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TABLE OF CONTENTS

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ARTICLES

EDITORIAL

THE RULE OF LAW IN EUROPE: A CONTESTED, BUT ESSENTIAL CONCEPT

*Giacinto della Cananea**

This special issue of the IJPL is about the rule of law. This topic has always been characterized by differing approaches, theoretically and pragmatically, but in the last three decades or so the difference has become more profound.

From a theoretical point of view, Paul Craig has encapsulated the essence of two strands in public law thought, as well as in legal theory, in the distinction between formal and substantive conceptions of the rule of law (*Formal and substantive conceptions of the rule of law: an analytical framework*, in *Public Law*, 1997, p. 467). Formal conceptions of the rule of law, he argued, address – *à la* Fuller - the manner in which the law is enacted and promulgated, the legal basis for the exercise of authoritative powers by public authorities, and their accountability through the courts or other mechanisms, such as external audit. They are essentially concerned with the existence of the law, not with the question whether it is good or bad. Substantive conceptions of the rule of law, he continued, seek to go beyond this, by devoting attention – *à la* Dworkin - mainly to the rights that individuals possess against the State. Whether this conception implies the priority of negative rights with respect to positive rights, is an important issue within this theoretical debate. But this is not of immediate concern for us here. What must instead be added is that in the continental tradition, which differs from the English variant of the common law tradition more that it does with regard to that of the United States, there has been a debate along similar lines, if not the same, especially with regard to the various ways to conceive the *Rechtsstaat* or *Stato di diritto*. The articles written by Jean-Bernard Auby and Gordon Anthony for this special issue show this similarity, whilst keeping an eye on national cultural specifities.

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With the increasing globalization of the law, especially after 1989, another dividing line has emerged. On the one hand, prominent lawyers from different Western countries have discussed reported violations of human rights in various regions of the world and have sought to mobilize the legal profession, the courts and other institutions for the protection of those rights and the fulfilment of the rule of law. Several studies and reports produced by respectable institutions, such as the Venice Commission, have affirmed that the States are subject to the rule of law, that governmental authorities should respect the rights of the individual and provide effective means for their enforcement. While traditional critics of this approach held that there are circumstances in which developing countries may legitimately decide that the pursuit of other goals, such as help for particular social groups or the fulfilment of a certain political agenda, may justify the sacrifice of at least some elements of the rule of law, others have gone much beyond this. They have criticized the use of the rule of law that has been made by some international institutions. In their opinion, the rule of law is not simply an ideology – as those of who are nostalgic of Marxism would put it – that masks substantive inequalities in power, but is even an instrument of exploitation of the weaker countries and social groups of the world. There is an important sub-text in this formulation, which suggests that individual rights, judicial review and its necessary condition, that is to say judicial independence, may not simply be the target of critical scrutiny, as is in typical in the Western legal tradition (and is confirmed by Mauro Bussani's contribution to this special issue, as well as, in another respect, by that of Stefano Dorigo), but could and should be contested more radically. Alternative constructions justify not simply temporary deviations, in the logic of the substantive conceptions of the rule of law mentioned earlier, but even, in their extreme forms, substitution of the idea of government not under the law with that of government but under the will of men, a will that is (allegedly) legitimated by the support of the majority of the people.

The contributions published in this special issue concerning Venezuela and Hungary (witten by Flavia Pesci Feltri and Gàbor Hamai, respectively) are particularly helpful for a better understanding of these developments. First, they show that such developments have a common, and negative, trait; that is, the

destructive – not only, to borrow Aristotle's famous distinction, in potentiailty, but also in actuality – impact of these alternative constructions for the civil, political, and social rights of many individuals, who are exposed to the arbitrariness of those who govern them. Second, they show the differences related to the broader institutional and legal framework, for the simple reason that in Europe there are, not without ambiguities and gaps, external limits to the will of those who govern. Thirdly, and consequently, they allow us to widen the discussion by considering the relationship of European public law scholarship to the domestic theoretical debate.

It is true, as Armin von Bogdandy warned during the workshop in which all these contributions were discussed, that those who contest the meaning that are given to the rule of law by the States who either founded the European Community or joined in the last century evocate the danger of a "tyranny of values". But although differences will inevitably remain over matters as fundamental as the individuation of the "values upon which the Union is founded" (Article 2 TEU), there is arguably an incoherence in the will (whether or not it is majoritarian within such relatively more recent member States) to remain in a 'club of nations' that was founded on liberal and democratic values and not so much the unilateral adhesion to the alleged virtues of "illiberal democracy", but the exercise of legislative and administrative powers in clear contrast with the fundamental tenets of the rule of law, such as judicial independence. Clearly separation of powers, of which judicial independence is a key corollary, is not the same in all political societies, and even an Asian dictator – as Montesquieu would have put it – may assert that its will is supreme because the law of the land so provides. But this was certainly not the sense in which the Copenhagen criteria were defined and refined, with regard to the enlargement of the EU. In this sense, the rules of the 'club' do not permit certain legal relations, between the political branches and the judiciary as well as between the former and universities, to be replaced by relations of force. It is not so much in 'official discourses', but in some particular events, such as the anticipated dismissal of a senior judge or the withdrawal of the authorization to issue diplomas, in sum in what happens in the streets and squares of an ideal public sphere that the real threats to liberty and justice can

be better perceived. Whether the impairment of judicial independence is compatible with the supranational constitution of the EU, as it was reshaped by European and national courts, is still another important question.

The following pages, considered as a whole, are thus not simply another attempt to distil the precise meaning of the phrase "the rule of law". The main purpose is rather to provide materials that describe and explain what is happening in Europe and elsewhere from our chosen viewpoint, and thus contribute to a debate that runs across national and disciplinary borders, as is the mission of the IJPL. We will continue to call for heightened attention and critical discussion on issues involving liberty and democracy, the respect for the rule of law and fundamental rights, our common core values.

THE RULE OF LAW IN THE GLOBAL PERSPECTIVE**

*Mauro Bussani**

Abstract

The essay aims to review from a comparative law perspective the premises and postures underpinning Western efforts to transplant the rule of law outside the West. In order to do so, the paper first examines the historical and cultural foundations of the rule of law in the West and then scrutinizes its actual potential for being exported in non-Western societies. Through a historical and comparative analysis, the paper sheds light on a set of data that are usually either discarded or underrated in mainstream legal debates.

TABLE OF CONTENTS

1. Introduction

The focus of this paper is on the attitudes and methods underpinning the Western attempts to transplant[1] the rule of law

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** This article is an abridged and revised version of a paper forthcoming in 68 American Journal of Comparative Law (2020). I wish to thank the paricipants in the the Seminar "*The Rule of Law. Convegno per il decennale della rivista Italian Journal of Public Law-IJPL*", held in Milan, on May 30-31, 2019, for their insightful comments. The usual disclaimers apply.

[1] In this paper the processes targeting legal changes from outside will be named 'legal transplants', even though comparative law literature uses a flurry of

outside the West[2]. The overall aim of the essay, in turn, is to both unearth the intimate legal foundations of the rule of law and to

different terms to indicate the very same (or similar) phenomena. For a concise survey of this terminology, M. Seckelmann, *Clotted history and chemical reactions on the possibility of constitutional transfer*, in G. Frankenberg (ed.), *Order from Transfer. Comparative Constitutional Design and Legal Culture* (2013) 37-40. Literature on legal transplants in turn is immense. Suffice here to mention the works where one can find the major ideas driving the debate: A. Watson, *Legal Transplants. An Approach to Comparative Law* (1974; 2nd ed. 1993); P. Legrand, *The Impossibility of 'Legal Transplants*, 4 Maastricht J. Eur. & Comp. L. 111 (1997); D. Berkowitz, K. Pistor & J.-F. Richard, *The Transplant Effect*, 51 Am. J. Comp. L. 163 (2003); M. Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2019, 2nd ed.) 442-473; G. Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 Int'l J. Const. L. 563 (2010); M.J. Horwitz, *Constitutional Transplants*, 10 Theo. Inq. L. 535 (2009); J.-L. Halpérin, *The Concept of Law: A Western Transplant?*, 10 Theo. Inq. L. 333 (2009); S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2011); M. Van Hoecke, *Legal Culture and Legal Transplants*, in R. Nobles and D. Schiff (eds.), *Law, Society and Community. Socio-Legal Essays in Honour of Roger Cotterrell* (2014) 273-291; M. Siems, *Comparative Law* (2nd ed., 2018) 231 ff. On the different nuances of the expression 'legal globalization', and on the meanings attached to them, *see* for all Dun. Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in D.M. Trubek, A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal* (2006) 19 ff.; S. Cassese, *The Global Polity. Global Dimensions of Democracy and the Rule of Law* (2012) 21-28; N. Walker, *Intimations of Global Law* (2015); J.-B. Auby, *Globalisation, Law and the State* (2017); H.P. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (5th ed., 2014) 51 ff. One should, however, be aware that beginning, latest, from the 16th century the development of capitalism has always "called for the destruction of differences in laws, standards, currencies, weights and measures, taxes, and customs duties at the level of nation state": B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 Eur. J. Int'l L. 1, 7 (2004).

[2] The financial investment in legal transfers often disguised as aid for legal and judicial development is remarkable. According to the last available data provided by the OECD database (stats.oecd.org – before they changed the dataset), in 2015 aid flows effectively disbursed to the legal sector of developing countries referred only to 'Legal and Judicial Development' (thereby excluding other entries like 'Human Rights', 'Anti-corruption', 'Media and free flow of information' and 'Women's equality') was about US $ 2.6 billion. In terms of development aid the World Bank "has spent around $18 billion since the 1990s on projects with a component from the 'law and justice' subsector, and around $48 billion on projects coded as having some 'rule of law' thematic impact": D. Desai, *Power Rules: The World Bank, Rule of Law Reform, and the World Development Report 2017*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law* (2018) 217, 221. See also J. Gillespie, P. Nicholson, *Taking the Interpretation of*

scrutinize its actual potential for being exported in non-Western societies. In order to do so, I will reappraise the notion of Rule of Law from a comparative law perspective. The latter approach, entailing a careful consideration of the historical and contextual factors, will enable the analysis of a set of data that are usually either discarded or underrated in the mainstream legal debate.

On the terminological level, it is worth noting at the onset that: by 'West' I refer to the areas of the world where Western legal tradition stands as the backbone of the concerned society; and by Western legal tradition I mean what a handful of world societies have in common as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught"[3].

2. Everything is 'Rule of Law'

'Rule of law' is a key notion to understand not only Western legal lingo, but also the identitarian discourse clustered around this very notion, as well as any possible argument

Legal Transfers Seriously: The Challenge for Law and Development, in Id. (eds.), *Law and Development and the Global Discourses of Legal Transfers* (2012) 2. On the scant evidence that legal transfers induce recipients to change their behavior in the ways envisaged by donor agencies, *see e.g.* K. Pistor, P.A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960–95* (1998); D. Kaufmann, A. Kraay & M. Mastruzzi, *Governance Matters III: Governance Indicators for 1996-2004* (2005), at worldbank.org/wbi/governance/pdf/govmatters3.pdf; W. Merkel, *Measuring the Quality of Rule of Law: Virtues, Perils, Results*, in M. Zurn, A. Noelkamper & R. Peerenboom (eds.), *The Dynamics of Rule of Law in an Era of International and Transnational Governance* (2012) 21; R. Peerenboom, *Toward a Methodology for Successful Legal Transplants*, 1 Chinese J. Comp. L. 4 ff. (2013); V.L. Taylor, *Regulatory rule of law*, in P. Drahos (ed.), *Regulatory theory: foundations and applications* (2017) 393, 397.

[3] J.H. Merryman, R. Pérez-Perdomo, *The Civil Law Tradition* (3rd ed., 2007) 1-2. We will see below (sections 2 to 5) that the Western "set of deeply rooted, historically conditioned attitudes" is perceived by our mainstream legal culture as a set of attitudes deprived of adverbs and adjectives and, therefore, as a toolkit ready to be transplanted into any other legal tradition, and into the mind of any other law-makers and law-users.

circulating about the expansion of Western law, its reasons, aims and patterns[4].

Indeed, if after the end of World War II and during the 'cold war' period the rule of law was by and large invoked as a principle of desirable political international order, since the 1990s it has come closely associated with the overall current achievements of Western civilization[5]. In fact, if one asks: what is the 'rule of law'? one finds many authoritative definitions converging in overlapping it with the whole of our legal civilization.

To avoid any cherry-picking, let me take as an example the 2004 Report by the UN Secretary-General on the Rule of Law[6]. The Report gives a characterization of the Rule of Law, which is mother and daughter of many other definitions circulating in the debate – from that of the Council of Europe[7], to those divulgated

[4] On the claim that Dicey was the first jurist to use the phrase 'the rule of law', *see e.g.* (and sceptically) J. Waldron, *The Rule of Law and the Measure of Property (Hamlyn Lectures 2011)* (2012) 7 ff.

[5] *E.g.*, S. Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (2011) 178-179. See also the text below and sections 4 and 5.

[6] *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (2004) paragr. 6 – according to J. Farrall, *United Nations Sanctions and the Rule of Law* (2007) 22, between 1998 and 2006, the phrase 'the rule of law' appeared in at least 69 Security Council resolutions. On the same lines of the UN Secretary-General Report, see USAID, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework* (2010), according to which the elements that comprise the rule of law – each of them "must be present for rule of law to prevail" (Id., 1) – edare: order and security, legitimacy, checks and balances, fairness (the latter consisting of four sub-elements: (a) equal application of the law, (b) procedural fairness, (c) protection of human rights and civil liberties, (d) access to justice), effective application (Id., 1-2 and *passim*).

[7] European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law*, adopted at its 86th plenary session (Venice, March 2011), venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e, para 41. On the same lines see Communication from the Commission to the European Parliament, the European Council and the Council, *Further strengthening the Rule of Law within the Union. State of play and possible next steps*, Brussels, 3.4.2019 COM(2019) 163 final, p. 1. In reaching this definition, the Venice Commission relied heavily on the work of Thomas Bingham referred to below, next note.

by Tom Bingham[8], Jeremy Waldron[9], Lon Fuller[10], Joseph Raz[11], and many others[12]. The Report reads:

"[The rule of law is] a concept at the very heart of the [UN] Organization's mission. It refers to the principle of governance to which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency".

After reading and learning what the rule of law is according to the UN and the many other authorities I mentioned above[13], one could ask: As to the values, and principles on which

[8] T.H. Bingham, *The Rule of Law* (2010) ch. 3-10.

[9] J. Waldron, *The Rule of Law*, cit. at 4, 6-7; see also Id., *The Rule of Law and the Importance of Procedure*, in J.E. Fleming (ed.), *Getting to the Rule of Law* (2011) 3, 6-7; Id., *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 Eur. J. Int. L. 315, 316-17 (2011).

[10] L.L. Fuller, *The Morality of Law* (1965, rev. ed.) ch. 2, 33-94.

[11] J. Raz, *The Rule of Law and its Virtue*, 93 L. Q. R. 195, 198 (1977), now in Id. (ed.), *The Authority of Law: Essays on Law and Morality* (1979) 210, 213. Fuller and Raz advocate what is usually considered the 'thin' or 'formal/procedural' view of the rule of law (see also J.M. Finnis, *Natural Law and Natural Rights* (2nd ed. 2011) 270-271; C. Sunstein, *Legal Reasoning and Political Conflict* (2nd ed. 2018) 119-122), as opposed to the 'thick' or 'substantive' one, for which see T.H. Bingham, *The Rule of Law*, cit. at 8; P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, Public Law 467–87 (1997)). On this dycothomy and for major references, see J. Møller, *The advantages of a thin view*, and A.W. Bedner, *The promise of a thick view*, in in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, cit. at 2, respectively at 21-33 and 34-47.

[12] Once remembered that "there are almost as many conceptions of the rule of law as there are people defending it" (O. Taiwo, *The Rule of Law: The New Leviathan?*, 12 Can. J. L. & Jur. 151, 152 (1999)), a survey of the definitions circulating in the literature, from Aristotle to contemporary writers, can be found, *e.g.*, in B.Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (2004); R. Kleinfeld, *Competing Definitions of the Rule of Law*, in T. Carothers (ed.), *Promoting the Rule of Law Law Abroad: In Search of Knowledge* (2006) 31 ff.; C. May, *The Rule of Law: The Common Sense of Global Politics* (2014) 33 ff.

[13] See above, notes 6-12.

we ground the basics of the Western legal civilization, what is left aside in this definition? As a matter of fact, all the fundamental beliefs and ideals underpinning our legal way of looking at, and living in the world are therein included. And yet, paradoxically, on the one hand, some of the features the mainstream debate attach to the rule of law cannot be found or are not fully-fledged in all Western societies[14]; and, on the other hand, some of those features (think of, e.g., accountability to the law, publicly promulgated laws, obedience to the law, the guidance role of the law) can be found in many non-Western societies including Islamic and autocratic ones[15], which Westerners do not consider to live by the rule of law itself[16].

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[14] For instance, on the "extreme reluctance on the part of federal or state governments to make the [U.S.] law available to people with little or no means", see F.K. Upham, *Mythmaking in the Rule of Law Orthodoxy*, in T. Carothers (ed.), *Promoting the Rule of Law Law Abroad*, cit. at 12, 75, 88 (see also the still binding U.S. Supreme Court decision in *Dandridge v. Williams*, 397 U.S. 471 (1970), stating that the U.S. Constitution contains no affirmative state obligation to care for the poor – and upholding welfare cap regardless of the family size). As to the treatment of African-Americans, minorities, and the lowest socio-economic classes in the U.S., P. Gowder, *The Rule of Law in the Real World* (2016) 189 ff.; C. Albisa, J. Schultz, *The United States. A Ragged Patchwork*, in M. Langford (ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (2008) 230, 247 ff. (as to the obstacles faced in the U.S. by the implementation and justiciability of economic and social rights). See also J. Waldron, *Security as Basic Right (after 9/11)*, in C.R. Beitz, R.E. Goodin (eds.), *Global Basic Rights* (2009) 207 ff.; M. Galanter, *Why the Haves Come Out Ahead. The Classic Essay and New Observations* (2014); E.G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Response*, in E.G. Jensen, T.C. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003) 336, 338; B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (2019) 3. For the lack of a "meaningful correlation" between gender equality and rule of law in many 'developed' countries, K. Pistor, A. Haldar & A. Amirapu, *Social norms, rule of law and gender reality: an essay on the limits of the dominant rule-of-law paradigm*, in J.J. Heckman, R.L. Nelson & L. Cabatingan (eds.), *Global Perspectives on the Rule of Law* (2010) 241 ff. (the quote is from p. 257).

[15] To reject or scrutinize the membership of autocratic and Islamic societies to the rule of law club, most include also the respect for human rights in the core definition (see e.g. the above definitions offered by Bingham, USAID, the Council of Europe, the UN Secretary-General, as well as J. Stromseth, D. Wippman & R. Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions* (2006) esp. at 58, 79, 186; M. Cartabia, *The Age of "New Rights"*, *Straus Working Paper* 03/2010, 14-15, at

3. Issues at Stake

Considering this, and considering the articulations the public discourse and scholarly discussions display about the functions that should be actually assigned to the rule of law[17], and

law.nyu.edu/sites/default/files/siwp/Cartabia.pdf; G. Palombella, *The Rule of Law Beyond the State: Failures, Promises, and Theory*, 7 Int'l J. Const. L. 442-467 (2009)) – at the price of emphasizing its all-Western nature (as made clear, in the very process of drafting the UDHR in 1947, by the American Anthropological Association, see The Executive Board, *American Anthropological Association Statement on Human Rights*, 49 New Series American Anthropologist 539 (1947). See also P. Fitzpatrick, *Modernism and the Grounds of Law* (2001); G. Frankenberg, *Human rights and the belief in a just world*, 12 Int'l J. Const. L. 35, 49 f. (2014); U. Baxi, *Epilogue: Changing Paradigms of Human Rights*, in J. Eckert, B. Donahoe, C. Strümpell & Z.Ö. Biner (eds.), *Law against the State: Ethnographic Forays into Law's Transformations* (2012) 266, 273 ff. For some significant refinements to this perspective, see M. Bussani, *De-Globalizing Rule of Law and Democracy. Hunting Down Rhetoric through Comparative Law*, 68 *Am. J. Comp. L.* (forthcoming 2020).

[16] As Joseph Raz noted (J. Raz, *The Rule of Law and its Virtue*, cit. at 11, 211), "[a] non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies … . It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity with the rule of law." (Raz's remarks befit the systems ruled by the so called 'autocratic legalism' as well, see e.g. K. Lane Scheppele, *Autocratic Legalism*, 85 U. Chi. L. Rev. 545 (2018); S. Baer, *The Rule of – and not by any – Law. On Constitutionalism*, 71 Current Legal Problems 335, 350-352 (2018)). See also J. Møller, *The advantages of a thin view*, cit. at 11, 21 f.; D. Dyzenhaus, *Legality and Legitimacy* (1997); L. Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in P. Domingo and R. Sieder (eds.), *The Rule of Law in Latin America* (2001) 17, 35, 46; T. Ginsburg and T. Moustafa, *Introduction*, in Iid. (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008) 4; B.Z. Tamanaha, *On the Rule of Law*, cit. at 12, 112, 119 f.; J.H.H. Weiler, *Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law*, in C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (2016) 313-326; B. Ackerman, *Revolutionary Constitutions*, cit. at 14, 2-3; M. Cherif Bassiouni & G.M. Badr, *The Shari'ah: Sources, Interpretation and Rule Making*, 1 UCLA J. Islamic & Near Eastern L. 135 (2002), note that modern Arabic translates the 'rule of law' as siyadar alqanun, meaning 'sovereignty of law'. Futher, one could remind that "the 1936 Soviet constitution provided for the supremacy of law, equal rights, free speech, free press, and a whole host of other liberal-democratic ideals": P. Gowder, *The Rule of Law in the Real World*, cit. at 14, 178 (and see J.R. Starr, *The New Constitution of the Soviet Union*, 30 Am. Pol. 1143 ff. (1936)).

[17] See in general O. Taiwo, *The Rule of Law*, cit. at 12, 34; J.N. Shklar, *Political Theory and the Rule of Law*, in A.C. Hutchinson, P. Monahan (eds.), *The Rule of*

considering also the low degree of specificity – and/or realism – achieved by the mainstream definitions mentioned above, anyone would agree that the question I started from keeps lying out there: What is the rule of law? What is the rule of law that Westerners are so proud of to the point of wishing it to be promoted and actually transplanted everywhere?

As we saw, the debate is inclined to mean, by the expression 'rule of law', the whole of our legal civilization[18]. This could embody a linguistic convention as many others[19], and yet quite unfortunate, under both the normative and the analytical point of view. On the normative level the point is that this oversized notion of rule of law would ridicule from the very outset any serious discussion on the possibility of having it transplanted outside the West (in less than a thousand years,

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Law: Ideal or Ideology? (1987), reprinted in S. Hoffmann (ed.), *Political Thought & Political Thinkers* (1998) 1 (the rule of law "has become meaningless thanks to ideological abuse and general over-use"); J. Waldron, *The Rule of Law*, cit at 4., 47 (criticizing the current debates where "everyone clamors to have their favorite value, their favorite political ideal, incorporated as a substantive dimension of the Rule of Law"; see also M. Krygier, *The rule of law: pasts, presents, and two possible futures*, 12 Ann. Rev. L. Soc. Sci. 199, at 211 (2016), according to whom the rhetoric of rule of law as an ideal should be assessed "critically to expose false claims in its name":); R. Kleinfeld, *Competing Definitions of the Rule of Law*, cit. at 12, 46 ff., 59 ff.; A.W. Bedner, *The promise of a thick view*, cit. at 11, 34-36.

[18] On the limits within which the notion, and the very idea of rule of law can be discussed at the international law level, *cf.* J. Crawford, *International Law and the Rule of Law*, 24 Adel. L. Rev. 3 (2003); M. Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 Va. J. Int'l L. 19 (2003); C. May, *The Rule of Law*, cit at 12.; B.Z. Tamanaha, *On the Rule of Law*, cit. at 12, 127 ff.; R. McCorquodale, *Defining the International Rule of Law: Defying Gravity*, 65 Int. & Comp. L. Q. 277; V. O'Connor, *Understanding the International Rule of Law Community, its History, and its Practice* (2015), at inprol.org/publications; J.H.H. Weiler, *Epilogue*, cit. at 16.

[19] From the mainstream perspective, translating the term 'rule of law' into other languages turns out to be a difficult endeavour. Duncan Fairgrieve has shown that even translation between English and French is far from simple with possibilities including 'règle de droit', 'la primauté de droit' (used in Canada), 'préeminence du droit' (used in the Council of Europe) and 'Etat de Droit' (or law governed state), with the latter being considered by the author as the closest to the common law meaning: D. Fairgrieve, *'Etat De Droit and Rule of Law: Comparing Concepts – A Tribute to Roger Errera*, Pub. L. 40-59 (2015). See also M.E.J. Krygier, *Rule of Law (and Rechtsstaat)*, in *International Encyclopedia of the Social & Behavioral Sciences*, vol. 20 (2nd ed., 2015) 780 ff.

unless we supply history with a made-in-West accelerator). On the analytical level, the oversized packaging of the rule of law as our entire legal civilization would dilute the rule of law into the ocean of our legal technostructures making it undistinguishable from the other features of our legal systems[20].

Thereby, we could either discard the notion as an unwieldy linguistic convention bereft of actual analytical and normative meaning[21], or try to understand whether it exists a kernel notion of rule of law that can be seen at the same time as characterizing our legal experiences and as the seed of whatever achievement we attained growing out of it[22].

Does this kernel notion exist (beside and beyond the variable degrees of compliance with any other requirement surrounding that kernel)? And where and when was this kernel notion generated?

4. At the Core of the Notion

It is a common opinion that the 'rule of law' we are talking about today was first initiated in England, with the Magna Charta (1215), or, some centuries later, when the famous judge Edward Coke "forbade" King James I (1603-1625) to sit in "his" Court, as

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[20] Cf. B.Z. Tamanaha, *Functions of the Rule of Law*, in M. Loughlin, J. Meierhenrich (eds.), *The Cambridge Companion to the Rule of Law* (forthcoming), at ssrn.com/abstract=3113820, 2-3.

[21] The lack of historical and comparative accuracy in singling out roots and technical background of the rule of law fails to acknowlwedge what noted also by J. Kroncke, *Law and Development as Anti-Comparative Law*, 45 Vand. J. Transn. L. 477, 524 (2012), i.e. that : "throughout the twentieth century, authoritarian and even fascist regimes have not shied away from developing instrumental law or what is now considered "thin" rule of law principles. In fact, the attraction of authoritarian regimes to the rule of law is not a new concept historically speaking. A range of scholars describe the predemocratic origins of rule of law ideals as well as its common law genesis as a result of elite power struggles in England. Scholars also note the way that fascism in Germany was compatible with procedural notions of the rule of law. Others have even cited the complicated relationship between the rule of law and antimajoritarian debates in U.S. history. Thus, it should not be wholly surprising that reference to rule of law ideals has now become the norm for contemporary authoritarian regime" (footnotes omitted).

[22] For a more thourough analysis of the issues dealt with in he following sections, see M. Bussani, *De-Globalizing Rule of Law and Democracy*, cit. at 15

the former considered the latter lacking the technical knowledge essential to administer the law.[23] These were paramount events that marked a point in time (and space) in the development of Western law's efforts to constrain the power of the ruler[24]. Thus, in order to understand what the rule of law is, one should bear in mind that the law stands in bi-univocal correspondence with the

[23] *See* for all P. Linebaugh, *The Magna Carta Manifesto* (2008); A. Arlidge, I. Judge, *Magna Carta Uncovered* (2014); P. Costa, *The rule of law: An outline of its historical foundations*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, cit. at 2, 135, 139-142; and cf. J.C. Holt, *Magna Carta* (3rd ed. 2014, with a new introduction by G. Garnett and J. Hudson) esp. 46-48; M. Radin, *The Myth of Magna Carta*, 60 Harv. L. Rev. 1060, 1062 (1947). See also B.Z. Tamanaha, *On the Rule of Law*, cit. at 12, 25 ff., as well as J.N. Shklar, *Political Theory and the Rule of Law*, cit. at 17, 26, on "Dicey's unfortunate outburst of Anglo-Saxon parochialism (…) The Rule of Law was thus both trivialized as the peculiar patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it".

[24] One can indeed recall the coeval efforts carried out with the same purposes in other parts of Europe, for, *e.g.*, through the Golden Bull of King Andrew II of Hungary (1122), that granted the Hungarian nobility the right to disobey the King when he acted contrary to law (jus resistendi) whereas the nobles and the church were freed from all taxes, could not be forced to go to war outside of Hungary and were not obligated to finance it. See J.M. Bak, G. Bónis & J.R. Sweeney (eds.), in collaboration with L.S. Domonkos, *Decreta regni mediaevalis Hungariae/The Laws of the Medieval Kingdom of Hungary*, I, *1000-1301* (2nd ed. 1999) 32 ff. and (for the English translation) 95 ff.; see also H.J. Berman, *Law and Revolution. The Formation of Western Legal Tradition* (1983) 293 f. By the Peace of Constance (or "Second Treaty of Constance") of 1183, signed by emperor Frederick Barbarossa and representatives of the Italian Lombard League, the cities in the Kingdom of Italy (northern and central Italy, apart from Venice) retained several regalia of local jurisdiction over their territories, and had the freedom to elect their own councils and to enact their own legislation (see A. Haverkamp, *Der Konstanzer Friede zwischen Kaiser und Lombardenbund (1183)*, in H. Maurer (ed.), *Kommunale Bündnisse Oberitaliens und Oberdeutschlands im Vergleich* (1987) 11 ff.; G. Raccagni, *The teaching of rhetoric and the Magna Carta of the Lombard cities: the Peace of Constance, the Empire and the Papacy in the works of Guido Faba and his leading contemporary colleagues*, 39 J. Medieval His. 61 ff. (2013)); by the *Statutum in favorem principum* (Statute in favour of the princes, 1232) Frederick II relinquished a number of important Royal rights ("Regalia") to the secular princes, the latter received the rights to mint coins and levy tolls in the German part of the Holy Roman Empire and were granted power of jurisdiction over their territories and the right of approval over any legislation proposed in future by the Emperor (see W. Koch, *Statutum in favorem principum*, in *Lexikon des Mittelalters* (1999) VIII 75-76).

culture it stems from and contributes in generating[25], and that Western culture and law were not born in England. Consequently, and to the very same purpose, one should go further than focussing on the apportionment of powers between the sovereign and its subjects. On the same foot, one should go deeper when understanding what made the technocratic uprising of judge Coke possible.

In a broader historical and comparative perspective, the seed of the rule of law can be found in an organisational model that was born in Roman law when, in the presence of an increasing articulation and complexification of society, it gave way to the secularization and professionalization of the law-giving process[26]. When one looks at the deepest roots of the notion, i.e. when one looks for the essential ingredient of whatever the recipe of the rule of law is, it can be seen as a social legal institution whereby the power of deciding conflicts that arise within a society is assigned to an independent secular lawyer. More precisely, in this model the public figure who is legitimised to settle disputes is the technocrat, on the basis of her specialised notions, and not a popular lay assembly, nor a figure provided with religious wisdom, either philosophical-moral or traditional, such as the Islamic qadī, the African chief of the community, or the delegate of the political party (as occurs under socialist legality).

