at the court adjudicating on the recusal application). Here, the CJEU expressly stated that the primacy principle entailed that an order given by a “court” should be considered null and void if it could not be considered to have emanated from an “independent and impartial tribunal previously established by law”.⁴³ In short, if the legislature were to create so-called “courts” to bypass the rule of law, the orders emanating from such puppet entities should be considered of no legal value by the “real” courts.

Coming back to the case-law of the ECtHR (in judgements given by the First Section), due to what has already been described, it may come with little surprise that both the aforementioned Disciplinary Chamber and Chamber of Extraordinary Review and Public Affairs of the Polish Supreme Court have been found not to be “tribunals established by law”.⁴⁴

As the patient reader most certainly has gathered by now, all these highly technical juridical discussions echo the hammering of godly instruments forged not out of steel, but with equally devastating effects for the integrity of the institutional agencies whose purpose is to uphold the rule of law. But let us further ourselves even more into the mist of the surrounding battlefield.

6 Institution-Arrangements: The Intimidation of the Judiciary Through Disciplinary Offences, Criminal Responsibility and Personal Liability

The considerations relating to the KRS, put forth in cases *A.K. and others* and *A.B and others*, were reiterated by the Grand Chamber of the CJEU, on 15 July 2021, in Case C-791/19, *Commission v. Poland*.⁴⁵ The principle novelty here being that the judgement was no longer related to a preliminary ruling procedure but to an action brought against Poland by the Commission, under Article 258 of the TFEU, regarding that Member State’s failure to fulfil its obligations under the Treaties. This CJEU judgement further analysed other legal provisions of the ongoing reforms, most notably, the possibility of the content of judicial decisions, including decisions to make a preliminary ruling request, to be considered disciplinary offences.

Where disciplinary regimes were concerned, it was not overlooked by the CJEU that these are necessary exceptions to the principle of irresponsibility, which, in justified extraordinary cases, may contribute to the accountability and effectiveness of the judicial system. The problem was the lack of clarity of the provisions concerning what was to

⁴³ Case C-487/19, *W. Ż.* [2021] ECLI:EU:C:2021:798.

⁴⁴ See, respectively, *Reczkowicz v. Poland* and *Dolińska-Ficek and Ozimek v. Poland*, Apps nos 43447/19, 49868/19 and 57511/19 (ECtHR, 22 July 2021 and 8 November 2021).

⁴⁵ Case C-791/19, *Commission v. Poland* (n 3).

be understood as a disciplinary offence, in particular regarding judicial decisions. In effect, instead of opting for the concept “obvious and gross violations of the law”, already consolidated in its meaning by the existing case-law of the Polish Supreme Court, the national legislature had now opted for the expression “obvious violation of the law”, eliminating thereby the term “gross”. This less demanding condition, specially when applied to mere “findings of error” in judicial decisions, therefore raised particular concerns regarding the new disciplinary regime forming a part of a system of political control of the content of judicial decisions.

The clear determination of what should be considered a disciplinary offence was all the more important in the context of the ongoing legal reforms that included, as we have seen, the early retirement of Supreme Court judges, a new composition of the KRS with powers to propose new judges for positions in the Supreme Court and choose the judges who were to sit in the new Chambers, in addition to powers now conferred upon the President of the controversial Disciplinary Chamber to discretionarily designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts.

Various disciplinary proceedings relating to preliminary ruling requests, in the short time after the creation of the new disciplinary bodies, had already been brought against Polish judges. In addition, a Polish judge had been suspended for ordering the *Sejm* (the Lower House of the Polish Parliament) to produce documents relating to the process for appointing the members of the KRS in its new composition. In addition, the defence rights of the judges submitted to disciplinary proceedings, such as the right to be heard and of access to a lawyer, had been significantly restricted by the new laws.

The CJEU thus explicitly declared that these legal reforms were all failures of the Republic of Poland to fulfil its obligations under the Treaties, in particular, to guarantee the independence and impartiality of its justice system.

As we all know by now, the story of the crisis of the rule of law in Poland is still far from seeing an end to it. If the above mentioned legal reforms undermining the imperviousness of Justice and opening it up to the influence of the executive and legislative were not already enough, at the time of writing, still pending is Case C-204/21, *Commission v. Poland*.⁴⁶ What’s at stake in this action, brought on the 1 April 2021, is the exclusive jurisdiction conferred upon the Extraordinary Review and Public Affairs Chamber to examine complaints based on the lack of independence of a judge or tribunal, therefore preventing other national courts to review compliance with the EU standards of independence and impartiality. Simultaneously, such a review when done by another domestic court may be classified as a disciplinary offence. This action also seeks to declare that the Republic of Poland has further failed to fulfil its EU obligations by conferring decision-making powers to the Disciplinary Chamber of the Supreme Court (whose independence and impartiality are allegedly not guaranteed), regarding cases which have a direct impact on the status and tenure of office of judges and assessors (trainee judges), such as allowing judges and assessors to be criminally prosecuted or detained, in addition to cases relating to the retirement, employment and social insurance of Supreme Court judges.

⁴⁶ Case C-204/21, *Commission v. Poland* [2021], report not available at the time of writing.

With all these recent reforms, including specific criminal provisions for judges and prosecutors, one cannot but have the impression - however hard it is to admit in relation to a EU Member State - that the situation in Poland has certain traces that remind us of the Turkish judicial crisis that began in 2016 and where more than 4500 judges and prosecutors have been sacked and at least 2450 jailed.⁴⁷

Apparently to counteract such dangerous tendencies, in case C-204/21, the Vice-President of the CJEU ordered, on the 14 July 2021,⁴⁸ interim measures determining the suspension of new powers conferred to the Extraordinary Review and Public Affairs Chamber and the Disciplinary Chamber.

However, on the very same day the Polish Constitutional Tribunal adjudicated that, insofar as the CJEU acts *ultra vires* (exceeding its scope of powers) and thereby imposes obligations on the Republic of Poland by prescribing interim measures pertaining to the organisational structure of Polish courts, certain provisions of the Treaties are deemed inconsistent with the Polish Constitution and are thereby not covered by the principles of precedence and direct application.⁴⁹ Shortly afterwards, in line with the Constitutional Tribunal's decision, the Republic of Poland, alleging that the order of the 14 July was contrary to the Polish constitutional order, requested the CJEU to cancel it. The CJEU promptly dismissed this request on the 6 October 2021,⁵⁰ recalling once again that not even national laws of constitutional level could undermine the principle of primacy of EU Law. In turn, on the day after (7 October 2021) the Polish Constitutional Tribunal adjudicated on an application lodged by the Polish Prime Minister, asserting that certain provisions of the EU Treaties (mainly article 19(1), second subparagraph, TEU), were inconsistent with Poland's Constitution, for the following reasons: 1) such provisions allow the EU authorities to act outside the scope of competences conferred upon them by the Republic of Poland in the Treaties; 2) under those provisions the Polish Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; 3) they prevent the Republic of Poland to function as a sovereign and democratic state.⁵¹ Indeed, according to the Polish Tribunal's reading of the Treaties, the EU, namely the CJEU, has no competence regarding the organisational structure of Polish Courts.⁵² On the other hand, the Constitution of the Republic of Poland, expressing the sovereignty of the Republic and its national identity, establishes the framework of the legal guarantees for the independence of judges. It follows that

⁴⁷ These judges and prosecutors (and their families), had no right to a trial (not even an unfair one) and whose property was confiscated, were thereby condemned to being social outcasts. On this subject, see J. I. Matos (2021).

⁴⁸ Order of the Vice-President of the Court [2021] ECLI:EU:C:2021:593.

⁴⁹ Judgement of the Polish Constitutional Tribunal, ref n P 7/20 < <https://trybunal.gov.pl/en/hearings/judgments/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonaniu-srodkow-tymczasowych-odnoszacych-sie-do-kszaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa> >, accessed 27 January 2024.

⁵⁰ Order of the Vice-President of the Court [2021] ECLI:EU:C:2021:834.

⁵¹ With two dissenting votes, filed respectively by Judge Piotr Pszczółkowski and Judge Jarosław Wyrembak.

⁵² Judgement of the Polish Constitutional Tribunal, ref no P 3/21 < <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> >, accessed 27 January 2024.

where the decisions of the CJEU are concerned, in particular, allowing domestic courts to bypass the national legal order, including its Constitution, so as to review the legality of the procedure for appointing a judge or to determine the defectiveness of the national process of appointing a judge and, as a result, to refuse to regard such a person as a judge, the legal provisions of the Treaties, as interpreted by the CJEU, are inconsistent with the Polish Constitution. In sum, Poland's constitutional standards regarding the organisation of its courts may not be replaced with the CJEU's interpretative guidelines and, if this is to be the case, such case-law is subject to assessment by the same Tribunal to evaluate its conformity with the Polish Constitution.

As we can see, the legal arguments of the Polish Constitutional Court essentially rest on the assumption that the EU has no competences regarding the independence and impartiality of the judiciary of Member States or, as the Polish Constitutional Tribunal phrases it, the "organisational structure and functioning of Polish courts". It is true that the Treaties do not confer such a competence on the EU in an explicit fashion. Furthermore, it has been acknowledged by legal scholars that the CJEU has made a "bold interpretation" of the second subparagraph of Article 19(1) TEU so as to afford itself such competence.⁵³ In spite of these considerations, we must admit that limiting the mechanism of the preliminary ruling procedure before the CJEU, through disciplinary arrangements, as we have seen above when analysing case C-791/19, is manifestly contrary to the EU legal order and understandably can not be tolerated by the CJEU.

It is in this context that, after the Polish Constitutional Tribunal's openly defying stance, on the 27 October 2021, a third interim measure in case C-204/21 was ordered by the Vice-President of the CJEU, this time applying a penalty payment of € 1.000.000,00 per day, until Poland complies with the obligations arising from the order of 14 July 2021, that is to say, until the suspension of the new powers conferred to the Extraordinary Review and Public Affairs Chamber and the Disciplinary Chamber.⁵⁴

Unfortunately, Poland is not the only EU Member State to recently be involved in these kinds of controversies. In the CJEU preliminary ruling procedure of joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația Forumul Judecătorilor din România*,⁵⁵ Romania was the envisaged state, by the judgement of 18 May 2021. The controversies revolved around legal amendments made during 2018 and 2019 to the various justice laws, which had been adopted within the framework of negotiations for Romania's accession to the European Union with the purpose of improving the independence and effectiveness of the judiciary, in particular in regards to the rule of law and, *inter alia*, the fight against corruption. Those legal reforms were most apparently against that framework (the Treaty of Accession, the Act of Accession and Decision 2006/928). At issue were Government (interim) appointments to management positions in the new "Judicial Inspectorate", through an emergency ordinance so as not to follow the ordinary appointment procedure. This body was responsible for conducting disciplinary investigations relating to judges and prosecutors. Questions were also raised concerning the controversial *SIIJ*, a specialised section of the Public Prosecutor's

⁵³ See A. T. Pérez ' (2020) (n 35).

⁵⁴ Order of the Vice-President of the Court [2021] ECLI:EU:C:2021:878.

⁵⁵ Joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația Forumul Judecătorilor din România* [2021] ECLI:EU:C:2021:393.

Office with exclusive competence for criminal proceedings brought against judges and prosecutors. Finally, the judgement also looked at the power given to the executive (the Ministry of Public Finance) to assess the personal liability of judges for judicial error, and subsequent limitations in those judge's defence rights, in particular the right to be heard. In this case, once again, the CJEU was obliged to reaffirm the EU standards regarding the rule of law and the principle of primacy of EU Law, as it has repeatedly done in relation to Poland, showing deep concern that these new bodies and procedural rules were to be used as instruments to exert pressure on, or political control over, judges and prosecutors, specially the ones that were dealing with ongoing high-level corruption or organised crime cases.⁵⁶ The Court further noted, on the issue of the principle of primacy of EU law, that this principle precluded legislation of a Member State, including legislation with constitutional status as interpreted by the respective constitutional court, according to which a lower court is not permitted to disapply a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the CJEU, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU (point 7 of the operative part of the judgement).

More recently, in the judgement of 22 February 2022, case C-430/21, the CJEU was obliged to go even further regarding the principle of the primacy of EU law.⁵⁷ Indeed, in this case criminal proceedings against judges were being carried out by the controversial *SIIIJ*. It followed from the case-law established in *Asociația Forumul Judecătorilor din România* that the independence of the *SIIIJ* needed to be evaluated by the referring court (the Court of Appeal) against EU Law standards. However, a judgement given by the *Curtea Constituțională* (the Romanian Constitutional Court) on 8 June 2021 had rejected as unfounded a plea of unconstitutionality concerning the *SIIIJ*. The Constitutional Court, in that same judgement, stressed the need to respect national constitutional identity and the supremacy of the Romanian Constitution on Romanian territory. Moreover, it stated that the CJEU had exceeded its jurisdiction when deciding these issues, allowing it to disrespect the preliminary ruling given by the CJEU. It went on to adjudicate that, although an ordinary court had jurisdiction to examine the conformity with EU law of a provision of national legislation, such a court had no jurisdiction to examine the conformity with EU law of a national provision which had already been found to comply with that principle by the Constitutional Court.⁵⁸ In turn, the CJEU responded that EU law precludes national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with the principle of the primacy of EU law. Furthermore the CJEU stated that any disciplinary liability of a national judge, on the ground that he or she had applied EU law, as interpreted by the CJEU, thereby departing from case-law of the constitutional court of that Member State, was also incompatible with the principle of the primacy of EU law.

⁵⁶ Ibid, paras 214 and 218.

⁵⁷ Case C-430/21, RS [2022] ECLI:EU:C:2022:99.

⁵⁸ Ibid, paras 18–19, 68.

7 The *Pouvoir Constituant* and How (not) to Silence a Judge

Surprisingly enough, designing disciplining bodies with backdoors to the executive and legislature and providing for ambiguous provisions on judge's responsibility are not the only ways to maintain the judiciary in check.

Most interesting here is the case *Baka v. Hungary*, adjudicated by the Grand Chamber of the ECtHR.⁵⁹ This case essentially revolved around the premature termination, on the 01-01-2012, of Mr. Baka's mandate as President of the Supreme Court of Hungary (and of the National Council of Justice). Albeit this central fact, we would like to underline the context in which this occurred due to its importance.

In April 2010 the alliance of Fidesz – Hungarian Civic Union and the Christian Democratic People's Party (hereafter Fidesz/KDNP) obtained a two-thirds parliamentary majority. Making use of its majority, in the course of 2011 the Fidesz/KDNP alliance drafted and adopted in Parliament what it called a new Constitution,⁶⁰ to come into effect on 01-01-2012. Among many other things, the "new" Constitution foresaw that the highest judicial body would be the *Kúria* (the historical Hungarian name for the Supreme Court), which would be considered as the legal successor to the existing Supreme Court. In the same year, Fidesz/KDNP drew up a new "Organisation and Administration of the Courts Act", which would also come into force on 01-01-2012. This bill established that the National Judicial Office would replace the National Council of Justice in the administration of the courts.

Between February and October of 2011, Mr. Baka, in his capacity as President of the Supreme Court and of the National Council of Justice, on several occasions and through multiple channels, like the media or the Parliament, expressed deep constitutional concerns over the ongoing legal reforms, in particular regarding the independence of the judiciary. Some of these concerns related to provisions of the Bill on the Fundamental Law of Hungary (the "new" Constitution) that targeted the judiciary. Under Mr. Baka's scrutiny was also a proposal to reduce the mandatory retirement age of judges (from 70 years to the general retirement age of 62). No less important were his concerns regarding the abolishment of the National Council of Justice and its replacement by a National Judicial Council and a National Judicial Office, the later having "unprecedented powers, with no adequate accountability" (powers to appoint judges and court executives, to issue normative orders and to designate a specific court in a given case). In

⁵⁹ *Baka v. Hungary* App no 20261/12 (ECtHR, 23 June 2016). This case was first adjudicated by the Second Section of the ECtHR (27 of May 2014) after which the Hungarian Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention.

⁶⁰ Hungary's prior Constitution dated from 1949 and it was the country's first and only written Constitution. Before its new Constitution, Hungary was the only former Central and East-European country that did not adopt an entirely new Constitution after the fall of Communism (cf. Venice Commission, Opinion on The New Constitution of Hungary, Opinion no 621/2011, CDL-AD(2011)016). The new Constitution states, in its Preamble, "We [the members of the Hungarian Nation] do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid". This proclamation entails a legal paradox of the highest order, as noted in the referred Venice Commission's Opinion (p. 9), for "an illegitimate or even non-existent Parliament cannot enact a new Constitution".

addition, in August of 2011, Mr. Baka challenged a bill on the amendment of certain legislative acts (including the Code of Criminal Procedure) before the Constitutional Court. Subsequently, in December 2011, the Constitutional Court declared the unconstitutionality of the impugned provisions and quashed them (notably, a provision concerning the Attorney General's right to establish the competence of a court in derogation from the default statutory rules).

Against this background, in November 2011, Hungary introduced the "Transitional Provisions of the Fundamental Law", to take effect on 1 January 2012. These provisions, which stated that they were part of the Fundamental Law, foresaw that the mandates of the President of the Supreme Court and of the President and members of the National Council of Justice would be terminated upon the entry into force of the Fundamental Law. As an effect of the entry into force of all these legal reforms, Mr. Baka's mandate as President of the Supreme Court terminated on 1 January 2012, three and a half years before its expected date of expiry. He remained in office as president of a civil-law division of the *Kúria*.

It was in this particular context that Mr. Baka, a former judge of the ECtHR, complained before the ECtHR, alleging that he had been denied access to a tribunal to defend his rights in relation to his premature dismissal as President of the Supreme Court. He contended that his dismissal was the result of legislation at constitutional level, thereby depriving him of any possibility of seeking judicial review, even by the Constitutional Court. In addition, he argued that the termination of his mandate as President of the Hungarian Supreme Court had been caused by the expression of his opinion on the legislative reforms, and therefore constituted a serious and completely unjustified interference with his freedom of expression.

In spite of the Hungarian Government's allegations, in particular that the case was not a human rights case, for it didn't involve either "civil rights or obligations" held by the applicant or a "criminal charge" against him, the Court, after carefully going through the *Vilho Eskelinen* test to determine the existence of a "civil" right protected by Article 6(1) of the ECHR, concluded that both of the applicant's claims were grounded and that violations of Article 6(1) (right of access to a court) and Article 10 (freedom of expression) had occurred. It thereby ordered the respondent State to pay a sum of € 100.000,00 to the applicant.⁶¹

Notwithstanding that final decision, it is interesting to pay notice to the opposing Government's main allegations that the case dealt with problems of public law and that, therefore, the preconditions that were necessary to trigger the right to a fair trial as foreseen in Article 6(1) of the ECHR were not met.

The Government's arguments are clearer if we consider the dissenting opinion of Judge Wojtyczek (Poland). According to this illustrious jurist, the aim of the European Convention on Human Rights, and of other international human rights treaties, is to protect the subjective rights of individuals against public authority. In the case at hand, however, what was in dispute was not the applicant's subjective right to an independent tribunal nor a subjective right to freedom of speech, for he acted not in a private capacity,

⁶¹ With similar issues, regarding the premature termination of the chief prosecutor's mandate in the Romanian National Anticorruption Directorate, see *Kövesi v. Romania* App no 20261/12 (ECHR, 5 May 2020).

but as President of the Supreme Court. As underlined by the opinion, “[d]eprivation of public power may adversely affect the legal position of a State organ, but it does not affect, *per se*, the human rights of the holder of public power”.⁶² Furthermore, the applicant’s legal position had been terminated through the Constitution, and was therefore an expression of a new constitutive power, the *pouvoir constituant*.⁶³ The exclusion of constitutional measures from judicial review thus served the purpose of preserving popular sovereignty. As this judge eloquently puts it, the President of the Supreme Court may have enjoyed protection from the executive and legislative branches of State, but he did not enjoy protection from the Constitution-maker. All these important issues had been insufficiently analysed by the majority. In sum, Judge Wojtyczek’s dissenting opinion obviously partakes of a more individualistic conception of human rights.

Interestingly, on the other side of the barracks, one might say, we find the joint concurring opinion of Judges Pinto de Albuquerque (Portugal) and Dedov (Russian Federation). This separate opinion, although agreeing with the conclusions of the majority, is also of the view that the Court left too many things unsaid, in particular the direct supra-constitutional effect of the ECHR, so as to override national provisions, including ones of Constitutional nature. Not least, the ECtHR, by presuming its “natural” or “legal” *Kompetenz-Kompetenz*, acted as if it were the Constitutional Court of Europe, while not explicitly stating it. In the opinion of these judges, these implicit assumptions should have been made explicit. Furthermore, in spite of the ideological discontinuity between the Hungarian Constitution of 1949 and the “new” Constitution of 2012, they argued for its continuity where the basic principles of the rule of law and the independence of the judiciary, including the irremovability of judges, were concerned. This continuity necessarily entailed the unconstitutionality of the controversial constitutional provisions determining the end of the applicant’s mandate as President of the Supreme Court. As a result, the Court should have left it clear that the controversial provisions terminating the applicant’s mandate were *ab initio* null and void and, in consequence, Hungary could not but reinstate the applicant as President of the Supreme Court.

8 The (Undue) Political Interference in the Appointment of Judges

As we have seen regarding the appointment of judges to positions in the Polish Supreme Court, independence may be indirectly compromised due to the lack of independence of the body with powers to propose the candidates for such positions. In this section we

⁶² Baka v. Hungary (n 58), dissenting opinion of Judge Wojtyczek, para 9.

⁶³ Baka v. Hungary (n 58), dissenting opinion of Judge Wojtyczek, para 13. With the use of this terminology by Judge Wojtyczek, one cannot but recall a certain XVIII century revolutionary tone, as attributed to Sieyes’s inaugurating writings, for example in the opening statement of the 1789 French Constitution, “Les Représentans de la Nation Française, réunis en ASSEMBLÉE NATIONALE, reconnaissent qu’ils ont par leurs mandats la charge spéciale de régénérer la Constitution de l’Etat. En conséquence, ils vont, à ce titre, exercer le POUVOIR CONSTITUANT...” (l’Abbé Sieyes, Préliminaire De La Constitution Française. Reconnaissance Et Exposition Raisonnée Des Droits de L’Homme et du Citoyen, 17 < <https://gallica.bnf.fr/ark:/12148/bpt6k41690g.texteImage> > accessed 27 January 2024.

go a step further to observe how concrete appointments have affected the independence of the judiciary, by directly illegal or unconstitutional procedures.

Indeed, pre-established objective criteria in the selection of judges or, in the wording of Article 6(1) of ECHR and the second paragraph of Article 47 of the CFREU, a court “established by law”, is an essential condition to form an independent and impartial adjudicating body in the first place.

In the specific domain of the appointment of judges, the ECtHR and CJEU have both stated that the appointment of judges by the executive or the legislature is not, *a priori*, impeded by the ECHR or EU Law, provided that, as the ECtHR states, “appointees are free from influence or pressure when carrying out their adjudicatory role”⁶⁴ or, in the words of the CJEU, “if, once appointed, they are free from influence or pressure”.⁶⁵ This ambiguous consequentialist criteria, however, may fall short of guaranteeing the essence of independence.

To stress this point, it will be interesting to first look at the judgement of the Grand Chamber of the ECtHR in case *Guðmundur Andri Ástráðsson v. Iceland*.⁶⁶ In this case, the applicant, who had been convicted of a low-level criminal offence, claimed that the appointment of one of the judges to the new Court of Appeal, that had intervened at the appeal level, had breached the law and, as a consequence, the applicant’s right to a tribunal established by law had not been safeguarded. This led the Court to scrutinise the appointment of the aforementioned judge to the newly created Court of Appeal.

According to the preestablished legal procedure of the appointments to that Court, the decision of the Minister of Justice was to be preceded by a list of the most qualified candidates, authored by an independent administrative body, the Evaluation Committee (hereinafter “EC”). Any divergence of the Minister from that list would have to be duly justified before the respective Parliament and needed its approval. The Minister of Justice was therefore entitled to propose her own candidates to Parliament, based on an independent investigation of all the elements necessary to substantiate her divergence. As concisely stated in the separate opinion of Judges O’Leary (Ireland), Ravarani (Luxembourg), Kucsko-Stadlmayer (Austria) and Ilievski (North Macedonia), “[s]he [the Minister] consequently had to ensure that her own investigation and assessment were based on expert knowledge, on a par with that of the EC, and that the instructions concerning the evaluation procedure as set out under the applicable rules on the work of the EC – rules that had been put in place by the Ministry of Justice to guide that work – were taken into account in her assessment”.⁶⁷ In reality, the Minister deviated from the Evaluation Committee’s list regarding 4 of the 15 proposed judges, which were later confirmed in a Parliament dominated by the Government’s party.

In the ECtHR’s assessment of the case, it took for granted the conclusions of the Icelandic Supreme Court with regard to the existence of a breach of national law concerning the appointment procedure of the 4 judges, including of the judge in the main

⁶⁴ *Maktouf and Damjanović v. Bosnia and Herzegovina* App no 2312/08 and 34179/08 (ECtHR, 18 July 2013), para 49.

⁶⁵ Case C-896/19, *Repubblica v. Il-Prim Ministru* [2021] ECLI:EU:C:2021:311, para 56.

⁶⁶ *Guðmundur Andri Ástráðsson v. Iceland* (n 8).

⁶⁷ *Guðmundur Andri Ástráðsson v. Iceland* (n 8), joint partly concurring, partly dissenting opinion of Judges O’Leary, Ravarani, Kucsko-Stadlmayer and Ilievski, para 46.

proceedings involving the applicant. The breach of law in question consisted, foremost, in the failure of the Minister to carry out an independent evaluation of the facts or to provide adequate reasons for her decision to choose 4 judges that had not been advanced by the Evaluation Committee. Surely, she had invoked reasons, such as the superior judicial experience of her preferred judges and, furthermore, the aim of gender balance. However, these were visibly ungrounded reasons, for it was most apparent, as the Court pointed out, that these variables had not been applied to all the chosen judges with the same weight, permitting her to cherry-pick the appointed 4 in detriment of 4 others. All this with the most uncomfortable background fact that the directly envisaged judge (Judge A.E.) was the wife of a parliamentarian belonging to the same political party as the Minister, who had given up the first place in the party's constituency list in Reykjavik in favour of that Minister, immediately before the beginning of the judge selection process.

After recognizing the described breach of law, the Court quickly moved on to evaluate the consequences of the breach regarding the right to a tribunal established by law. In this context, the ECtHR made use of a new threshold test to determine whether the breach in question was "of such gravity as to entail a violation of the right to a tribunal established by law".⁶⁸ This test basically consists of three steps. In the first place, a positive one that consists in the recognition of a manifest breach of the domestic law. Secondly, a teleological step, consisting in an evaluation of whether that breach translated into a real risk that the other governmental bodies, in particular the executive, could exercise undue discretion in relation to the domestic court. Thirdly, a step concerning the effective review conducted by national courts, if any, and whether effective remedies were so provided.

After verifying the three conditions of the test, the ECtHR concluded that there had been a violation of the right to a tribunal established by law, as foreseen in Article 6(1) of the ECHR, but came short of determining the proper legal consequences of such a violation under Article 46 of the Convention. Indeed, instead of sustaining the reopening of the applicant's case and all similar cases, due to the simple absence of a "tribunal established by law" adjudicating those cases, the Court concluded that the mere finding of the violation should be regarded as just satisfaction by the applicant. As pointed out by Judge Pinto de Albuquerque in his separate opinion, the consequences thereby sustained by the Court or, better said, the lack of any actual consequences, made this ECtHR judgement a mere "paper tiger".⁶⁹ One must admit that this kind of non-result, begs the question on how decisions of a non-tribunal may subsist in the legal order. We should also ask if the result would be the same if, instead of a low-level criminal case, a high-level one was at hand involving, for example, corruption. At any rate, if decisions of a non-tribunal are to subsist in a legal order, who is expected to take that legal order seriously?

On the other hand, it is important to point out that the Icelandic selection procedure, scrutinised by the ECtHR in case *Guðmundur Andri Ástráðsson v. Iceland*, although faulty, did permit an adequate review of its lawfulness. That is due to the fact that the *a priori* rules established by the Government, were indeed clear criteria for the selection

⁶⁸ *Guðmundur Andri Ástráðsson v. Iceland* (n 8), para 243.

⁶⁹ *Guðmundur Andri Ástráðsson v. Iceland* (n 8), joint partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, para 16.

of the judges. It was the deviance from those well known set of rules that permitted the ulterior evaluation of the procedure by the Court. But what happens where no such *a priori* rules exist (or are unclear)?

When we take into account this last observation regarding the lack of known criteria for the selection of certain judges, many appointment procedures throughout Europe may not pass the test of democratic transparency. Indeed, it is almost a paradox that in the lack of known preestablished and well determined criteria, even the appointment of judges to the CJEU do not allow for a comparable level of scrutiny that was applied, for example, in *Guðmundur Andri Ástráðsson v. Iceland*. This issue has even come up before the CJEU itself and may demand new levels of transparency for all Tribunals and not just for some.⁷⁰ Here we may recall that in case C-619/19, in face of Poland's allegations that the procedure for the renewal of the mandate of its judges were similar to those in place regarding the CJEU, this Tribunal, in response to those objections, most interestingly felt the need to invoke the appointment and renewal procedures foreseen in Articles 253 and 255 of the TFUE. However, the problem with the criteria set out in Article 253 is that it merely states what is awaited and not the means to get there. In effect, Article 253 states, in essence, that judges of the CJEU are chosen between persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence. Obviously, what is sought are unequivocally independent judges but the question remains on how does the appointment procedure guarantee such an essential attribute? One may answer, following the same Article, that it is guaranteed by the fact that those appointments depend on the common accord of the governments of the Member States and is preceded by the opinion of an independent panel as foreseen in Article 255. However, the problem with such an answer is that the workings of the independent panel are far from transparent.⁷¹ Unfortunately there are no public hearings during the appointment processes.⁷² In addition, the opinion of the independent panel is not binding and, in contrast to the procedure for the appointment of judges to the new Icelandic Court of Appeal, the appointment procedure of CJEU judges does not demand a reasoned decision when the selection deviates from the opinion.⁷³

⁷⁰ Case C-619/18, paras 119–121 (n 34). See also Case C-192/19, paras 132–133 (n 34). Regarding the ECtHR, according to paragraph 21 of the joint concurring opinion of Judges Pinto de Albuquerque and Dedov, the Hungarian Government's arguments casted "doubt on the very independence of this Court" (para 44).

⁷¹ See M. S.-O.-l'E. Lasser (2020) 60–62.

⁷² See A. H. Zhang (2016).

⁷³ A similar point could be made regarding the procedures for the appointment of European Prosecutors as foreseen in Articles 14(3) and 16 of Regulation (EU) 2017/1939 of 12 of October 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's. Indeed, the referred Articles 14(3) and 16, combined with the provisions of Council Decision 2018/1696 of 13 July of 2018, on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939, although requiring a reasoned opinion of an independent selection panel for the approval of three candidates and their ranking and order of preference, considers this opinion to be non binding on the Council. The Council is, in the last instance, who decides on the appointment of a given European Prosecutor. These legal instruments, however, do not make it mandatory for the Council to motivate its divergence

As we leave these delicate but urgent issues, we turn our attention to the judgement of the First Section of the ECtHR in case *Xero Flor w Polsce sp. z o.o. v. Poland*.⁷⁴ First of all, this case is of particular interest because it concerns the composition not of an ordinary court but of a Constitutional Court. Focusing on the right to a tribunal established by law, and to make another long and complicated story as short as possible, we recall that this case revolved around the election of 5 judges to the Polish Constitutional Court, for upcoming positions, by the last session of the seventh-term *Sejm* (as you may recall, the lower house of Parliament), on 8 October 2015. In light of a new majority in the *Sejm* that took office on 12 November 2015 (the eighth-term *Sejm*), primarily formed by the Law and Justice Party, another 5 judges were appointed for the exact same positions. In spite of the Polish Constitutional Court's findings –that the legal provisions sustaining 3 of the appointments of the outgoing *Sejm* were consistent with the Constitution (because the opening of the positions had occurred under the term of this *Sejm*, specifically on 6 November 2015) but that the other 2 were not (openings that occurred on 2 and 8 December)⁷⁵, through a concatenation of behaviours from the President of the Republic, the executive and the legislature, the 3 validly appointed judges by the outgoing *Sejm* were never allowed to take office. Indeed, the “new” *Sejm* declared the former appointments invalid and the President of the Republic, also from the Law and Justice Party, refused to take the oath of service from the judges appointed by the outgoing *Sejm*. Instead, the President took the oaths from the subsequently appointed 5 judges. In addition, several legal amendments were made underlining the importance of that oath, also in spite of findings of the Constitutional Court stating otherwise. Later on, a chamber of 5 judges of the Constitutional Court, including 2 of the controversial “judges” appointed by the “new” *Sejm* (M.M. and H.C.), one of which served as the presiding judge of that chamber, issued an innovative judgement finding that the preceding Constitutional Court's rulings had not determined the legal status of any of the judges of the Constitutional Court,⁷⁶ obviously his and his “friends” included. It further concluded that the legal provisions that sustained the election of judges of the Constitutional Tribunal by the (eighth-term) *Sejm* and who took the oath of office before the President of Poland, were consistent with the Constitution.

Without losing its composure, the ECtHR carried on with business as usual, notably taking for granted that the Constitutional Court was to be considered foremost a tribunal under Article 6(1) of the ECHR. This first proposition was not without controversy, as acutely pointed out in the separate opinion of Judge Wojtyczek.⁷⁷ Subsequently, the ECtHR applied the three-step test developed in *Guðmundur Andri Ástráðsson v. Iceland*,

from the reasoned opinion of the selection panel. On the other hand, the legal procedures for the internal selection of the candidates by each Member State is left to their own discretion.

⁷⁴ *Xero Flor w Polsce sp. z o.o. v. Poland* App no 4907/18 (ECtHR, 7 May 2021).

⁷⁵ Judgment of the Polish Constitutional Court of 3 December 2015, ref no K 34/15, < <https://trybunal.gov.pl/en/hearings/judgments/art/8866-ustawa-o-trybunale-konstytucyjnym> >, accessed 27 January 2024.

⁷⁶ *Xero Flor w Polsce sp. z o.o. v. Poland* (no 73), paras 61–62.

⁷⁷ *Xero Flor w Polsce sp. z o.o. v. Poland* (n 73), joint partly concurring, partly dissenting opinion of Judge Wojtyczek, para 15.8.

and once more it concluded that the applicant, a company whose main proceedings concerned a relatively straightforward case of State civil responsibility, had been deprived of its right to a tribunal established by law. Notwithstanding the seriousness of this violation, once again the Court shied away from any actual consequences to be deduced from its conclusions. Indeed, it even concluded that it was not necessary to examine the admissibility and merits of the applicant's complaint under Article 1 of Protocol 1 to the Convention, concerning a violation of the right to private property, which was, from the very beginning, the disputed right in question and the whole point of the main proceedings.

In turn, in the wake of the ECtHR's judgement in *Xero Flor w Polsce sp. z o.o. v. Poland*, by way of an application lodged by Poland's Prosecutor General, the respective Constitutional Court adjudicated, on the 24 November 2021, that article 6 § 1 of the ECHR (the right to a fair trial) was unconstitutional, when interpreted as granting jurisdiction to the ECtHR to review the legality of the election of Constitutional Court judges.⁷⁸ This decision, given by a panel of 5 judges and concluding that the Polish Constitutional Court cannot be subsumed to the concept of a "tribunal" as foreseen in article 6 § 1, echoes the doubts expressed in the separate opinion of Judge Wojtyczek in *Xero Flor*. Where the term "tribunal" was concerned the Constitutional Court of the Republic of Poland pointed out that, unlike common Courts, it does not implement the administration of justice, construed as settling individual civil, criminal or administrative cases. Even when considering a constitutional complaint, the Constitutional Tribunal adjudicates on the law, and not on the individual rights of the complainant. On the other hand, the Constitution Court argued that, when assessing the legality of the process of electing a judge to that same Court, the ECtHR had devised a procedure for reviewing the composition of the Constitutional Tribunal that is unknown to the Polish Constitution (not even the Constitutional Court itself has such powers) and, in an unauthorised way, interfered in the constitutional powers of the Polish state authorities – the *Sejm* and the President of the Republic.

These two contradictory decisions (*Xero Flor* and K 6/21) remind us of Bertrand Russell's famous paradox on self-referentiality, for the Tribunal would thus seem to be simultaneously a tribunal established by law but not a "tribunal established by law". In other words, it would belong to the set of tribunals established by law that cannot be established by law (the legitimacy of its composition depending, so it seems, on a political and not juridical evaluation). On the other hand, the contradiction reminds us of the double nature, either political or juridical, of a Constitution (in its material sense) and the historical debate on how best to guarantee it, most notably illustrated by the debate between Schmitt and Kelsen. What is clear is that the Polish Constitutional Court, as it had already proclaimed in relation to the CJEU decisions on the organisation and structure of its Court system as a whole, intends to draw a sovereign red line where itself is concerned now in relation to the ECtHR, appealing to its formal Constitution to do so. Such a position would be quite understandable if its composition was exempt of

⁷⁸ Judgement of the Polish Constitutional Tribunal, ref no K 6/21 < <https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11711-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny> >, accessed 27 January 2024.

grave illegalities. But, as we have seen, that simply is not the case, depriving it of any credibility.

