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Polexit v. European Union

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ABSTRACT: This article was based on the historical course of the Polish crisis that lasted more than 7 years, culminating with the ruling of October 7, 2021 by the Polish Constitutional Court. This, in turn, paved the way for Poland's exit from the Union as well as the discussion of several open legal issues – from the rule of law and the Union's values to the first considerations for the future of European integration.

KEYWORDS: Polexit – Polish constitutional court – rule of law – EU values – Article 2 TEU.

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1. Introduction

October 7, 2021 was the day of the hearing, after numerous referrals to the Polish Constitutional Court [*Trybunał Konstytucyjny* (TC)] and the related operative part of the judgment in Case K 3/21, relating to the assessment of the conformity of certain provisions of the Treaty on European Union (TEU) as interpreted by the Court of Justice of the European Union (CJEU) with the Polish constitution. On the same day, in 1958, the Court of Justice of the European Communities was established and became operational.[1] An unforgettable day in the history of European integration.

The gradual detachment of Poland from the principles of the rule of law[2] and the principles of the Union has lasted for about 6 years.[3] Detachment and

[1] Molina Del Pozo Francisco, *El Tribunal de Justicia de la Uniòn Europea: procedimento y recursos* (Pamplona: Editorial Aranzadi, 2020).

[2] In modern times the rule of law received its first systematization as a legal notion by the British jurist Albert Dicey (Albert Dicey, *Lectures introduction to the study of the law of the constitution* (London: Macmillan, 1886). James Pfander, "Dicey's nightmare: An essay on the rule of law", *California Law Review*, 107 (3), (2019): 744ss; Kent Roach, *Remedies for human rights violations. A two-track approach to supra-national and national law* (Cambridge: Cambridge University Press, 2021), 538ss. Also taking up the same principles that since the end of the 18th century had found expression in France, with reference to the "État de droit" (Bernard Hibbitts, "The politics of principle: Albert Venn Dicey and the rule of law", in *Anglo-American Law Review*, 23 (1), (1994): 4ss; Michael Principe, "Albert Venn Dicey and the principles of the rule of law: is justice blind? A comparative analysis of the United States and Great Britain", *Loyola of Los Angeles International and Comparative Law Review*, 22 (3), (2000): 360ss; Blandine Kriegel, *État de droit ou Empire?* (Paris: Bayard, 2002), 82ss), and the German-language law on the "*Rechtsstaat*", which would spread throughout Europe. For a more in-depth analysis of the argument, see: Pietro Costa, "The rule of law: An outline of its historical foundation", in *Handbook on the rule of law*, ed. Christopher May, Adam Winchester (Cheltenham: Edward Elgar, 2018), 136ss. Léon Duguit, *Traité de Droit Constitutionnel* (Paris: Fontemoing, 1911). Nóra Chronowski, Márton Varju, "The Hungarian rule of law crisis and its European context", in *Rule of law in Europe – Current challenges*, ed. A. Kellerhals, T. Baumgartner (Zurich: Schulthess Juristische Medien AG, 2017), 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 Montesquieu's 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 Tom Ginsburg, Mila Versteeg, "Constitutional correlates of the rule of law", in *Constitutionalism and the Rule of Law*, ed. Maurice Adams, Anne Meuwese, Ernst Ballin (Cambridge: Cambridge University Press, 2017), 510ss, the rule of law: "*(...) would be characterized by a persistent theoretical confusion (...)*". Brian Tamanaha, "The history and elements of the rule of law", *Singapore Journal of Legal Studies*, (2021): 240ss. Robert Stein, "Rule of law: what does it mean?", *Minnesota Journal of International Law*, 18 (2) (2019): 294ss, which anticipates the principle of the separation of powers for the reconstruction of the rule of law in the strict sense. The rule of law was normatively enshrined in the Treaty of Amsterdam and also appeared in the Preamble of the Charter of Nice among the common "values" listed in Article 2 TEU. On this matter, see also: Thedore Konstadinides, *The rule of law in the European Union: the internal dimension* (Oxford & Oregon, Portland: Hart Publishing, 2017), 38ss. Jordan Daci, "Legal principles, legal values and legal norms: Are they the same or different", *Academicus: International Scientific Journal* (2010): 119ss. Danijela Dudley, "European Union membership conditionality: The Copenhagen criteria and the quality of democracy", *Southeast European & Black Sea Studies*, 20 (4), (2020): 525ss, where the author expresses the opinion "(...) that the concrete application of these criteria has sometimes sin of consistency (...)". In the same spirit, see also: Isabelle Ioannides, *Rule of law in European Union external action. Guiding principles, practices and lessons learned* (Sweden: International IDEA, 2014), 14ss. Ilina Cenevska, "The rule of law as a pivotal concept of the EU's politico-legal order", *Iustinianus Primus Law Review*, 11 (1) (2020): 6-7. Marija Vlajković, "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", *ECLIC*, 4, (2020): 240-241.

[3] Dimitris Liakopoulos, "Respect of rule of law between "internal affairs" and the European Union.

open debate in the halls of the European Union due to the legislative reforms that took place in Poland as well as the mechanism for selecting and appointing the members of the TC, thus becoming a reliable rubber for government initiatives[4] and an impetuous departure from the canons of the rule of law that started around May 24, 2015. This was the day when Donald Franciskek Tus of the right-wing conservative Law and Justice party (Prawo i Sprawiedliwość, PiS) took political power in Poland, where in the European Parliament, it joined the group of Conservatives and Reformists Europeans. On that day Andrzej Sebastian Duda, a young professor of administrative law from Krakow, prevailed with 51.55% of the votes, over the outgoing president, Bronisław Maria Komorowski, exponent of the centrists of the Civic Platform (Platform Obywatelska, PO), member of the group of the European People's Party which stalled at 48.45% of the votes.

With the new ordinary Polish law approved on 24 June 2015, the election of the entire college by the Sejm was confirmed by a majority of the voters and, as a consequence, allowed the political majority of the moment to get their hands on the TC. The Sejm was approved to provide for the coverage of the positions/vacancies of constitutional judges not only for the three expiring by the end of the legislature (the first days of November); but also, for two further judges who would alternate those whose nine-year mandate would end in December, that is, once the new legislature began. The aim was for the outgoing party to ensure, in case of defeat in the upcoming legislative elections, the absolute prevalence of constitutional judges of their choice at least for the entire duration of the next legislature, through the indication of 5 of the 15 constitutional judges, "prefabricating", as claimed by the opposition of the Law and Justice party; a "system" useful for paralysing legislative activity in the event of going over to the opposition after the autumn vote. Within this framework, the first president of the Supreme Court and the National Council of the Judiciary filed the related appeals with the TC against numerous provisions of the law, appeals which are joined in Case K 35/15.

Remaining on the historical path, we are reminded that the Sejm renewed with a PiS majority, five days after the inaugural session of its mandate, on November 19, 2015. He approved a new law on TC, with the aim of "normalising" it and, subsequently, proceeded to appoint new constitutional judges. The concerning decision shortened the term of office of the president and vice president to three years (with renewal allowed once). The mandate of the constitutional judges began not from the date of election, but from that in which they were sworn in before the President of the Republic. After a few days on November 25, the Sejm, with the votes of the PiS alone, adopted five individual resolutions with which it invalidated, with retrospective effect, the appointments of the five constitutional judges elected on October 8 by the previous Parliament (Diet). Thus, the Sejm proceeded with the election of five judges to replace those deposed. This happened despite the pending appeal of the aforementioned appeal (Case K 34/15), which was then finally decided with a judgment of 9 March 2016, which declared the entire law on TC unconstitutional. The newly elected judges took the oath in the hands of the Head of State, Duda, between 3 and 9 December 2015, but the president of the TC limited himself to recognising their status without admitting them to hearings or

The case of Poland and Hungary as a political v. functional raison d'être", *Acta Universitatis Danubius*, Relationes Internationales, 12 (2) (2019).