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[25] J.H. Merryman, R. Pérez-Perdomo, *The Civil Law Tradition*, cit. at 3, 1-2; J. Husa, *Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law*, 6 Chinese J. Comp. L. 129, 138 ff. (2018).

[26] The latter point has been made, *e.g.*, by H.J. Berman, *Law and Revolution*, cit. at 24, 7 ff.; B.W. Frier, *The Rise of Roman Jurists. Studies in Cicero's pro Caecina* (1985) 139 ff., 156, 188 ff., 269 ff.; F. Wieacker, *Römische Rechtsgeschichte. Einleitung, Quellekunde, Frühzeit und Republik* (1st ed. 1988) 519 ff.; Id., *Foundations of European Legal Culture*, 38 Am. J. Comp. L. 1, 23 f. (1990); A. Watson, *The Law of Ancient Romans* (1970) 24 ff.; J.-L. Halpérin, *The Concept of Law*, cit. at 1, 338; Michel Humbert, *Droit et religion dans la Rome antique*, 38 Arch. Phil. Dr. 34 (1993); D. Johnston, *Roman Law in Context* (1999) 5 ff.; F. Schulz, *History of Roman Legal Science* (1946) esp. 6-12, 30 f., 60 f.; and see also Max Weber, *Economy and Society. An Outline of Interpretive Sociology* (1978; G. Roth and C. Wittich eds., transl. from J. Winckelmann (ed.), *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, 4th ed. 1956) 795 ff. See also J.R. Commons, *Legal Foundation of Capitalism* (1924) 67, 86, 249; F.A. von Hayek, *The Constitution of Liberty: The definitive edition* (rev. ed. 2011 – 1st ed. was published in 1960) 243-246.

This is the kernel of the rule of law. This is a feature that surfaces in many of the mainstream definitions I referred to above (it is usually presented as "independent adjudication", or as "access to justice before independent and impartial courts"[27]), but the role of this element is decentralized by the parallel emphasis assigned to a long list of different attributes deemed crucial and substantial to the very definition of the rule of law[28]. Yet, without the independent, secular dispute-solver technocracy, none of the features of the rule of law those definitions emphasize (from "supremacy of law" to "accountability to the law", from "prohibition of arbitrariness" to "judicial review of administrative acts") would have been able to find their way into the development of Western institutions. Without the independent, secular dispute-solver technocracy, any defense of one's own entitlements, any claim against fellow citizens or public bodies – including claims related to the implementation of the principles of equality and non-discrimination, and to the different forms of freedom – would be (and outside the West they can always be) pre-judged against a set of political, religious, philosophical, clannish values, goals and rules. Values, goals and rules that do not represent the backbone of our legal and institutional infrastructure. Conferring the power of resolving the disputes to an independent, technocratic professional requires a secularized society (i.e. a social and cultural context which deeply supports its

[27] See the definitions offered by the UN Secretary General, USAID, the Council of Europe, Bingham, Waldron, Raz, *supra* notes 6-11, and accompanying text. See also M.N.S. Sellers, *What Is the Rule of Law and Why Is It So Important?*, in J.R. Silkenat, J.E. Hickey Jr., P.D. Barenboim (eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (2014) 3, 4 ff., 13; A.W. Bedner, *The promise of a thick view*, cit. at 11, 37; T. Ginsburg, *Difficulties with Measuring the Rule of Law*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, cit. at 2, 50, 52; R.S. Summers, *A Formal Theory of the Rule of Law*, 6 Ratio Juris 127, 133-134 (1993).

[28] Let me just add that the arguments grounded on the overlapping of rule of law with what it should achieve, such as 'global justice', or 'good governance' (see for all A. Sen, *Global justice*, in J.J. Heckman, R.L. Nelson & L. Cabatingan (eds.), *Global Perspectives on the Rule of Law*, cit. at 14, 53 ff.; and, in a more articulate way, J. Waldron, *The Rule of Law*, cit. at 4, *passim* and at 93 ff.; J. Raz, *The Rule of Law and its Virtue*, cit. at 11, 211) can at their best simply complement the present comparative analysis on what the rule of law is, and where it comes from, for without the technocratic dispute-solver any assessment of the practices of 'justice' or 'good governance' can be only set against a legal (and cultural) background different from the Western one.

independence from religious as well as political transcendentalisms) where individuals and groups have led the ruler and/or the other customary or religious chiefs to dismiss the power of settling the disputes arising in the society itself.

This is why the Western way of looking at (and thinking of, and applying) the law did not take roots in societies which arranged their development according to different institutional engineering, according to social beliefs, political and legal balances that are at odds with the primary role to be assigned to the independent, secular dispute-solver technocracy.

5. Lessons. The Western Legal Self in a Broken Mirror

It should go without saying that much more, and far more complex than the implantation of the above 'kernel' of the rule of law on Western soil, allowed us to tread the path towards the construction of apparatuses of notions and principles, as well as of techno-structures able to support the development of the legal institutions our societies live by today. And yet, of this complex path one should just be relentlessly mindful.

Being aware of this multifarious historical track would prevent one from synchronically flattening it down and squeezing it into a definition of rule of law that simply musters together everything Western societies have so far achieved. Packaging the bulk of Western legal civilization and labelling it as the 'rule of law' to use it for export purposes, as if it were a commodity, or a turnkey plant, reveals itself as not only faultering on the ground, but also heedless and ungrateful towards our own history. A history which only with great efforts (and conflicts, and bloody wars) has passed down the complex of tools which are now available to us and which we would like to see adopted everywhere[29].

[29] D.C. Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in C.S. Hsu (ed.), *Understanding China's Legal System: essays in honor of Jerome A. Cohen* (2003) 93; S. Humphreys, *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice* (2010), *passim*, and 13, 187; J. Kroncke, *Law and Development as Anti-Comparative Law*, cit. at 21, 488 (but see also 533-534: "With some irony, we should remember that the only other modern country [besides the U.S.] to so systemically misjudge foreign legal developments through an export-oriented legal culture was the Soviet Union");

Depriving the rule of law of its very historic and comparative value makes the 'export' version of the 'rule of law' – be it supported by 'big money', States, NGOs, or global institutions[30] – become one of the many spongy notions which either offer themselves to the interests of those who use them, or serve a vision of the law (and of the world) lacking the capacity of looking beyond the West[31]. Take all the notions of the rule of law I mentioned earlier. Each of them come from, are entrenched within, and aim to reflect the whole of current political, socio-economic and institutional Western frameworks – as well as the role and work of legal thought producers, and of lawyers, judges, law enforcement agencies[32]. What is further evident in this oversized packaging of the rule of law is that the formulas it contains and the proposals it makes are rarely supported by historical and comparative analysis able to overcome the partiality embedded in the regional dimension of the Western legal culture.

K. Pistor, *Advancing the Rule of Law: Report on the International Rule of Law Symposium Convened by the American Bar Associations November 9-10, 2005*, 25 Berkeley J. Int'l L. 7, 10 (2007).

[30] V.L. Taylor, *Regulatory rule of law*, cit. at 2, 401 f.; K. Simion, V.L. Taylor, *Professionalizing Rule of Law: Issues and Directions* (2015) esp. 27 ff.; M. Infantino, *Numera et impera: gli indicatori giuridici globali e il diritto comparato* (2019) 104-122.

[31] Another good example comes from USAID (USAID, *Guide to Rule of Law Country Analysis*, cit. at 27 – the Guide's purpose is "to assist USAID Democracy and Governance (DG) officers in conducting a rule of law assessment and designing rule of law programs that have a direct impact on democratic development": Id., 1): "Legal cultures differ depending upon history, with many countries basing their legal system on the civil law tradition and others (including the U.S.) on the common law tradition, while many countries include elements of both traditions and may incorporate significant traditional, religious, or customary components. … Societies differ in terms of the values they ascribe to law versus other means of social organization, such as personal or family loyalty. … The principle of rule of law, however, transcends all these differences. This has important implications for practitioners. If the rule of law is a universal principle, then supporting the rule of law is not necessarily imposing foreign ideas on a society" (Id., 6).

[32] One can further note that "the legal culture shared by judges and theorists encompasses shared understandings of proper institutional roles and the extent to which the status quo should be maintained or altered. This culture includes "common sense" understandings of what rules mean as well as conventions (the identification of rules and exceptions) and politics": J.W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L. J. 22 (1984), and this is precisely what most differs across legal cultures and jurisdictions.

In other words, the intellectual awareness as well as the scientific attitude necessary to understand the impact of our views on experiences different from our own are dramatically lacking[33].

Let me be clear, all this would be reasonable if we were to discuss the rule of law and its living features in an all-Western dimension, if theoreticians entitled the fruits of their work "Western (or American, or European) rule of law". This is not the case, though: the vocation towards universality and/or timelessness is implicit. Consequently, any claim to treat the Western rule of law as a notion that includes the whole of Western legal civilization and that can be universalized without paying due attention to its historical sources (and to the different contexts where it should be exported), is doomed to appear as preposterous or opportunistic. It comes to no surprise, therefore, that those notions of rule of law, turned into concepts without history and geography, be put at the service of strategies unable to build a pacified and fruitful relationship between 'us' and 'them'[34]. Our public discourses feed the consideration of the 'other' lacking the rule of law, not as the starting point for any analysis willing to be inclusive of diversity and of a shared perspective, but as a defect to be put straight or to be condemned – almost like saying that not only is the West the lord of the rule of law, but that it should also be the lord of *any* law[35].

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[33] See also G.K. Hadfield, B.R. Weingast, *Microfoundations of the Rule of Law*, 17 Ann. Rev. Pol. Sci. 21 (2014); R. Kleinfeld, *Competing Definitions of the Rule of Law*, cit. at 12, 41; G. Frankenberg, *Constitutions as commodities: notes on a theory of transfer*, in Id. (ed.), *Order from Transfer. Comparative Constitutional Design and Legal Culture* (2013) 10 ff.

[34] The mainstream acceptance of the rule of law as a space-less and time-less technology ends up treating law as a "technical equipment, social machinery, which can be transported and plugged in wherever the need for them arises": M.E.J. Krygier, *Institutional Optimism, Cultural Pessimism and the Rule of Law*, in M.E.J. Krygier, A. Czarnota (eds.), *The Rule of Law after Communism* (1999) 77, 82. See also C. May, A. Winchester, *Introduction*, in Iid. (eds.), *Handbook on the Rule of Law*, cit. at 2, 1, 3; J. Husa, *Developing Legal System, Legal Transplants, and Path Dependence*, cit. at 25, 483-486; and cf. G. della Cananea, *Due Process of Law Beyond the State: Requirements of Administrative Procedure* (2016) 86-87, 198-204.

[35] See T. Ruskola, *Legal Orientalism*, 101 Mich. L. Rev. 179 ff. (2002); S. Wilf, *The Invention of Primitivism*, 10 Theo. Inq. L. (2008), art. 7, 485 ff.; R. Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in Id. (ed.), *Asian Discourses of Rule of Law* (2004) 1 ff.; D.B. Goldman, *Globalisation and the*

Along this way, being 'de-contextualised' and 'naturalized', the rule of law ends up either representing the foolish servant of Western opportunism, or feeding autarchic visions of the world, ill-equipped to understand, not to mention to solve, any of the others' problems.

Western Legal Tradition: Recurring Patterns of Law and Authority (2008) 4-8; C. May*, The Rule of Law*, cit. at 12, 100 ff.

THE RULE OF LAW
THE FRENCH PERSPECTIVE*

*Jean-Bernard Auby***

Abstract

The article sheds lights on the historical and current position adopted by French law with regard to the concept of rule of law. In particular, the primacy attributed to parliamentary law, the submission of the State to a special body of law, the declining role played in practice by the principle of separation of powers are all elements which characterize the French perspective on rule of law in a very peculiar way.

TABLE OF CONTENTS

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If one wants to summarize very simply the main position historically adopted by French law with regard to the concept of rule of law, one can say: that it drew its inspiration from the German doctrine of the *Rechtsstaat* while separating itself significantly from it and that it constantly remained far from the English conception of the rule of law.

While the German doctrine of the *Rechstaat* developed in the second half of the XIXth century, it is only at the beginning of the XXth one that French authors started to refer to it and to try and position French law in comparison with that concept.

Not that French law did not have any idea of a submission of statal authorities to the Law: on the contrary, it had for long adopted a rather hierarchical vision of Law, whose respect was imposed on all public authorities except the King – with nuances –, and since the Revolution it had made a pillar principle that all public authorities had to respect fundamental rights – the "*droits de l'homme et du citoyen*" enshrined in the 1789 Declaration –[1].

Nevertheless, the French vision distinguished oneself on some aspects, well described in the very famous book by Raymond Carré de Malberg, *Contribution à la théorie générale de l'Etat*[2]. Carré de Malberg fundamentally demonstrated that the Constitution' supremacy in the French system was purely theoretical, the real primacy being attributed to parliamentary law – "*la loi*", in French –. Thus, he claimed that the concept of "*Etat légal*" better characterized the French perspective than the one of "*Etat de droit*", direct translation of "*Rechsstaat*". Correlatedly, he argued that the French system of the "Legal State" only concerned the limitation by law of administration and justice, not that of the legislator.

The French system, by its basic characteristics, well highlighted by R. Carré de Malberg, constitutes an original context for the development of the rule of law. To explain more precisely in what sense, it is necessary to go from more theoretical considerations to more practical ones, and to evoke what the French legal tradition has to offer in terms of general apprehension of the relations between the State and Law (1), of institutional guarantees of the rule of law (2) and of principles

[1] J. Chevallier, *L'Etat de droit, Paris, Montchrestien* (2017).

[2] 2° vol. (1920-1922).

relating to the normative production – in line with the rule of law concept – (3).

1. General apprehension of the relations between the State and the Law

In order to locate more precisely the traditional French vision of the rule of law, it is necessary to highlight the two fundamental convictions to which it strongly adheres: the equivalence of the State and Law, and the principle of the State's submission to a special body of law.

1.1 The equivalence of State and Law

Being based upon the credo of parliamentary law sovereignty – legislation being in principle topped by the Constitution, but in a purely theoretical manner –, the traditional French approach also conveys the conviction of an equivalence of State and the Law: not only is there no source of law above parliamentary legislation – at least no source of law whose superiority would be made effective –, but there is no fountain of law external to the state, whether international, local or private.

Curiously, this position was not accepted by two authors who are often considered as the two founding fathers of the modern French administrative law: Léon Duguit[3] and Maurice Hauriou[4]. Both, in the first part of the XXth century, claimed that equating Law and the State was not acceptable since it was the best way of vesting statal authorities with purely arbitrary powers.

Both pleaded, with different arguments, that something existed above the legislative might. Duguit contested the idea of sovereignty in itself, he thought that the basis of the legal edifice was the "objective" law deriving from the needs of social solidarity, and that all public authorities were submitted to that "objective" law. Hauriou viewed the legal systems as an arrangement of diverse institutions – Santi Romano picked up and systematized that idea – and considered that the statal institutions

[3] Eg.: L. Duguit, *Traité de droit constitutionnel*, 5 vol. (1927-1930).
[4] Eg.: M. Hauriou, *Précis de droit constitutionnel* (1929).

were just part of them: by way of consequence, part of the Law was produced out of the State.

The truth is that these two famous authors were not too much followed on this particular issue of the equivalence of State and the Law. The mainstream French public law doctrine has remained notably positivist, in the sense that it has always predominantly considered that the Law was and only was the one produced by legislators. Produced by legislators and applied and interpreted by judges: importantly so, it must be underlined, in the field of administrative law, the French administrative law having also been mainly created by the *Conseil d'Etat*. But, like the Parliament, judges are part of the State.

In the recent past, though, there has been a renewed debate on the subject. Some authors have again strived to demonstrate that the assimilation of Law and the State was not realistic: a large amount of the Law being generated out of the State, in some international and European entities, and in the deep fabric of the society through contracts. That assimilation, some of them added, was just a symptom of the excessive place conceded to the State in the French vision, and the modernization of the latter required a more open reading of how the Law is produced. This analysis was proposed, in particular, in a most debated book written by a barrister partly trained in the United States and mainly based on a comparison between the French and the American vision: "*Le droit sans l'Etat*", by Laurent Cohen-Tanugi[5].

1.2 The State's submission to a special body of law

With its commitment to parliamentary supremacy and the important role played by judges in the field of administrative law, the traditional French vision of the rule of law, finally, had characteristics fairly symmetrical to the ones presented by the British vision of parliamentary sovereignty and of a prominent judicial power. By contrast, the two visions have always been opposed as to the submission of public authorities to special rules[6].

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[5] L. Cohen-Tanugi, *Le droit sans l'Etat* (2007).

[6] M. Freedland, J. Auby (eds.), *The Public Law/Private Law Divide*; *Une entente assez cordiale?* (2006) ; B. Plessix, *Droit administratif général*, 2° ed. (2018).

a) Borrowing to the continental legal traditions, the French one fully adheres to the conviction that the Law is divided into public and private law; and that, if things go this way, it is because the activity of public institutions needs by nature, at least to a certain degree, to be submitted to special rules. And it adds to this a correlated judicial organization, in which special jurisdictions – administrative courts – are entrusted with the application of the special rules applicable to public entities.

All this, which places the French system in sheer opposition with the diceyan vision, has been clearly accepted, at least since the end of the XIXth century: the unchallenged reference being the case of "Blanco" (1873) in which the "*Tribunal des Conflits*"[7] admitted that administrative institutions liability was not submitted to the Civil Code rules, but to special rules, taking into account the special needs of public service activities ("*le service public*")[8].

Things are nevertheless a bit more complex, since French administrative law has never gone so far as to admit that any and every situation related to administrative activities would be submitted to special rules: on the contrary, courts and the doctrine have always accepted as a principle that some administrative activities fell under ordinary law, because their social, economic, or political nature made their similar to private ones, those of citizens and businesses.

In particular, a very important judgment of 1921, in the case of "*Société commerciale de l'ouest africain*"[9] ruled that, among the public services, some – the "*services publics industriels et commerciaux*" – were principally subject to ordinary law because of their similarities with market activities.

[7] This jurisdiction, composed of half members of the *Conseil d'Etat*, the supreme administrative court, and halt members of the *Cour de Cassation*, the supreme ordinary court, is in charge with determining which part of the judicial organization – the administrative one or the ordinary one – has jurisdiction on a particular issue where this has been disputed.

[8] *Tribunal des Conflits*, 8 February 1873, Blanco.

[9] *Tribunal des Conflits*, 22 January 1921, *Société commerciale de l'ouest africain* (also known as the «Bac d'Eloka» judgment, under the name of the ferryboat the litigation originated from.

b) Then, it is no less true that, in fact, public institutions are "normally" submitted to the special rules: normally meaning, here, most of the times.

Two points must be underlined accordingly.

The first one is that the French administrative law does not welcome the idea that, when the Administration would use legal tools similar to the ones which are the common instruments of legal relations between private people – typically, the contract –, it would necessarily place itself under the rules of private law. Where, for example, the common law tradition, but also the German administrative law one, will consider that a contract belongs by nature to private law, French administrative law will deem that contracts made by public authorities may be either public law contracts or private law ones, depending on their content.

The second one, related, is that, in fact, French administrative law considers that there is a share of private law and a share of public law in all areas of public administration. Just as much as contracts made by public authorities may be public law ones or private ones, assets possessed by public entities may be subject to public law – they then belong to the "*domaine public*" – or to private law – they then belong to the "*domaine privé*", people working with the administration may be "agents publics" – therefore employed under public law – or "*salariés de droit privé de l'administration*" – placed under common labour law –.

It must nevertheless be immediately added that, in fact, nowadays at least, administrative public law is clearly dominant. Things went this way by the conjunction of various factors. Legislation was one: for example, a 2000 statute decided that all procurement contracts made by the administration – and they are by far the majority of administrative contracts – had a public law nature. Case-law was another one: for example, with time, the criteria used in order to determine if an administrative staff would be an "*agent public*" or a "*salarié de droit privé de l'administration*" evolved in favour of the first option. Some economic and political evolutions played their part: for example, because of various waves of privatizations, the perimeter of the "*services publics industriels et commerciaux*" has significantly shrunk.

2. Institutional guarantees of the rule of law

In order to be effective, the submission of public authorities to the law has to be guaranteed by institutional mechanisms. Very important in this respect are those related to separation of powers: one excellent way for having the law respected within the public apparatus is to separate the institutions which serve different functions in relation with it – creation, implementation, interpretation…–. Then, of course, it is essentially on jurisdictional supervisions that our systems mainly trust in order to recall public authorities to the respect of Law.

Both series of mechanisms are affected by some specific orientations in the French system.

2.1 Separation of powers

a) It is in 1748 that "*L'Esprit des Lois*", Montesquieu's main book on constitutional issues, proposed – drawing some inspiration from previous authors like John Locke – the separation of powers theory: based upon the idea that the main powers in the State must be attributed to different institutions, the theory also includes the requirement of a certain balance of powers – this concern, for example, led Montesquieu to propose that the King be endowed with a right of veto on legislation.

The leaders of the 1789 Revolution fully adhered to the theory, to the point that they made the 1789 Declaration of human rights say that any society in which the separation of powers is not ensured has no Constitution at all[10].

b) In fact, all the – numerous: the whole XIXth century is a period of strong constitutional instability – French political regimes after the 1789 Revolution, except the Empires, were to be parliamentary ones, that is to say constitutional arrangements in which collaboration of powers is as important as separation[11].

Moreover, in the current regime of the Fifth Republic – born in 1958 –, the powers of the executive have been so significantly increased, including in legislative matters, that the current constitutional relationship between the main powers certainly favors the executive rather than it rests on a balance of powers.

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[10] Article 16 of the Déclaration : "*Toute Société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée n'a point de Constitution*".

[11] See M. Morabito, *Histoire constitutionnelle de la France de 1789 à nos jours*, 15th ed. (2018).

That said, a true picture of the distribution of powers can only be drawn if consideration is taken of the importance of the statal administration and of the Council of State. Both are main inspirators of the normative production, the administration because of its strong tradition of cohesion, expertise, familiarity with high public policies issues, the Council of State simultaneously because it is – apart from being the main administrative judge: we will come back to this – the main legal advisor of the Government – and on various issues of the Parliament as well – and because most of the highest positions in ministries as well as in independent agencies are held by some of its members.

In sum, behind the separation of powers between political organs, there is a rather strong degree of concentration, of which the executive and the Council of State are indisputably beneficiaries.

c) Then, the French system shelters another specific orientation in separation of powers which is about the relationship between the executive and the judicial.

Neither in the relation between the executive and the administrative courts nor in the relation between the executive and the ordinary judiciary – the "private law courts" – is there a strict independence.

We have already referred to the strong links which still exist between the supreme administrative court, the *Conseil d'Etat*, and the government, of which it is the main legal advisor and with which an organizational linkage exist through the frequent occupation by members of the *Conseil d'Etat* of the highest positions in ministries.

On the judiciary side, the most important fact is that one part of the judicial machinery is not independent from the government, but on the contrary subject to its hierarchical authority. It is the branch of the judiciary which is in charge of prosecutions, and is called in French "*Ministère Public*" or "*Parquet*".

It is true that this situation of dependency has been alleviated by recent reforms – the constitutional one which has been made in 2008, notably[12] – that has endowed "*Ministère*

[12] B. Stirn, *Les libertés en questions*, 11th ed., 95 (2019).

Public" magistrates with better independence in terms of career. But their functional subordination remains strong enough.

Regular proposals are made as to the adoption of independent prosecutors, but the tradition still resists.

2.2 The jurisdictional guarantee

a) All that has just been explained has obviously consequences on the jurisdictional guarantee of the rule of law.

Even if increased in the recent past, the still limited independence of the criminal prosecutors naturally makes less probable that they trigger criminal actions against public authorities, whether members of Parliament, ministers, or civil servants.

As to the Conseil d'Etat, even if it has acquired a very high level of independence – in fact, the institution is independent because powerful –, its proximity with the government leads it sometimes to take into account the interests of the latter more profoundly that an ordinary judge would probably do.

b) To this, must be added some weaknesses in the constitutionality review system.

Such a system was indeed provided for in the 1958 Constitution, funding the current Fifth Republic, but it took a long time to take off and it retains some limitations.

It is only in 1971 that the "*Conseil Constitutionnel*" agreed to include among the bases of its review the preamble of the Constitution, from which flows the essential part of fundamental rights protection. Until then, statutes submitted to it could only be contested on the basis of what could be found in the body of the Constitution itself, thence essentially rules concerning law making processes and the distribution of powers between the Parliament and the Government.

The scope of constitutionality review nevertheless remained limited for procedural reasons. Until 2008, statutes could only be submitted to the "*Conseil Constitutionnel*" before they came into force and only by certain public authorities, not by the citizens themselves. The 2008 Constitutional reform introduced a new mechanism, called "*question prioritaire de constitutionnalité*", which allows any citizen being party to a judicial procedure to raise the issue of constitutionality of a legislative act the judges are about to apply in the case. Subject to a filtration by the supreme

administrative court – "*Conseil d'Etat*" – or the supreme judiciary one – the "*Cour de Cassation*" –, the "*question prioritaire de constitutionnalité*" will then be transferred to the "*Conseil Constitutionnel*" for constitutionality review[13].

Weaknesses remain, concerning in particular membership to the "*Conseil Constitutionnel*", that is not subject to the possession of any legal expertise, to which is added the de jure membership of all former Presidents of the Republic. One of its last presidents – Jean-Louis Debré – used to claim that the "*Conseil Constitutionnel*" was not really a court, rather a political organ. The creation of the "*question prioritaire de constitutionnalité*" has certainly pushed it forward towards a real jurisdictional entity, but the evolution in that direction is not complete.

3. Principles relating to the normative production

The position a legal system can claim to have in relation with the rule of law does not just result from the institutional arrangements associated with the distribution of powers and judicial supervision of public authorities. It has also something to draw from the very content of normative production.

In this respect, being in accordance with the rule of law means abide with some requirements in terms of quality of the norms and in terms of protection of the citizens against brutal normative changes.

3.1 Quality of the norms

One can only say that one finds oneself in a real rule of law system if the norms which are emitted by law – creators are sufficiently clear to make sure that any lay citizen can understand what they mean and what kind of behavior they forbid or require.

In the French system, there is a constitutional rule which heads for that direction. It is a principle of intelligibility and accessibility of the law, which was acknowledged by the "*Conseil Constitutionnel*" in a 16 December 1999 judgment[14].

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[13] M. Morabito, *Histoire constitutionnelle de la France de 1789 à nos jours*, cit. at 11, 509.

[14] J. Auby, *Observations théoriques, historiques et comparatives sur l'incertitude du droi*t, 4 Revue tunisienne des sciences juridiques et politiques (2018-2).

3.2 Protection of citizens against brutal normative changes

Another important condition for accepting that one particular legal system is a rule of law one is that it contains principles that protect citizens against brutal changes in legislation which could cause to them excessive harms.

At the top of these principles, are the general one of legal certainty, and the more specific one of legitimate expectation, which implies that legal changes affecting people who could reasonably expect the maintenance of the rules they deferred to previously, should be applied in a progressive way and with transitions.

In the French system, the general principle of legal certainty has been adopted by the administrative law jurisprudence[15]. By contrast, French courts have not accepted that national law would entail the principle of legitimate expectation: thus, they apply it in the field of EU law implementation – they have no choice, here – but not when EU law is not concerned[16].

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Submitting the State to the Law seems to be a rather simple program. And though, even if some general implications of it are universal, the national legal systems have found and find their way through it at the expense of significant variations. The French one followed its own path, accorded to its traditionally centralist character, which can be said to have rendered things easier at times, more difficult at others. Among other features, it knows rather well how to organize the internal discipline of the public apparatus, while it is less comfortable when it comes to make accountable the very center of the State which is the national executive power.

[15] *Conseil d'Etat*, 24 March 2006

[16] S. Calmes, *Du principe de la protection de la confiance légitime en droits allemand, communautaire et français* (2000).

THE COMMON LAW, THE RULE OF LAW, AND BREXIT

*Gordon Anthony**

Abstract

This article considers how Brexit will affect the rule of law doctrine that is applied by courts in the United Kingdom (UK). Focusing, first, on how UK courts have previously absorbed the demands of EU law, it considers whether the courts will use that experience to safeguard a "thick" conception of the rule of law, or whether they will allow the rule of law to be hollowed out by Brexit. While such analysis can of course only be speculative at this stage, the article suggests that there is much within pre-existing case law to indicate that EU will continue to exert some influence in domestic law. This is a result not just of the fact that there will continue to be statutory links to EU law in the post-Brexit constitution, but also because of the "economy of the common law" and its pursuit of progression rather than regression. Important, too, are the common law's ongoing links to international legal norms that will continue to have various points of intersection with the EU legal order**.

TABLE OF CONTENTS

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1. Introduction

Brexit has given rise to a number of searching questions about the nature of the UK constitution, both in its contemporary and in its future forms.[1] Some of the most prominent questions have concerned the balance of institutional relations within the UK during the process of withdrawal, where the leading case law has emphasised the primary function of the "sovereign" Westminster Parliament.[2] However, attention has also been given to the role that EU law may play in UK courts once the transition period agreed under Article 50 TEU has ended, notably as the European Union (Withdrawal) Act 2018 has created a new category of "retained EU law".[3] While the first purpose of that category of law is to ensure that there is legal certainty in the post-Brexit domestic legal order,[4] it is clear that there will be complicated questions about, among other things, the content of the rule of law doctrine that is applied by the courts. At its most obvious, this is because many areas of substantive EU law, as well as the general principles of EU law (but not the Charter of Fundamental Rights), will continue to be directly relevant in proceedings in domestic courts once Brexit has taken form.[5]

** This is a revised version of a paper given on 31 May 2019 at a conference in Milan to celebrate the 10th Anniversary of the IJPL. My thanks are due to Professor della Canenea for his kind invitation to speak at the conference, and to the participants for their question and comments. Any errors are mine.

[1] Literature is voluminous: see, e.g., A. Biondi, P. Birkinshaw (eds.), *Britain Alone? The Implications and Consequences of UK Exit from the EU* (2016); M. Dougan (ed.), *The UK After Brexit: Legal and Policy Challenges* (2017); M. Elliott, J. Williams, A. Young (eds.), *The UK Constitution After Miller: Brexit and Beyond* (2018); and A. Antoine, *Le Brexit* (2020).

[2] See, among others, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1; and *R (Miller) v Prime Minister* [2019] UKSC 41, [2019] 3 WLR 589.

[3] EU (Withdrawal) Act 2018, ss 6-7. The transition period currently ends on 31 December 2020: Art 126 of the Agreement on the withdrawal of the [United Kingdom] from the European Union and the European Atomic Energy Community of 19 October 2019, available at *www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration*.