This lack of credibility of the Polish Constitutional Court becomes ever more noticeable through the most recent decision of the ECtHR. In effect, on the 15 March 2022, in case *Grzęda v. Poland*, the Grand Chamber of the ECtHR issued its first ruling in regards to what has come to be known as Poland's rule of law crisis.⁷⁹ This case dealt with the premature termination of the term of office of a judicial member of the KRS, who was a judge of the Polish Supreme Administrative Court. The ECtHR concluded, as it had done in *Baka v. Hungary*, that there had been a violation of article 6 § 1 of the CEDH based on the fact that the judge in question, having a "civil" right to serve a four-term mandate in the KRS (under article 187 § 3 of the Polish Constitution), had not had access to a tribunal established by law to question the premature termination of his public office and that that exclusion had not been founded on objective reasons in the State's interest. To arrive at such a conclusion, the Court evaluated the admissibility of the claim and thereby its jurisdiction, applying and further developing the *Eskelinen* Test. While doing so, the ECtHR reiterated grave doubts regarding the validity and legitimacy of the Constitutional Court when adjudicating through panels of judges that included persons elected to positions already filled (by the seventh-term *Sejm*). Such panels "naturally" contradicted former judgements of the same Court without any "cogent explanation".⁸⁰ Overall, in the context of the recent judicial reforms authored by the Polish Government, the ECtHR, extensively citing the case-law of the CJEU, could not but strongly underline the manifest harm caused to the independence of the judiciary.

One final note on the judgement of the Grand Chamber of the CJEU in joined cases C-748/19 to C-754/19 (preliminary ruling procedure), issued on the 21 November 2021.⁸¹ In this case, also related to Poland, the CJEU clarified that EU law precludes provisions of national legislation pursuant to which the Minister for Justice of a Member State (in Poland and since 2016, simultaneously the Public Prosecutor General) may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

The mere fact that the Minister of Justice can be the same person as the Public Prosecutor General may come as a surprise to many European jurists. In addition, the criteria applied by the Minister for Justice for the purpose of seconding judges to higher criminal courts were not even made public. And if all this was not enough to question such appointments and the manifest lack of independence therein, the Minister of Justice had the power to terminate such secondments at any time, without the criteria associated with that power being known and without the reasons for such a decision having to be expressly stated.⁸² By now it will go without saying that flagrant violations of the principle of irremovability of judges and the potential use of terminations as covert

⁷⁹ *Grzęda v. Poland* App no 43572/18 (ECtHR, 15 March 2022).

⁸⁰ *Ibid*, paras 314–315.

⁸¹ Joined cases C-748/19 to C-754/19, *WB and Others* [2021] ECLI:EU:C:2021:931.

⁸² *Ibid*, para 79.

disciplinary sanctions were at cause, all with evident consequences for the independence and impartiality of the judiciary.

We have by now observed many judicial cases, enough, to paraphrase Hamlet and the most notable of English playwrights, to say that something seems to be rotten in the “kingdom” of Europe.

9 Conclusions

We live at a turning point of History where the independence of the judiciary is being, in some European countries, ostensibly under attack. In particular and presently, as known through the case-law of the ECtHR and the CJEU, in Poland, Hungary and Romania. That does not mean that insufficiencies in the guarantees of independence of the judiciary do not coexist in other countries. Indeed, as we have shown, the composition of the Portuguese High Council for the Judiciary and the architecture of the Judicial Division of its Supreme Court, are still open to controversy. On the other hand, many appointments to judge positions occur in relative opacity in other European countries and even at the EU level, as is the case, for instance, of the CJEU itself.

We would also like to point out that one thing is a clear breach of law or rules of procedure, as happened in the selection of judges scrutinised by the ECtHR in *Guðmundur Andri Ástráðsson v. Iceland*, and another, the enactment of laws that purposively seek to create vulnerabilities in the judiciary, be it through the composition of High Councils, be it through legal mechanisms of disciplinary, criminal or personal liability.

Obviously freedom of speech is part of the essence of Democracy but has been under attack, even when the speakers are part of the judiciary and only express their opinions in relation to the independence of the courts. Hungary, in this aspect, went to the extent of enacting unconstitutional constitutional provisions, to prematurely terminate the mandate of the then President of the Supreme Court, just to silence his criticism of the undermining of the independence of the Hungarian judiciary.

In the specific domain of the appointment of judges to strategic judiciary positions, in particular, to the Polish Supreme Court and Constitutional Court, the cases have shown that the executive and legislature will engage in extreme (il)legal measures for the control of the judiciary, namely by picking certain candidates over others and making it impossible to obtain judicial review of such choices. Where the referred Constitutional Court is concerned, the legislature went to the extent of declaring former valid appointments by Parliament invalid, against the findings of the “same” Constitutional Court. As an effect of such reforms, the present composition of the Polish Constitutional Court has substantially changed to incorporate at least 3 judges (in a total of 15) invalidly appointed by the current legislature.

The ECHR and EU law are vital legal instruments to protect the independence of the judiciary against legal manipulations, including ones enacted at the highest level, due to their inherent primacy over national laws, including national Constitutions. Both the CJEU and ECtHR are ultimately responsible for upholding those legal instruments and have frequently been confronted with hard cases concerning the referred manipulations. Where standards of independence of the judiciary are concerned, the CJEU has aligned itself with the case-law of the ECtHR and vice-versa. In spite of this mutual alignment,

while the CJEU has been unequivocal in stating the primacy of EU law as a fundamental principle directly related to the independence of the judiciary and rule of law, the ECtHR sometimes seems hesitant on drawing consequences from the primacy of the ECHR, falling short of stating its powers and determining that actual consequences take place in the legal orders concerned. The ECtHR seems, at times, more focused on the political acceptance of its decisions than on the binding force of the legal principles that sustain them.

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Protecting Judicial Independence by Strengthening Public Confidence in the Judiciary

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1 Introduction

Protection of judicial independence has become a matter of great concern for the European legal space in recent years, and both European courts have intensively been addressing the topic in their judgments. Indeed, judicial independence lies at the very core of the rule of law, which is a cornerstone of both the Council of Europe and the EU, as Article 3 of the Statute of the CoE and Article 2 of the TEU make clear. At the same time – despite any recent claim to the contrary – the rule of law and judicial independence itself are an essential part of the shared constitutional identity of all the States that have freely adhered to these two international organisations.

In my intervention I would like to share some thoughts drawing from my specific experience as a judge of a constitutional court – of course, subject to the caveat that I am going to say only reflects my personal opinions, and not necessarily those of my court.

More specifically, I will focus on a particular aspect of the protection of judicial independence that has not been touched upon by the other distinguished speakers, namely the connections between *judicial independence* and *public confidence in the judiciary*.

As I will try to show, the Italian situation vividly illustrates how vital this connection is. From a both *de iure* and *de facto* perspective, Italian courts and prosecutors enjoy a very high degree of independence from any other power of the State – possibly one of the highest in a comparative perspective. Yet in recent years the judiciary as a whole has been experiencing the most serious crisis of public confidence since the birth of the Republic in 1946. This climate may well create the conditions for legislative reforms curtailing judicial independence, and ultimately undermining the very rule of law, as has happened in some European countries, which other speakers have referred to in their interventions.

To analyse this connection, I will firstly say some words on the situation of judicial independence in Italy from an objective perspective (Sect. 2). I will then try to briefly explain the causes of the confidence crisis in the judiciary I mentioned (Sect. 3). Finally, I will reflect on some possible strategies to overcome this crisis and avoid thereby the worrying scenarios we have been witnessing in other member States of the EU, drawing some suggestions from the recent experience of the Italian Constitutional Court itself – an institution which, while not being formally part of the judiciary power, is often seen itself, in the public opinion, as a judicial actor (Sect. 4).

2 Judicial Independence in the ICC's Jurisprudence

As anticipated, in Italy not only judges, but also public prosecutors undoubtedly enjoy a very high level of *de iure* and *de facto* independence from political powers.

The principle of independence of the judiciary «from any other power» is enshrined in Article 104 of the Constitution. According to Article 105, appointments, promotions and disciplinary proceedings for judges fall under the exclusive competence of the High Council of the Judiciary, which is composed, on its part, by two thirds of judges elected by their colleagues, and only by one third of members elected by Parliament. The 'internal' independence is guaranteed by Article 101, according to which judges are subject only to the law – such a provision ruling out any hierarchical subjection of judges to any other judges, except for merely organisational matters. According to Article 106, judicial appointments are based on public competitive examinations. Once elected, a judge may not be removed from office unless by decision of the High Council of the Judiciary at the outcome of a disciplinary proceeding, in which the person concerned fully enjoys their defence rights (Article 107), the decision itself being then subject to judicial review before the Joint Sections of the Court of Cassation. Public prosecutors enjoy the same constitutional status as judges (Article 106) and are subject to the authority of the same High Council of the Judiciary. The Minister of Justice only has responsibility for the organisational functioning of the services involved with justice, but has no authority over judges and prosecutors (Article 110).

All these guarantees have been strictly and consistently enforced by law and practice after the enactment of the Constitution in 1948, so that it is correct to say that the principle of independence of the judiciary – including, crucially, public prosecutors, who are recognised as part of that power – has not been seriously questioned in my country so far.

Only sporadically has it been necessary for the Constitutional Court to reaffirm this principle vis-à-vis legislative provisions that are not in line with this principle.

For example, in 2021 the Court struck down a provision allowing honorary judges, recruited through temporary contracts by the High Council of the Judiciary, to act as members of the judiciary panels in civil appeal proceedings¹. While recognising that the measure was functional to tackle the judicial backlog in the Italian courts of appeals, the Court observed that the Constitution only allows that honorary judges deal with cases of minor relevance, precisely to ensure that judicial functions are carried out by judges recruited through public competitive examinations and enjoying full independence from the political powers and, internally, from the very judiciary power, which is ultimately responsible – through the High Council – for the prorogation of the temporary contracts for honorary judges.

More interesting from a comparative perspective is, perhaps, the Constitutional Court case law on independence of public prosecutors. In a previous judgment, for example, the Court had struck down a provision setting forth an obligation on police officers to inform their superiors on the investigations led by public prosecutors in which they cooperate². The provision was deemed to be incompatible with Article 109 of the Constitution,

¹ Judgment No 41 of 2021.

² Judgment No. 229 of 2018.

establishing that public prosecutors avail themselves of police officers placed under their direct authority. The Court held that this obligation violated the constitutional guarantee of independence of public prosecutors from the executive, since it enabled superior police officers – not placed under the direct authority of public prosecutors, and reporting instead to the government – to exercise a control over, or at least to receive information of, the investigations carried out by public prosecutors through police officers who functionally operate under their exclusive direction.

The actual performances of judges and public prosecutors in Italy confirm the high degree of independence they enjoy not only *de iure*, but also *de facto*. At least since the beginning of the Nineties a conspicuous number of prosecutions involving members of parliament and prominent government officials – including a prime minister in office – have taken place in Italy; and many of these prosecutions have actually led to convictions, sometimes with the effect of banning the individuals concerned from holding public office for a certain period of time. Notwithstanding the notorious capacity of the local mafias to infiltrate public offices and even control the core of the public administration in certain parts of the Italian territory, public prosecutors and courts have been able, especially in the last forty years, to indict and convict a remarkably high number of people for mafia-related offences, thereby significantly weakening the power of those organisations. Even more remarkably, Italy has been the first country where an investigation launched by a local public prosecution office has led to the conviction of various US intelligence agents for their involvement in the extraordinary renditions program coordinated by the US administration in the aftermath of 9/11, to which the ECtHR also referred in its well-known *El-Masri* judgment³. And this conviction was particularly significant, since the investigation was carried out without any cooperation by government agencies, which had refused to give any information to the prosecutors on the grounds of State secrecy⁴.

3 Judicial Independence and Public Confidence in the Judiciary

Yet the overall picture in my country is far from ideal, due to a very serious crisis of public confidence in the judiciary that risks undermining the public perception of the importance of the very principle of judicial independence in a democracy⁵.

The recent experiences of attacks against judicial independence in other EU member States, carried out by governments and parliaments freely chosen through democratic

³ ECtHR (GC), *El Masri v. The Former Yugoslav Republic of Macedonia* (2012), App. No. 39630/09.

⁴ Extensively on the investigation, the following criminal proceeding and the intervention of the Constitutional Court, see judgments No 106 of 2009 and 24 of 2014 by the Constitutional Court itself.

⁵ See the recent EU Commission Staff Working Document 2022 Rule of Law Report – Country Chapter on the rule of law situation in Italy, at 3: ‘The level of perceived judicial independence in Italy continues to be low among the general public’ (pointing out that only 37% of the general population perceive the level of independence of courts and judges to be ‘fairly or very good’ in 2022) (https://ec.europa.eu/info/sites/default/files/29_1_194038_coun_chap_italy_en.pdf) accessed 27 January 2024.

elections, is an ominous sign. In those States, public opinion has hardly reacted against such attacks, either because of a lack of understanding of the key role of judicial independence for the rule of law and democracy, or – more probably – because of a general lack of trust in the judicial systems in those same countries. A reaction came late, mostly prompted by international organisations rather than by national actors, apart of course from the judicial institutions themselves.

It is not by chance that for a very long time the ECtHR has been stressing that “justice must not only be done, it must also be seen to be done”⁶: the *appearance* of impartiality of the judiciary is just as important as its *being* impartial and independent from other powers. And it is not by chance either that the CoE’s *Plan of Action on Strengthening Judicial Independence and Impartiality*, adopted by the Committee of Ministers in 2016, in its very introductory words stresses that “it is of primordial importance that judicial independence and impartiality exists in fact and is secured by law, and that public confidence in the judiciary, where it has been lost, is restored and maintained”⁷. The two aims are inextricably linked.

A lack of public confidence in the judiciary is not an Italian prerogative, admittedly. In many countries throughout the world, judges and prosecutors are widely seen by sectors of public opinion as part of those elites towards which a generic feeling of resentment is rising.

However, the Italian situation is particularly worrying for some special reasons.

Firstly, the functioning of the Italian judicial system has always suffered from the excessively lengthy proceedings, in almost every sector of the law⁸. There are of course good reasons to argue that Italian judges and prosecutors are hardly responsible for that: the causes manly lie both in the complexity of the procedures envisaged by the law, and in the excessive number of cases which need to be dealt with, that no legislative reform has been able to reduce so far. But the fact remains that Italian courts, despite the strong personal commitment of their members and their widely recognised professional skills, are incapable of rendering justice within a reasonable time. This is, inevitably, perceived by public opinion as a failure to render justice at all.

Secondly, the very strengths of the Italian judiciary in terms of independence from political powers, in particular the abundance of indictments and convictions concerning politicians, often give rise to accusations towards courts and prosecutorial offices that they are themselves pursuing political agendas – a fact that also contributes to undermine the moral authority of the judiciary, seen as a ‘partial’ actor in the political arena. While similar accusations are common everywhere in the world, and are to some extent inevitable in such cases, the criticism becomes less groundless in the light of the disturbing gap, in the recent Italian experience, between the great quantity of investigations and prosecutions involving politicians and the smaller number of final convictions. Indeed, the very opening of an investigation, and more still a prosecution, already damages the political life of the person concerned, even if he or she is eventually acquitted.

Finally, recent judicial investigations and the following scandals have shown a network of improper connections between some politicians and some members of the High

⁶ ECHR, *De Cubber v. Belgium* (1984), App. No. 9186/80, at 26.

⁷ At 7 (<https://rm.coe.int/1680700285>) accessed 27 January 2024.

⁸ See, again, the mentioned EU 2002 Rule of Law Report (n 5) at 10.

Council of the Judiciary, with the aim of controlling or at least influencing the appointments of judges and prosecutors in senior positions. This has created, in the public opinion, an impression of partisanship of the judiciary, which is further enhanced by the longstanding, and highly criticised, practice that gives a key role, in the decision-making process of the High Council itself, to the various judicial associations representing judges and prosecutors, which are often perceived as improper ‘political’ factions within the judiciary.

All these factors, of course, do not undermine the *factual* independence of judges and prosecutors, which continues to be one of the strongest in a comparative perspective; but, certainly, they weaken the moral authority of the judiciary as a whole in public eyes, and risk undermining the acceptance of their decisions – which could also lead, in a long- or mid-term perspective, to possible refusals to comply with those decisions by the political institutions. After all, at least since the 18th century we know that the judiciary is ‘the least dangerous branch’ of the State, having no sword nor purse to enforce their decisions, which are to be respected simply on the grounds of the legal – and ultimately moral – authority of the institutions that have made them.

Besides, a widely shared mistrust towards the judiciary could all too easily create the conditions for legislative reforms curtailing judicial independence, perhaps with the concealed aim of shielding the actions of political powers from the scrutiny that can only effectively be performed by strong and independent courts and prosecutors.

4 Possible Strategies to Strengthen Public Confidence in the Judiciary

How could, then, public confidence in the judiciary be rebuilt in such a scenario?

Let me start by the general suggestion contained in the CoE’s Plan of Action of 2016: on the one hand, “transparency” should be ensured “in the workings of the judiciary and in its relations with the executive and legislature”; and on the other hand, the judiciary itself should adopt “a proactive approach towards the media and to the dissemination of general information”⁹.

Transparency and communication appear to lie at the core of this recommendation. Preservation of judicial independence cannot sensibly mean lack of *accountability* to the public: courts and prosecutors do not certainly need electoral support, at least in Europe; but they do need to enjoy trust among the public – and trust cannot be taken for granted. Trust must be acquired, and maintained, through an ongoing dialogue with the public, by showing what is the proper function of the judiciary, and how this function is actually carried out.

These observations seem to be obvious, but they are not. At least in Italy, judges – even constitutional judges – tend to think that, unlike politicians of all sorts, they should perform their duties in silence, speaking only through their formal judgments. The problem is, of course, that these judgments – even if they are readily available on the internet, as is the case of the judgments by the Constitutional Court – are often too long, too technical, too complicated to be read and understood by anyone without a legal background.

⁹ At 11.

This is why my Constitutional Court has felt a compelling need, in recent years, to adopt a proactive approach toward the media and the public in general¹⁰, as suggested by the mentioned Plan of Action. Just as other supreme, constitutional and international courts¹¹, we have started to publish press releases on our most important decisions, in a language that can be easily understood by the general public, summarising in plain terms the core of the judgment – its ruling, but also the essential reasons supporting it. Our experience shows that newspapers and in general media reports tend to simply reproduce the press release itself, thereby granting a correct communication to the public on the content of the judgment – which of course does not rule out the possibility that the judgment is criticised, but at least ensures that the critique is not itself based on a misunderstanding of the judgment.

Beyond the communication concerning single judgments, we have also thought it is necessary to improve the knowledge of our court and its vital function in a constitutional democracy. To this end, we have decided to put in place a multifaced strategy which includes, beyond the well-established internet website with all the relevant information about the Court and its judgments, a Twitter and an Instagram account, as well as series of podcasts recorded by judges – sometimes in dialogue with prominent public figures – explaining in simple terms the Court's jurisprudence on sensitive matters¹². In the pre-Covid era we had also engaged in lectures at secondary schools, as well as a tour in several Italian penitentiaries that was eventually documented in a film produced by the Italian TV State broadcast, and later shown in schools and public events¹³.

A similar communication policy should probably be performed by the judiciary as a whole, including public prosecution. The strategy could be, of course, differently shaped, according to the different size and financial means of each judicial office; but its aim should remain that of sharing the essential information about what the judiciary does in its day-to-day activity, to the service of the public.

In the absence of a proactive communication by the courts, the pieces of judicial news that tend to be published by the media are precisely those that are most damaging for the reputation of the judiciary: isolated episodes of judicial corruption, improper links between judges and politicians, systemic failures in the handling of the caseload, etc. Therefore, a counter-narrative is needed to show the many strengths of our judicial systems and their vital role in preserving the rule of law, people's rights, and the basic conditions of our social life.

A specific effort must be employed, in my view, in explaining why it so important that this role be performed by actors that are independent from any other power, and do not directly respond to the electorate for their performance – this last point seeming indeed counter-intuitive, and being perhaps the most difficult to explain to a layperson. I vividly remember when a good friend of mine – a well-educated person, working as a manager in an important firm – candidly confessed to me that he could not understand

¹⁰ For a recent detailed description of the Court's policy in this respect, see D.Stasio (2020).

¹¹ On the communication practices put in place by the European and Inter-American courts of human rights see, extensively, S. Steininger (2022).

¹² See <https://www.cortecostituzionale.it/categoriePodcast.do> accessed 27 January 2024.

¹³ See https://www.cortecostituzionale.it/jsp/consulta/vic2/vic_home.do accessed 27 January 2024.

why on earth judges and prosecutors should not be democratically elected, like any other person holding a power, as happens in the majority of US jurisdictions. What is so obvious for all of us, is not necessarily such for our fellow citizens.

Communication, transparency, and ultimately accountability should, in sum, be our keywords. Flaws, shortcomings, systemic failures should not be denied – they should instead be fairly acknowledged, along with the expression of concrete commitments to fix them in the framework of realistic strategies, and according to reasonable timetables. At the same time, positive results – in tackling the caseload, granting prompt responses to judicial challenges, ensuring protection to neglected rights, or bringing criminals to justice, as far as public prosecutors are concerned – should be properly highlighted, in a sober but self-confident way.

Judgments themselves need to be explained to the public, especially when they concern matters that have attracted attention in the media, such as in cases involving prominent public figures and politicians. The reasons why, for example, a member of the government is convicted, or instead is acquitted after being indicted of a serious crime by the public prosecutions, deserve to be communicated in clear and well-balanced terms, since the community who has elected her has every right to know why she is stripped from the office by the decision of a non-elected court, or is finally declared innocent after being sent to trial by a prosecutor who has also not been elected. A communication service, or an especially trained spokesperson – as suggested, again, by the CoE's Plan of Action – could be in the best position to perform such a delicate task, which requires the capacity, at the same time, to understand the technicalities of a judgment, to extract its core reasoning and to explain it in an easily understandable way – something which might appear difficult for trained jurists, but is in the end so much in line with the idea famously expressed once by Lord Donaldson, that the law is no more than 'common sense under a wig'.

Communication may not be a magic solution for the crisis of trust towards the judiciary, which is so dangerous for the judicial independence and for the rule of law itself. However, an effective communication policy is surely a necessary step to be undertaken, by judges and prosecutors in Europe, without any further delay.

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The Limits of Judicial Irremovability from the Perspective of the Restoration of the Rule of Law: A View from Strasbourg

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Judicial removal without cause is one of the most serious attempts to judicial independence. Understandably, in any decent rule of law system judicial irremovability became a fundamental tenet of the rule of law (hereinafter ROL). The independence and impartiality of the judiciary is fundamental for the existence of the legal community that serves as the basis of the European Union. What to do with judges or even with the judiciary whose activities undermine the trust in the administration of justice in the EU because of the complicity of the judiciary or part of it in the demise of the ROL? What is appropriate, once the illiberal regime that caused the ROL backlash is removed? (These are the two, interrelated types of ROL restoration.) What to do if that judiciary (and the political branches behind it) engage in activities “aimed at the destruction of any of the rights and freedoms” set forth in the European Convention of Human Rights (hereinafter: ECHR)? What to do in case there are systemic shortcomings in a judiciary, for example corruption, political bias (due to selection on grounds of political loyalty or political influence or pressure, including pressure coming within the judiciary), or large scale lack of professional skills and knowledge?¹ How to reform a judiciary that is confronted with the above problems if judges are irremovable? These problems are acute in periods of transition to the ROL where a judiciary inherited from a past authoritarian regime or failed state is not skilled or is inclined to follow embedded authoritarian legal concepts and attitudes. This paper deals with a special transition problem that is common to a number of EU member states: how to restore the ROL in those member states where illiberal democracy has undermined (at least partly) the integrity of the judiciary?

The difficulty of the ROL restoration originates from the fact that many illiberal democracies have tried to legalize the abuse of the ROL by placing the wrongdoing and power grab into a legalistic frame. To quote from Levitsky and Ziblatt, one of the first steps how the democratic system is being captured and subverted from the inside by autocrats, is precisely “packing and “weaponizing” the courts and other neutral agencies”, saying that “the tragic paradox of the electoral route to authoritarianism is that democracy’s assassins use the very institutions of democracy – gradually, subtly,

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¹ This is the problem in a number of non-EU states which try to transit to a democratic, rule based constitutional system.

and even legally – to kill it.”² To turn these institutions into RoL actors requires their restoration given that RoL is seriously compromised in illiberal democracies (from Hungary to Bulgaria) and other non-EU populist regimes (for example, Venezuela). One of the central concerns in RoL restoration is the future of statutory and constitutional institutions that not only served well the RoL erosion but will most likely (or are actually) obstacles of the restoration.

It may be true in terms of political science analysis that illiberal democracies show clear signs of democratic backlash and constitutional institutions promote this agenda instead of protecting a democratic political order, but such findings cannot be directly transferred to legal action and do not provide sufficient legal legitimacy for restorative action. It is true that the CJEU and the European Court of Human Rights (hereinafter: ECtHR) were already very close at the time of this writing (end of 2021) to conclude that the administration of justice in Poland is not independent, but at least in the case of Hungary the judicial authorities and the Constitutional Court were not identified by international courts as non-courts, and the Romanian or Bulgarian administration of justice, although subject to permanent review under a verification mechanism is even less subject to supranational judicial condemnation. As to Hungary, the systemic irregularities seem to be disregarded at the level of the supranational judiciary. The dismissal of the President of the Hungarian Supreme Court and the forcing into retirement of judges in 2011 were found to be in violation of the ECHR but the lack of proper remedial action went judicially unnoticed.³ As to the Hungarian Constitutional Court, after many years of uncertainty and legal hesitation the system of constitutional review was declared an effective remedy by the ECtHR around 2018.

The restoration of the RoL by reforming the administration of justice through personal changes runs into RoL objections. The principle of judicial irremovability and the prohibition holding judges accountable for the judgments they have rendered stand in the way of any removal, including removal in the name of institutional rearrangement, at least where the restoration of the RoL is assumed to be legitimate only if it is carried out in accordance with the RoL. Although constitutional amendment (and the entry into force of a new constitution in particular) allows more freedom in this respect, even these changes may be contrary to fundamentals of constitutionalism (see e.g. the unconstitutional constitutional amendment doctrine).⁴ Without constitutional amendment the necessary restorative steps are simply illegal and extra-legal. A quasi revolutionary removal is hardly compatible with the RoL, although exceptional circumstances may justify limited exceptions.

² S. Levitsky and D. Ziblatt (2018) p. 7.

³ *Baka v. Hungary*, App. no. 20261/12, 23 June 2016.

⁴ Y. Roznai (2019). The Indian Supreme Court declared in 2015 that the 99th Constitutional Amendment Act is void, being contrary to the basic structure of the Indian Constitution, preventing the establishing of a National Judicial Appointments Commission (NJAC). The new system would have changed the judicial appointment procedure which was in the hands of a collegium system run by the Supreme Court and its President. The collegium system was designed by the Court itself without much positive law basis. *Supreme Court Advocates-on-Record - Association & Anr. v/s Union of India* (WRIT PETITION (CIVIL) NO. 13 OF 2015).

“Irremovability is designed to shield...judges from influence of the political majority of the day. It would be unacceptable if each new government could replace sitting judges with newly elected ones of their choice.”⁵ It is for this reason that the reform of the judiciary by *en masse* personal change in transition to democracy (and *prima facie* likewise in the process of restoring the ROL) is often considered impermissible by international expert bodies like the Venice Commission, even where there is evidence that the judiciary is overwhelmingly incompetent or corrupt. On the other hand, where there is a *systemic threat to the rule of law*⁶ where the threat originates in the judiciary (apex courts in particular) the equation may change, justifying extraordinary measures in respect of irremovability.

The ECtHR, like many European supranational authorities, is of the view that the security of tenure of judges is a universally recognised principle in all jurisdictions respecting the ROL. The position of the ECtHR is that judicial independence is derived from the requirement of the individual right to fair trial. Separation of powers is considered a relevant principle, although so far this did not play an independent role in the Court’s findings – although that would certainly make the declaration of the incompatibility of a court with independence simpler. There is also reference to the ROL as principle, mentioned in the Preamble of the Convention.

However, there can be exceptions to irremovability, but these require compelling reasons.⁷ As the Grand Chamber of the CJEU in the case of *Commission v. Poland* (C-619/18) has stated, the principle of the irremovability of judges is not absolute, although an exception to that principle would only be acceptable “if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it.”⁸

In the practice of the ECtHR typically an inappropriate, unlawful judicial conduct that is irreconcilable with the judicial function and integrity counts as compelling reason for removal. But it was never said that a compelling reason can only be individual conduct based. Arguably the restoration of the public confidence in the justice can be a compelling reason where specific individual conduct is present.

The ECtHR concluded that upholding the principles of legal certainty and irremovability of judges at all costs, and at the expense of the requirements of “a tribunal established by law”, may in certain circumstances inflict even further harm on the ROL and on public confidence in the judiciary. It follows that where irremovability is contrary to the requirement of a court established by law compelling reasons will justify the removal. A court that is designed with the intention to operate in a politically biased way will not automatically benefit of the presumption of irremovability.

⁵ Venice Commission, Opinion No. 963/2019, para 58. (Armenia). The remark concerns the judges of the Constitutional Court of Armenia.

⁶ This was the finding in respect of Poland. (See the Opinion of the Venice Commission of 14–15 October 2016 and the European Parliament resolution of 13 April 2016).

⁷ *Baka v. Hungary*, App. no. 20261/12, 23 June 2016.

⁸ *Commission v. Poland*, (C-619/18) 24 June 2019 [Grand Chamber] para 108.

The principle of irremovability does not mean absolute irremovability: the grounds of removal are broad. Disciplinary violations and criminal activity are ordinary grounds of removal, if the dismissal occurs in fair procedure (often with special guarantees of the judicial process given the sensitivity of removal). Transition to democracy and the restoration of the ROL represent special cases. Given the imperative needs of the transformation of the politically compromised judicial system additional grounds of removal may be considered and alternative forms of fair proceedings come into consideration. In the case of transition to democracy from a totalitarian regime personal service to the previous totalitarian regime is often considered a ground for dismissal, even if the judge acted within the four corners of the existing (totalitarian) law. Being a secret service informant, active membership in totalitarian organizations, or participation in clearly inhuman judgments are grounds of individualized dismissal.

The situation differs in the case of semi-failed states where the judiciary failed too. In the case of Ukraine and Albania international experts seemed to endorse some kind of non-individualized approach with individual review without judicial finality. A general vetting of all judges was introduced, where the assumption of irremovability was not fully applicable. The present chapter deals with a third situation, namely potential changes in the judiciary in the process of restoration of the ROL in case illiberal regimes are forced out of power. As of the present writing (end of 2022), there is no example of such ousting in Europe, except perhaps in Bulgaria, but ROL based international legal systems (e. g. European Union law or the IACtHR) are already confronted with the dilemma: how to deal with judges who observe and apply the highly problematic legal provisions operating in a politically compromised administration of justice which maintains a veneer of professionalism.

The dilemma of the restoration of the ROL in illiberal democracies concerns courts (apex courts in particular), judicial formations (e. g. adjudicating chambers with one or more allegedly unlawfully operating members) or individual judges. The criticism is not based here on lack of professionalism or corruption and even less on collective complicity in gross human rights violations. The problem consists in the institutional role that judges or courts have played in the mechanism of illiberal democracy. This involvement and the likelihood that the judiciary will continue to sustain the ROL backlash compromises the restoration of the ROL.

The fate of the compromised judiciary and its judges is primarily a constitutional issue with clear political ramifications. Once again, separation of powers and the ROL would dictate that the judiciary is untouchable. Any reform intended to remove judicial power holders will risk the politicization of the judiciary. While there can be (often well founded) reservations regarding the moral integrity of some of the judges appointed in illiberal regimes, general vetting or dismissal on such grounds is particularly risky. While a judicial reform that affects managerial positions in the judiciary may be less problematic than dismissals, especially if the measures are taken by judges and within the guarantees of institutional autonomy, such restorative reforms remain risky.⁹

⁹ After years of conflicting judgments the ECtHR ruled that a court president is dismissed from his post on the basis of a failure to perform his administrative duties (managerial skills) properly, Article 8 is not applicable, as he remained a judge in the same court. (*Denisov v. Ukraine* [GC], App. no. 76639/11, 25 September 2018, §§ 126–133. This does not settle the judicial

However, if the *system of* appointment of the judges was wrongful, or at least the appointment to the apex courts is politically biased, the whole judicial body (e.g. a decision-making formation) will be compromised. Appointment enters the picture because a finding that a court is not a “tribunal established by law” may have considerable ramifications for the principles of legal certainty and irremovability of judges. Appointment is relevant in the determination whether a tribunal can be considered “independent” within the meaning of Article 6 § 1 ECHR given that the process of appointing judges necessarily constitutes an inherent element of the concept of the “establishment” of a court or tribunal “by law.”¹⁰

If the appointment is wrongful the removal of wrongfully appointed judges who are obstacles to the restoration of the ROL and were instrumental in the formally lawful undoing of the ROL is less problematic. Once the removal is based on a void appointment the objections that animate the principle of irremovability are less forceful. This is reflected in the standards recently developed by the ECtHR and the CJEU.

To sum up the position of the ECtHR: appointment is crucially related to the necessary personal and institutional independence that is required for impartial decision making, and it is thus a prerequisite of impartiality. Independence characterizes both (i) a state of mind, which denotes a judge’s imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit –, which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties.

The early case law of the ECtHR has established that the dependence of judges especially of the executive is impermissible. It has also insisted on various institutional and procedural guarantees in matters of removal for cause. In this respect it is now required that in the body dealing with removal the majority must be judges.¹¹ In the last few years the ECtHR provided a restatement of its approach to appointment.¹²

independence issue. The International Commission of Jurists, submitted in the same case that the principle of independence of the judiciary necessarily implied security of tenure in the office of court president.

¹⁰ *Guðmundur Andri Ástráðsson v. Iceland*, [GC] App. no. 26374/18, para 227.

¹¹ *Nunes de Carvalho et Sa v Portugal* [GC], App. no. 55391/13, 57728/13 and 74041/13.

¹² The logic of *Ástráðsson* was applied to the formations of the Polish Constitutional Tribunal because of the participation of improperly elected judges. (*Xero Flor w Polsce sp. z o.o. v. Poland*, App. no. 4907/18, 7 May 2021). The Polish Constitutional Tribunal, in a new, overwhelmingly PiS (the ruling party) appointed composition overruled the earlier decision that these improperly elected judges cannot sit. In its judgment K 6/21 (24.11.2021), the Polish Tribunal refused to consider the ECtHR judgment claiming that the Tribunal is not part of the judiciary and not being a court the considerations based on Art. 6 of the ECHR do not apply. In the meantime, in *Dolinska-Ficek and Ozimek v. Poland* (49868/19 and 57511/19, August 11 2021) the ECtHR ruled that given that all the members of the Disciplinary Chamber of the Supreme Court were wrongfully elected (see below) that chamber does not provide the guarantees of independence because it was appointed by a Judicial Council that lacked independence vis a vis the political branches.

Recently, in *Ástráðsson* the Court has devised a three-prong test: the criteria, taken cumulatively, provide a basis to guide its assessment regarding appointments.

According to the ECtHR:

*“- In the first place, there must, in principle, be a manifest breach of domestic law in the sense that it must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation, since a procedure that is seemingly in compliance with the rules may nevertheless produce results that are incompatible with the above object and purpose [independence of the judiciary]”.*¹³

The ECtHR is of the view that only “essential violations” can be considered as an attempt to the independence of a court as a tribunal established by law. For example, the disrespect of the qualification criteria or procedural violations do not amount to such violations, although the way the test was applied in *Ástráðsson* indicates that a combination of non-essential violations may still result in a finding that a judgment was not rendered by a tribunal established by law. What matters is the result: does the inappropriateness undermine the object and purpose of the procedure.

From the perspective of the restoration of the RoL the exceptions to irremovability recognized by the Court are of particular relevance. Even a formally correct appointment may qualify as manifest breach if the *result* of the process itself is contrary to the object and purpose (i. e. independence) of the appointment process. Even if the appointed person is qualified the criteria of qualification may be such that are contrary to independence. It was left open what happens where there is no manifest breach of domestic law but the respected law itself is incompatible with the RoL.

Given the importance of irremovability only a pressing (compelling) need for removal is acceptable. As in all cases where the fundamental principles of the Convention come into conflict, a balance must therefore be struck in such instances to determine whether there is a pressing need – of a substantial and compelling character – justifying the departure from the principle of legal certainty. Even if such finding is established that has direct consequences (not specified in detail in the leading case) on the decision rendered by the illicit judicial formation, the legal validity of a judgement rendered depends on the circumstances. According to the ECtHR, even irregularly appointed judges may be part of a court established by law, e. g. when they have served a long enough time. RoL allows for the consideration of the lapse of time, as RoL standards can be derogated for the sake of legal certainty. This is perhaps an inevitable consideration, although it remains paradoxical: RoL requires its own disregard, or more properly, the RoL as a principle is satisfied if it finds the right balance in a conflict between its own components.

¹³ The third prong of the test refers to the quality of the evaluation of the appointment by the domestic authorities; it is for the domestic courts to determine the manifest breach. This reliance on the domestic authorities originates from the subsidiary nature of the ECtHR, as it considers only the appropriateness of the findings of the domestic courts in the matter. In fact, such reliance on the domestic authorities (“the judiciary evaluating itself”) has created some inconveniences and even a kind of Catch 22, as the Polish cases indicate, where the ECtHR Chamber, reasoning with the frames of the *Ástráðsson* judgment, had to challenge the legal validity of the position of the Constitutional Tribunal.

From the perspective of the restoration of the ROL the problem with such a balance in favour of legal certainty (*res iudicata*) is this: is the time lapse a good enough reason to let appointees of the improper selection process, including those who were politically biased, to continue to serve in their illicitly obtained position, continuing their at least potentially politically biased adjudicatory activity, especially in managerial positions?