[4] Rick Lyman, "In Poland, an assault on the courts provokes outrage", *New York Times*, July 19, 2017.

to chambers. Case K 34/15 was partially decided on 3 December 2015. According to Article 137 of the law of 25 June 2015 on TC, it was judged illegitimate by the aforementioned case in the part in which "*he had also allowed the election of judges whose mandate had expired in the subsequent parliamentary term (...) the Court stated that the Head of State was incumbent on the duty to make new judges legitimately elected to swear an oath*".[5]

A new problem arises from the decision of the president of the TC, Andrzej Rzepliński, regarding the decision of the case to the plenary composition. The termination of the mandate of four judges, and the abstention of three others, reduced the number of judges available below the quorum of nine required to deliberate in plenary. The conflict between the TC and the President of the Republic, Parliament, and the Government, on the other hand, was exacerbated when the latter hesitated until 15 December 2015 to publish the sentence in the Dziennik Ustaw, publication which, pursuant to Article 190, par. 3 of the Constitution, is a condition of the effectiveness of the law.[6] In the same period, with Order U 8/15 of 4 December, the TC declared itself incompetent to judge the parliamentary resolutions invalidating the resolutions of the Sejm, by which five judges had been elected on 8 October, as they had no normative character.

2. European Commission and Polish authorities: towards the opening of the procedure of Article 7, par. 1 TEU?

The European Commission (EC), taking into account the Polish situation, has since 13 January 2016, initiated a dialogue based on the New EU Framework to strengthen the rule of law starting with the Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland[7] which is completed with the Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374.[8] With a new Recommendation on July 26, 2017,[9] it tried to avoid the entry into force of the laws on the National Council of the Judiciary, the Supreme Court and ordinary courts. The EC continued with the Recommendation adopted on December 20, 2017,[10] in which it was noted that the previous requests were completely ignored by the Polish authorities. According to the EC, the Polish situation constituted a clear systemic threat[11] to the rule of law and on 20 December 2017, it decided to activate the procedure pursuant to Article 7, par. 1 TEU, aimed at ascertaining by

[5] Polish Constitutional Court, K. 34/15, 185/11/A/2015 of 3 December 2015, Ref. n. K/34/15.

[6] Judgement CJEU *Asociația "Forumul Judecătorilor din România"*, 18 May 2021, C-83/19, paras. 245ss; Judgement CJEU *Asociația "Forumul Judecătorilor Din România" and Asociația Mișcarea Pentru Apărarea Statutului Procurorilor*, C-127/19 (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19).

[7] C/2016/5703, *OJ L 217,* 12.8.2016, 53–68.

[8] C/2016/8950 OJ L 22, 27.1.2017, 65–81.

[9] Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council C/2017/1600 OJ L 66, 11.3.2017, 15–21.

[10] Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 C/2017/9050 OJ L 17, 23.1.2018, 50–64.

[11] Michael Ioannidis, Armin von Bogdandy, "Systemic deficiency in the rule of law: what is this, what has been done, what can be done", *Common Market Law Review*, vol. 51, no. 1 (2014): 64ss; András Jakab, Dimitry Kochenov, *The enforcement of EU laws and values. Ensuring member States compliance* (Oxford: Oxford University Press, 2017).

the Council,[12] which decides by a majority of four-fifths of its members, with the approval of the European Parliament, the existence of a clear risk of serious violation of the values referred to in Article 2 TEU[13] in Poland.

Taking Article 7 TEU as our starting point, we intend to expand to other inputs as well, identifying their strengths and weaknesses. We believe that none of the instruments identified is, by itself, suitable to adequately protect the axiological structure of the Union and that only a combination of these could lead to convincing results. While Article 7 of the TEU[14] is at the center of the news because of the above decisions of the European Parliament, the activation of the mechanism in Poland cannot be considered by itself as an efficient choice. In fact, it has now become clear to anyone that the instrument defined as a nuclear option by the then Commission President Durão Barroso[15] is little more than a toy weapon.

The situation in Poland worsened with the general political elections of 13 October 2019, when the PiS increased the consensus, obtaining 43.59% of the votes, maintaining an absolute majority in the Sejm, where its 235 seats out of 460 were confirmed and, as a consequence, this gave them the mandate to govern practically without the help of other parties. In the Senate, it obtained 39.99% of the votes, only 48 seats out of 100, thus losing 13 compared to the previous electoral round and forcing the PiS to start finding support among the smaller parties.[16] The victory of the opposition in the Senate has limited practical effects. According to the Constitution, the Senate has no fiduciary relationship with the Government, it can only slow down the legislative process, having thirty days to decide on a bill approved by the Sejm, with a resolution that the latter can in turn reject by a majority of the votes.

In the presidential elections of 28 June-12 July 2020, postponed due to the COVID-19 pandemic, Duda prevailed in the ballot with 51.03% of the votes, beating the opposition candidate, the mayor of Warsaw Rafał Kazimierz Trzaskowski, of Civic platform, which collected 48.97%. In October 2021, five years after the Commission's

[12] See ex multis, José Luís da Cruz Vilaça, *European Union law and integration. Twenty years of judicial application of European Union law* (Oxford & Oregon, Portland: Hart Publishing, 2014); Ralph Folsom, *Principles of European Union law including Brexit* (Minnesota: West Academic, 2017), 278ss. Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur, *EUV/AEUV – Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union* (München: C.H. Beck, 2016); Maria Decheva, *Recht der europäischen Union* (Baden-Baden: ed. Nomos, 2018); Catherine Barnard, Steve Peers (eds.), *European Union law* (Oxford: Oxford University Press, 2017), 586ss; Alina Kaczorowska-Ireland, *European Union Law* (London & New York: Routledge, 2016); Francesco Martucci, *Droit de l'Union europèenne* (Paris: LGDG, 2017); Miguel Poiares Maduro, Marlene Wind (eds.), *The transformation of Europe: twenty-five years on* (Cambridge: Cambridge University Press, 2017), 321ss; Robert Schütze, *European Union Law* (Cambridge: Cambridge University Press, 2015), 382; Simon Usherwood, John Pinder, *The European Union: A very short introduction* (Oxford: Oxford University Press, 2018).

[13] Reasoned proposal in accordance with Article 7(1) of the TEU 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).

[14] Mattias Derlén, Johan Lindholm, *The Court of Justice of the European Union: multidisciplinary perspectives* (Oxford & Oregon, Portland: Hart Publishing, 2018).

[15] See the State of the Union Address of September 14, 2022.

[16] Nicoló Conti, *Party attitudes towards the EU in the Member States: Parties for Europe, parties against Europe* (London: Routledge, 2013); Claire Kilpatrick, "On the rule of law and economic emergency: The degradation of basic legal values in Europe's bailouts", *Oxford Journal of Legal Studies*, 35 (2) (2015): 325ss. In this article, the author distinguishes between "*thick or substantive versions, teleological versions and procedural versions*" of the rule of law.

first initiatives on the rule of law[17], after repeated judgments of non-compliance pursuant to Article 259 TFEU[18] and the equally low number of interstate appeals to the ECtHR.[19] Non-compliance sentences were obviously anticipated by precautionary orders, and in the numerous preliminary rulings of the CJEU "organised" by referrals by Polish judges, the political power of PiS and Prime Minister Mateus Jakub Morawiecki, actually in office since 11 December 2017, were quickly normalised and as a result, the opening of the procedure of Article 7, par. 1 TEU, that languishes before the Council, together with the monitoring procedure provided by the Council of Europe.[20] The lack of use of Article 259 TFUE in matters regarding the rule of law demonstrate the inexistence of Member States' initiative in this regard as an expression of "*diplomatic considerateness*". Another interpretation is its infrequent use as an expression of Member States' trust in the Commission's effectiveness as Guardian of the Treaties (TEU and TFEU).[21] As the CJEU has constantly held, "*(...) every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution (...)*".[22]

3. The war of the judges: the infringement procedures promoted by the EC

The beginning of the procedure of Article 7, par. 1 TEU and the evident risk of serious violation of the values referred to in Article 2[23] requires a four-fifths

[17] Dimitry Kochenov, "Biting intergovernmentalism: The case for the reinvention of article 259 TFEU to make it a viable rule of law enforcement tool", *Hague Journal on the Rule of Law*, 15 (7) (2016): 154ss, "*(...) the assessment of democracy and the rule of law criteria during this enlargement was not really full, consistent and impartial, and the threshold to meet the criteria was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowledgement that the Copenhagen political criteria had been met (...)*".

