

La condicionalidad del Estado de Derecho. Oportunidades y retos

The rule of law conditionality. Opportunities and challenges

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Resumen: Este trabajo pretende analizar el Estado de Derecho en el caso polaco en los últimos años y, sobre todo, conducir a un primer análisis de las conclusiones del Abogado General de 2 de diciembre de 2021 que rechazaron los recursos de Polonia y Hungría contra el régimen de condicionalidad para la protección del presupuesto de la Unión en caso de violación del Estado de Derecho.

Palabras clave: art. 2TEU, art. 7TEU, art. 19TEU, art. 47CFREU, Estado de derecho, Integración europea, CJEU, condicionalidad financiera, democracia illiberal.

Abstract This paper seeks to analyze the rule of law in the Polish case in recent years and above all to lead to a first analysis of the conclusions of the Advocate General of 2 December 2021 which rejected the appeals of Poland and Hungary against the conditionality regime for protection of the Union budget in the event of a breach of the rule of law.

Keywords: art. 2TEU, art. 7TEU, art. 19TEU, art. 47CFREU, rule of law, European integration, CJEU, financial conditionality, illiberal democracy.

SUMMARY: -1.Introduction; -2.Conditionality in case C-156/21 Hungary v. Parliament and C-157/21 Poland v. Parliament and Council of 2 December 2021; -3.(Follows) Art. 322 TFEU; -4.Case C-619/18 European Commission v. Poland of 24 June 2019; -5.Conclusions.

1. INTRODUCTION

Since its inception and over time, the European Union has provided for a variation of instruments to ensure that the rule of law¹ is respected in

¹In modern times the rule of law received its first systematization as a legal notion by the British jurist Albert Dicey (A. DICEY, *Lectures introduction to the study of the law of the constitution*, Macmillan, London, 1886. L. HEUSCHLING, *Etat de Droit, Rechtsstaat, Rule of law*, ed. Dalloz, Paris, 2002. J. PFANDER, *Dicey's nightmare: An essay on the rule of law*, in *California Law Review*, 107 (3), 2019, pp. 744ss. K. ROACH, *Remedies for human rights violations. A two-track approach to supra-national and national law*, Cambridge University Press, Cambridge, 2021, pp. 538ss). Also collecting the same principles that since the end of the eighteenth century that had found enunciation in France, with reference to the "État de droit" (B. HIBBITTS, *The politics of principle: Albert Venn Dicey and the rule of law*, in *Anglo-American Law Review*, 23 (1), 1994, pp. 4ss. M.L. PRINCIPE, *Albert Vann Dicey ans the principles of the rule of law: Is justice blind? A comparative analysis of the United States and Great Britain*, in *Loyola of Los Angeles International and Comparative Law Review*, 22 (3), 2000, pp. 360ss. B. KRIEGEL, *État de droit ou Empire?*, Bayard, Paris, 2002, pp. 82ss.), and that the German-language law on the "Rechtsstaat" would spread it throughout Europe. For further analysis in argument see: P. COSTA, *The rule of law: An outline of its historical foundation*, in C. MAY, A. WINCHESTER (eds.), *Handbook on the rule of law*, E. Elgar, Cheltenham, 2018, pp. 136ss. L. DUGUIT, *Traité de Droit Constitutionnel*, Fontemoing, Paris, 1911. N. CHRONOWSKI, M. VARJU, *The Hungarian rule of law crisis and its European context*, in A. KELLERHALS, T. BAUMGARTNER, (eds.) *Rule of law in Europe. Current challenges*, Schulthess, Zurich, 2017, pp. 149-168. The aforementioned doctrine designates a form of State in which the associates are equally bound and respect the same laws (principle of equality), and whoever is vested with authoritative powers must exercise them according to the laws (principle of legality). In a substantial sense, the notion is more structured, because it includes the well-known Montesqueuian separation of inviolable constitutional powers and rights, from whose threat or injury the individual can defend himself by invoking the intervention of a third and impartial judge and free from political conditioning. According to: T. GINSBURG, M. VERSTEEG, *Constitutional correlates of the rule of law*, in AA.VV., *Constitutionalism and the rule of law. Bridging idealism and realism*, Cambridge University Press, Cambridge, 2017, pp. 510ss, the rule of law: "(...) would be characterized by a persistent theoretical confusion (...)". B.Z. TAMANAHA, *The history and elements of the rule of law*, in *Singapore Journal of Legal Studies*, 2021, pp. 240ss. R. STEIN, *Rule of law: What does it mean?*, in *Minnesota Journal of International Law*, 18 (2), 2019, pp. 294ss, which anticipates the principle of the separation of powers to the reconstruction of the rule of law in the strict sense. The rule of law was normal that it was consecrated in the Treaty of Amsterdam (art. F TEU) and also appeared in the Preamble of the Charter of Nice among the common "values" listed in art. 2 TEU. See in argument also: TH. KONSTADINIDES, *The rule of law in the European Union. The internal dimension*, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 38ss. J. DACI, *Legal principles, legal values and legal norms: Are they the same or different*, in *Academicus: International Scientific Journal*, 2010, pp. 119ss. D. DUDLEY, *European Union membership conditionality: The Copenhagen criteria and the quality of democracy*, in *Southeast European & Black Sea Studies*, 20 (4),

all Member States. The dispute over the "legality" of the decision-making powers exercised in the European legal space, including national systems, is an embarrassing, distressing reality that has been going on in recent years, also affecting citizens residing in "illiberal regimes"² and, indirectly, "all residing in the EU through the participation of these regimes in European decision-making processes and the adoption of binding rules for all"³.

In particular, among the rights enunciated by art. 2 TEU⁴ is the rule of law⁵, as a member of a community of values, that define a democratic community and a constitutional identity through a dynamic and interactive relationship as a process of mutual learning and gradual convergence with distinct constitutional traditions into traditions that have become common.

These are values endowed with a dual nature internal to each Member State and external in that they are part of and are interpreted in

2020, pp. 525 ss, where the author expresses the opinion: "(...) that the concrete application of these criteria has sometimes sin of consistency (...)" In the same spirit are also: I. IOANNIDES, Rule of law in European Union external action. Guiding principles, practices and lessons learned, International IDEA, Sweden, 2014, pp. 14ss. I. CENEVSKA, The rule of law as a pivotal concept of the EU's politico-legal order, in *Iustinianus Primus Law Review*, 11 (1), 2020, pp. 6-7. M. VLAJKOVIC, Rule of law. EU's common constitutional "denominator" and a crucial membership condition on the changed and evolutionary role of the rule of law value in the EU context, in *ECLIC*, 4, 2020, pp. 240-241.