Time is not an absolute cure of past illegality. In adverse possession situations bad faith may counter the lapse of time. Likewise, the length the performance cannot be decisive: it is the quality of the judicial service that matters – but this is not a consideration or ground in ordinary removal.

The *Ástráðsson* test opens certain possibilities to circumvent the obstacle of the irremovability in the restoration of the ROL. However, the finding of *ab initio* voidness of the judgments of wrongfully established tribunals could have inconvenient consequence. Potentially all the judgments rendered by the non-judges are void – a solution that runs the risk of undermining legal certainty as it is not clear what happens to the judgments rendered. On the other hand, the approach offers the possibility of substantive review of past judgments which contributed to the abusive power grab and corrupt practices of illiberal regimes. In terms of the restoration of the ROL within the frame provided by the Convention there are no directly applicable rules regarding the fate of wrongfully appointed judges and even less on chambers or courts formed in disrespect of the *Ástráðsson* appointment requirements. In other words, the *Ástráðsson* test does not offer a final, automatic solution to wrongful appointments. Given that the ECtHR deals with convention rights and not with constitutional matters, at least not directly, it is not surprising that the *Ástráðsson* judgement did not deal with the appropriateness or necessity of removal of judges who are improperly appointed. However, in the context of the Polish cases the ECtHR had to conclude that certain judicial formations, filled with irregularly appointed “non-judges” do not operate as courts.

On the other hand, appointed judges do have a right to keep their position and, at least in some cases where the dismissal occurred in vicious procedure, the suggested remedy of wrongful removal was reappointment.¹⁴

In principle, the appointment considerations apply to institutions as well: An organ not established according to the legislation would be deprived of the legitimacy required in a democratic society to hear individual complaints. The systemic problem is that in illiberal democracies the courts are established in line with the (abusive) provisions of the law, where laws are appropriately tailored to create an opportunity to appoint the “right” judges. Here law and rule *by law* is to *legalize arbitrariness*. The problematic courts and judges are appointed in conformity with domestic law but in an abusive way.¹⁵ The international courts had to go beyond the appearance created by domestic law, considering the legitimacy of the appointing body and of the process applied in the appointment, using their own standards.

¹⁴ *Oleksandr Volkov v. Ukraine*, App. no. 21722/11, 9 January 2013.

¹⁵ The situation of the Polish Constitutional Tribunal is exceptional, as in this case there is a finding of the Constitutional Tribunal declaring the unconstitutionality of some 2015 appointments. This was overruled by the Tribunal in a different composition with the participation of the unlawfully elected judges when the term of most of the judges who voted in 2015 has already expired.

Note that because of the need to respect judicial irremovability the ECtHR has construed the problem of an “abusive judiciary” that in itself represents a risk to impartiality as a problem of wrongful appointment.¹⁶ In other words, the frame that the precedent respecting ECtHR has applied (and offered for potential domestic use) was developed in a context (namely an individual shortcoming within the context of fair trial rights of third parties) that differs substantially from a systemic political manipulation of the judiciary that characterizes the demise of the ROL in illiberal democracies. As of the end of 2021 the ECtHR was still framing the problem of the attack on the judiciary in a formalistic way. The ECtHR found that overruling an earlier decision of the Polish Tribunal without (what the ECtHR considers satisfactory) justification amounts to arbitrariness. It follows that such findings are irrelevant. However, the Polish constitutional review system is not based on the precedential value of earlier decision.¹⁷

The ECtHR was motivated by the desire to rely on abstract, non-political, considerations. It was even less appealing to analyze the political bias in the decisions of the domestic courts, in particular the political agenda of the constitutional courts, supporting the government’s power grab. Such review would apparently go against another principle of the ROL: there can be no political or disciplinary accountability for the content of judicial decisions – although it is in this respect that the performance of coopted courts is really undermining constitutionalism and democracy. The narrow interpretation of the ROL requires a kind of neutrality which results from a technical analysis. This precludes substantive review which would result in the finding of systemic governmental bias. The understandable reluctance of courts to enter into some kind of “political justice,” a restraint embedded in a strict, formal concept of the ROL, sets the limits of judicial action. In view of the above, it was not surprising that for a long time the ECtHR refrained from discussing the rather obvious political bias behind the legal façade that was created to achieve the desired political goals by the specific appointments. This reluctance is understandable but somewhat surprising as the ECtHR was aware of the position of other European instances regarding the “systemic threat to the rule of law” in Poland, and quoted these findings extensively.¹⁸ Moreover, the ECtHR had a well established doctrine of systemic violation.

Nevertheless, it did not consider the political intent of the legislation in changing (constitutionally) the existing system of appointments. This apolitical deferentialism is rather common worldwide, given the reluctance of the courts to pass political judgement. In *Ástráðsson* the political calculation and manipulation in the individual selection of judges was left out in the supranational judicial analysis, though it clearly transpires from the reconstruction of the facts of the case.¹⁹ Likewise, when the mandate of the President of the Hungarian Supreme Court was prematurely terminated under the pretext

¹⁶ The CJEU followed a different logic. Its concern was related to the protection of mutual trust in judicial decisions rendered by independent courts.

¹⁷ See the separate opinion of Judge Wojtyczek in *Xero Flor w Polsce sp. z o.o. v. Poland* App. No(s). 4907/18, 7 May 2021. The case concerned a three members panel of the Constitutional Tribunal with one unlawfully elected judge. Because of the participation of the judge the panel did not qualify as a tribunal established by law.

¹⁸ *Reczkowicz v. Poland*, App. No. 43447/19, 22 July 2021.

¹⁹ On the judicial reluctance to engage in substantive legislative intent analysis see A. Sajó, (2021).

of the entering into force of the new constitution (Fundamental Law) in 2012, the ECtHR discussed the matter primarily as a matter of freedom of expression as Mr. Baka was forced out (and not allowed to be considered for a future term thanks to an *ad hominem* law) because he voiced his critical professional position. The ECtHR did not consider the appropriateness of shortening the term a political (constitutional) matter, although it referred at least to the violation of the ROL.²⁰

However, as the *Ástráðsson* case clearly indicates, there is an alternative to the technical approach, a more political avenue for the decision-making. Perhaps in the Icelandic context, where the problem did not seem systemic and the Supreme Court did provide some kind of remedy, an apolitical approach was sufficient to achieve the novel result. A broader approach would entail the review of the failure of democratic politics, a matter of relevance in the efforts to restore the ROL. In *Ástráðsson* the wrongful appointment process originated in a dirty personal deal between the Minister of Justice and the politician husband of the judge who was nominated by the Minister notwithstanding her lesser performance compared to her peers.²¹ There was quite some evidence demonstrating that this illicit political deal was behind the appointment, and the ECtHR was fully aware of it. However, it refrained from the analysis of this substantive issue. It was satisfied with the lack of justification for preferring the lady candidate. In other words, for the Court this was a case of illicit appointment for lack of proper justification and not one of corrupt practices. The ECtHR refrained from considering the accountability aspects of the collusion and limited its analysis to the arbitrariness of the ministerial decision, instead of the corrupt deal behind the arbitrariness. While this avenue was not used, in case of sufficient evidence of political bias this might result in a finding of improper appointment. It is important, and legally possible, to consider the reasons behind arbitrariness. *The fundamental difficulty of the formal arbitrariness review* is that smarter judges with sufficient resources and without moral compass are generally able to come up with make-shift “reasons” (legalese Tohu va-Vohu and “respect of constitutional traditions, etc.). With the much heralded procedural turn of the ECtHR (and other minimalist courts) judges (and legal reasoning) will not be able to withstand judicial cheating. It is the good luck of legal formalism that the Polish Constitutional Tribunal is so careless and confrontational that it is relatively easy to disregard its decisions as arbitrary.

This reluctance to draw conclusions on the basis of political wrongdoing reflects the subsidiary role that the ECtHR has increasingly attributed to itself. As to the CJEU, contrary to the approach of the Advocate General, it preferred a fact based but still non-political approach, where the evaluation is based on how ordinary citizens would consider the appearances. It is for the domestic court to determine: “whether, taken together, ... all the ... relevant findings of fact which it will have made are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the Disciplinary Chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, thus, whether they may lead to that chamber not being seen to be

²⁰ *Baka v. Hungary*, App. no. 20261/12, 23 June 2016. Concurring opinions discussed the ECtHR’s power to review whether constitutional changes are compatible with the Convention.

²¹ It seems that there are smoking guns in the Poland indicating the political bias in the appointments.

independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law.”²²

Certainly, such apolitical methodology promises a non-controversial (seemingly judicially neutral, legalistic) solution. These international courts do not feel qualified to enter into the discussion of domestic facts (and even less laws written in exotic languages) which are (local) context bound and hardly accessible to foreign judges (at least this is the narrative). With or without a doctrine of subsidiarity they have to rely on local fact finding or, in the case of the CJEU, on local conclusions. But this means that they must rely on the politically often complicit domestic courts. In Poland this resulted in a war of attrition among the various courts. In Hungary it is unlikely that such review will ever take place with satisfactory self-criticism; with a lot of twisting and turning the higher judicial instances will find a way not to draw the conclusion intended in Luxembourg.²³ In Bulgaria so far the Judicial Council was unable to take steps regarding the Prosecutor General.

In the hypothetical case that the illiberal regime will be voted out, the issue is what can be done legally with the leftover constitutional institutions (especially apex courts) which operate as enclaves (leftovers) of the illiberal regime, representing a clear and imminent danger that they will continue to protect the illiberal government that was voted out at the election, paralyzing thereby the restoration of the ROL – in the name of the ROL. What to do with the courts (and apex courts in particular) of illiberal democracies? Let’s consider the practical application of the above *Ástráðsson* appointment test in the context of the restoration of the ROL.

In the case of systematic and structural violations²⁴ of judicial independence removal for improper appointment may satisfy the above test. This seems to be the case in Poland, where judges were appointed with the decisive participation of a constitutional body that

²² *A. K. v Krajowa Rada Sądownictwa* (C-585/18), and *CP* (C-624/18), *DO* (C-625/18) v *Sąd Najwyższy*, [GCh] Judgment of 19 November 2019., para 153.

²³ See e. g. the disregard of the *Berlington* (C-98/14) judgment. While the CJEU clearly stated that there is state responsibility for damage caused by legislation and that Hungarian slot machine regulation (that deprived operators of their licence without compensation) concerns free movement of goods, and the legislation is contrary to EU law, the Hungarian *Kuria* managed not to award damages claiming that this is not a potential movement of goods, as the operation of the slot machines is not across borders. The fact that the slot machines came into the country from another member state was of no relevance for the Hungarian courts.

²⁴ The violation is structural as it originates in the composition of the Polish Judicial Council. It is systematic as the new appointment possibility was abused repeatedly and regularly in a way that is incompatible with judicial independence. The declared goal was to place in pole position judges who are loyal not to law but to PiS and its ideological commitment, ready to discipline their differently minded colleagues. The decisions finding a violation of supra-national law are not based on the well-documented politically motivated persecution of the judges carried out by the new disciplinary system. Instead, it is held that the Council is illegal because the disciplinary judges, although proposed by their peers (in a non-transparent, dubious process) are elected by the Sejm, a political body instead of having a Council with at least half of the members elected by their peers. The second objection is that the law amending the rules regarding the appointment have terminated the statutory mandate of elected members.

was created in violation of the ROL.²⁵ In the Polish situation the judicial appointments remain illicit given the lack of transparency in the nomination process and many irregularities in individual appointments. But this would mean that the removal shall be a matter of individualized evaluation and not collective handling. The practical advantage is that it would not require mass removal which would cause serious trouble for the administration of justice, both practical and in the sense of legitimacy. On the other hand, it is tempting to consider the appointments in their political reality. It is in the political context that the abuse and its intent become clear. For two years before the “reform” of the Polish Judicial Council there were no appointments, enabling the filling of the unusual vacancies by the new body. This abusive result makes the appointments fundamentally flawed, across the board – but is it fair to hold this against the individual appointees who have their fundamental rights at stake? Whether collectively or individually, the appointments may be declared void, though it is not clear what will be the practical impact of such mass removal on the administration of justice. What are the consequences of such voidness if it affects a large number of judges and judgments, undermining legal certainty, legitimate expectations, including the expectations of the improperly appointed judges (many of them simply not having had alternatives in case they wished to become judges)? As of 2021, only certain formations of the Supreme Court) were declared non-courts (the disciplinary chamber). As to the Constitutional Tribunal judgments rendered with the participation of one of three viciously elected constitutional court judges were held void.²⁶

While in the case of Polish courts the systemic violation of judicial independence is relatively easy to prove (though the remedies remain controversial) the matter is more complicated in Hungary, especially in respect of the Hungarian Constitutional Court (hereinafter: HCC). As to Hungary, most of the alleged improprieties of appointment concern events that occurred 10 years ago (albeit with lasting consequences of an untreated cancer) and are not as blatant as in the Polish case. There is no judicial finding regarding the unlawfulness of the appointments to the HCC which were carried out in conformity with the amended law. As to the ordinary courts, it is true that the 2012 law that forced judges of ordinary courts into early retirement was held invalid by a number of courts.²⁷ It was found contrary to the Fundamental Law by the Hungarian Constitutional Court (at the time still without a clear pro-Fidesz government majority)²⁸, the equal treatment directive (as determined by the CJEU)²⁹ and right to private life (ECtHR)³⁰. Likewise, the early termination of the mandate of the President of the

²⁵ This is the point of departure for both the CJEU and the ECtHR. This manuscript was submitted before the ECtHR (Grand Chamber) has rendered its judgment on dismissal of the members of the Judicial Council in *Grzęda v. Poland* appl. no. 43572/18, 15 March 2022.

²⁶ This is a real Pandora box and the ECtHR seems to be reluctant to open it in the context of other countries. It did not challenge the appointment of new Turkish judges to various superior courts after the unlawful removal of sitting judges after the 2017 attempted coup.

²⁷ The retirement affected disproportionately court presidents and others who held positions in court management because of their seniority. Court presidents with all their formal and informal managerial power can undermine the internal independence of the judges.

²⁸ 33/2012 (VII.17) AB. Hat.

²⁹ *Commission v Hungary*, Case C-286/12, 6 November 2012.

³⁰ *Erményi v. Hungary*, App. no. 22254/14.

Supreme Court and the Vice-President was held to violate the ECHR.³¹ Where there were findings of illegality the excesses were formally corrected (with the significant exception of the *Baka* case). No authority ever considered the lasting structural consequences of the judicial retirement case (i. e. that the court management was transferred to judges selected by the political power.) The appointments which occurred after the illegal removals were never found to be problematic by a judicial instance. The new system of judicial self-government enabled a Parliament elected FIDESZ cadre (a judge) to exercise considerable power in appointment and court management. This system was not reviewed by supranational courts although the Venice Commission expressed its concerns. At first glance the *Ástráðsson* criteria were not manifestly violated and the problem of the judiciary is not about appointment (except for the current President of the Supreme Court)³², but removal from administrative-managerial positions, a matter that occurred many years ago (albeit most likely with lasting structural consequences).

However, if *Ástráðsson* is applied in respect of the Hungarian Constitutional Court (which was never formally challenged in a supranational court for not being independent) doubts emerge. The HCC is composed of judges who were elected exclusively upon FIDESZ nomination and solely with FIDESZ votes. The selection was not always in conformity with law³³ but *Ástráðsson* is not very demanding in that respect.

The appointment problems lie in the amended law. Only a few months after coming to power in 2010 the FIDESZ supermajority changed the rules of nomination of constitutional judges moving from co-decision to a unilateral supermajority solution. The FIDESZ majority was writing the system in its own favor; crucially, it has created new seats in the tradition of court packing when there was a vacancy. The appointments resulted in the denial of pluralism, as all sitting judges were nominated and elected exclusively with Fidesz votes, while at least the Venice Commission is of the view that by allowing changing parliamentary majorities to elect judges of one tendency or another “better reflects the changing political and societal views of the society.”³⁴ However, strictly speaking court packing is not considered necessarily contrary to judicial independence and remains a matter of debate³⁵, although it could amount to direct interference where the change is not intended to improve efficiency (where the exclusive purpose of efficiency improvement cannot be demonstrated).

Are these judges wrongfully appointed that would justify, in principle, their removal enabling the restoration of the ROL, in conformity with *Ástráðsson*?

³¹ *Baka v. Hungary*, App. no. 20261/12, 23 June 2016.

³² As to the Hungarian Supreme Court, the law was changed a few months before the election of the President of the Court, to enable him to satisfy merit based criteria. About the same time the SC President received new powers enabling him to determine to some extent the composition of various judicial formations.

³³ A political science professor, formerly a member of the FIDESZ government, was considered professor of law where being a professor of law is a statutory requirement; two members were MPs sitting with the parliamentary majority, etc.

³⁴ Venice Commission, CDL-AD(2014)017 Tajikistan - Opinion on the Draft Constitutional Law on the Constitutional Court, para 14.

³⁵ Presidential Commission on the Supreme Court of the United States, DRAFT FINAL REPORT, December 2021.

The Hungarian appointments were in conformity with the applicable (amended, tailor-made) domestic law. It can be argued, however, that the procedure that was seemingly in compliance with the rules did nevertheless produce results that are incompatible with the object and purpose of judicial independence as the elections to the body that did not provide the political balance that helps relatively unbiased interpretation of the constitution. The appointment procedure was designed for a purpose (to have a loyal court) that is incompatible with the object and purpose of constitutional impartiality. However, it is unlikely in that in a standard judicial analysis a court will venture into the review to what extent the HCC has systematically sided with the government, amounting to the violation of the requirement of impartiality just because the HCC hardly ever created any obstacle to the governments goals to aggrandize and perpetuate power. After all it was the Fundamental Law (the constitution) that enabled such legislation and the HCC only applied the Fundamental Law. Even assuming that these arguments are valid, what remains is an authoritative forum that tests these allegations. Even assuming that the conditions of a finding of improper appointment are present, the *Ástráðsson* test requires a finding of improper appointment by domestic courts, a highly unlikely matter in Hungary. It is true that a manifest breach can be found by the ECtHR even in the absence of a domestic finding but these were well legalized measures.

Assuming, for the sake of argument that the improper appointments would in principle result in voidness of the judges' mandate, *ab initio*. Removal does not automatically follow from wrongful appointment, not even where there is a pressing need (like that of the restoration of the RoL).³⁶ The wrongful appointment approach is important in destroying the myth of irremovability but it cannot be sufficient for the restoration of the RoL. After a decade or so few of the allegedly wrongfully appointed judges may still be active; the dubiously appointed court presidents moved elsewhere having determined who their successors will be, etc. This is how the original sin begets a second generation of judicial managers born in sin.

Where the illegality of the appointment cannot be proven within the narrow technical limits of *Ástráðsson*, or is too cumbersome to prove, a more "political" but at the same time more honest argument can be made: all the appointments to a body that systematically aimed at the destruction of the RoL are contrary to the purpose of judicial independence. Such body is acting against the purpose of the RoL and therefore illegal or unconstitutional, or contrary to international treaty obligations.

This radical approach remains debated. While in the logic of the ECtHR removal may remain a RoL conform option, as a kind of RoL exceptionalism, exceptionalism exists on the verge of extra-legality. To put it bluntly, this is a revolutionary alternative to the illegal appointments approach. Revolution and the RoL are strange bedfellows and for some people a revolutionary restoration of the RoL cannot produce a RoL system. For others oxymorons do exist, if not in textbook treatise of judicial independence but in real legal life.

³⁶ It is troubling that in *Ástráðsson* the Court refrained from taking position on the consequences of the wrongful appointment regarding the concerned judges. Of course, the concerned Icelandic judge who was not appointed did not submit an application to the ECtHR, at least not in this case.

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The Importance of the Consultative Council of European Judges for the Rule of Law

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This statement will first describe the interpretation of Art. 6 European Convention of Human Rights (ECHR), subsequently it will focus on the work of the Consultative Council of European Judges (CCJE) and will address the influence of CCJE on the case-law of the European Court of Human Rights.

1. Europe as constituted by the membership in the Council of Europe consists of 47 member states. This Europe – larger than the EU - has a broader cultural, legal, geographical, and language dimension. And what is important: The Council of Europe has several members in which the erosion of the rule of law and of judicial independence is at stake. However, based on the Convention the member states represent a legal community with more similarities than differences.

Art. 6 ECHR states that everyone has the right to an “independent and impartial tribunal established by law”. The member states of the Council of Europe have accepted the obligation to guarantee an independent and impartial judiciary by national law. This obligation is legally binding for each member state under international law. Today, it is very important to make this clear as some member states seem to deny this obligation.

The principles in Art. 6 ECHR are institutional guarantees on which democracy and the rule of law depend. A functioning independent judicial system is therefore vital to the strengthening of the rule of law. An efficient, impartial, and independent judiciary is the cornerstone of any functioning system of democratic checks and balances.

2. What does an “independent and impartial tribunal by law” mean according to Art. 6 ECHR? What are the criteria/standards of the Court’s case-law in more detail? How do national judges influence the creation of these standards on the level of the Court?

The Court has adopted a variety of important judgements related to the requirement of what a “tribunal” an “independent and impartial judiciary in general” is under Article 6 ECHR.

In this context, the Court applies the principle of autonomous interpretation. This means that some of the Convention’s key terms are be defined authoritatively by the Court and independently of how they may be understood by member states. This interpretation relies on a systematic approach to the Convention on the Council of Europe, its goals and the common or divergent application of principles in the legal systems of its member state.

A. Eilers—President of the Consultative Council of European Judges (CCJE), Judge at the Court of Appeal.

Employing this value-oriented fact finding approach the Court often defines common denominators or common European legal standards which then are applied in the cases of the Court.

3. The CCJE is an important body in the development of this European standard.

a) CCJE is an advisory body of the Council of Europe. Its work is defined in the context of the implementation of Article 6 ECHR, in particular the right to an independent and impartial court.

It is the only body within an international organization to be composed exclusively of judges and in this respect, it is unique in Europe. It was created 20 years ago. The CCJE gives advice to the Committee of Ministers on issues relating to the status of judges and the exercise of their duties.

All members state in the Council of Europe are represented in the CCJE. Every member state appoints a serving judge, with an in-depth knowledge of questions relating to the functioning of the judicial system combined with a high level of personal integrity. The members of the CCJE act in their personal capacity without any external instructions.

With its work, the CCJE specifies the requirements for judicial independence. It provides an institutional framework for determining judicial independence. In other words: European judges itself specify and thus defend the European rule of law.

The work of the CCJE is essentially characterized by two focal points, which may be described as “benchmarking” and “monitoring”.

b) Every year, the plenary of the CCJE adopts Opinions. They define the preconditions for judicial independence and impartiality, thus establishing a European standard. In addition to the Magna Carta of Judges (MC) of 2010 - adopted on the occasion of the 10th anniversary of the CCJE -, there are already 24 Opinions.

MC and Opinions are not legally binding. However, as they become part of the reasonings of the Courts case law they must be considered as factual law.

The MC enumerates the guarantees of judicial independence referring to independence itself, the body in charge of guaranteeing independence, the access to justice and transparency, ethics, and responsibility. It also states that the principles shall apply *mutatis mutandis* to judges of all European and international courts.

The Opinions deal with different topics. One focus is on the nature of the judicial decision-making process, with the framework conditions of judicial activity such as working conditions, tenure, training, performance evaluation, remuneration, education, judicial ethos, but also with the quality of judicial decisions themselves. Another focus is on the relationship to other state authorities or judicial bodies.

The representatives of the member states always endeavor to ensure that their opinions do not merely reflect a summary of their own legal cultures. When adopting the Opinions, the plenary rather strives to determine its own European standard. This does not necessarily reflect the legal reality of each individual member state.

In sometimes long and intensive discussions, the plenary struggles to find the best possible wording that meets this standard. It also considers the need to ensure coherence among the opinions. This is achieved by coordinating the contents and by referring to earlier opinions.

The plenary of the CCJE selects the respective topics of the Opinion in an autonomous manner. The members formulate the requirements for the content of judicial independence. Their adoption is preceded by empirical findings - supported by an expert - on the situation in the individual member states.

An overview of the respective national legal and factual basis obtained within the framework of these findings enables a partly descriptive, partly program-like presentation of the topic. Thus, the Opinions are based on empirics and legal dogmatics. They conclude with a summary and recommendations that form a European overarching standard.

National legislators and administrations may orient themselves to this standard, but also the Court in its interpretation of the Convention uses the Opinions as a source of soft law.

Given the independence and competence of the members of the CCJE, the Opinions have a high degree of legitimacy. This is how national judges influence the creation of these standards on the level of the Court.

There is no doubt that the dialogue between the member states, which took place during the drafting of the Opinion, already promotes the European legal culture. Thus, it even creates a possible basis for legal standardization. Experienced reports and statements of the representatives of the member states create mutual understanding for processes under the rule of law and make clear the concrete personnel concerns of the judges, the requirements, and challenges of the judiciary under the specific political framework conditions.

c) In addition, the task of the CCJE is to provide targeted cooperation at the request of the CCJE members, judicial bodies, or relevant associations of judges, and to enable member States to comply with the Council of Europe standards.

Attacks on judicial independence can come from both the executive and the legislative branches. The CCJE deals with serious legislative infringements on the rule of law and comments on individual cases of violation of judicial independence. Overall, this activity may be described as “monitoring”.

The reporting of violations to the CCJE reflects how fragile the young rule-of-law systems are in some countries of Eastern and Southeastern Europe. The report of the CCJE-Bureau on the independence and impartiality in the Council of Europe member States, 2019, refers to Poland, Hungary, Turkey, Romania, Serbia, Bulgaria.

Changes in the retirement age of judges, replacements, and dismissals of judges for so called “incompetence,” non-transparent appointment procedures, incomplete composition or the creation of new courts are regularly reported violations of judicial independence. However, interventions in the economic basis or the organizational independence initially granted by judicial administrations should also be mentioned here. Other interventions are drafts on the methodology of ensuring the uniform application of laws by court.

Moreover, politicized media coverage, populism and general political encroachment put judges under pressure and indirectly influence judicial decisions. The reports clearly show that by addressing the CCJE and by its monitoring opinion, certain timely publicity can be achieved. It thereby partly fends off the attacks on judicial independence or keeps them within limits.

The fact that – in general - the respective States take the reports seriously is shown by the fact that they, for their part, can comment and explain themselves, and sometimes do so very explicitly. In cases of systematic violations, the work of the CCJE is preparatory for all further reactions under European law and policy.

4. The CCJE has a significant and growing influence on the case-law of the Court.

The Court regularly and increasingly refers to the statements, MC and Opinions of the CCJE as sources of a European standard for the requirements of judicial independence and impartiality. It is recognized that the work of the CCJE builds the basis for the development of the relevant international standards for measuring independence and impartiality of the judiciary under Art. 6 ECHR.

The Court refers to the opinions literally in the facts as “relevant domestic and international law or documents “document of the council of Europe” “relevant international or European documents or text” or as “the courts assessment”. Thereby the CCJE is integrated into the case-law as European standard as a source of soft-law.

In its (concurring) Opinion of honorable former Judge at the ECtHR Pinto de Albuquerque states in *Baka v. Hungary*¹:

“The court’s direct recourse to international-law standards on judicial independence, including soft-law sources, as a source of law in order to address the applicant’s situation is highly remarkable, and laudable.”

“The court invokes the soft law of the Council of Europe as a legal basis not only to sustain the principle of the independence of the judiciary in abstract but also to assert in concrete the existence of the applicant’s individual civil right to irremovability and of access to a court to protect that right in the (Hungarian) legal framework.”

In the case *Baka v Hungary*, the focus has been particularly on the issue of the tenure and removal of judges by the executive and legislative powers. Up to now, this has been one of main reasons why the Court stated a violation of Art. 6 ECHR.

What were the facts in that case?

The applicant - former Hungarian Judge at ECHR who was elected as President of the Supreme Court by the Parliament for a six-year term – stressed that the proposal of reducing the retirement age of judges was infringing the fundamental principles of judicial independence, status and irremovability of judges.

As consequence of the entry into force of all constitutional and legislative amendments, the applicant’s Mandate as President of the Supreme Court terminated three and a half years before its expected date of expiry. The applicant lost the remuneration and other benefits and since the applicant had not attained retirement age by the time needed, he could not claim payment of that post-function benefit.

The court referred in its reasoning substantially to the Opinion of the CCJE as sources of soft law and remarks as follows:

“The court notes, in this regard, the emphasis that is placed on these qualities of technical competence and moral integrity of judges in various prominent international texts, as an aspect of the right to a fair trial before an independent and

¹ 20261/12, 2016.

impartial “tribunal” established by law. It would refer in this connection to para 25 of Opinion 1 (2001) of the CCJE, which recommends that “the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency.”

Expressly the Court argued:

“The CCJE considered in Opinion 1 (2001)

that the irremovability of judges should be an express element of the independence enshrined at the highest internal level,

that the intervention of an independent authority, with procedures guaranteeing full rights of defense, is of particular importance in matters of discipline and

that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area.”

And the Court refers to the Magna Carta of Judges (Fundamental Principles) 2010 (MC) as follows:

“Rule of law and justice

1. The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair, and efficient manner.

Judicial independence

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.

3. Judicial independence shall be statutory, functional, and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

Guarantees of independence

5. Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.

9. The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation).”

5. This brings up to the question which individual source of law in the CCJE carries the most significance?

In particular, the Court refers to the MC as the fundamental principles in recent judgements².

However, other opinions are also expressly referred to as a source of law. These include opinions concerning the qualification and evaluation of judges as there are:

Opinion 1/2001 on standards concerning the independence of the judiciary and the irremovability of judges³

Opinion 3/2002 on ethics and liability of judges⁴.

Opinion 11/2008 on the quality of judicial decisions⁵

Opinion 17/2014 on the evaluation of judges work the quality of justice and respect for judicial independence⁶.

Finally, those opinions, which concern the relationship of the judiciary within the society, are of particular importance:

Opinion 18/2015 on the position of the judiciary and its relation with the other powers of state in a modern democracy⁷

and Opinion 21/2018 on preventing corruption among judges.

In addition, in the context of recent decisions on the rule of law (mainly in the case-law regarding the situation in Poland), the Opinion 10/2007 on Council for the judiciary at the service of society has gained particular importance⁸.

² Harabin v. Slovakia - 58688/11, 2012; Sergey Zubarev v. Russia - 5682/06, 2015; Denisov v. Ukraine - 76639/11, 2018; Ramos Nunes De Carvalho E Sá v. Portugal - 55391/13, 57728/13 und 74041/13, 2018; Gudmundur Andri Astradsson v. Iceland - 26374/18, 2019; Reczkowicz v. Poland - 43447/19, 2021; Dolinska v. Poland - 49868/19, 2021; Svilengacanin and others v. Serbia - 50104/10, 2021.

³ Baka v. Hungary - 20261/12, 2016; Bilgen v. Turkey - 1571/07, 2021.

⁴ de Carvalho Basso v. Portugal - 73053/14 - 33075/17, 2021; Stoklosa v. Poland - 68562/14, 2021.

⁵ Borovska and Forrai v. Slovakia - 48554/10, 2014; Mraz a.o. v. Slovakia - 44019/11, 2014; Shala v. Norway - 1195/10, 2012; Abu and others v. Romania - 34796/09, 2021.

⁶ Guz v. Poland - 985/12, 2020.

⁷ Gudmundur Andri Astradsson v. Iceland - 26374/18, 2020. The case concerned an applicant's allegation that the new Icelandic Court of Appeal, was not a "tribunal established by law", on account of irregularities in the appointment of one of the judges who heard the case. The Court had upheld the applicant's conviction for road traffic offences. The court held that there had been a violation of Art. 6 § 1. Given the potential implications of finding a violation and the important interests at stake, the Court took the view that the right to a "tribunal established by law" should not be construed too broadly that any irregularity in a judicial appointment procedure would risk compromising that right. It thus formulated a three - step test to determine whether irregularities in a judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law.

⁸ Poposki and Duma v. "The former Yugoslav Republic of Macedonia" - 69916/10 - 36531/11, 2016, Jaksovski and Trifunovski v. "The former Yugoslav Republic of Macedonia" - 56381/09 - 58738/09, 2016, Gerovska Popcevska v. "The former Yugoslav Republic of Macedonia" - 48783/07, 2016, Mitrinovski v. "The former Yugoslav Republic of Macedonia" - 6899/12, 2015, Thiam v. France - 80018/12, 2018, Rzedza v. Poland - 43572/18, 2021.

In the case of *Reczkowicz v. Poland*⁹, the Court finds a violation of Art. 6 ECHR. The irregularity of the appointment process/inherently deficient procedure for judicial appointments to the newly created Disciplinary Chamber of the Supreme Court lacked the attributes of a “tribunal” which is “lawful” within the meaning of Art. 6 ECHR¹⁰.

The case *Xero Flor w Polsce sp z.o.o. v. Poland*¹¹ is about the complaint of an appointment of one judge in particular to the Constitutional Court which had examined its case. The applicant complained about the domestic courts’ refusal to refer the legal question to the Constitutional Court. He also alleged that the bench of five judges in the Constitutional Court which had examined his case had been composed in violation of the Constitution. One judge had been elected by the Sejm despite that post having already been filled by another judge elected by the preceding Sejm. In consequence, the Court had to address the question whether the current composition of the Polish Constitutional Court, which was restructured following the judicial reform, satisfies the principles of the rule of law. The Court considered a violation of Art. 6. The irregular election of a duplicate-judge onto the Constitutional Tribunal, i.e. a judge appointed to an already filled judicial post, rendered the bench unlawful. It was not a “tribunal established by law”.

In this case the Court referred to the “Judicial independence and impartiality in the Council of Europe member States in 2017” as well as to the “report of the Bureau of CCJE and the Bureau of CCEP – challenges for judicial independence and impartiality in the member States of the Council of Europe - 24.03.2016”.

It is important to mention that the Court refers in *Reczkowicz v Poland* not only to the Opinion 10/2007 (composition and selection of judge’s members in the Council for the judiciary) but as well to the opinion of the CCJE Bureau following the request of the Polish National Council of the Judiciary to provide an opinion with respect to the Draft Act of September 2017 on the Polish national council of the Judiciary.

The Bureau of the CCJE (composed by President, Vice-President, 2 further elected members) is competent to assess whether drafted regulations or their interpretation in member states are following the Councils standard concerning judges.

In the case of Poland i.e., there have been several Opinions of the Bureau in 2017 to 2019 stating that Drafts on the selection methods for judge members of the National Council, pre-term removal of judges, the structure of the National Council would infringe judicial independence insofar as the legislative and executive powers will have a decisive role in the procedure for appointing judges. Expressively the Bureau assessed the adoption of these acts as a major set-back for the rule of law and for judicial independence.

In reaction to the occurred situation in Poland and other member states during the last years the CCJE had decided on the new subject of the Opinion for 2021.

Referring to the Opinion 10/2007 on the Council for the Judiciary at the service of society CCJE followed up these general recommendations on the composition, functioning and powers of the Council for the Judiciary and developed its standard in the Opinion 24/2021 on Evolution of the Councils for the Judiciary.

⁹ 43447/19, 2021.

¹⁰ See as well *Dolinska - Ficek and Ozimek v. Poland* - 49868/19 – 57511/19, 2021.

¹¹ 4907/18, 2021.

It can be assumed that this opinion will also be considered in the case law of the Court.

Here are the major conclusions and recommendations of Opinion 24/2021:

“The members of the Council must be selected in a transparent procedure that supports the independent and effective functioning of the Council and the judiciary and avoids any perception of political influence, self-interest or cronyism.

The majority of members of the Council should be judges elected by their peers, guaranteeing the widest possible representation of courts and instances, as well as diversity of gender and regions.

A selection of judge members by parliament or the executive must be avoided.

Members should be appointed for fixed time in office and must enjoy adequate protection for their impartiality and independence from internal and external pressure. A member’s term should in principle only end upon the lawful election of a successor.

The CCJE wishes to reaffirm the importance of security of tenure of all Council members as a crucial precondition for the independence of the Council. Members may only be removed from office based on proven serious misconduct in a procedure in which their rights to a fair trial are guaranteed.”

6. In conclusion:

There are certainly other bodies in the Council of Europe as well that serve to strengthen the European rule of law and democracy. However, the fact that the CCJE has been composed of experienced, active judges from all member states for more than 20 years, through discourse, identify the necessary issues and go beyond the mere establishment of uniform European rules to formulate a European standard as best practice, is unique.

With remarkable unity, requirements for judicial independence are named and violations are evaluated. The case-law relies increasingly on the work of the CCJE as a relevant source of law in interpreting Art. 6 ECHR. Therefore, the case-law of the Court reinforces their factual lead to binding quality. Thus, it could be anticipated that the Court will rely on the work of the CCJE in the future as well.

The CCJE does not only guarantee judicial independence, but also presents a unique element of European legal culture. Therefore, its work remains necessary to strengthen the rule of law in Europe.

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Supporting Judges Standing Up for Our European Rule of Law

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*For António Marques Júnior and Igor Tuleya,
pan-European rule of law defenders*

1 Introduction

Over the past decade at least two EU Member States, Poland and Hungary, have taken a notable nosedive in democracy rankings.¹ A core aspect of this have been attacks on judicial independence. This is problematic at a normative and political level. The EU is premised on being and can only function as a club and political community consisting solely of liberal democracies. A construct that is at its heart a community of law cannot exist without independent judges all over the EU. But what is often less visible is that it is also problematic at a more personal level, in the sense of creating impossible choices for individual judges. Some of them have faced serious consequences when sticking to their oath to protect and uphold the law.