[18] N. Wunderlich, "Commentary of Article 259 TFEU", in *H. VON DER GROEBEN, Kommentar zum Europäischen Unionsrecht* (Baden-Baden: ed. Nomos, 2015).

[19] See under discussion: It is conveyed that Article 8 of ECHR (Right to respect for private and family life) and case law have developed specific positive obligations of a state, which are combined with the rule of law, as we can observe in the case *P.P. v Poland*, 8 January 2008, para. 88: "*(...) the rule of law principle creates additional obligations of the State to guarantee that individuals under their jurisdiction have access to effective legal means to enforce the protection of their human rights, in particular in situations when private actors infringe these rights (...) the Rule of Law creates a benchmark for the quality of laws protecting human rights: legal provisions in this field-and beyond-have to be, inter alia, clear and predictable, and non-discriminatory, and they must be applied by independent courts under procedural guarantees equivalent to those applied in conflicts resulting from interferences with human rights by public authorities (...)*". In the same spirit, see the following cases from the same Court: *Sławomir Musiał v. Poland* of January 20, 2009; *Ilias and Ahmed v. Hungary* of March, 4, 2017; *Baka v. Hungary* of June, 23, 2016; *Varga and others v. Hungary* of March, 10, 2015; *Nabil and others v. Hungary* of September 22, 2015; *R.R. and others v. Hungary* of December 4, 2012; *Solska and Rybicka v. Poland* of September 20, 2018; Piechowicz v. Poland of April 17, 2012; *Rutkowski and others v. Poland* of July 7, 2015; *Braun v. Poland* of November 4, 2014. See for further information: Jolien Schukking, "Protection of human rights and the rule of law in Europe", *Netherlands Quarterly of Human Rights*, 36 (2) (2018): 154ss; Gerane Lautenbach, *The concept of the rule of law and the European Court of Human Rights* (Oxford: Oxford University Press, 2013), 192ss.

[20] Conseil de l'Europe, Assemblée parlementaire, Le fonctionnement des institutions démocratiques en Pologne, Res. 2316 (2020), adopted on 28 January 2020, on the report of the Commission for compliance with the obligations and commitments of the member states of the Council of Europe.

[21] N. Wunderlich, "Commentary of Article 259 TFEU".

[22] Judgement CJEU *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, 6 October 1982, Case 283/81, para 20; Frank Schorkopf, "Wertsicherung in der Europäischen Union. Prävention, Quarantäne und Aufsicht als Bausteine eines Rechts der Verfassungskrise?", *Europarecht*, 50, no. 2 (2016): 148ss.

[23] In this regard, see also Judgement CJUE *Andy Wightman and Others v Secretary of State for Exiting the*

majority in the Council. Faced with the fear of not having obtained any concrete results since 2017, the EC tried to rely on the infringement procedure and on the decisions arising by the CJEU[24] from therein and as well as the interim measures issued with the aim of ensuring effective precautionary protection pending the declaratory judgments on the infringements charged against Poland.

The EC did not immediately base itself on a breach of the rule of law under Article 7 TUE, knowing that politically, it could not obtain an effective result according to its own principles of the Union. Consequently, it lodged an appeal pursuant to ex Article 258 TFEU (Case C-441/17, Commission v. Poland (Białowieża Forest) of 17 April 2018),[25] concerning a complaint relating to the violation of two environmental directives ("habitat"[26] and "Birds"[27]), in the forest area inside the Natura 2000 site of the Białowieża forest, on the border with Belarus; an asset, among other things, protected, since 1979, by UNESCO as a World Heritage Site. At the same time, it introduced an application for urgent measures (Case C-447/17 R),[28] seeking to put an end to the deforestation operations, subsequently asking the Court, through an integration of the application, to order Poland to pay a delay penalty, given that deforestation operations continued despite the Vice President of the Court's order of July 2, 2017. By order of 27 July 2017,[29] the request was

European Union, 10 December 2018, Case 621/18, para 63; For further details see also: Dagmar Schiek, "The ECJ's Wightman ruling, the "Brexit" process and the EU as a constitutional entity", *Frankfurter Newsletter zum Recht der Europäischen Recht (FIREU)*, 07.01.2019; Kenneth A. Armstrong, "The right to revoke an EU withdrawal notification: Putting the bullet back in the article 50 Chamber?", *Cambridge Law Journal*, 78 (1) (2019): 36ss; Giuseppe Martinico, Marta Simoncini, "Wightman and the perils of Britain's withdrawal", *German Law Journal*, 21 (2020): 802ss; Alexander Thiele, "Exit vom Brexit? Zur Möglichkeit einer einseitigen Rücknahme der notifizierten Austrittsabsicht nach Art. 50 Abs. 2 EUV – zugleich Anmerkung zum Urteil des EuGH v. 10.12.2018, Rs. C-621/18 (Wightman) ", *Europarecht* 54 (2) (2019): 268ss.

[24] Koen Lenaerts, "The Court of Justice as the guarantor of the rule of law within the European Union", in *The contribution of international and supranational courts to the rule of law,* ed. Geert De Baere, Jan Wouters (Cheltenham: Edward Elgar Publishing, 2015), 244ss.

[25] Judgment CJEU *Commission v Poland (Białowieża Forest)*, 17 April 2018, Case C-441/17.

[26] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, 7–50. Modified by the Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia OJ L 158, 10.6.2013, 193–229.

[27] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds OJ L 20, 26.1.2010, 7–25. Modified by the Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia OJ L 158, 10.6.2013, 193–229.

[28] Judgment CJEU *European Union v. Guardian Europe*, 5 September 2019, joined cases C-447/17 P and C-479/17 P.

[29] In Judgment CJEU *Commission v. Poland (Independence of ordinary Courts)*, 5 November 2019, Case C-192/18. For further details see also: Luke Spieker, "Defending union values in judicial proceedings. On how to turn Article 2 TEU into a judicially applicable provision", in *Defending checks and balances in EU Member States*, ed. Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski, Matthias Schmidt, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht)*, vol. 298 (Berlin, Heidelberg: Springer, 2021); Kim Lane Scheppele, Dimitry Vladimirovich Kochenov, Barbara Grabowska-Moroz, "EU values are law, after all: enforcing EU values through systemic infringment actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, 39 (2020): 6ss; Nasiya Daminova, "Rule of law vs. Poland and Hungary – an inconsistent approach?", *Hungarian Journal of Legal Studies*, 60 (3) (2019): 242ss. Although the aforementioned case law was not cited, according to our view, the case law used by the CJEU is in conflict with the effective protection of the adversarial system principle and

provisionally accepted considering the risk of serious and irreparable damage to the forest complex and urging that the measure be adopted without waiting for further comments from Poland. The Court attributed the question to the Grand Chamber. In the order of 20 November 2017, the judges, bearing in mind the precautionary principle in the context of the environmental protection pursued by the EU, found the condition relating to the existence of a *fumus boni iuris* to be satisfied. The requirement concerning urgency was also presumed to exist in the absence of scientific information capable of ruling out that the active forest management operations at issue would not produce harmful and irreversible effects on the protected habitats in question. The CJEU considered it more urgent than preventing deforestation damage from occurring also on the basis of Article 279 TFEU as an effective guarantee of EU law, which gives the CJEU the power to adopt, even *ex officio*, interim measures to ensure the effectiveness of injunctions.