[4] See *Legislating for the United Kingdom's Withdrawal from the European Union 2017*, Cmnd. 9446.

[5] On the Charter see EU (Withdrawal) Act 2018, s. 5(4).

Although these norms will no longer be linked to the supremacy doctrine – they are also subject to change by legislation enacted in Westminster and/or in the devolved institutions – UK courts will have to consider how far norms of EU law should continue to have an influence in the domestic legal order. The task will be a not insignificant one: much of the contemporary rule of law doctrine in the UK has been shaped by the experience of EU membership, but Brexit now places the doctrine in a very different constitutional setting.

This article offers some comments on the approach that the courts may take to the relationship between EU law and domestic law in the future – in essence, whether they will use EU to safeguard a "thick" conception of the rule of law, or whether they will allow the rule of law to be hollowed out by the fact of Brexit.[6] Although such comments can (of course) only be speculative at this stage, it will be suggested that there is much within pre-existing case law on the reception of EU law to indicate that it will continue to exert some influence within the domestic system. This is a result not just of the fact that there will continue to be statutory links to EU law, but also because of, what John Allison has called, the "economy of the common law".[7] In a chapter that was published in 2000, Allison used this term to describe the incremental and reactive way in which the UK courts had reconciled UK constitutional law with the demands of the EU legal order. While such assimilation of norms had occurred against the backdrop of the supremacy doctrine, it was characterised by a not infrequent integration of standards even when EU law was not at issue.[8] It will be suggested that such voluntary integration of norms may still occur in post-Brexit case law and that, even if it does not occur, the courts may be reluctant to undo previous instances of integration. This is partly because the development of the common law is best defined by progression rather regression; it is also because the common law

[6] On "thick" and "thin" (and other) conceptions of the rule of law, see P. Rijpkema, *The Rule of Law Beyond Thick and Thin*, 32 L. & Phil. 793 (2013).

[7] J. Allison, *Parliamentary Sovereignty, Europe and the Economy of the Common Law*, in M. Andenas, D. Fairgrieve (eds.), *Liber Amicorum in Honour of Lord Slynn of Hadley: Judicial Review in International Perspective* (2000), 177.

[8] G. Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* (2002).

will continue to be influenced by international (query: global?) legal norms that have various points of intersection with the EU legal order.[9]

The article is divided into two main sections. The first section identifies what the "rule of law" doctrine is taken to mean for the purposes of the common law, and explains how EU law helped to shape the doctrine over the time of EU membership. The second section explains how links to EU law will be maintained post-Brexit and how UK courts may accommodate overlaps between the common law, EU law, and international law. The conclusion offers some more general comments about the common law's future conception of the rule of law.

2. The rule of law and the effects of EU membership

The contours of debate about the rule of law under the UK constitution are well-known and start with Dicey's commentary about the absence of any distinction between private persons and public officials for the purposes of the common law.[10] While this aspect of his commentary was most famously associated with his perceived antipathy towards *droit administratif*, it also belied an approach to legal equality which was "formal" rather than "substantive" in nature.[11] The point here was that, while all persons were equally subject to the law of the land, the sovereignty of Parliament entailed that discriminatory laws could be enacted and that they would be applied "equally" by the courts.[12] Raz, writing much later, also sought to distinguish the

[9] See J. Laws, *The Common Law Constitution* (2014); R. Rawlings, P. Leyland, A. Young (eds.), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, 2013); and P. Birkinshaw, *European Public Law: The Achievement and the Brexit Challenge* (2020). On global law, see N. Walker, *Intimations of Global Law* (2015).

[10] See J. Jowell, *The Rule of Law*, in J. Jowell, C. O'Cinneide (eds.), *The Changing Constitution*, 9th ed. (2019), ch. 1.

[11] P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PL 467 (1997).

[12] For a judicial statement concerning this effect, see, e.g., *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723, Lord Reid: "It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did

content of the rule of law from debates about morality and political philosophy, and linked the doctrine to, *inter alia*: a prospective effect for laws; the need for clear legal rules; access to an independent judiciary; and limits on discretion in the sense that it cannot be used in a way that undermines underlying legal rules.[13] This placed Raz in opposition to commentators who considered that the rule of law has (and must have) a substantive element whereby it incorporates values that serve to constrain governmental choices.[14] For Paul Craig, the endeavour was to find a middle way between these two approaches and to provide a fuller account of precisely how, and when, the various elements take form in law.[15]

The leading contribution on the topic – or certainly now the most widely-cited – is Sir Tom Bingham's book, *The Rule of Law*.[16] Published in 2010, this provides an account not just of historical influences on the rule of law, but also of contemporary features that led another judicial figure – Lord Hope – to describe it as "the ultimate controlling factor on which our constitution is based".[17] The historical account in Bingham's book partly makes the above point about the common law's global positioning, as it refers to comparative experience as well as to the influence that international human rights norms have had on UK law.[18] Bingham's approach is unapologetically in favour of a substantive conception of the rule of law, and he notes his preference for a

these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid".

[13] *The Rule of Law and its Virtue*, 93 LQR 195 (1977).

[14] See, perhaps most famously, R. Dworkin, *Law's Empire* (1986). See, also, the works of TRS Allan, notably *Law, Constitutional Justice: A Liberal Theory of the Rule of Law* (2001) and *The Sovereignty of Law: Freedom, Constitution, and Common Law* (2015).

[15] See n. 11 above. It might be noted that Raz has since written a significantly revised account of the doctrine: see *The Law's Own Virtue* (October 6, 2018), available at: *https://ssrn.com/abstract=3262030*.

[16] Published in 2010.

[17] *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 304, para. 107. On the principle's place under the constitution see further *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

[18] See n. 16 above, chs. 1-2.

"thick" understanding of its content.[19] He uses this descriptor when discussing human rights law in particular, where the common law has absorbed a range of European and international influences.[20] Noting a number of rights and examples of their impact in practice, he rejects the populist critique that protecting the individual prioritises rights over community interests.[21] His central thesis is thus that the protection of rights is central to a healthy democratic society rather than antithetical to conceptions of good government.

Bingham's book also mentions the obligations of EU membership and how these were "not problematical from a rule of law viewpoint, since (by Article 6 of the Treaty on European Union) the Union is founded on principles which include the rule of law".[22] When doing so, he briefly discusses the impact that the supremacy doctrine had on Parliamentary sovereignty, and this provides a link to the above point about how EU law was able to influence developments in domestic law more generally. As is well-known, the first case that revealed the supremacy doctrine's full implications for UK law was *Factortame*, where the House of Lords granted an injunction against a Minister of the Crown to prevent him from enforcing an Act of Parliament that interfered with, *inter alia*, the freedom of establishment of Spanish fishing companies.[23] While the case is best known for having resulted in the disapplication of an Act of the (sovereign) Parliament, the grounding imperative for the Court of Justice (which had received a preliminary reference from the House of Lords) was the effective

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[19] *Id.*, 67.

[20] See, also, D. Feldman, *The Internationalisation of Public Law*, in *The Changing Constitution*, cit. at 10, ch. 5.

[21] See n. 16 above, 68.

[22] Id., 46. Though he does note challenges presented by the way in which EU legislation is drafted and the "continental European image" of judgments of the CJEU. *Id.*, 46-47.

[23] *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603. On the basis for supremacy see, subsequently, *Thoburn v Sunderland CC* [2003] QB 151, 187-189. And for related comments about the relationship between domestic law and EU law see *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, 349, para. 79, Lord Reed, and [2014] 1 WLR 324, 382-3, para. 208, Lords Mance and Neuberger; and *Pham v Secretary of State for Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, 1617-1621, paras. 80-91, Lord Mance.

protection of the individual. In *M v Home Office*, that imperative "spilled-over" when the House of Lords ruled that injunctions should also be available against Ministers of the Crown in cases that did not have any EU law dimension.[24]

Injunctions can, of course, also be linked to the imperative of preventing abuses of power or "arbitrariness in executive decision-making". This is one of the cardinal features of the rule of law that are often identified in literature and policy papers, where other features include legality (which can be taken to imply "a transparent, accountable, democratic and pluralistic process for enacting laws"); legal certainty; access to independent and impartial courts; effective judicial review including respect for fundamental rights (as in *Factortame* and *M*); and equality before the law.[25] The common law's development of these principles has inevitably been influenced not just by EU law but also by the law of the European Convention on Human Rights (ECHR), which has effect in domestic law under the Human Rights Act 1998.[26] The rule of law doctrine that exists in common law can, in that sense, be said to be at least part European and to have been developed through a "confluence" of legal systems.[27]

Four cases can be used to illustrate this point. The first is *Wooder v Feggeter*, which concerned legality and transparency in the context of the duty to give reasons.[28] The question here was whether a mental-health patient who was to be administered a form of treatment to which he objected should be given the reasons for the decision that the treatment should proceed. While the case was ultimately determined with first reference to the

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[24] [1994] 1 AC 377, analysed in G. Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration*, cit. at 8, 139-142.

[25] See, e.g., Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158, available at *eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2014:0158:FIN:EN:PDF,* p 4.

[26] See M. Amos, *Human Rights Law*, 2nd ed., (2014).

[27] D.A. Leonardi, *The Strasbourg System of Human Rights Protection: "Europeanisation" of the Law through the Confluence of the Western Legal Traditions* 8 ERPL 1139 (1996).

[28] [2003] QB 219, 229, at para. 37. The judge referred, at para. 39, to, *inter alia*, P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 Cambridge L.J. 282 (1994).

ECHR, it crystallised a debate about whether the common law lagged behind European standards – and notably those in EU law – in so far it does not impose a general duty to reasons.[29] Referencing the leading literature on the point, Sedley LJ held that reasons should be given in the case because "the impact of the decision is so invasive of physical integrity and moral dignity that it calls without more for disclosure of the reasons for it in a form and at a time which allow the individual to understand and respond to them".[30] The judge also noted that "Article 8 [of the ECHR] recognises a standard of protection of personal autonomy" and, on that basis, he concluded that both Article 8 and the common law required the giving of reasons "not as a matter of grace or of practice but as a matter of right". It was a ruling that was widely understood to have taken the common law towards a general duty to give reasons, even if that final stage has not yet been reached.[31]

The second case – which concerned legal certainty – is *Uniplex v NHS Business Services Authority*.[32] This was a preliminary reference to the Court of Justice, which was asked how to interpret a time-limit in public procurement regulations that required challenges to decisions about awards to be made "promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period within which proceedings may be brought".[33] The word "promptly" was one that had been borrowed from the domestic procedure governing applications for judicial review, where it had allowed UK courts to dismiss challenges brought within three-months where the court considered that the applicant had not acted with due expedition.[34]

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[29] On the position at common law, see P. Craig, *Administrative Law*, 8th ed. (2016), 369-376; and on the position in EU law, see P. Craig, *EU Administrative Law*, 3rd ed. (2019), ch. 12.

[30] D.A. Leonardi, *The Strasbourg System of Human Rights Protection: "Europeanisation" of the Law through the Confluence of the Western Legal Traditions*, cit. at 27.

[31] For a recent judicial consideration of the extent of the common law duty, see *R (Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108.

[32] C-406/08, 48 *Common Mkt. L. Rev.* 569 (2011).

[33] Regulation 47(7)(b) of the (now revoked) Public Contracts Regulations 2006.

[34] On time-limits, see P. Craig, *Administrative Law*, cit. at 29, 857-862.

In its ruling, the Court of Justice made it clear that such judicial discretion within the three-month period was contrary to the requirements of legal certainty and that it also had implications for the effective protection of rights under EU law. It was a ruling that was to have effects across two-stages: first, through the courts reading the word "promptly" out of legislation in any case governed by EU law; and, secondly, through amendment of the rules governing judicial review to omit the word "promptly" for purely domestic law cases.[35]

The third case – *R (Unison) v Lord Chancellor*[36] – concerned access to justice and illustrated how the common law and EU law can often arrive at the same end-point in terms of protecting rights. The case centred upon the legality of changes to the fees regime that governs proceedings in employment tribunals, which had been amended to require the advance payment of fees for claims and appeals (the government had sought to justify the changes on the basis of a "user pays" principle).[37] The challenge to the regulations was brought by a public sector union which argued that the new regime was contrary to, among other things, the EU law principle of effective protection of rights and the common law right of access to justice. Finding that the changes were unlawful, the Supreme Court agreed that they breached EU law's precepts of proportionality and effectiveness because they would have the practical effect of meaning that many individuals would be unable to afford to bring proceedings. And on the issue of the common law, the Supreme Court likewise found that there had a been a breach of the right of access to justice. Noting that, "The constitutional right of access to the courts is inherent in the rule of law", the Court emphasised that interference with common law rights is possible only where it is authorised by clear and unequivocal statutory language or language which has that effect by necessary implication.[38] In this case, there was no such authorisation.

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[35] For the first stage, see, e.g., *R (Berky) v Newport County Council* [2012] EWCA Civ 378; and for the second stage, see (in Northern Ireland), *The Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017*, SR 2017/213.

[36] [2017] UKSC 51, [2017] 3 WLR 409.

[37] The new regime was contained in the Courts and Tribunals Fees Remission Order, SI 2013/2302.

[38] [2017] UKSC 51, [2017] 3 WLR 409, at paras. 66-85, esp. 66.

The fourth case is the much older case of *ex parte Equal Opportunities Commission (EOC)*, which concerned equality law and recourse to effective judicial review.[39] The EOC here sought to challenge various provisions of the Employment Protection (Consolidation) Act 1978 as contrary to (what was then) Article 141 EC and related EEC Directives.[40] The EOC argued that the Act discriminated indirectly against women by granting preferential employment protection rights to full-time workers (a majority of whom were men) as opposed to part-time workers (a majority of whom were women). Finding for the EOC, the House of Lords (as it then was) held that *Factortame* had established that judicial review was available even in relation to Acts of the Westminster Parliament and that the 1978 Act breached EU law's equality regime. In doing so, Lord Keith considered the case law of the Court of Justice, and he also had regard to a range of social studies, which was a departure from the normal judicial approach to evidence and argument. The ruling of the House of Lords was thus regarded as novel not just for procedural reasons but also because it had embedded the idea that Parliamentary sovereignty had been abridged by EU membership and the enforceable rights of individuals.[41]

3. The rule of law after Brexit?

How, then, might Brexit affect the rule of law? Certainly, it would seem that the in-road into Parliamentary sovereignty that was made in *Factortame* and *EOC* will not survive EU withdrawal, for the obvious reason that the supremacy doctrine will no longer apply in the domestic courts on its original terms. Moreover,

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[39] *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.

[40] *Viz.*, Directives 75/117/EEC OJ 1975 L45/19 and 76/207/EEC OJ 1976 L39/40.

[41] Harlow and Szyszczak described that judgment as "a landmark decision and turning point in the public law arena". See Carol Harlow, Erica Szyszczak, *Case Note: R v Secretary of State for Employment Ex Parte Equal Opportunities Commission*, 32 *Common Mkt. L. Rev.* 641 (1995), 650. On subsequent justifications for the supremacy of EU law in UK courts, see n. 23 above. And for a further instance of disapplication of an Act of Parliament, see *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777.

another indicator to that effect is the case law on Brexit that was referenced in the Introduction, where the Supreme Court returned the UK constitution to a traditional (Diceyan) view of Parliamentary sovereignty.[42] Although EU membership had not been the only factor that had suggested a diminution of Westminster's sovereignty – case law on common law fundamental rights and on devolution had had similar effects[43] – the Brexit case law has reaffirmed that Parliamentary sovereignty is UK law's ultimate "rule of recognition". The point was made not just in the first *Miller* case, but also in a case about the powers of the Scottish Parliament during the process of withdrawal.[44]

On the other hand, it has been suggested above that Brexit need not mean that the common law will automatically exist at one remove from EU law, at least in the short-to-medium term.[45] It is a point that can be developed with reference to: (a) The European Union (Withdrawal) Act 2018; and (b) common law fundamental rights.

3.1. The European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 is the key piece of legislation governing the domestic law effects of Brexit (it is to read alongside related legislation in areas that include customs, trade, and immigration, as well as the EU-UK Withdrawal Agreement that has effect in domestic law under the European Union (Withdrawal Agreement) Act 2020).[46] While the

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[42] See n. 2 above.

[43] See, as regards common law rights, e.g., *Re Moohan* [2014] UKSC 67, [2015] AC 901, 925, para. 35, Lord Hodge. And on the implications of devolution, see, e.g., *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, 1059-1060, paras. 118-119, Lord Thomas.

[44] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; and *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] 2 WLR 1. See further G. Anthony, *Brexit and Devolution*, in S. Kadelbach (ed.), *Brexit – and What it Means* (2019), 68-75.

[45] See further G. Anthony, *Brexit and the Common Law Constitution*, 24 EPL 673 (2018), from which the following paragraphs borrow.

[46] On the legislation that was to be introduced, see the text of the Queen's Speech 2017, available at *https://www.gov.uk/government/speeches/queens-speech-2017*. The Withdrawal Agreement – formally Agreement on the withdrawal of the [United Kingdom] from the European Union and the European Atomic Energy Community of 19 October 2019 – is available at

Act is of considerable complexity – there were many amendments to it as it passed through Parliament – it provides for three main constitutional outcomes. The first is the repeal of the European Communities Act 1972, which had given effect to the obligations of EU membership and had been central to the House of Lord's reasoning in *Factortame* and subsequent case law. The repeal of the 1972 Act happened on 31 January 2020 and, whilst EU law will continue to apply in domestic law until 31 December 2020[47], repeal will bring to an end free movement rights as well as obligations in relation to, *inter alia*, the Charter of Fundamental Rights and the jurisdiction of the Court of Justice.[48] The second outcome is the retention, in force, of a wide range of EU law measures which are known as "retained EU law" and which will be subject to the exclusive jurisdiction of the UK courts.[49] As was also noted in the Introduction, this category of law has been created for reasons of legal certainty, although leading members of the judiciary have expressed concern about how their role may be politicised by having to read retained EU law in the light of the body of EU law that preceded it.[50] This is a criticism of section 5 of the Act, which provides that the supremacy doctrine will not apply to any enactment or rule of law passed or made on or after "exit day", but which gives the doctrine a residual role in relation to the interpretation of legislation that pre-dates – and in some instances post-dates – Brexit.[51] The third outcome is the possibility

https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration.

[47] Article 126 of the Withdrawal Agreement; and European Union (Withdrawal Agreement) Act 2020, s. 1.

[48] Sections 1 and 5.

[49] Sections 2-7.

[50] *Lady Hale outlines concerns with language of Brexit bill*, Irish Legal News (March 22, 2018), available at *http://www.irishlegal.com/11809/lady-hale-outlines-concerns-language-brexit-bill/*.

[51] The relevant parts of section 5 read: "(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day. (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day. (3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day

for the body of "retained EU law" to be changed incrementally in accordance with domestic political preferences, whether at the central and/or at the devolved levels. This is an issue that has since given rise to difficult constitutional questions both about relations between the UK and devolved governments – as per the Scottish case above – and about how far subordinate legislation might be used to amend primary legislation when giving effect to new policy preferences.[52]

Plainly, it would be disingenuous to say that Brexit will not result in a distinction between EU law and UK law, as the bare fact of withdrawal (of course) makes such a distinction, and there have been early political statements about the creation of a very different regulatory regime in the UK.[53] However, it is equally true that the European Union (Withdrawal) Act 2018 has placed UK courts in a circumstance whereby they must now use the "economy of the common law" to reconcile past and emerging constitutional realities. While it is possible that some judges would seek to draw a bright line distinction between EU law and domestic law – there are authorities from the time of membership that would support such an approach[54] – other judges might be expected to adopt a fluid approach to the overlap of norms under the European Union (Withdrawal) Act 2018. For instance, in the field of non-discrimination law – where EU law has historically underpinned domestic measures on, among other things, gender, sexual orientation, race and religion[55] – there may be pragmatic and prudential reasons for regarding post-Brexit Court of Justice rulings as (strong) persuasive authorities. Such reasons start with the fact that courts and tribunals may be faced with questions

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of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification".

[52] Sections 8-12. For the Scottish case, see n. 44 above; and for some of the issues around the use of subordinate legislation, see *The Great Repeal Bill and Delegated Powers*, HL Paper 123 (2017).

[53] *Boris Johnson vows "no alignment" with European in post-Brexit Trade deal*, *PoliticsHome* (February 2, 2020), available at *https://www.politicshome.com/news/uk/political-parties/conservative-party/boris-johnson/news/109558/boris-johnson-vows-no*.

[54] See, e.g., *R v Ministry of Agriculture, Fisheries and Food, ex p First City Trading Ltd* [1997] 1 CMLR 250 (cf. *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400).

[55] For the applicable regimes, see K. Monaghan, *Equality Law*, 2nd ed. (2013).

about the historical and purposive interpretation of the new "retained EU law" measures, where it may be false to attempt to answer such questions without considering the Court of Justice's developing case law on the relevant EU rules. Relevant, too, may be the idea of a "confluence" of legal norms, as questions about anti-discrimination law may overlap with questions about Article 14 ECHR and the case law of the Strasbourg Court.[56]

Another area in which there may be scope for a continued overlap of norms – here, between domestic law, EU law and international law – is the environment.[57] The most prominent example is the Aarhus Convention that has been signed by both the UK and EU, which imposes public interest obligations in relation to access to information, public participation in decision-making, and access to justice.[58] The Aarhus Convention has effect in UK law primarily under legislation that implements a range of corresponding EU Directives and in respect to which the Court of Justice has already delivered a number of significant rulings.[59] One such ruling was in the *Edwards* case on protective costs orders, which followed a Supreme Court reference on the meaning of "prohibitively expensive" for the purposes of the Aarhus Convention's requirements about access to justice.[60] The subsequent ruling of the Court of Justice was relevant not just to the UK's obligations under EU law but also under the Aarhus Convention itself, where a Compliance Committee can assess

[56] For the overlap, albeit in a case in which the court did not need to go on to consider Article 14 ECHR, see *Walker v Innospec Ltd* [2017] UKSC, [2017] 1 ICR 1077, para. 16.

[57] See G. Anthony, *Public Interest and the Three Dimensions of Judicial Review*, 64 NILQ 125 (2013).

[58] The text of the Convention is available at *https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention.html*.

[59] On the legal framework in domestic law, see C. Banner (ed.), *The Aarhus Convention: A Guide for UK Lawyers* (2015), chs. 2-5.

[60] *R (Edwards) v Environment Agency (No 2)* [2010] UKSC 57, [2011] 1 WLR 79; Case C-260/11, *R (Edwards) v Environment Agency* [2013] 1 WLR 2914; and article 10a of Council Directive 85/337/EEC and article 15a of Council Directive 96/61/EC, as read with article 9.4 of the Aarhus Convention. And see, subsequently, *R (Edwards) v Environment Agency* [2013] UKSC 78, [2014] 1 WLR 55.

complaints about breaches by a signatory party.[61] While it would be overly simplistic to expect that the UK courts would or should always follow future Court of Justice rulings on the Aarhus Convention – aspects of the EU legal order itself have been said to breach the Convention[62] – a decision to ignore the Court of Justice's post-Brexit case law may equally be misguided. Environmental protection is, after all, an unavoidably shared endeavour, and courts can always learn from one another in such contexts.[63]

3.2. Common law constitutional rights

The area of common law constitutional rights provides yet another example of where confluence has occurred and where it may continue to occur in the future. Such rights might best be described as unwritten guarantees that have been recognised by the courts (in some instances) for centuries and which have become increasingly prominent in case law since the 1980s.[64] Although it has been doubted whether such rights can truly be described as constitutional in nature,[65] it is axiomatic that the common law offers protection to, amongst others, the right to life, freedom of expression, the right to liberty, and the right of access to justice (as in *Unison*, above).[66] When doing so, the courts have previously said that they may be willing to review even an Act of the Westminster Parliament for compliance with such rights,

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[61] On the Committee, see *http://www.unece.org/env/pp/ccbackground.html*; and M. Macchia, *Legality: The Aarhus Convention and the Compliance Committee*, in S. Cassese, B. Carotti, L. Casini, E. Cavalieri, E. MacDonald (eds.), *Global Administrative Law: The Casebook*, 3rd ed (2012), ch. III.A.1.

[62] See J.A. Campos, *EU violating the Aarhus Convention: Public right to access to justice not yet assured*, at *https://www.clientearth.org/eu-violating-aarhus-convention-public-right-access-justice-yet-assured/*.

[63] For the wider dynamics of such borrowing, see S. Choudry (ed.), *The Migration of Constitutional Ideas* (2009).

[64] For an extra-judicial account, see S. Sedley, *Lions Under the Throne* (2015).

[65] See B. Dickson, *Human Rights and the United Kingdom Supreme Court* (2013), ch. 1; and, e.g., *Watkins v Home Office* [2006] UKHL 17, [2006] 2 AC 395, 411ff, Lord Rodger.

[66] See, respectively, *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514; *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696; *R (Lumba) v Home Secretary* [2011] UKSC 12, [2012] 1 AC 245; and *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

albeit no such review has actually happened and the Brexit case law would now cast doubt on the force of such statements. In reality, the protection of common law rights has thus taken form in a "legality principle" that requires the Westminster Parliament to use either express words to override common law rights or words which have that effect by necessary implication (again, as in *Unison*, above).[67] The approach of the courts has also been aligned to a principle of "anxious scrutiny" whereby administrative decisions that interfere with common law rights can be subject to a form of proportionality review.[68]

Such developments in the law have sometimes occurred on the basis of the common law's own internal dynamism, and case law has continued to note the importance of that means of development.[69] Certainly, from an historical perspective, it can be said that the common law has existed on its own continuum so that, for instance, its right to a fair hearing has evolved into a common law right of access to justice.[70] However, in making such adaptations, whether they relate to access to justice or to other rights, the common law has been influenced by external standards that have included EU law (*Uniplex*, *EOC*, etc) and the ECHR.[71] While it is true, in terms of the ECHR, that the courts have not always followed rulings of the Strasbourg Court,[72] they have

[67] *R v Home Secretary, ex p Simms* [2000] 2 AC 115, 131, Lord Hoffmann; and, e.g., *Ahmed v HM Treasury* [2010] UKSC 2 & 5, [2010] 2 AC 534, and *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

[68] *Pham v Secretary of State for Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, 1628-1630, Lord Reed. However, it has to be noted that there continues to be doubt about the precise status of the proportionality principle in domestic law: see *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355.

[69] Notably, in the following decisions: *Re Reilly's Application* [2013] UKSC 61, [2014] AC 1115; *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455; and *A v BBC* [2014] UKSC 25, [2015] AC 588.

[70] P. Leyland, G. Anthony, *Textbook on Administrative Law*, 8th ed. (2016) ch. 17.

[71] See M. Amos, *Human Rights Law*, cit. at 26; and T. Hickman, *Public Law After the Human Rights Act* (2010).

[72] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, 125, Lord Neuberger; and, e.g., *Poshteh v Kensington and Chelsea LBC* [2017] UKSC 36, [2017] AC 624. It has been said that the courts have been involved in a process of "constructive dialogue" with the ECtHR, on which idea, see A. Young, *Democratic Dialogue and the Constitution* (2017), esp. ch. 8.

nevertheless allowed ECHR case law to permeate the common law and even to give rise to new domestic causes of action.[73] When doing so, the courts have sometimes examined the reach of rights with reference to the Charter of Fundamental Rights, which has been referenced both on a free-standing basis and as a correlate of the ECHR.[74] References have also been made to unincorporated international law, where treaties have been used as aids to statutory interpretation and to the development of the common law, and where customary international law has been said to exist as a part of the common law itself.[75]

In broad terms, Brexit should do little to complicate this overlap of standards. While the European Union (Withdrawal) Act 2018 provides that the Charter of Fundamental Rights is no longer enforceable in the UK courts – there have also been political debates about the future position of the Human Rights Act 1998[76] – there is nothing to suggest that further changes to the UK's human rights framework are imminent. Indeed, on the assumption that the Human Rights Act 1998 will remain in force for the foreseeable future, there will continue to be scope for European influences either directly through the ECHR and/or indirectly through the Charter of Fundamental Rights (whether as considered by the Strasbourg Court and/or as "persuasive" authorities within the common law tradition). Looking forward, the real challenge in terms of rights may therefore not crystallise until (if?) further political steps are taken to close-off domestic law

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[73] E.g., the misuse of private information: see *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [2004] 2 AC 457; and *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081.

[74] See, e.g., *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55, [2012] 1 WLR 3333; and *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271.

[75] On treaties, see, e.g., *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, 993, para. 27, Lord Hoffmann; on customary international law, see, e.g., *Keyu v Secretary of State for Foreign Affairs* [2015] UKSC 69, [2016] AC 1355, 1411-1414, Lord Mance. See, also, *Benkharbouche*, cit. at 41.

[76] See, e.g., *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws*, available at *https://www.conservatives.com/~/media/files/.../human_rights.pdf*. For some constitutional questions, see H. Mountfield QC, *Beyond Brexit: What does Miller Mean for the UK's Power to Make and Break International Obligations?* 22 JR 143 (2017).

from European human rights influences. Should that happen, there may well be questions about whether the UK would be in breach of its international obligations, as the EU-UK Withdrawal Agreement contains commitments about the role that the ECHR plays in the particular context of Northern Ireland.[77] However, for the common law, which has done so much to absorb European standards, the more pressing matter may be how to continue to develop rights in a progressive, rather than regressive, manner. While one way of doing so may be to draw more immediately on the comparative experience of other common law systems, international law – both in the form of treaty law and customary international law – may also become increasingly influential.[78] Were that to happen, it might be that the common law would merely have replaced one set of "external" norms for another, and continued to develop Bingham's "substantive" / "thick" conception of the rule of law.

4. Conclusion

Such comments are, however, speculative, and the courts may not need to engage in much re-engineering of, what is sometimes called, "the common law constitution".[79] While Brexit undoubtedly represents a fundamental legal and political change, the avoidance of a "no-deal Brexit", coupled with the stated intention to have close EU-UK relations in the future, means that withdrawal may not be so fractious as it may otherwise have been.[80] For the rule of law doctrine, this is important in so far as

[77] See Ireland-Northern Ireland Protocol, esp. Article 2. For some of the complexities, here developed with reference to the previous draft Withdrawal Agreement, see C. McCrudden, *Brexit, Rights and the Ireland-Northern Ireland Protocol to the Withdrawal Agreement* (British Academy, 2018), available at *https://www.thebritishacademy.ac.uk/publications/europe-futures-brexit-rights-ireland-northern-ireland-protocol-withdrawal-agreement*.

[78] For possibilities in this regard, see C. Harlow, *Export, Import: The Ebb and Flow of English Public Law*, PL 240 (2000) and D. Feldman, *The Internationalisation of Public Law*, cit. at 20.

[79] See J. Laws, *The Common Law Constitution*, cit. at 9.

[80] See *Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom* (October 19, 2019), available at *https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration*.

legal disputes often have a political context that lends legitimacy and significance to the judgments of the courts. Where that context is defined by necessary and desirable linkages between legal orders and political systems, it is much easier for the rule of law doctrine to be grounded in domestic principle and to absorb external norms.[81] If Brexit ultimately recasts rather that rejects that reality, the economy of the common law may need to do little to protect the rule of law.