This short contribution highlights both normative and political aspects of illiberal tendencies within the EU and more personal consequences for those standing up to protect the rule of law (Sects. 2 and 3). It will then suggest three lessons to be drawn by EU institutions (Sect. 4). It argues that, perhaps paradoxically, protecting the rule of law in Europe may require focusing on fewer instruments than are currently applied but applying them comprehensively and more quickly. But it also argues that more practically supporting those who personally stand up to protect the rule of law is both fully possible and essential.

2 The Nature and Consequences of Backsliding of Judicial Independence in the EU: Anatomy of a Non-response and Legalised Undermining of the Rule of Law

The slide to illiberalism within the EU, and the EU's response to it, has been well documented.² Ever since the situation in Hungary and Poland started spiralling downwards, the Commission and other EU institutions have been quite slow in responding. The

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¹ J Morijn (2022).

² L Pech and KL Scheppele (2017) pp. 3–47.

Commission has not responded to all aspects of the attack on issues such as judicial independence, has not often used the possibility to request expedited proceedings, and has been slow in asking for financial penalties in cases of non-compliance with Court of Justice rulings. Other Member States share the blame, as they have so far refused to start infringement cases where the Commission refuses to do so. All of this is all the more surprising, because the Court of Justice has consistently ruled to strongly defend judicial independence. But it is dependent on “supply” of cases.

A good example of a resulting concrete dilemma for judges across Europe is how to go about applying the Framework Decision on the European Arrest Warrant. Particularly Dutch and German judges are visibly struggling with the question how they can guarantee fair trial for suspects or those convicted under their jurisdiction, when their transfer is requested by Polish judges. Is it possible to be sure that any person will receive fair treatment if the European Court of Justice has itself pointed out various fundamental problems with the highest courts in Poland due to political capture?³ Even if the answer seems pretty clear legally – no – so far the Court of Justice has opted to save the instrument⁴, likely because the concept of mutual recognition is so fundamental to so many EU policy areas. This shows just how fundamentally the EU as a form of cooperation gets challenged when judicial independence is under pressure.

Instead of using this as a sign to double down on enforcement to protect judicial independence, EU institutions have largely focused on issuing more reports and inventing ever new tools and procedures.⁵ A lot of attention has gone to the Article 7 TEU procedure, which has not led to any concrete result, most specifically because Hungary and Poland can support each other when needed to avoid a European Council decision to suspend voting rights. Moreover, a tremendous amount of policy energy has gone into producing the so-called rule of law report⁶, which has had very little discernible effect in changing the situation in the Member States where the problems are the biggest.

This has had a doubly detrimental effect. Not only has it failed to stop backsliding. It has lulled many into thinking we were addressing the problem. What amounted to collective European non-action has effectively created an open opportunity for governments, like the Polish and Hungarian, to push through a political agenda that is harming the EU’s foundations, including also judges specifically.

In this respect, an aspect that is not frequently called out in these terms is that part of the strategy of these Member States is to use Union law and procedures to their advantage. Much of this happens behind closed door, but not all of it. Hearings at the Luxembourg Court are public. What you hear the Polish and Hungarian government’s agents argue in that courtroom, away from cameras and diplomatic filters, is remarkable.⁷ They are completely open in their disregard for the most basic concepts of EU law.

When it comes to judges specifically, and the Polish government’s agenda to suppress those who are independent and impartial, it even openly lies. Judge Waldemar Zurek has explained this well in the documentary *Judges Under Pressure*. Rather than him being

³ P Bárd and J Morijn (2020 – I), and (2020 – II).

⁴ Case C-216/18 PPU, LM.

⁵ J Morijn (2018) pp. 14–42.

⁶ For a good overview of the instruments, see: Lt Pech and P Bárd (2022).

⁷ J Morijn (2020 – I), J Morijn (2020 – II), and J Morjin (2021).

a “communist element” needing to be expelled from the judiciary, he was actually part of the resistance against the illiberal regime before 1989.

Unsurprisingly, the Polish government has a 100% record in losing its cases in Luxembourg. But we would be very much mistaken to think this is a sign that EU institutions are intervening successfully. As was argued eloquently by Scheppele *c.s.*⁸ the Polish government is, in fact, “winning by losing”. Its strategy is to play for time while abusing procedures and change facts on the ground. The Polish government, not the EU, controls the narrative and dynamics of the interaction.

It continues this, as we saw pronounced through the politically captured Polish Constitutional Court in October 2021, which stated that the primacy of Union law is at odds with the Polish Constitution. The building that used to house a court is now completely barricaded off, protected by police. This is the reality where Polish judges, NGOs and soon perhaps the media, are basically running out of options and time to protect the rule of law relying on EU law without much outside help. In Hungary the situation is even worse.

3 Defending the Rule of Law: The Importance of Considering the Personal

On 25 April 2002, when still a student, I learned perhaps my most important lesson about what it takes to defend democracy and the rule of law. With a group of other students from all over Europe I spent that day with António Marques Júnior. He was one of the low-ranking military officers involved in the carnation revolution on 25 April 1974. Later he served in the Council of the Revolution and eight consecutive terms in Portuguese parliament: an iconic figure for Portugal’s transition towards a democracy.⁹ He invited students to join him for the yearly parade on Lisbon’s Avenida de Liberdade. I still remember the faces of those standing along that magnificent boulevard as they shouted the slogan “25 April forever: fascism never again”: 28 years after the revolution they came to pay tribute to those who had changed their lives.

Over dinner, at his home (and after glasses of symbolic 1974 port wine were poured), Mr. Marques Junior gave a short and quite simple speech that became a very formative moment – and deeply informed how I study today’s rule of law crisis. He insisted that, rather than something essentially normative or even political, fighting for democracy and the rule of law is above all very practical. It is an endeavour that is often against the tide, sometimes at personal risk. He cautioned that you will usually hear more arguments against action than for speaking and acting up. This requires that rule of law defenders remain persistent and creative in hammering home the basics of their beliefs. The rule of law, he taught me, is a verb.

In the here and now, this also applies to judges. Some have had to make stark choices that should be unimaginable in an EU based on the rule of law, and sadly have remained largely hidden from decision-makers. They have had to pick between honouring their

⁸ KL Scheppele et al (2020) pp. 3–121.

⁹ Wikipedia page about António Marques Júnior, at: https://pt.wikipedia.org/wiki/Ant%C3%B3nio_Alves_Marques_J%C3%BAnior (visited 30 November 2023).

oath and putting their career and livelihood on the line. Polish Judge Igor Tuleya is a notable example. In the documentary *Judges Under Pressure* he recently explained why he took this course:

“If I weren’t doing this, I would feel as though I ran away at the crucial moment
The energy I use up to mobilise, to force myself to act comes at less of a cost
Than a sense of worthlessness I would otherwise feel the rest of my life”

Should we really be basing our community of values on such a principled stance only few will dare?

Shortly afterwards the illegal Disciplinary Chamber of the Supreme Court lifted his immunity. After watching this on a livestream, Judge Tuleya opened his email and scrambled to send a reference for a preliminary ruling to the Luxembourg Court before he would be cut off from the internet by the judicial authorities. Asked why he wanted to do this, he answered: “Because it is the last thing I can do”. Do we need a better illustration of how ineffective the EU’s response has been? Do we have a better illustration of how important the EU could be to those fighting to protect the rule of law – if only it got its act together?

4 Courses of Action: Less is More, but the Personal Should also be More Political

So what should EU institutions do first at this stage to walk their talk about the importance of protecting the rule of law? There are essentially three elements, which will be discussed in turn. They are easy enough to formulate. But since we are in a situation where action has been too late, they will require some immediate choices that would be disruptive in the short term, and clear leadership to follow through on.

The first thing is to acknowledge the urgency and nature of the problem and call it by its name. EU institutions continue to talk about constructive dialogue. This is misguided because a dialogue takes good faith partners on both sides. It is also increasingly hard to justify now that the European Parliament, in a recent resolution, has declared Hungary is no longer a liberal democracy.¹⁰ It only takes one morning of listening in at a hearing at the European Court of Justice in Luxembourg to realise that this is simply not where we are today.

We need to be aware that we therefore currently have not one, but two rule of law debates.

One between liberal democratic Member States and others, quite another amongst Member States that are liberal democracies. The first debate is much more important and urgent – and should take priority.

Second, EU institutions, and therefore not only the Commission but also Member States composing the Council, must act accordingly. It may sound paradoxical and

¹⁰ European Parliament Resolution on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of serious breach by Hungary of the values on which the Union is founded, Document A9-0217/2022 15 September 2022.

counterintuitive, but their biggest challenge may be to discontinue a lot of rule of law activities. It is reasonable to have a dim view of the use of the rule of law report when it comes to where the problem is. Neither is there much reason to think that more resolutions or conclusions adopted by the European Parliament or the Council of Ministers will change matters. It is a drain on resources, sends the wrong signals, and sets us up to continue what has been rightly called “losing by winning”.

There are two things that should be upped, though: hard law and real support. Both are the likeliest tools to blow a hole in the story illiberal governments tell at home. First, applying hard law. Infringement actions, combined with interim measures, and followed by enforcement are still underused. E.g., why is there still no action directed at the captured Council of the Judiciary/neo-KRS in Poland? How can the EU expect to halt the problem without closing the tap of illegal judicial appointments? We can also immediately apply the rule of law conditionality regulation, in force since 1 January 2021, not only with regard to Hungary but also with regard to Poland.

Not guaranteeing judicial independence is a rule of law problem that justifies blocking EU funding, because it is a risk affecting the sound financial management of EU funds in a sufficiently direct way. Why? It is practically and logically impossible for judges to be independent on a part-time basis or within a specific sector only. As a side-note, the rule of law conditionality regulation also necessitates that rule of law defenders learn the dull language of budgetary experts to make a difference where a real difference can be made.

It is also essential for EU institutions to be proactive for once. Clearly, the next battleground in Poland and Hungary will be the media and the elections. The Commission has seen this, and has proposed new legislation, a media freedom act. This is not the right way to go, both in substance and strategically. After all, one does not need a crystal ball to predict it will first take a while to develop, then be watered down by the illiberal governments it aims to target, and then be challenged in front of the European Court of Justice.¹¹

Instead, as this author has argued with Prof Bodnar¹², the Commission can immediately protect media pluralism and elections by basing a legal action on EU citizens’ existing active right to vote. The argument is that such a right, which is fully covered by Union law, is meaningless without access to a plurality of information sources – and *effet utile* is a basic notion of Union law.

But apart from hard law, and I want to stress this, there is also practical support measures. Polish judges have often told me they do not feel taken seriously by EU institutions. I can understand why. We live in a Europe where Polish judges need to crowdfund to financially support their illegally suspended colleagues whose salaries have been cut to set an example.

Why has the Commission not issued a public statement that it will the 1 million euro/day fine, imposed to stop activities of the same Disciplinary Chamber that illegally suspended these judges, to support them? Why does no Member of European Parliament or Member State jump in at this open invitation to make a difference?

¹¹ See above, n. 1.

¹² J Morijn and A Bodnar (2021).

The last point is simple too: prioritise this above all else. Even if we often get a sense that the different silos within EU institutions have a life and logic of their own, the rule of law is not an isolated, self-contained policy area, on par with others. It is foundational and conditional for anything that can be sustainably achieved in each and every one of the Commission's policy priorities, e.g. environment, digital affairs, migration. Put differently, any perceived progress in any of these policies will actually be worthless without more stringent rule of law enforcement – after all, who will check compliance? Perhaps this is a point we should be making more often, and more creatively.

Because of the EU's past failure, we now have to work on this while 2 Member States are no longer liberal democracies, are no longer fully applying Union law but do still have their voting rights. Make no mistake, true rule of law enforcement action may be incredibly disruptive in the short term. Things will have to get worse before they can get better. But there is no middle ground. To protect the rule of law, EU institutions need to protect judges unconditionally. There cannot be meaningful EU cooperation without independent judges.

5 Conclusion: The Connection Between António Marques Júnior and Igor Tuleya

In January 2020 I met Judge Igor Tuleya for the first time, in Warsaw. On that occasion I gave him a note to thank him for taking the time to talk to me and to express my personal admiration for his fight on behalf of all of us. It was inspired by Antonio Marques Junior's 2002 speech and read:

“Protecting the rule of law in Europe is always practical and concrete
 Benefiting from the EU's free movement I first learned this in Portugal
 There the carnation became a symbol of peaceful transition
 From autocracy to democracy on 25 April 1974
 Shorthand too for personal courage in the face of adversity and risk
 The Dutch are famous both for flowers and for being stingy
 Producing *wooden* Portuguese carnations sums us up quite well
 In this case that European cooperation has a powerful silver lining
 It illustrates that the carnation cannot, and will never go bad”

In November 2021, just before the screening of the documentary *Judges under Pressure* in Amsterdam, Judge Tuleya pulled me aside. He wanted to show me something. What came from his wallet was the back image to the text I had given him almost three years earlier: an iconic image of 1974 Portuguese soldiers with carnations in their rifles - <https://portugaltravelguide.com/carnation-revolution/>. This brave Polish and European judge had been carrying it with him for almost three years. Is there a better way to illustrate how António Marques Júnior's lesson still resonates across Europe, and how is fight is a pan-European one?

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The Rule of Law Crisis in Europe: What's Next?

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1 Introductory Remarks: The Rule of Law Crisis in Europe

The so-called “rule of law crisis” we are facing nowadays in Europe is almost certainly the most complex and profound one the European Union (EU) has faced since the Communities were initially founded. There are several reasons that may justify this statement. I will mention the two that I find the most prominent.

In the first place, it is a crisis that goes to the *heart* of the European project. It compromises the core values on which the EU is built. It shakes the foundations of the EU, and the very *raison d'être* of the Communities. As every law student learns in the first classes of EU law, the European project worked historically as an instrument of promotion of democracy and the rule of law in Europe. It is precisely the threat to this original vocation of the EU that is at stake nowadays.

Secondly, it is also a crisis that while disclosing the imperfections and shortcomings of the European legal system – in particular the limitations of the arsenal of the juridical and political guarantees available in the EU to ensure respect for the rule of law – makes us question the fundamentals of the European model, in particular (i) the nature and scope of EU federalism, (ii) the balance between Member States competences and those of the Union, (iii) the reach of fundamental rights protection in the EU and the (iv) limits to principle of supremacy of EU law. Thus, this is truly a crisis felt at different levels of the rule of law, understood in all its complexities and specificities at the European level.

Therefore, considering not only the centrality of what is at stake – i.e., the survival of liberal democracy as the system of government common to all Member States of the EU and underlying to the EU political system as well – but also the questions and challenges it brings along, the current crisis is perhaps the most significant the EU has faced since its inception.

Truth be said, not everything in the “rule of law crisis” is bad nor damaging. The crisis is also an important moment for the European project for the positive things it may carry along. On the positive side, it constitutes an unique opportunity for the EU and its Member States to firmly and openly reaffirm their common values and reassert the essence of European foundations. Also, it has equally proven to be a moment to further develop and improve the so-called “rule of law toolbox” created under the current version of the Treaties. Furthermore, it has provided the European institutions with a renewed opportunity to promote integration through law and politics.

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This has become visible, for example, in the well known and ground-breaking decision of the Court of Justice of the EU (“CJEU”) in the famous case *Associação Sindical dos Juízes Portugueses*¹, in 2018, where the Court affirmed that national courts and tribunals, for being entrusted together with the CJEU, with the duty of ensuring that in the interpretation and application of the Treaties the law is observed must, meet the requirements of effective judicial protection. A conclusion strictly drew from the combined reading of Article 2 TEU (which refers to values on which EU is based and common to its Member States), Article 4(3) TEU (which provides for the principle of sincere cooperation) and Article 19(1) TEU (stating the principle of effective judicial protection of individuals’ rights under EU law). This ruling has been praised as the most important judgment since *Les Verts*,² regarding the principle of the rule of law in the EU legal system, and has been considered to be the EU equivalent of the US Supreme Court case of *Gitlow*,³ regarding the principle of effective judicial protection (which led to the progressive application of the US federal Bill of Rights to all state norms even when the states act within their own sphere of competence marking the beginning of the incorporation doctrine)⁴.

Also, more recently, the Order of the President of the Court of October 2021 ordering Poland to pay the European Commission a daily penalty payment in an amount of €1.000.000,00 within an interim measures procedure - due to the lack of suspension of the application of the provisions of national legislation relating to the areas of jurisdiction of the Disciplinary Chamber of the Supreme Court - constitutes a good example on how far the CJEU is willing to go in this context. It is possible to say that, perhaps without surprise, the crisis has offered the CJEU a revived occasion to do what it does best: to promote European integration on legal grounds.

¹ Case C-64/16, *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117.

² Case 294/83, *Les Verts/Parliament*, ECR 1986 p. 1339.

³ *Gitlow v. New York*, 268 U.S. 652 (1925).

⁴ See L Pech and S Platon (2018) at <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html> accessed 27 January 2024. See also Opinion of AG Sharpston in Case C-34/09, *Ruiz Zambrano*, [2011] ECLI:EU:C:2011:124: “Making the application of EU fundamental rights dependent solely on the existence of exclusive or shared EU competence would involve introducing an overtly federal element into the structure of the EU’s legal and political system. Simply put, a change of the kind would be analogous to that experienced in US constitutional law after the decision in *Gitlow v New York*, when the US Supreme Court extended the reach of several rights enshrined in the Constitution’s First Amendment to individual states. The ‘incorporation’ case-law, based since then on the ‘due process’ clause of the Fourteenth Amendment, does not require an inter-state movement nor legislative acts from Congress. According to the Supreme Court, certain fundamental rights are so significant that they are ‘among the fundamental personal rights and liberties protected by the due process clause [...] from impairment by the states’. (para. 172)”.

2 The Polish Case

The most visible face of the crisis is undoubtedly the Polish *affair*. The position of Poland has been problematic for several years now, having the European Commission activated Article 7 TEU against Poland in 2017 – which after an informal dialogue with this state constituted the first activation of said mechanism. Parliament would end up to resort to the same instrument against Hungary, the following year, in 2018. However, the features of Article 7 TEU, notably the strict conditions and procedures on which it rests, have demonstrated the essentially ineffective character of this solution⁵.

The Polish case has recently escalated with the delivery of the already famous judgment of the Polish Constitutional Tribunal of last October where the latter refused to comply with the decision of the CJEU on the inadmissibility of the rules of appointment of judges for the Supreme Court⁶. Indeed, in March 2021, the CJEU considered that the successive amendments to the Polish Law on the National Council of the Judiciary, which have the effect of removing effective judicial review of that Council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court were liable to infringe EU law⁷.

Polish resistance to European rules and standards has meanwhile risen to the level of the European Convention of Human Rights (“ECHR”), with the Polish Constitutional Court declaring, on the 24th November of this year, that Article 6(1), first sentence of the ECHR is inconsistent with the Polish constitution, insofar as the term “tribunal” used in that provision comprises the Constitutional Tribunal of the Republic of Poland and

⁵ See, e.g., L Pech (2020) pp. 157–174; W Sadurski, (2010).

⁶ Case K 3/21 available at <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-tractatu-o-unii-europejskiej> accessed 27 January 2024. See also M Lasek-Markey (2010) at <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/> accessed 27 January 2024:

“It must be noted that Poland’s Constitutional Tribunal is a judicial body whose primary competence is to scrutinise the constitutionality of legislation. In accordance with Article 194 of Poland’s 1997 Constitution, it is composed of 15 judges elected by the Parliament for a 9-year term. Back in 2015, shortly before the general election which brought about a change of government, the Parliament elected five judges to replace those whose term was about to expire. However, the President of Poland, Andrzej Duda, refused to swear them into office and, following the victory of PiS in the general election, the newly constituted Parliament elected new judges who were then sworn into office by the President within hours.”

⁷ Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021.

insofar as it grants the European Court of Human Rights (“ECtHR”) the jurisdiction to review the legality of the process of electing judges to the Constitutional Tribunal⁸.

Focusing on the CJEU’s judgment, much has been said already about the dangers of the ruling and the possible implications of the resistance of the Polish Constitutional Court to the unconditional supremacy of EU Law over the national constitution. The European Commission had an immediate and inflamed reaction to the decision, firmly upholding and reaffirming the founding principles of the Union’s legal order, and stating that it would “*not hesitate to make use of its powers under the Treaties to safeguard the uniform application and integrity of Union law*”⁹. Public opinion – and some academia – immediately started discussing the possibility of a *Polexit*¹⁰.

Notwithstanding, in my view, the ruling of the Polish court is less important for what it represents than for what it discloses. In fact, it is important to highlight that constitutional courts rulings refusing the full scope of the principle of supremacy of EU law are not new. They are not new to the CJEU; they are not new to the Polish Constitutional Court. There is truly “nothing new under the sun” with regard to the long judicial debate on whether EU law trumps national constitutional guarantees.

It is worth recalling that in 2020, in the peak of the first wave of the pandemic, the German Constitutional Court issued its first ruling where it refused compliance with the CJEU decision on the validity of the European Central Bank programme adopted

⁸ See Decision K 6/21 available here <https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny> accessed 27 January 2024. This constitutes a reaction to the ruling of the ECtHR in *Xero Flor w Polsce sp. z o.o. v. Poland*, Application no. 4907/18, decided in May 2021, where the latter held that the presence of Judge Mariusz Muszyński, one of the judges elected in 2015 by the new Parliament, constituted a violation of Article 6 ECHR as regards the right to a tribunal established by law (see paras. 289–291). See M Lasek-Markey (2010): “It is worth pointing out that the current President of the Constitutional Tribunal, Judge Julia Przyłębska, who is widely known to be a close friend of the PiS leader, Jarosław Kaczyński, was also among the five judges appointed in violation of Article 6 ECHR (right to a fair trial). Six years after the 2015 Constitutional Tribunal crisis and with a number of other judges appointed since by the ruling party, some of whom were active PiS politicians and Members of Parliament prior to their appointment, the Constitutional Tribunal is widely considered to have lost independence from the executive, its reputation tarnished”.

⁹ See e.g., Statement by the European Commission on the decision of the Polish Constitutional Tribunal of 14 July (15.7.2021) available at <https://www.eumonitor.nl/9353000/1/j9vvik7m1c3gyxp/vlkipq488pvc?ctx=vhafifazabhr> accessed 27 January 2024; and Statement by European Commission President Ursula von der Leyen (8.10.2021) available at https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5163 accessed 27 January 2024.

¹⁰ See e.g., A Easton “Poland stokes fears of leaving EU in ‘Polexit’”, BBC (9.10.2021) available at <https://www.bbc.com/news/world-europe-58840076> accessed 27 January 2024; “After Brexit, Polexit? Cartoonist depicts possible result of EU-Poland legal row” France 24 (22.10.2021) available at <https://www.france24.com/en/europe/20211022-after-brexit-polexit-cartoonist-depicts-possible-result-of-eu-poland-legal-row> accessed 27 January 2024; Maximilian Steinbeis (2021) at <https://verfassungsblog.de/the-exit-door/> accessed 27 January 2024.

in 2018, which allowed for the purchase of assets in secondary markets¹¹. As is well known, the German Constitutional Court has maintained, since the 1970s, an intense dialogue with the CJEU with regard to scope of supremacy of EU law, whose absolute and unconditional nature it firmly opposes. It has several times threatened to overrule EU norms on constitutional grounds, and in 2020 it made clear that it will not only “bark”, but it is willing to “bite” whenever the CJEU acts *ultra vires*¹². However, in 2020, despite the strong reaction by the European Commission¹³ - which later resulted in the sending of a letter of formal notice to Germany in June 2021¹⁴ -, no one discussed the possibility of Germany exiting the Union.

Without prejudice, the German ruling has been severely criticised by several scholars who have called the attention to the “precedent effect” of the decision. By actually refusing the authority of a CJEU’s ruling, the German Constitutional Court was opening the door for other episodes of disobedience by other Member States of the EU, which was particularly problematic with regard to those already involved the “rule of law fight” with the Commission¹⁵.

In any case, many other constitutional courts in Europe have adopted similar approaches – the French, the Italian, the Spanish among many others, and since 2020 also the Portuguese Constitutional Court -, a fact that the Prime Minister of Poland highlighted emblematically in his speech before the European Parliament following the delivery of the recent Polish ruling¹⁶. The Polish Constitutional Court has itself resisted the unconditional supremacy of EU law since the very beginning in its decision on accession by Poland to the EU¹⁷, later on a ruling the European Arrest Warrant¹⁸ and later on the conclusion of the Lisbon Treaty¹⁹. In fact, the Constitutional Tribunal of the Republic of Poland has never recognised absolute primacy of EU law over the Constitution.

¹¹ Judgment of 5 May 2020, 2 BvR 859/15 available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html accessed 27 January 2024.

¹² See D Kyriazis (2020) at <https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/> accessed 27 January 2024.

¹³ Statement by President Von Der Leyen (10.5.2020) available at https://ec.europa.eu/commission/presscorner/detail/en/statement_20_846 accessed 27 January 2024.

¹⁴ June infringements package: key decisions (10.6.2021) available at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743 accessed 27 January 2024.

¹⁵ D Mooney (2020) <https://esthinktank.com/2020/06/21/the-eu-in-danger-what-the-german-constitutional-courts-weiss-ruling-might-mean-for-europe/> accessed 27 January 2024; Miguel Maduro (2020) at <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court> accessed 27 January 2024.

¹⁶ Available at <https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament> accessed 27 January 2024.

¹⁷ K 18/04: “In its judgment in K 18/04, delivered in May 2005, shortly after Poland’s accession to the EU, the Tribunal confirmed the Constitution’s supreme legal force, explaining that a possible collision between a constitutional norm and a provision of EU law may in no circumstances be resolved by assuming the supremacy of the EU norm”.

¹⁸ Decision in P 1/05, 27 April 2005.

¹⁹ See Decisions in K 32/09, 24 November 2021, and SK 45/09, 16 November 2011.

As is well known, supremacy of EU law is involved in legal controversy since *Costa/ENEL*²⁰ was originally decided. The idea that every piece of EU law trumps every piece of national law has never been widely nor peacefully accepted by national courts throughout Europe. The constitutional dialogue between national and European courts on supremacy has been tense and intense, and every now and then problematic judgements by Member States courts have been delivered.

The problem is thus not resistance to primacy of EU law and its implications; the problem is mostly the context where the Polish ruling has been delivered. It is the first time a head of Government challenges directly the validity of the Treaties before a Constitutional Court. A Court which is in its majority allegedly composed of judges who are sympathizers of the Executive. Judges that have declared in radical terms the unconstitutionality of key provisions of the TEU in so far as they may hinder the sovereignty of the Polish State to decide on the domestic judicial system - which is a matter that according to that court rests on Member States and is not covered by EU competences. Thus, even if framed as a classical “supremacy *affair*”, the Polish ruling goes well beyond the dynamics of constitutional dialogues in Europe. And the current state of affairs in Poland serves to demonstrate that with regard to the supremacy conundrum not anything goes.

In fact, the threats to the independence of the judiciary in Poland have become widely known. It is a systemic problem along with other threats to the rule of law currently taking place in Poland. As mentioned above, the recent Polish ruling is in itself a reaction to a CJEU’s decision on the rules applicable to the appointment of judges to the Supreme Court recently adopted by the Executive. And this is not the first European ruling in this regard.

In 2019, Poland was condemned twice for the rules on the retirement of magistrates. The CJEU considered that the reduction of the age of retirement of judges infringed the principle of tenure and thus the independence of the judiciary. Hence, in June 2019, the CJEU considered that Polish legislation concerning the lowering of the retirement age of judges of the Supreme Court was contrary to EU law²¹, concluding, in November 2019, the same on the Polish rules relating to the retirement age of judges and public prosecutors, adopted in July 2017²².

Furthermore, on the 19th of November 2019, the Grand Chamber of the CJEU held, in an expedited procedure within a preliminary reference by a Polish judge²³, that the right to an effective remedy, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and reaffirmed, in a specific field, by Directive 2000/78, precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal. The CJEU considered that that happens where the objective circumstances in which such a court was formed, its characteristics and the means by which its members had been appointed

²⁰ Case 6/64, *Costa/E.N.E.L.* (1964) ECR 1964 p. 585.

²¹ Case C-619/18 *Commission v. Poland* (Independence of the Supreme Court) [2019] ECLI:EU:C:2019:531.

²² Case C-192/18 *Commission v. Poland* (Independence of ordinary courts) [2019] ECLI:EU:C:2019:924.

²³ Joined Case C-585/18, C-624/18 and C-625/18 A.K. (Independence of the Disciplinary Chamber of the Supreme Court) [2019] ECLI:EU:C:2019:982.

were capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the unreceptiveness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it. It would there be for the referring court to determine, in the light of all the relevant factors established before it, whether that did in fact apply to the Disciplinary Chamber of the Polish Supreme Court²⁴.

More recently, also within a preliminary ruling²⁵, in March of 2021, the CJEU held that the successive amendments to the Polish Law on the National Council of the Judiciary which have the effect of removing effective judicial review of that Council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court were liable to infringe EU law.

In April 2021, the Commission brought again an action for failure to fulfil obligations against Poland due to amendments to the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, which entered into force in February of the year before²⁶. The Commission considered, *inter alia*, that: (i) the Polish law on the judiciary undermines the independence of Polish judges and is incompatible with the primacy of EU law; (ii) it prevents Polish courts, including by using disciplinary proceedings, from directly applying certain provisions of EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the CJEU; (iii) and that Poland violates EU law by allowing the Disciplinary Chamber of the Supreme Court – the independence of which is not guaranteed – to take decisions which have a direct impact on judges and the way they exercise their function. In the latter regard, considering that the competence of the disciplinary chamber extends to cases of the lifting of immunity of judges with a view to bringing criminal proceedings against them or detain them, and the consequent temporary suspension from office and the reduction of their salary, the Commission argued that the mere prospect for judges of having to face proceedings before a body whose independence is not guaranteed creates a “chilling effect” and can affect their own independence – which seriously undermines judicial independence and the obligation to ensure effective legal protection, and thus the EU legal order as a whole.

Pending the judgment of the CJEU in this case, the Commission asked the Court, to order Poland to adopt a series of interim measures. On 14 July 2021, the Vice-President of the Court granted all the Commission's requests. On 27 October 2021, the Vice-President of the Court ordered Poland to pay a periodic penalty payment of €1.000.000 euros per day, from the date on which that order was notified to Poland and until such

²⁴ If that would end up to be the case, the principle of the primacy of EU law thus requires it to disapply the provision of national law which reserves exclusive jurisdiction to the Disciplinary Chamber to hear and rule on cases of the retiring of judges of the Supreme Court, so that those cases may be examined by a court which meets the requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field. See, in particular, paras. 132–166 of the decision.

²⁵ Case C-824/18 A.B. and others (Nomination des juges à la Cour suprême – Recours) [2021], ECLI:EU:C:2021:153.

²⁶ Pending Case C-204/21, Commission v. Poland.

time as that Member State complied with the obligations arising from the order of 14 July 2021 or, if it failed to do so, until the date of delivery of the final judgment²⁷.

More recently, in July 2021, the Court held that the disciplinary regime for judges in Poland was not compatible with EU law²⁸ - a regime it had ordered Poland to immediately suspend in April 2020²⁹. The Court declared therein in that:

- (i) by failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, which is responsible for reviewing decisions issued in disciplinary proceedings against judges;
- (ii) by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts;
- (iii) by conferring on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts and, therefore, by failing to guarantee that disciplinary cases are examined by a tribunal “established by law”; and
- (iv) by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time, and by providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect on the course of the disciplinary proceedings and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel and, therefore, by failing to guarantee respect for the rights of defence of accused judges of the ordinary courts...

... Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. Also, and more significantly perhaps, the CJEU held that “by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice of the European Union to be restricted by the possibility of triggering disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU”.

Finally, last month, in November 2021, within a preliminary reference, the CJEU ruled that EU law precludes the regime in force in Poland which permits the Minister for Justice to second judges to higher criminal courts; secondments which that minister – who is also the Public Prosecutor General – may terminate at any time without stating reasons³⁰.

²⁷ Case C-204/21 R, Order of 27 October 2021, Commission/Poland, ECLI:EU:C:2021:878.

²⁸ Case C-791/19 Commission/Poland (Régime disciplinaire des juges) [2021] ECLI:EU:C:2021:596.

²⁹ Case C-791/19 R, Order of 8 April 2020, Commission/Poland [2020] ECLI:EU:C:2020:277.

³⁰ Joined Cases C-748/19 to C-754/19 Prokuratura Rejonowa w Mińsku Mazowieckim, [2021] ECLI:EU:C:2021:931.

The list of judicial proceedings before the CJEU on the issue of the independence of the judiciary speaks for itself. In parallel, the systematic violation of judicial independence in Poland has also been voiced by several other institutions in different *fora*, and has been the object of both academic and political debate and popular reaction³¹.

3 Other Examples: Hungary

We know that in this process Poland does not stand alone. Notably, the issue has been also the object of proceedings against Hungary. Already in 2012, the CJEU deemed that the radical lowering of the age of retirement of judges was “unjustified discrimination founded on age”³².

More recently, in November 2021, the CJEU decided, within a preliminary reference by an ordinary judge, that EU law precludes a national supreme court, following an appeal in the interests of the law brought by the Prosecutor General, from declaring a request for a preliminary ruling submitted by a lower court unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings. In this case, disciplinary proceedings (which were in the meantime discontinued) had been brought against the referring judge. Since he was uncertain as to whether such proceedings and the decision of the Supreme Court were compatible with EU law and as to the impact of that decision on the action to be taken upon the criminal proceedings before him, the judge made a supplementary request for a preliminary ruling in that regard³³.

Hungary has also been brought to the CJEU on the grounds of the violation of other rule of law principles. Hence, it was condemned twice in 2020 for having restricted the funding of NGO’s from abroad³⁴ and regarding the bill on universities targeting George Soros’ University of Central Europe³⁵. In June 2020, the CJEU considered that the restrictions imposed by Hungary on the financing of civil organisations by persons established outside that Member State did not comply with EU law; and, in October 2020, that the conditions introduced by Hungary to enable foreign higher education institutions to carry out their activities in its territory were incompatible with EU law.

Also in 2020, Hungary was condemned for its refusal to apply the relocation mechanism for asylum seekers, for illegally detaining asylum seekers in transit zones, and for failing to fulfil its international protection and return obligations. In April of said year, the CJEU decided that by refusing to comply with the temporary mechanism for the relocation of applicants for international protection, Poland, Hungary and the Czech

³¹ See e.g. Warsaw protest in January 2020: “Thousands protest against Poland’s plan to discipline judges” Reuters (11.1.2020) available at <https://www.reuters.com/article/us-poland-judiciary-toga-march-idUSKBN1ZA0PD> accessed 27 January 2024; and C Davies “Judges join silent rally to defend Polish justice” The Guardian (12.1.2020) at <https://www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers> accessed 27 January 2024.

³² Case C-286/12 Commission v. Hungary [2012] ECLI:EU:C:2012:687.

³³ Case C-564/19 IS (Illégalité de l’ordonnance de renvoi) [2021] ECLI:EU:C:2021:949.

³⁴ Case C-78/18 Commission/Hungary (Transparency of associations) [2020] ECLI:EU:C:2020:476.

³⁵ Case C-66/18 Commission/Hungary (Enseignement supérieur) [2020] ECLI:EU:C:2020:792.

Republic failed to fulfil their obligations under European Union law; and that those Member States could rely neither on their responsibilities concerning the maintenance of law and order and the safeguarding of internal security, nor on the alleged malfunctioning of the relocation mechanism to avoid implementing that mechanism³⁶. Later that year, in December, the Court held that Hungary failed to fulfil its obligations under EU law in the area of procedures for granting international protection and returning illegally staying third-country nationals. In particular, by restricting access to the international protection procedure, unlawfully detaining applicants for that protection in transit zones and by moving illegally staying third-country nationals to a border area, without observing the guarantees surrounding a return procedure, Hungary had breached EU law³⁷.

Furthermore, in November 2021, the CJEU held that by criminalising organising activities in relation to the initiation of a procedure for international protection by persons not fulfilling the national criteria for granting that protection, Hungary infringed EU law – as criminalising such activities impinges on the exercise of the rights safeguarded by the EU legislature in respect of the assistance of applicants for international protection³⁸.

And finally, it is worth mentioning that, in June 2021, the CJEU dismissed Hungary's action against Parliament's resolution triggering Article 7 TEU – *i.e.* the procedure for determining the existence of a clear risk of a serious breach by a Member State of the values on which the European Union is founded³⁹.

4 What's Next?

Despite the latter ruling, actions for infringement initiated by the Commission (together with some brave preliminary references put by national courts to the CJEU) have served as a substitute for Article 7 TEU. Facing the shortcomings of the latter procedure⁴⁰, the Commission has resorted to the classical instrument of the actions for infringement against Member States who are deemed to be in breach of their EU law obligations, bringing those states to court.

It is furthermore clear that despite the legal and political difficulties associated with the current crisis, the Union cannot tolerate the existence of political regimes that bluntly breach the core values of the Union. The European Union is not based on a mere community of interests; it is grounded on a true community of values.

The question at this moment is thus: what now? What must be done next? Or what more can be done to manage the crisis and control the flourishing of illiberal regimes within the Member States of the Union? Although it can be difficult to anticipate the precise future conduct of all the relevant the actors, some alternatives can be pointed out.

³⁶ Joined Cases C-715/17, C-718/17 and C-719/17 Commission v. Poland, Hungary and the Czech Republic (Temporary mechanism for the relocation of applicants for international protection) [2020] ECLI:EU:C:2020:257.

³⁷ Case C-808/18 Commission v. Hungary (Accueil des demandeurs de protection internationale) [2020] ECLI:EU:C:2020:1029.

³⁸ Case C-821/19 Commission v. Hungary (Incrimination de l'aide aux demandeurs d'asile) [2021] ECLI:EU:C:2021:930.