This is a provision that links it to the need for an effective guarantee of the rule of law enshrined in Article 2 TEU.[30] The Court ordered Poland to notify the Commission of the measures taken to comply with the order and ruled that, in the event that the EC deemed them unsuitable, it could summarise the proceedings. The Court decided ex officio by order of 11 October 2017, to deal with this case in accordance with the expedited procedure. The judgment was issued on April 17, 2018, about nine months after the introduction of the appeal by the Commission, whose grievances, according to the conclusions of the Advocate General Yves Bot, were all declared well founded and the breaches charged to Poland were confirmed.

The EC took a second, more stringent step to verify and ensure the rule of law in Poland by proposing for the first time an appeal for non-compliance based on Article 258 TFEU relating to the measures adopted by a Member State in the field of national judicial organisation with the criteria established by Article 19, par. 1, second paragraph TEU in combination with Article 47 of the Charter of the Fundamental Rights of the European Union (CFREU).[31] The appeal was based on the Polish positions relating to the lowering of the age of judges of the Sąd Najwyższy (Supreme Court), appointed before 3 April 2018.

Appointments contrary to the principle of the immovability of judges as a result of the President of the Republic being given the power to extend the service of judges of the same court despite having reached the lower retirement age limit, violate the principle of independence of the judiciary. In this spirit and with judgment C-619/18, European Commission v. Poland of 24 June 2019, Hungary also intervened, causing the CJEU to observe that "(...) *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 (...)*".[32]

Hence, one is left to wonder how the existence of the *fumus boni iuris* requirement and the production of serious and irreparable damage to the legal order of the

especially with the right to a fair trial according to Article 6 para. 3 of the TEU and Article 47 of the CFREU and the best interests of the administration of justice.

[30] Jürgen Schwarze, Ulrich Becker, Armin Hatje, Johann Schoo, *EU-Kommentar* (Baden-Baden: ed. Nomos, 2019).

[31] Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds.), *Commentary on the European Union treaties and the Charter of fundamental rights* (Oxford: Oxford University Press, 2019).

[32] Judgment CJEU *Commission v Poland (Independence of the Supreme Court)*, 24 June 2019, Case C-619/18.

Union are warranted, thus justifying the urgent status, as well as the balancing of the interests at stake and the granting of the requested provisional measures.

Overall, we could argue that with Case C-619/18, European Commission v. Poland, the CJEU decided to side, at least in this stage, with the EC, that had lodged an appeal for non-compliance. The CJEU upheld the request for interim measures and ordered Poland to suspend the application of the rules on lowering the retirement age of the judges of the Supreme Court, also requesting that the courts concerned be allowed to continue to exercise their functions with the status prior to the entry into force of the law. It also blocked the possibility of appointing judges according to the new rules, as well as the new President of the Supreme Court. For the CJEU's vice-president, the requirement of judges' independence is an essential element of the fair process and functional to preserving the common values of the Member States enunciated by Article 2 of the TEU.[33] To this end, it should be added that the reform involves the judges of the Supreme Court and, therefore, due to the adoption of definitive judgments, there is a risk of serious and irreparable damage to each subject. Poland is required to inform the EC about the measures taken to comply with the ordinance.[34]

Within 2 days, the Polish Parliament adopted, on 23 November 2018, a law on the Supreme Court of December 2017, which was promulgated by President Duda on 30 December, on the twenty-first and last day scheduled for the exercise of this power. On 17 October 2018, Minister of Justice Zbigniew Ziobro – also in his capacity as Attorney General – raised the issue related to the compatibility of Article 267 TFEU with the Polish Constitution, namely the possibility for national judges to submit preliminary reference requests to the CJEU on issues concerning judicial power. It was an unexpected decision, aimed at limiting, impeding *rectius* the possibility of national judges' dialogue with the CJEU (Article 267 TFEU), based on the principle of independence of the judiciary, a mandatory change of European jurisprudence, a lack of uniformity in the application of EU law, and the announcement (de facto) of a Polexit.

The CJEU with judgment of 24 June 2019, Case C-619/18, with accelerated procedure and according to the conclusions of the Advocate General Tanchev[35] – with regard to Compliance with and monitoring of the rule of law[36] – the relationship between the procedure, even if not binding, is examined by Article 7 TEU[37] and the one referred to in Article 258 TFEU. It has been argued that Article

[33] Gunnar Beck, *The legal reasoning of the Court of Justice of the EU* (Oxford & Oregon, Portland: Hart Publishing, 2013).

[34] See the European Commission for Democracy through Law (the Venice Commission). Poland opinion on the draft act amending the act on the national Council of the judiciary, on the draft act amending the act on the Supreme court, proposed by the President of Poland and on the act on the organisation of ordinary Courts (adopted by the Venice Commission at its 113th plenary session – 8-9 December 2017). Opinion no. 904/2017 of 11 December 2017.

[35] Presented on 11 April 2019 (Case C-619/18 – Opinion of Advocate General Tanchev). For further details see also: Kassiani Oikonomou, "Crisis of the rule of law in the EU through the case law of the ECJ: The case of Poland", *HAPSc Policy Briefs Series*, 1 (2) (2020): 192ss; Aida Torres Pérez, "From Portugal to Poland: The Court of Justice of the EU as watchdog of judicial independence", *Maastricht Journal of European and Comparative Law*, 27 (1) (2020): 110ss.

[36] Thedore Konstadinides, *The rule of law in the European Union: the internal dimension*.

[37] Roberto Baratta, "Rule of law «dialogue» within the EU: A legal assessment", *Hague Journal on the Rule of Law* (2016): 366: "*(...) if the Commission initiates a pre-Article 7 procedure issuing a recommendation addressed to a State, the latter could challenge it since it would be an act producing legal effects (...)*". However, it must be said that,

7 TEU and Article 258 TFEU establish separate procedures and can be invoked simultaneously. These provisions "*(...) are not mutually exclusive and the reference to one of the obligations (...) incumbent by virtue of the treaties in Article 258 TFEU includes all the provisions of EU law not relating to the CFSP. Article 7 TEU essentially concerns a "political" procedure, intended to counter a "serious and persistent violation" by a Member State of the values referred to in Article 2 TEU.*[38] *Article 258 TFEU, on the other hand, establishes a "legal" path*