² L. PECH, K.L. SCHEPPELE, *Illiberalism within: Rule of law backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 19, 2017, pp. 11ss. According to the authors: "(...) rule of law backsliding as the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party (...)". See also in argument: T. DRINÓCZI, A. BIEN-KACAŁA, *Illiberal constitutionalism and the European rule of law*, in T. DRINÓCZI, A. BIEN-KACAŁA, *Rule of law, common values and illiberal constitutionalism. Poland and Hungary withing the European Union*, ed. Routledge, London, 2020

³ L. PECH, K.L. SCHEPPELE, *Illiberalism within: Rule of law backsliding in the EU*, op. cit.

⁴ A. MANGAS MARTÍN, *Tratado de la Unión Europea. Tratado de funcionamiento y otros actos básicos de la Unión Europea*, Editorial Tecnos, Madrid, 2019. H.J. BLANKE, S. MANGIAMELLI, *Treaty on the functioning of the European Union,. A commentary*, ed. Springer, 2021. M. MLYNARSKI, *Zur Integration Staatlicher und europäischer Verfassungsidentität*, Mohr Siebeck, Tübingen, 2021.

⁵ L. PECH, P. WACHOWIEC, D. MAZUR, *Poland's rule of law breakdown: A five-years assesment of EU's (in) action*, in *Hague Journal on the Rule of Law*, 13, 2021, pp. 10ss.

the light of the common constitutional traditions of Member States. Art. 2 TEU constitutes the essential core of EU constituent process by partially reproducing the content of the previous art. 6 par. 1 TEU. Reference is also made to art. 7 TEU in art. 354 TFEU which specifies the scope and methods of voting relating to this procedure whose strong political nature has been illustrated in the past in the Haider case in a consistent sense; which put in a potential cause-effect relationship a massive deterioration in the protection of fundamental rights in some Member States with the erosion of some fundamentals of European integration, in particular the principle of mutual recognition of jurisprudential origin (C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein* of 20 February 1979 (Cassis de Dijon), ECLI:EU:C:1979:42, I-00649)⁶.

The notion of the rule of law must be understood not according to a substantive meaning coinciding with the protection of human rights⁷ but formal, evoking the existence of a legal system with a hierarchy of rules and control mechanisms in compliance with this hierarchy⁸. The rule of law does not represent a state of bliss achieved by some states and pursued by others⁹. It represents an important guiding idea for the organization of the state and the legal order. It is not possible to derive concrete rules or schemes of general validity that guarantee the success of a state organization, but only some "principles" that constitute the rule of law,

⁶ For further analysis see also: T.H. FOLSOM, *Principles of European Union law, including Brexit*, West Academic, Minnesota, 2017, pp. 278ss. For discussion see: A. MANGAS MARTÍN, *Tratado de la Unión Europea, Tratado de Funcionamiento*, ed. Marcial Pons, Madrid, 2018. J. USHERWOOD, S. PINDER, *The European Union. A very short introduction*, Oxford University Press, Oxford, 2018. M. DECHEVA, *Recht der europäischen Union*, ed. Nomos, Baden-Baden, 2018. R. SCHÜTZE, T. TRIDIMAS, *Oxford principles of European Union Law*, Oxford University Press, Oxford, 2018. F. MARTUCCI, *Droit de l'Union européenne*, LGDG, Paris, 2019. C. VIRSEDA FERNÁNDEZ, *Unión europea*, Editorial Aranzadi, Pamplona, 2020. A. HARATSCH, C. KOENIG, M. PECHSTEIN, *Europarecht*, Mohr Siebeck, Tübingen, 2020.

⁷ A. RICHARD, *Procédure en manquement d'État et protection des droits fondamentaux dans l'Union européenne*, ed. Larcier, Bruxelles, 2021.

⁸ CJEU, case: 352/85, *Ireland v. Commission of the European Communities* of 15 December 1987, par. 18, ECLI:EU:C:1987:546: "(...) Community legislation must be certain and its application predictable for those who are subjected to it. This need for legal certainty is required with particular rigor when it comes to legislation capable of entailing financial consequences, in order to allow interested parties to accurately recognize the extent of the obligations it imposes (...)".

⁹ M. ELÓSEGUI, A. MIRON, I. MOTOC, *The rule of law in Europe. Recent challenges and judicial responses*, ed. Springer, Berlin, 2021.

such as: Impartiality of the magistrature, legality of administration, separation of powers, respect of human rights¹⁰ and secondary principles such as solidarity, conditionality, etc. which are provided for in various articles of the founding treaties of the Union. The framework conditions dictated by public law and to every national political situation are concretized in the principles of the rule of law in practice and are certainly never perfect in any country in the world.

The reference to the rule of law, while applied to non-state entities such as the EU, expresses the need for all subjects (institutions, Member States, individuals) to be subordinated to respect for the law and follows the EU jurisprudence according to which a community of law is based on the control of the conformity of the acts of the institutions to the treaties considered the constitutional charter¹¹ on a complete system of legal remedies aimed at ensuring the control of the legality of the acts of the institutions¹². The state of law includes a series of partly original principles i.e. effectiveness of judicial remedies, respect for the rights of the defense, legal certainty, proportionality, protection against arbitrary or disproportionate interventions by public authorities.

These essential characteristics of Union law "have given rise to a structured network of mutually interdependent principles, norms and legal relationships, which bind, in a reciprocal way, the Union itself and its Member States, as well as, between them, the Member States"¹³. According to the Court of Justice of the European Union (CJEU), "Such a

¹⁰ As pointed out by the Advocate General Tanchev, in its conclusions in the Commission v. Poland (CJEU, C-192/18, Commission v. Poland (Indépendance des juridictions de droit commun) of 5 November 2019, ECLI:EU:C:2019:924, published in the electronic Reports of the cases, parr. 98 and 106): "(...) the limits inherent in the CFREU, from which it appears that it applies to Member States only when they implement EU law (article 51(1) CFREU), cannot be extended to a point such as to attenuate the duty of the Commission to protect the fundamental values of the Union contained in article 2 TEU, constituting them part of the common European constitutional heritage (...)". For example, flagrant or systemic violations of human rights, committed by a Member State outside the scope of EU law, could fall under article 2 of the TEU. See also in argument: M. KELLERBAUER, M. KLAMERT, J. TOMKIN, Commentary on the European Union treaties and the Charter of fundamental rights, op. cit.

¹¹ L. PECH, The rule of law as a constitutional principle of the European Union, in Jean Monnet working paper, 04/09, 2009, pp. 14ss.

¹² P.E.PIGNARRE, La Cour de justice de l'Union européenne juridiction constitutionnelle, ed. Larcier, Bruxelles, 2021.

¹³ E. BERRY, M. J. HOMEWOOD, B. BOGUSZ, Complete EU law: Text, cases and materials, Oxford University Press, Oxford, 2019.

legal construction rests on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the Union is founded, as specified in article 2 TEU. This premise implies and justifies the existence of mutual trust between the Member States as regards the recognition of these values and, therefore, respect for the law of the Union that implements them (...)"¹⁴.