³⁹ Case C-650/18, Hungary v. Parliament [2012] ECLI:EU:C:2021:426.

⁴⁰ See D Kochenov (2018) pp. 166–187.

4.1 Withdrawal from the Union (Article 50 TEU)

Starting with the avenues that seem less likely to produce relevant outcomes, the radical solution of withdrawal from the Union seems to be “off the table”. Although it has been argued that the Polish Constitutional Court ruling could be read as a full-blown implied decision to withdraw from the EU⁴¹, the argument is unconvincing. Plus, Poland has clearly affirmed its intention to continue to be part of the EU (although it is willing to contest some of the “rules of the game”). The words of the Polish Prime Minister before the European Parliament leave no scope for doubt: *“For us, European integration is a civilisational and strategic choice. We are here, we belong here and we are not going anywhere”*⁴².

4.2 Rule of Law Framework

Secondly, hopes do not seem to lie in the so-called “Rule of Law Framework”⁴³ and the more flexible and informal dialogue with Member States it enshrines. Although the mechanism was designed to be *“activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law”*⁴⁴, the Commission has used this framework only once to try to stop developments in Poland. It has not used it against countries where it has expressed concerns, such as Malta (where the murder of journalist Daphne Caruana Galizia highlighted systemic failings in the judiciary), or Romania (where the then ruling Social Democratic Party legislated to try to protect its leader from corruption proceedings and increase its control over judges). More significantly, the Commission has contributed to weaken the tool when it failed to engage with Hungary.

In any case, in September 2020, Parliament called for the creation of a new mechanism to cover democracy, the rule of law and fundamental rights, which would consolidate and supersede existing instruments to avoid duplication - in particular, the annual Rule of Law Report, the Commission’s Rule of Law Framework, the Commission’s annual reporting on the application of the Charter, the Council’s Rule of Law Dialogue and the Cooperation and Verification Mechanism – and would be supported by *“country-specific clear recommendations, with timelines and targets for implementation”*⁴⁵. Non-compliance under the mechanism could lead to action under Article 7 TEU, infringement

⁴¹ See C Hillon (2020) at <https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/>.

⁴² Available at <https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament> accessed 27 January 2024.

⁴³ Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law (COM/2014/0158 final. See D Kochenov and L Pech (2015) pp. 512–540.

⁴⁴ Section 4.1.

⁴⁵ Report on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INL)) available at https://www.europarl.europa.eu/doceo/document/A-9-2020-0170_EN.pdf accessed 27 January 2024.

procedures or the implementation of budgetary conditionality. It would be expected that the current rule of law mechanism would be strengthened if it included such provisions, linking the monitoring of national situations to concrete means of action⁴⁶.

4.3 Article 7 TEU

Independently, it is important that the Council concludes Article 7 TEU procedure. Very few hearings with Member States have been organised so far. Several countries have held the Council presidency without organising any hearings.

It has been widely said that the Council will not be able to conclude the proceedings because the two currently targeted countries will support each other and prevent any decision to sanction them. However, the unanimity vote and the decision to apply sanctions fall under Article 7(2) procedure, not Article 7(1) which is open in both cases. The aim of the latter is to simply establish the existence of a “clear risk of a serious breach” of the rule of law, without the possibility of imposing sanctions. The Council, “where 25 states voted in favour of the conditionality regime in December 2020, should be able, if it has the political will, to muster the four-fifths majority required for this decision”⁴⁷.

Concluding Article 7(1) procedure would be the first time that the rule of law would be formally asserted by peers as being under threat. Although the opening of Article 7(2) is unlikely, as long as Budapest and Warsaw support each other, it would increase political pressure, especially if combined with other instruments such as the infringement procedures and the conditionality regime.

4.4 Actions for Infringement

Resorting to classical mechanisms, the European Commission could initiate further action for infringements under Article 258 TFEU. For instance, an action against Poland on the grounds of the illegality of the Constitutional Court ruling. After *Commission/France*⁴⁸, it is clear that the Commission could act on the basis of a breach committed by the judiciary. In the past, the Commission has refrained from doing so in similar cases, which could mean that this course of action could be seen as controversial and would have to be duly justified. In any case, this year the Commission has sent a letter of formal notice to Germany, concerning the German Constitutional Court’s

⁴⁶ See “The Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights” available at [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2072\(INL\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2072(INL)) accessed 27 January 2024.

⁴⁷ See E Maurice (2021) at <https://www.robert-schuman.eu/en/european-issues/0590-protecting-the-checks-and-balances-to-save-the-rule-of-law> accessed 27 January 2024.

⁴⁸ Case C-416/17 Commission v. France (Advance payment) [2018] ECLI:EU:C:2018:811.

Weiss judgment⁴⁹, arguing therein that through that judgment, Germany violated several fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness and uniform application of EU law, as well as the jurisdiction of the CJEU under Article 267 TFEU.

Moreover, the Commission could initiate more judicial actions against Member States on rule of law issues. Several suggestions have been made and include at least three other judicial reforms in Poland regarding (i) the composition of the Constitutional Court and its non-compliance with the rulings of the CJEU; (ii) the competences of the Extraordinary Chamber of the Supreme Court, (which is responsible for, among other things, electoral disputes); (iii) and the composition of the National Council for the Judiciary, a body which has been suspended from the European Network of Councils for the Judiciary because of its political character⁵⁰.

Furthermore, pursuant to Article 260 TFEU the Commission maintains the possibility to ask the CJEU for the enforcement of its judgments through the imposition of a lump sum or penalty payment until the decisions of the CJEU are fully complied with.

4.5 Action for Systemic Violations of Rule of Law Principles

It has also been suggested that, based on precedent, the Commission could bring a new kind of action for failure to fulfil EU law obligations on the grounds of the existence of systemic and reiterated violations to the rule of law principles, which could allow for a more effective and wide-reaching judgement by the CJEU.

This would be a kind of “bundle judicial proceeding” that could respond not just to new laws/measures in isolation, but to actions that rely on non-independent bodies to dismantle or weaken checks and balances and would work along the lines of Article 7 TEU.

4.6 Facing Time Constraints

Additionally, as time is of the essence, the Commission could consider (i) reducing deadlines for action, (ii) open proceedings immediately after the adoption of the contested measures, (iii) reduce the time for the issuance of a reasoned opinion after an unsatisfactory response and refer the country to the CJEU if the Member State does not comply.

⁴⁹ See EU Law Live “Commission initiates infringement proceedings against Germany over German constitutional court’s *Weiss* judgement” 9.6.2021 available at <https://eulawlive.com/commission-initiates-infringement-proceedings-against-germany-over-german-constitutional-courts-weiss-judgment/> accessed 27 January 2024. “While noting that the German Constitutional Court recently dismissed as inadmissible two applications for an order of execution on 29 May, and held that the judgment had been sufficiently complied with, it reasons that the breaches of the principle of primacy of EU law have still not been dealt with. In this sense, the Commission considers that the *Weiss* judgment constitutes ‘a serious precedent, both for the future practice of the German Constitutional court itself, and for the supreme and constitutional courts and tribunals of other Member States’.”.

⁵⁰ See E Maurice (2021) at <https://www.robert-schuman.eu/en/european-issues/0590-protecting-the-checks-and-balances-to-save-the-rule-of-law> accessed 27 January 2024.

In addition, Accounting for the importance of time in complex judicial proceedings that may be prolonged beyond reasonable, the Commission should continue asking the CJEU to impose all necessary interim measures.

And it is worth recalling that the CJEU may always decide to deal with certain cases under an accelerated procedure under the procedural rules in force, “where the nature of the case requires that it be dealt with within a short time”⁵¹.

4.7 The Conditionality Regulation

Notwithstanding all these possibilities, hopes lie mostly in the so-called “Conditionality Regulation”⁵² – the EU Regulation that provides for a general regime of conditionality for the protection of the Union budget. It has been said that this would allow to “hit where it hurts the most” by cutting off EU funding to Member States found to be in breach of the rule of law⁵³.

However, the European Council’s conclusions of December 2020 have casted doubts on the avenues opened under said regulation. In fact, not only Member States have qualified the possible recourse to said mechanism in numerous ways - affirming that the regulation will be applied in full respect of article 4(2) TEU, notably the national identities of Member States inherent in their fundamental political and constitutional structures, of the principle of conferral, as well as of the principles of objectivity, non-discrimination and equal treatment of Member States - but more importantly the Commission announced its intention to develop and adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment. In this regard, the Council stated that, should an action for annulment be introduced regarding the Regulation, the guidelines will be finalised after the judgment of the CJEU so as to incorporate any relevant elements stemming from such judgment. Until such guidelines are finalised, the Commission committed not to propose measures under the Regulation.

That said, Poland and Hungary have brought actions for annulment against the regulation on March 2021. Both Member States contested the act on several grounds: arguing that (i) it rests on an incorrect legal basis, it breaches (ii) Article 7 TEU, (iii) the principles of conferral, (iv) institutional balance, (v) legal certainty, (vi) proportionality, (vii) equality of Member States, (viii) it impinges on the jurisdiction of the CJEU, and (ix) it violates EU financial norms. At this moment, both actions are still pending before the CJEU and it is not difficult to anticipate that these will be complex cases that may take the CJEU some time to decide⁵⁴, although the recent delivery of the Advocate-General’s Opinion - considering that both actions should be dismissed – is good news in this respect.

⁵¹ See Article 33 of the Rules of Procedure of the CJEU.

⁵² Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1–10.

⁵³ SeERD Kelemen and KL Scheppele (2018) at <https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu>.

⁵⁴ Pending Case C-156/21 Hungary v. Parliament and Council and Pending Case C-157/21, Poland v. Parliament and Council.

4.8 Political Process

These legal remedies should not in any case make obviolate the centrality of the political process. Despite of the avenues opened by the several juridical solutions and the possibility of combining all of them to maximize effectiveness, the threats to the rule of law in Europe need mostly to be politically contained. Courts can only do what they are meant to do. In Poland (and probably in Hungary) it seems that they will not be capable of doing much (although more references to the CJEU by national courts on rule of law issues may help to implement and complement the existing case-law). In any case, an answer must be found in the political dynamics of the European Union.

At this level, there is still something that can be done. As stated above, Council should resume Article 7 TEU, and Member States could be more involved in supporting the actions undertaken therein. Parliament could decide to systematically organise debates on the countries whose annual reports on the rule of law are the most problematic. The Commission could do more to explain its work, its intentions but also its constraints. As someone has put it: *“the strength of the law and the range of existing instruments also lies in the confidence that the institutions inspire in citizens and governments”*⁵⁵.

In reality, any solution to the crisis will much depend on some degree of goodwill and cooperation by Member States and the EU institutions. The crisis has put in evidence that the balance between Member States competences and those of the EU is a delicate one, with systemic implications, and cannot be solved exclusively through the classical judicial dialogue between European and constitutional courts. As the EU cannot resort to the force of arms to enforce EU law nor the CJEU's decisions – as happened for instance in the USA with the episodes surrounding the enforcement of the Supreme Court's decision in *Brown vs. Board of Education*, in September 1957, in Little Rock, Arkansas⁵⁶-, the role of politics is imperative.

5 Final Remarks

I end with two final notes.

A first one, to highlight that whatever the solutions to be implemented, the immediate demands of today should not make us forget the need to find a political solution that ensures the integrity of the Union and its nature as a Union of law in the long run.

A second one, to re-affirm that the current crisis should not be confused with previous episodes of constitutional crisis in the EU. The rule of law crisis runs much deeper. To be clear: constitutional dialogues and divergences play an important role in the EU if courts operate against the backdrop of constitutionalism (i.e., acknowledging separation of powers and protection of fundamental rights as the backbone of the EU constitutional legal order). Once agreement on the foundations of EU constitutionalism is at stake, no honest or loyal constitutional dialogue can take place. After all, it is not supremacy that

⁵⁵ See E Maurice (2021) at <https://www.robert-schuman.eu/en/european-issues/0590-protecting-the-checks-and-balances-to-save-the-rule-of-law> accessed 27 January 2024.

⁵⁶ With the Governor calling the National Guard to surround Central High, declaring “blood would run in the streets” if blacks students attempted to enter and President Eisenhower's decision to send federal troops to ensure the protection of the black students, while entering the school.

constitutes an existential condition of EU law. At the end of the day, it is the primacy of the rule of law that truly constitutes the backbone of the European project. It is in the affirmation of the rule of law that the EU finds its original vocation and where its legitimacy is built every day.

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The Position of the Public Prosecutor's Office – The Need for European Standards on Internal/External Independence

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It is a pleasure to be with you today in this incomparable setting in the city of Lisbon, which the Law Faculty of the Catholic School of Law offers us.

I would first like to thank MEDEL and its President, Filipe Marques, for their kind invitation to take part in this series of conferences and in this round table, which offers us the opportunity to reflect together on the rule of law in Europe and on the guarantees of independence and autonomy of the judiciary and the Public Prosecutor's Office.

The principle of separation of powers is a fundamental pillar of any rule of law and of any democracy. The Executive, the Legislature and the Judiciary are the powers that make up the State, but it is from the people that they emanate and who are their true owners. We are their mere administrators, each in our own sphere and competence, as public servants. In this task, each of these powers must act separately and independently, but in harmony with the others, in order to fulfil their respective obligations and the very purpose of their democratic existence.

In this respect, the independence of the judiciary and the autonomy of the Public Prosecutor's Office are of particular relevance, in order to fulfil the important mission entrusted to them by our constitutions, to guarantee the Rule of Law, legality and the rights of citizens.

To this end, it is essential for states to have a body of law that guarantees the essential conditions for those who make up the state to be able to act free from any kind of unjustified internal or external interference, especially from the political powers.

Democracies are never fully and definitively built, they are not an achievement to be taken for granted. The duty of citizens, but above all of institutions, is to work every day for the effective realisation of their principles and values. We must be alert and react to political and ideological drifts that could jeopardise the democratic standards that we have set for ourselves through national and international consensus, among all of us.

These are not just abstract threats, for in Europe itself we are witnessing legal reforms affecting the independence of the judiciary, such as those in Poland and Hungary, which are of great shared concern and which have prompted a reaction from European bodies and courts.

All of the above should lead us to a profound reflection on the position of the judiciary and - as we are now addressing in this round table - of the Public Prosecutor's Office in

D. Delgado—Former Minister of Justice and Prosecutor-General.

democratic systems of justice. And also to take the path towards a definitive strengthening of the autonomy of the Public Prosecutor's Office in all possible spheres.

This is why it is so important to equip ourselves, at European and international level, with common standards of independence and autonomy, as well as supranational evaluation and control mechanisms.

Among them, I would highlight, within the scope of the Council of Europe, the rounds of evaluation and recommendations of GRECO (Group of States against Corruption) in the field of judicial independence. I must say that the latest assessment of Spain has improved significantly, and has evolved from "globally unsatisfactory" in 2016 and 2018 to conclude in 2019, in view of the positive advances, that we are no longer entitled to such a rating. The 2021 report considers 6 of the 11 recommendations to have been fulfilled, 4 to have been partially fulfilled and only one - which does not refer to the Public Prosecutor's Office - remains unfulfilled.

The only recommendation that depends exclusively on the Public Prosecutor-General's Office, which refers to the establishment of a Code of Conduct for prosecutors, has been satisfactorily fulfilled last year with the approval by the Public Prosecutor's Council of a Code of Ethics, which all prosecutors have adopted through an inclusive and participatory process in which the entire career has been involved.

I would also like to make a very brief reference to the importance of the opinions of the Consultative Council of European Prosecutors, on which I will not dwell, as my dear Antonio Vercher, whom I would like to take this opportunity to congratulate on his recent re-election as President of this body, will be able to give a better account of it below.

I would like to cite here, by way of example, Opinion No. 13 (2018) on the independence, responsibility and ethics of prosecutors or Opinion No. 9 (2014) on European standards and principles concerning prosecutors. Also Recommendation (2000) 19 of the Committee of Ministers of the Council of Europe on the role of the Public Prosecutor's Office in the criminal justice system.

Finally, I cannot fail to mention the second part of the Venice Commission's Report on European standards on the independence of the judiciary, which refers specifically to the Public Prosecutor's Office.

I would like to take advantage of my speech to explain the general lines of the regulation of the Spanish Public Prosecutor's Office and its legal guarantees of autonomy, as well as to offer some reflections on the future, a future that for the Spanish Public Prosecutor's Office - which I have the honour of representing - is full of new challenges that we take on with enthusiasm and, above all, with responsibility.

The 1978 Constitution provides for the Public Prosecutor's Office in Article 124, within Title VI dedicated to the Judiciary. This is a complex arrangement whereby the Public Prosecutor's Office is integrated into the Judiciary, but is endowed with functional autonomy, exercising its function through its own bodies.

Our Constitution definitively renounces the old concept of the Public Prosecutor's Office as a "liaison body" between the Government and the Judiciary, making its independence from the Executive a reality. Consequently, the prosecutor will only act "*ex officio* or at the request of the interested parties", thus excluding any type of request or order from the Government.

The Constitution also entrusts it with missions of transcendental importance: to defend legality and the rights of citizens, on the one hand, and to promote the satisfaction of the public and social interest, on the other. It is therefore the guarantor not only of the Rule of Law, but also of the Social and Democratic State in which Article 1 of our Constitution establishes Spain.

The defence of legality, as a manifestation of the will of the people, becomes the main and most characteristic mission of the Public Prosecutor's Office, as a promoter of the action of justice, establishing itself as a "*custos legis*".

The constitutional configuration, as I was saying, also assigns it the defence of citizens' rights, in an organic and full sense, which means an expansion of our functions, as the public prosecutor will be actively present in all those areas and procedures in which fundamental rights and public liberties may be compromised, in order to guarantee their effective protection. Our protective functions are thus strengthened, as we want to move towards a principle of universal protection of people, of the most vulnerable and of their rights.

Our constitutional mission goes beyond defending the public interest protected by law, i.e. the interests of the community organised as a State and the maintenance of social peace through the exercise of *jus puniendi*.

To this it adds that of promoting the satisfaction of the social interest: that which represents the benefit and progress of society, and which takes on special relevance when placed in connection with the guiding principles set out in our constitutional text, such as the protection of the family, labour rights, health, access to culture, environmental rights, housing, the protection of youth, the disabled and the defence of consumers and users.

Article 124 of the Constitution also provided for the principles governing the actions of the Spanish Public Prosecutor's Office. On the one hand, we are guided by the principles of legality and impartiality, which mean that prosecutors are subject to the rule of law and guided by no other interest than the public interest.

On the other hand, we are governed by the principles of unity of action and hierarchical dependence, in such a way that the latter is an instrument for the former. This guarantees legal certainty and the equality of all before the law, so that there is a uniform response, homogeneous criteria for action in the face of similar requirements and conditions, anywhere in the national territory.

It should be recalled that, as European and international bodies have reiterated, the principle of hierarchical dependence should not be an obstacle to the autonomy of the Public Prosecutor's Office and its consideration as an impartial authority. This has been referred to, for example, in the Judgment of the CJEU of 12 December 2019, according to which the requirement of independence excludes the possibility of being subject to instructions from outside the judiciary, in particular from the Executive, but "does not prohibit internal instructions, which may be given to prosecutors by their hierarchical superiors, also prosecutors, on the basis of the subordination that governs the functioning of the Public Prosecutor's Office".

Our structure is territorially structured into different Prosecutor's Offices: Autonomous Community, Provincial and Area Prosecutor's Offices, each of which is

headed by a Chief Prosecutor. The units of the Prosecutor-General's Office, as well as the Special Prosecutor's Offices and the central bodies also have their own heads.

The networks of specialist prosecutors are also led by the corresponding Chamber Prosecutor, who is responsible for their coordination. And at the top of this system is the Public Prosecutor-General, the highest representative of the Public Prosecutor's Office, who has the powers granted to him or her by our Regulations, which do not include jurisdictional functions but rather executive ones.

As an instrumental principle, hierarchical dependence does not imply strict control over the actions of prosecutors, who maintain their personal autonomy through a whole system of checks and balances - the so-called check and balance - which are established in our Regulations, and which comply with European standards on the autonomy of the Public Prosecutor's Office.

Among them, in order to guarantee internal autonomy, control mechanisms are legally provided for, such as the Boards of Public Prosecutors or the intervention of the Public Prosecutor's Council, a democratic representative body of the career: nine of its twelve members are elected by direct suffrage of all prosecutors. The Council has important functions, such as informing on appointment proposals, resolving disciplinary and merit proceedings, hearing any referrals made by the chief prosecutors in a specific case, as well as appointments and replacements made by the Prosecutor-General, among others.

Furthermore, our Regulations govern an important mechanism to safeguard the personal autonomy of prosecutors, which is the right to disagree with the orders or instructions of a hierarchical superior when they consider them illegal or inappropriate, by raising the discrepancy before the Board of Public Prosecutors, which the Chief Prosecutor will have to hear before issuing the corresponding decision.

As for autonomy *ad extra*, i.e. that which guarantees the absence of external interference, it is articulated at various levels.

With regard to the appointment of the Public Prosecutor-General, our constitutional text grants its proposal to the Government, a system that Spain shares with other models in our European environment, and which is based on the function of the Public Prosecutor-General to develop criminal policy, focusing on those issues and criminal phenomena for which society as a whole has shown special interest or concern, through the democratically expressed will of the people. Examples of the development of criminal policy include the fight against gender violence, environmental protection, the prosecution of political corruption, and the defence of vulnerable groups or those who suffer discrimination.

To ensure this autonomy, our Regulations once again provide us with tools for control and checks and balances. The relations and communications between the Prosecutor-General's Office and the Government and Parliaments, both central and regional, are expressly provided for the Regulations. Any type of order or instruction from the Executive or other public powers is legally vetoed; this is unthinkable in the Spanish legal system.

The Government may only request, but not order, the Prosecutor-General to take action to defend the public interest. The feasibility or appropriateness of this request is decided after hearing the Board of Chamber Public Prosecutors, which will also be heard

whenever orders or instructions are issued on matters directly affecting any member of the Government.

We agree with GRECO's recommendation that this legal regulation could be implemented in a more transparent and protective manner, so as to expressly foresee that the Government's communications with the Prosecutor's Office are articulated in writing and duly recorded.

The 2007 reform gave an important boost to the autonomy of the Public Prosecutor-General, modifying his or her dismissal, which, until then, could be proposed at any time by the Government. Since 2007, as I have said, the Prosecutor-General can only be dismissed for the reasons set out in detail and not in a discretionary manner, nor can he or she be renewed during his or her term of office. This avoids any suspicion in the actions of the Prosecutor-General that might be aimed at not being dismissed or later renewed in office. The legal impossibility removes this shadow of doubt.

In Spain, therefore, we have a model of an independent and protective Public Prosecutor's Office, enshrined in our constitutional text and in our Regulations. This year we are commemorating the 40th anniversary of the Regulations and its significance for our democratic history.

But this is also a time for reflection and proposals for the future. We believe that, after these four decades in force and with the challenge of the projected change in the criminal procedure model looming, with the prosecutor as the director of the investigation, it is time to tackle a comprehensive regulatory reform, which would grant the Public Prosecutor's Office a status of reinforced autonomy.

The Prosecutor-General's Office is committed to promoting this new regulatory framework and this strengthening of our autonomy at different levels:

Firstly, through the attribution of *budgetary autonomy*. The true organisational autonomy of the Public Prosecutor's Office, the exercise of the functions constitutionally entrusted to it "through its own bodies", requires it to have its own budget, capacity and means for its management.

The budgetary autonomy of the Public Prosecutor's Office, its financial independence from the Ministry of Justice, which is already necessary at present, is essential in a model of purely accusatory criminal proceedings. The provision of expertise, the hiring of experts or other necessary expenses for the development of an investigation cannot depend - for obvious reasons - on the will of the Executive.

For this reason, the budget of the Public Prosecutor's Office must be set aside annually in the General Public Budget, as well as the prior provision of resources - personnel and material- for the management of its own resources.

An own budget is crucial for the autonomy of the Prosecutor's Office, as highlighted by GRECO, the Venice Commission, Recommendation 19 of the Council of Ministers, or the opinions of the CCPE, e.g. No. 7 (2012) on the administration of means of the Prosecutor's Offices, among others.

In the same vein, Regulation 2017/1939, which establishes enhanced cooperation for the establishment of the European Public Prosecutor's Office, warns in paragraph 111 of the need to provide it with its own budget to guarantee its full autonomy and independence.

This is therefore an unavoidable demand for a truly independent Prosecutor's Office.

Secondly, *organisational autonomy* is required, through the attribution to the Prosecutor's Office of powers in the administrative and regulatory regime of the members of the prosecutor's career, in areas as important as administrative situations, leaves of absence, permits, secondments, discretionary appointments or disciplinary regime.

For example, the Ministry of Justice currently has the power to refuse a secondment for a prosecutor to travel to participate in a particular judicial proceeding or inter-institutional meeting; or the Council of Ministers can depart from a discretionary appointment proposal of the Public Prosecutor General.

In terms of *regulatory autonomy*, the legal reservation that the Magna Carta itself provides for the regulations of the institution is at odds with the attribution to the Ministry of Justice of the capacity for regulatory development of these regulations, instead of limiting this regulatory capacity for the self-regulation of the institution to the Prosecutor-General's Office.

This inability to govern the structure and composition of its «own bodies» prevents the Public Prosecutor-General's Office from remedying any shortcomings it may have noticed in its organisation, which is fundamentally based on the principles of specialisation and territoriality. It should be the Public Prosecutor-General's Office itself which, by assessing the statistical data collected from all the prosecutor's offices and centralised in the Public Prosecutor's Inspection, should be able to allocate personnel resources within the framework of existing or newly created posts.

The regulatory autonomy of the Public Prosecutor's Office cannot be limited exclusively to the approval of circulars, instructions and consultations in development of the principle of unity of action. The nature of a body of constitutional relevance and the regulatory recognition of its own legal personality demand that the Public Prosecutor-General's Office has its own regulatory capacity over the internal regime of the Public Prosecutor's Office, over its own organisation, similar to that of the General Council of the Judiciary.

And finally, *training autonomy*. Despite the fact that the latest legal reforms have strengthened the leading role of the Public Prosecutor-General's Office in this area, by assigning us the task of drawing up training plans and strategies for initial and continuing training, the independent training of members of the Public Prosecutor's Office requires detachment from the organisation and management of the Ministry of Justice and the assumption of exclusive or shared competencies with the CGPJ, based on its own objectives, needs and budget.

In short, the future of the Spanish Public Prosecutor's Office depends on this comprehensive strengthening of its autonomy, in order to face the new challenges of the future with guarantees of success.

Thank you very much.

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Independence and Autonomy of Prosecutors in Europe: Opinion No. 16 (2021) of the Consultative Council of European Prosecutors (CCPE) of the Council of Europe

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1 Introduction

Under the title “Consequences of decisions of International Courts and Treaty bodies on the practical independence of Prosecutors”, the Consultative Council of European Prosecutors (CCPE)¹ of the Council of Europe (CoE), based in Strasbourg (France), has adopted, in accordance with the mandate given to it by the CoE Committee of Ministers, a document, generically called Opinion² - although the term report is also used - which analyses the basis for the independence of Prosecutors in Europe.³ It uses the term “independence” in a broad sense, so that it can be useful in all CoE countries, seeking to bring it into line with European reality, precisely in order to facilitate the professional work of prosecutors.

It is undoubtedly a timely document, especially considering the complications that different Public Prosecutor’s Offices in Europe are going through. In my own country, Spain, without going any further, the situation in this respect is very problematic, being, moreover, framed within a scheme with a strong political component, as can be seen by simply reading the daily press, to which I refer for the sake of brevity. All of which places the Spanish Public Prosecutor’s Office in an undoubtedly complicated situation, since the 1978 Constitution gave it the current treatment in its article 124.⁴

A. V. Noguera—President of the Consultative Council of European Prosecutors (CCPE).

¹ The acronym CCPE stands for Conseil Consultatif de Procureurs Européens, a consultative and advisory body of the Council of Ministers of the Council of Europe, created by Decision of the Deputy Ministers of Justice on 13 July 2005, with the intention of institutionalising an Annual European Conference of Prosecutors, which had been held until then.

² The CCPE devotes most of its activity to preparing Opinions on issues relevant to Prosecutors for the Committee of Ministers of the Council of Europe, to which it is an advisory body (see note 1 above), although other CoE bodies or countries may also ask the CCPE to prepare Opinions on specific issues.

³ The document was adopted on 26 November 2021, at the Council of Europe in Strasbourg by the individual vote of the Prosecutors representing the 47 Member States that make up the CoE.

⁴ Article 124:

Allow me to add that, at the time, I published an article on the CCPE⁵ - practically an informative article - in which I pointed out that the CCPE is a body created within the CoE with the aim of attending to the development of the Public Prosecutor's Office on the European continent, given that this development is a verifiable fact and is not confined to our country alone. This body also seeks to provide a unitary perspective, as far as possible, both to this process of development of the Public Prosecutor's Offices and to the strengthening of their independence, taking into account the different legal systems that coexist in Europe.

For the rest, I shall proceed to set out the most representative aspects of Opinion No.16 (2021), avoiding referring to the repercussions of the concept of independence on the Spanish Public Prosecutor's Office, which is governed in its essential aspects in Article 124 of the Constitution,⁶ and although there is no specific reference to the principle of independence, it should be pointed out, in any case, that Article 2.1 of the Regulations of the Public Prosecutor's Office,⁷ provides that the Spanish Public Prosecutor's Office is attached to the Judiciary.⁸

In any case, what the CCPE has been very clear in preparing this Opinion is that the aspects to which it refers must be fully respected in any CoE country, for the same reasons that the CoE itself has been established, i.e. because they are essential for the defence of the rule of law and human rights.

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1. The mission of the Public Prosecutor's Office, without prejudice to the functions entrusted to other bodies, is to promote the action of justice in defence of legality, of the rights of citizens and of the public interest protected by law, ex officio or at the request of the interested parties, as well as to ensure the independence of the Courts and to procure before them the satisfaction of the social interest.
 2. The Public Prosecutor's Office exercises its functions through its own bodies in accordance with the principles of unity of action and hierarchical dependence and subject, in all cases, to the principles of legality and impartiality.
 3. The law shall govern the regulations of the Public Prosecutor's Office.
 4. The State's Prosecutor General shall be appointed by the King, on the proposal of the Government, after hearing the opinion of the General Council of the Judiciary.

⁵ A. Vercher Noguera (2018).

⁶ See note 4 above.

⁷ Law 50/81 of 30 December 1981, which governs the Regulations of the Public Prosecutor's Office.

⁸ Article 2.1:

“The Public Prosecutor's Office is a body of constitutional relevance with its own legal personality, integrated with functional autonomy in the Judiciary, and exercises its mission through its own bodies, in accordance with the principles of unity of action and hierarchical dependence and subject, in all cases, to the principles of legality and impartiality”.

2 Essential Aspects of Opinion No. 16 (2021)

When preparing this document, several assumptions have been established which are essential to be able to speak clearly of independence, thus avoiding confusion and improprieties. These assumptions are as follows:

- It is assumed that there are several legal systems and cultures in Europe, with two pre-eminent systems, the Anglo-Saxon and the Continental. However, over the centuries European criminal justice systems have borrowed elements and institutions from each other, so that what we have today is a variety of hybrid systems.⁹ Paradoxically, this has led to an interesting degree or level of convergence,¹⁰ with prosecutorial independence being one of the aspects towards which Europe is moving most strongly.¹¹
- In turn, another essential starting point is the fact that many judicial decisions taken by different courts on the independence of Judges are closely linked to the independence of Prosecutors, since the independence and autonomy of the Prosecutor's Office is in turn an indispensable corollary of the independence of the judiciary.¹² The CCPE has therefore stressed to CoE Member States the need to take appropriate steps to strengthen the independence, accountability and ethics of Prosecutors,¹³ in parallel with those taken to promote the independence of Judges.¹⁴ It goes without saying that the Consultative Council of European Judges (CCJE) has been operating within the CoE together with the CCPE,¹⁵ and relations between the two advisory councils have

⁹ Paragraph 3 of the Opinion.

¹⁰ See Report on European Standards on the Independence of the Judiciary: Part II - The Prosecutor's Office, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17–18 December 2010), paragraph 9.

¹¹ "The members of the Public Prosecutor's Office must, in particular, give evidence of excellence in their decisions and professional conduct. At a time when the independence or tendency towards autonomy of the Public Prosecutor's Office is gaining strength, and taking into account the necessary responsibility that must be attached to it, the statutory and procedural rules are not sufficiently detailed to regulate the deontology and conduct of its members." Vide Explanatory Memorandum. Council Of Europe Committee Of Ministers Recommendation (2000)19 To The Member States On The Role Of The Prosecutor's Office In The Criminal Justice System (Adopted by the Committee of Ministers on 6 October 2000, during the 724th meeting of Ministers' Deputies). Paragraph 35.

¹² See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Charter of Rome, Section IV.

¹³ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section i.

¹⁴ See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Charter of Rome, Section V.

¹⁵ The Consultative Council of European Judges (CCJE) was established pursuant to Resolution No. 1 on Measures to measures to reinforce the independence and impartiality of judges in Europe, adopted by the 22nd Conference of European Ministers of Justice, which took place in

been particularly constructive. In fact, joint work has been carried out between the two institutions, in which a variety of issues have been dealt with, from statements on problems affecting judges and prosecutors in Europe to the drafting of an Opinion,¹⁶ also jointly, on issues of common interest to judges and prosecutors.¹⁷

- The independence of Prosecutors is indispensable for them to be able to carry out their professional mission. Strengthening their role in the establishment of the rule of law and society is a guarantee that the justice system will function properly and effectively and that judicial independence will be strengthened. Thus, as with the independence guaranteed to Judges, the independence of Prosecutors is not a prerogative or privilege conferred for their benefit, but a guarantee in the interests of proper, impartial and effective justice that protects the public and private interests of the individuals concerned.¹⁸ In that line, the Prosecutor must act with caution and fairness in deciding whether to prosecute and why to charge, because of the serious consequences for a human being of the initiation of an investigation and subsequent criminal trial, which can lead to conviction and punishment.
- In this respect, the Prosecutor, like the judge, cannot act in a case in which he or she has the slightest personal interest of any kind and must therefore be subject to professional responsibilities designed to safeguard his or her own impartiality and integrity.¹⁹
- Therefore, to cover the different possibilities of the various legal systems that exist in the CoE, in countries where the Public Prosecutor's Office is part of or subordinate to the Government, the State must ensure that the nature and scope of its powers with respect to public prosecution are clearly established by law, and that the Government exercises its powers in a transparent manner and in accordance with international treaties and standards, national legislation and general principles of law.²⁰

Chisinau (Moldova) on 17–18 June 1999. This resolution agreed on the adoption of a comprehensive action programme on Strengthening the Role of Judges, to be drawn up in consultation with judges, as well as the establishment, within the Council of Europe, of a consultative group composed of judges.

¹⁶ For example, the Joint Declaration on the problem of justice in Turkey, due to recent political developments, issued on 27 July 2016.

¹⁷ Such is the case of Opinion 4(2009), also known as the Bordeaux Declaration, under the title “Judges and Prosecutors in a Democratic Society”.

¹⁸ See CCPE Opinion No. 4 (2009) on relations between judges and prosecutors in a democratic society, para 27.

¹⁹ See Report on European Standards as regards the Independence of the Judicial System: Part II - The Office of the Prosecutor, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17–18 December 2010), paragraphs 16 and 17. See Opinion No. 16 (2021), paragraph 4 on the implications of the decisions of international courts and treaty bodies as regards the practical independence of Prosecutors.

²⁰ See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, paragraph 33.

- In the same vein, the Opinion indicates that both the autonomy and independence of Prosecutor’s Offices and Prosecutors should be promoted²¹ and legally guaranteed at the highest possible level and in a similar way to the independence of Judges.
- In the same vein, the Opinion continues, it is necessary that in countries where the Prosecution is independent of the governmental authorities, the State should take the necessary and effective measures to ensure that the nature and extent of this independence are established by law²² and not only by administrative provisions. Indeed, a fully independent Prosecution remains a guarantee of the unconditional impartiality of judges.

In addition to these assumptions, the preparation of Opinion No.16 is based on a varied normative basis from the CCPC itself,²³ conventions and case-law,²⁴ as well as contributions from the United Nations²⁵ and other entities related to the Public Prosecutor’s Office at a global level.²⁶

3 Principles and Practical Foundations Determining the Term “Independence” in a Broad Sense

Opinion No. 16 (2021) is built on an absolutely key principle. According to this principle: “independence means that the prosecutors are free from unlawful interference in the exercise of their duties to ensure full respect for and application of the law and the principle of the rule of law and that they are not subjected to any political pressure or unlawful influence of any kind. Independence applies both to the prosecution service as a whole, its particular body and to individual prosecutors.”²⁷

²¹ See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Charter of Rome, Section IV.

²² See Recommendation Rec (2000)19, paragraph 14. See also CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, paragraph 33.

²³ This Opinion also builds on previous CCPE opinions, in particular Opinion No. 9 (2014) on European norms and principles concerning prosecutors, including the Rome Charter, and Opinion No. 13 (2018) on the independence, accountability and ethics of prosecutors, as well as Recommendation Rec (2000)19 of the Committee of Ministers to Member States on the role of public prosecutors in the criminal justice system (hereafter Recommendation Rec (2000)19) and Recommendation Rec (2012)11 of the Committee of Ministers on the role of prosecutors outside criminal justice (hereafter Recommendation Rec (2012)11).

²⁴ This Opinion has been prepared on the basis of the European Convention on Human Rights and the relevant case-law of the European Court of Human Rights, as well as the case-law of the Court of Justice of the European Union and the relevant decisions of the United Nations treaty bodies.