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beyond the explicit provision of Article 288, paragraph 5, TFEU according to which "*the recommendations and opinions are not binding*", the "*preliminary*" character of the New Framework to the procedure pursuant to Article 7 TEU and the same terminology used in the Rule of Law Recommendation in Poland (recommends, encourages, invites) lead to the exclusion that the recommendation produces legal effects and therefore constitutes a challengeable act pursuant to Article 263 TFEU. In this regard, it may be recalled that the CJEU, although it considered that "*even if the recommendations are not intended to produce binding effects and cannot give rise to rights that can be brought by individuals before a national court, they are not entirely devoid of any of legal effects*", however, has defined these effects in well-defined limits. The national courts must in fact take into consideration "*(...) the recommendations for the resolution of the disputes submitted to their judgment, in particular when they help in the interpretation of national rules adopted to ensure their implementation or aim at completing Community rules. (...)*" according to the case T-721714, *Kingdom of Belgium v. European Commission* of 27 October 2015, ECLI:EU:C:2015:829. According to our opinion and having made the appropriate distinctions, the recommendation adopted at the end of the dialogue established in the New Framework seems to have considerable affinity with the acts adopted by the Commission during the pre-litigation phase of the infringement procedure pursuant to Article 258 TFEU, in particular with the reasoned opinion which, notoriously, cannot be challenged. See ex multis, José Luís da Cruz Vilaça, *European Union law and integration. Twenty years of judicial application of European Union law*; Ralph Folsom, *Principles of European Union law including Brexit*, 278ss; Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur, *EUV/AEUV – Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union*; Maria Decheva, *Recht der europäischen Union*; Catherine Barnard, Steve Peers (eds.), *European Union law*, 586ss; Alina Kaczorowska-Ireland, *European Union Law*; Francesco Martucci, *Droit de l'Union européenne*; Miguel Poiares Maduro, Marlene Wind (eds.), *The transformation of Europe: twenty-five years on*, 321ss; Robert Schütze, *European Union Law*, 382; Laurent Pech, "Article 7 TEU: From «nuclear option» to «sisyphean procedure»?", in *Constitutionalism under stress*, ed. Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (Oxford: Oxford University Press, 2020), 157ss; Simon Usherwood, John Pinder, *The European Union: A very short introduction*; Laurent Pech, Patryk Wachowiec & Dariusz Mazur, "Poland's rule of law breakdown: a five-year assessment of EU's (in)action", *Hague J Rule Law*, 13, 1–43 (2021): paras. 5 and 19: "*Article 7(1) Reasoned Proposal can be summarised as follows: (i) The unlawful appointment of the current individual presiding over the Constitutional Tribunal, the unlawful nomination and appointment of three individuals to the same body with one of these individuals unlawfully appointed Vice-President with the consequence that the judgments rendered by the Tribunal can no longer be considered as providing effective constitutional review; (ii) The deliberate refusal to publish and/or fully implement several rulings of the Constitutional Tribunal issued prior to its "capture" in December 2016; (iii) The adoption of several laws which, through their combined effect, have notably increased the systemic threat to the rule of law due to their incompatibility with the Polish Constitution and basic European standards on judicial independence: The law on the Supreme Court; the law on the National Council for the Judiciary; the law on Ordinary Courts Organisation and the law on the National School of Judiciary; (iv) The failure to refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole; (v) The failure to ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence and is prepared in close cooperation with the judiciary and all interested parties (…) This approach is arguably in breach of the intent and purpose of Article 7 TEU. By adopting modalities which make the hearings as ineffective as possible, the Council has also violated the EU principle of effect utile. In more practical terms, these serious shortcomings have resulted in Polish authorities being able to avoid any serious opprobrium within the Council while presiding over one of the most severe examples of autocratisation in the world in the past ten years (...)*".

[38] 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: Louise Halleskov Storgaard, "EU Law autonomy versus European fundamental rights protection – on Opinion 2/13 on EU accession to the ECHR", *Human Rights Law Review*, 15 (3) (2015): 487ss. On the one hand, the Article 53 does not oblige the States to guarantee a higher level of protection than that of the ECHR, on the other hand the same CFREU must guarantee the same level of protection of ECHR so that there is no conflict between the

(...) to obtain a declaration of non-compliance and may also lead to the imposition of financial penalties (...) the fact that Article 269 TFEU, relating to the contestation of the legitimacy of an act adopted by the European Council or by the Council pursuant to Article 7 TEU,[39] *limits the jurisdiction of the Court to the "procedural requirements"*[40] *provided for by Article 7 TEU, cannot reduce the power of the Court to rule on the basis of its jurisdiction pursuant to Article 258 TFEU*

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two provisions. Moreover, the CJEU has evoked the specificity of the Union's control system on respect for fundamental rights, in particular the principle of mutual trust in the areas of civil and criminal judicial cooperation, visa, asylum and immigration, namely the area of freedom, security and justice that obliges each Member State to presume respect for fundamental rights by the other Member States and the absence of their jurisdictional powers in the field of foreign and security policy. See also in Judgement CJEU *Jeremy F. v Premier minister*, 30 May 2013, Case C-168/13 PPU. 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 Judgement CJEU *Stefano Melloni v Ministerio Fiscal*, 26 February 2013, Case C-399/11 and Judgement CJEU *Ministerul Public-Parchetul de pe lângă Curtea de Apel Constanţa v. Radu*, 29 January 2013, Case C-396/11; Fenella Billing, *The right to silence in transnational criminal proceedings: comparative law perspectives* (Berlin: Springer, 2016), 323ss. Fisnik Korenica, *The EU accession to the ECHR: Between Luxembourg's search for autonomy and Strasbourg's credibility on human rights protection* (Berlin: Springer, 2015), 282ss; Tobias Lock, "The future of EU accession to the ECHR after Opinion 2/13: Is it still possible and is it still desirable?", *Edinburgh School of Law Research Paper Series*, (2015). Fabrice Picod, "La Cour de justice a dit non à l'adhésion de l'Union européenne à la Convention EDH", *La Semaine Juridique, Édition Générale* (2015): 230, 234; Jean-Paul Jacqué, "The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, 48 (4) (2011): 995, 1005; Daniel Halbestram, "«It's the autonomy, stupid!» A modest defense of Opinion 2/13 on EU accession to the ECHR, and the way forward", *Michigan Law Paper*, 105 (2015); Elspeth Berry, Matthew J. Homewood, Barbara Bogusz, *Complete EU law: text, cases and materials* (Oxford: Oxford University Press, 2019); Turkuler Isiksel, *Europe's functional constitution: a theory of constitutionalism beyond the state* (Oxford: Oxford University Press, 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", *Washington University Global Studies Law Review*, 18 (2019): 56ss.

[39] Article 7, para. 1 TEU foresees that the first phase of the procedure is set in motion on a motivated proposal by one third of the Member States, the EP, or the EC. The Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, will be able to find that there is a clear risk of a serious breach by a Member State of the values referred to in article 2 TEU. Before taking this decision, the Council shall hear the Member State concerned and may adopt recommendations addressed to that State, acting in accordance with the same procedure. If the reasons for the finding remain or become aggravated, the European Council is expected to act unanimously on a proposal by one third of the Member States or the EC and after obtaining the consent of the EP and having invited the Member State concerned. The Member State presenting observations may point out the existence of a "*serious and persistent breach*" by a Member State of these same values. Following this observation, the Council, by a qualified majority, may decide to adopt sanctions against the State under reproach.

In particular, Article 7, para. 3 TEU provides that the Council, acting by a qualified majority, may decide to suspend some of the rights deriving from the Member State in question from the application of the Treaties, including the voting rights of the government representative of that Member State in the Council. In doing so, the Council considers the possible consequences of such suspension on the rights and obligations of natural and legal persons. Deeds taken on the basis of Article 7 TEU, which are eminently political in nature, are not amenable to judicial review other than "*with regard to compliance with the only procedural provisions provided for in the aforesaid article*" (article 269 TFEU). For further details see Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds.), *The European Union treaties and the charter of fundamental rights – A commentary* (Oxford: Oxford University Press, 2019).

[40] See the following cases: Judgement CJEU *Online Games Handels GmbH and Others v Landespolizeidirektion Oberösterreich*, 14 June 2017, Case C-685/15, paras. 54 and 55; Judgement CJEU *European Union Copper Task Force v. Commission*, 13 March 2018, Case C-384/16 P, paras. 116 and 117. For further details see also: Hilde Ellingsen, *Standing to enforce European Union before national courts* (London: Hart Publishing, 2021), 74-76; Judgement CJEU *Industrias Químicas del Vallés v. Commission,* 13 March 2018, Case C-244/16 P, paras. 106 and 107.