2. CONDITIONALITY IN CASE C-156/21 HUNGARY V. PARLIAMENT AND C-157/21 POLAND V. PARLIAMENT AND COUNCIL OF 2 DECEMBER 2021

A process that according to art. 4 TEU, does not lead to the disappearance of the constitutional political identities of each individual Member State but constitutes the "community of values" which uninterruptedly defines the supranational constitutional identity as an ineluctable constitutional diversity¹⁵.

Some recent facts attest to the relevance of these values including the rule of law but also that of solidarity, pluralism, tolerance, justice based on the texts of the treaties as constituting the next generation of EU (NGEU)¹⁶, as true principles of a federative nature¹⁷.

Within this framework we can report the conclusions of the Advocate General Campos Sánchez-Bordona of 2 December 2021 in the case of Hungary and Poland: Case C-156/21 (Hungary v. Parliament and Council) and C-157/21 (Poland v. Parliament and Council)¹⁸ against the

¹⁴ F. NICOLA, B. DAVIES, *European Union law stories*, Cambridge University Press, Cambridge, 2017.

¹⁵ D. LIAKOPOULOS, *European integration through member states' constitutional identity in EU law*, ed. Maklu, Antwerp, Portland, 2019.

¹⁶ C. DE LA PORTE, M. DAGNIS JENSEN, *The Next Generation EU: An analysis of the dimension of conflict behind the deal*, in *Social Policy Administration*, 55, 2021, pp. 390ss.

¹⁷ M.J. RANGEL DE MESQUITA, *European Union values, rule of law and the Multiannual Financial Framework 2021-2027*, op. cit., pp. 287ss.

¹⁸ C-156/21, ECLI:EU:C:2021:974 and C/157/21, ECLI:EU:C:2021:978 of 2 December 2021. The Advocate General Manuel Campos Sanchez rejects the *lex specialis* argument that: "(...) article 7 TEU would be bypassed by the new conditionality mechanism, maintaining that the conditionality mechanism is substantially distinct both in its purpose, as well as in its implementation. Reiterating his analysis concerning the first plea of the applicants, the AG lays out that the new Regulation has the aim of protecting the Union's

conditionality regime for the protection of the Union budget in case of violation of the principles of the rule of law, arguing that they must be rejected¹⁹. The conclusions of the Advocate General do not bind the CJEU but highlight how the question of respect for the principles of the rule of law is increasingly relevant in the scenario of future EU challenges. What was the validity of the Regulation 2020/2092²⁰ that implements the mechanism for protecting the Union budget against violations of the principles of the rule of law by the Member States? And the principle of conditionality, although not connected to any annual budget, is legitimate or violates the values of art. 2 TEU? The above Regulation has been

budget from the consequences of rule of law breaches in the Member States. Article 7 TEU however, offers a political procedure, which is subject to different conditions and provides for more far-reaching consequences, including the suspension of certain membership rights (...) parr. 227-229). the Opinions open the door to an even broader protection of the rule of law through the various legal channels offered by the Treaties.

¹⁹ With the judgment of 16 February 2022 (CJEU, C-156/21 and C-157/21, Hungary and Poland v. Parliament and Council of 16 February 2022, ECLI:EU:C:2022:97, not yet published) the CJEU after the intervention of 10 Member States in support of the Parliament and the Council (and with the lack of some such as Italy and Greece) rejected the appeals proposed by Hungary and Poland for the annulment of the relative regulation n.2020/2092/EU to a general conditionality regime for budget protection. Poland has obtained a lot of money in its pockets from the past and will try to make some clearly legal concessions and will fight on individual funds that are frozen and in case do filibuster on other European dossiers. According to our opinion, the conditionality mechanisms cannot be perceived as a targeted attack on some Member States with the aim of determining public opinion as a type of economic sanctions and engaging the so-called "rally round the flag effect" (J. GALTUNG, On the effects of international economic sanctions. With examples from the case of Rhodesia, in *World Politics*, 19, 1967, pp. 382ss). The conditionality mechanism is an ad hoc instrument against some Member States with the aim of the impartiality of the institutions involved in the adoption of the relative measures and with the "claim" of respect for the values and principles of the Union (M. BLAUBERGER, V. VAN HÜLLEN, Conditionality of EU funds: An instrument to enforce EU fundamental values?, in *Journal of European Integration*, 43 (1), 2021, pp. 1-16).

²⁰ 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. Four aspects, envisaged as the "pillars" of rule of law, were analysed: "(...) the level of trust in the checks and balances in the Member States, the functioning of the media and the civil society, as well as the resilience of the justice system during the pandemic (...)". For further analysis see also: M. BLAUBERGER, V. VAN HÜLLEN, Conditionality of EU funds: An instrument to enforce EU fundamental values?, in *Journal of European Integration*, 43 (1), 2021, pp. 5ss.

violated and the mechanism of art. 7 TEU²¹ must be unleashed, in the event that “there is a clear risk of serious violation by a Member State of the values referred to in art. 2 TEU (...) or the existence of a serious and persistent violation? One can wonder if the Regulation does not introduce a *probatio diabolica* (a legal requirement to achieve an impossible proof). These are questions that the Advocate General gives a positive answer, reporting that the Regulation has been “burdened” and there are also the appeals for non-fulfillment proposed by the EC (art. 258 TFEU) or by another Member State (art. 259 TFEU)²² that allow to strengthen the state of law within the spirit of the EC's forewarned position that since 2014 has adopted a “new EU framework to strengthen the rule of law”, aimed at “ensuring effective and consistent protection of the rule of law in all Member States, addressing and resolving situations of systemic threat to the rule of law”²³.

The EC established the “European Rule of Law Mechanism” in 2019. A mechanism based on an intense dialogue with national authorities and stakeholders with the main aim of objectively and impartially observing all Member States.

The framework of the instruments and according to the annual report of the EC according to the conclusions of the European Council of December 2020²⁴, should be to protect the Union budget, including Next

²¹ See ex multis, J.L. DA CRUZ VILAÇA, *European Union law and integration. Twenty years of judicial application of European Union law*, Hart Publishing, Oxford & Oregon, Portland, 2014. T.H. FOLSOM, *Principles of European Union law, including Brexit*, West Academic, Minnesota, 2017, pp. 278ss. R. GEIGER, D.E. KHAN, M. KOTZUR, *EUV/AEU*, C.H. Beck, München, 2016. M. DECHEVA, *Recht der europäischen Union*, ed. Nomos, Baden-Baden, 2018. L. PECH, *Article 7 TEU: From “nuclear option” to “sisyphian procedure”?* in U. BELA VUSAU, A. GLISZCZYŃSKA-GRABIAS (eds), *Constitutionalism under stress*, Oxford University Press, 2020, pp. 157ss. J. USHERWOOD, S. PINDER, *The European Union. A very short introduction*, Oxford University Press, Oxford, 2018. L. PECH, P. WACHOWIEC, D. MAZUR, *Poland's rule of law breakdown: A five-years assessment of EU's (in) action*, op. cit., par. 5 and 19.