5. Postscript – the United Kingdom Internal Market Bill

Since this article was submitted for publication, there has been a high-profile dispute between the UK government and the EU-27 about trading relations after the transition period has ended. The dispute has centred on a Bill that was introduced in Parliament which includes clauses that would give UK government Ministers the power to act in contravention of the Withdrawal Agreement, in particular as relates to the Ireland-Northern Ireland Protocol. In an astonishing turn of events, a UK government Minister acknowledged in Parliament that the Bill would contravene international law but that this was necessary to allow Ministers to protect the integrity of the UK's internal market. In corresponding political debates, it was said that this would undermine the rule of law and amount to an act of bad faith on the part of the UK government. Nevertheless, it appears at the time of writing that the Bill will enter into law, albeit that the disputed powers will be exercisable only with prior Parliamentary approval.[82]

The fact of this Bill does not unsettle the argument that has been made above. It does, however, bring into sharp focus the potential legal consequences of the doctrine of Parliamentary sovereignty that has been reinvigorated by the Brexit case law. In short, the UK government has mobilised the doctrine in a way that gives the domestic legal order clear ascendancy over the international order. When doing so, the government has included within the Bill provisions that seek to limit the scope for judicial

[81] For such linkages, see J.B. Auby, *Globalisation, Law and the State* (2016).

[82] For commentary on the Bill and associated issues visit: https://publiclawforeveryone.com/.

review of exercises of the relevant Ministerial powers. While it remains to be seen whether those powers will ever be exercised in practice – an agreement on future trading relations would denude them of relevance – they present a potentially very real challenge to the rule of law doctrine in UK law. In the event that an exercise of the contested powers comes before the courts, it is to be hoped that any subsequent ruling would be able to reinforce the rule of law as "the ultimate controlling factor on which our constitution is based".[83]

[83] *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 304, para. 107, Lord Hope.

THE RULE OF LAW AND TAX LAW: THE CASE OF THE ABUSE OF LAW

*Stefano Dorigo**

Abstract

The rule of law is in crisis, both in civil and public law matters. "Formal" law is loosing its prevalence and interpretative activity is becoming more relevant for the identification of the applicable discipline. Such phenomenon is expanding also in tax law, thus eroding the principle of reserve of law. The article analyses the crisis of the rule of law in tax law, focusing on the case of abuse of law/tax avoidance in the Italian tax legal system. That case highlights the growing importance of the courts as well as of the s.c. "technocracy" in shaping the content of the law in this field. Moreover, international soft law -albeit not binding- is often used as interpretative reference, showing its strong capability of directing national legal systems in their regulatory and tax policy choices. The whole picture becoming uncertain, the parties (tax administration and taxpayers) seem willing to replace the traditional rule of law with a rule of agreement, stemming from a coordinated and agreed interpretation and application of the law. In any case, the new environment urges for specific training for tax judges to overcome their scarce propensity to apply broadly values and principles developed at supranational level.

TABLE OF CONTENTS

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1. Introduction: the rule of law and its current crisis

The rule of law has been defined as "elusive"[1]. In fact, it seems difficult to precisely circumscribe its essential characteristics, which depend on the context and historical period to which reference is made. Moreover, its origin in common law systems indicates that we are in front of a changing concept, which has undergone and still undergoes processes of enrichment and delimitation by administrative practice and jurisprudence. For a tax law scholar, who certainly does not aspire to venture into a field for which he does not have the necessary expertise, a summary can, however, be attempted for the sole purpose of the present analysis.

One can say that the rule of law is primarily an instrument which, through the prevalence of formal law (that is, the law approved and enacted by the Parliament), offers protection to the individual from a dual perspective. First, by giving him the rules of conduct capable of guiding his choices, guaranteeing certainty of the relative consequences and thus protecting legitimate expectations. Secondly, by limiting the arbitrariness of the executive power, in particular by requiring the public administration to act in compliance with the legal rules and the rights of the individual[2].

The picture is then necessarily completed by the presence of an efficient and autonomous judicial apparatus which, in compliance with the principle of separation of powers, can monitor the administration's respect for the limits of its prerogatives and offer the individual effective protection in case of violation of his/her rights[3].

Today, it is widely believed that the described concept is now largely in crisis. The main reason is the downsizing of the

[1] See B. Tamanaha, *The Rule of Law: An Elusive Concept?*, in G. Palombella, N. Walker (eds.), *Relocating the Rule of Law* 3 (2009).

[2] Those features are emphasized by S. Civitarese Matteucci, *Il significato formale dell'ideale del "governo delle leggi" (rule of law)*, *Diritto amministrativo* 29 (2011). According to the classical doctrine, the rule of law requires "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power": A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 202 (1965).

[3] An author has highlighted the link between our legal system and those of Anglo-Saxon tradition, whereas the former is growingly oriented towards a recognition of the creative role by the judicial power: S. Cassese, *Le basi costituzionali*, in S. Cassese (ed.), *Trattato di diritto amministrativo*, I, *Diritto amministrativo generale*, 202, 204 (2000).

role of formal law as the prevailing source in the regulation of the relationship between individuals and authorities. This situation has long been grasped by civilistic doctrine, which recognizes - without however manifesting a particular unease – that today the law shall not be identified with written law[4]. The latter is flanked by other types of regulation, which do not stem from institutions having democratic representativeness, but which are particularly effective in practice, since they result from the work of entities showing a high technical preparation. Therefore, the role of the legislator is weakened, while the activity of the interpreter - particularly the judge – is enriched by new functions, particularly that of composing the rule, adapting it to the context of the time and place in which it has to be applied. For private law scholars, as mentioned, no specific problems arise, since we remain in the context of relations between private individuals, characterised by the freedom of the parties and their substantial equality[5].

The position of public law scholars is more controversial. In the context of relations governed by public law, in fact, the equality between the parties is generally lacking and the need for a guarantee of the private one (which is implicit in the rule of law) appears particularly pressing in order to avoid the arbitrariness of the public administration and the consequent compression of individual rights. In front of the widespread awareness that written law now plays a recessive role, there is no unanimity of opinion on the consequences that may arise. Someone notes that the crisis of written law is inevitable in the light of the new paradigm of constitutional democracy, which imposes a dynamic vision of the relationship between the legislator and the interpreter, based on dialogue and on the need for the latter to guarantee the correct application of the norm in each single case[6].

[4] An author notes that ñil diritto non si identifica più univocamente con la leggeò: M. Franzoni, *Diritto, processo e precedente giudiziario*, *Politica del diritto* 415 (2013).

[5] It has been stated that ñil diritto applicato in base a regole e principi concorre sempre più con la funzione legislativa non fosse altro perché i diritti e le tutele devono essere ricercate, in via interpretativa, in un sistema plurale di fonti dove sono centrali la Costituzione e le Carte europee e sovranazionaliò: G. Vettori, *La giurisprudenza come fonte del diritto privato*, *Persona e mercato* 137 (2016).

[6] That is the position held by M. Fioravanti, *La Corte e la costruzione della democrazia costituzionale. Per i sessantôanni della Corte Costituzionale*, 28 April 2016, in *cortecostituzionale.it*.

Others, on the other hand, argue that the restriction of the role of the legislator and the extension of that of the interpreter with regard to rules often formulated in vague terms make the choices of conduct by the individuals more complex, strengthen the discretion of the public administration and contradict the democratic principle[7]. The prevailing role of the judiciary, therefore, risks to be problematic, since the *jurisdictio* is not always neutral, but tends to place itself in conformity to the wave (political and ideological) of the times[8], and in so doing it puts even more in crisis the pursuit of the goals of protection proper to a genuine rule of law. It can happen that the judiuciary either stands in contrast with the *gubernaculum* (as recent experiences in some Eastern European countries shows[9]) or flattens out on positions more or less in line with the dominant interests.

The picture appears, therefore, fragmented, especially in the analysis of the possible outcomes of an assumption that, instead, is almost unanimously accepted: that of the disappearance of the prevalence of the law and the simultaneous affirmation of a strong role of the interpretative activity.

2. The practice in tax law: the case of abuse of law

The question now is whether similar considerations apply also in the field of tax law. In this context, the situation appears even more delicate, since - in the Italian Constitution, but not only – the reserve of law requires that the legislator, national or regional, regulates the essential elements of the tax case (subjects, taxable facts, tax base). Indeed, it can be said that in tax law the analysis of the rule of law and its features has always been made precisely making reference to the reserve of law.

[7] See L. Vespignani, *Lo óstranoô mondo di Mr. Rule of Law. Le varie facce del rule of law nelle trasformazioni dello Stato contemporaneo*, *Diritto e questioni pubbliche* 467 (2017).

[8] The same concept could be expressed by saying that the judge is often driven by the aim to guarantee specific social values: and one knows that these values can reflect the prevailing political and ideological orientations.

[9] One can recall the passionate analysis made by M. Cartabia, *The Rule of Law and the Role of Courts*, *Italian Journal of Public Law* 1 (2018), where she writes that ñunexpectedly powerful leaders supported by strong majorities have dismantled all restraints; the separation of powers has been eroded and the rule of law, as well as judicial independence, are under attackò.

In recent years this issue - especially from the point of view of the certainty of the rule and therefore of the taxpayer's trust - has been the subject of many and not entirely univocal reflections. The reasons for this renewed interest in a rule (art. 23 of the Italian Constitution) that even in the debates of the Constituent Assembly received little interest are manifold: on the one hand, the global crisis and the growing interest in combating the abuses of multinationals, which are based on a rigidly formalistic application of the rule laid down by law; on the other hand, on the internal level, the hypertrophy and slowness of tax legislation and its often twisted formulation[10]. In front of these situations, the law loses its centrality to the advantage of other forms of regulatory production that lack many of the corollaries typical of the reserve of law.

Given the deep public and constitutional roots of tax law, that evolution raises at least two highly problematic issues: a metamorphosis of the system of sources, in the sense that the law becomes somewhat secondary; and a change in the role of the various actors involved (legislator, tax administration and taxpayer, especially if a multinational company). One should therefore question the continuing relevance of the reserve of law under art. 23 of the Constitution.

Such a process and its uncertain implications can be illustrated making reference to the case of abuse of law/tax avoidance in the Italian tax legal system[11].

Here, in fact, we have passed from a broad but specific rule (art. 37-bis of Presidential Decree 600/1973, which limited the elusion only to those cases listed exhaustively by the legislator); to an extension of its boundaries made by the jurisprudence, particularly that of the Court of Cassation which first recalled the prohibition of abuse under the EU law and then enhanced the preceptive function of art. 53 of the Constitution; until the

[10] R. Cordeiro Guerra, *Crisi della fattispecie, fonti multilivello e ruolo del giudice: il caso del diritto tributario*, *Rassegna tributaria* 265 (2019) observed that ñspesso gli interventi normativi sono tardivi, di pessima qualità e perciò tali da creare più problemi di quanti ne risolvonoò.

[11] See, *inter alia*, F. Gallo, *Lôabuso del diritto in materia fiscale nellôevoluzione della giurisprudenza della Corte di Cassazione*, *Rassegna tributaria* 849 (2016); and L. Del Federico, E. Traversa, *Il nuovo regime punitivo dellôabuso del diritto in materia tributaria: disciplina nazionale e quadro europeo*, *Rivista trimestrale di diritto tributario* 597 (2017).

formulation of European and international guidelines (especially by the OECD) on the need to introduce general anti-abuse regulations to combat the BEPS phenomena, which inspired and drove the intervention of our legislator, after the law of delegation of 2014, with the codification in a positive norm (art. 10-bis of the Statute of the taxpayer's rights) of jurisprudential guidelines and of other sources extraneous to the positive internal system[12].

We have therefore witnessed a sort of circular path: from a specific norm (art. 37-bis) we finally arrive at another norm (art. 10-bis), but in the middle there is a sort of cataclysm for the way in which the content of the discipline is established. In fact, there is a progressive and evident loss of relevance of the role of the legislator in defining what the abuse of law is: the latter in fact conforms more or less passively to the previous jurisprudence of the Supreme Court as well as to international soft law (among other things without even hiding this influence, as evidenced by the wording of the law of delegation). Therefore, at the end of the path and albeit the presence of a written rule, it seems that the respect of Art. 23 of the Constitution is only formal, since the content of that rule is thought of elsewhere, certainly outside the usual representative channels[13].

What emerges from the case of abuse of tax law is, therefore, twofold: the growing importance of living law (*diritto vivente*), which comes from the law in action of the courts and which here influences the normative activity of the legislator; and the relevance of the so called "technocracy", whereby the content of the law is in some way predetermined in assemblies where the rate of technical competence is high but the profile of democratic legitimacy and control is equally nuanced[14].

[12] A thorough analysis of the evolution of the concept of tax avoidance in the Italian legal system can be found in G. Ingrao, *L'evoluzione dell'abuso del diritto in materia tributaria: un approdo con più luci che ombre*, *Diritto e pratica tributaria* 1433 (2016).

[13] See again, in that sense, R. Cordeiro Guerra, cit. at 10, 268, who refers to a written law "meramente riproduttiva di contenuti altrove pensati e progettati".

[14] The various characters of the new phenomenon of external influences on the works of national Parliaments has been analysed by P. Pistone, *I limiti esterni alla sovranità tributaria statale nell'era del diritto globale*, in C. Glendi, G. Corasaniti, C. Corrado Oliva, P.G. De' Capitani di Vimercate (eds.), *Per un nuovo ordinamento tributario. Contributi coordinati da Victor Uckmar in occasione dei novant'anni di Diritto e pratica tributaria* 655 (2019).

A last controversial issue needs to be highlighted with regard the process which led to the final formulation of the rule concerning the abuse of tax law. Art. 10-bis -as well as all GAARs- is a vague, evaluative norm, full of open concepts[15]; it therefore leaves to the interpreter, and first of all to the tax administration, the power to fill in its content in each specific case. Of course, it's normal that every legal norm has a component of uncertainty, in which the interpreter is called to work; however, in the general anti-abuse norms uncertainty - what a author calls "penumbra"[16] - is certainly prevalent. Therefore, the concrete application of the rule is delegated (mainly) to the tax office and realizes a real integration of the taxable facts[17]. The concretization of the general rule requires that a gap be identified, not formal but axiological[18], through a creative activity strongly characterized in ethical terms. As if to say, it is a fight against abuse even beyond the limits of the positive rule because it is right (value judgment) that the balance between the cunning taxpayer (who is usually the richest) and the honest one be restored. As a consequence, the risk of arbitrariness becomes concrete and the uncertainty for the taxpayer increases[19].

3. Other "clues" of the crisis of the reserve of law in tax law.

What has been highlighted in the previous paragraph with regard the abuse of law/tax avoidance shows that in that field the reserve of law is experiencing a clear downsizing. It is now necessary to investigate whether this is an isolated case or whether other cases can confirm the same evolution.

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[15] See F. Montanari, *Diritto giurisprudenziale, contrasto ai comportamenti abusivi e certezza nei rapporti tributari*, *Rivista di diritto tributario* 211, 227 (2019), who observes that ñla caratteristica preponderante di tutte le clausole generali sia proprio quella della indeterminatezza, anche dal punto di vista semanticoò.

[16] The expression has been used by H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harvard Law Review* 593 (1958).

[17] That is the correct opinion by V. Ficari, *Clausola generale antielusiva, art. 53 della Costituzione e regole giurisprudenziali*, *Rassegna tributaria* 389 (2009) who however explicitly recall the previous position held by A. Fedele, *La riserva di legge*, in A. Amatucci (directed by), I *Trattato di diritto tributario* 192 (1994).

[18] G. Fransoni, *Appunti su abuso del diritto e óvalide ragioni economicheô*, *Rassegna tributaria* 932 (2010).

[19] Those possible consequences are highlighted by F. Benatti, *Norme aperte e limiti al potere del giudice*, in *Europa e diritto privato* 19 (2013).

This principle of the reserve of law has ancient roots, dating back to the American Revolution and the established rule of "no taxation without representation". It has always represented, together with the right to self-imposition, the foundation of the democratic system based on the separation of powers and the guarantee of limits to the obligation for everyone to contribute to public expenditures[20].

The reserve of law had at its roots a guarantor function: to stem the power of the executive (first the sovereign and then the majority expressing the government), ensuring that the provision of assets imposed is determined according to the logic of the democratic principle (no taxation without representation). This *ratio* is consistent with nineteenth-century liberalism and has remained so even when the reserve of law has been combined with the need for certainty, guaranteed by the law that is capable of offering effective guidance to the conduct of individuals. Here, too, the liberal imprint of the protection of the individual sphere of proprietary rights prevails.

Such an arrangement entered in crisis, in the tax field, for at least two reasons: the awareness that legislation is too slow compared to the rapid change in practice and is often technically inadequate[21]; above all, the perception that this misalignment generates damage and inefficiency both for the country-system as a whole (in terms of foreign investment and its attractiveness) and even more for social balance, social rights, *welfare* and the redistribution of wealth.

The case of tax abuse/avoidance by multinational enterprises is the mirror of this situation: formal respect for written law, a practice that goes fast and that exploits the gaps in the legislation without violating it directly, creation of monopolies, deepening of economic inequalities, drainage of public resources at the expense of social policies, already

[20] The topic of the reserve of law under art. 23 of the Constitution has been deeply explored by scholars. One can make reference, as examples, to S. Cipollina, *La riserva di legge in materia fiscale nellôevoluzione della giurisprudenza costituzionale*, in L. Perrone, C. Berliri (eds.), *Diritto tributario e Corte costituzionale* 163 (2006); and A. Fedele, cit. at 17, 157.

[21] One author speaks about the ñdiscredito della leggeò, in front of which the role of courts becomes the tool to give the rules a practical and comprehensible meaning: A. Giovannini, *Certezza del diritto in materia tributaria: il ruolo della giurisprudenza*, *Innovazione e diritto* 6, 13 (2014).

shrinking as a result of the global crisis. Hence the reaction of the legal system, which, however, takes place largely outside the legislative channels, recalling general principles or formulating value judgments. In short, the need for "substantial justice" prevails, even if this objective is in conflict with the reserve of law[22].

This reference seems sufficient to realise how tax law is the emblem of an ongoing revolution both in the reconstruction of sources and in the argumentative method of jurisprudence. It is therefore necessary to analyse the causes of this phenomenon elsewhere. In addition to what has been said in general in the previous paragraph, it seems that the particular importance that "living law" takes on in tax law can be traced back to two phenomena: the first of a more formal nature, the second of a philosophical nature.

First of all, the influence of supranational sources in tax law appears even more marked than in other jurisdictional contexts.

The case law of the EU Court of Justice and the European Court of Human Rights has a very specific relevance in tax matters. This is due to the fact that neither the EU Treaties nor the ECHR have any direct relevance to tax law. It has therefore been the case law of the courts within their respective systems that over time has developed principles and rules that are also intended to apply to States member of the EU or part of the ECHR. This phenomenon of jurisprudential extension of the scope of supranational rules also to the field of taxation is particularly evident in relation to the experience of the European Union, where one can correctly speaks about a "negative harmonisation" in the field of direct taxation[23]: where the procedures for creating rules cannot operate, because of the obstacles placed by the Member States in a system characterised by the need for unanimity, case law intervenes, which - while resolving specific cases - is able to guide the conduct of national legislators and therefore of interpreters.

[22] The interpretation of the jurisprudence of the Supreme Court in term of the affirmation of a principle of substantive justice (*giustizia sostanziale*) has been proposed by G. Ingrao, cit. at 12, 1443.

[23] For an analysis of the preminent role of the EU Court of Justice in the field of direct taxation, see S. Dorigo, *Il diritto tributario nell'Unione europea*, in R. Cordeiro Guerra (ed.), *Diritto tributario internazionale. Istituzioni* 185 (2016).

However, the ECtHR, which, particularly with regard to the rights of taxpayers, has also reached not dissimilar points, has drawn up a set of rules and principles intended to apply in national legislation even if they conflict with specific legislative provisions[24].

The resulting situation is therefore peculiar. The tax case will in fact find its discipline in the internal rules but in so far as they are shaped, inter alia, by European or conventional legal interpretations. The "dialogue between the courts", repeatedly evoked by the interpreters as the inevitable peculiarity of our legal time, thus articulates the path of reconstruction of the legal norm, fragments it and makes it apparently problematic.

The second profile is, as mentioned, philosophical. In times of economic crisis - as we have been experiencing for almost a decade now - it is the jurisprudence that is in charge of adapting the rigid system of rules to the changed economic and social needs. The legislator often appears prisoner of its own procedures full of compromises and cross vetoes and is often unable to intercept these needs quickly, as would be appropriate. Judges, who live the law in action, interpret what is perceived as common sense and bend the interpretation and application of the rules to it, resorting - where they do not allow such manipulation - to the vent of general or immanent principles. These principles are always placed in a textual framework of constitutional rank, but in reality they are constructed time by time to protect subjective situations considered particularly worthy of protection. Once again, the example of the abuse of the law is enlightening: the legislator is in fact forced to follow, literally, the evolution of jurisprudence and when it resolves to intervene, it does so taking into account the landings of that jurisprudence, implicitly certifying its correctness.

There is a further aspect that appears to be relevant to investigating the matter. Here, perhaps more than in other areas of the legal system, one perceives the relevance of sources that are not such in the full sense of the term, since they do not produce

[24] As for the applicability of the ECHR to tax disputes, too, refer, with no claim of being exhaustive, to Ph. Baker, *Taxation and the European Convention of Human Rights*, 41 *European Taxation* 298 (2001); and L. Del Federico, *Tutela del contribuente ed integrazione giuridi-ca europea. Contributo allo studio della prospettiva italiana* (2010).

binding rules, but which nevertheless assume a weight that goes well beyond the strictly formal data[25]. A first example is the guidelines that international bodies draw up and suggest to Member States and beyond. In tax matters, it is mainly the OECD that elaborates these best practices and disseminates them, in an attempt to guide the conduct of States: the BEPS project, which aims to identify the main tax-damaging conduct of multinational groups and to propose to States the adoption of measures to combat it adequately, is made by non-binding indications, but the success of the final elaborations disseminated by the OECD in 2015 shows that national laws are prepared to refer to rules perceived as authoritative beyond the existence of a legal obligation to do so[26].

We are therefore witnessing a situation in which the traditional sources of law gradually lose their prevalence, to the advantage of forms of soft law, enclosed in instruments which are not formally binding but which, due to their particular authoritativeness, are capable of directing the national legal systems in their regulatory and tax policy choices. The phenomenon is not new in the context of international tax law[27], however in recent times - and in particular after the global economic crisis - there has been a real proliferation of such interventions without the traditional characteristics of coercion.

Within the European Union, too, this phenomenon is becoming increasingly common. In recent years, in fact, the Commission has taken action by adopting a series of communications, non-binding acts with the aim of offering the Member States some guidelines, drawn from the interpretation of the arrests of the EU Court of Justice, on some of the most controversial issues of direct taxation relating to transnational

[25] See again R. Cordeiro Guerra, cit. at 10, 267, who recognizes that ñle disposizioni domestiche in campo fiscale non solo perseguono lôadeguamento a fonti sovranazionali vincolanti, ma sempre più di frequente recepiscono raccomandazioni, pareri ed in generale atti di soft law che in tal modo acquisiscono in fatto una rilevanza che non avrebbero in dirittoò.

[26] See F. Amatucci, *Lôadeguamento dellôordinamento tributario nazionale alle linee guida dellôOCSE e dellôUE in materia di lotta alla pianificazione fiscale aggressiva*, *Rivista trimestrale di diritto tributario* 3 (2015).

[27] Since the beginning of some form of international regulation in tax matters, there have appeared instruments, aiming at giving guidance to the States, which -albeit not mandatory- have become extremely important over time: just think of the OECD Model of bilateral convention against double taxation and the related commentary.

cases[28]. The attempt by the Commission is to offer authoritative, albeit not strictly binding, guidelines to the Member States, basing them, however, on the practice developed by the EU Court of Justice with regard to specific cases. Not surprisingly, those guidelines have a strong influence on the conduct of Member States, which, on the one hand, do not see themselves formally stripped of their sovereign powers in the field of direct taxation and, on the other hand, are persuaded by a discipline derived from the rulings of the EU Court of Justice.

The Italian tax legislator takes these addresses seriously. One can recall that the law of delegation n. 23/2014, in its art. 5 dedicated to the new regulation of abuse of law, included among the guiding principles those "contained in the European Commission's recommendation on aggressive tax planning no. 2012/772/EU of 6 December 2012". Then a document in itself devoid of any legal constraint for Member States is considered to be an expression of shared rules and it is attributed a mandatory effect even in the context of the constitutional procedure under Article 76 of the Constitution.

What matters is that in the context of tax law this is by no means an isolated or exceptional situation. The examples - apart from the debated issue of EU law, which is, however, becoming increasingly important in the field of taxation - could be very numerous, I will limit myself here to mention a recent case, which still shows how the legislator is lagging behind and how the heart of discipline completely escapes the hands of the internal actors.

With regard to transfer pricing, Article 110, paragraph 7, of Legislative Decree n. 917/1986 establishes the possibility for the tax authorities to adjust the price of transactions between two companies - one Italian and one foreign – part of the same group, where that price does not correspond to the free market price. It adds that by decree of the Ministry of Economy and Finance guidelines for its implementation will be established "on the basis of best international practices". So here we have a law that sets the rule, but that is basically a rule of principle (the price of intra-group transactions must be in line with that of transactions between independent companies) that leaves to a subordinated

[28] For an analysis of the practice recalled in the text, one can make reference to S. Dorigo, *Il diritto tributario nellôUnione europea*, cit. at 23 (185).

source the almost complete regulation of the institution. However, the primary source already indicates that that discipline will have to be somehow drawn elsewhere.

The ministerial decree of May 2018, which implemented the bill, significantly refers to a series of international documents which are not binding, being mere acts of soft law: OECD model, BEPS actions, OECD guidelines. Again, we are facing a rule that only apparently complies with Article 23 of the Constitution, but which in reality leaves the concrete discipline to international sources without any democratic legitimacy.

4. The changing nature of the reserve of law in tax law: crisis or opportunity?

The analysis reveals a complex but still fragmentary picture. Notwithstanding its constitutional rank, the reserve of law is weakening for at least two reasons: the legislator is increasingly inspired by the guidelines of international practice, even if they are not binding; the sources of international soft law are increasingly gaining relevance for the regulation of specific cases. As a logic consequence, the central role of the interpreter, be it the public administration or the judge, emerges, thus producing non-secondary effects: technical competence is considered more reliable than democratic representativeness; the choices for the taxpayer become uncertain; the financial administration, unbound by the limits deriving from formal law, acquires a very wide margin of discretion. At the same time, the attribution of a decisive role to the judiciary – which would be positive in abstract terms for the re-establishment of a balance - does not seem able to adequately protect a genuine rule of law in concrete, since -as mentioned- it is often flattened on the positions of the executive, especially in times of economic crisis.

Looking at a similar scenario, one could come to the conclusion that the rule of law is in deep crisis also in the field of taxation, so that the taxpayer's subjective position is in danger. In the writer's view this is not the case and there should be no room for pessimism. There are at least two situations which deserve consideration and should lead to a different (and more optimistic) view about the survival of the rule of law (albeit in a different shape than in the past) in the tax system.

The first one concerns the correct evaluation of the way the legislator has taken inspiration for re-writing the rule about tax avoidance in the new article 10-bis of the Statute of Taxpayers' Rights. That case highlights that the principle of the reserve of law in tax matters, as it is commonly interpreted, no longer expresses a value always and in any case destined to prevail[29]. The aim of certainty for the citizen remains important, but it is still mainly placed in an individual perspective, we could say proprietary, which today has to deal with different values. Therefore, the violation of the reserve of law in some cases could be the lesser evil[30], if it realizes a better balance between the various interests involved. As an author held, art. 23 of the Constitution is based on different *rationes* (some of them unrelated to the individual sphere of ownership) and therefore postulates a graduation of its own rigidity, which is also inherent in the same nature "relative" of the reserve[31].

In the age of globalisation, of the economic crisis and of the fading of social justice systems, of the imbalances between multinational companies and normal taxpayers, the need to protect the public/herarial interest and, ultimately, the defence of a certain social structure come to the fore, suggesting the need for the individual sphere to be limited. The balancing technique is certainly not new, if we look at the role of the Constitutional Court itself[32], for example in guaranteeing a balanced application of the new Article 81 of the Constitution with respect to the safeguarding of *welfare* policies. We can then consider sacrificing a little certainty if this aims to protect the revenue and the correct redistribution of the tax burden among the affiliates[33]. Because we

[29] The fact is that the reserve of law in tax matters is always relative, therefore it allows that further values can influence the way the tax fact are intended for the purposes of the legislative discipline.

[30] As pointed out by J. Rawls, *A Theory of Justice* (1971), 242.

[31] See in that sense A. Fedele, cit. at 17, 157.

[32] The need for a balancing of conflicting values has been ofted advocated by the Italian Constitutional Court. See, in that field, A. Morrone, *Bilanciamento (giustizia costituzionale)*, *Enciclopedia del diritto ï Annali*, II, VII, 185 (2008).

[33] It has been noted that ñtax avoidance reduces the effectiveness of welfare systems, a matter that is particularly important in the light of the public perception (that is probably accurate) that most tax avoidance is perpetrated by the rich or by people who are relatively well-offò (R. Preeble, J. Preeble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?*, *Victoria University of Weelington Legal Research Papers* 21, 40 (2012).

must not forget that here we are in the context of the tax obligation, which has a connotation of solidarity and a social and redistributive function that in some way must be preserved in face of conducts that give an advantage formally unexceptionable but in substance undue[34].

It seems to me that article 10-bis realizes in that sense a good compromise: a rule in which the legislator goes as far as it can go, that is, in which the directive is inevitably flexible but not indefinite, so as to limit as far as possible the arbitrariness of the subject (the tax administration) that will have to apply it[35]. The effect is not that of introducing a "moral" evaluation by the interpreter, rather that of permitting the latter to take into consideration social values in a clearly delimited legal field of action. As correctly noted by a scholar, "*la funzione della novella, comune a qualunque clausola generale, è quella di fornire le linee guida per una applicazione prudente dell'abuso e bilanciata tra diversi valori ed esigenze dell'ordinamento*"[36].

The second scenario shows completely new characters.

The latter are linked to the emergence of a different relationship between the tax administration and the taxpayers, no longer based on the opposition between authority/subsidiarity, but regulated in a basically equal and cooperative way[37]. This is a phenomenon which - once again - has international and European roots, but which is finding an unexpected success in the Italian tax system as a result of two competing causes: the need (increased by the global economic and financial crisis) to encourage the attraction of investments into the country and, therefore, to provide instruments capable of ensuring the certainty and reliability of the relative tax treatment. Therefore, consensual forms of determination of the way of being of the tax relationship,

[34] The authors in the preceding footnote add that ñcertainty and related rule of law values are, therefore, extremely important where criminal sanctions are imposed, but are less important where the issue is tax avoidanceò (42).