²⁵ The CCPE has also gained insight from the United Nations Guidelines on the role of prosecutors, adopted in 1990, basically the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August - 7 September 1990.

²⁶ Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted in 1999 by the International Association of Prosecutors (IAP).

²⁷ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, paras 15–16.

At the same time, a number of practical aspects are listed which translate into a basis for asserting this independence:

- firstly, measures to ensure such independence should be established through the relevant legal framework, such as the independence of judges;²⁸
- consequently, the status, independence, recruitment and career of Prosecutors should, like Judges, be clearly established by law and governed by criteria of transparency and objectivity;²⁹
- regulations for Prosecutors should guarantee their external and internal independence, preferably through provisions at the highest legal level and ensure its implementation by an independent body such as a Prosecutorial Council, in particular for appointments, careers and discipline.³⁰ It is furthermore necessary to ensure the necessary stability and to develop appropriate provisions for the promotion, discipline and loss of status of Prosecutors;³¹
- throughout their career, including for recruitment and promotion, Prosecutors should be selected on the basis of their merits, skills, knowledge and ethical values, and receive adequate training to perform their duties independently and impartially, and in full compliance with ethical standards.³² This logically implies taking into consideration merits acquired through effort and dedication, which can be objectively evaluated and far from criteria strictly centred, for example, on youth or territorial location. The latter are neither merits nor demerits, but rather expressive of indecisiveness, inconsistency or fickleness and, in fact, are not even criteria, as was made clear in the debate on the subject in the CCPE.
- instructions from the executive branch relating to specific cases are generally undesirable. In this context, instructions not to prosecute should be prohibited and instructions to prosecute should be strictly governed in accordance with Recommendation Rec (2000)19;³³
- general instructions on the priorities of the Public Prosecutor's Office activities resulting from the law, the development of international co-operation or requirements relating to the organisation of the service must always be given in accordance with the law and, furthermore, in a fully transparent and written manner.³⁴ Furthermore, all

²⁸ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section i.

²⁹ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section iii.

³⁰ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section iii.

³¹ See Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17–18 December 2010), paragraph 18; see also CCPE Opinion No. 9 (2014) on European Norms and Principles concerning Prosecutors, paragraph 53.

³² See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section ii.

³³ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section iv.

³⁴ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, para 34–35.

internal instructions within the Office of the Prosecutor must be given in writing, be transparent and aim to seek the truth and ensure the proper administration of justice.³⁵

If instructions are given to Prosecutors by superiors within the Office, they should be in writing, be given in a transparent manner and always aim to apply the law with respect for human rights and fundamental freedoms;³⁶

- the status, remuneration and treatment of Prosecutors, as well as the provision of financial, human and other resources allocated to the services of the Prosecutor's Office, should correspond, in a manner comparable to that of Judges, considering the eminent nature of the Prosecutors' professional mission and duties;³⁷
- Member States should protect Prosecutors and, as appropriate, members of their families and livelihoods, in the performance of their duties;³⁸
- in their systems of administrative and hierarchical organisation, Member States, if they wish to confer or maintain the status of judicial authority on prosecutors within the meaning of the European Convention on Human Rights, must ensure that they have all the guarantees, in particular those necessary for independence, associated with that status;³⁹
- the general public and interested persons should, upon request, receive adequate information about the Prosecutor's Office and its activities. In parallel, Prosecutors should play a key role in disseminating such information through appropriate channels and in accordance with the law, while ensuring respect for prosecutorial independence, the presumption of innocence, the needs of the investigation, the protection of personal data and other relevant aspects according with what has been said above.⁴⁰
- Appointments for limited periods with the possibility of reappointment entail the risk that the Prosecutor makes his or her decisions not on the basis of the law, but with the idea of pleasing those who reappoint him or her.⁴¹ This is one of the most problematic aspects of the Public Prosecutor's Office, given the very limited regulation of this matter, which is leading to more than questionable approaches in which merits acquired through objectively assessable effort and dedication often do not take precedence, but rather other interests, including those of the hierarchical superior.

³⁵ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, para 40.

³⁶ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section vi.

³⁷ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section xi.

³⁸ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section ix.

³⁹ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section xii.

⁴⁰ See CCPE Opinion No. 13 (2018) on Independence, Accountability and Ethics of Prosecutors, Recommendations, Section vii.

⁴¹ See Report on European Standards as regards the Independence of the Judicial System: Part II - The Office of the Prosecutor, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17–18 December 2010), para 50. See paragraph 15 of Opinion No. 16 (2021) on the implications of the decisions of international courts and treaty bodies as regards the practical independence of Prosecutors.

4 Contributions from Case-Law and International Organisations

The references of the European Court of Human Rights (ECtHR) to prosecutors have, so far, been rather limited, as indicated in Opinion n° 16 of the CCPE.

Article 6 of the European Convention provides that everyone has the right to an independent and impartial tribunal established by law. There is a vast case-law on what an independent tribunal should be. The relevance of the concept derives from the fact that it is an element of the judicial system vital to the strengthening and functioning of the rule of law. An independent and impartial tribunal ensures respect for human rights and fundamental freedoms and is vital to ensure public confidence in the justice system in a democratic society. These have traditionally been the aspects most analysed by the ECtHR.

However, in relation to the same type of approach, the role of the Public Prosecutor's Office is essential. But more crucially, the Prosecutor plays a key role not only in the enforcement of laws, but more importantly, in giving full effect to rights, including, of course, human rights. Whatever his or her specific task in the national criminal justice system, it undoubtedly involves the notion of "Human Rights in Service".⁴²

However, as I have pointed out, the independence and autonomy of Prosecutors have so far been examined by the ECtHR only to a limited extent, unlike the case-law on Judges, which is much more comprehensive. These concepts, in relation to Prosecutors, have only been addressed in a few judgments. However, since the independence and autonomy of the Prosecutor's Office is, as the CCPE has made clear, an indispensable corollary of the independence of the judiciary,⁴³ the guidance provided by the judgments concerning the Judiciary⁴⁴ may also be applicable, *mutatis mutandis*, to the Prosecutor's Office.

In that vein, and referring already to the case-law of the ECtHR, it has been said that, in a democratic society, both the Courts and the investigating authorities must remain free from any kind of political pressure. It is therefore in the public interest to maintain confidence in the independence and political neutrality of the Prosecuting Authorities of a State.⁴⁵

It has also been said that the general procedural safeguards applicable in Member States include provisions regulating the institutional or functional independence of Prosecutors, whether they are members of the judiciary or civil servants.⁴⁶ Moreover, in some Member States, Prosecutors are protected from undue pressure by additional safeguards, such as the obligation to prosecute all offences except misdemeanours⁴⁷ (on the basis

⁴² See E. Myjer et al. (2009) p. 2.

⁴³ See paragraphs 2 and 4 of Opinion No. 16 (2021) on implications of decisions of international courts and treaty bodies as regards the practical independence of Prosecutors.

⁴⁴ See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Charter of Rome, Section IV.

⁴⁵ *Guja v. Moldova* No. 14277/04 of 12 February 2008, § 86 and 90.

⁴⁶ *Kolevi v. Bulgaria*, No. 1108/02, 5 February 2010, §§ 148–149; *Vasilescu v. Romania*, No. 27053/95, 22 May 1998, §§ 40–41; *P v. Romania*, No. 33343/96, 3 June 2003, § 238; *Mill v. France*, No. 37104/06, 23 November 2011, §§ 57.

⁴⁷ *Kolevi v. Bulgaria*, No. 1108/02, 5 February 2010, § 149.

of the need to respect the principle of legality). In some other Member States, which acknowledge the principle of discretionary prosecutions, importance is attached to the transparency of the official guidelines governing such discretion.⁴⁸

Although prosecution systems in some Member States are hierarchically structured with senior Prosecutors empowered to give orders and instructions to junior Prosecutors, a number of safeguards can be put in place to ensure the effectiveness and independence of the bodies in charge of criminal investigations from senior Prosecutors, including in relation to:

- transfer of the case to another entity within or outside the prosecution system;
- special investigation procedures in cases of suspicion against senior prosecutors;
- suspension of the Prosecutor under suspicion from his or her duties (in the case of the most senior Prosecutor this decision would be taken by the political bodies responsible for his or her appointment); and
- general safeguards, such as guarantees ensuring the functional independence of the Prosecutors within their hierarchy and judicial control over the actions of the Prosecutor’s Office.⁴⁹

The case of *Kolevi v. Bulgaria* is particularly interesting, in the context under consideration, in that the ECtHR established that the executive branch of Government cannot dismiss Chief Prosecutors without independent judicial review and also noted⁵⁰ that the premature termination of the applicant’s (Chief Prosecutor) term of office was a particularly severe sanction, which undoubtedly had a “chilling effect” in the sense that it must have discouraged not only her, but also other Prosecutors and Judges from participating in the future in the public debate on legislative reforms affecting the judiciary and, more generally, on issues relating to the independence of the judiciary. In doing so, the ECtHR reaffirmed, *inter alia*, the freedom of expression of Prosecutors with regard to legislative reforms that may have an impact on the judiciary and its independence.⁵¹

For its part, the Court of Justice of the European Union (CJEU) declared, with regard to prosecutors - and interpreting the concept of “issuing judicial authority”⁵² in relation to a European injunction - that Article 64 of the French Constitution guarantees the independence of the judicial authorities, which includes judges and prosecutors, and that the Public Prosecutor’s Office performs its duties objectively, free from any instructions from the Executive in a specific case. This is so, given that the Minister of Justice can only give general instructions concerning criminal justice policy to the Prosecutors in order to ensure that such policy is applied in a consistent manner throughout the national territory. As regards the government, such general instructions cannot in any event have the effect of preventing a prosecutor from exercising his discretion as to the

⁴⁸ *Kolevi v. Bulgaria*, No. 1108/02, 5 February 2010, §§ 149.

⁴⁹ *Kolevi v. Bulgaria*, No. 1108/02, 5 November 2009, § 142.

⁵⁰ *Pedregoso v. Romania*, No. 3594/19, 5 May 2020, §§ 154, 201, 205 and 208–209. See also *Baka v. Hungary*, No. 20261/12, 23 June 2016, §§ 156–157 and 164–167.

⁵¹ *Kövesi v. Romania*, No. 3594/19, 5 May 2020, §§ 209.

⁵² Within the meaning of Article 6(1) of 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.

proportionality of issuing a European arrest warrant. Moreover, the Public Prosecutor's Office carries out prosecutions and ensures that the law is applied in accordance with the principle of impartiality.⁵³

In turn, and with regard to the case-law of the Inter-American Court of Human Rights, referring to the specific duties of Prosecutors, the Court underlined the State's duty to carry out an independent and objective investigation in relation to human rights violations and crimes in general, stressing that the authorities in charge of the investigation must be independent, *de jure* and *de facto*, which requires not only hierarchical or institutional independence, but also actual independence.⁵⁴

The Court added that the independence of Prosecutors implies the absence of political pressure or undue hindrance in their professional actions, also ruling out any kind of reprisals for decisions taken by them in an objective and impartial manner. This requires a guarantee of stability and a fixed term in the exercise of their professional actions. Therefore, the specific guarantees for Prosecutors, in an equivalent application of the protection mechanisms recognised for Judges, can be expressed in the following points:

- (i) that removal from office must be for legally permissible reasons only, either through a procedure that complies with the right to a fair trial or because the mandate for which they have been appointed has expired;
- (ii) that Prosecutors can only be removed for serious disciplinary misconduct or incapacity, and
- (iii) all proceedings against Prosecutors must be in accordance with fair procedures that guarantee objectivity and impartiality under the Constitution or the law, since the free removal of Prosecutors promotes an objective doubt about the real possibility that they can perform their duties without fear of reprisals.⁵⁵

All this without forgetting the rulings of the Member States' own Courts which, inspired by the above case-law, have ended up reinforcing the independence of Prosecutors, being one of the examples of the positive progressive impact of the case-law of the international Courts, and in particular of the ECtHR, on the practical independence of the Prosecutors of the Member States. Such rulings relate to a wide range of aspects of the status and profession of Prosecutor, and are particularly necessary where reforms of the judiciary and the prosecution service do not provide sufficiently positive results.⁵⁶

For its part, the Human Rights Committee (HRC), which is the body of independent experts that monitors the implementation of the United Nations International Covenant

⁵³ See case 566/19 (joined cases C-566/19 and C-626/19), 12 December 2019, §54. See judgments delivered on the same date in Cases 625/19 and 627/19. See also cases C-489/19 of 9 October 2019; and cases C-508/18 (joined cases C-508/18 and C-82/19) and C-509/18 of 27 May 2019.

⁵⁴ Case of *Martínez Esquivia v. Colombia*, §§ 86–88. In the same vein, IACHR, Report No. 109/18, Case 12.840. Merits. *Yenina Esther Martínez Esquivia v. Colombia*, 5 October 2018, adopted by the Commission at its 126th session held on 5 October 2018, 169th Period of Sessions, available at: <https://www.oas.org/en/iachr/decisions/court/2019/12870FondoEn.pdf> accessed 27 January 2024.

⁵⁵ Case of *Martínez Esquivia v. Colombia*, §§95–96.

⁵⁶ See paragraph 61 of Opinion 16 (2021) on the implications of the decisions of international courts and treaty bodies as regards the practical independence of Prosecutors.

on Civil and Political Rights (ICCPR) by its States Parties, has issued a series of recommendations in relation to judicial and prosecutorial independence, insisting on the need to strengthen the independence of both the Judiciary and the Prosecutor's Office.⁵⁷ The HRC has also made clear that the principle of judicial independence, an essential guarantee for the independent exercise of judicial duties, requires that judges and prosecutors be able to interpret and apply the law and freely assess facts and evidence, without intimidation, obstruction or interference in the exercise of their duties.⁵⁸

5 Epilogue

It is clear that what emerges from the inventory of case-law of the international courts just reviewed, as well as the decisions of other bodies, initially focused on judicial independence, is an increasing concern for the independence of Prosecutors. This has been observed, moreover, in the light of developments in case-law and the subject in general in recent years. In turn, this compilation of case-law provides a number of useful indicative elements which can serve to clarify the concepts of prosecutorial impartiality and independence, both in law and in practice.

It is therefore a very interesting process, with the main added value that the ECtHR case-law has binding force and the requirement, as it follows, that general measures be taken by the Member States to put an end to the violations identified in the ECtHR judgments. This process is mandatory and is supervised by the Committee of Ministers of the Council of Europe, as is clear from Article 46 of the European Convention on Human Rights.⁵⁹

⁵⁷ Concluding remarks regarding Angola, 2019.

⁵⁸ See paragraph 83 of Opinion 16 (2021) on the implications of the decisions of international courts and treaty bodies as regards the practical independence of Prosecutors.

⁵⁹ Article 46:

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1,

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it shall refer the case to the Committee of Ministers, which shall close its examination of the case.



Public Prosecutor's Offices, Decisions of the Court of Justice of The European Union, Jurisdiction and Risks of Misconceptions

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1 Grounds

The title of this session “The position of the Public Prosecutor’s Office/the need for European rules on internal/external independence” is inseparable from one of the most curious paradoxes of the Public Prosecutor’s Office within Europe:

- On the one hand, it remains the most national of the formal instances of control, due to the enormous diversity among Member States (MS);
- On the other, it has been the protagonist in some shaping or harmonisation projects within the framework of the European Union (EU)¹.

This intervention will not focus on the principles developed in the framework of soft law expressed in recommendations of the Committee of Ministers of the Council of Europe² and in opinions of the Consultative Council of European Prosecutors. Nor will it address the political mechanisms available to EU bodies that may have repercussions on national prosecutors, under Articles 2 and 7 of the Treaty on European Union.

Our centre of attention will therefore be the possibility of EU rules, in a functional sense (as opposed to axiological guidelines), namely binding prescriptions of the Court of Justice (ECJ) for Member States concerning the Public Prosecutor’s Office as an actor in criminal.

This is an area in which two levels must be distinguished:

- On the one hand, possible general institutional rules;
- On the other hand, guarantees arising from the exercise of specific functions and/or obligations of Member States—for example on certain powers regulated by European rules (such as the issuing of European arrest warrants) or obligations of effectiveness in the prosecution of certain offences such as those affecting the EU’s financial interests, the suppression of money laundering and the financing of terrorism.

P. Dá Mesquita—Judge at Tribunal de Contas.

¹ This paradox had already been highlighted in DÁ MESQUITA (2003) p. 14.

² Such as those adopted on the management of criminal justice and the role of the Public Prosecutor’s Office in the criminal justice system, Recommendations Rec(1995)12 and Rec(2000)19.

Guarantees for certain functional areas within the Public Prosecution Service (the second level referred to above) should not be confused with supposed general statutory European standards on the duties of Public Prosecutors in Member States (the first level referred to above). In many cases, the assessment of national rules on the Public Prosecutor's Office by international courts only arises in the event that particular responsibilities are assumed by Public Prosecutors at the domestic level and are not covered in terms of national law by the reservation of jurisdiction (in which case supranational requirements on guarantees for Public Prosecutors as a condition for the exercise of these functions would no longer be relevant).

2 Historical Mark of the National Models of Criminal Procedure and Configuration of the Public Prosecutor's Office

The development during the 19th century in some European States of a Public Prosecutor's Office as a bureaucratic institution extended to the entire national territory revealed in continental Europe an instrument with the potential to disembody the judicial system, through the functional distribution, but also an institution that in the service of the purposes and interests of the dominant political powers could condition the independence of the judicial system.

These constructions are inseparable from the reformist movements of criminal procedures that have emerged in continental Europe since the end of the 18th century, which, despite being influenced by some representations of the English system, have come to take shape in different schemes of reaction to the judicial order of the Ancien Régime, with some of the most dramatic disruptions focusing on the field of evidence, but also on institutional components such as the changes in criminal juries and schemes on the exercise of criminal prosecution³.

In the 19th century, two opposing schools developed, the French and the Italian, on the relationship between the Public Prosecutor's Office and the executive and the exercise of criminal prosecution, which influenced the organisational and procedural configuration in several other countries, namely Spain and Portugal⁴. There is a diversity of institutional designs, functional scopes and constitutional frameworks for national

³ DÁ MESQUITA (2011) pp. 44–49.

⁴ At the beginning of the 20th century, the Portuguese proceduralist ALBERTO DOS REIS considered that according to the French school, “the public prosecutors are representatives of the executive power before the judicial authority, hence their removability, hierarchical subordination to the minister of justice and disciplinary responsibility towards that minister for the execution of orders received”, REIS (1905) p. 189. RASSAT (1996) p. 107 and MATHIAS (1999) pp. 25, from different perspectives, consider that the association of the Public Prosecutor's Office with the Executive was a “historical error” caused by an equivocation as to its antecessors, the Prosecutors of the Republic. In the words of Alberto dos Reis, for the Italian school: “the Public Prosecutor's Office, in the exercise of its judicial functions properly so called, cannot be considered to represent the executive power, because the latter has no right to be represented in any part or stage of the process. The Public Prosecutor's Office must therefore be an irremovable magistracy independent of both the executive power and the judicial magistracy”—see REIS (1905) and MORTARA (1896).

Public Prosecutors' Offices, which, if the assessment is extended to all the states that are currently members of the EU, comprises multiple distinct schemes, marked by different historical roots (for example, the mark of the German criminal procedure reform of 1877), with hybrid and eclectic solutions being found in several states, in terms of organisational design, the relationship with the executive, the police and the courts, as well as variants related to models and guarantees of other administrative apparatus of the specific states.

The comparative study of the institution of the Public Prosecutor's Office must include a reading of its organic and procedural components that is attentive to its historical dimensions, and also depends on instruments for analysing the systems of administration of justice and the cultures themselves (legal and operational) which cannot be limited to a descriptive juxtaposition of legal systems, but must include considerations on *ideal* models intended to serve as a grid for classification, analysis, and understanding of concrete legal systems⁵.

3 Case Law of the Court of Justice on Public Prosecutor's Office and Judicial Authority Concepts

The case law of the ECtHR and the ECJ in their consideration of the institutional guarantees of national Public Prosecutor's Offices has focused mainly on the second of the two levels we initially mentioned: certain competences that in some legal systems are part of the judge's reserve and in others are (or may be) attributed to the public prosecutor, especially when the legal texts applied by these courts refer to a specific concept of judicial authority (JA).

Article 5(3) of the European Convention on Human Rights (ECHR), in relation to the legality of detentions, refers to a *judge or other officer authorised by law to exercise judicial power*, which summoned the Strasbourg Court, in particular, to examine the guarantees of the prosecutors who make up certain national Public Prosecutors' Offices.

The case of *Moulin v. France* judgment, of 23 November 2010, addressed the guarantees of autonomy of the decision-making of *other officers authorised by law to exercise judicial power* in addition to the principle of the unity of the judiciary in force in France, according to which magistrates, after entering a single national competition, may exercise successive judicial and Public Prosecutor's Office functions throughout their career.

⁵ Hence, DAMASKA undertakes a functional analysis that has as a decisive reference point the organizational structure that power assumes (especially in the judicial sector) in general connection with that which the State assigns to it. This construction is highly complex in that it is articulated at three main levels: (1) the organization of powers in general, (2) the structure of the judiciary, and (3) the forms of the process; its operability is based on the simplicity of the basic theoretical elements, whose analytical combination, reinforced and associated with the contents coming from historical and comparative analysis, transforms them, according to Taruffo, "into a particularly malleable and effective instrument for the construction of ideal models but also for verifying their correspondence with reality": TARUFFO in DAMASKA (1991) p. 117.

The ECtHR found a violation of Article 5/3 of the ECHR due to the combination of three decisive factors: the detainee was not brought before a judge until more than five days after her detention, five days is an excessive period of time for presentation to a judicial authority subsumed under the rule of the Convention and the French Public Prosecutor's Office to whom the defendant was presented during this time (and who decided to extend the detention) did not meet the requirements of a JA for this purpose, as he lacked full independence from the executive.

At the level of European Union law, the concept of JA has been particularly developed by Article 6 of the Framework Decision (FD) on the European arrest warrant (EAW) and the guarantees that the Public Prosecutor's Office must meet in order to issue EAWs under that statute⁶.

Since it was initially uncontested that the concept of an JA could go beyond that of a judge it was also clear that the question would require a case law densification by the ECJ.

Three judgments⁷ were delivered on 10 November 2016, with the Court, after highlighting that the concept of JA issuing a EAW is proper under EU law, concluding that it was not fulfilled by a Swedish police authority or the Lithuanian ministry of justice, but would already be fulfilled in the case of a Hungarian prosecutor.

In these judgments, the ECJ rejected the more restrictive line taken by Advocate General Sánchez-Bordona, who argued that the competence to issue EAW always included the reserve of the judge. Idea reiterated by the same Advocate General, in the sense that the "JA of issuing" EAW "does not cover the institution of the Public Prosecutor's Office" in new cases on national Public Prosecutor's Offices that were object of two Judgments issued on 27-5-2019⁸.

Judgments of the Grand Chamber of the ECJ in which the Lithuanian Prosecutor General was considered to be a JA for the purpose of issuing EAW, as opposed to two district prosecutor's offices of two Federal Republic of Germany states (Länder) because in those cases the respective prosecutors lacked independence from the executive.

However, the 27-5-2019 Judgment concerning Lithuania deepened the requirement in this regard, through the analytical decomposition between the EAW decision and a necessary and precedent national arrest warrant. While admitting that the issuing of the EAW could be undertaken by a public prosecutor of the Public Prosecutor's Offices who meets the requirements to qualify as a JA for the purposes of the FD, the Court stressed that when the EAW is issued by the Public Prosecutor's Office the previous national detention order must be determined or homologated by a judge⁹.

⁶ Framework Decision 2002/584/JAI, of 13 June 2002.

⁷ *Poltorak, Kovalkovas and Özçelik* in cases C-452/16 PPU, C-477/16 PPU and C-453/16 PPU.

⁸ One related to joined cases C-508/18 and C-82/19 and the other to case C-509/18.

⁹ Cf. §§ 44 to 50, the latter of which reads as follows: "it is for the 'issuing judicial authority', referred to in Article 6(1) of Framework Decision 2002/584, namely the entity which, ultimately, takes the decision to issue the European arrest warrant, to ensure that second level of protection, even where the European arrest warrant is based on a national decision delivered by a judge or a court".

Later judgements of the ECJ confirmed the deflation of the importance of the previous discussion on the concept of JA for the purpose of issuing EAW, since, according to the current case law of the ECJ, when the JA is a prosecutor, it is always required that at the national level the detention has been decided or homologated by a judge¹⁰.

The problem of the exclusive competence of the judge as opposed to the Public Prosecutor's Office as the JA was also relevant in the most recent case law expressed in Judgment of 2-3-2021¹¹ on Directive 2002/58/EC on privacy and electronic communications, in which the ECJ concluded that "Article 15(1) of Directive 2002/58, as amended by Directive 2009/136, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights, must be interpreted as precluding national legislation that confers upon the public prosecutor's office, whose task is to direct the criminal pre-trial procedure and to bring, where appropriate, the public prosecution in subsequent proceedings, the power to authorise access of a public authority to traffic and location data for the purposes of a criminal investigation". A case concerning Estonia with repercussions on legislation in other States, on the amendment of Italian legislation by means of Statutory Instrument No 132 of 30-9-2021.

4 Judicial Authority and the Autonomy of National Legal Categories with Respect to European Functional Concepts

According to Benjamin Cardozo's impressive formula a "fertile source of perversion in constitutional theory is the tyranny of labels"¹². Taking this into account, the jurisprudential constructions on the requirements that the Public Prosecutor's Office must fulfil for the purposes of certain European rules with competencies reserved for the JA should not contaminate national concepts developed in constitutional and legal frameworks of concrete sovereign States.

The national concepts of the Judicial Authority may include a set of guarantees that are specific to the particular legal system and that, for example, are fundamental to allow the national Public Prosecutor's Office to assume certain criminal procedural powers in the light of the particular constitutional order of the state.

Therefore, the autonomy of the concepts of JA in the ECHR and in EU law in relation to national rights also includes an autonomy of the national legal categories, which cannot be arbitrarily reduced to a lowest common denominator and which, in the light of the specific legal systems, may include stronger requirements which are completely autonomous of the issues considered by the Court of Justice.

¹⁰ That is to say, although in a different way from the initial thesis of the A-G, the case law developed by the ECJ points to the need for the complex procedure of issuing an EAW to always require the intervention in at least one of the stages of a judge, cf. Judgment of 9-10-2019 (case C-489/19) and 3 Judgments of 12-12-2019 (cases C-625/19, C-627/19 PPU and finally the examination of two joined cases concerning France C-566/19 and C-626/19). In all these cases there was intervention by a judge in the decision-making process regarding the national detention order, and in the assessment of the requirements to qualify the concrete national MP's as JA it seems to attenuate the strictness verified in the German cases C-508/18 and C-82/19.

¹¹ Case C-746/18.

¹² *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).

Autonomy of concepts that can be illustrated by the Portuguese case, in which the problem of the qualification and effectiveness of the guarantees of the Public Prosecutor's Office as a JA is shaped by a particular constitutional history that goes beyond the limits of the detaining powers of the state apparatus, involving issues such as the pretension of effective mechanisms against the operability of administrative privileges within the scope of criminal justice.

This is an area in which it is important to bear in mind a ballast that goes beyond the regime that ended in 1974, in particular a historically founded distrust of the abuses of power on the basis of the acceptance of exogenous controls and institutes such as popular action in criminal matters (with roots in the first half of the 19th century).

On the other hand, constitutional rules on the body of members of the Public Prosecution Office can be integrated into a structural reading on plurality and decision-making autonomy that, despite the Portuguese separation of the national entities of autonomous administration of judges and prosecutors, comprise connections with the Italian model of magistrates of the Public Prosecution Office. It is an inseparable product of constitutional rules on Criminal Procedure and the functions of the Public Prosecution Office in that universe.

5 The European Public Prosecutor's Office for the Criminal Prosecution Affecting the Financial Interests of the European Union

The second element of the paradox pointed out at the beginning, the Public Prosecutor's Office as the protagonist of some supranational projects within the framework of the EU, had as its central element the discussion that began a quarter of a century ago¹³ when was approved a document for the creation of a *Corpus Iuris* with the objective to strengthening the criminal protection of the European Union's financial interests which contained as an essential and innovative proposal the creation of a European Public Prosecutor's Office¹⁴.

¹³ In 19 September 1996.

¹⁴ In public terms, the story began with the European Commission commissioning a group of experts (chaired by Mireille Delmas-Marty) with the task of drawing up guiding principles concerning the criminal protection of the EU's financial interests that culminated in the *Corpus Iuris*—DELMAS- MARTY (ed.), (1997); DELMAS- MARTY/VERVAELLE (eds.) (2000). In the *Corpus Iuris* a European Public Prosecutor's Office was proposed that would be competent to investigate and prosecute crimes against the financial interests of the European Union, an idea that was continued in the *Corpus Iuris* of 2000 (Florence Proposal). After the public discussion in the framework of the Green Paper on the European Public Prosecutor, which began in December 2001, there was some restraint on the excessive harmonization promoted in the *Corpus Iuris*, especially in view of the proportionality principle. After an initial rejection by the Council in the 2007 treaty reform, the possibility of a European Public Prosecutor's Office came to be supported in Article 86 of the Treaty on the Functioning of the EU. After several preparatory works, the Commission presented its proposal in 2013, and Council Regulation 2017/1939 departed from the Commission proposal in several aspects, namely by abandoning a monocratic model.

A process with multiple vicissitudes (and different proposals over the years) which culminated in the emergence of another EU body based in Luxembourg, the European Public Prosecutor's Office (EPPO), which began operating on 1-6-2021. The European Public Prosecutor's Office is configured as a single entity with two levels: (1) a central one consisting of a European Public Prosecutor, the Permanent Chambers and the European Public Prosecutors, and (2) a decentralised one consisting of the European Delegated Prosecutors, located in the Member States that are part of the EU body but exercise functions in the Member States and before national courts.

Thus, the creation of the EPPO implies the restriction of the powers of the Public Prosecutor's Offices of the participating Member States in a matter that falls within the competence of national courts when applying national law conformed to EU law (which takes precedence over national law).

This is an EU body with a very limited functional scope, relating to the investigation, prosecution and upholding of a range of offences "affecting the financial interests of the Union", covering only 22 EU countries, as Denmark, Ireland, Hungary, Poland and Sweden are not participating, at least for the time being.

Maturation over more than 20 years (with advances and retreats) has culminated in the consecration of an interesting institutional model of the EPPO and illustrates the unfoundedness of the thesis, which some still advocate, on the necessary association between a unified and indivisible Public Prosecutor's Office and monocratic solutions¹⁵. In fact, in the EPPO's architecture the guarantees of external independence in the exercise of criminal proceedings are combined with transparent mechanisms for defining the specific persons subjectively responsible for the specific decisions of the Public Prosecutor's Office as regards the investigation and the exercise of criminal proceedings.

The issuing of orders and instructions is subject to legally regulated procedures on the distribution of competences, defining forms of intervention by the central level that safeguard the evaluative autonomy of the prosecutor (and remedies, such as the possibility of recalling the procedure and other control mechanisms that mitigate the risks of atomisation). In the EPPO model, hierarchical interventions produced in a singular and hidden manner are prohibited, and there are guarantees of independence or internal autonomy of the prosecutors, complemented by broad and accountable control mechanisms of the sub-bodies (and respective members) based in Luxembourg. An organisational and procedural scheme in which the recognition of the evaluative responsibility of all procedures, including the delegated ones, comprised a healthy balance between the protection of unity and of dissent, making the bodies (individual and collegial) of the various levels or instances responsible for their decisions (even if tacit).

However, there are factors which may lead to reservations about the legitimacy of the EPPO, first and foremost in the appointment of European Public Prosecutors, through a procedure with great scope for decisive and discretionary action by the national executive powers¹⁶ and the fact that it is a heavy structure for a very limited operational scope. This

¹⁵ In particular, with single heads of department and opaque internal procedures that do not allow the identification and scrutiny of the actual decision-makers of Public Prosecutor's Offices' acts.

¹⁶ As happens in other EU bodies such as the Court of Justice itself.

means that intense scrutiny must continue as to whether it complies with the principle of proportionality.

It is also important not to forget that when entities are created within the EU apparatus, there is a risk of excessive commitment to self-justification of their hypothetical usefulness and coexistence with other European bodies (an effort that is often marked by the interests of the respective bureaucracies), which has led to drifts that justifiably arouse distrust among tax payers on behalf of whom these bodies act, not always with the most appropriate control within the EU framework.

While it is true that a new-born child has no negative ballast, the EPPO is presented with a framework tinged with some bad examples. It should be noted that, an entity close to EPPO such as the European Court of Auditors (ECA) of the EU (a strong driving force behind the EPPO and has some relevant functions regarding the new institution¹⁷). The ECA whose (non)usefulness has long been questioned (in view of the reports it produces and the audits it does not carry out), and serious pathologies were revealed between the lines of the recent ECJ judgement of 30-9-2021 of the *Pintxen case*¹⁸, particularly in terms of omissions, deficits in internal controls, public service ethics and peculiar institutional culture, which would remain hidden if it had not been for a complaint and an OLAF investigation.

6 Public Prosecutor's Office, Court of Justice, Jurisdiction and Disputes

At the European level, the jurisprudential assessment of the institutional guarantees of the Public Prosecutor's Office has been fundamentally related to a European standard of minimum requirements for exercising the competences reserved for the JA in European normative instruments.

This, in turn, may have a variable impact on national systems depending on the internal distribution between formal instances of control, in particular judges, Public Prosecutor's Office and police.

That is, if a particular national Public Prosecutor's Office exercises powers that are reserved by a particular EU legislative instrument to entities that can be classified as a JA, and the ECJ concludes that this Public Prosecutor's Office does not meet the requirements to act as a JA for that purpose, a challenge arises that must be solved by the Member State.

The Member State may, in abstract terms, overcome the problem identified by the ECJ judgment through alternative routes, to be decided within the framework of national sovereignty, namely: (a) conferring jurisdiction on a pre-existing judicial body that meets these requirements; (b) reforming the Public Prosecutor's Office to make it compatible with the requirements indicated in ECJ case law; (c) creating a new body (even if this

¹⁷ In the P-G E selection procedure (art. 14/3), in the control of EP accounts (art. 94) and in the audit of EP contracts (art. 110/2 and 4).

¹⁸ Case C-130/19 known as the *Pintxen case*, an important judgment which was only available in French and Flemish, as opposed to the opinion of Advocate General Gerard Hogan which met the proper standard of disclosure, i.e., in all official languages, which accentuates the bizarreness of the special treatment given to the judgment.

means making it independent from a body that is part of another institution), giving it a status of guarantees that is compatible with the concept of an EU JA and conferring on it the jurisdiction over which the problem has arisen¹⁹.

The European Public Prosecutor's Office for the investigation, prosecution and upholding before national courts of certain offences against the EU's financial interests is an EU body whose actions are directly linked to EU normative instruments, including the Charter of Fundamental Rights, the interpretation of which falls within the jurisdiction of the ECJ. Its creation was also a way of restricting the competences of Member States' Public Prosecutor's Offices in cases involving EU law that are judged by national courts.

National Public Prosecutors' Offices are very diverse institutions, with different constitutional statutes, functions, competences and operational frameworks in the various criminal procedural regimes, which has repercussions in a plurality of systems on external and internal independence.

In any case, despite the multifarious nature of the Public Prosecutors' Offices in the various Member States, there is one point on which there is consensus: in general, they are not judicial bodies and, consequently, they cannot approach the ECJ to ask it to clarify a point of interpretation of EU law or to review the legality of an act of EU law—they do not fall within the concept of a judicial body for the purposes of Article 19(1) (second paragraph) and (3)(b) of the TEU.

As a result, national Public Prosecutors' Offices lack an element that has been central to the case-law of the ECJ, which, since the ASJP judgment of 27 February 2018 (C-64/16), has considered itself competent to rule on certain judicial reforms and even on occasional acts affecting national judges and courts²⁰.

In addition to lacking the core element, according to the most recent case law of the Court of Justice, to be able to assess the violation of statutory guarantees of a professional judiciary, in terms of the balance between the constitutional apparatus of the EU and the Member States, an extension of the prescriptive intervention of EU bodies to judge the institutional designs of national Public Prosecutors Offices would always seem to be problematic and undesirable.

National Public Prosecutors Office's fit into their respective criminal procedural models and even in cases where they are not expressly mentioned in the constitutional text, they are institutions that form part of the very fabric of sovereign states that cannot and should not be judged by the ECJ as an EU body, when they do not relate to specific matters concerning the application of EU law (as we have seen happen with Article 6/1 of the FD on EAW or Article 15/1 of Directive 2002/58/EC on privacy and electronic communications).

¹⁹ This is an abstract analysis, which may have nuances in concrete expressions. In the case of the evolution of the ECJ's prescriptions on JA for the purpose of issuing EAW, the deflation of the importance of fulfilling the concept of JA has been inseparable from, at a certain step, the affirmation of the mandatory intervention of a court at least in one step of the overall procedure that culminates in the EAW.

²⁰ An approach that began with the aforementioned judgement on the guarantees for judges of the Portuguese Audit Court, which was subsequently invoked for prescriptive decisions on judicial reforms in a progressive constructivism of the Court of Justice.

On the other hand, the impetus for generic assertions to conform and sanction *deviant members* by imposing minimum or maximum common denominators often includes simplistic approaches that ignore the complexity of legal systems, their history and the respective checks and balances, which are not fully understood in abbreviated bureaucratic guidelines, but involve a multitude of elements and balances unattainable by the scores of hasty legal engineers²¹.

Capturing the plurality of systems and models of sovereign states is significantly more complex in the supranational court of the EU than it is in the case-law of the Supreme and Constitutional Courts, which interpret and apply federal Constitutions that must be obeyed by the laws of the federal states, and in which the diversity of solutions and regimes form part of a common heritage at the conceptual level, particularly as reflected in the chapters on Fundamental Rights in the constitutional texts.