²² M. KELLERBAUER, M. KLAMERT, J. TOMKIN, *Commentary on the European Union treaties and the Charter of fundamental rights*, Oxford University Press, Oxford, 2019.

²³ M. KELLERBAUER, M. KLAMERT, J. TOMKIN, *Commentary on the European Union treaties and the Charter of fundamental rights*, op. cit.

²⁴ EUCO 22/10 COEUR17 CONCL 8 of 11 December 2020.

Generation EU (NGEU)²⁵, sound financial management and the financial interests of the Union through the numerous financial conditionality mechanisms. Conditionality based on a common logic i.e. eligibility for payment from the Union budget subject to compliance with certain horizontal, distinct and additional requirements that comply with those provided directly by the European fund to which the payment is charged.

The financial conditionality provided for by Regulation 2020/2092 is bound, as regards implementation of the budget and respect for the rule of law "essential for the protection of other fundamental values". The Advocate General also argued that "financial conditionality implies a link between solidarity and responsibility. The Union transfers resources from its budget to Member States on condition that they are spent responsibly, which implies that this is done in accordance with the values of the Union, such as that of the rule of law. Only if the implementation of the budget respects the values of the Union will there be sufficient mutual trust between the Member States when the necessary financial means are provided to the Union to achieve its objectives"²⁶. Financial conditionality must respect the requirements of primary law which fall within the competences attributed to the Union. These are the objections that concern both Poland and the Hungary²⁷ and were rejected by the Advocate General which relied on the unsuitability of the legal basis identified in art. 322, par. 1, lett. a) which allows the Union legislature to adopt concrete rules relating to financial matters, i.e. the implementation of the Union budget²⁸.

According to the Advocate General the contested regulation actually allows the EC and the Council to define the notion of the rule of law and the related acquired requirements. According to the applicants, the approved mechanism allows for the adoption of sanctions affecting the fundamental structures of a Member State, within the Union competence.

²⁵ C. DE LA PORTE, M.D. JENSEN, The next generation EU: An analysis of the dimensions of conflict behind the deal, in *Social Policy & Administration*, 55, 2021, pp. 6-15.

²⁶ In case C.156/21, *op. cit.*

²⁷ D. LIAKOPOULOS, Respect of rule of law between "internal affairs" and the European Union. The case of Poland and Hungary as a political v. functional *raison d'être*, in *Acta Universitatis Danubius. Relationes Internationales*, 12 (2), 2019. L. CSINK, Rule of law in Hungary, in T. DRINÓCZI, A. BIEN-KACAŁA, Rule of law, common values and illiberal constitutionalism. Poland and Hungary withing the European Union, ed. Routledge, London, New York, 2020

²⁸ M. KELLERBAUER, M. KLAMERT, J. TOMKIN, Commentary on the European Union treaties and the Charter of fundamental rights, *op. cit.*,

3. (FOLLOWS) ART. 322 TFEU

Art. 322 TFEU concerns only the implementation of the budget and cannot be the legal basis for the adoption of such an instrument. The Advocate General observes: "(...) The objective of Regulation 2020/2092 is to ensure, through the mechanism of conditionality, the correct implementation of the Union budget, in the event of violation of the principles of the rule of law in a Member State and which jeopardize the sound financial management of the funds. Considered as a whole, the objective of the 2020/2092 regulation is therefore to protect the Union budget in the presence of specific situations that threaten its correct execution and which represent violations of the rule of law. It therefore does not claim to protect the latter through a sanctioning mechanism"²⁹.

²⁹According to (art. 6) if it does not believe that "other procedures provided for by Union legislation allow it to more effectively protect the Union budget". The mechanism in question (recital 14) integrates the various instruments at its disposal, as already mentioned, such as the European mechanism for the rule of law, infringement and sanction procedures pursuant to art. 7 TEU mentioned above (and also the justice scoreboard). The procedure itself and its effectiveness have been challenged by some Member States (Poland, Hungary), to the point that the European Council adopted (conclusions of 11 December 2020) a sort of compromise to avoid full, immediate effect to the regulation, and the European Parliament has presented an insufficient appeal against this solution against the Commission. In particular see also: European Parliament, Resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, PA_TA-PROV(2020)0225. See also: W. JACOBY, J. HOPKIN, From lever to club? Conditionality in the European Union during the financial crisis, in *Journal of European Public Policy*, 8, 2020, pp. 1162ss. D. KOCHENOV, Article 7: A commentary on a much talked-about "dead" provision, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI, M. SCHIMDT (eds.), *Defending checks and balances in EU Member States*, Springer, Berlin, 2021, pp. 130-152. See in particular the doc. EUCO 22/20, CO EUR 17, CONCL8 of 10-11 December 2020; Recital 2 of the regulation recalls the conclusions, underlining the need that "the financial interests of the Union must be protected in accordance with the general principles enshrined in the Treaties, in particular the values referred to in art. 2 "and that the rule of law is respected. Public authorities, recital 3, must act "within the limits set by law"; "Sound financial management", recital 8, can only be guaranteed if the national public authorities, precisely, "act in accordance with the law". See also from the EP the relevant document doc. COM(2021)389 final of 8.7.2021, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions 2021, EU Justice Scoreboard.

Adding that according to the Regulation the cross compliance mechanism could not be applied retroactively (par. I.2.k), nor to systemic violations (par. I.2.e, lett. 2). To become fully operational, it requires implementing provisions, which according to the Council should be the product of a "close consultation" between the Commission and all the Member States and waiting for the timing of a possible judgment on the validity of the regulation itself (par. I. 2.c). The European Parliament, in a resolution of 17 December 2020³⁰, criticized these positions, speaking of regulatory ineffectiveness (paragraphs 4, 5) and proposing the adoption of a motion of censure against the Commission in the event that it leaves, on the other hand, to condition (par. 8). A few days later the President of the Constitutional Affairs Commission sent an official note to his counterpart in the Legal Affairs Commission and he carefully solicited the matter and that the possibility of contesting the validity should be evaluated, according to ex art. 263 TFEU³¹, of the aforementioned conclusions of the European Council, as they may have an immediate interference in the exercise of the legislative function.

This is a strong solicitation with the aim: "(...) To avoid further delays (...) in the application of the regulation in question was expressed by the plenum in the resolution³² of 25 March 2021 (par. 13) (...) identified a precise deadline, 1 June 2021, beyond which the Commission's inaction will be the subject of an appeal before the Court of Justice, pursuant to art. 265 TFEU (par. 14) (...) "³³. The Regulation gives the Commission the possibility of proposing sanctions, while leaving the final decision to the Council, to a body that not only falls outside the range of influence of Parliament, but which in practice has conformed to the European Council's guidelines, including also the affiliation of the respective members to the same national Governments.