[35] It has been noted, on this regard, that ñparadoxically, the proponents of a GAAR considered that it would restore the rule of lawò (P. Way, *The Rule of Law, Tax Avoidance and the GAAR*ò, *GITC Review* 79, 97 (2013). The analysis made in the present article is evidently a confirmation of such a position.

[36] Again F. Montanari, cit. at 15, 243.

[37] The evolution noted in the text above has been emphasized, as one of the main features of tax law in the new millenium, by L. Del Federico, *Autorità e consenso nell'imposizione tributaria: tributi paracommutativi e tasse facoltative*, *Ragion Pratica* 55 (2008); and F. Gallo, *Le ragioni del fisco. Etica e giustizia nella tassazione* (2007).

through which the parties identify in advance and in the reciprocal discussion the tax discipline of a certain concrete case, thus avoiding any possible litigation, are increasing in number.

This process has gone through a number of successive stages: first of all, the function of the tax administration was enhanced in order to give opinions to the taxpayer following specific requests[38]; then, the possibility of stipulating advanced agreements with reference to companies with international activities was introduced[39]; finally, the legislator provided for the possibility, for larger companies, to establish a form of cooperative compliance, allowing them to come to a situation of continuative (i.e. throughout the tax period) monitoring and agreed resolution of any critical issues with the tax administration, in exchange for the preparation of adequate tax risk management procedures by the enterprise[40].

In all these cases, but especially in the last two, a new phenomenon emerges: the parties confront each other and agree on an arrangement which - while aimed at determining the actual tax burden in accordance with the principle of the ability to pay - is in fact the result of negotiation to the extent that the uncertainties of interpretation accompanying the legislative text are overcome. The objective of certainty and predictability of the discipline is therefore achieved, allowing the taxpayer to take his investment decisions consciously; at the same time, the interests of the tax administration -although fully respected- does not prevail,

[38] I refer to the discipline of the ñinterpelliò (advanced rulings), which is now completely described in art. 11 of Law n. 212/2000 (Statute of Taxpayerôs Rights). See, inter alia, A. Viotto, *Tutela dellôaffidamento, consulenza giuridica ed interpello*, *Rivista di diritto tributario* 698 (2017).

[39] The ñdecreto internazionalizzazioneò (internationalisation decree), approved with Legislative Decree n. 147/2015, introduced the possibility for multinational enterprises to reach prior agreements wuth the tax administration by which they can know in advance - and with binding effect also for the future, unless there is a change in the factual circumstances - the way with which the latter will consider certain transactions that occur frequently in the operations of international groups. See, for details, M. Grandinetti, *Gli accordi preventivi per le imprese con attività internazionale*, *Rassegna tributaria* 660 (2017).

[40] The regime of the cooperative compliance has been introduced by Legislative Decree n. 128/2015 following the indications in the Law of Delegation n. 23/2014. On this sensitive issue, see the seminal considerations made by F. Gallo, *Brevi considerazioni sulla definizione di abuso del diritto e sul nuovo regime del c.d. adempimento collaborativo*, I *Diritto e Pratica Tributaria* 947 (2014).

since the logic of the agreement is precisely that of equalising the position of the parties involved.

Although in an unchanged constitutional and normative context, the structure being implemented in the Italian legal system seems therefore suitable to carry out the same functions as the rule of law, in some way making up for the perceived crisis of the prevalence of the written law by means of a sort of "rule of agreement".

The two scenarios, in short, show that, if the rule of law, as traditionally understood, seems to be in crisis, the system is capable to reach different forms of regulation of the conflicting interests of the public and private parties which are suitable, at least in abstract, to preserve the fundamental values that the principle is designed to guarantee.

5. The problem of judicial protection

Of course, there remains a problem, that of the trial (and, therefore, of judicial protection). Whatever road is outlined for the practical affirmation of the values underlying the rule of law, a fair and effective remedy must be made available to the taxpayer in order to protect his rights in case of violation.

It is not possible to dwell on the subject here. The inadequacies of the Italian tax process have long been highlighted[41] - as much as the lack of independence of the judge, the limits to the proofs admitted and the numerous procedural rules granting advantages to the tax administration over the taxpayer - but until now any proposed reform has never seen the light of day.

The problem is undoubtedly a general one, in the sense that it is the very structure of the tax process that seems inadequate to achieve effective protection of the subjective situations that normally underpin the principle of the rule of law. However, I would here make some reflections on the specific profile that

[41]One author has critically emphasized ñlôinadeguatezza del processo tributario di merito, disciplinato da una legislazione antiquata ed incompleta, affidato ad organi vetusti, di origine ottocentesca, composti da giudici tutti e istituzionalmente onorari e *part time*, neppure necessariamente laureati in giurisprudenza, dipendenti di una delle parti processuali, ossia del Ministero dellôeconomia e delle finanze, selezionati senza nessuna forma di concorso pubblico, proprio, invece, dellôordine giudiziarioò (A. Giovannini, cit. at 21, 15).

relates to the preparation of the judges and their lack of propensity to accept the protections and values developed at supranational level. Even if it were possible to resolve the inadequacies of the trial, the need to train the tax judge to a greater respect for supranational guidelines, which can be decisive to ensure compliance with the rule of law at the internal level, would remain alive.

It may then be wondered whether, already in the current asset of things, it is possible to identify some instrument of dialogue between national tax judges and supranational courts useful to feed the propensity of the former to achieve the objectives of a genuine rule of law, thus taking the former away from the influence by the executive power.

The answer to the question may seem obvious. In the legal system of the EU there is already the instrument of the reference for a preliminary ruling, which has been used for several decades in relation to tax disputes. In fact, it has been used so frequently that today many of the most significant decisions delivered by the CJEU concern tax issues.

With regard to the ECHR, the jurisprudence of the ECtHR has always been a reference for internal judges in the interpretation of conventional rules given the fact that the latter are perceived as living norms continuously adapted to new needs precisely by the jurisprudence of the ECtHR. Furthermore, this role should be strengthened following the recent entry into force of the additional Protocol 16 to the ECHR, which provides for the possibility for national courts "of the highest jurisdictions" to submit to the Court a request for an opinion concerning the interpretation and the application of the provisions of the Convention in concrete cases. The mechanism that has been deliberately made similar to the reference for a preliminary ruling system existing in the EU because of the desire of its creators to promote the dialogue between the judicial authorities.[42]

[42] See in that sense the Explanatory Report to Protocol 16, which recalls that according to the Group of Wise Persons ñ*it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Courtôs óconstitutionalô role*ò. The Explanatory Report can be found at www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

In reality, the just mentioned procedures do not seem satisfactory. The advisory instrument envisaged by Protocol 16 has a very limited subjective scope covering only the highest jurisdictions (even with the exclusion of the Constitutional Court with regard to Italy). Therefore, judges of merit are excluded from its functioning and these are the courts which are highly engaged with the substance of the concrete case and therefore are often more attentive to a substantialist approach in balancing the opposing interests (of the tax authorities and taxpayers). Moreover, not only the beginning of the procedure is always optional, but also the opinion eventually delivered by the chamber established within the ECtHR is never binding, even with regard to the judgment which gave rise to the question.

Some perplexities arise with regard to the suitability of a mechanism of preliminary ruling to guarantee an effective and fair exchange of interpretative messages between national and supranational courts in the field of tax law. And these problems arise apart from the just mentioned characteristics of the referral to the ECtHR according to Protocol 16 which are themselves profoundly differentiating the instrument in question from the EU preliminary ruling and are in some way weakening its effectiveness in the context of the dialogue between the courts. In fact, the preliminary ruling gives rise to a formal and public procedure which produces the risk that the conflicting positions may become even more rigid. The publicity that the outcome of the proceedings may have (and usually has) represents, in short, the greatest inconvenience, since often the involved courts prefer to assume more "expendable" positions in the public debate, rather than making a serious effort towards a genuine dialogue.

The experience of the *Taricco* case – which was result of a reference for a preliminary ruling and concerns, although indirectly, a tax law issue - shows precisely how the media produced clamor of some events does contribute for genuine and sincere dialogue and is pushing instead a compromise in which one of the conflicting positions prevails and the other loses.[43]

[43] The critical view expressed in this article is not common. Many scholars argue that the Taricco case is a positive example of dialogue between national courts and the EUCJ. See in the latter sense M. Bonelli, *The Taricco saga and the consolidation of judicial dialogue in the European Union*, 25(3) *Maastricht Journal of European and Comparative Law* 357 (2018).

Of course, this does not diminish the usefulness of this institute, which has helped over the years for the formation of a common European spirit also on many tax issues. However, it is necessary to imagine more meaningful places and means of dialogue, far from the excessive political and media pressure that sometimes surrounds the former and therefore capable of achieving a more fruitful compromise between conflicting positions.

For example, one could imagine wider forms of circulation of supranational court decisions in national jurisdictions and the institutionalization of informal mechanisms of joint training between tax judges of several European states. A model could be that of the coordination meetings that take place periodically within the Eurojust project.[44] The aim is to create supranational bodies that put together tax judges from the Member States of the European Union as well as the judges of supranational courts and which promote the dialogue and the exchange of knowledge between them. The joint training tool seems to be in fact suitable to allow an effective circulation of the interpretative models, thus favoring the identification of best practices to be replicated in the national context.

This is not a particularly new idea. Since many years, especially in the context of the EU, several initiatives have been put in place to develop dialogue and joint training for judges (and more generally of legal practitioners) of the Member States. The 2011 communication of the EU Commission entitled "Building trust in EU-wide justice in new dimension to European judicial training" states the importance of creating a genuine European legal culture and recalls that "judicial training is a crucial element of this process enhances mutual confidence between Member States, practitioners and citizens ". Even before, however, the Hague Program called for "the progressive creation of a European judicial culture [...] based on training and networking".[45]

However, this process is still largely unsatisfactory. First of all, significant progress has been made so far only with regard to criminal justice, in the presence of a clear foundation of the

[44] See A. Weyembergh, *The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU*, 2(1) *New Journal of European Criminal Law* 75 (2011).
[45] G. Oberoi, *Globalisation of the judicial education discourse*, 38(3) *Commonwealth Law Bulletin* 393, 415 (2012).

European action in the Treaties. On the contrary, in other areas of law - such as that of civil and commercial law - the initiatives undertaken have been much less incisive. This situation is linked to the absence of equally clear justifications in the treaty norms and to the incapacity, therefore, of the European institutions to undertake direct actions which are binding for the Member States. This entailed the adoption of bottom-up training systems: starting from the initiative of private bodies representing the categories of legal operators, they go on with the subsequent support of common training actions by the Commission that recommends the adoption of the same by the Member States.[46]

As one can see, there is no binding power for the Commission, while every responsibility remains with the Member States, both at the level of support of exponential private organizations and then at the level of transposition of the Commission's guidelines.

In such less institutionalized context the training of tax judges suffers from further problems. The Commission documents do not deal with tax matters and - apart from some sporadic exceptions - even the exponential bodies of the judiciaries of the Member States do not attach particular importance to this matter. The European Judicial Training Network, an institution created by the Member States in 2004, identified tax law as worthy of particular attention in the context of the activity of the working groups set up within it. However, no concrete initiatives seem to have been undertaken.

An intervention by the Commission in the direction of identifying common training tools on European tax law issues now seems to be prevented by the difficulty of attributing to the EU a general competence in the matter, but also by the fears of the states that such initiatives can have a negative influence on the independence of the judiciary in such a delicate area, even from a political point of view, such as that of taxes. There is also the tendency of the European institutions to enhance the principle of subsidiarity in this field too, limiting the common intervention

[46] H.E. Hartnell, *EUstitia: Institutionalizing Justice in the European Union*, 23 *Northwestern Journal of International Law & Business* 113, 116 (2002).

only to those sectors where a clear European value added can be realized.[47]

It seems to me, however, that an alternative model can still be imagined. It could refer to the experience gained within the OECD, based on the development of guidelines that are not binding for the states but whose compliance is subject to periodic revision with a consequent (public) evaluation of the greater or lesser "virtuosity" of one state over others. The absence of a legal constraint is filled by the risk of negative publicity that the incorrect transposition of the guidelines could generate. A situation capable of pushing many states to a spontaneous adaptation.

Hence, a mechanism of this kind could perhaps also be replicated for tax matters. One could think, given the importance of fundamental rights in the action of national tax courts, to a concerted action between the EU and the Council of Europe. This could produce guidelines or models of joint training of national tax judges, including linguistic ones, whose implementation - if appropriate through the establishment of bilateral or multilateral bodies - could then be monitored at central level (by the EU Commission, for example, or by the Council of Europe itself) according to a periodic peer review procedure.

Anyhow, the proper training of judges is fundamental in every legal system, but it is even more so in a supranational context, where - as we have seen - a compromise must be reached between two different ways of conceiving the tax relation, the internal and the European one. Therefore, the development of informal but institutionalized bodies aimed at achieving a steady dialogue between national and supranational jurisdictions seems to be the most suitable solution to avoid judicial approaches excessively centered on the national level and to achieve a genuinely supranational - and therefore uniform - conception of the taxpayer's rights in the context of the tax relation.

[47] S. Benvenuti, *The European Judicial Training Network And Its Role In The Strategy For The Europeanization Of National Judges*, 7(1) *International Journal for Court Administration* 59, 65 (2015).

THE FALL OF THE RULE OF LAW IN HUNGARY AND THE COMPLICITY OF THE EU

Gábor Halmai[*]

Abstract

Hungary was one of the first and most thorough political transitions after 1989, which due the negotiated 'rule of law revolution'[1] provided all the institutional elements of liberal constitutional democracy: rule of law, checks and balances and guaranteed fundamental rights. Hungary also represents the first, and probably the model case, of backsliding to an illiberal system dismantling the rule of law. The current Hungarian state of affairs was made possible by the governing Fidesz party's 2010 electoral victory, called by Prime Minister and party leader Viktor Orbán as a 'revolution of the ballot boxes.' As I will argue in this paper the European Union is also complicit in tolerating the first authoritarian member state of the European Union

TABLE OF CONTENTS

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[1] See the term used by the first Constitutional Court in its decision 11/1992. (III. 5.) AB.

1. The Rule of Law 'Counter-Revolution' of 2010

Prior to the 2010 elections Viktor Orbán did not hide his intention to eliminate any kind of checks and balances, and even the parliamentary rotation of governing parties. In a September 2009 speech, he predicted that there was "*a real chance that politics in Hungary will no longer be defined by a dualist power space. Instead, a large governing party will emerge in the center of the political stage [that] will be able [to] formulate national policy, not through constant debates but through a natural representation of interests*". Orbán's vision for a new constitutional order—one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values—has been entrenched in a new constitution, enacted in April 2011. The new constitutional order was built with the votes of his political bloc alone, and it aims to keep the opposition at bay for a long time. The new constitutional order of the Fundamental Law and the cardinal laws perfectly fulfill this plan: they do not recognize the separation of powers, and do not guarantee fundamental rights. Therefore, the new Hungary (not even a Republic in its name anymore) cannot be considered a liberal constitutional democracy governed by the rule of law.

Before January 1, 2012, when the new constitution became law, the Hungarian Parliament had been preparing a blizzard of so-called cardinal—or supermajority—laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These laws affect the laws on freedom of information, prosecutions, nationalities, family protections, independence of the judiciary, status of churches, functioning of the Constitutional Court, and elections to Parliament. In the last days of 2011, Parliament also enacted the so-called Transitory Provision to the Fundamental Law, which claimed constitutional status and partly supplemented the new Constitution even before it went into effect. These new laws have been uniformly bad for the political independence of state institutions, for the transparency of lawmaking, and for the future of human rights in Hungary. The independence of the judiciary was dealt with the constitutional amendment, which changed the appointment and reassignment process for judges. The Transitory Provisions to the Fundamental Law reduced the retirement age for judges on ordinary courts from seventy to sixty-two, starting on

the day the new constitution went into effect. This change forced somewhere around 274 judges into early retirement. Those judges include six of the twenty court presidents at the county level, four of the five appeals court presidents, and twenty of the eighty Supreme Court judges.

According to the cardinal law on the status of the churches the power to designate legally recognized churches is vested in Parliament itself. The law has listed fourteen legally recognized churches and required all other previously registered churches (some 330 religious organizations in total) to either re-register under considerably more demanding new criteria, or continue to operate as religious associations without the legal benefits offered to the recognized churches (such as tax exemptions and the ability to operate state-subsidized religious schools). As a result, the vast majority of previously registered churches have been deprived of their status as legal entities.

On March 11, 2013, the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe, and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The most alarming change concerning the Constitutional Court annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions; new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions were substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions—which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law. This made it possible for Prime Minister Orbán to raise the possibility of the reintroduction of the death penalty, declared

unconstitutional by the Constitutional Court in 1990, or threaten with retroactive political justice despite a 1992 ban by the Court. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaty of the European Union and the European Convention on Human Rights.

By 2013 the Hungarian system of governance became populist, illiberal, and undemocratic, which was Prime Minister Orbán's openly stated intention[2]. The backsliding has happened through the use of 'abusive constitutional' tools: constitutional amendments and even replacements, because both the internal and the external democratic defense mechanisms against the abuse of constitutional tools failed. The internal ones (constitutional courts, judiciary) failed because the new regime managed to abolish all checks on its power, and the international ones, such as the EU toolkits, failed mostly due to the lack of a joint political will to use them.

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[2] In a speech delivered on July 26, 2014, before an ethnic Hungarian audience in neighboring Romania, Orbán proclaimed his intention to turn Hungary into a state that "*will undertake the odium of expressing that in character it is not of liberal nature*". Citing as models he added: "*We have abandon**ed** liberal methods and principles of organizing society, as well as the liberal way to look at the world* […] *Today, the stars of international analyses are Singapore, China, India, Turkey, Russia* […] *and if we think back on what we did in the last four years, and what we are going to do in the following four years, than it really can be interpreted from this angle. We are* […] *parting ways with Western European dogmas, making ourselves independent from them* […] *If we look at civil organizations in Hungary* […] *we have to deal with paid political activists here* […] *They would like to exercise influence* […] *on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of it being a liberal state, that we should make it clear, that these are not civilians* […] *opposing us, but political activists attempting to promote foreign interests* […] *This is about the ongoing reorganization of **the** Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests*". Full text of Viktor Orbán's speech at Băile Tuşnad of 26 July 2014," *Budapest Beacon*, July 29, 2014 at http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/.

2. EU Attempts to Cope with the Rule of Law Situation in Hungary

The new constitutional system was the subject of a report for the European Parliament prepared by its Committee on Civil Liberties, Justice and Home Affairs (LIBE), adopted on 3 July 2013[3]. With its acceptance of the Tavares Report (named after Rui Tavares, a Portuguese MEP at that time) the European Parliament has called for a new framework for enforcing the principles of Article 2 of the Treaty. The report calls on the European Commission to institutionalize a new system of monitoring and assessment.

The first reaction of the Hungarian government was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on "*the equal treatment due to Hungary*". The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: "*We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain*". The resolution argues that the European Parliament exceeded its jurisdiction by passing the report and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls on the Hungarian government "*not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families*". These words very much reflect the Orbán-government's view of 'national freedom', the

[3] www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN

liberty of the state (or the nation) to determine its own laws: "*This is why we are writing our own constitution* […] *And we don't want any unsolicited help from strangers who are keen to guide us* […] *Hungary must turn on its own axis*"[4].

Encouraged by the Tavares report, then-Commission President Barroso also proposed a European mechanism to be "*activated as in situations where there is a serious, systemic risk to the Rule of Law*"[5]. Commission Vice-President Reding, too, announced that the Commission would present a new policy communication[6].

Due to the pressure, the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the European Parliament. The changes left in place provisions that undermine the rule of law and weaken human rights protections. The Hungarian parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013. The government's reasoning states that the amendment aims to "*finish the constitutional debates at international forum*" (meaning with European Union – G.H.). A statement from the Prime Minister's Office said: "*The government wants to do away with those* […] *problems which have served as an excuse for attacks on Hungary*". But this minor political concession does not really mean that the Hungarian government demonstrated respect for the formal rule of law, as some commentators rightly argue[7].

As none of the suggested elements have worked effectively in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council

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[4] For the original, Hungarian-language text of Orbán's speech, entitled Nem leszünk gyarmat! (We won't be a colony anymore!) see e.g. www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat_The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012, available at http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>.

[5] J.M.D. Barroso, *State of the Union address 2013*, Plenary session of the European Parliament, Strasbourg, 1 September 2013.

[6] V. Reding, *The EU and the Rule of Law. What Next?*, Centre for European Policy Studies, Brussels: 4 September 2013.

[7] A. von Bogdandy, *How to Protect European Values in the Polish Constitutional Crisis*, www.verfassungsblog.de (2016).

to strengthen the rule of law in the Member States[8]. This framework is supposed to be complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify and improve the suspected violation of EU law. As the Hungarian case has shown, infringement actions are usually too narrow to address the structural problem which persistently noncompliant Member States pose. This happened when Hungary suddenly lowered the retirement age of judges and removed from office the most senior ten percent of the judiciary, including many court presidents and members of the Supreme Court. The European Commission brought an infringement action, claiming age discrimination. The European Court of Justice in Commission v. Hungary established the violation of EU law[9], but unfortunately the decision was not able to reinstate the dismissed judges into their original positions, nor could it stop the Hungarian government from further seriously undermining the independence of the judiciary and weakening other checks and balances with its constitutional reforms. Even though the Commission formulated the petition, the ECJ apparently wanted to stay away from Hungarian internal politics or had an extremely conservative reading of EU competences and legal bases, merely enforcing the existing EU law rather than politically evaluating the constitutional framework of a Member State[10]. This was the reason that Kim Lane Scheppele suggested to reframe the ordinary infringement procedure to enforce the basic values of Article 2 through a systemic infringement action[11].

The new framework allowed the Commission to enter into a dialogue with the Member State concerned to prevent fundamental threats to the rule of law. This new framework can best be described as a 'pre-Article 7 procedure', since it establishes an early warning tool to tackle threats to the rule of law, and

[8] Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law.
[9] ECJ, 6 November 2012, Case C-286/12.
[10] For the detailed facts of the case and the assessment of the ECJ judgement see G Halmai, *The Case of the Retirement Age of Hungarian Judges*, in F. Nicola, B. Davies (eds.), *EU Law Stories, (*2017), 471-488.
[11] See K. Scheppele, *EU can still block Hungary's veto on Polish sanctions*, www.politico.eu (2016).

allows the Commission to enter into a structured dialogue with the Member State concerned, in order to find solutions before the existing legal mechanisms set out in Article 7 are used. The Framework process is designed as a three-step procedure. First, the Commission makes an assessment of the situation in the member country, collecting information and evaluating whether there is a systemic threat to the rule of law. Second, if a systemic threat is found to exist, the Commission makes recommendations to the member country about how to resolve the issue. Third, the Commission monitors the response of the member country to the Commission's recommendations.

The first step to use the new Rule of Law Framework was not taken against Hungary, but against Poland in early January 2016, and also Article 7 was triggered by the European Commission already in December 2017, even though the backsliding in Poland has only started in 2016, and haven't yet reached the level of Hungary. The main reason for this difference was that the governing Fidesz party delivers votes to the European People's Party (EPP), the largest faction at EP, while the Polish governing party, PiS belongs to the smaller fraction of the European Conservatives and Reformists[12].

Finally, on 12 September 2018 the European Parliament – the first time ever - launched Article 7 TEU proceedings against a Member States' government. The MEPs by 448 votes for to 197 against and with 48 abstentions adopted the report prepared by Judith Sargentini denouncing the many violation of EU values by Viktor Orbán's government.

With the adoption of the Sargentini report the unequal treatment of the two rogue Member States had changed, mostly due to the fact that 115 out of the 218 MEPs of EPP also voted against the Orbán government. The change of EPP's view on Orbán has been foreseen after the unexpected announcement of EPP's leader, Manfred Weber to support the report. Weber, who, was considered earlier as one of the main supporters of Orbán[13].

[12] See this conclusion in R.D. Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, 52 Gov. & Opp. Int'l J. Comp. Pol. 2 (2017).

[13] The reason for Weber's changed attitude could be that two weeks before the vote he was supported by Chancellor Merkel as Spitzenkandidat for the Presidency of the European Commission in the 2019 EP election

After the parliamentary vote Weber even challenged leaders of the Member States in the Council to take a stance on Orbán's domestic policies, after MEPs 'did their job' in triggering Article 7 process[14].

In his speech, prior to the vote Orbán threatened the that time European Parliament with a new composition after the 2019 elections, when anti-migrant populist parties can even have the lead, and form the European Commission: "*We need a new European Commission that is committed to the defense of Europe's borders*"[15]. This threat must have been one of the reasons for the majority of EPP that despite their vote for the Sargentini report they did not want to kick out Orbán's Fidesz from the party family before the 2019 parliamentary elections. Even though the EP elections did not bring the expected victory of the populists, and EPP at least suspended Fidesz' membership, the commitment of the newly elected European institutions[16] did not make it make it more likely that the Council with the necessary 4/5 of the votes will follow the proposal of the Parliament by determining the existence of a clear risk of a serious breach Hungary of the values on which the Union is founded. The corrective arm of Article 7, which can lead to sanctions against the Member State, including the suspension of the voting rights of the representative of that government in the Council, can even be vetoed by any Member State[17].

This scepticism has been confirmed by the fact that the first Council hearing occurred on 16 September 2019, more than one year after the parliamentary decision thanks to the Finnish presidency. The Parliament was denied the opportunity to present

[14] Weber challenges European leaders over Hungarian rights, Financial Times, 16 September 2018. www.ft.com/content/e353ba68-b993-11e8-94b2-17176fbf93f5

[15] *Ibidem.*

[16] Besides the fact that Frans Timmermans who was instrumental to trigger Article 7 against both Poland and Hungary did not get the rule of law portfolio in the new Commission, in her first speech in the European Parliament of Ursula von der Leyen, the newly elected Commission president stated regarding these procedures that *"We must all learn that full rule of law is always our goal, but nobody's perfect."* https://euobserver.com/news/145504

[17] The votes on the Sargentini report have shown that besides the Polish government, which already committed itself to veto any possible sanctions against Hungary, there are other governments, which would be reluctant to vote for sanctions, for instance that of the UK.

its Reasoned Proposal with the Commission being asked instead to provide a factual update on the relevant infringement procedures against Hungary[18].

To sum up the impact of the Parliamentary resolution, it came too late, several years after the Orbán government's actions already represented a 'clear risk of a serious breach of the values on which the Union is founded.' Launching Article 7 meant also too little, because besides the important political function of naming and shaming Hungary as a violator of EU values, the chances to reach the corrective arm of the procedure are extremely low[19]. Hence, one can argue that instead of Article 7 alternative means from the toolkits of the EU may be more effective[20]. Infringement actions as alternatives did not really work so far in the case of Hungary but cutting off EU structural funds for regional development or other forms of assistance as a value conditionality approach was not really tried as of yet[21].

The Commission's Reflection Paper on the Future of EU Finances, published on 28 June 2017, states: "*Respect for the rule of law is important for European citizens, but also for business initiative, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union. There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget*"[22].

Günther Öttinger, the German budget commissioner of the European Commission, said that EU funds could become conditional after 2020, depending on the respect for the rule of

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[18] About the delayed procedure of the Council see Laurent Pech's contribution to this volume.

[19] See the same assessment of the vote by S. Carrera & P. Bárd, *The European Parliament Vote on Article 7 TEU against the Hungarian government: Too Late, Too Little, Too Political?*, www.ceps.eu

[20] Klaus Bachmann argues for using alternative tools instead of Article 7. See K. Bachmann, Beyond the Spectacle: The European Parliament's Article 7 TEU Decision on Hungary, www.verfassungsblog.de (2018)

[21] See a detailed analysis in G. Halmai, *The Possibility and Desirability of Rule of Law Conditionality*, 11 Hague J. Rule Law 171-188 (2018).

[22] Reflection Paper on the Future of EU Finances. European Commission, 28 June 2017, at https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-eu-finances_en.pdf

law[23]. Similarly, Commissioner Jourová argued for such a new conditionality requirement: "*We need to ensure that EU funds bring a positive impact and contribute more generally to promote the EU's fundamental rights and values. That is why I intend to explore the possibility to strengthen the 'fundamental rights and values conditionality' of EU funding to complement the existing legal obligations of Member States to ensure the respect of the Charter when implementing EU funds*"[24]. In October 2017, Jourová linked again EU funds to rule of law, by saying that "*We need to make better use of EU funds for upholding the rule of law* [...] *In my personal view we should consider creating stronger conditionality between the rule of law and the cohesion funds*"[25]. On 23 November 2017, Hans Eichel, co-founder and former chairman of G20, former Minister of Finance of Germany, and Pascal Lamy, former European Commissioner, also on behalf of former European Commissioners Franz Fischler and Yannis Peleokrassas sent an open letter to Jean-Claude Juncker, President of the European Commission, asking the European Commission to temporarily suspend payment of all EU funding to Hungary, with the exception of funding provided directly by the Commission, i.e. without the intermediary role of the Hungarian government[26].

Similarly, a recent policy paper of the Centre for European reform suggests that for more serious breaches, the Commission could suspend disbursement of funds, and step up monitoring and verification. In doing so, it would have to ensure that the poorer regions and vulnerable groups did not suffer disproportionate harm from measures designed to have an impact on governments that ignore EU values and the rule of law. Funding, the Centre recommends, could be directed away from governments and go directly to enterprises or be disbursed by civil society organizations[27] - if there are still such independent organizations, I would add.

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[23] https://euobserver.com/institutional/138063

[24] '10 years of the EU Fundamental Rights Agency: a call to action in defence of fundamental rights, democracy and the rule of law, Vienna, 28 February 2017.

[25] https://euobserver.com/political/139720

[26] See above all http://hungarianspectrum.org/2017/11/28/open-letter-to-jean-claude-juncker

[27] J Selih, I. Bond & C. Dolan, *Can EU Funds Promote the Rule of Law in Europe?*, Centre for European Reform (2017).

On the other hand, former Commission President Juncker said that net recipients of EU funds may resent being penalized financially for actions that net contributors could carry out with impunity. Therefore, he expressed concerns about tying the rule of law to structural funds, which he claimed could be "*poison for the continent*", and "*divide the European Union*"[28]. Even after the Commission decided to trigger Article 7 (1) procedure against Poland, which put the country on a path that could ultimately lead to sanctions, Juncker said that he preferred that the EU and Poland hold "*sensible discussions with each other, without moving into threatening gestures*"[29].

In mid-February 2018, the European Commission published its Communication on A New, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020 as a contribution to the Informal Leaders' meeting[30]. The Communication points out that "*as part of the public debate, it has been suggested that the disbursement of EU budget funds could be linked to the respect for the values set out in Article 2 of the EU Treaty and in particular to the state of the rule of law in Member States*". At the same time the German government has circulated a draft white paper to other EU Member States proposing to link cohesion funds to respect for EU solidarity principles[31]. Germany wants more of the EU's next multiannual budget to be tied to respect for core EU policies and values, including the rule of law and migration. This plan would be a big departure from traditional uses of the structural funds, which have had a heavy focus on infrastructure projects as well as education and training for EU nationals. The Polish government attacked the plan "*because it could lead to limitation of member states' rights guarded by the EU Treaty*"[32].