(...)." In fact, the Advocate General relied on the former judgment of *Associação Sindical dos Juízes Portugueses* judgment.[41] Indeed, the EC appeal concerned an alleged violation of the rule of law, a fundamental value of the Union and reflected in Article 19 TEU. Therefore, the EC can institute such proceedings against a Member State pursuant to Article 258 TFEU, even when that Member State is not applying EU law pursuant to Article 51, par. 1 of the CFREU. The CJEU stated that by lowering the retirement age of Supreme Court judges appointed to the Supreme Court before April 3, 2018, and by giving the President of the Republic of Poland the discretion to extend the judicial function of Supreme Court judges, Poland had violated the principles of immovability and independence of judges and had failed to fulfill its obligations under Article 19, par. 1, paragraph 2 of the TEU.

As per our understanding, the independence of the judicial bodies constitutes an essential aspect of the right to a fair trial, as a guarantee of the protection of the subjective legal positions deriving from EU law and as a safeguard of the common values set forth in Article 2 TEU[42] and of the fundamental value of the rule of law.[43] Rightly, the independence of the ordinary courts had to be in accordance with Article 19 TEU, concretised on the value of the rule of law and on Article 2 TEU, which entrusts national judges and the Court itself with the task of guaranteeing the full and just application of EU law[44] as well as the judicial protection of individuals (effective judicial protection in the sectors covered by EU law) pursuant to that law.[45] This is a general principle of the Union that, in fact, derives not only from the European constitutional traditions of the Member States, but also from Articles 6 and 13 of the ECHR.

The CJEU further intervened with its judgment of 5 November 2019 and the pronunciation the following 19 November, in the joined cases: C-585/18, C-624/18 and C-625/18 A.K. (Independence of the Disciplinary Chamber of the Supreme Court) of 19 November 2019,[46] with which the CJEU replied to the preliminary questions raised by the Polish Supreme Court (in these cases by the Labor Section), relating to the independence requirements of the Disciplinary Section established

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[41] Judgement CJEU *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, 27 February 2018, Case C-64/16, paras. 1, 18, 27. In this sense see also: Judgement CJEU *Minister for Justice and Equality,* 25 July 2018, Case C-216/18 PPU, paras. 50ss.

[42] Manuel López Escudero, "Primacía del derecho de la Unión Europea y sus límites en la jurisprudencia reciente del TJUE", *Revista de Derecho Comunitario Europeo* (2019): 787 *et seq*.

[43] C-216/18 PPU, *op. cit*., paras. 48-63.

[44] 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, para. 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: Christina Eckes, "The autonomy of the EU legal order", *Europe and the World: A Law Review*, 4 (1) (2020): 6ss; Marise Cremona, "The opinion procedure under Article 218 (11) TFEU: Reflections in the light of opinion 1/17", *Europe and the World: A law review*, 4 (1) (2020): 5ss; Christian Riffel, "The CETA opinion of the European Court of Justice and its implications – Not that selfish after all", *Journal of International Economic Law*, vol. 22, no. 3 (2019): 504ss; F. Iorio, "Opinion 1/17 – Has the EU made peace with investment arbitration?", *International Business Law Journal*, 4 (2019): 410ss.

[45] C-216/18 PPU, *Minister for Justice and Equality*, *op. cit*., para. 50.

[46] Judgement CJEU *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, 19 November 2019, Case C-585/18.

at the latter Court as well as the National Council of the Judiciary (KRS) which, as in other selections of judges, plays a decisive role. The Luxembourg Court took the opportunity to address this concern: "*(...) A survey of the independence criteria which every national judge (...)*,"[47] without ruling on the incompatibility of the Polish legislation with the interpretation that CJEU itself has given with regard to Article 47 CFREU, does not provide any clarification on the prevalence of EU law and the need for non-application of conflicting national law.

Despite the order of 8 April 2020, Case C-791/19 R, Commission v. Poland (*Régime disciplinire des juges*) of 15 July 2021,[48] with which the CJEU ordered the suspension of most of the activities of the new disciplinary section established at the Supreme Court, pending an evaluation of its independence, the latter substantially continued to operate and deprive various judges of immunity to subject them to disciplinary proceedings.

We take note of a rapid judicial development before the CJEU, given the orders of 21 May and 20 September 2021 in Case C-121/21 R, Czech Republic v. Poland (Mine de Turòw),[49] possibly the only inter-institutional appeal before the CJEU, the orders of 14 July and 6 October 2021 in Case C-204/21 R, Commission v. Poland,[50] and the judgment of 15 July 2021, Case C-791/19 (Disciplinary Regime for Judges).

The judicial war between Warsaw and Luxembourg, in addition to the aforementioned non-compliance judgments, was caused by the preliminary ruling delivered by the Grand Chamber of the Court on 2 March 2021, at the request of the Naczelny Sąd Administracyjny (Supreme Administrative Court), in Case C-824/18 AB and others. The postponement originated in the context of court proceedings brought by candidates for judicial office A.B., C.D., E.F., G.H. and I.J. and the Krajowa Rada Sądownictwa (National Council of the Judiciary, KRS), in which the above-mentioned candidates challenged resolutions that the KRS decided not to propose to the President of the Republic their appointment to the functions of judge of the civil sections and/or penalties of the Sąd Najwyższy (Supreme Court). In practice, the KRS has proposed to the President of the Republic the appointment of other candidates. The excluded candidates challenged the aforementioned resolutions before the referring court and asked the judge to suspend their implementation.

As expected, the Attorney General argued that since a similar case was pending before the TC, the CJEU had no jurisdiction in a judicial review in an area not governed by EU law, despite the fact that similar jurisdiction and *erga omnes* on identical legal issues existed before the CJEU and the TC. The Court held that it respects the judicial organisation which is mandatory for each Member State of the Union and which is certainly within the competence of each democratic state, as a guarantee of effective judicial protection in the fields governed by EU law according to Article 51 CFREU, whilst not removing the competence/principle that each Member State is obliged to respect the obligations of the law and the principles derived from it by EU law, according to Article 51 CFREU.[51]

[47] Cases C-585/18, C-624/18 and C-625/18 A.K.
[48] ECLI:EU:C:2021:596, not yet published.
[49] ECLI:EU:C:2021:752, not yet published.
[50] ECLI:EU:C:2021:878, not yet published.
[51] Michal Bobek, Jeremias Adams-Prassl (eds.), *The EU Charter of fundamental rights in the Member States*

4. The judgment of 7 October 2021

With an action pending, presented on March 29, 2021, the government asked the TC to establish any profiles of inconsistency with the Constitution of some provisions of the TEU, deeming unconstitutional some measures imposed by national authorities to avoid violation of Union law.[52]

This is a reaction and especially a "response" to the preliminary rulings of the Luxembourg courts regarding the Cases C-824/18, A.B. and others, as this time around we are presented with all the highest offices of the Polish state, such as the Prime Minister, the President of the Republic, the Sejm, the Minister of Foreign Affairs, the Attorney General and the Polish Ombdusman, despite the immediate withdrawal requested by the EC on 10 June 2021 by the Commissioner, responsible for justice, Didier Reynders.

The final judgment was not only signed by the President of the TC Julia Przyłebska[53] and the eleven judges belonging to the panel,[54] but it was also published by the Prime Minister, in the Dziennik Ustaw Rzeczypospolitej Polskiej (Journal of Laws of the Republic of Poland) of 12 October 2021, subheading no. 1852. It deals with a binding sentence and with full juridical efficacy according to the Article 190, par. 3 of the Polish Constitution, in addition to the definitive nature, conferred by par. 1 of the same provision.