Within this spirit, the Vice President of the CJEU adopted, on 27 October 2021, an ordinance which imposed Poland on the payment of a penalty equal to one million euros per day until it complies with its obligations under the ordinance of 14 July 2021 resulting from the judgment C-204/21 R, Commission v. Poland ³⁴ as a consequence of

³⁰ (P9_TA-PROV (2020)0360)

³¹ J. SCHWARZE, V. BECKER, A. HATJE, J. SCHOO, EU-Kommentar, ed. Nomos, Baden-Baden, 2019.

³² P9-TA(2021)0103

³³ P9-TA(2021)0103

³⁴ ECLI:EU:C:2021:878, not yet published.

interim measures concerning some laws of Poland and concretely on the independence of judges³⁵ one of the principles of the rule of law as referred to in articles 19 TEU³⁶ and 47 of the Charter of the Fundamental Rights of the European Union (CFREU)³⁷. These are essential principles for the functioning of the preliminary reference³⁸ thanks to which the national

³⁵ CJEU, C-585/18, A.K (Indépendance de la chambre disciplinaire de la Cour suprême) of 19 November 2019, ECLI:EU:C:2019:982, published in the electronic Reports of the cases. P.J. BIRKINSHAW, *European public law: The achievement and the Brexit challenge*, Kluwer Law International, New York, 2020. M. KRAJEWSKI, M. ZIÓŁKOWSKI, *EU judicial independence decentralized: A.K.*, in *Common Market Law Review*, 57 (4), 2020, pp. 1107-1138. K. GAJDA-ROSZCZYŃIALSKA, K. MARKIEWICZ, *Disciplinary proceedings as an instrument for breaking the rule of law in Poland*, in *Hague Journal on the Rule of Law*, 12, 2020. The CJEU states that the guarantees of independence with respect to legislative and executive powers, and impartiality "presuppose the existence of rules, relating in particular to the composition of the body, the appointment, the duration of the functions as well as the causes for abstention, of recusal and revocation of its members, which make it possible to dispel any legitimate doubt that individuals may have regarding the impermeability of said body with respect to external elements and its neutrality with respect to opposing interests (...)", (CJEU, C-585/18, A.K (Indépendance de la chambre disciplinaire de la Cour suprême) of 19 November 2019, op. cit., par. 123-124). M. ELÓSEGUI, A. MÍRON, I. MOTOC (eds.), *The rule of law in Europe: Recent challenges and judicial responses*, Springer, Cham, 2021.

³⁶ We should say that not all violations of the rule of law, and more generally, of article 2 of the TEU, can be linked to article 19 TEU. Also the protection of fundamental rights, foreseen by article 6 of the TEU and by the CFREU, have a close connection with article 2 TEU, but obviously only within the scope of the CFREU, remedies for the joint violation of one or more provisions of the latter in conjunction with article 2 TEU. This could happen, for example for serious and systemic violations of the freedom of the Press or freedom of association, but also for other rights provided by the CFREU. The European Commission has filed an appeal for failure to fulfill obligations in Poland, based on article 19 (1) TEU (CJEU, C-791/19, *Commission v. Poland* of 8 April 2020, ECLI:EU:C:2020:277, not yet published).

³⁷ For further analysis see: M. BOBEK, J. ADAMS PRASSL, *The EU Charter of fundamental rights in the member States*, Hart Publishing, Oxford & Oregon, Portland, 2020. H.P. JARASS, *Charta der Grundrecht der Europäischen Union: GRCh*, C.H. Beck, München, 2020. R. TINIÉRE, C. VIAL, *Les dix ans de la Charte des droits fondamentaux e l'Union européenne*, ed. Larcier, Bruxelles, 2020. S. PEERS et al. (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Hart Publishing, Nomos, C.H. Beck, Oxford & Oregon, Portland, 2021.

³⁸ J. PERTEK, *Le renvoi préjudicé*, ed. Larcier, Bruxelles, 2021.

judge acts as a real judge of the legal system of the Union³⁹ and thus allows to guarantee the full effectiveness and autonomy of this right.

The disputed laws are: a) The amending laws of the ordinary courts and of the Supreme Court, of the administrative courts and of all national courts that violate the principles that must preclude an independent and impartial judge established by law; b) the amending law of the supreme court relating to the exclusive competence to decide on complaints and questions of law concerning the lack of independence of a judge; c) the law amending the law on jurisdictional bodies which makes it possible to consider as a disciplinary offense the failure to comply with the requirements of the European Union relating to an independent and impartial judge, pre-established by law; d) the law that transferred to the disciplinary section of the Supreme Court, the independence of which is not guaranteed, the competence to decide cases affecting the status and performance of the function of judge and the authorization to carry out criminal proceedings in against judges or the authorization of their arrest, cases relating to labor law and social security concerning judges, and cases relating to the retirement of such judges.

³⁹ C-64/16, Associação Sindical dos Juizes Portugueses, of 27 February 2018, ECLI:EU:C:2018:117, published in the electronic Reports of the cases, parr. 1, 18, 27 and 29. The use of article 19 (1) also makes it possible to go beyond the scope of article 47 CFREU, which, due to its final provisions, has a more limited application than article 19 (1). The CJEU has in fact clarified, in the judgment in question, as regards the field of application *ratione materiae* of article 19 TEU, that "this provision concerns the areas covered by EU law, regardless of the situation in which the Member States implement this right, pursuant to article 51(1) CFREU". Thus, the violation of only article 2 TEU was mentioned in the order of the President of the CJEU of 15 November 2018 (Order of the President of the Court in case: C-619/18 Commission v. Poland of 15 November 2018, ECLI:EU:C:2018:910, published in the electronic Reports of the cases, par. 21), according to which "the requirement for the independence of judges pertains to the essential content of the fundamental right to a fair trial, which is cardinal as a guarantee of the protection of all the rights deriving to the individual from the law of the Union and the safeguarding of the values common to the Member States set out in Article 2 TEU, in particular, of the value of the rule of law". On the contrary, the question of the independence of national courts as an element of the rule of law was examined by the Court only from the point of view of article 19 TEU in the *Miasto Łowicz* judgment alone. In this sense see also the next case: C-216/18 PPU, Minister for Justice and Equality of 25 July 2018, ECLI:EU:C:2018:586, published in the electronic Reports of the cases, parr. 50ss. See also in argument: W. SADURSKI, *Poland's constitutional breakdown*, Oxford University Press, 2019.

In particular, according to art. 19 TEU⁴⁰ and art. 2 TEU⁴¹, guarantee the judicial control in the Union legal system not only to the CJEU but also to the national courts, where "the Member States establish the judicial remedies necessary to ensure effective judicial protection in the areas governed by EU law"⁴². The principle of effective judicial protection of the rights of individuals under EU law constitutes a general principle of EU law that derives from the constitutional traditions common to Member States and which has been enshrined in the ECHR and art. 47 CFRE⁴³.