The usual argument against such kind of financial sanctions is that it would punish the people of Hungary (or Poland for that matter), instead of their leaders, pushing them further away from

[28] See www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison
[29] *Ibidem.*
[30] http://europa.eu/rapid/press-release_IP-18-745_en.htm
[31] www.ft.com/content/abb50ada-1664-11e8-9376-4a6390addb44
[32] www.ft.com/content/d6ef7412-157c-11e8-9376-4a6390addb44

the EU, and into the arms of their illiberal governments[33]. Also academic critics point out that the proposal, if implemented, could undermine the European citizens' union by leaving behind those citizens who have the misfortune to live in a members state with an authoritarian national government[34]. But why not consider the scenario that those regions and citizens taken hostage by their own elected officials, and who do not want to suffer due to the loss of EU funds because of their authoritarian leaders, will be emboldened to stand up against such governments, and vote them out of office, probably even if the election system isn't fair, as is the case in Hungary now. A recent proof that the European Union is still important for the Hungarian voters is the result of a pool conducted right after the European Parliament's vote to trigger Article 7, 56% of the respondents answered "yes" when asked if the European Parliament's decision on the Sargentini report was fair, and just 24% responded "no." Some 53% of the respondents said the negative vote was only about the Hungarian government, while more than 12% saw it as being about the whole country, and 16% thought it was about both[35].

Outside the scope of an Article 7 procedure, Prime Minister Orbán claims that linking EU funds to political conditions goes against the EU treaties[36]. But one can argue that the Common Provision Regulation[37] that regulates the European Structural and Investment Funds (which combines five funds, including the Cohesion Fund) requires governments to respect the rule of law as

[33] See this argument by Danuta Hübner, Chair of the European Parliament's Committee on Constitutional Affairs. www.euronews.com/2017/12/29/view-eu-must-not-surrender-to-illiberal-forces. Former Commissioner László Andor similarly argues that as a consequence of political conditionality, poorer regions would suffer because of their illiberal governments. See to this end www.progressiveeconomy.eu/sites/default/files/LA-cohesion-final.pdf

[34] Having regard to this aspect see e.g. www.foederalist.eu/2017/05/kein-geld-regelbrecher-politische-bedingungen-eu-strukturfonds-ungarn-polen.html

[35] www.euronews.com/2018/09/13/exclusive-poll-what-do-hungarians-think-of-the-european-parliament-s-vote-to-trigger-artic

[36] "*The EU is based on treaties, and there is nothing in there that would create this possibility* [of linking funds to the rule of law]", Viktor Orbán said in an interview. See https://berlinpolicyjournal.com/trouble-ahead

[37] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1303 Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013.

a condition for receiving money[38]. Article 6 of the Regulation require governments to ensure that funds are spent in accordance with EU and national law. The provision reads: "*Operations supported by the ESI Funds shall comply with applicable Union law and the national law relating to its application*". Some scholars argue that the Regulation should expressly specify the rule of law as forming part of "*applicable Union law*"[39]. Of course, the Regulation can relatively easily be amended, but I do not think that is even necessary to acknowledge that the rule of law, as part of Article 2 TEU, is applicable primary Union law. In my view, if a member state does meet these requirements, it does not fulfil the legal conditions of the funds, and consequently cannot get them. Independent courts can be considered as essential institutions conditions, and one could certainly raise the question whether the captured courts in Hungary (or again in Poland for that matter) qualify as 'courts' under Article 19 TEU[40]. Article 30 of the EU's Financial Regulation (966/2012) states, among other things, that EU "*funds shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness*". Also, according to this regulation, "*The principle of efficiency concerns the best relationship between resources employed and results achieved*". Furthermore, according to Financial Regulations, "*The principle of effectiveness concerns the attainment of the specific objectives set and the achievement of the intended results*". Finally, according to Article 59 (2) of the Financial Regulation, "*When executing tasks relating to the implementation of the budget, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the Union's financial interests*".

According to the EU's Regulation on European code of conducts on partnership in the framework of the European

[38] See a similar argument I. Butler, *To Halt Poland's PiS, Go for the Euros*, Liberties EU news, (2017).

[39] See M. Waelbroeck & P. Oliver, *Enforcing the Rule of Law in the EU: What Can be done about Hungary and Poland?*, www.blogdroiteuropeen.com (2018).

[40] The judgment of the Grand Chamber of the Court of Justice of the EU from 27 February 2018 in Associação Sindical dos Juízes Portugueses v Tribunal de Contas suggests that the EU principle of judicial independence may be relied upon irrespective of whether the relevant national measure implements EU law. About the innovative nature of the judgment see M. Ovádek, *Has the CJEU Reconfigured the EU Constitutional Order?*, www.verfassungsblog.de (2018).

Structural and Investment Funds (240/2014), the governments of the member states must closely cooperate with "*bodies representing civil society at national, regional and local levels throughout the whole programme cycle consisting of preparation, implementation, monitoring and evaluation*". They should also "*examine the need to make use of technical assistance in order to support the strengthening of the institutional capacity of partners, in particular as regards small local authorities, economic and social partners and non-governmental organisations, in order to help them so that they can effectively participate in the preparation, implementation, monitoring and evaluation of the programmes*"[41].

3. Counterarguments to Value Conditionality

Not everyone in the European constitutional law literature agrees with the desirability of the EU rule of law conditionality measures. In his contribution to this issue as well as to a debate at the Rule of Law in the EU, Armin von Bogdandy counseled caution[42]. He argues that although the Treaty on European Union may have included legally operative fundamental principles that are the 'true foundations of the common European house,' but enforcing these principles strictly could bring the house down. Von Bogdandy darkly recalls Carl Schmitt's warning about a 'tyranny of values' which, he reminds us, is 'a defense of values which destroys the very values it aims to protect.'

As von Bogdandy argues, there are important values on the other side. Under Article 4(2) TEU, the EU must respect domestic democracy and constitutional identity – and this commitment requires the EU to tolerate normative pluralism. Moreover, the EU has always stood for peace, and attempting to enforce a common set of values too strongly at a delicate moment may lead to explosive conflict. While von Bogdandy recognizes that the EU cannot exist without a common foundation of values and he acknowledges that Article 7 TEU is a cumbersome mechanism for enforcement of those values that requires supplementation, the

[41] A. von Bogdandy's full text is now available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0240&from=EN

[42] See above all A. von Bogdandy, *Fundamentals on Defending European Values*, www.verfassungsblog.de (2019).

thought of the EU pressing a Member State to conform to EU values when it is determined to head in a different direction nonetheless makes him queasy.

As we argued in a response co-authored by Kim Lane Scheppele[43], von Bogdandy's arguments are wise in normal times. But we no longer live in normal times. The current governments of at least two Member States, Hungary and Poland, are engaged in normative freelancing with the explicit aim of making future democratic rotation impossible, so the self-correction mechanisms on which previous 'normal times' have relied will no longer work.

Take Hungary, which is no longer a democratic state because its citizens can no longer change the government when they so desire. In 2010, Prime Minister Viktor Orbán's Fidesz party came to power with an absolute majority of the votes in a free and fair election, but due to the inherited disproportionate election system, the 53% of the vote gained by Fidesz turned into 67% of the parliamentary seats. Under the Hungarian constitution that Orbán also inherited, a single two-thirds vote in the unicameral parliament could change the constitution as well as the so-called 'two-thirds laws' that governed important aspects of Hungary's basic governmental structure and human rights. Orbán's constitutional majority allowed him to govern without legal constraint, and he won this constitutional majority again in 2014 and 2018. But Orbán has won such overwhelming victories through election law tricks. In December 2011, the Parliament enacted a controversial election law that gerrymandered all-new electoral districts. In 2013, another new election law made the electoral system even more disproportionate, by increasing the proportion of single-member constituency mandates and eliminating the second round run-off in these constituencies so that the seats could be won by much less than a majority vote. The law also introduced 'winner-compensation,' which favored the governing party in the tallying of party list votes and managed to suppress the vote of ex-pats who had left under pressures from Orbán's tightening control while allowing in the votes of new citizens in the neighboring states who backed Orbán. With this rigged electoral system Fidesz was able to renew its two-thirds

[43] K.L. Scheppele & G. Halmai, *The Tyranny of Values or the Tyranny of One-Party State*, www.verfassungsblog.de (2019)

majority both in 2014 and 2018 with less than a majority of the popular vote.

The OSCE election observers were very critical of both the 2014 and 2018 elections, noting that "*overlap between state and ruling party resources*", as well as opaque campaign finance, media bias, and "*intimidating and xenophobic rhetoric*" also hampered voters' ability to make informed choices[44].

Beyond rigging the electoral law, Fidesz made the playing field even more uneven by dismantling independent media and threatening civil society, as well as opposition parties As Steven levitsky and Lucan Way have argued: "*Clearly, Hungary is not a democracy* […] *Orbán's Hungary is a prime example of a competitive autocracy with an uneven playing field*"[45].

Rousseau may have inspired Carl Schmitt's concept of democracy, but the mysterious 'general will' is now used by autocratic nationalists like Viktor Orbán to build an 'illiberal democracy' that he claims Hungarians support. Illiberalism is highly critical towards all democratic values, including those currently enshired in Article 2 TEU as well as in Article 4(2) TEU. Orbán's isn't merely illiberal in not respecting human dignity, minorities' and individual's rights, the rule of law and separation of powers, but he isn't democratic either, because the outcome of the elections are foreordained.

Orbán's Hungary isn't only a 'pseudo-democracy,' but it also abuses the concept of national identity protected in Article 4(2) TEU. From the very beginning, the government of Viktor Orbán has justified non-compliance with the values enshrined in Article 2 TEU by referring to national sovereignty. Nowhere has this been clearer than when the government refused to accept refugees in the giant migration of 2015, and also refused to cooperate with the European relocation plan for refugees after that. After a failed referendum in which the Hungarian public refused to support the Orbán government in sufficient numbers as it sought a public rubber-stamp for its rejection of refugees, the packed Constitutional Court came to the rescue of Hungary's

[44] www.osce.org/odihr/elections/hungary

[45] See www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/

policies on migration by asserting that they were part of the country's constitutional identity.

The Constitutional Court in its decision held that 'the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty'[46]. Therefore, the Court argued "*the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State*"[47]. This abuse of constitutional identity was aimed at rejecting the joint European solution to the refugee crisis and clearly flouted common European values, such as solidarity.

In a more recent decision, the Constitutional Court by ruling that the criminalization of 'facilitating illegal immigration' does not violate the Fundamental Law again refered to the constitutional requirement to protect Hungary's sovereignty and constitutional identity to justify this clear violation of freedom of association and freedom of expression hiding behind the alleged obligation to protect Schengen borders against 'masses entering [the EU] uncontrollably and illegitimately.'[48] The Commission has brought several infringement actions against Hungary for its handling of asylum claims and for its mistreatment of claimants, but the Hungarian government rejects all 'interference' from Brussels on this point by abusing the concept of constitutional iudentity.

4. Conclusion

This paper tried to prove that in the rule of law backsliding in Hungary in a non-democratic system with authoritarian tendencies. The last nine years of this development have shown that EU's the traditional mechanism of the infringement procedure did not work, and neither the triggered Article 7

[46] Decision 22/2016 AB of the Constitutional Court of Hungary, para [68]. For a detailed analysis of the decision, see G. Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, 43 Rev. of Cen'l & East Eur. L. 23-42 (2018).

[47] *Ibidem.*

[48] See N. Chronowski & G. Halmai, *Human Dignity for Good Hungarians Only*, www.verfassungsblog.de (2019).

procedure nor the most recent attempts of the outgoing European Commission on the EU Rule of Law Toolbox[49] published on 3 April 2019 and the Rule of Law Review Cycle[50] announced on 17 July 2019, not to speak about the mentioned rather decreased commitment of the new European Commission seem to force the governments to end the breach of European values.

I think that to keep the vision of Europe as a value community, makes it inevitable to enforce the joint values of the rule of law, democracy and fundamental rights in every Member States. For this reason, the more consequent use of certain traditional tools, such as infringement procedures also for the breach of values enshrined in Article 2 TEU, or even triggering Article 7 for that matter are important, beacuse if democracy is hijacked, courts are captured, rights are threatened and the EU is disrespected by a Member State government, the sincere cooperation guaranteed in Article 4(3) cannot be guaranteed. But at the same time, new means of value conditionality should also be activated, such as cutting funds for member states that do not comply with certain basic institutional requirements of the rule of law. Probably a good sign for doing so is that after triggering Article 7 against Hungary French President Macron, clearly referring to Hungary, said that "*countries that don't want more Frontex or solidarity will leave Schengen. Countries that don't want more Europe will no longer touch structural funds*"[51]. Also, the European Parliament is preparing a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. As I have argued, this is possible through implementing the Common Provision Regulation, and can be carried out on a case-by-case basis. Putting

[49] See EU Rule of Law Toolbox at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en. About the assessment of this Communication see L Pech & D. Kochenov, *Strengthening the Rule of Law within the European Union. Diagnoses, recommendations, and what to avoid. Policy Brief*, RECONNECT (2019)

[50] See https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-343-F1-EN-MAIN-PART-1.PDF. For a critique of this follow up Communication, L. Pech, D. Kochenov, B. Grabowska-Moroz & J. Grogan, *The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism*, www.verfassungsblog.de (2019).

[51] www.politico.eu/article/emmanuel-macron-eu-migration-frontex-holdouts-hungary-viktor-orban-should-be-booted-out-of-schengen

conditionality into the Multiannual Financial Framework after the 2020 budget period is another potential avenue to enforce compliance with joint values. It will surely be both difficult and unpleasant for the EU to try to enforce its values. But the rule of law crisis requires difficult and determined action in order for the European Union to function.

VENEZUELA:
THE DISMANTLING OF THE RULE OF LAW
SINCE THE INSTAURATION OF THE CHAVISTA REGIME

*Flavia Pesci Feltri**

Abstract

This essay aims to analyse the complex issue of the gradual dismantling of the rule of law in Venezuela, through a chronological analysis of the various violations of the Constitutional Charter and the regimes that have occurred over the years.

TABLE OF CONTENTS

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Introduction

The dismantling of the Rule of Law in Venezuela, or rather its total elimination, has not been produced abruptly, through a military *coup d'état*, one of those to which the XX$^{th.}$ Century Latin America had made us been accustomed to, as a matter of fact, it begun in 1999, by means of a progressive destruction plan of each and all of the

democratic institutions that had been able to grow since 1958, after almost 60 years of military governments more or less autocratic and, certainly, following 10 years or iron-clad dictatorship headed by General Marcos Pérez Jiménez. Such gradual, incisive, perseverant dismantlement's object has essentially been the substitution of the Social and democratic State of law and justice consecrated by article 2 of the 1999 Constitution, by the implementation of a supposed "socialist" state that has become a reality in a totalitarian State, supported by the force of arms, led by a group of politicians and militaries who have been concentrating power against more than 30 million persons. As a product of years of corruption inefficiency, elimination of civil and political liberties and of a nefarious intervention of the State in the economy, absolutely controlling all of the citizen's action environments, we currently have the world's highest hyperinflation, the greatest population's exodus ever have been recorded in Latin America, the highest death toll due to the lack of medicines, and food and to persisting violence; and with citizens trying to survive from the deepest precariousness and struggling for the return of the rule of law and democracy through free, fair, transparent and independent elections. The Venezuelan society is currently suffering from what has been called and declared a complex humanitarian emergency[1], a concept being different from that of humanitarian crisis because the latter appears as a consequence either from natural disasters, or from armed conflicts.

The complex humanitarian crisis, rather, as affirmed by the very same United Nations Organization (UN), is the product of several factors progressively unleashing it, to wit: a) the dismantling of formal economy and state structure; b) civil conflicts; c) starvations; d) humanitarian crises; and e) the population's exodus. Hence, the feature of complex humanitarian crisis is that its main cause is of a political kind; it is the result of political policies imposed by authoritarian regimes gradually destroying the societies' cultural, civil, legal, political and economic stability, as in effect it is the case in Venezuela. I shall try to summarize the fundamental milestones

[1]http://www.civilisac.org/emergencia-humanitaria-compleja/las-emergencias-humanitarias-complejas-caracter-politico.

having marked the dismantling of the rule of law in Venezuela through these 20 years of Chavista government, those being the leading to the implementation of an authoritarian regime of a communist nature. Said milestones' exposition turns around the principles governing and supporting the Rule of Law: a) Principle of legality, (the State's and its public powers' abidance to the Law) from which derive those of constitutional supremacy (the Constitution is the supreme law and the foundation of the legal system); and, the principle of constitutional rigidity (the Supreme Law's amendment may only be made by means of the principles in it provided); b) The respect, guarantee and protection of rights, human and fundamental ones; c) The separation of powers and, especially the requirement of an impartial and autonomous judicial power; d) The principle of popular sovereignty.

The facts being told pretend to give evidence about how the chavista regime, assuming power by means of democratic mechanisms (after 2 failed coups d'état led by Chávez on February and November 1992), "brilliantly" dismantled the Rule of Law. Elected as President of the Republic in 1998, and as long as the oil income allowed it, Hugo Chávez had the backing of the majority of Venezuelans, something that made it possible for him to clear the way for the completion of a "socialist" State, altering and violating the legal system that he, himself had proposed in the 1999 constitutional text, one contemplating all the guarantees, freedoms and rights defended by modern constitutional States. Due to the radical drop of oil income, with the Venezuelan economy's foundations annihilated; with the rule of law's institutions weakened and attacked; and the premature and surprising death of Chávez, the popular support sustaining the chavista fortress began to crumble.

Then started a phase in which the Chavista government, now led by Nicolás Maduro undressed itself. All of that is revealed with the parliamentary elections of December 2015. The opposition was able to overwhelmingly win, in spite of the fact that the institutions and public powers were already kidnapped by the government's power and subjected to the Executive's and government party's sole will. Let us then begin to tell about the milestones revealing the

violence actions against the Venezuelan Rule of Law and democracy, perpetrated by the power itself during the two last decades. That, in two natural parts: Hugo Chávez and Nicolás Maduro Moros.

I. Hugo Chávez Frias

After two coup d'état attempts, led by Lieutenant Colonel Hugo Chávez on February and November 1992, and following his liberation by means of a pardon granted to him by President Caldera, Chávez was elected President in December 1998, for the 1999-2004 presidential term. On the day of his swearing in before Congress, on February 2, 1999, Hugo Chávez pronounced the following words: "I swear before God, the Homeland my people that under this dying Constitution, that I shall and promote or boost the necessary democratic transformations being in order that the Republic may have a *Magna Carta* suitable to the new times". And, effectively, he complied with his oath, yet only that for Chávez the "new times" were not precisely, the same times of a democratic and under rule of law State.

1. The violation of the 1999 Constitution from the day following its "popular" sanction (1999-2000)

The Venezuelan 1999 Constitution is the product of the setting-on of a constituting process conduced disregarding the 1961 Constitution, by the Hugo Chávez candidate, then endorsed by the formerly called Supreme Court of Justice, once the candidate's election as President was secured. A lot has been written about that process and it is not what is of interest here. I just want to stress that the National Constituent Assembly was shaped in an anti-democratic way, inasmuch as it did not warrant the minorities' proportional representation; at the same time, it was also contrary to the Venezuelan State's federal conformation, since no equal representation to each state it was provided. Such Assembly was formed by 125 chavista "constituents" and only 6 who were not, even though the pro-government representatives won with only by the 52% of the votes.

The text composed under those conditions was submitted for referendum approval in the middle of a natural catastrophe of enormous dimensions'; the participation rate was just 44.02% of the electoral registry. Such text does not have a true transition regime, and, besides, since the beginning, suffered several modifications without having met the procedures provided therefore.[2]

1.1. The creation of a Public Power's Transition Regime after the Constitution was approved

The Constitution of 1999 was drafted by a National Constituent Assembly called behind the 1961 Constitution's back; under the impulse of the recently elected president, Hugo Chávez. The new Constitution was submitted to binding referendum and the text was approved on December 15, 1999. Although its essential mission was to produce the new constitutional text and the National Constituent Assembly had concluded its task, that very same year the Assembly enacted a Decree with constitutional rank regulating "The Public Powers' Transition Regime" by means of which, directly and without any consultation, appointed each of the Public Powers head officers[3].

[4] It is important to underline that, even when the 1999 Constitution was approved, the National Assembly started a transition regime; we thus have, for instance, that it decreed on August 1999 the Judicial Emergency, something that allow them to create the Commission of Organization and Operation for the Judicial Power by means of which it dismissed judges and prosecutors and directly, without possibility of any contest, appointed their substitutes for along 10 years whereas said Commission operated until the year 2010.

[3] In such sense, Professor Brewer Carías has denounced in many of his essays and writings published along these 20 years, that National Constituent Assembly of 1999, attributing itself competencies it did not have (inasmuch as they had not been approved by means of the referendum), acted as follows: 1) it set a National Legislative Commission (the so called Tiny Congress that had not been provided by the recently approved Constitution); 2) substituted the states' legislative assemblies; intervened the Mayoralties and the Legislative Councils; 3) Directly appointed the Supreme Tribunal of Justice's magistrates, without meeting the requirements provided by the recently approved 1999 Constitution; and 4) also promulgated the Public Power's Electoral Statute. All of it was performed during the year 2000 without having been approved by referendum. In this sense, consult, among others, cf. A. Brewer Carías, *Golpe de Estado y proceso consituyente en Venezuela* (2001); Vv.

Thus, a transition regime was created outside the Constitution. A recourse was entered before the Constitutional Chamber—recently appointed using the questioned Decree, against such 'Transition Regime'. that [4] The Chamber declared that the regulation was supra-constitutional and, accordingly it was not subject to the just promulgated Constitution.

1.2 The substantial and formal modifications of the 1999 Constitution's contents

On the other hand, the constitutional text approved on December 15, 1999, published in the Official Gazette on December 30, 1999, was republished on March 24 of the year 2000, whereas the National Constituent Assembly included an Exposition of Motives – that was never submitted to the public's approval– changing 182 articles and 13 transitory provisions. From the former it turned out, that as from March 2000, there were two constitutions in Venezuela. That of 1999, approved by the people under referendum, ad that of March 2000, modified, unilaterally, by a National Constituent Assembly that officially concluded its functions on December 1999.

2. The constitutional regime's gradual reform by means of laws and decree-laws (2007-2010)

During his first constitutional term (1999-2006) Hugo Chávez, undoubtedly counted with a great popular support. However, he also counted with an increasing fierce political opposition that, since 2001 made efforts to prove the regime's authoritarian nature. From that period comes the movement of April 2002, that came to request the temporary ousting of the Chávez's government; the so-called taking of the Altamira Square by military officers during several months, between 2002 and 2003; the subsequently known as "oil strike" between 2002 and 2003; the promotion of a consultant referendum aimed to provoke Hugo Chávez's renunciation (2003); the launching

Aa (eds.), *Estudios sobre la Asamblea Nacional Constituyente y su inconstitucional convocatoria en 2017* (2017).

[4] The CC/STJ, sentence 6 of January 6, 2000.

or implementation of a recall referendum of Hugo Chávez's mandate (2004); the massive waiver to participate in the parliamentary elections of 2005 due to the absence of adequate electoral conditions. Between 2003 and 2004 the Supreme Tribunal of Justice dismantled the National Electoral Council, just after the so-called the Chambers' war[5]. There was also the closing of the First Court of Contentious Administrative Matters [6].

Finally, on December 2006, presidential elections were held with the political opposition's participation. Chávez obtained 62.7% of the votes, with a 74.87% of participation rate[7]. On the following day, he proposed a constitutional reform that would be copied on some *axes* to which he referred during the campaign, and that would lead Venezuela to socialism.

2.1 Constitutional reform and its rejection by mean of referendum (2007)

In the year of 2007, president Chávez proposed the amendment of the Constitution in several of its essential aspects[8] since he pretended to substitute the State of law by a "socialist" state in order to establish the so-called communal State[9]. The proposal was submitted binding referendum, yet the citizens rejected it. The official results for that process were never published. In 2008, Leopoldo López, the Major of the Municipality of Chacao and the opposition leader with highest popular support, was politically disabled by the

[5] See A. Brewer Carías, J. Peña Solís (eds.), *La Guerra de las Salas del TSJ frente al referéndum revocatorio* (2004).

[6] The report issued by the Inter American Human Rights Commission of October 24, 2004, accounts the consequences for the Rule of Law and human rights.

[7] http://www.cne.org.ve/divulgacionPresidencial/resultado_nacional.php

[8] The 1999 Venezuelan Constitution provides three procedures for its text's review; the constitutional amendment, the constitutional reform and the Constituent Assembly. This last procedure is aimed to reform the Constitution in its essential foundations; hence, the very same constitutional text provides necessary process to get the people's approval by means of referendum.

[9] The reform sought by mid 2007 was initiated not through the call of a National Constituent Assembly by means of referendum, as it should have been, it was rather proposed before the National Assembly formed by deputies whom since 2005, were mainly members of the government party.

Comptroller of the Republic, banning him from participating or holding public positions during 6 years.

2.2 The 2009 constitutional amendment

One of the topics, issues or aspects that Chávez pretended to modify back in 2007 was the limitation for the President's reelection. Rejected his reform project and failing to recognize the effects assigned by the Constitution to such rejection, he proposed a new amendment of the Constitution that was finally approved by means of a new referendum, thus eliminating the restrictions to the successive nomination for all popular election offices.[10]

2.3. The constitutional regime's reform by means of laws and decree-laws (2007-2010)

Since 2007, communist laws began to be adopted starting to refer to the "Popular Power". That went on during 2008 and 2009, in spite of the reform's rejection. 2010 was a corollary. In January 2010 and successive months, President Chávez declared the necessity of a change the State's structure and to public policies, clearly assuming Marxism as a doctrine that ought to be materialized[11] In September of that very same year of 2010, there were new parliamentary elections, in which the government lost the qualified majority and for such reason by the end of the year 2010, prior to the initiation of the new legislative term, it enacted a set of organic laws incorporating said Marxist doctrine and regulating a socialist, militarist, centralized,

[10] Originally, Chávez's proposal referred only to the amendment of the Constitution's article 230, which prohibited the indefinite reelection; yet on January 5, 2009, the President decided include also governors, majors, deputies and any other elected public offices. All the amended articles being referred to elective public offices will not be transcribed; it will suffice, as an example to indicate the amendment related to the president of the republic's reelection: "Article 230 (old one): The presidential term is of six years. The President of the Republic may be reelected just one time, for an additional term." "Article 230 (amended): The presidential term is of six years. The President or Female President may be reelected."

[11] http://www.cubadebate.cu/especiales/2010/02/21/lineas-chavez-rimbo-al-estado-comunal/#XQD15i3SF-U.

police State called a communal State[12]. A communal State, or socialist State, was legally established in parallel to the social, democratic of law and justice State consecrated by the Constitution.

3. On Hugo Chávez's illness, his new reelection (2013-2019) and his decease[13]

According to the consulted sources, since mid 2011, when the President became ill with cancer,[14] until the date of his death (March 2013), the government kept in secrecy the real health condition of Hugo Chávez, in order to avoid the activation of the procedure provided by article 233 of the Constitution setting the President's temporary and absolute absences. The mentioned article provides in its first paragraph that it shall be deemed as an absolute absence, among others, "the permanent physical or psychic inability certified by a medical board designated by the Supreme Tribunal of Justice and with the National Assembly's approval"[15]. On October 7, 2012,

[12] The Popular Power's Organic Laws, of the Communes, of the Communal Economic System, of Public and Communal Planning, and of Social Comptrollership, in order to structure the communal State by means of the so-called popular power there was a reform of the Organic Law of Municipal Public Power, the Laws of the State Planning Councils and Coordination of Public Policies, and of the Local Councils of Public Planning.

[13] It is recommended to read of the chronicles which professor Brewer Carías wrote during those months, from December until March of 2013, where he carefully analyses each one of the violations against the Venezuelan Constitution and Laws. Such Chronicles can be consulted in A. Brewer Carías, *La destrucción del Estado de Derecho, la ruida de la democracia y la dictadura judicial. Tratado de Derecho Constitucional Tomo XVI* (2017), 223 ff.

[14] Since there are no official reports on this subject, I limited myself to quote the available information from Wikipedia, the only one offering information in such sense and which quotes newspaper articles and information having been given during Hugo Chávez's illness. I refer to the article titled "*Anexo: Cronología de la enfermedad terminal de Hugo Chávez*". Consult also "*Cronología de los problemas de salud del presidente Hugo Chávez*", El Universal, Caracas, 31 December 2012.

[15] Article 233. The following shall be absolute absences of the President of the Republic: death, the renunciation, the destitution decreed by judgment of the Supreme Tribunal of Justice, the permanent physical or mental inability certified by a medical board designated by the Supreme Tribunal of Justice and with the

and despite of his persisting illness, Chávez participated at the new presidential elections, for the 2013-2019 constitutional term. With a very precarious health, he won with 55.07% (8,191,13) of the votes against Henrique Capriles who grouped all the opposition forces and obtained 44.31% (6.591,304) of the votes.[16]. At the end of October 2012, President Chávez, already elected for the following presidential term, admits he is seriously ill and travels to Cuba to start a new treatment; on December 8, he returns to Caracas and announces on TV and media that the cancer has not disappeared and that he must have a new surgery in Havana.

He publicly designed Nicolás Maduro (his Vice President) as his political heir, clamming the votes for him in the event that he should be "disabled" to rule. On December 11 Chávez is operated for the fourth time and on the 31st, Maduro returns from Havana announcing that the President's health is getting worse. January 10, 2013 was the starting date for the presidential term. The elected president should have given oath before the National Assembly; yet the seriousness of his illness restrained him from doing so. For that reason and required a previous constitutional interpretation, the Constitutional Chamber adopted an opinion on January 9, 2013[17] affirming that since Chávez had been reelected and performing at the presidency, the fact of not appearing before the Legislative Power to be sworn did not mean that he should not keep performing functions pointing out that what the "principle of administrative continuity" should be applied. In case of the President's absences due to health reasons, the Constitution provides that the Supreme Tribunal must appoint a medical board that must inform if the President's absence is temporary or absolute adding that in the event that such report determines that there are sufficient grounds to declare the absolute absence, the National Assembly must approve it. Notwithstanding,

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approval of the National Assembly, the office's abandonment, declared by the National Assembly, as well as the mandate was publicly revoked.

[16]http://www.cne.gob.ve/resultado_presidencial_2012/r/1/reg_000000.html?