The judgment, with three prepositions, refers primarily to the founding Treaties of the Union. The complaints of the TC should have been addressed to the Polish government and parliament since the Treaty of Athens of April 16, 2003, with which Poland joined the European Union, after approval by the Sejm on April 1, 2008, with 384 in favor, 12 abstentions and 56 against, and the Senate on the following day, with 74 in favor, 6 abstentions and 17 against. The President of the Republic signed the treaty's instrument of ratification only on October 10, after five months of parliamentary approval. According to Article 87, par. 1 of the Constitution, the related amendments reported to TEU and TFEU are among the sources of Polish law, as are the Constitution of laws and decrees and according to Article 91, par. 2 of the Constitution, "*the ratified international agreement (...) prevails over the law, if this law is incompatible with the agreement*".[55]

(Oxford & Oregon, Portland: Hart Publishing, 2020).

[52] See Judgement CJEU *A.B. and Others v Krajowa Rada Sądownictwa*, 2 March 2021, Case C-824/18, ECLI:EU:C:2021:153, not yet published.

[53] The Prime Minister's appeal aimed at the TC's assessment of the Union's compliance with the Polish Constitution and especially: 1) of Article 1, first and second paragraph TEU, in combination with Article 4, para. 3 TEU, Article 2, Article 7, Article 8, para. 1, in conjunction with Article 8, para. 2, Article 90, para. 1, Article 91, para. 2, as well as Article 178, para. 1 of the Constitution, in relation to the effective legal protection; Article 19, para. 1, second paragraph of the TEU, in conjunction with Article 4, para. 3 TEU; Article 2, Article 7, Article 8, para. 1, in conjunction with Article 8 para. 2, Article 91, para. 2, Article 90, para. 1, Article 178, para. 1, as well as Article 190, para. 1 of the Constitution; Article 19, para. 1, second paragraph of the TEU, in conjunction with Article 19, para. 1, second paragraph, TEU, in conjunction with Article 2 TEU; Article 8, para. 1, in conjunction with Article 8, para. 2, Article 90, para. 1 and Article 91, para. 2, Article 144, para. 3 and 17, as well as Article 186, para. 1 of the Constitution.

[54] Judge Rapporteur Bartłomiej Sochański. Next to the signature of judge Piotr Pszczółkowski there is the classic formula – "zdanie odrębne" – which indicates the dissenting opinion, while next to the signature of Jaroslaw Wyrembak "votum separatum" is mentioned, which also means dissent.

[55] In this sense, see also Article 1 of the sentence of the TC in conjunction with Article 4, para. 3 TEU.

In the same first proposition, the TC denies that the EU, established by Article 1 TEU, has not respected the principle of loyal cooperation,[56] enshrined in Article 4, par. 3 TEU,[57] and the Polish Constitution has lost the role of supreme law of the state and Poland no longer acts as a sovereign and democratic state[58] – these are statements that do not correspond to the Polish reality.[59]

The Polish arguments are based on previous events, namely the UK's request since November 10, 2015, of the following: "*A permanent waiver (opt-out) formally consecrated, legally binding and irreversible from the commitment to share the process of integration towards ever closer union among the peoples of Europe*".[60] We insist that the EU has not taken any "new steps" on the path of European integration given that Poland after Lisbon intervened and ratified only the accession treaty of Croatia of 12 October 2011.

As well as with regard to the affirmation that the institutions of the Union acted *ultra vires*, the appeal proposed by the Warsaw government of 11 March 2021 against the European Parliament and "*the ever closer union between the peoples of Europe*" is proof of such. A type of integration based on EU law and its interpretation by the CJEU involves "a new stage", where: "*a) The Institutions act outside the competences conferred on them by the Republic of Poland in the treaties; b) the Polish constitution is not the supreme law of the Polish Republic, having priority over its binding value and its application and c) the Polish Republic, not acting as a sovereign and democratic state, is incompatible with Article 2, Article 8 and 90, par. of the same constitution*".[61]

Poland, through the TC, had been showing regret towards the accession treaty (K 18/04) since May 11, 2005. The TC relied on the incipit of the preamble of the Constitution which stated: "*The sovereign and democratic determination of the fate (of) the Polish nation*" and it was specified that Article 90, first paragraph and Article 93, third paragraph, did not authorise the transfer to an international organisation of certain competences in matters of legal acts or decisions contrary to the Constitution and did not allow the transfer of competences capable of preventing Poland from functioning as a sovereign and democratic state. Therefore, for the TC, the Member States could control the legislative bodies of the Union that acted within their competences, respecting the principles of subsidiarity and proportionality and

[56] Marcus Klammert, *The principle of loyalty in European Union law* (Oxford: Oxford University Press, 2014).

[57] Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds.), *Commentary on the European Union treaties and the Charter of fundamental rights.*

[58] Cristina Dallara, *Democracy and judicial reforms in South-East Europe* (Heidelberg: Springer, 2014).

[59] Idem.

[60] 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, 1–10 and currently pending in the CJEU case C-157/21 *Poland v. Parliament and Council*, brought on 11 March 2021. Currently under discussion see also: Justyna Łacny, "The rule of law conditionality under Regulation No 2092/2020 – Is it all about the money?", *Hague Journal on the Rule of Law*, 13 (2021): 86ss.

[61] In this sense, see also: Thomas Groß, "Postnationale Demokratie-gibt es ein Menschenrecht auf transnationale Selbstbestimmung?", *Rechtswissenschaft*, 2 (2011): 127ss; Jürgen Neyer, "Justice, not democracy: legitimacy in the European Union", *Journal of Common Market Studies*, 48 (2010): 905ss. U. Scliesky, *Die wehrhafte Demokratie des Grundgesetzes – XII Handbuch des Staatsrechts der Bundesrepublik Deutschland* (München: C.H. Beck, 2014), 825-829, 873ss; Dani Rodrik, "The future of European democracy", in *After the storm: How to save democracy in Europe*, ed. Luuk van Middelaar and Philippe Van Parijs, (Bruxelles: Lanoo, 2015), 56ss.

otherwise, the primacy of EU law would not have been calculated.[62] The TC argued that Article 9 of the Constitution precluded compliance with international law and related international treaties but only in case such treaties did not undermine and could not extend to the Constitution, as the supreme right of the Republic. In the case of conflicts between the constitution and the law of the Union, even of primary rank for the TC, it was not possible to change it, nor to modify any provision of the Constitution.

In reality, the ruling of October 7, 2021, also stands in the same line, where according to Rideau's opinion: "*les menaces permanentes que fait peser la jurisprudence constitutionnelle, et en particulier ce dernier arrêt, sur l'application du droit de l'Union européenne en Pologne*".[63]

The second[64] and the third[65] propositions of the TC's judgment both affirm the incompatibility with the Polish Constitution of the obligations deriving for the Member States from Article 19, par. 1, second paragraph of the TEU, together or not with Article 2 TEU, ensuring effective judicial protection in the field of application of EU law, allowing national courts: "*a) To circumvent the provisions of the Constitution; b) to judge on the basis of provisions no longer in force, revoked by the Sejm or declared unconstitutional; c) review the legitimacy of the appointment of judges; d) check the legitimacy of the resolutions of the National Council for the Judiciary in the procedure for the appointment of judges; d) determine the defects of the procedure for the appointment of judges*". Therefore, the TC does not consider such prerogatives compatible with the Polish constitution, stating that: "*Member States establish the judicial remedies necessary to ensure effective judicial protection in the areas governed by EU law*". In fact, it is only in the second and third propositions of the sentence that the real clash between Warsaw and the Union over the principle of the primacy of EU law over that of the Member States is highlighted. This is a principle that was elaborated nearly 70 years ago by the CJEU as a main and fundamental principle of European integration that had the fortune of being clearly articulated from the early years of the integration phases through the main case 6/64, Costa v. ENEL of July 15, 1964 and brilliantly recalled by then president Robert Lecourt with a sentence:

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[62] The principle of prevalence of the Constitution was affirmed in the Judgement of 31 May 2004 (K 15/04) on the constitutionality of the law relating to the elections to the European Parliament.

[63] Joël Rideau, *Droit institutionnel de l'Union européenne* (Paris: LGDJ, 2010), 1359ss.