With the subsequent decision of the Grand Chamber of 25 July 2018 in the LM case, in the matter of the European arrest warrant, the CJEU argued that: "(...) It must be emphasized that the requirement for the independence of judges relates to the content essential of the fundamental right to a fair trial, which is of cardinal importance as a guarantee of the protection of all the rights deriving to the individual from the law of the Union and the safeguarding of the values common to Member States set out in art. 2 TEU⁴⁴, in particular of the value of the rule of law (...)"⁴⁵.

⁴⁰ K. LENAERTS, The Court of Justice as the guarantor of the rule of law within the European Union, in G. DE BAERE, J. WOUTERS, The contribution of international and supranational courts to the rule of law, Edward Elgar Publishers, Cheltenham, 2015, pp. 244ss.

⁴¹ Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland. Proposal for a COUNCIL DECISION on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, Brussels 20.12.2017 COM (2017) 835 2017/0360 (NLE).

⁴² M. KELLERBAUER, M. KLAMERT, J. TOMKIN, Commentary on the European Union treaties and the Charter of fundamental rights, op. cit.,

⁴³ M. KELLERBAUER, M. KLAMERT, J. TOMKIN, Commentary on the European Union treaties and the Charter of fundamental rights, op. cit.,

⁴⁴ In this sense see also the case: C-621/18, Wightman and others of 10 December 2018, ECLI:EU:C:2018:999, published in the electronic Reports of the cases, par. 63. For further details see also: D. SCHIEK, The ECJ's Wightman ruling, the "Brexit" process and the EU as a constitutional entity, in Frankfurter Newsletter zum Recht der Europäischen Recht (FIREU) of 07.01.2019. K.A. ARMSTRONG, The right to revoke an EU withdrawal notification: Putting the bullet back in the article 50 Chamber?, in Cambridge Law Journal, 78 (1), 2019, pp. 36ss. G. MARTINICO, M. SIMONCINI, Wightman and the perils of Britain's withdrawal, in German Law Journal, 21, 2020, pp. 802ss. A. THIELE, Zur Möglichkeit einer einseitigen Rücknahme der notifizierten Austrittsabsicht nach 50 Abs 2 EUV-zugleich Anmerkung zum Urteil des EuGH v. 10.12.2018, RS C-621/18, Wightman, in Europarecht 54 (2), 2019, pp. 268ss.

⁴⁵ C-216/18 PPU, Minister for Justice and Equality of 25 July 2018, ECLI:EU:C:2018:586, published in the electronic Reports of the cases, par. 36, 48 and 50ss: "(...) It recalls that the fundamental premise on which EU law is based is that all

4. CASE C-619/18 EUROPEAN COMMISSION V. POLAND OF 24 JUNE 2019

In case of the CJEU C-619/18, European Commission v. Poland of 24 June 2019 Hungary also intervenes where the CJEU observed: "(...) The organization of its judicial system was sufficiently complex and, moreover, unprecedented and therefore deserving of an in-depth examination, beyond the possibilities of the judge urgency, and yet, *prima facie*, not without a serious foundation (...)"⁴⁶.

The CJEU decided the infringement appeal brought by the Commission⁴⁷ against the Republic of Poland, reiterating that the

Member States share the values of article 2 TEU and that the independence of judges "is of cardinal importance as a guarantee of the protection of all the rights arising to the individual by Union law and the safeguarding of the values common to the Member States set out in article 2 TEU, in particular the value of the rule of law" which is incorporated in article 19 TEU (...)"'. The CJEU had already specified in *Aranyosi and Căldăraru* (CJEU, joined cases C-404/15 and C-659/15, P. Aranyosi and R. Căldăraru of 5 April 2016, ECLI:EU:C:2016:198, published in the electronic Reports of the cases) that the limitations to the principles of mutual recognition and trust between Member States can be made "in exceptional circumstances", when the surrender procedure risks inducing inhuman or degrading treatment, pursuant to section 4 of the CFREU, of the wanted person. After the LM judgment, the link between the principle of mutual trust and respect for the fundamental values of article 2 TEU has been constantly reiterated in several cases concerning the European arrest warrant. In the same spirit see also the case: C-128/18, *Dorobantu* of 15 October 2019, ECLI:EU:C:2019:857, not yet published. For further details see also: F. MAIANI, S. MIGLIORINI, One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice, in *Common Market Law Review*, 57, 2020, pp. 9ss. As clarified by the CJEU in *Jawo* (CJEU, C-163/17 *Abubacarr Jawo contro Bundesrepublik Deutschland* of 19 March 2019, ECLI:EU:C:2019:218, published in the electronic Reports of the cases, par. 80-81. P. JAN KUIJPER, F. AMTENBRINK, D. CURTIN, B. DE WITTE, A. MCDONNELL, *The law of the European Union and the European Communities*, Kluwer Law International, New York, 2018), this principle requires that each of the Member States: "(...) consider, except in exceptional circumstances, that all other Member States respect Union law" and, in particular, the fundamental rights and common values on which it is based the Union, as established in article 2 TEU, and that the respective national legal systems are able to provide equivalent and effective protection of the fundamental rights recognized by CFREU (...)"'.
⁴⁶ ECLI:EU:C:2019:531

⁴⁷ See also in argument: European Commission, Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland, IP/20/772, 29 April 2020. The Reasoned Opinion in this case was adopted six months

guarantee of the independence of the courts: "(...) Constitutes the content of a specific obligation of the Member States (...), and that each European State can request to become a member of the Union and that the latter groups States that have freely and voluntarily adhered to the common values referred to in art. 2 TEU⁴⁸, undertaking to promote them⁴⁹. Union law is therefore based on the fundamental premise according to which each Member State shares with the other Member States, and recognizes that they share with it, said values (...) and that in order to guarantee the specific characteristics and autonomy of legal order of the Union, the Treaties established a judicial system intended to ensure consistency and unity in the interpretation of Union law (...)"⁵⁰.

Art. 19 TEU allows each individual the right to challenge the legitimacy of any national decision or measure relating to the application of an EU act to them⁵¹. Equivalent rule of law as entrusting a judicial guarantee to national and CJEU judgments: "Of primary importance is

later: European Commission, Rule of Law: European Commission takes next step in infringement procedure to safeguard the independence of judges in POLAND, INF/20/1687, 30 October 2020. K.L. SCHEPPELE, D. KOCHENOV, B. GRABOWSKA-MOROZ, EU values are law, after all: Enforcing EU values through systemic infringement actions by the European Commission and the Member States of the European Union, in *Yearbook of European Law*, 39, 2020, pp. 12ss.

⁴⁸ W. SCHROEDER, The rule of law as a value in the sense of article 2 TEU: What does it mean and imply?, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR; C. GRABENWARTER, M. TABOROWSKI, M. SCHMIDT (eds.), *Defending checks and balances in EU Member States*, ed. Springer, Berlin, 2021, pp. 108ss.