[17] Sentence no. 2 SC/TSJ, 1 September 2019, http://historico.tsj.gob.ve/decisiones/scon/enero/02-9113-2013-12-1358.HTML; see A. Brewer Carías, *Estado de Derecho, la ruina de la democracia y la dictadura judicial. Colección Tratado de Derecho Constitucional Tomo XVI* (2017).

the evidence and violating again the Constitution (there was no doubt that if the procedure would have been initiated, his inability to serve as president would have been declared, since he was in fact unable before the elections), and neither the Supreme Tribunal or the Legislative Power acted, as they should have. Hugo Chávez never assumed the position of President. His decease was announced on March 5, 2013. Regarding human rights' violation, it is worth to mention that in the year 2012 the Inter American Human Rights Court ruled against the Chávez government in several complaints for violation of the Constitution and fundamental rights during preceding years; Then, Chávez decided to withdraw Venezuelan jurisdiction from the Court's jurisdiction reasoning that its decisions violated the national sovereignty. Therefore, he denounced the *American Human Rights Convention*.

II. NICOLAS MADURO

Deceased Chávez and applying the article 233 of the Constitution's, the Executive Vice President Nicolás Maduro should be appointed as interim President and, within the following 30 days, the National Electoral Council should call for a new presidential election for the term 2013-2019. It happened so, but ignoring the article 229 of the Constitution[18].

1. New presidential elections and Nicolás Maduro's proclamation as new president (2013-2019)

After the announcement of Hugo Chávez's decease, and following the mandate of the article 233 [19], Nicolás Maduro should

[18]Article 229. One may not elect President of the Republic whoever is performing the office of Executive Vice President, Minister, Governor and Mayor, on the day of his or her nomination or at any other moment between such date and that of the election,

[19] Article 223. The following shall be absolute absences of the President of the Republic: death, the renunciation, the destitution decreed by judgment of the Supreme Tribunal of Justice, the permanent physical or mental inability certified by a medical board designated by the Supreme Tribunal of Justice and with the

temporarily cover the absolute absence of the President. Due to the need of calling of a new electoral process, and in view that Nicolás Maduro had been "designated successor" by Chávez, there was a practical problem as a consequence of the article 229 of the Constitution. Such article expressly prohibits the Executive Vice President's nomination as candidate to run for President. Again, the problem was solved by the Constitutional Chamber, through a decision of March 08, 2013[20], in which declared that Maduro "no longer performs as vice president and becomes the president in charge"[21]. Maduro could not be candidate, under express constitutional prohibition. He became candidate by means of a decision of the Constitutional Chamber. The elections took place on April 14, 2013. The elections resulted in the government's party victory and that of its candidate Maduro, but with very tight results since the latter obtained 50.61% of the votes (7,587,759) while his closest competitor, Henrique Capriles Radonski, obtained 49.12% (7,363,980) [22]. The Opposition contested these results since during the voting process at least 3,500 possible irregularities were observed, generating several doubts about such results; the Electoral Power refused to perform the audits, arguing that the error margin was minimal and that it did not affect the whole results. The Constitutional Chamber received and decided against several

approval of the National Assembly, the office's abandonment, with it being declared by the National Assembly, as well as his mandate being publicly revoked. Whenever an absolute absence of the President elect should be produced prior to the assumption, one shall proceed to a new universal, direct and secret election within the following thirty consecutive days. While the new President is being elected and assumes, the Executive Vice President shall be in charge of the Presidency of the Republic. In the former cases, the new President shall complete the corresponding constituional term. If the absolute abcense is produced during the constitutional term's last two years, the Executive Vice President shall assume the Presidency of the Republic until completing the same.

[20] Sentence no. 141, SC/TSJ, 8 March 2013, https://www.accesoalajusticia.org/wp-content/uploads/2016/03/SC-N°-141-08-03-2013.pdf.

[21] https://www.accesoalajusticia.org/volviendo-atras-como-justifico-el-tsj-la-ausencia-de-chavez/.

[22] http://www.cne.gob.ve/resultado_presidencial_2013/r/1/reg_000000.html?,

electoral recourses due to forced formal reasons, but the resolution of such disputes corresponded to the Electoral Chamber instead,[23].

2. Protests against the president of the Republic, Nicolás Maduro (2014)

2.1 Protests and violations of human rights

In early year 2014, the country's economic condition was really serious. The high inflation rates, the shortages of food and medicines; the student protests' repression, the institutionalized violence and impunity; the discontent of half of the population with the results of presidential elections and the dark handling of Chávez's illness and decease, brought the beginning of a set of protests against the government, led and promoted by three of the opposition's leaders[24]. Massive protests paralyzed the country from February through July 2014, and it resulted in the excessive use of force by military and police bodies together with pro-government armed groups, whom violently raged against protesters. At least 9,286 protests were accounted nationwide.

The result of these months of chaos was a systematic violation of human rights. The figures are the following: 43 people dead while in use of the right to peaceful protest, most of them murdered by government forces, other by incidents generated by the barricades placed by people protesting in order to block the public roads; 878 people injured, including security force's staff; tens of persons tortured and mistreated; and 3,351 people arrested, many of them are

[23] Sentence no. 1.111, 7 August 2013; it is also recommended to read the analysis made by Allan Brewer Carías about the unconstitutional situation of the Constitutional Hall when it advocates the knowledge of the electoral contentious appeals against elections on that date; analysis which is found in said book of the referred author, A. Brewer Carías, *Estado de Derecho, la huída de la democracia y la dictadura judicial* (2017), 223 ff.

[24] María Corina Machado, Antonio Ledezma y Leopoldo López.

still in jail waiting for trial.[25] During the protests, an arrest warrant was issued against Leopoldo López, another the opposite leader. Such warrant was issued by Public Prosecutor (Luisa Ortega Díaz), who accuses him for "public instigation, damages to property and criminal association".

On February 18, López surrendered to the authorities and, on September 2015 he was sentenced to 14 years of prison. The *United Nations Organization,* the *European Union, Amnesty International* and *Human Rights Watch* as well as other international human rights organizations, condemned such sentence since it attempted against the right to protest, also because the decision was adopted in a trial which violated all the due process constitutional guarantees[26]. In November of that very same year the prosecutor and the General Chief Prosecutor Luisa Ortega Díaz whom formerly accused López expressed in 2018 that such process was set-up without evidence and that the same were all false.

2.2 Appointment of public powers officials without counting with the qualified majority required by the Constitution

In the middle of a deep political, social and economic crisis (the scarcity of food and medicines had already made the government impose rationing measures), the National Assembly appointed the Magistrates of the Supreme Tribunal, the Comptroller General of the Republic and the People's Defender with a simple majority of the deputies', although according to article 279 of the Constitution such appointments should be made requiring a qualified majority of 2/3 of the deputies[27]. It is also necessary outline

[25]https://www.amnesty.org/download/Documents/AMR5312392015SPANISH.pdf http://www.observatoriodeconflictos.org.ve/oc/wp-content/uploads/2015/01/Conflictividad-en-Venezuela-2014.pdf.

[26] For this issue and for many others related to the systematic violation of human rights in Venezuela. One must read the Report issued by the United Nations *High Commissioner for Human Rights* dated July 31, 2017 titled *Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017* (2018).

[27] Article 279. The Republican Moral Council shall convoke a Committee of the Citizen Powers Nominations Evaluation, to be formed by representatives of several

that the designation of the National Electoral Council's members, both in 2004 as on 2014, were made by the Constitutional Chamber of the Supreme Tribunal of Justice, when such designations must be made with the favorable vote of 2/3 of the parliament's deputies according to art. 296 of the Constitution [28].

3. On the new National Assembly with an opposition majority and the express appointment of the express magistrates of the Supreme Tribunal of Justice (2015)

On December 2015 there were elections of deputies for the National Assembly. Said election results were as follows: the opposition obtained 112 seats of a total of 167, with a 56.21% (7,728,025) of the votes, while the government party obtained 40.92% of the votes (5,625,248) [29] On December 2015 and before the new National Assembly started operating, the outgoing Legislative Power elected the new magistrates of the Supreme Tribunal, in contravention of all legal and constitutional requirements. Effectively, 11 Magistrates surprisingly resigned (5 of the Constitutional Chamber) although their terms expired in 2016, all of it to prevent that they were appointed by the new National Assembly; the terms provided by the Constitution and by the *National Assembly's Interior and Debates Regulations* to make the nominations and corresponding

sectors of the society; it shall forward a public process from whose results one shall obtain a short list of three for each Citizen Power's, which shall be submitted to consideration of the National Assembly. The latter, by means of the favorable of two thirds of its members, shall choose within a term not exceeding thirty continuous days to the holder of the Citizen Power being considered. If upon this term's conclusion there is no agreement in the Assembly, the Electoral Power shall put the issue to popular consultation.

[28]Article 296. The National Electoral Council shall be integrated by five persons not linked to organizations with political purposes; three of them shall be nominated by the civil society, one by the national universities' faculties of legal and political sciences, and one by the Citizen Power. The National Electoral Council's members shall be appointed by the National Assembly with the vote of two thirds of its members. The National Electoral Council's members shall choose their President among them, in accordance with the law.

[29] http://www.cne.gob.ve/resultado_asamblea2015/r/0/reg_000000.html?

challenges were violated; the chairman of the Nominations Committee had been a candidate of the Government party and have not been elected and, moreover, he was also a magistrate candidate!!! The Nominations Committee's Secretary was the son of said committee's chairman. All the nominated candidates for magistrates were directly linked to Chavism: either for being registered in the government's party or because they had recently lost the parliamentary elections or for having served offices in the Executive Power. Most of the nominees did not met the requirements set by the Constitution, several did not have post graduate studies, nor experience as university professors or judges; others lacked the minimum time since their law degrees (art. 263[30] Constitution) [31]. The need to control of the country's highest court by the government caused one of the greatest violations of the Rule of Law during the Venezuelan democratic history. When the Magistrates assumed their offices on December 2016, the Constitutional Chamber's *express* judges devoted themselves, to dilute progressively the legislative body's powers through more that 96 judgments (since 2016 until April 2019), emptying their contents in the Chamber's clear role as the Executive Power's subaltern.

The Constitutional Chamber transferred and distributed the National Assembly's functions among the Executive Power, to the electoral Council or Agency, also to the National Constituent Assembly and even to itself, simply eliminating its powers as legislative body. The Constitutional Chamber also disqualified the

[30]Article 263, In Order to be magistrate if the Supreme Tribunal of Justice it is required: 1. To have Venezuelan nationality by birth without having any other nationality. 2. To be a citizen with recognized honorability. 3. To be a jurist with recognized competence, to enjoy a good reputation. To have performed as a lawyer during at least fifteen years and to have a postgraduate university degree in legal science; or to have been a chair holding university professor, or to be or having been superior judge in the specialty corresponding to the Chamber for which he or she is being nominated, with a minimum of fifteen in performance of the judicial career, and recognized prestige in his or hers functions performance. 4.Whatsoever other requirements set by the law.

[31] Cf. Report issued by the ONG *Acceso a la Justicia* (2016). https://www.accesoalajusticia.org/wp-content/uploads/2016/03/informe-a-AN-3-2.pdf.

opposition parties and deputies, many of them tried and jailed without respecting their parliamentary immunity and without due process, by military justice. Ultimately and since it was elected and recognized by the very same Electoral Power, none of the Legislative Power's decisions, have not been implemented since the Constitutional Chamber invalidated them[32].As we will see, to all that we need to add a key point: the creation of a National Constituent Assembly (NCA) without any previous call to the people, nor following any constitutional procedure, just in order to substitute the National Assembly.

4. On the permanent declaration of the state of emergency and on the violation of human rights and the revocation referendum (2016)

The 2016 year's outlook is as follows: Nicolás Maduro decreed the State of Exception or Emergency limiting rights and guarantees, and extending it every 60 days in spite of the Constitution provides that the exception may not last more than one hundred twenty days (constitution's art. 338)[33]; furthermore, these continuous declarations of State of exception have not counted with the mandatory

[32] Cf. A. Brewer Carías, *El reparto de despojos: La usurpación definitiva de las funciones de la Asamblea Nacional por la Sala Constitucional del Tribunal Supremo de Justicia al asumir el poder absoluto del Estado*, 149-150 Revista de Derecho Público 292, 300 (2017); A. Brewer Carías, *De la dictadura judicial contra la Asamblea Nacional* (2017).

[33]Article 338. The state of alarm may be decreed when there were catastrophes, public calamities or other similar events seriously endangering the Nation's security or that of its citizens. Said state of exception shall last up to 30 days and may be extended up to thirty days more. A state of economic emergency may be decreed when there appear extraordinary economic circumstances seriously affecting the Nation's economic life. Its duration shall be of up to sixty days and may be extended by an equal term. The state of interior or exterior emergency may decreed in the event of an internal or external conflict seriously endangering the Nation's security or that of its citizens. It shall last for up to ninety days and may be extended for further ninety days. Approval of the exception states corresponds to the National Assembly. An organic law shall regulate the states of exception and determine the measures that may be adopted based on the same.

legislative's approval, as required by the Constitution, but with the approval of the Constitutional Chamber[34].

Likewise, Maduro ruled by Decree Laws, substituting the National Assembly's essential competence. During the year 2016, the Constitutional Chamber declared unconstitutional and cancel or overrode or voided the majority of the laws and other parliamentary acts adopted by the National Assembly, both in the matter of legislation or law-making and of political control over the Government and Public Administration as the Constitutional mandate prescribes[35].

From the human rights perspective, according to the Venezuelan NGO "*Observatorio de la Violencia*", during the year 2016, 5,281 persons were murdered by the action of the state security bodies or forces for "resistance to the authority" or contempt to authority[36]. Also, according to the Venezuelan NGO Foro Penal, by the end of 2016 there were 109 political prisoners in jails; likewise, and in accordance with the same NGO, since January 2014 until September 2016, there were 6,535 dues to political reasons[37]. Last but not least, the National Electoral Council refused to call the recall

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[34] https://www.accesoalajusticia.org/golpe-constitucional/.

[35] Cfr. Acceso a la Justicia, TSJ concretó disolución de la Asamblea Nacional en 2017 https://www.accesoalajusticia.org/tsj-concreto-disolucion-de-la-asamblea-nacional-en-2017/; A. Brewer Carías, *La instalación de la Asamblea Nacional el 5 de enero de 2017, su acuerdo de 9 de enero de 2017, declarando la falta absoluta del Presidente de la República, y la anulación del acto de instación y de todos sus actos por el poder constitucional*, 149 150 Revista de Derecho Público 261, 270 (2017); A. Brewer Carías, *Crónica sobre el último sablazo dado por la "justicia constitucional" contra la Asamblea Nacional terminando con sus funciones como órgano de representacion popular* (2017); G. Sira Santana, Gabriel, *La Asamblea Nacional según el Tribunal Supremo de Justicia, luego de las elecciones parlamentarias del año 2015*, 148 Revista de Derecho Público 33 (2017).

[36] Informe 2016, *Obervatorio Venezolano de violencia* (OVV). https://observatoriodeviolencia.org.ve/2016-ovv-estima-28-479-muertes-violentas-en-venezuela/

[37] *Foro Penal, Reporte sobre la represión del Estado Venezolano, año 2016*, cf. https://foropenal.com/reporte-sobre-la-represion-del-estado-venezolano-ano-2016.

referendum claimed by the citizens following the guidelines provided in the Constitution[38].

5. The usurpation or misappropriation of the Legislative Power by the Supreme Tribunal of Justice and the reactivation of massive protests (2017)

5.1 On the Constitutional Chamber's decisions and the new wave of popular protests

On March 28 and 29, 2017, the Constitutional Chamber adopted sentences no. 155 and 156, respectively, limiting the National Assembly's members' immunity, as well as depriving and assuming their legislative's powers. Those powers were then transferred to the Executive Power[39].

Facing such temerity, the opposition several countries from the international community's and the *Organization of American States* described such action as an internal or self-inflicted coup[40]. On the following day Venezuela's Chief Prosecutor, Luisa Ortega Díaz[41], expressed her concern before such sentences because they clearly violated or infringed the Constitution destroying also the separation of powers and the judicial power's independence principles. Therefore, she declared that he country's main Jurisdictional Court was materializing the usurpation or misappropriation of functions. As a consequence of such decisions, civil protests were reactivated

[38] J.I. Hernández, *Análisis de las violaciones cometidas por el Consejo Nacional Electoral en el procedimiento de Referendo Revocatoro 2016* (2017).

[39] As it was conveniently asserted by the Venezuelan *NGO Acceso a la Justicia*, the issue with such decisions from the Constitutional Chamber was that they "ended up with the thrust in Venezuelan parliament". See also A. Brewer Carías, *La Consolidación de la Dictadura Judicial: La Sala Constitucional en un juicio sin proceso usurpó todos los poderes el Estado, decretó inconstitucionalmente un Estado de Excepción y eliminó la inmunidad parlamentaria* (2017).

[40] https://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-019/17 .

[41] We shall remember, that she acted on government's behalf during all these years, and also whom back in 2014 leaded the process and imprisonment or incarceration or jailing of the Venezuelan political opponent Leopoldo López's.

again throughout the whole or national territory; those protests begin on April and concluded on July 2017, and leading once again, to new human rights' violations.

The High Commissioner for Human Rights (OHCHR) from the Office of the United Nation's published a report titled Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to July 31 2017, in which the generalized and systematic use of excessive force, arbitrary detentions, illegal search warrants , mistreatments and tortures, among other arbitrariness committed by the national authorities and security forces during the four months of protests against the national Government[42]. Currently, the International Criminal Court has initiated a preliminary investigation process about the facts occurred since the year 2014. During such period, 6,729 protests were recorded; 134 people were murdered as a consequence of such protests; 5,511 people were arrested for political reasons following the information provided by the Venezuelan NGO "*Foro Penal*", between January the 1st up to December 31st, the majority during April and August 2017[43].

5.2 On the void or null or invalid and unconstitutional call for a Constituent Assembly

On May 1st 2017, and going far beyond the provisions the Constitution of 1999, Nicolás Maduro, initiated the procedure for the establishment of a National Constituent Assembly, usurping the popular sovereignty, since only the people, as the sole holders of the original constituent power, were entitled to decide, by means of referendum if this kind of procedure could be initiated or not. [44]
Maduro not only did request the aforementioned procedure against the Constitution, but besides or moreover setting-up the elections' guidelines, by establishing an electoral and territorial system in

[42]http://www.ohchr.org/Documents/Countries/VE/HCReportVenezuela_1April-31July2017_SP.pdf.

[43] *Foro Penal, Reporte 2017 sobre la represión en Venezuela*, cf. https://foropenal.com/wp-content/uploads/2018/01/INFORME-REPRESION-DICIEMBRE-2017-1.pdf.

[44] A. Brewer Carías, *Bases Constitucionales del proceso de transición democráctica liderizado por la Asamblea Nacional en Venezuela, frente a la usurpación* (2019), 9 ff.

which not all the ballots had the same value. As a consequence of Maduro's electoral guidelines, five million people were excluded.

Once again, he Constitutional[45]and its Electoral Chamber justified such exclusion through four decisions[46]. Obviously, during the constituents' election process of July 30, 2017, all kinds of human rights' violations were denounced: threats to public officers; absence of electoral guarantees and lack of international observation; and on the day of such void or invalid elections, protestors were repressed resulting in the murder of 10 citizens[47]. The vices of that electoral process were of such entity that the technological company in charge of the electoral processes in Venezuela since 1999, Smarmatic Company from London, warned about the manipulation of "at least" 1 million ballots in the National Constituent Assembly's elections[48]. Just in one month, a new National Constituent Assembly (NCA) was created, as a super ruling power above all the constitutional one, with the capacity to adopt supra-constitutional regulations and of remove authorities or officers just for its willingness, and aiming to set-up a communal power; creating thus, an illegitimate constituent power running in parallel to the Legislative Power that had been democratically elected back in December 2015.

Finally, it is worth to bear in mind that during year 2017, Maduro kept or maintained the state of exception or emergency and

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[45] By means of sentence no. 455, the Constitutional Chamber declared the constitutionality of the President of the Republic's decree whereby he calls for a National Constituent Assembly imposing, fallaciously, the idea that the President have not usurped the popular sovereignty by setting-up the guidelines of the electoral system (sectorial and territorial voting) by choosing of the constituents.

[46] Sentences of the Electoral Chamber (EC), (#83, 84 and 85 of June 27) denied three electoral recourses filed both by citizens and by the Deputy General Prosecutor, asserting that the Constitutional Chamber had already pronounced about the issue in Sentence no. 455, Acceso a la Justicia Informe año 2017 (2017).

[47]http://efectococuyo.com/politica/30-de-julio-el-dia-en-que-hubo-muertes-barricadas-y-elecciones-cuestionadas-en-venezuela/.

[48] Also, Reuters, the international news agency informed that for the NCA elections only 3.7 million people had voted on Sunday at 5:30 p.m., far away from the 8.1 million that the NEC's president had assured that it had been obtained at the journey's closing. The thing is that not even the chavism's supporters warranted the results. https://lta.reuters.com/article/topNews/idLTAKBN1A11UZ-OUST.

the constitutional rights were suspended or duty suspension He extended such exception extending it on six occasions[49]. As the Venezuelan *NGO "Acceso a la Justicia"* affirmed, until 2017 the events against the rule of Law and Human Rights in Venezuela from the beginning of Nicolás Maduro's presidential term: "… (omitted)… have led to our country to be listed as a dictatorship by organizations experts in human rights, such as Human Rights Watch and Freedom House International. Others like The Inter American Human Rights Commission (IACHR) have ranked Venezuela since 2010 as one of the countries in which there is no democracy or is facing circumstances that affect seriously the use and enjoyment of the fundamental rights; these affirmations were published in their annual report 2010 (chapter IV). Alike, in August 2017 the Office of the UN Commissioner for Human Rights, published a report about the generalized and systematic use of excessive force, arbitrary detentions, illegal searches, mistreatments and tortures, among other abuses committed by national authorities and security forces along the protests against the national Government that lasted four months. The international community has not been left behind and, particularly, since Sentences # 155 and 156 of the Supreme Tribunal of Justice's (STJ) Constitutional Chamber (CC) of March 2017, a few countries began to withdraw its ambassadors and asserting that a dictatorship has been established in Venezuela. In the national scenario, several NGO's as well as recognized defenders of human rights' have also declared that Venezuela entered into an authoritarian modeling 2016 and that the STJ played an important role there to[50].

[49] *Acceso a la justicia: Informe año 2017*. https://www.accesoalajusticia.org/wp-content/uploads/2018/08/Bolet%C3%ADn-informe-anual-Acceso-a-la-Justicia-2017.pdf

[50] *Acceso a la Justicia: El largo camino a la dictadura*. https://www.accesoalajusticia.org/golpe-a-las-garantias-constitucionales/

6. Protests for the lack of basic services, the illegitimate presidential elections for the term 2019-2025 term and the hyperinflation (2018)

According to figures published by *Venezuelan Observatory of Social Conflicts* in January 2019, during 2018 there was an increase of protests of 30% compared to 2017; a record for Venezuela, where previous figures reached 12,715 marches or manifestations, that is to say, 35 protests took place on daily bases[51]. Unlike the former year's protests, those of 2018, were mostly to demand the provision of services, the protection of economic, social, cultural and environmental rights, while political reasons were displaced[52]. Simultaneously to this absolute crisis situation, Maduro requested the illegitimate National Constituent Assembly to call for presidential elections. These elections were supposed to be called on December 2018. Instead were held in May, that is to say 7 months in advance. Maduro's petition was made after having illegalized political parties and had imprisoned many of the opponents. The advancement of the presidential elections was the President's answer after the failure of the conversations between the government and the opposition promoted by the church, as well as the international community. Those conversations took place during January and February 2018 at the Dominican Republic. One of the key issues raised by the opposition within that frame was the call for free, plural and transparent elections in December with an impartial electoral Council and with the presence international observers. The elections were held, but without any compliance of the electoral legislation and constitutional provisions.

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[51] http://www.observatoriodeconflictos.org.ve/tendencias-de-la-conflictividad/conflictividad-social-en-venezuela-2018.

[52] Indeed, as specified the annual report of the *Observatorio Venezolano de Conflictividad Social (OVCS),* *89% of the protests took place to the request of economic, social, cultural and environmental rights, the protests for political reasons were displaced because : "Were to face the lack of effective public policies to attend urgent problems related to the public services' quality, collective labor agreements, health, food and education, the citizens protests were on a daily basis and these are the reasons on top of political protests".

The consequence is that those results were not recognized by the Venezuelans or by the international community. In the words of the Venezuelan NGO "*Acceso a la Justicia*": 1. They were not held on the constitutional scheduled date, December 2018 (for being the closest to the mandate's culmination January 10), but on May 2018, without any justification; 2. They were called by the National Constituent Assembly (NCA), an illegitimate body with supra-constitutional powers and not by the competent body, the National Electoral Council (NEC); 3. The opposition did not participate because it was being progressively annulled since 2016, by means of multiple judgments of the Supreme Tribunal of Justice (STJ) and actions by the NEC and the NCA; 4. There were no impartial international observers and there was no control while they were held; a series of irregularities were detected and denounced by several non-governmental organizations by filing an appeal before the Supreme Tribunal of Justice declared inadmissible by the Electoral Chamber as it used to[53].

Besides the deep social crisis resulting from the absence of services and the political crisis due to the illegal advancement of the presidential elections, an economic crisis, never seen before, kept getting deeper.

By December 2018, Venezuela found itself among the first three countries of the world with the highest inflation rate (hyperinflation).

According to the National Assembly's statistics, in 2018, the prices variation in Venezuela were of 1,698,488.2%. Just in December the inflation rate showed an increase of 141.75%. The daily inflation for the last month of the year was of 3%.[54]. Useful to remind that

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[53] See *Acceso a la Justicia: ¿Por qué Juan Guaidó no se autoproclamó?* https://www.accesoalajusticia.org/por-que-juan-guaido-no-se-autoproclamo/; cf. A. Brewer Carías, *Bases Constitucionales del proceso de transición democrática liderizado por la Asamblea Nacional en Venezuela, frente a la usurpación*, cit. at 45.

[53] By Sentence no. 455 the Constitutional Chamber declares the constitutionality of the decree.

[54] http://www.bancaynegocios.com/venezuela-cerro-2018-con-inflacion-de-1-698-4882/; "*Fmi Prevé Una Inflación De 10.000.000% Para Venezuela En 2019*", on *El Universal Diario*, date 10/09/2018, en

officially the country entered into hyperinflation on November 2017, when the prices recorded an increase of more than 50%[55].

7. On the usurpation or misappropriation of powers by Nicolás Maduro and the request for the reestablishment of the rule of Law and democracy (2019)

As on January 10, 2018 –the expiring date for the constitutional term, there was no democratically elected president, nor a recognized one by the international community and the majority of Venezuelans. the reason was that such elections were called by a 'de facto' body, the National Constituent Assembly created by Nicolas Maduro in parallel and to substitute and on the back of the Legislative Power, democratically elected back in December 2015. As was indeed recognized by the very same Electoral Power.

Accordingly, on January 11, 2019, the sole legitimate representative of popular sovereignty was, and still is, the Parliament, since: The National Constituent Assembly was not called by the people as provided by the Constitution, but by the President who has not competences for such a call; the People's Defender, the General Prosecutor, as well as the members of the National Electoral Council were chosen by the illegitimately designed National Constituent Assembly and not by the Legislative Power, as the Constitution of 1999 also provides; most of the Supreme Tribunal Magistrates were designated regardless any of the mandatory provided by the Constitution, as well as such appointments were performed by an incompetent body (outgoing of the Legislative Power back in 2015), by means of an express procedure.

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http://www.eluniversal.com/economia/22724/fmi-preve-una-inflacion-de-10000000-para-venezuela-en-2019; *"Asamblea Nacional Informó Inflación Mensual Y Anualizada De Febrero"*, on *El Nacional Diario*, date 03/14/2019; *"La Inflación De Venezuela Se Desacelera Pero Sigue Exorbitantemente Alta"*, *El Nuevo Herald Diario*, date 03/14/2019, en https://www.elnuevoherald.com/noticias/mundo/america-latina/venezuela-es/article227740674.html.

[55] https://www.efe.com/efe/america/economia/venezuela-entra-en-hiperinflacion-por-primera-vez-su-historia/20000011-3426684.

Thus, when Nicolás Maduro swore as president before the National Constituent Assembly and before the Supreme Tribunal of Justice, on January 10, 2019 he became a 'de facto president', usurping illegitimately the power; such illegitimacy and unconstitutionality affects not only to the Executive, but to all the other powers, with the exception of the National Assembly, the last public body elected according to mandatory provisions of the Constitution and Laws[56]. To face such scenario on January 15, 2019, the Legislative Power declared[57] the usurpation of the presidency by Nicolás Maduro, and, on the 23rd of the same year, proclaimed Juan Guaidó, the President of the National Assembly, President. Guaidó swore before a huge majority of citizens to reestablish the constitutional order, the rule of Law and the democracy by means of free and democratic elections, for which he assumed, provisionally, the office of President. He did not "self-proclaimed" as has being highlighted by some international communication media, he only swore before a competent authority, which is not the same.

Indeed, "the proclamation is the declaration of a candidate as the winner in an electoral process, and the second [oath] expresses the loyalty to the Constitution and the laws, that was what Juan Guaidó did on January 23. Accordingly, it is erroneous to say that Juan Guaidó "self-proclaimed" himself, since he did not declare himself the winner of an election, since he was not even elected as president of the Republic, he was only designated as such temporarily by the AN in view of the usurpation of the office by Maduro who was not legally and technically speaking, elected on May 20, 2018" [58].

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[56] Cf. A. Brewer Carías, *Bases Constitucionales del proceso de transición democractica liderizado por la Asamblea Nacional en Venezuela, frente a la usurpación y Acceso a la Justicia: ¿Por qué Juan Guaidó no se autoproclamó?* (2019).

[57] Cf. A. Brewer Carías, *Bases Constitucionales del proceso de transición democr;actica liderizado por la Asamblea Nacional en Venezuela, frente a la usurpación*, cit. at. 45, 77.

[58] See *Acceso a la Justicia*: *¿Por qué Juan Guaidó no se autoproclamó?* https://www.accesoalajusticia.org/por-que-juan-guaido-no-se-autoproclamo/; A. Brewer Carías, *Bases Constitucionales del proceso de transición democr;actica liderizado por la Asamblea Nacional en Venezuela, frente a la usurpación*, cit. at. 45, 141 ff.

What were the constitutional grounds on which the Venezuelan parliament was based to decide that its president should be who should lead the transition towards democracy in Venezuela? The Constitution of 1999 do not have a provision to rule the facts arisen from January 10th (year?): the existence of an illegitimately elected president who could swear on the scheduled date, as provided by article 231 of the Constitution and that who could take the office.

So, the sole recourse to rule such facts were to apply the article 233 of the Constitution by analogical interpretation. Such interpretation principles are part of the Constitution itself when regulates the absolute absence before taking the office, as well as the values and principles of the social and democratic State of law, jointly with the articles related to the usurpation of power and the right of rebellion. Indeed, the Article 233 provides that: "Whenever the absolute absence of the elected president occurs prior to assuming office, a new universal, direct and secret election should be called within the thirty consecutive following days. As long as the election and the assumption by the new president takes place, the president of the National Assembly shall be in charge of the Presidency of the Republic." Thus, and bearing in mind that on January 10 a new presidential term was beginning, also that elections of May the 20th had not been recognized, and that there was no elected president as on January 10, the answer that can be extracted from the Constitution was and is, that the president of the National Assembly was the one to be sworn as interim president until a new, free, independent, transparent election with international observers is called by a competent authority. Hence, the Parliament –public power representing popular sovereignty and whose democratic legitimacy is out of doubt, he proceeded to do it as it happened.