At this level, the ECJ has managed to maintain a line of relatively restrained decisions that are remarkably coherent when compared, for example, with the case-law of Strasbourg, as has been shown by the latter's various fluctuations, particularly in the tense dialogue that the ECHR has maintained with the UK Supreme Court.

The ECJ has maintained some rhetorical caution in view of the imperative to keep the areas of case law pronouncement within the limits of the Treaties and the European Charter of Fundamental Rights, whose Article 51(1) emphasises that its addressees are the institutions and bodies of the Union, in compliance with the principle of subsidiarity, and that it only addresses Member States "when they are implementing Union law".

However, even while respecting the principles of Member State sovereignty, the ECJ has revealed particular difficulties with core questions of evidence law and criminal procedure, which involve areas of law and philosophy other than those that have traditionally formed the nucleus of the work of the Luxembourg Court.

For example, in a recent preliminary ruling about the European investigative order in criminal matters, the *Ivan Gavanzov II* Case²² of 11-11-2021, was established by the ECJ a peculiar, original and unmotivated assertion on a right to judicial remedy against decisions concerning the *hearing of witnesses*²³.

Thus, on a matter that is significantly simpler than the one involved in capturing the wide-ranging variables that make up the functional and institutional profiles of

²¹ To illustrate, it makes no sense to consider that there is an imperative to, for example, "judge" on a European level the Swedish system, considering that the respective Public Prosecutor's Office must now understand constitutional safeguards such as those enshrined in Italy, nor to defend the reduction of institutional guarantees of the Italian Public Prosecutor's Office on the grounds of the quality of the functioning of the Swedish system. The cultural, institutional, organizational, administrative, and constitutional contexts and regimes do not allow for evaluations focused only on a supranational comparison of portions of each of the legal architectures.

²² Case C-852/19.

²³ As if in equivalent terms to the right to challenge decisions regarding "home and business searches and seizures". It should be noted that the judgment was shaped by adherence to a mistaken pronouncement by Advocate General Bobek. Paragraph 47 of the judgment reads as follows: "it must be held that the execution of an European investigative order, the purpose of which is the hearing of a witness by videoconference, is likely to adversely affect the person concerned and that person must therefore have a legal remedy available to him or her against such a decision, in accordance with Article 47 of the Charter".

the national Public Prosecutor's Office, the ECJ defended, without elaborating on the grounds, a thesis that runs counter to the heritage of multiple procedural regimes outlined at the constitutional level on the duty of witnesses to cooperate with the State—it should be noted that the judgement refers to the general issue of being summoned for questioning by videoconference and not to possible incidents in questioning, such as exercise of the privilege against self-incrimination, invocation of professional secrecy, use of coercion, or punishment in reaction for (express or tacit) refusal to cooperate.

As long as this statement is not corrected by the body that issued it, it may be a disturbing factor revealing the risks of excessive expansionism of the judgments of the Luxembourg Court in the assessment of national criminal procedural regimes.

The *Weiss* Case of the Second Chamber of the Federal Constitutional Court of Germany (BVerfG) of 5 May 2020 directly confronts core aspects of the problem of the constitutional jurisdictions of Member States and the EU, comprising the express assumption of the BundesVerfassungsGericht's understanding that the ECJ in a previous decision exceeded what was permitted under Article 19(1) (2§) TEU. Collision which, as several authors have pointed out for some years (including when results of Luxembourg and Karlsruhe decisions were, apparently, harmonised), is inseparable from axiological dimensions concerning the autonomy of law and jurisdiction in the face of functional political needs assumed by EU bodies.

Curiously, the ECJ could not resist a response to the BVerfG, only three days after the *Weiss* judgement, by means of a peculiar press release (no. 58/2020 of 8 May 2020) prompted by a judgement of a court of a sovereign state. A text whose apparent restraint does not disguise the political dimension of the forum chosen and, consequently, of the choice of three ECJ judgments (curiously, the above-mentioned *Pintxen* case by the ECJ itself did not lead to a press release). This is an unequivocal political problem, whose new stage is expressed in the infringement procedure opened by the Commission against Germany (about a year after the BVerfG judgment).

Thus, the problem relates to constitutional judicial authority and cannot be evaded by fragile euphemisms, such as *judicial dialogue*, when what is at stake is the power to have the last word in disputes relating to the constitutional law of states.

The differences between the two bodies go beyond their respective territorial scope, between the defence of a constitutional text and constructivism about a post-Westphalian era²⁴, to the institutional profiles²⁵ and operating models²⁶ of the entities in conflict.

²⁴ This has not been part of the processes of accession to the successive EU treaties by the Member States that joined the EU before the fall of the Berlin Wall.

²⁵ Including the form of appointment and field of recruitment of the members of the two entities, the terms of office (6 years renewable by the respective government in the case of the ECJ, 12 non-renewable years in the case of the BVerfG).

²⁶ In particular in the tradition of reasoning on constitutional questions that in Germany involves procedural transparency and accountability of judges far removed from the monolithicism of the ECJ. In Germany, in 1967, the Plenary of the BVerfG voted in favor of the expression of the judges' votes; the following year, after extensive discussion, a jurists' congress in Nuremberg ended with a vote in the same direction (by a majority of 371 votes to 31), a process that culminated in the 1970 reform of the law of the BVerfG. It should be noted that the strange academic disinterest in the appointments and control of the members of the ECJ has been progressively counterbalanced by some studies, including about empirical data – see SYNNØVE et al. (2022).

The evolution of the ECJ's intervention towards direct impositions of a constitutional nature on sovereign legal orders required normative legitimation and an axiology with principles on accountability models for the judiciary in the assessment of difficult issues.

Plan in which the exercise of a binding prescriptive power for jurisdictional and democratically legitimated organs of the Member States is not compatible with an anodyne discourse, even if correct and synthetic, as if the decisions of the ECJ were the result of a strict mechanistic or axiomatic-deductive operation. This pathology is not diminished in the alternative and/or cumulative way, which is also revealed in some decisions of the ECJ, focused on the occasional censure of the *circumstances of the case* without binding to abstract parameters normatively founded.

When judging on the conformity of national legislation with the standards of EU law in the light of a constitutional matrix, it is important to bear in mind that in order to present itself as a jurisdictional activity with a *motivation* that is wholly or partly cognitive and normatively founded, procedural transparency is required (including in internal matters such as the designation of the rapporteur), as well as reasoning (even if competing or divergent) that is conceptually assumed by specific judges, because the legal judgement of a court should not be based on the political authority of the EU body. On the other hand, in the Schmittian conception, the exercise of the court's political function as a Union body should be decision-taking without allowing internal loopholes, such as the expression of judges' votes²⁷, a paradigm far removed from the idea of the judiciary present in the constitutions of several states, where the independence of each judge is a value in itself.

In a court that presents as a constitutional jurisdiction likely to impose itself on democratic parliaments on controversial issues, its dictates also constitute a problem of legitimation inseparable from the judges' responsibility to express the authority of arguments and not just the authority of a monolithic institutional power.

At the ECJ, the silencing of deliberative voting and of the voices of its members (in the proper place, which is court decisions and not press releases, interviews or conferences), together with the unavoidable problem of legitimising the decisions of its members, haunts the expansionist superimposition of the ECJ in relation to the courts of the Member States.

In recent judgments of the ECJ, the weakness of its prescriptive statements on the duty of appointments of judges of national courts, by virtue of its variant doctrine and the regulatory regime itself on the appointment of members of the ECJ. In this plan, in addition to the unprecedented step determined by case-by-case needs, concerning a supposed counterbalance to the governmental power to appoint judges by means of a hypothetical possibility of a technocratic veto by an ad hoc entity, it is confirmed that the political decision of national executives to choose the members of the ECJ clashes with some of the canons established by the Court of Luxembourg in some of its recent decisions on the appointment of judges of national courts.

²⁷ Some argue that "in the event of a change of government, the secrecy of the court's deliberations in practice works against the opportunistic judge" SYNNØVE et al. (2022) p. 37. In several areas, including the broad presidential powers (for example in the choice of rapporteurs), there is a peculiar culture that is different from that of constitutional courts, in which it is common ground that the positions of each of the judges are indispensable to the critical mass of the body of law and the accountability of its members, enhancing the transparency and reasoning of judgments.

I cannot help but recall the famous phrase, in 1936, of Charles Evans Hughes, then Presiding Judge of the US Supreme Court at a time of tumultuous tensions between that court and the state and federal legislative powers, in which another standard of jurisdictional responsibility is revealed: a dissenting vote “in a court of last resort is an appeal to the brooding spirit of law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed”²⁸.

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²⁸ EVANS (1936) p. 68.



On the Origins of the Separation of Powers: Some Historical Remarks

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1 Prelude

History has shown that in societies politically organized as constitutional States, one shall not take for granted the achievements of civilization on which we set our lives. At times, like the one we live in Europe right now, new and unexpected menaces emerge, and regrettably, humanity does not always reveal to have learned even the hardest lessons of the past.

Therefore, it is critical to revisit the different ideas that constitute the foundations of the constitutional State as a social and political paradigm, which rests on the crossover of three principles: the guarantee of fundamental rights, the separation of powers, and popular sovereignty. Righteously three principles that are very simple in their basic formulation, but very challenging legally and of enormous plasticity in their practical realization.

This very brief fragmented text focuses on the historical origins of the principle of separation of powers – which has its most impregnable stronghold in the independence of the judiciary. It focuses as well on the way that principle established itself, from a very early stage, as one of the pillars of modern constitutionalism, although with different national variations, in the light of the idiosyncrasies of each legal experience.

It is a history worth remembering, full of encounters and disagreements, with some subtle ironies, and without which we can hardly respond to the severe challenges that the separation of powers faces today. We hope with these historical remarks to meet the expectations of our readers.

2 Locke's Lost Opportunity

It is common knowledge that the framework of the separation of powers is Book XI of *De L'Esprit des Loïs*, published for the first time in 1748 in Geneva by a French aristocrat named Charles-Louis de Secondat, baron de La Brède et de Montesquieu. Briefly, Montesquieu.

The first ironic note of this story is right here. Montesquieu was not the first political thinker to defend the necessity of limiting the power through its separation in several

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parts, albeit being considered for all posterity as the inventor of the principle of separation of powers. James Madison was well aware of this significant misunderstanding – one might say a misunderstanding of historic proportions – when in his *Paper* no. 47 writes, “*the oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.*” Not yet satisfied with this small insinuation, Madison maliciously proceeds with the exposure of Montesquieu’s material source: “*the British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry.*”¹

Oracle or didactic writer, none of the qualificatives is particularly fair in regards to the French thinker, who was an earnest intellectual – with concerns of theoretical and empirical rigor –, and who, in particular, expressly cites the British Constitution as his immediate source: “*though all governments have the same general end, which is that of self-preservation, (...) there is one nation in the world that has political liberty for the direct end of its Constitution.*” Therefore, as proposed, “*we shall presently examine the principles on which this liberty is founded.*”²

To what extent the subsequent analysis made by the author – in particular, in chapter VI of the Book XI of *De L’Esprit des Lois*, rightly entitled “*Of the Constitution of England*” – substantiates a rigorous description of the British reality of the time, which he had known personally, or from which point these considerations become normative, it is an issue over which much ink has been spilled. Perhaps what it is about is a somewhat idealized description of a changing reality, but where the aristocratic inclination of the observer hindered him from seeing what was happening at the time: that the power of the House of Lords was already slipping through its fingers and progressively placing itself in the the House of Commons. Indeed, for whom does not appreciate the idea of equality between men under any circumstances – after all, “*in such a state there are always persons distinguished by their birth, riches, or honours*” that cannot be “*confounded with the common people*”³ – it is understandable that the significant erosion of the position of the Lords, accentuated after the Revolution of 1688, was left in the shadows.

Who indeed Montesquieu does not quote, not even to disagree with him, is John Locke, who on the other side of the English Channel had already advocated for the separation of powers, in the pages of his famous *Two Treatises of Government*, published for the first time in 1689. Six decades before *De L’Esprit des Lois* saw the light of the day. Moreover, Locke had advocated for the separation of powers precisely with the same purpose that motivated Montesquieu, of limiting the power of the State, and thus avoid the historical record, which is simultaneously a prediction: “*every man invested with power is apt to abuse it, and to carry his authority as far as it will go.*”⁴

In effect, according to Locke, “*it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make (...), and thereby come to have a distinct interest from the*

¹ A Hamilton et al. (2001) p. 250.

² CL Montesquieu (1951) p. 396.

³ Ibid, p. 400–401.

⁴ Ibid, p. 395.

rest of the community."⁵ From this premise, the first great philosopher of Liberalism goes on to make a not particularly successful attempt of a substantive distinction between the legislative power and the executive power, supported by a clear circumstantial difference: laws do not take much time to produce, meaning that their authors do not need to assemble for too long. However, despite being produced at once, the laws are in force permanently, and their execution is perennial, wherefore, the executive power must always be in effect. The legislative power is limited in time, whereas the executive power is continual.⁶

After defining this dichotomy, Locke proceeds to define another power but definitely goes in the wrong direction and thus misses the right destination. More than a third power, the so-called federative power seems like an external (or international) variation of the executive power, albeit substantially disconnected from obedience to strict laws. Most importantly, its incumbent is indeed (and, in the opinion of its maker, it would be good if it continued to be) the same as the executive power: the monarch⁷.

If the British philosopher had not worried about being politically correct – e.g., in such careful defense of the so-called royal prerogative, as “*this power to act according to discretion for the public good, without the prescription of the law and sometimes even against it*”⁸ – perhaps he would have observed the political reality of England at the time with a more analytical spirit and therefore confronted with the courts, their judges and the jury institution.

Furthermore, many years prior to this time, Thomas Hobbes – who always paid a high price for the political incorrectness of his *Leviathan* – had already identified three different legal areas of the relationship between the sovereign and the subjects. One area covered by the law, in which men owed obedience to the laws defined by the sovereign according to the obligations voluntarily assumed in the social agreement. Another area diametrically opposed, of true liberty, related to some inalienable rights and that therefore could never constitute an object of the said agreement under any circumstances. Finally, one intermediate area, not (yet) entirely covered by the positive law, in which prevails what, at present times, we would call general freedom of action. In reference to this third area, Hobbes states quite clearly that when a subject has a “*controversy with his sovereign of debt, or of right of possession of lands or goods, or concerning any service (...), or concerning any penalty (...), grounded on a precedent law*”, he has likewise “*the same liberty to sue for his right as if it were against a subject, and before such judges as are appointed by the sovereign.*”⁹

Therefore, if Hobbes could already in 1651 perceive this perspective of the British constitutional system – judges appointed by the sovereign, to apply the law in lawsuits brought by the subjects (among themselves) and against the sovereign himself (naturally, with as much independence as was conceivable at the time) – indeed it could also have been perceived by Locke, in 1689, when he returned to his beloved England and published *Two Treatises of Government*, right after the *Glorious Revolution*.

⁵ J Locke (1996) p. 364.

⁶ Ibid, pp. 364–365.

⁷ Ibid, pp. 365–366.

⁸ Ibid, p. 375.

⁹ T Hobbes (1904) pp. 143–144 and pp. 158–159.

3 The Judge Montesquieu

The opportunity that Locke lost would thus be taken on by a judge – with a very keen sociological vein – in the lands of France.

The Baron of Montesquieu is figured in history as the father of the separation of powers precisely because he was a judge by profession. In other words, because he was a judge in the Parlement of Bordeaux – an occupation relatively common at the time for a certain French aristocracy – he understood that the judicial function does not apply the law in the same way that the executive function does. Both the executive power and the judicial power perform law enforcement tasks. In this sense, they are both secondary functions subordinate to the law, but they do not share the same nature. In the active prosecution of the public interest, the first is a partial power and organizes itself hierarchically. The second is characterized by impartiality, passiveness, and independence.

This is the destination point of Montesquieu's theory. Notwithstanding, the journey is equally fascinating. In his own words, *“in every government, there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals.”*¹⁰

This rigorous and in-depth description of the functions that States took on at the time reveals that there is in his thinking an undeniable dichotomy between making the law and applying it – meaning that the correspondent functions are in divergent plans. Based on this description, Montesquieu concludes with the most relevant terminological note of the history of political ideas: *“the latter we shall call the judiciary power, and the other simply the executive power of the state.”*¹¹

Fundamentally, the conceptual and terminological distinction of the different functions of the State does not yet mean separation of powers. Thus, losing no time, Montesquieu carries on with absolute clarity: *“when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. (...) Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. (...) There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”*¹²

Finally, while listing the capacities and limits of each of the three powers individually, Montesquieu also dedicates himself to identifying their respective incumbents: a parliament with two houses (one composed of people distinguished by their births and another composed of illustrious people that represent the commons); the monarch himself; and no permanent judges who are *“persons taken from the body of the people”* (by

¹⁰ CL Montesquieu (1951) pp. 396–397.

¹¹ Ibid, p. 397.

¹² Ibid, p. 397.

reference to the institution of the jury, but that in practice does not discharge the presence of a professional judge)¹³. Hence the idea, to be strengthened later, that the spirit that encouraged this author was not genuinely democratic – let alone republican – but rather the establishment of a mixed government that combined the monarchy, the aristocracy, and the democracy in variable degrees.

Overall, in the mid-18th century, in absolutist France, only a judge – experienced and erudite as Montesquieu – would be able to create the distinction between executing and judging as two different ways to apply the same law: by the (armed) arm of the monarchs and their direct servants, and by the prudence of the judges – in the latter case not even the distinction between criminal justice and civil justice is missing. Ergo, the intelligence of a judge is both in the origin of the separation of powers and of the independence of the judiciary.

4 The American Experience

On the other hand – and this is the second ironic note of this narrative – it is often said that Montesquieu inspired himself on the British constitutional experience to propose to France a system of separation of powers that would only be enacted on the other side of the Atlantic with the approval of the United States Constitution in 1787.

If Montesquieu himself assumes the inspiration in the British political system – a system that he directly experienced during the time he lived in England – his influence on the Founding Fathers is also an undeniable fact – and, consequently, on the whole of the American constitutional process. The articles I, II, and III of the Constitution approved in Philadelphia are dedicated, respectively, to the legislative power (Congress), to the executive power (President), and the judiciary (Courts). If the nucleus of the United States Declaration of Independence seems clipped from the pages of John Locke, the first articles of the oldest Constitution in force do not hold, given the content of *De L'Esprit des Lois*, much more than the realization of a couple of unoriginal ideas: the division of the power in three branches, aiming to avoid its abuse.

It is a fact that Montesquieu did not live time enough to savor the impact of his work in the early days of American constitutionalism. However, his name is extensively quoted in the *Federalist Papers*, published by Hamilton, Jay and Madison, to convince New York citizens to vote favourably on the ratification of the Federal Constitution. Notably, *Paper* no. 47, above-mentioned, features vast paraphrases of the *De L'Esprit des Lois* and dedicates itself with great detail to thoroughly examining the relationships between the different powers in the British Constitution and the Constitutions of the existing American States, to conclude that the axiom of the separation of powers had never implied that “*the legislative, executive and judiciary departments, are by no means totally separate and distinct from each other*”¹⁴, but rather bearing important points of interaction.

Therefore, in the British experience, treatises, signed by the Head of State, have the authority of legislative acts. The King appoints all the judges. The Supreme Court of

¹³ Ibid, p. 398.

¹⁴ A Hamilton et al. (2001) p. 250.

Appeal of the kingdom is inside the upper house of the Parliament. Furthermore, a limited branch of the legislative power serves as Private Council of the monarch. For their part, in several American Constitutions, the executive magistrate has veto power on the works of the legislative magistrate. The senates of the States, a part of the legislature, are also courts for the trial of specific crimes committed by executive and judiciary members. Finally, a significant portion of the government employees is appointed with the blessing of one of the branches of the legislative power. Ultimately – and in an overly minimalist interpretation – what matters for the advocates of the American Constitution is that the *whole* power exercised by one department is not in the hands of those who have the *whole* power of another department.¹⁵ Montesquieu has never set the bar this low. However, his considerations on the ambivalence of each of the powers that simultaneously have the “*faculté de statuer*” – to do its part – and the “*faculté d’empêcher*” – to impede the remaining powers to do what they should not, thus controlling their impulses¹⁶ – are famous considerations.

Paper no. 48 is also important because it reflects the belief in the political and functional superiority of the legislative power – an idea inherited from Montesquieu – and, simultaneously, of its greatest hazard. Indeed, “*the legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.*”¹⁷ Moreover, “*in a representative republic (...), where the legislative power is exercised by an assembly (...), it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.*”¹⁸ If ever there were any doubts about this, it would suffice to think that “*the legislative department alone has access to the pockets of the people.*”¹⁹ This argument weighs like heavy stones in a country that united itself and declared independence to avoid paying the taxes levied by the British sovereign.

To counter this hazardous stronghold of the legislative branch, subsequent *Papers* later advocate the use of various antidotes: first, the internal subdivision of the legislative branch itself in two houses (sort of separation of powers inside the separation of powers); second, a veto power (albeit not absolute) of the executive magistrate on the works of the legislative magistrate; third, the originality of the federal structure of State itself, in which “*the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.*”²⁰; forth, the social pluralism. If the first and second antidotes are still clearly affiliated with Montesquieu’s work, the third and fourth already forge what will be the path of Alexis de Tocqueville.

Finally, *Papers* no. 67 to 77 are explicitly dedicated to the executive power – election, nature, and competencies – and *Papers* no. 78 to 83 extensively emphasize the importance of the independence of courts to a limited Constitution and the need for instruments of

¹⁵ Ibid, pp. 250 e 251.

¹⁶ CL Montesquieu (1951) p. 401.

¹⁷ A Hamilton et al. (2001) pp. 256–257.

¹⁸ Ibid, p. 257 and p. 263.

¹⁹ Ibid, p. 258.

²⁰ Ibid, p. 270.

guarantee of that independence in the plan of the personal and functional status of the judges.

The irony that the American Constitution was the first to enshrine Montesquieu's doctrine becomes even denser because – in the New World – there were no monarchs to assume the executive power nor aristocrats to sit in the upper house of Parliament. For this reason, the constituents saw themselves forced to adapt the organogram designed by Montesquieu by placing an elected President in the place of the King and creating a Senate to take the place of the House of Lords in the legislative branch. The last thing the Americans wanted was a king and a nobility class. Moreover, it is worth remembering that they had declared independence precisely to get rid of the King of England, his court, and the extensive list of archbishops, bishops, dukes, counts, barons, sheriffs, bailiffs, reeves, and other lords who stubbornly continued to pervade the British social fabric (since John Lackland had been forced to sign the Magna Carta in 1215).

Montesquieu was a firm monarchist, but the first historical realization of his thinking was, in fact, profoundly republican.

5 The Other Side of Montesquieu

Furthermore, Montesquieu was not a true democrat – far from it – and the first materialization of his thinking into a concrete political project was very democratic, at least for the standards of that epoch.

Contrary to other illuminist authors – such as Hobbes, Locke, and mostly Rousseau –, Montesquieu did not believe in the intrinsic equality of all men. He thought that bicameralism was a demand of human nature and the only way to guarantee the freedom of such men who have the right to occupy a distinct social position. This side of Montesquieu is certainly his least known – and his darkest side: aristocracy occupies a place of its own, and the people as a whole are not apt to exercise the political power; thus, only an elite extracted from among the people can and must represent it.

In fact, in his own words, *“in such a state there are always persons distinguished by their birth, riches, or honours: but were they to be confounded with the common people, and to have only the weight of a single vote (...), the common liberty would be their slavery (...). The share they have, therefore, in the legislature ought to be proportioned to their other advantages in the state; which happens only when they form a body that has a right to check the licentiousness of the people (...).”* To this aristocratic vein, consistent with the affluent family he was born into, Montesquieu adds yet another elitist vein when referring to the lower house of Parliament: *“the legislative power is therefore committed to the body of the nobles, and to that which represents the people, each having their assemblies and deliberations apart, each their separate views and interests.”*²¹

This form of political representation of the people is not only the result of the practical impossibility of implementing, in big States, a government system in which all members of the people participate – in essence, a self-government system or, as Rousseau will later defend, a direct democracy – but it constitutes a requirement for the rationality (if not the salubrity) of public life. Such progressive forms of governing would always

²¹ CL Montesquieu (1951) pp. 400–401.

be subject to significant inconveniences, even in small States. On the one hand, *“the great advantage of representatives is their capacity of discussing public affairs. For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy.”*²² Therefore, the concept of representation adopted is the antipode of what is currently called mirror representation: a parliament that is a faithful reflection of society as a whole. On the other hand, not even in the election of the people’s representatives is it beneficial for the whole third state to vote. It is true that *“all the inhabitants of the several districts ought to have a right of voting at the election of a representative”*. However, it is crucial to have no illusions: from this group should be excluded all that *“are in a so mean situation as to be deemed to have no will of their own”*²³.

Therefore, it should now be clear that the primary purpose of Montesquieu when he assembled his schema of the separation of powers was not to build a democratic government – not in its entirety, not even within the legislative – but to build a mixed or combined government. In other words, a government system in which each of the three powers has its own source of legitimacy and in which, consequently, the monarchic, aristocratic, and democratic elements must coexist peacefully.

The executive power has a monarchic legitimacy, the legislative power benefits simultaneously from an aristocratic legitimacy in the upper house and democratic legitimacy in the lower house. As for the jurisdictional power, Montesquieu does not say so but being himself a judge and aristocrat, it is normal for him to think that a certain aristocracy should control it, if not by birth, at least by merit or knowledge. This was, in fact, the reality of his time, when the so-called “judiciary parliaments” were occupied by an elite, which even challenged the determinations of absolute monarchs (and, in some cases, paid the price for such audacity).

About this last point, it should be noted that under the inspiration of the British experience, Montesquieu opens the door to popular legitimacy of the judicial function, which the American legal system will use, but not the continental European legal systems (they will merely follow it occasionally). In reality, this legal institution takes on a double function: on the one side, it fulfills individuals’ fundamental right to be judged by their peers (a right that becomes more important when societies are more fragmented); on the other side, it allows to democratically justify the concrete exercise of the administration of justice. Notably, it allows calling the political community, globally resented with the practice of a crime, to the trial of the one who offended them.

In summary, therefore, despite recognizing that the Founding Fathers also had their anguish about the merits of democracy – as demonstrated by the intricate schema assembled for the election of the President, which had the purpose of controlling the weight of popular will in the choice of the incumbent of such an important position – it does not detract from the fact that the separation of powers made a democratic journey across the Atlantic. Despite having been thought to reinterpret a monarchy as a mixed regime, the separation of powers ended up founding a democratic republic.

²² Ibid, p. 400.

²³ Ibid, p. 400.

6 Rousseau's Legacy

The model of separation of powers judiciously designed by Montesquieu not only had an impact in the USA. Although a little later, it had great influence in France too.

From then on, it will also have inspired a large number of States on the European continent, as they were swept by the respective liberal revolutions – and throughout the world, whenever were elaborated the first written constitutions in each country. Portugal and Brazil were no exception, with the particularity that in the Brazilian Constitution of 1824 and in the Portuguese Constitutional Law of 1826 that replicates it a fourth power was added to the three identified by Montesquieu. A new authority called the *moderating power*, immediately inspired by Benjamin Constant, and which is still to this day an important part of the Lusophone juspublicist culture.

However, Montesquieu's doctrinal influence in his own country went hand in hand with the vibrant thinking of Jean-Jaques Rousseau, a Swiss-born author who – and this is another great irony of this history – did not believe in the separation of powers.

It is a fact that Montesquieu and Rousseau converged on the thesis of the supremacy of the legislative power over the others, but for the thinker of Geneva, the people, acting by a qualified majority, could do everything. They had to be able to do everything. Popular sovereignty, by definition, does not admit any limits, whether they arise from the existence of fundamental rights, whether they result from the principle of separation of powers, or whether they are inherent to the need (albeit practical) of establishing mechanisms for political representation.

For Rousseau, the people's sovereign will cannot be legitimately constrained. The majority rule, according to which the people take all their deliberations, is not a simple decision-making rule. It is a rule of truth: majority is synonymous with reason, freedom, and, consequently, truth. The minority is wrong and lives as a prisoner of that wrong, and therefore has no rights and not only can be but must be subdued by the majority. This is the meaning of the famous Rousseau's paradox according to which, by being forced to obey the general will (which is ultimately defined by the majority), the minority is only being forced to be free. In his own words, "*subjugating men in order to make them free.*"²⁴

Obsessed by the problem of a "*man was born free, and everywhere he is in chains,*" Rousseau constructs a whole model of governance in which "*each of us puts his person and all his power in common under the supreme direction of the general will; and we as a body receive each member as an indivisible part of the whole.*"²⁵ Furthermore, he states that this fundamental pact, "*instead of destroying natural equality (...) substitutes moral and legal equality for whatever degree of physical inequality nature has put among men.*"²⁶

Simply, "*the social pact gives the body politic absolute power over its members; and (...) it is this same power; directed by the general will, that bears the name of sovereignty.*"²⁷ This will that is insistently called "*general*" – because it transcends the

²⁴ JJ Rousseau (1964) p. 310.

²⁵ Ibid pp. 289–290.

²⁶ Ibid p. 294.

²⁷ Ibid pp. 305–306.

sum of the particular wills of each of the elements of the community – “*is always right, it never needs to be rectified*”²⁸. It is expressed in the legislative power, conceived as “*a superior kind (...) able to see all human emotions, while feeling none*”; as an “*extraordinary man*,” as a “*wise man*”, or even as an “*almost divine*”²⁹ being. Consequently, “*we must no longer ask who has the right to make the laws*” since each one of them is nothing but the “*acts of the general will.*” As such, by definition, the law cannot “*be unjust, since no one can be unjust towards himself.*”³⁰

Even at the end of his most popular political book, Rousseau briefly mentions *De L'Esprit des Lois*, but given the transcriptions just made, it is clear that it is not the author of the theory of the separation of powers that interests him, but rather the sociologist of the climate's theory, who focuses on the good legislator and the art he must have to take advantage of the good characteristics of his people and to counteract the bad ones.³¹ It is true that even further on, Rousseau distinguishes between force and will – “*under the name of executive power and the latter under that of legislative power*” –, but the conclusion could only be one: “*nothing is done, or should be done, unless they are in accordance.*”³²

There is nobody better than the legislator to know how to execute the law. Besides, after so much praise for the legislator, who can genuinely qualify himself as power other than him? If the idea of the separation of powers is compatible with an unequal position of those powers, this is not the case if the relationship is of absolute and total subjection (of everything else) to the sovereign legislator.

In any case, Article 6 of the Declaration of the Rights of Man and of the Citizen, of 1789, has definitively registered in the French constitutional heritage the axiom according to which “*Law is the expression of the general will*” and, along with it, the vision (or prejudice) that the work of the legislator is the source of Law par excellence, if not the only source of Law that reason can accept as valid. Article 4 of the Constitution of year I (1793) would further reinforce this with two adjectives: “*Law is the free and solemn expression of the general will*” – or would it not be this French Constitution, of short and troubled cogency, the one that most directly inspired itself on the thought of the philosopher from Geneva.

7 The French Experience

In the French constitutional practice, this idea of the political and even moral superiority of the law and the legislative power, very much rooted in Rousseau's thought, is thus ideologically intertwined with the paradigm that Montesquieu had constructed of the principle of the separation of powers: a model that is clearly unbalanced in favor of the legislative power, in which there is a primary power that drafts the laws and two secondary, subordinate powers that faithfully apply those laws.

²⁸ Ibid p. 311.

²⁹ Ibid pp. 312–313, 314 and 318.

³⁰ Ibid p. 328.

³¹ Ibid, p. 333.

³² Ibid, pp. 334–335.

The differences between one author and the other do not thus concern the hegemony of the legislative function, which is consensual, but the degree of loyalty – if not servility – and the degree of autonomy of the other powers in relation to the general and abstract prescriptions of the legislator. However, the question arises in differentiated terms in relation to the executive and the judiciary powers – the latter, moreover, apparently absent from Rousseau’s work.

As far as the former is concerned, one should recall the weight that the so-called principle of legality had in the development of French Administrative Law, which spread to the entirety of continental Europe and remained for many years (if not until the present). Principle well known for its endless discussions on levels of binding and discretion – reminiscent of the “*prerogative*” that Locke attributed to the monarch – on the law as the limit or basis for administrative action, on the (material) distinction between law and regulation, et cetera.

In any case, this principle of legality is nothing more than an expression of the supremacy of the legislative over the executive and of the ambition to subordinate an administrative machine (led, at least formally, by the king) to a democratic power – an attempt to domesticate, through the affirmation of the law, a power that had been autocratic all along. The purpose is to democratically legitimize a function of the State whose history of arbitrary actions and abuses loses itself in time – and, as is well known, bad habits die hard. To achieve this goal, it is critical that the liberal idea of fundamental rights – especially life, freedoms, and property – stand as individual spheres of free action, spaces of autonomy preserved from the intrusion of public power and in which, therefore, this one cannot intervene without the people’s consent. In other words, if there is no specific law approved by the people’s representatives in Parliament.

It is a fact that in the first amendments to the US Constitution – the American *Bill of Rights* of 1791 – fundamental rights begin precisely by being formulated against the legislator – “*Congress shall make no law...*” –, but it is also certain that liberals, in general, never stopped seeing the law as an instrument to safeguard the freedom of citizens. Moreover, if they made some mistakes along the way, one of them was precisely trusting the law too much, assuming that its author was more enlightened and less susceptible to biases than he actually was.

As for the judiciary, it is commonplace to say that Montesquieu portrays the function of judges in a minimalist way, almost humiliating to the judges themselves. Even disregarding here the passages about the non-permanence of (jury) courts – so that the power to judge is not bound “*to any particular state or profession*” and so that the one feared is the magistrature and “*not the magistrate*” – the judiciary is successively described as “*invisible and void,*” “*somehow null,*” as the “*mouth that pronounces the words of the law*” and, finally, as a power interpreted daily by “*mere passive beings, incapable of moderating either its force or rigour.*”³³

Whatever the best explanation for these words of Montesquieu, it is clear that being a judge himself, and having valued the judiciary to the point of making it substantively autonomous from the executive power, in absolutely innovative terms, they can only be understood based upon mental reserve or extreme political prudence. In fact, it would

³³ CL Montesquieu (1951) pp. 398, 401 and 404.

not be easy to speak of a “*judicial power*” in 1748, not so much because of the adjective “judicial”, but above all because of the noun “power”.

On the one hand, throughout royal absolutism – Louis XV reigned in France at the time – any power other than that exercised directly by the sovereign, however irrelevant it might claim to be, would always be an opposing power. Not by chance, *De L’Ésprit des Loix* was published in Geneva (and not in Paris) and without reference to its author name. Precautions that did not prevent it from being considered a pernicious book and placed in the Index only a couple of years after its publication – although it does not contain many ideas on matters of faith. On the other hand, there are some historical episodes in which the so-called judicial parliaments, despite being in a certain way an extension of the royal power to administer justice, became notable for resisting absolutist monarchs – the Parliament of Paris, for example, annulled the wills of Louis XIII and Louis XIV. Therefore, prudence recommended not to present judges as having a power of their own, but rather to underline the importance of calling upon the community to exercise justice (through juries), and to assure the lords of the realm that they would be judged by their peers, so as not to subject them to envy.³⁴

In short, in Montesquieu’s view, the best way to affirm the judiciary was to pretend that there were no judges. It is not suitable for them to be “*continually (...) under the view*”³⁵ of the people – and the truth is that even today, the presence of judges outside the walls of the courts, mainly in the mediatic sphere, requires prudence and still generates much discomfort.

In any event, this balance between veneration of the law and the legislator, on one side, and suspicion towards the courts and especially judges, on the other side, has marked until now the French understanding of the separation of powers, with two very particular manifestations. The first reflects itself in the refusal to submit the (post-revolutionary) executive power to the control of (ordinary) courts, in a logic according to which judging the Administration is still a form of administrating – with the consequent creation of special courts to solve disputes between private individuals and public authorities, i.e., administrative courts, with a peculiar status of conditioned independence. The second consists of the persistent refusal of a genuine system of constitutional review of laws, with the participation of the courts in general. A blockage that only the Fifth Republic has partially overcome with the establishment of a *sui generis* mechanism of concentrated, preventive, and semi-political constitutional review.

8 Sieyès’s Attempt

This last point on the constitutional review of legislation is, in fact, central to the strategic interpretation of the models for implementing the separation of powers in the different constitutional experiences.

Despite dividing each of the powers into faculties to enact – “*the right of ordaining by their own authority*” and faculties to prevent – “*the right of annulling a resolution taken by another*”³⁶ –, in Montesquieu’s theory, there is no place for the judiciary to review the

³⁴ Ibid, p. 404.

³⁵ Ibid, p. 398.

³⁶ Ibid, p. 401.

validity of laws in relation to any higher legal parameter, be it the fundamental law or the prescriptions of natural law. How bold, indeed, would it be for a null power to call into question the work of the legislative power! The relationship between the judiciary and the legislative power is essentially one of subordination. The separation exists between the legislative and executive power and between the latter and the judiciary.