⁴⁹ J. SCHWARZE, V. BECKER, A. HATJE, J. SCHOO, *EU-Kommentar*, op. cit.

⁵⁰ ECLI:EU:C:2019:531

⁵¹ In Opinion 1/17, (CJEU, Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, published in the electronic Reports of the cases, par. 110), the CJEU stated that: "the Union has its own constitutional framework" and that "the founding values set out in article 2 TEU", as well as the general principles of the law of Union, the provisions of the CFREU, in particular the provisions of the Treaties, the rules on the attribution and division of competences, the rules for the functioning of the Union institutions and the jurisdiction of the same, as well as the fundamental standards in specific sectors, structured to contribute to the completion of the integration process referred to in article 1, second paragraph, TEU (...)". For further analysis see also: C. ECKES, The autonomy of the EU legal order, in *Europe and the World: A Law Review*, 4 (1), 2020, pp. 6ss. M. CREMONA, The opinion procedure under art. 218 (11) TFEU. Reflections in the light of opinion 1/17, 4 (1), 2020, pp. 5ss. C. RIFFEL, The CETA opinion of the European Court of Justice and its implications. Not that selfish after all, in *Journal of International Economic Law*, 22, 2019, pp. 504ss. F. IORIO, Opinion 1/17. Has the EU made peace with investment arbitration?, in *International Business Law Journal*, 4, 2019, pp. 410ss.

preserving the independence of said body, as confirmed by art. 47, second paragraph of the CFREU ", as reported on November 5, 2019, in case C-192/18, Commission v. Poland (Independence of ordinary Courts) of 5 November 2019⁵², relating to the conferral to the Minister of Justice the power to authorize or not the extension of the exercise of the functions of judicial magistrates of the Polish ordinary courts beyond the new retirement age of the aforementioned magistrates, lowered by the same law and the violation of the obligations of the Republic of Poland pursuant to art. 19, paragraph 1, second subparagraph, TEU⁵³.

The CJEU had previously decided in case A.K. of 19 November 2019 by reference for a preliminary ruling and held, *inter alia*, that EU law prevents the application of EU law from falling into the exclusive jurisdiction of a court that is not independent and impartial.

Sticking to the same principles, the CJEU has decided in case A.B. of 2 March 2021, relating to the compatibility of EU law with the provisions of a Polish law that deprived a national jurisdiction of the competence to adjudicate the related appeals lodged by candidates for judicial posts at the Supreme Court against decisions of the National Council of the judiciary not to present their candidacy for such posts but to present that of other candidates to the President of the Republic,

⁵² ECLI:EU:C:2019:529, published in the electronic Reports of the cases. For further details see also: L.D. SPIEKER, Defending union values in judicial proceedings. On how to turn Article 2 TEU into a judicially applicable provision, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI, M. SCHMIDT (eds) Defending checks and balances in EU Member States. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht), vol. 298. Springer, Berlin, Heidelberg, 2021. K.L. SCHEPPELE, D. VLADIMIROVICH KOCHENOV, B. GRABOWSKA-MOROZ, EU values are law, after all: Enforcing EU values through systemic infringement actions by the European Commission and the member States of the European Union, in Yearbook of European Law, 39, 2020, pp. 6ss. N. DAMINOVA, Rule of law vs. Poland and Hungary-an inconsistent approach?, in Hungarian Journal of Legal Studies, 60 (3), 2019, pp. 242ss. Although it was not referred to the cited jurisprudence according to my opinion the jurisprudence used by the CJEU conflicts with the effective protection of the adversarial principle and especially with the principle of the fair trial, according to art. 6, par. 3 TEU and art. 47 of the CFREU and the best interest of the administration of justice.

⁵³ D. KOCVENOV, P. BÁRD, The last soldier standing? Courts versus politicians and the rule of law crisis in the new Member States of the EU, in European Yearbook of Constitutional Law, 1, 2020, pp. 243ss.

excluding and depriving the aforementioned national jurisdiction to propose a preliminary reference to the CJEU.

The CJEU according to art. 267TFUE⁵⁴, on the reference for a preliminary ruling, and art. 4, par. 3TEU must be interpreted in the sense that they oppose such legislative changes, while it is up to the referring court to evaluate and concretize through a decision whether the preliminary questions are capable of generating, in the subjects who intend to appeal, legitimate doubts as to the impermeability of the judges appointed by the President of the Republic and their neutrality in relation to conflicting interests. As a consequence, the loss of trust in justice, as a cardinal principle of a democratic state⁵⁵ and of law where the principle of the primacy of EU law must be interpreted in the sense that it imposes on the referring jurisdiction a legislative "guarantee" that is not incompatible with the values of the Union and the exercise of the competence to recognize disputes brought before it on the basis of the legislative discipline prior to the said amendments.

Not only Poland but also in the Maltese case (*Repubblika* case) of 20 April 2021⁵⁶ the CJEU remains faithful to the aforementioned jurisprudence, reiterating its basic lines, introducing the principle of the

⁵⁴ J. SCHWARZE, V. BECKER, A. HATJE, J. SCHOO, EU-Kommentar, op. cit.

⁵⁵ CJEU, C-418/18 Patrick Grégor Puppink and others v. Poland of 19 December 2019, ECLI:EU:C:2019:1113, published in the electronic Reports of the cases, par. 64. See also the conclusions of the Advocate General Bobek in case: C-418/18, Puppink and others v. European Commission of 29 July 2019, ECLI:EU:C:2019:640, published in the electronic Reports of the cases, par. 67. The mentioned case underlined the link between article 2 and 10 TEU, in relation to the powers of the European Commission in the mechanism of the Union citizens' initiative: "Under article 10 (1) TEU, the functioning of the Union is based on representative democracy, which concretizes the value of democracy. The latter constitutes, by virtue of article 2 TEU, one of the values on which the Union is founded (...)" D. LIAKOPOULOS, European integration through member states' constitutional identity in EU law, op. cit. See also in argument: T. ISIKSEL, Europe's functional constitution. A theory of constitutionalism beyond the State, Oxford University Press, Oxford, 2016. J. LYN ENTRIKIN, Global judicial transparency norms: A peek behind the robes in a whole new world. A look at global "democratizing" trends in judicial opinion-issuing practices, in Washington University Global Studies Law Review, 18, 2019, pp. 56ss. A. KRAJEWSKA, Connecting reproductive right democracy and the rule of law. Lessons from Poland in times of COVID-19, in German Law Journal, 22, 2021, pp. 1080ss.