[64] In the second point of the operative part of the sentence, the TC notes that: "*Article 19, par. 1, second paragraph of the TEU, to the extent that, in order to ensure effective judicial protection in the field of application of EU law, it confers on national judges (ordinary, administrative, military, Supreme Court) the competence to: a) circumvent the provisions of the Constitution in judicial activity is incompatible with Article 2, Article 7, Article 8, par. 1, Article 90, par. 1 a) and Article 178, par. 1 of the Constitution; b) judging on the basis of provisions that are not in force or have been revoked by the Sejm or deemed unconstitutional by the TC, is incompatible with Article 2, Article 7, Article 8, par. 1, Article 90, par. 1, Article 178, par. 1 and Article 190, par. 1 of the Constitution.*"

[65] In the third point of the operative part of the sentence, the TC notes that: "*Article 19, par. 1, second paragraph of the TEU and Article 2 TEU, to the extent that in order to ensure effective judicial protection in the field of application of Union law and to ensure the independence of judges, they confer on national judges (ordinary, administrative, military and the Supreme Court) the competence to: review the legitimacy of the procedure for the appointment of judges, including the review of the legitimacy of the act by which the President of the Republic appoints a judge are incompatible with Article 2, Article 8, par. 1, Article 90, par. 1 and Article 179, in conjunction with Article 144, para. 3 and 17 of the Constitution; b) reviewing the legitimacy of the resolutions of the National Council of the Judiciary aimed at requesting the President of the Republic to appoint a judge are incompatible with Article 2, Article 8, par. 1, Article 90, par. 1 and Article 186 of the Constitution; c) determine the defects in the procedure for the appointment of judges, as resulting from the refusal to consider the person appointed to a judicial office as a judge, in accordance with Article 179 of the Constitution, are incompatible with Article 90, par. 1, Article 90, par. 1 and Article 179, in conjunction with Article 144, para. 3 and 17.*"

"*Pas de communauté de marché sans loi commune, pas de loi commune sans interprétation uniforme, pas d'interprétation uniforme sans la primauté d'un tel droit*".[66]

If Poland has benefited and continues to benefit from the Internal Market up until now (one must not forget the stereotype of the Polish plumber[67] in this context) it seems contradictory and of little legal but only political value to aim at the primacy of the Union as an essential condition of the EU and its law.[68]

5. The Polish crisis and the EU

It is quite obvious that we have been dealing with a Polish crisis for many years now. One cannot even consider comparing the latest Polish decision of October 7 with several similar decisions of other constitutional courts of various EU Member States, opening the discussion on the role of the CJEU and related countermandings. Let us not forget that the Union itself from the first moment of its birth and during its integrative process has allowed a dialogue between the constitutional courts and the CJEU through the appeal for preliminary rulings. However, in the Polish case, the TC violated the obligation of referral under Article 267, third paragraph TFEU. On the one hand, a government is behind this crisis, while in other constitutional judgments, we find a constitutional check by internal judges (Italy-Taricco judgment) or private applicants (Germany-PPSP case).[69] In the Polish case, unlike the other cases, the government was the instigator, since it legitimised the issue with an appeal to the TC, despite being aware of the European legal system as well as the final outcome of the TC. This statement is confirmed after Prime Minister Morawiecki's letter of 18 November 2021 to the heads of government and the presidents of the European Council, the EC and the European Parliament. The Prime Minister stressed that Poland wants to remain "a loyal member" that respects EU law and recognises its primacy over national law, arriving at a closing citation of Jean Monnet's ideas. On the other hand, the same letter disputes the possibility of using financial sanctions against Member States due to the rules included in the Next Generation EU Regulation (December 2020) which also refers to the rule of law. Poland and Hungary challenged Regulation (EU) 2020/2092[70] of the European Parliament and of the Council of 16 December 2020 on a general cross-compliance regime for the protection of the Union's budget before the CJEU and the hearing of discussion held on 1 and 12 October 2021.

The EC issued the same day with the sentence of the TC[71] and clearly showed that the beginning of the judicial Polexit is a legally inaccurate expression, given

[66] Robert Lecourt, "Allocution prononcéé à l'Audience solennelle à l'occasion du dixième anniversaire de la cour de justice des Communautés européennes", Luxembourg, 23 October 1968, 22ss.

[67] The stereotype of the "*Plombier polonais*" was used in France in 2005, in the victorious campaign in the referendum against the Treaty that adopts a Constitution for Europe. The "*Polish plumber*" reappeared in the United Kingdom, eleven years later, used by the Brexiters at the time of the 2016 referendum, which was followed by the withdrawal from the EU.

[68] Pierre Pescatore, *L'ordre juridique des Communautés européennes. Étude des sources du droit communautaire* (Liège: Presses Universitaires de Liège, 1975), 227ss.

[69] For further details see also: Dimitris Liakopoulos, *European integration through Member States' constitutional identity in EU law* (Antwerp, Portland: ed. Maklu, 2019).

[70] 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, 1-10.

[71] CJEU, C-157/21.

the possible withdrawal from the Union must follow the provisions of Article 50 TEU, as interpreted through the Wightam and others ruling of 10 December 2018 and the Brexit practice.

The crisis shows that the EU is reaching a "natural plateau" based on a pragmatic division between national policy and supranational policy. Notably, the movement towards the "ever-closer union" that the Founding Fathers of the EU dreamed of when they signed the Treaty of Rome in 1957 will have to stop at some point; there will never be a comprehensive European federal state. This European "*sonderweg*" will once again affirm the primacy of national communities as the deepest source of legitimacy in the integration process.[72]

In our understanding, this vision of Europe makes it inevitable that the common values of the rule of law, democracy and fundamental rights must be applied in all Member States. Hence, the more consistent use of certain traditional instruments, such as infringement proceedings also for the breach of the values enshrined in Article 2 of the TEU, or even the triggering of Article 7 to this end, are of great importance. However, at the same time, new means of conditionality must also be activated, such as cutting off funds to Member States that fail to meet certain basic institutional requirements of the rule of law. There is nothing more necessary than political will!

6. Conclusions

In Europe, the rule of law is under attack and in deep crisis. Europe also stands in line with the Founding Fathers and the words of Jean Monnet. The tensions that in some countries concern the rule of law can be the starting point for consolidating the value of the rule of law, qualifying it as one of the traits that characterise the constitutional identity of the Union. EU law, as codified written law, is valid and often needs to be reformed to better meet the demands arising from the rule of law. Indeed, in many countries, the mark of the old "undemocratic" power remains, and the rule of law often appears contradictory and untransparent and certainly does not meet the specific needs of each individual Member State. The centralisation of a unitary system that the Union seeks unfortunately does not reflect the decentralised structures of everyday life, *i.e.* national legislation, and often does not even correspond to the needs of the people, who vary from one region to another even though they are all part of the same Euro-unit organisation. And so, the question is: In such situations, would it really be surprising if EU institutions or other Member States used all the legal means and resources made available by the Treaties?

[72] Petra Bárd *et al.*, "An EU mechanism on democracy, the rule of law and fundamental rights", *CEPS Paper in Liberty and Security in Europe*, no. 91 (2016): 5; Mark Dawson, Floris de Witte, "Constitutional balance in the EU after the euro-crisis," *Modern Law Review* 76 (5) (2013): 820ss; Kim Lane Scheppele, "Constitutional coups in EU law", in *Constitutionalism and the rule of law: Bridging idealism and realism*, ed. Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (Cambridge: Cambridge University Press, 2017); Vlad Perju, Silja Vöeneky, Gerald Neuman, "On uses and misuses of human rights in european constitutionalism", in *Human rights, democracy, and legitimacy in a world in disorder*, ed. Silja Voeneky, Gerald L. Neuman (Cambridge: Cambridge University Press, 2018).