Not even the incisive considerations of the famous Abbé de Sieyès, written on the eve of the Revolution, transformed this state of affairs, even though he made the distinction between constituent (original) power and constituted (delegated) powers quite clear. Indeed, in chapter V of his *Qu'est-ce que le Tiers État?*, Sieyès begins by making a public appeal: “if we do not have a constitution, one must be made, and the nation alone has this right.”³⁷ A few pages after, he insists: “the nation exists before everything, it is the origin of everything. Its will is always legal, it is the law itself. Above it only ‘natural right’ exists.” He then continues with the thesis, according to which, “if we want to get an exact idea of the series of ‘positive’ laws that can only emanate from its will, we find, in the first line, the constitutional laws. (...) These laws we call fundamental (...) because the bodies that exist and act by them cannot touch them.” And he ends with the following conclusion: “in each of these parts, the constitution is not the work of the constituted power, but of the constituent power.”³⁸

Sieyès further explains – as well as in his *Préliminaire de la Constitution Française*, a booklet that has almost faded into oblivion³⁹ – that the power of the “ordinary representatives” of the people is limited to questions of government. By contrast, the power of the “extraordinary representatives” is “all that the nation wishes to give them”⁴⁰ – and, because “extraordinary representation is nothing like the ordinary legislature,” naturally “the General States, even if assembled, have no competence to make any decision about the constitution.”⁴¹

Notwithstanding the author’s decisive weight in the revolutionary process, especially in defense of the political position of the third estate, these meditations were not sufficient to forge in the French legal doctrine the belief that the constitution – as a regulatory text, and not just as a political proclamation – is equipped with a force superior to that of other laws and that, above all, this supremacy must be assisted by practical mechanisms of guarantee. In France, by tradition, fundamental law and ordinary law tends to go hand in hand.

9 Hamilton’s Audacity

In contrast, on the other side of the Atlantic, American constituents have had from the very beginning a clear awareness of the Constitution’s hierarchical superiority and of the need to trust the courts the constitutional power to review the legislation.

The most celebrated decision in the entire history of constitutional justice – *Marbury v. Madison*, delivered in 1803, only 16 years after the Philadelphia Convention – certainly

³⁷ A Sièyes (2002) p. 50.

³⁸ Ibid, p. 53.

³⁹ A Sièyes (2002).

⁴⁰ Ibid, pp. 56–57.

⁴¹ Ibid, pp. 57–59.

did not arise by chance. Quite the contrary. In *Paper* no. 78, notwithstanding the formal deference initially maintained towards the ideas of the great Montesquieu, Alexander Hamilton ultimately makes a crystal-clear defense of the courts' general competence to review the constitutionality of laws, perfectly aware of the profound theoretical and practical consequences of such recognition.

Hamilton stems from a comparative analysis of the dangerousness of the three powers. Furthermore, it is already known that "*the executive not only dispenses the honours, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse.*"⁴² Of the judiciary it is said, as the French oracle might have said, "*to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments*"⁴³ – thus allowing the famous expression later taken by Alexander Byckel, "the least dangerous branche."

However, two paragraphs later, Hamilton, after stating that "*the complete independence of the courts of justice is peculiarly essential in a limited constitution.*" contradicts almost everything he said before, advocating in a clairvoyant manner that this limited character, in practice, cannot be preserved "*no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.*" Entirely aware of the scope of his words, he refers to the "*perplexity*" that is caused by the idea of attributing to the courts the power to "*pronounce legislative acts void, because contrary to the constitution*" since such a doctrine suggests the idea of "*superiority of the judiciary to the legislative power.*" Nevertheless, what is certain is that Hamilton does not falter for a second and argues that there is no clearer principle than that according to which "*every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that (...) the servant is above his master; that the representatives of the people are superior to the people themselves.*"⁴⁴

Much more judicious than asserting that the "*legislative body are themselves the constitutional judges of their own powers*" is, therefore, the interpretation according to which the "*the courts were designed to be an intermediate body between the people and the legislature, in order (...) to keep the latter within the limits assigned to their authority.*" Thus, if "*the interpretation of the laws is the proper and peculiar province of the courts,*" the Constitution is also a law – it is, of course, the "*fundamental law*" – and it is in that capacity that it must be "*regarded by the judges.*"⁴⁵

Before turning his attention to the professional status of judges – and the importance of their independence and no-removability to guarantee the supremacy of the Constitution – Hamilton still has time to answer the essential question: does this system of judicial review of the constitutionality of laws mean the "*superiority of the judicial to the legislative power*"? The answer is absolutely orthodox: "*it only supposes that the*

⁴² A Hamilton et al (2001) p. 402.

⁴³ Ibid, p. 402.

⁴⁴ Ibid, p. 403.

⁴⁵ Ibid, p. 403–404.

power of the people” – meaning the sovereign people who approve the Constitution – “*is superior to both.*” Indeed, “*that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.*”⁴⁶

The so-called paradox of constitutionalism – “we are under a Constitution, but the Constitution is what the judges say it is” – may well have been formulated only in the beginning of the twentieth century, by Charles Evans Hughes, one of the most distinguished Chief Justices of the Supreme Court. However, the one who gave rise to this paradox was, in fact, Alexander Hamilton in 1788.

10 Tocqueville’s Observations

This last point does not serve to give an account of the labors of Hercules that constitutional doctrine and justice have had to (supposedly) dismantle the paradox left to us by Hamilton. It serves, instead, to report one last episode, which is symbolically important, in this history of encounters and disagreements between the referential creator of the separation of powers and his two main creations, in the US and France.

Between 1831 and 1832, a Frenchman named Alexis de Tocqueville – like Montesquieu, an aristocrat and magistrate – visited the US and methodically observed, during his time there, the American legal and political reality. In the work in which he critically compiled the results of his observations – *De la Démocratie en Amérique*, published in two volumes in 1835 and 1840 – Tocqueville stresses that the Americans “*have kept all the distinctive characteristics common to the judicial power,*” and that these are essentially three: they serve as arbitrators of disputes since they can “*deliver a verdict only when there is a lawsuit.*”; they “*can never get involved except in a particular case*”; and it “*must always wait to be apprised*” before acting.⁴⁷

Even though he “*perfectly resembles the magistrates of other nations,*” the American judge nevertheless possesses “*an immense political power.*”⁴⁸ To the rhetorical question about the origin of this power, Tocqueville answers bluntly: “*the cause is this single fact: the Americans have recognized the right of judges to base their decisions on the constitution rather than on the laws. In other words, they have allowed them not to apply laws that would appear unconstitutional to them.*”⁴⁹

If this right provides a reasonable explanation for the social prestige of American judges and their weight in public life, it is also true that it derives from the very concept of Constitution that has always characterized their constitutional experience. More precisely: in France, the Constitution is an “*immutable work*”; in England, it can be constantly modified – “*or rather it does not exist at all*”; and in the US, “*it forms a work apart that, representing the will of all the people, binds legislators as well as ordinary citizens; but it can be changed by the will of the people following established forms and in cases for which provisions have been made.*”⁵⁰ Therefore, in one fell swoop,

⁴⁶ Ibid, p. 404.

⁴⁷ A Tocqueville (1981) pp. 168–169.

⁴⁸ Ibid, p. 169.

⁴⁹ Ibid, p. 169.

⁵⁰ Ibid, p. 169.

the author introduces the concepts of a rigid, flexible, and semi-rigid Constitution and bases the judicial review of legislation precisely on the express provision (in Article 5) of a procedure for constitutional amendment. In other words, the ability of the people to amend their Constitution discards the paradox of constitutionalism – or, at least, prevents the most severe cases of interpretative blockage from dragging on for a long time.

Tocqueville further explains his thinking: if “*in France, the courts could disobey the laws on the grounds that they found them unconstitutional, the constituent power would actually be in their hands, since they alone would have the right to interpret a constitution whose terms no one could change. They would therefore take the place of the nation.*” It is true that, “*denying judges the right to declare laws unconstitutional, we indirectly give the legislative body the power to change the constitution (...) But better to grant the power to change the constitution of the people to men who imperfectly represent the will of the people*” – that is to say, the Members of Parliament – “*than to others who represent only themselves*” – *rectius*, the judges.⁵¹

Differently, in the US – leaving aside the British example, where it is challenging to separate constituent power and legislative power – “*the nation can always reduce magistrates to obedience by changing its constitution.*” Nevertheless, until that eventually happens, he assumes that “*from the day when the judge refuses to apply a law in a trial, it instantly loses part of its moral force. Those who have been wronged by the law are then alerted that a way exists to escape the obligation to obey it; trials multiply, and it becomes powerless. Then one of these two things happens: the people change the constitution or the legislature revokes its law.*”⁵²

It is evident that the possibility of approving amendments to the Constitution does not definitively overcome the paradox of constitutionalism – American constitutional history, by the way, provides several examples of this –, but it is also important to underline that Tocqueville tries to mitigate the problem through a prudent defense of the constitutional review.

In fact, he only defends a concrete and dispersed review – long before, should we say, the abstract review was invented by Kelsen and enshrined in the Austrian Constitution of 1920. In his careful words, the judge’s duty to constitutional review should be limited to cases in which “*he must judge the law in order to be able to judge the trial. When he delivers a verdict on a law, outside of a trial, he goes completely beyond his sphere and enters into that of the legislative power.*”⁵³ – even if only to act as a negative legislator. Only in the concrete review does the judge act in this capacity – not in other forms of abstract analysis, when he calls the law into question outside his decision-making process.

11 Epilogue

We will never get very far if we do not know the path where it all began, where we have been, and where the paths we follow may take us.

⁵¹ Ibid, p. 170.

⁵² Ibid, p. 171.

⁵³ Ibid, p. 172.

After all, we are dwarfs on the shoulders of giants like Hobbes, Locke, Montesquieu, Rousseau, Madison, Hamilton, Sieyès or Tocqueville. We are humbled heirs to a long constitutional tradition of more than 250 years old, with numerous declinations, but which has even deeper roots, in Greek philosophy, in Roman Law and the different moral canons of Christianity.

There are no systems of separation of powers in the abstract. There are only the original archetypes – that we have tried to describe as accurately as possible – and those models that in concrete terms have been developed and enshrined in different Constitutions, in multiple languages, in all continents.

However, in any of them, it is up to the judges – under the watchful eye of an open society of Constitution’s interpreters, as suggested by Häberle – to define the scope of the separation of powers and the exact meaning of the judiciary’s independence – the most separated of all the three powers –, which cannot fail to be felt by all of us as a heavy responsibility. It is for all those judges who faithfully honor this responsibility – with their daily work and many times bravely facing obstacles and all sorts of pressures – that this text pays tribute.

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Independence of the Prosecution System

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Today, discussing and reflecting on the rule of law is not just an occasional issue, but an urgency in Europe and within the European Union itself.

Founded on values, such as the respect for fundamental rights, democracy and the rule of law that are considered to be consensual, the European Union is today confronted with internal currents that may jeopardise the path outlined.

Hasty reforms carried out by emerging or resurgent political trends in Hungary and Poland have increased political influence on the judiciary and weakened its independence, through changes in the rules of appointment or dismissal for access to the Constitutional Court, higher courts or management boards of the Public Prosecutor's Office, or control of the inspection or disciplinary process of magistrates.

But situations occurring in other Member States such as Romania, Bulgaria or Slovakia also present concerns regarding judiciary independence.

In addition, the Covid-19 pandemic, apart from the immediate health and economic impact has created a wide and diverse set of challenges for society and, more specifically, for public administrations and legal and constitutional systems.

This context has further emphasised how essential an independent judiciary is to the rule of law, through the possibility of recourse to an independent court and judicial review against possible unjustified infringements on fundamental rights and freedoms.

The fight against corruption is also essential for the preservation of the rule of law. A high perceived corruption rate undermines trust in public authorities.

It is crucial that institutions responsible for the control of compliance with criminal law work effectively, independently, and impartially.

There is already a consolidated understanding in the case-law of both the CJEU and the ECtHR that the rule of law addresses principles such as legality, which requires a transparent, accountable, democratic and pluralistic legislative procedure; legal certainty; prohibition of arbitrary exercise of executive power; effective judicial protection by independent and impartial courts and effective judicial review, including respect for fundamental rights; as well as the principles of separation of powers and equality before the law.

Respect for the rule of law is essential for citizens and businesses to have confidence in public institutions.

There are increasingly frequent political attacks and orchestrated media campaigns against judges and prosecutors, attempting to discredit the justice system in public opinion so that they can exercise greater control over criminal investigation and prosecution.

A. Carvalho—President of Sindicato dos Magistrados do Ministério Público (SMMP).

The efficiency of the judicial system is based on its assumed independence. To maintain that greater control of the political power over the judicial system would increase its efficiency is false, a strategy designed with the sole purpose of hampering its functioning and preventing some from being reached, in essence generating a manifest inequality in treatment before the law.

Fighting corruption also presupposes that the judiciary, the Public Prosecutor's Office and the bodies responsible for law enforcement have sufficient funding, human resources, technical skills and expertise.

The independence of national courts is key to ensuring effective judicial protection.

To ensure such independence, they must be subject to the classification and disciplinary authority of councils that guarantee independence in their composition and designation, as well as in the method of appointment and judgement, and the rules of separation of powers and transparency must be respected.

This requirement is also extended to the Public Prosecutor's Office.

According to a recent judgment of the ECtHR, on the path of the recommendations of the Council of Europe and other international instruments, delivered in case of *KÖVESI v. ROMANIA* (Application no. 3594/19) of 5 May 2020, the independence of prosecutors is a key element for maintaining judicial independence. Prosecutors must be called upon to participate in reforms of judicial systems and must have an active voice in public debates when these reforms may compromise their independence.

Independence of the Courts and the Public Prosecutor's Office is an essential premise for the rule of law.

Threats to the rule of law undermine the legal, political, and economic foundations of the European Union and ultimately its very subsistence.

MEDEL, such as at its origins, continues to play an important role in upholding the independence of the judiciary and promoting the democratic rule of law as the cornerstone of our societies and our common identity.

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Three Topics on Democracy, Judicial Associations and Justice

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Minister of Justice, this will most probably be the last public act in which I participate with Your Excellency as President of the Association of Portuguese Judges, after 3 years and 8 months of institutional relationship. Therefore, in addition to thanking you for your presence, I must express a word of appreciation for the always correct, loyal and considerate manner in which you have dialogued with us, even when we did not agree and needed to disagree.

Mr. Dean of the Lisbon School of the Law Faculty of Universidade Católica, almost 40 years after I began the university studies that would lead me to the profession of judge, I take this opportunity to praise the academics who, in the scientific study and training of legal professions, make an essential contribution to the deepening of a culture of respect for the values of the rule of law.

Madam Vice-President of MEDEL - an institution that brings together 24 associations from 16 countries and represents more than 18,000 magistrates throughout Europe - I would like to pay a sincere tribute to you and all of MEDEL's leaders, past and present, for your sense of service, your spirit of solidarity, your commitment to democracy and for the much you have done to defend justice and European magistrates.

Mr President of the Union of Public Prosecutors, although we come from different sections of magistrate profession, with distinct functions in the administration of justice, it is often up to us, in these temporary garments of “trade unionists” that we are now wearing, to say what needs to be said when many would prefer us to keep quiet, to speak loudly and forcefully to those who do not want to hear us, to demand what should be given to justice without favour and even to bear deeply unfair criticism. We are used to it, and we are uncompromising. In your person, I praise the work of the institution herein represented, in defence of a Public Prosecutor's Office that is strong, prestigious, autonomous from political power and effective in communication and in action.

As we come to the end of this day and a half of debate, and being a representative of one of the Portuguese magistrates' associations that is part of MEDEL and helped organise this conference, I can only say thank you.

Thank you to Universidade Católica, with a special note to Professor Paulo Pinto de Albuquerque, for welcoming us here so warmly;

Thank you to the national and foreign speakers, from the courts, from the universities and from politics, for the quality of your speeches;

M. Soares—President of Associação Sindical dos Juizes Portugueses (ASJP).

Thank you to all those who attended the proceedings, here in this room or remotely by videoconference, for your interest in an issue that is so vital to the future of the people of Europe.

However, I will not end without three notes that remain in my memory:

The first, on the vices that are hidden in realities that we all hold to be virtuous;

The second, and corresponding to the first, on the virtues that can be found in realities that many consider to be vicious;

And the third, on the lesson that remains from all this: as in the story of King Frederick II of Prussia and the miller of Sanssouci in Europe, there are still judges and courts in Luxembourg.

The vices of virtue of which I spoke remind us that the values of the rule of law are neither consensual nor irreversible, even in our European area of virtuous democracy. As the recent examples of Hungary and Poland show us, democracy contains within itself destructive vices that can corrode it from within.

We have known this before, from other moments in history, but now we are once again being confronted with this harsh reality: free and democratic elections can also enable people to elect authoritarian governments that are enemies of democracy and freedoms.

We must not forget this in each of our countries. Everywhere there are aspiring dictators disguised as democrats, waiting for the opportunity to seize power.

When speaking of the vices of virtue, I am referring to the irreplaceable role of national and international magistrates' associations in the fight for democracy that is taking place in Europe.

I do not know what it is like in your countries, dear colleagues from MEDEL and foreign guests, but here in Portugal there are many people who demonise judicial associations, as if they were an illegitimate excrescence, foreign to sovereignty and democratic life; as if they were a subversive instrument for the judiciary to take political power by storm.

These people have never spent a minute thinking about a paradox that renders their thesis completely illogical: why is it that there is not a single democracy in the world without free and intervening judicial associations and, on the contrary, all authoritarian regimes fiercely pursue these associations?

Well, if there were any doubt, recent times have shown the virtues of these associations that many consider vicious.

Who has been at the forefront, from the very first moment, in publicly denouncing the attacks on the independence of the judiciary, not only in Poland but also in other countries?

Who has been mobilising to draw the attention and consciences of academics, democratic politicians, civil society organisations and public opinion?

Who has not tired of knocking on the door of the European political institutions, asking for the formal control mechanisms that are currently in place to be activated?

This work for the benefit of judicial independence and the rule of law has come first and foremost from national and international associations of magistrates, namely MEDEL and the European Association of Judges.

Let this be a lesson to those who do not believe in our work.

One final note on the fact that the Court of Justice of the European Union has once again been called upon to play a decisive role in the reconfiguration process of European “constitutionalism”, ensuring compliance with the structural principles of the European Union.

Issues which seemed to be countries’ internal affairs are, after all, of interest to the European Union and all the Member States.

This is good news for the vitality of the European project and bad news for the illiberal populism impulses that, in various countries, are planning to dismantle guarantees of the rule of law and judicial independence.

Thus, here is a new limit that will condition the internal processes of reform of justice in each of the countries of the European Union. It is no longer enough to obey the Constitutions or the internal laws. It is no longer enough to invoke the legitimacy of the democratic vote. It is also necessary to comply with the fundamental principles established in the treaties to become a member of the European Union, which each State freely committed itself to when it decided to join.

A safe return to your countries, in good health, encouragement and hope for better days.

Thank you.

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The Independence of Prosecutors: Cornerstone of the Rule of Law and Precondition for the Overall Independence of a Judicial System

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It is clear that in the current crisis of the Rule of Law, that in recent years harvested a systematic weakening of the independence of the judiciary in Europe (and its sheer disappearance in Turkey, Hungary and Poland), what is endangered are the rights and freedoms of citizens. It is the very idea of Europe as a community based on the primacy and universality of fundamental rights, and on indivisible and universal values of human dignity, equality and solidarity as enshrined in the European rights Charters. It is the spiritual and moral heritage of the Union that we committed ourselves to recognize and protect for future generations.

The national judges, by taking seriously these Charters and keeping a “dialogue” with the European courts, have been key actors in the establishment of the system of values that represents the shared fabric of our community. The national judges, who are - and feel as - *European* judges, their associations, the High Councils for the Judiciary and their institutional networks are now in the frontline for the defense of the Rule of Law, the content of which has been made clear by the European Commission while designing the new mechanism to react to systemic crises in the member states since 2013. We have to reaffirm that the Rule of Law is not simply *a system where laws are applied and enforced (so not only “black letter law”)*, but it encompasses as well *the spirit of the law and fundamental rights, which are the ultimate foundation of all laws*¹.

It is clear that the real target of the strategy based on the openly declared objective to question the supremacy of EU law and the obligations stemming from the European Convention on Human Rights, that reached its apex with the judgments of the Polish constitutional court last October and November, is indeed the very existence of a supra-national architecture for the protection of the Rule of Law, and of individual rights and freedoms.

MEDEL constantly stressed that the Public Prosecutor is a cornerstone of this architecture, and one of the keys to its effectiveness.

The years long reflection on its internal and external independence, accountability and transparency, across the variety of national contexts, made possible to reach - in

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¹ https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677 accessed 27 January 2024.

opinions, recommendations and further soft law - a shared *identity* of Public Prosecution, based on common principles concerning its status and its relation with the *judiciary*: the independence of prosecution services is indeed both a precondition and a *necessary corollary to the independence of the judiciary*, as made clear by the “Rome Charter”, adopted by the CCPE in 2014².

This new *identity* is linked to the role of the Prosecutor in modern democracies and to the shift of paradigm represented by the increasingly supranational dimension of justice: from “guardian of legality” - a watchdog on the observance and enforcement of criminal law – to “justice organ” that *acts on behalf of society and in the public interest to respect and protect human rights and freedoms as laid down, in particular, in the Convention for the protection of Human Rights and Fundamental Freedoms and in the case law of the European Court of Human Rights*.³

It is the Prosecutor who - not less than defense lawyers- can trigger in the judge, who sits in front of him or her, the «*réflexe communautaire*», that is a part of the machinery enabling a dialogue between the national courts and the Court of Justice of the EU⁴. A dialogue now embracing the Strasbourg Court after the implementation of the advisory-opinion procedure set out in Protocol n.16 to the European Convention on Human Rights.

It should go without saying that the new *identity* of the Prosecutor as *promoter and guarantor of rights and freedoms* requires not only *principles*, but also a common institutional framework enabling it to perform its functions with impartiality and independence.

In the common legal space based on mutual trust between judicial systems, which implies a constant review - involving the national courts as well - of the actual capacity of all national systems to ensure the same level of protection of fundamental rights, the capacity of prosecution to act independently becomes one of the lenses through which one must read the radically new *legal environment* created by the common area of justice. All this appeared clearly in the case of the reference to the Court of Justice of the EU for the definition of the concept of judicial authority for the purpose of the European arrest warrant.

We can certainly repeat ourselves that the different models of prosecution are the outcome of different historical paths and of specific national cultural and social chemistries, but whatever the specific solution adopted at national level this must be compatible with the implementation of the Prosecutor’s functions that concern rights and freedoms and with its role in actively promoting fair and impartial judicial decisions.

The ongoing democratic backsliding is teaching us all this the hard way. The institutional arrangement of prosecution is aggressively and strategically exploited to modify institutional balances to the advantage of the executive power, providing it with a firm grip on the machinery of justice and on the exercise of core judicial functions.

Poland provides us once again the most striking example: the 2016 reform unified the role of Minister of Justice and that of General Prosecutor, thus merging in the same person increased powers over Court presidents, and increased powers of inquiry and

² Opinion n.9 of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors.

³ Ibid.

⁴ See L. Salazar (2021) pp. 85–89.

of direct intervention in specific cases pending in the jurisdictions. This concentration of power encompassed the removal of any form of internal independence for individual prosecutors, who can be assigned to lower functions or different offices, subject to arbitrary disciplinary and criminal proceedings. Together with increased external prerogatives in the *maintenance of law and order*, all this deeply impacted on the separation of powers and, thus, on democracy.

But in other contexts as well, where and when the Rule of Law proves unstable, it is the structure of prosecution that easily becomes the key to a covert transfer of prerogatives to the executive branch or to pressures on the judges. Let's just mention the remarks of the Venice Commission, the decisions of ECtHR and the reports of the European Commission (issued in the context of the Cooperation and Verification Mechanism) on the appointment and dismissal of prosecutors in Romania, and on the deficiencies of the structure and role of Prosecution in Bulgaria, that appeared as functional to the merging rather than to the separation of powers, with unreasonable broad prerogatives and lack of accountability, in a context of huge pressure on judges.

Any institutional arrangement must be assessed in the light of Rule of Law principles according to article 2 of the Treaty on European Union and cannot become a tool to put the courts under political control. This has been recently recalled by the Grand Chamber of the Court of Justice of the EU in the case of the specialized section of the Prosecutor Office for offences committed by judges and prosecutors introduced in Romania: it is clearly a general standard which perfectly fits to what happened in Poland with the Internal Affairs Department of the state prosecution service that launched actions against judges as Igor Tuleya, Beata Morawiec and many others who suffered serious consequences after taking decisions disliked by the leading political party.

An independent status for prosecutors is a *fundamental requirement of the Rule of Law* and a *fundamental instrument of the independence of jurisdiction*: MEDEL clearly stated these principles since the 90's, in the Palermo and Naples declarations and recently recalled them in the *Florence declaration of 19 September 2020*⁵.

These principles permeated a number of European documents dealing – significantly - with the independence of judges, as the *Magna Carta*⁶ and the report prepared jointly in 2016 by the Bureau of CCJE and the Bureau of CCPE, stating that “*the independence of prosecutors is a further safeguard in maintaining the independence of judges, it is crucial in a democratic society and an essential condition for the independence of the entire justice system*”⁷.

⁵ Palermo Declaration (Elements of a European Statute of the Judiciary adopted on January 16th, 1993; Naples Declaration (MEDEL Declaration of Principles concerning the Public Prosecutor), adopted on March 2nd, 1996).<https://medelnet.eu/wp-content/uploads/2012/02/Palermo.pdf> accessed 27 January 2024.<https://medelnet.eu/medel-declaration-of-firenze/> accessed 27 January 2024.

⁶ Magna Carta of Judges (Fundamental principles), adopted during the CCJE plenary meeting in Strasbourg (17–18 November 2010), point 11 “Judges shall ensure equality of arms between prosecution and defence. An independent status for prosecutors is a fundamental requirement of the Rule of Law”.

⁷ *Joint report on challenges for judicial independence and impartiality in the members states of the Council of Europe*, General Principles, I. The importance of independence and impartiality, point 35.

MEDEL constantly stressed the need for a *parallel legal framework* for judges and prosecutors where the latter can rely on a status fully complying with Rule of Law principles, subject to continuous monitoring by EU institutions on the respect of European common standards ensuring, also through autonomous self-government institutions, the impartial and independent exercise of prosecutorial functions.

The establishment of the European Public Prosecutor's Office— that MEDEL always supported— should be considered as a *milestone* in this direction and represents a major step forward towards the introduction of a renewed model of public prosecutor, well aligned to the magnitude of the tasks it has to perform in order to ensure an effective and impartial guarantee of rights and liberties, the control of legality and the promotion of the principle of equality of all citizens before the law⁸.

The kick-off of EPPO's activity will necessarily raise a line of questions concerning the protection of the fundamental rights of individuals under investigation and prosecution and, once again, *the role of national courts and the EU Court of Justice in developing the EPPO legal framework in a Rule of Law compliant manner will be crucial*⁹.

Independence in the form of external independence towards other European institutions, agencies, member states, internal autonomy of its members, and accountability are the core features of the new body.

The EPPO Regulation lays down specific rules to ensure such independence, in line with the case law of the European Court of Human Rights, and the internal autonomy: EPPO operates as an indivisible Union body, a single entity albeit strongly interconnected to the national judicial systems through the European Delegated Prosecutors, who are - according to the Regulation- “an integral part of the EPPO”, acting exclusively on its behalf and in its name on the territory of their respective Member State, with “a functionally and legally independent status which is different from any status under national law” (*recital 32*).

The great challenge represented by the establishment of the EPPO requires not only the harmonization of national legislations: it requires also the integration of structures and systems and potentially uniform legal rules – even of constitutional rank - concerning the independence and accountability of prosecutors in the different national systems.

It is high time to implement a common European Independent Statute of the whole judiciary, something that MEDEL advocates since 1993.

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⁸ According to art. 5 of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the EPPO, all these principles are bounding for the activities it will carry out, respecting also the principles of proportionality, impartiality and accountability.

⁹ See V Mitsilegas (2021) pp. 254–264.

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Portuguese Presidency of the Council 2021 and the Rule of Law

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The Rule of Law is a current issue in European politics, which has gained visibility in recent times, both because of the presentation of the Annual Reports on the Situation of the Rule of Law in Europe¹ and, unfortunately, because of the situation experienced in some Member States.

This theme was elected as one of the transversal priorities of the Portuguese Presidency of the Council of the European Union in the first semester of 2021, and, in line with the German Presidency that preceded it, Portugal brought to the political debate, in the Justice Council, specific aspects of the Rule of Law more directly related to Justice, such as the independence of the judiciary and the prevention and fight against corruption, two of the most important pillars on which the Report is structured.

Thus, the meeting of Ministers of Justice held on June 7th discussed the importance of well-functioning Public Prosecutors' Offices, in particular for the proper functioning of the criminal justice system, the effectiveness of prosecutions and judicial cooperation in criminal matters between the Member States².

The case-law of the Court of Justice of the European Union concerning prosecutors, particularly in judicial cooperation in criminal matters based on the European arrest warrant, was also analysed. It follows that prosecutors must be independent of the executive, to be considered as a judicial authority competent to issue an arrest warrant.³

F. Van Dunem—Judge in Portugal, Former Minister of Justice.

¹ The European Rule of Law Mechanism was established in 2019 with the aim of strengthening the common commitment of the Union and Member States to the Rule of Law. It is an annual cycle of analysis of the situation of the Rule of Law in the EU territory and includes national reports on each member state in terms of the judicial system, the fight against corruption, freedom, and pluralism of the media, and may cover other issues relevant to the balance of the State's powers. The mechanism has a preventive logic and aims at early identification and corrective intervention by States in relation to distortions that call into question the foundations of the Rule of Law. The first Rule of Law Report was published in 2020, with an assessment focusing on 2019. For the contents of that and subsequent reports, see 2020 Rule of Law Report; 2021 Rule of Law Report accessed 27 January 2024.

² See <https://www.consilium.europa.eu/pt/meetings/jha/2021/06/07-08> accessed 27 January 2024; <https://data.consilium.europa.eu/doc/document/ST-9091-2021-INIT/pt/pdf> accessed 27 January 2024.

³ Judgment of 25 July 2018, case c-216/18PPU; Judgment of 12 December 2019, case C-566/19PPU.

This is also the line taken by the European Commission for Democracy through Law, known as the Venice Commission, when it states that “*sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence*”⁴.

Also, during the Portuguese Presidency two international conferences on the Rule of Law were organised, in Coimbra and Lisbon, and in the same time the European Commission organised a seminar on the Rule of Law and the prevention of corruption for media representatives from Croatia.

Portugal has thus made an important contribution to keeping alive the discussion on this issue, which is not a new one. Among the many academic writings, the vast existing documentation, and the various definitions available, this one from the United Nations is worth mentioning:

*“The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforces and independently adjudicated, and which are consistent with human rights norms and standards.”*⁵.

The separation of powers and the independence of the judiciary are essential elements to the functioning of the Rule of Law and for the protection of citizens against the arbitrary exercise of power. The principle of democratic legality and the respect and guarantee of fundamental rights constitute its inseparable founding blocks.

The concept of the Rule of Law is, for all these reasons, the foundation on which our democratic societies are built. It is part of the humanist history of Europe, as a common feature of European identity that was at the origin of the creation of the Council of Europe, as highlighted in the Preamble to the European Convention on Human Rights adopted in 1950.

It is also undeniably inscribed in the matrix of the European project. Alongside respect for human dignity, freedom, democracy, equality and respect for human rights, Article 2 of the Treaty on European Union enshrines the principle of the Rule of Law as a founding value of the Union, a value shared by the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.

The Rule of Law is not only central to the construction of the European Union. It is critical to our common future. As the preamble to the Charter of Fundamental Rights of the European Union states, the Union has a duty to contribute to the preservation and to the development of these common values in its Member States⁶.

The Rule of Law, democracy and fundamental rights are inseparable and structural references of our societies. Fundamental rights can only be guaranteed if effective judicial protection is ensured, if the principle of equality is respected, if there is freedom of expression and informed debate, with independent and responsible media and an active civil society.

⁴ <https://data.consilium.europa.eu/doc/document/ST-9091-2021-INIT/pt/pdf> accessed 27 January 2024.

⁵ United Nations Secretary-General, 2004.

⁶ <https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:12016P/TXT&from=FR> accessed 27 January 2024.

The times we live call upon us to reaffirm the importance of the Rule of Law, the need to protect fundamental values and individual freedoms, as shown by the COVID-19 pandemic, with the compression of some rights and the restriction of freedom of movement, the worsening of inequalities that it led to, and the spread of populist discourses that have fuelled hatred, xenophobia and discrimination against minorities, and associated migration with issues like insecurity and crime.

The discussion on the effects of the pandemic on the Rule of Law is therefore unavoidable.

In Portugal, the constitutional framework of the state of emergency was put into practice for the first time in our democratic regime⁷. It became necessary to take difficult decisions and impose restrictions on the fundamental rights of citizens. At European level, the measures had a substantial impact on freedom of movement.

The Parliament remained in function and played a central role in defining and monitoring the state of emergency. The Ombudsman and the Public Prosecutor's Office remained permanently operational, monitoring the observance of democratic legality and citizens' rights.⁸

The restriction of rights and the requirement for the normal functioning of institutions entails responsibility and control. The courts have also played an essential role in this context as guarantors of the Constitution and fundamental rights⁹.

The pandemic has also shown how the criteria of necessity and proportionality in the restriction of rights and the effective independence of the powers of the State are essential to guarantee the Rule of Law¹⁰.

Alongside the pandemic reality, the digital transition has brought new opportunities to make fundamental rights more effective and more visible, due to the ease of access to knowledge and justice, but it has also posed new challenges. The rapid dissemination of online content, the vulnerability in which a fringe of the population has been placed regarding abuses, such as domestic violence, sexual abuse of children, the spread of terrorist and radicalisation propaganda and the increase of cybercrime, in general, are just a few examples.

⁷ Cf., RAR 15-A/2020, dated 2020-03-18 and DPR 14-A/2020 dated 2020-03-18, in Portuguese Official Journal ("Diário da República") No. 55/2020, 3rd Supplement, Series I of 2020-03-18.

⁸ Law No. 44/86, of 30 September, which governs the state of siege and the state of emergency states, in its article 18, paragraph 2 that the services of the Ombudsman and the Public Prosecutor's Office shall remain "... in permanent session, with a view to the full exercise of their powers to defend democratic legality and citizens' rights."

⁹ Law 44/86 expressly provides for the right of access to the courts, in a provision that reads as follows: "During the validity of the state of siege or state of emergency, citizens maintain, in its fullness, the right of access to the courts, in accordance with the general law, to defend their rights, freedoms and guarantees injured or threatened with injury by any unconstitutional or illegal provisions" - Art. 6.

¹⁰ This period was marked by intense debates, multiple studies, and publications on the topic. See, e.g., the "Cadernos da Pandemia", published by the Ombudsman, particularly the book entitled "Estado de Direito" (State of Law), dated 19/05/2021 and Maria da Glória Garcia's argument, "Direito em Tempo de Pandemia" (Law in a Time of Pandemic), published by the Catholic University.

The fight against crime, in particular organised crime, which constitutes a serious threat to the Rule of Law, to the values on which our democratic societies are based and to individual rights, is therefore an obligation for all States, and must be pursued through all admissible legal means.

It should also be recalled, in this field, the publication of the “*Strategy to strengthen the application of the EU Charter of Fundamental Rights*”, by the European Commission, in December 2020, to respond to current challenges and making the Charter a reality for citizens’ lives, by creating obligations for the European Union and the Member States¹¹.

The Portuguese Presidency of the Council of the European Union has made the defence and strengthening of the Rule of Law one of its priorities and therefore could not fail to also promote the implementation of this Strategy, also including it in the priority objectives in the field of Justice.

In that context the Ministers of Justice approved, in March 2021, the Council Conclusions on the strengthening of the Charter of Fundamental Rights, which identify a set of guidelines, with emphasis on training and on the role of the Court of Justice and the national courts¹².

Due to its relevance, it stands out from these Conclusions:

- The importance of universities and training schools for legal practitioners in promoting awareness of the Charter through academic research and training activities, in cooperation with the Union institutions, national authorities and civil society organisations.
- The importance of CJEU case-law in interpreting and applying the Charter, which should be an integral part of the training of those professionals, as a way of raising awareness of the Court’s reading of the Treaties, thereby fully promoting the *acquis* of the Union.
- The vital role played by the courts in upholding fundamental rights and the Rule of Law. Judges are the true guarantors of the Charter, since they are called upon to ensure the effective judicial protection of the rights enshrined in it.

The protection of Human Rights and individual freedoms can never be taken for granted. The Rule of Law, as a corollary of just and inclusive, participatory, and peaceful societies, is a reality under permanent construction that is sometimes the target of attacks on its foundations and needs to be protected.

Therefore, qualified judges, prosecutors and other legal professionals are essential to fostering the protection of citizens’ rights and the proper functioning of the Rule of Law.

It is also for these reasons that the European Strategy for Judicial Training for 2021–2024, assumes an important role in this field, in the construction and deepening of a European area of Justice¹³. The synergies created between this Strategy, the European

¹¹ See <https://eur-lex.europa.eu/legal-content/PT/TXT/HTML/?uri=CELEX:52020DC0711> accessed 27 January 2024.

¹² See. <https://data.consilium.europa.eu/doc/document/ST-6795-2021-INIT/pt/pdf> accessed 27 January 2024.

¹³ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011DC0551> accessed 27 January 2024.

Democracy Action Plan¹⁴, the Citizenship Report¹⁵ and the Rule of Law Cycle in the Union allow to pursue a common and coherent approach for the promotion and protection of the European Union's fundamental values.

It is up to everyone, members of government, parliamentarians, judges, prosecutors, lawyers, and academics to defend the Rule of Law and the separation of powers and to promote a democratic and humanist culture.

Protecting, promoting and strengthening the Rule of Law is not only a duty of public institutions, but also an imperative of citizenship that should concern us all.

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¹⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423> accessed 27 January 2024.

¹⁵ <https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX%3A52020DC0730> accessed 27 January 2024.

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