⁵⁶ C-896/19, *Republika v. II-Prim Ministru* of 20 April 2021, ECLI:EU:C:2021:311, not yet published.

obligation of Member States of "non-regression"⁵⁷ in the protection of the rule of law. In particular, the CJEU argued that the Member States: "(...) Have freely and voluntarily adhered to the common values enshrined in art. 2 of the TEU on which the Union is founded and on which, moreover, the mutual trust between the countries of the Union rests (...) "⁵⁸. It follows that compliance by a Member State with the aforementioned values "constitutes a condition for the enjoyment of all the rights deriving from the application of the treaties to that Member State"⁵⁹, which, therefore, "cannot change its legislation in so as to bring about a regression of the rule of law and, in particular, of the guarantee of independence of judges, which constitutes one of the most qualifying elements (...) "⁶⁰. The "point of non-regression" was constituted by the legal order in force at the time of Malta's accession to the Union in 2004.

⁵⁷ J. GERSCHEWSKI, *Erosion or decay? Conceptualizing causes and mechanisms of democratic regression*, in *Democratization*, 28 (1), 2020, pp. 43ss

⁵⁸ Values underlined by the CJEU in the opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECJ, 18 December 2014, ECLI:EU:C:2014:2454. For further discussion see also: L. HALLESLOV STORGAARD, *European Union law autonomy versus European fundamental rights protection. On opinion 2/13 on EU accession to the ECHR*, in *Human Rights Law Review*, 15 (3), 2015, pp. 487ss. See also in case: C-168/13 PPU, *Jeremy F. of 30 May 2013*, ECLI:EU:C:2013:358, published in the electronic Reports of the cases. The CJEU affirmed that: "(...) the absence of the necessary provisions of the Framework it frameworks, it must be that the framework for the implementation of the objectives of the framework to a European Arrest Warrant (...)". In the same spirit see also. CJEU, C-399/11, *Stefano Melloni of 26 February 2013*, ECLI:EU:C:2013:107; C-396/11, *Ministerul Public-Parchetul de pe lângă Curtea de Apel Constanța v. Radu of 29 January 2013*, ECLI:EU:C:2013:39, both of them published in the electronic Reports of the cases. F.M.W. BILLING, *The right to silence in transnational criminal proceedings. Comparative law perspectives*, ed. Springer, Berlin, 2016, pp. 323ss. F. PICOD, *La Cour de justice a dit non à l'adhésion de l'Union européenne à la Convention EDH*, in *La Semaine Juridique, Édition Générale*, 2015, pp. 230, 234. D. HALBESTRAM, *It's autonomy stupid. A modest defense of Opinion 2/13 on EU accession to the ECHR, and a way forward*, in *Michigan Law Paper* 105, 2015. E. BERRY, M.J. HOMEWOOD, B. BOGUSZ, *Complete EU law: Text, cases and materials*, Oxford University Press, Oxford, 2019. T. ISIKSEL, *Europe's functional constitution. A theory of constitutionalism beyond the State*, Oxford University Press, Oxford, 2016. J. LYN ENTRIKIN, *Global judicial transparency norms: A peek behind the robes in a whole new world. A look at global "democratizing" trends in judicial opinion-issuing practices*, in *Washington University Global Studies Law Review*, 18, 2019, pp. 56ss

⁵⁹ CJEU, C-896/19, *Republika v. II-Prim Ministru of 20 April 2021*, op. cit.

⁶⁰ CJEU, C-896/19, *Republika v. II-Prim Ministru of 20 April 2021*, op. cit.

The CJEU underlined that art. 19 TEU "(...) concretizes the value of the rule of law affirmed in art. 2 TEU, making it" actionable ", and entrusts the burden of guaranteeing judicial control in the legal system of the Union not only to the Court, but also to the national courts (...) although the organization of justice in the Member States falls within the competence of the latter, in exercising this attribution they are nevertheless bound to respect the obligations deriving from EU law (...). To ensure that its judges, as part of the system of judicial remedies in the sectors governed by this law, meet the requirements necessary to guarantee effective judicial review. In this sense, it may even seem superfluous to emphasize that in the group of these presuppositions there is that of independence, intrinsically connected to the task of judging, which is indeed one of the corollaries of the fundamental right to an effective remedy enshrined in art. 47, lett. 2 CFREU (...)"⁶¹.

In the same case the Advocate General Hogan clarified that: "(...) The fact that the action taken in the present case is of a declaratory nature does not prevent the Court from ruling on a preliminary question if such action is permitted by law and this question corresponds to an objective need for the purpose of resolving the dispute with which it is duly referred (...) in the Maltese system the appointment decisions would not be considered (...) subject to judicial review and that (...) is currently only available the remedy of the *actio popularis* although this instrument simply represents a means of contesting the constitutionality of a law and it is not a procedure in which the validity of an individual judicial appointment can be examined (...)"⁶².

According to our opinion, the formulation of the prohibition of regression in the *Repubblika* case is linked to a rather clear assumption, such that in the absence of changes that lead to a retreat in protection, the constitutional legislation in force in a Member State at the time of its accession to the Union (would) be assisted by a presumption of conformity with the values protected by art. 2 and therefore in art. 19 TEU (...)"⁶³.

⁶¹ M. LELOUP, D. KOCHENOV, A. DIMITROVS, Non-regression: Opening the door to solving the "Copenhagen dilemma"? All the eyes on case C-896/19 *Repubblika v. Il-Prim Ministru*, in RECONNECT Working Paper (Leuven), n. 15, 2021, 18 June 2021, spec. 13.

⁶² CJEU, C-896/19, Conclusions of the Advocate General Hogan in case: *Repubblika* of 17 December 2020, ECLI:EU:C:2020:1055, par. 28ss.

⁶³ CJEU, C-896/19, Conclusions of the Advocate General Hogan in case: *Repubblika* of 17 December 2020, op. cit., par. 29.

5. CONCLUSIONS

In Europe the rule of law is under attack and in deep crisis, but Europe too remains in keeping with the founding fathers and the words of Jean Monnet. The tensions that in some countries concern the rule of law⁶⁴ can be the starting point for consolidating the value of the rule of law, qualifying it as one of the traits that characterize the constitutional identity of the European Union. Union law, as a law codified in writing is valid and often needs to be reformed to better meet the requirements arising from the rule of law. In fact, in many countries it bears the imprint of the former "undemocratic" power and the rule of law often remains contradictory and not very transparent and certainly does not meet the specific needs of each individual member country. The centralization of a unitary system that seeks the Union unfortunately does not reflect the decentralized structures of daily life, i.e. national law and often does not even correspond to the needs of peoples, which vary from one region to another despite the fact that all are part of the same Euro-unit organization. And the question is: In such situations, would it really be surprising if the EU institutions or other Member States used all the legal means and remedies made available by the Treaties?

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⁶⁴ See: Rule of law report. The rule of law situation in the European Union COM/2021/700 final of 20 July 2021. In particular, it was reported that the rule of law: includes: a) legality, according to which the national legislative process must be transparent, democratic, pluralistic; b) legal certainty; c) the prohibition on the arbitrary exercise of executive power; d) the guarantee of effective judicial protection by independent and impartial judicial bodies which guarantee the protection of fundamental rights and civil liberties; e) freedom of communication and pluralism; f) the separation of powers; g) equality before the law.

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