III. Summary and conclusion

The aforementioned facts, have marked the essential milestones. It provides evidence as how, each of the bases and principles on which the rule of Law is based have been systematically

violated. In as much as making a detailed correlation between facts and the principles stated in this work's introductory part would suppose extending us excessively, we shall only stop at one of them: the principle of the judges' autonomy and impartiality, since without them it is impossible to warrant the rule of Law, democracy and the defense of the human rights.

The judges that lacks of independence are "the judges designated for their political or personal link with those who designate them (designated by 'hand-picked'), or who may only remain or be promoted in their offices by virtue of their personal relations" (Pérez Perdomo. 2004-367)[59]. It is precisely the absence of judicial independence what allowed the rooting of a totalitarian and failed State in Venezuela resulting therefrom in the most serious consequences for Venezuelans. When a politicized judge who does not comply with his essential functions which is to control the power, there is a free road for the instauration of a totalitarian regime. The Supreme Tribunal of Justice, but especially its Constitutional Chamber, has created the conditions for the takeover of the absolute power by the Executive. Although Venezuelan judicial system has never been an example to be followed both before and after chavism, what has happened during these two decades has no precedents. The road towards the politicization of the Judicial Power in Venezuela started in August 1999[60]. When the National Constituent Assembly before the elaboration and promotion of the Constitution, created the Commission of Judicial Restructuring and declared the judicial emergency, proceeding to remove some judges and appoint other 'hand-picked' in a moment of total instability. Due to the judges' provisory condition in the year 2003, the Inter American Human Rights Court published a report expressing its concern for aspects

[59] L. Louza, *La independencia del Poder Judicial a partir de la Constitución de 1999*, 30 Politeia 35, (2007).

[60] Cf. *Acceso a la Justicia, Evaluación del desempeño del sistema de justicia venezolano (2001-2015);* https://www.accesoalajusticia.org/wp-content/uploads/2017/09/sistema-judicial-1.pdf y ULA Observatorio de Derechos Humanos: Derecho a la Justicia en Venezuela. http://www.uladdhh.org.ve/wp-content/uploads/2018/12/Informe-Derecho-al-acceso-a-la-justicia-en-Venezuela-Descargar.pdf.

"affecting the independence and impartiality of the Judicial Power, particularly the high percentage of judges and prosecutors in temporariness tenure and the breach to observe certain procedures set by law and by the Constitution for their appointment and removal".

The year 2004 was determinant to weaken the Judicial Power's scarce independence. The chavista government did not have the qualified majority at the National Assembly and nevertheless, infringing the Constitution, enacted the *Organic Law of the Supreme Tribunal of Justice* (art. 203 CBRV) raising the number of magistrates from 20 to 32 to get more power among them. Likewise, the parliament, without having the mandatory qualified majority, appointed 49 of the Tribunal's magistrates (17 holders and 32 substitutes), allowing for 2006, the Supreme Tribunal was composed almost completely by non-independent nor impartial or autonomous magistrates[61].

Since the enactment of the Constitution until 2008, the magistrates of the Supreme Tribunal of Justice's were renewed on three occasions, in spite of the fact that article 264 of the Constitution provides that such magistrates' term in office must be 12 years.

Another revealing and dramatic example of the judges' subordination to the Executive, was the famous case of judge Afiuni, who in 2009 was immediately arrested by the security bodies after President Chávez ordered her imprisonment by television.

[61] It is quite important to remember the day when the Supreme Tribunal of Justice resolved to take off all its masks and express its absolute devotion to Chávez: that day was February 26, 2006, when Venezuelans incredulous watched by television, that in the Act of opening the judicial year, the Supreme Tribunal of Justice's Magistrates sitting at the auditorium's podium, and the Instance judges and those of the Contentious Courts (who were sitting as pretended public) in front of the President of the Republic, yelled outstanding the government party's motto saying "Ühm ah, Chávez no se va" [Oh, oh, Chávez doesn't leave"]. Since Chávez passed away at any the public headquarters and any the court you can read notices saying "Here no one talks bad about Chávez". After his death, I witnessed at some trials before the First Instance Court and while they were questioning me to get my testimony, I saw the screens of the court officers' computers' and Chávez's face was while the computer was idle mode.

The reasoning was that she had granted provisional freedom to Mr. Eligio Cedeño, in jail for president's instructions. A criminal court condemned her to 5 years of prison.

This case was so arbitrary that on December 30, 2009 the Inter American Human Rights Commission published a report describing this situation as "a coup by President Chávez to the magistrates and lawyers in the country" [62].

The tortures and inhumane treatments suffered by the judge Afiuni in jail was terrible and are known by international entities that pressure for claiming house arrest.

Between 2005-2013, the Constitutional Chamber never ruled against the Executive for any violation of a constitutional right; nor any petition on the grounds of unconstitutionality was granted. No government act was override, neither any President's decrees-law was ever considered against the Constitution.

The aforementioned illegality of the so-called express designation of magistrates also shown the absolute lack of independence of the Supreme Tribunal of Justice; and how, from January 2016, the Constitutional Chamber (composed by 7 persons that were active members of the government party) played a crucial role in the destruction of the rule of Law and the Constitution, since: suspended three of the opposition's candidates to avoid the shaping of a qualified majority and declared the recently elected National Assembly in contempt; as a consequence of the supposed National Assembly's contempt, all their acts, laws and regulations enacted

[62] "At this report's paragraph 300, the IACHR, makes references to judge Afiuni's case: «Regarding these facts, on December 17, 200 the IACHR sent an information request to the State. On their turn some United Nations' rapporteurs expressed their deep concern for judge Afiuni's arrest, that they described as "a coup by President Hugo Chávez against the independence of magistrates and lawyers in the country". The UN rapporteurs expressed their worry from the fact that President Hugo Chávez had publicly instructed the General Prosecutor and the Supreme Tribunal's President to punish judge Afiuni with the highest penalty .In such sense, they said that "the reprisals for performing functions constitutionally guaranteed and the creation of a climax of fear in the judicial power and the lawyers does not serve any other purpose that of undermining the rule of law and obstructing justice"; see ULA *Observatorio de Derechos Humanos: Derecho a la Justicia en Venezuela.*

were declared against the Constitution by the Chamber; by emptying the legislative power competences, the Chamber dismantled, it's the National Assembly by means of 96 sentences from January 2016 up to this date; supported the creation of the National Constituent Assembly in 2017, body that called for the illegitimate elections of 2018; and, the Supreme Tribunal acting in Full Chamber decided to waive the deputies' immunity and by means of its sentences allowing also the imprisonment of regional governors from the opposition as well as members of parliament.

The provisional or provisory tenure for both for judges and public prosecutors remains in force, allowing their removal when they do not follow the government's instructions[63].

Since the Constitution of 1999 promoted by the chavista regime came into force, Venezuela entered into a stage in which the new constituted powers gradually proceeded to dismantle the social and democratic State of Law created by the very same President that had promoted it. It was possible because the real intention of the government's party since it came into the power was to implement a socialist State, with Marxist shape.

Infringing the principles supporting the rule of Law, all the Public Powers acted against such rule submitting themselves to the Executive's instructions and orders. A prominent role in the destruction of the rule of Law was played by the Supreme Tribunal of Justice. Through all the judgments or sentences adopted along these past twenty year, the Constitutional, Administrative and Electoral Chambers showed a its absolute political partiality in order to achieve in order to enable a full control of the power in favor of the

[63] "On August 2017, 25 Public Prosecutors of the state of Mérida were dismissed; they were provisional although they had been serving at public administration for 25 years. These dismissals occurred when the officers expressed their differences with the presidential call to an NCA. In spite of the fact that they have filed both judicial and administrative recourses, their cases have not been heard yet by the justice". Confront with the report published by the "*Observatorio de Derechos Humanos" from Venezuelan University of the Andes (ULA): Derecho a la Justicia en Venezuela*, which we highly recommended since it clearly summarizes how the Judicial Power's polarization took place in Venezuela.

Executive Power[64]. Because of it and of the public policies applied by the government against the Constitution, Venezuela currently suffers a complex humanitarian crisis in which the human rights have been systematically infringed, transforming the Venezuelan society into a group of men and women living under immediacy and survival[65].The figures gathered today by international bodies protecting human rights as well as by Venezuelan NGOs who have a truly laudable work during all these years are frightening. So far (May 2019) and since 1999 the numbers are as follows:

Deaths by violence (1999-2018): the NGO "*Observatorio Venezolano de Violencia" (OVV)*, expressed that between the years 1999 and 2018, in Venezuela more that 300 thousand violent deaths were recorded. In 91% of the homicides there has not been even an arrest; since 1999, some 7,200 inmates have died at reclusion centers. On daily basis, an average of40 young people or youths die in Venezuela[66]

Murdered for protesting (2014, 2017, 2018, 2019): during the months that those protests lasted, we have that in the year 2014, 43

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[64] "The judgments or sentences by the Constitutional Chamber beginning on December 6, 2016, have created a coup d'état in constant evolution; and are the consequence of a long road that began with the very same constituent process that ended with the Constitution of 1999. Thus, the Constituent Assembly called by the Supreme Tribunal of Justice's–, elected violating the Constitution of 1961− in force by 1999, exceeded the mandate given by the electors by creating an illegitimate transitory regime that led to, '*de facto*', elimination of the separation of powers principle. In this context, the Constitutional Chamber, created by the Constitution of 1999, has played a key role. From its first judgment, the Constitutional Chamber assaulted the constitutional system of justice, usurping the condition as the "highest and last interpreter of the Constitution" setting itself up and 'de facto' as the highest Court, even above the Supreme Tribunal of Justice"; see J.I. Hernández, *Asedio a la Asamblea Nacional*, in Vv. Aa. (eds.), *Estado de Derecho, la huida de la democracia y la dictadura judicial* (2019), 742 ff.

[65] We recommend the following press article published by the New York Times about the crisis in Venezuela: Venezuela lives the worst economic crisis for a country without war, according to experts, https://www.nytimes.com/es/2019/05/17/venezuela-crisis economia/?rref=collection%2Fsectioncollection%2Fnyt-es.

[66] https://elcooperante.com/ovv-entre-1999-y-2018-en-venezuela-se-registraron-mas-de-300-mil-muertes-violentas/ (Consulted on 05/09/19).

deaths occurred; by 2017, other 163 deceased; in 2018 during the social protests other 14 people died; and so far, this year 2019, since February we can count already 51 protesters murdered. This figure amounts a total of 271-murdered people.[67].

Political prisoners**:** According to the NGO "*Foro Penal*" by the end of February 2019, the number of political prisoners increased to 966 people. Considering that the former number reported by the NGO was of 273, in means that there was an increase of 700 people, the highest number in Venezuela's history since the "Foro Penal" keeps records (18 years ago). The updated figure (April 29, 2019) is of 775 political prisoners at national level[68].

Declaration of a complex humanitarian crisis, The crisis in figures: 3,7 million people suffered malnutrition in 2018, according to the FAO; 7 million Venezuelans require humanitarian aid according to the United Nations' Humanitarian Affairs and Emergency Relief Office; 6 million families all over the country benefit from the food provided or distributed by the Government; 1.9 million people require nutritional assistance, including 1.3 million children under 5 years of age according to the United Nations' Humanitarian Affairs and Emergency Relief Office; 2.8 million people require medical

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[67] "*Víctimas De Represión. Asesinados", ONG Foro Penal, actualizado para el 31/01/2018*, en https://foropenal.com/victimas-de-la-represion/#asesinados-estados, (Consulted on 05/03/2019); "*Declaración Sobre La Situación En Venezuela*", Organization of American States (OAS), dated 07/03/2014, at http://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-084/14, (Consulted on 03/05/2019); "*Venezuela: Violenta Respuesta A Las Manifestaciones. Denuncias De Asesinatos, Detenciones, Cierre De Medios*", Human Rights Watch (ONG), dated 03/03/2019, at https://www.hrw.org/es/news/2019/05/03/venezuela-violenta-respuesta-las-manifestaciones.

[68] "*Víctimas De Represión. Asesinados"*, ONG Foro Penal, avaiable at https://foropenal.com/victimas-de-la-represion/#asesinados-estados; "*Declaración Sobre La Situación En Venezuela*", Organization of American States (OAS), at http://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-084/14; "*Venezuela: Violenta Respuesta A Las Manifestaciones. Denuncias De Asesinatos, Detenciones, Cierre De Medios*", Human Rights Watch (ONG), at https://www.hrw.org/es/news/2019/05/03/venezuela-violenta-respuesta-las-manifestaciones.

assistance, including 1.1 children under 5 years of age according to the United Nations' Humanitarian Affairs and Emergency Relief Office; 4.3 million children under 5 years of age require water and sanitation assistance, according to the United Nations' Humanitarian Affairs and Emergency Relief Office; 1 million children have interrupted their education as a consequence of the crisis according to the United Nations' Humanitarian Affairs and Emergency Relief Office.

Massive exodus of population**:** during the year 2018, 2,400,000 Venezuelan people were accounted leaving the country as emigrants or refugees; and in 2019, the number grew to 3,706,624 people. (*no queda claro si estás comparando la cifra de migración mundial con la venezolana o la de venezolanos que emigraron a cualquier país del mundo, pore so lo he dejado así*)[69].

[69] "*Más De 300.000 Niños Venezolanos En Colombia Necesitan Ayuda*" – Organización de las Naciones Unidas (ONU), Noticias ONU, con fecha del 29 de abril de 2019, https://news.un.org/es/story/2019/04/1455081; "Emergencias. Situación En Venezuela. Cifras Oficiales", Alto Comisionado de las Naciones Unidas para los Refugiados (UNHCR Or ACNUR), en https://www.acnur.org/situacion-en-venezuela.html (Consultadas el 02/05/2019); "Los Flujos De Venezolanos Continúan Constantes, Alcanzando Ahora La Cifra De 3,4 Millones", Alto Comisionado de las Naciones Unidas para los Refugiados (UNHCR – ACNUR), en https://www.acnur.org/noticias/press/2019/2/5c700eb94/los-flujos-de-venezolanos-continuan-constantes-alcanzando-ahora-la-cifra.html, (Consultada el 03/05/2019); "*El éxodo venezolano. urge una respuesta regional ante una crisis migratoria sin precedentes*", Human Rights Watch (ONG), en https://www.hrw.org/es/report/2018/09/03/el-exodo-venezolano/urge-una-respuesta-regional-ante-una-crisis-migratoria-sin.

ARTICLES

SOME CONTRADICTIONS IN THE *BUNDESVERFASSUNGSGERICHT* JUDGMENT ON QUANTITATIVE EASING OF THE EUROPEAN CENTRAL BANK

*Angela Ferrari Zumbini**

Abstract

The decision of the *Bundesverfassungsgericht* of May 5th 2020 on ECB has already been criticized from different point of views. The majority of the critics are focused on the institutional consequences of the judgment. This article aims at highlighting some intrinsic contradictions of the decision that make it unsustainable. The inconsistencies regard various profiles: the addressee of the decision, the definition of the CJEU ruling as an ultra-vires judgment, the nature of the functions of ECB, the denied repercussions on the Purchase Program related to the Coronavirus crisis. Finally, the article tries to draw some hypotheses about what the reactions and the consequences of this decision might be.

TABLE OF CONTENTS

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1. Introduction

This is not the first time that the German Constitutional Court has issued a controversial high-impact ruling on European integration (highlighting its limitations or counter-limits)[1]. Just a few days after its publication, the decision of 5 May was already subject to numerous criticisms, especially regarding the ensuing institutional and economic consequences. In this short essay, I

[1] There is an extensive bibliography on the numerous judgments of the *Bundesverfassungsgericht* regarding constitutional identity, *Ewigkeitsklausel* and democratic principle in relation to European Union law. For a recent interpretation of the relationship between the *Grundgesetz* and EU law in terms of the loss of the centrality of the *GG* as a benchmark, see F. Wollenschläger, *Constitutionalisation and deconstitutionalisation of administrative law in view of Europeanisation and emancipation*, in 10 Rev. Eur. Adm. L. 7 (1/2017). In his essay *Die zweite Phase des Öffentlichen Rechts in Deutschland: Die Europäisierung des Öffentlichen Rechts*, in 38 Der Staat 495 (4/1999), R. Wahl specifically defined the Europeanisation of public law as a "Second Phase" in German public law. The "Marginalisation" of the constitution has been highlighted by numerous scholars; see, for example, G.F. Schuppert and C. Bumke, *Die Konstitutionalisierung der Rechtsordnung* (2000), and M. Jestaedt, *Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts. Eine deutsche Perspektive,* in O. Jouanjan and J. Masing (ed.), *Verfassungsgerichtsbarkeit*, (2011).

would like to highlight some of the contradictions inherent in the judgment.

2. The judgment of 5 May 2020

The decision of the Second Senate of the German Constitutional Court concerns the Public Sector Purchase Program (PSPP)[2] adopted by the European Central Bank (ECB) on 4 March 2015 and subsequently amended on several occasions.

The PSPP allows national central banks to purchase government bonds on the secondary market. This measure aimed to bring the rate of inflation to approximately what is considered the optimal 2% level by injecting money, thus lowering interest rates on the debt securities of States in financial difficulties.

Many private individuals in Germany turned directly[3] to the *Bundesverfassungsgericht* (BVG), complaining about the breach of their constitutional rights, namely those deriving from the principle of democracy, sovereignty of the people, and the budgetary sovereignty of the *Bundestag*.

The decisions of the ECB play a key role in the judgment on constitutionality, and it is the Court of Justice of the European Union (CJEU) that has jurisdiction to pronounce on their validity. The BVG therefore requested referral for a preliminary ruling, asking the European Court of Justice whether the ECB's decisions breached the Treaties (specifically, the prohibition on monetary financing under Article 123 TFEU and the principle of attribution under Article 5 TEU, exceeding the ECB's mandate on monetary policy and the budgetary policy mandate reserved to States).

[2] For an analysis of the PSPP from the purely monetary point of view, please refer to W. Arrata, B. Nguyen, I. Rahmouni-Rousseau, M. Vari, *The Scarcity Effect of Quantitative Easing on Repo Rates: Evidence from the Euro Are*a, in *IMF Working Papers*, December 2018.

[3] Applicants include Bernd Lucke, one of the founders of *Alternative für Deutschland*, Peter Gauweiler, politician and former member of parliament for the CSU, and entrepreneur Heinrich Weiss.

With its decision of 11 December 2018[4], the CJEU answered the BVG's questions, stating that the purchase programme as decided on by the ECB is legitimate because it does not exceed the ECB's sphere of authority and does not breach the prohibition of monetary financing[5].

However, in a sensational (but not entirely unexpected) judgment of 5 May 2020, the BVG considered that it was not bound by the decision made by the CJEU in its preliminary ruling and stated that the ECB's decisions regarding the purchase programme were unlawful because they violated the *Verhältnismaßigkeitsprinzip*[6] (deeming that the unlawfulness could be remedied with an additional ex-post statement of reasons, to be provided within three months).

Regardless of any political assessment or judgement, the ruling – in the writer's view – is marked by a series of contradictions on a purely legal level.

3. The contradictions in the judgment

3.1 The formal and substantive addressees of the judgment

The first contradiction lies in the difference between the formal addressees of the judgment and those who, in effect, appear to be the substantive recipients.

The formal addressees of the decision are the German Federal Government and the *Bundestag*. According to the Court, these German constitutional bodies infringed the constitutional

[4] Court of Justice of the European Union, Grand Chamber, judgment C-493/17 of 11 December 2018.

[5] There have been numerous somewhat critical reactions to the judgment, especially regarding loose control over the principle of proportionality, see M. Dawson and A. Bobic, *Quantitative easing at the Court of Justice - Doing whatever it takes to save the euro*: *Weiss and Others*, in 56 Comm. Mkt. L. Rev. 1005 (4/2019). The conflict between the two courts arising from the judgment on the referral for preliminary ruling had already been highlighted by S. Dietz, *Die gerichtliche Kontrolle der EZB durch den EuGH und das BVerfG - ein Konfliktfall im Verfassungsgerichtsverbund und Eurosystem?,* in 30 Europäische Zeitschrift für Wirtschaftsrecht 925 (22/2019).

[6] For an historical view of the principle of proportionality in German law, starting from the *Polizeirecht*, see P. Lerche, *Übermaß und Verfassungsrecht – zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit* (1961).

rights[7] of the applicant German citizens because they failed to take action to verify that the ECB's PSPP decisions complied with the principle of proportionality. The BVG's judgment is therefore meant to sanction the inaction of the German Government.

There can be doubt, however, that the substantial recipients are (not only but at least also) the bodies of the European Union, first and foremost the ECB. According to the Court, the German bodies should have required the ECB to make known all the assessments it carried out in setting up, and then proceeding with, the purchasing programme in order to subject the ECB's decisions to careful scrutiny in the light of the principle of proportionality. Thus, it is inferred that the ECB, for its part, failed to provide such information from the start.

The BVG does not have the authority to assess the lawfulness of the actions of EU bodies (including the ECB) as this is the prerogative of the CJEU. However, the German Court circumvents this limitation by censuring the German Government's inaction in reviewing the actions of the ECB.

The confusion regarding the addressees of the judgment emerges in all its contradictoriness in § 235, where the Court orders the Bundesbank to no longer give effect to the purchase programme, i.e. to stop purchasing securities (granting a transitional period of three months, deemed sufficient for the necessary coordination with the central bank system). However, the BVG establishes a resolutive condition for this prohibition imposed on the *Bundesbank*: it may continue with the purchase programme if, during the three-month transition period, the ECB Governing Council adopts a new decision suitably explaining and justifying the weighting given to monetary policy objectives and

[7] Specifically, the Court considers the violation of the following constitutional rights: Article 38(1) (Members of the Bundestag shall be elected by direct, free, equal and secret universal suffrage. They are the representatives of the people as a whole, are not bound by any mandate or directive and are subject only to their conscience) in conjunction with Article 20(1) (The Federal Republic of Germany is a democratic and social federal state) and (2) (All state power emanates from the people. It shall be exercised by the people by means of elections and voting and by special bodies with legislative, executive and judicial powers), in conjunction with Article 79(3) (No changes may be made to this Basic Law that affect the division of the Federation into Länder, the principle of the participation of the Länder in legislation or the principles set out in Articles 1 and 20).

the consequences for economic and fiscal policies by demonstrating its proportionality. It is interesting to note that the German text of the judgment states that the new ECB decision must be *nachvollziehbar* ("comprehensible"), while the English version published on the BVG's website (which, for obvious reasons, is the most widely read version abroad) felt the need to specify that the new decision must not only be comprehensible but also "substantiated".

It is clear that the direct addressee of the ban on the purchase of government bonds (the Bundesbank) in reality hides the true (indirect) addressee of the judgment, the Governing Council of the ECB, upon which the Court attempts to impose not only an obligation to adopt a new decision but also a stronger obligation to state reasons.

3.2. The relationship between the *Bundesverfassungs-gericht* and the CJEU

a) The contradiction in requesting a referral for a preliminary ruling and then failing to abide by it

The BVG made a referral for a preliminary ruling to the CJEU, specifically requesting that it assess the constitutionality of the ECB's decisions, thus affirming the (exclusive) jurisdiction of the CJEU as to the validity of the actions of EU bodies. However, upon receiving a response that diverged from its opinion, it decided to disregard the CJEU's decision. It would appear that the BVG requested an "opinion" from the CJEU, hoping to obtain a convergent decision on which to base its conclusion with greater certainty. Moreover, the Italian Government itself had objected that referral for a preliminary ruling to the CJEU was inadmissible, pointing out that it was more a matter of a request for an opinion than a referral for a preliminary ruling to a court with the authority to hand down a final decision on the matter.

b) The contradiction in defining the CJEU judgment as ultra vires only to hand down an ultra vires judgment itself.

The BVG states verbatim that the judgment of the European Court of Justice is "*schlechterdings nicht mehr nachvollziehbar*"

(absolutely not comprehensible[8]) and was made "ultra vires" (§ 116). The judges of the Second Senate in Karlsruhe consider that the CJEU had not fully exercised its powers, adopting unjustified self-restraint regarding the ECB. The BVG devotes many complex pages to the argument that a judgment deemed to express excessive self-restraint can be described as ultra vires. The key steps can be summed up as follows.

The German Court accuses the Court of Justice of having carried out its proportionality check on the ECB's decisions too loosely, having merely verified the absence of "*offensichtlich außer Verhältnis*" ("manifestly disproportionate") measures (§ 156).

This erroneous (weak) application of the principle of proportionality allegedly leads to a failure to monitor compliance with the principle of attribution under Article 5 TEU. In this way, the ECB could extend its powers beyond those conferred on it by the Treaty. By failing to apply a standard of intensive scrutiny, the CJEU has allowed undue extension of the ECB's powers, acting against the task assigned to it by the Treaty. The last passage of this complex statement of reasons can be found in paragraph 154, where (if not in a flight of fancy, at least, stretching the limits of logic) the Court states that the interpretation of the principle of proportionality undertaken by the CJEU in its Judgment of 11 December 2018 and the determination of the ESCB's mandate based thereon manifestly exceed ("*überschreiten offensichtlich*") the judicial mandate conferred on it by Article 19(1) TEU and leads to a transfer of authority to the detriment of the Member States. Therefore, the BVG states that the decision of the CJEU is an ultra-vires act which is not binding on the BVG in this case[9].

Consequently, the BVG itself considers that it must exercise the (unexercised) powers of the CJEU, thereby acting ultra vires since it has no such power.

[8] Actually the official translation of the decision published on the BVG website translate *schlechterdings nicht mehr nachvollziehbar* with "simply not comprehensible", but in my opinion it is preferable the translation "absolutely not comprehensible".

[9] § 154 of the judgment, the original German is: "*Es stellt sich deshalb als Ultra-vires-Akt dar, der das Bundesverfassungsgericht in dieser Frage nicht bindet*".

In a meaningful paragraph (§ 164), the BVG disregards a number of fundamental principles of Union law[10]. The German Court states that, in order to be able to decide on the alleged inaction of German bodies, a preliminary question must be raised, namely the validity of ECB decisions. For the reasons set out above, the Court cannot rely on the decision of the CJEU. The BVG therefore considers that it must re-examine the ECB's decisions itself, adopting the rules of the Treaties as a yardstick for lawfulness.

Lastly, the Karlsruhe Court states that the ECB's decisions on the purchase programme "*mangels hinreichender Erwägungen zur Verhältnismäßigkeit*" (do not contain sufficient grounds to demonstrate their proportionality), and thus exceed the powers conferred by Article 127 TFEU, which are limited to monetary policy and to "supporting competence regarding the Member States' economic policies". The BVG further stresses that the European System of Central Banks can support economic policies within the European Union but cannot set and pursue its own economic policy agenda.

The BVG therefore defined the European Court's ruling ultra vires (as it applied excessive self-restraint) and consequently decided to ascribe to itself the power to judge the validity of the ECB's acts, thus adopting an ultra vires decision itself.

3.3 The functions of the ECB: an independent or political body?

The judgment under examination contains further contradictions with regard to the ECB's functions.

The BVG devotes several paragraphs (namely §165 to §179) to the examination of the various economic, social and fiscal components that the ECB ought to have considered and balanced with the purely monetary objective underlying the PSPP. In particular, according to the German court, the ECB should have examined and assessed the impact of the purchasing plan on the fiscal and budgetary policies of the Member States (§§ 170-171),

[10] Moreover, infringement of EU law by a court of last instance may lead to infringement proceedings under Article 258 TFEU, as was the case in *Traghetti del Mediterraneo*, Case C-379/10, decided by the Court of Justice with its judgment of 24 November 2011.

the banking sector (§ 172), and individuals suffering numerous indirect effects as property owners, tenants, etc. subject to the risk of creating real estate bubbles, as well as substantial losses for savers (§ 173), unprofitable companies that can continue to survive by asking for low-cost loans while not being profitable (§ 174), and the role of the ESCB itself which is gradually becoming more and more dependent on the Member States (§ 175).

On closer inspection, two contradictory aspects emerge in relation to the ECB's functions.

Firstly, the ECB, an independent body[11] – according to the reasoning of the decision claiming to be impervious to government pressure – allegedly receives instructions from a national constitutional court on the merits of its decisions, following the reasoning of the ruling.

Secondly, the BVG criticises the ECB for failing to take into account the consequences of the purchasing programme on economic and fiscal policy, thereby infringing the principles of attribution and proportionality. However, the ECB has no authority in matters of economic and fiscal policy. The reasoning is almost paradoxical: taking only monetary policy (regarding which it has authority) into consideration, the ECB acts ultra vires because it fails to consider other aspects (over which it has no authority).

Furthermore, the Second Senate points out that purely monetary choices have important consequences in economic and social terms (e.g. "helping" States that issue debt through the PSPP means lowering interest rates and therefore causes disadvantages for savers). The Court does not say this explicitly, but by fully developing this concept it seems possible to read a very significant invitation between the lines: in adopting the purchasing plan, the ECB has made choices of a not merely monetary but also economic and social nature. The ECB therefore made not merely technical, but also "political" choices, and this should have been made explicit. Balancing an apparently technical objective such as the level of inflation on the one hand, and any economic and social impact on savers, tenants, property owners,

[11] On the nature and role of the ECB we refer to C. Zilioli, A.L. Riso, *New tasks and Central Bank independence: The Eurosystem experience*, in P. Conti-Brown, R.M. Lastra (ed.), *Research Handbook on Central Banking* (2018).

policyholders, etc., on the other implies a political evaluation and choice that must be presented as such, explicitly stating all the terms and effects of the question and adequately substantiating the choices. Making the economic and social evaluations public would have allowed national governments and the governors of national central banks to take up a position regarding the purchasing plan. The German Court specifically fears "monetary dominance" (actually using the English term in § 171 of the German text) by the ECB, which might influence the fiscal policies of the Member States, which would effectively lose the possibility of autonomously establishing good budgetary policies.

3.4. The (denied) implications for Covid-19 operations.

The text of the judgment never refers to the Pandemic Emergency Purchase Programme (PEPP) or discussions on possible action to counter the financial emergency caused by the Covid-19 outbreak. Time constraints meant, of course, that it was not possible for new and possible programmes to be addressed.

However, the first paragraph of the press release summarising the main facts and reasoning regarding the judgment (published on the BVG website) states that "The decision published today does not concern any financial assistance measures taken by the European Union or the ECB in the context of the current coronavirus crisis"[12]. Such an *excusatio non petita* requires a particularly careful reading of the paragraphs that the BVG devotes to the description of the PSPP's risk-sharing mechanisms in order to see whether the conditions set out in this decision might in any way prefigure a trend for future decisions.

In reality, there are some passages in the grounds that may well constitute the basis for a possible subsequent decision on new purchasing programmes (including the various solutions currently under discussion to address the financial consequences of the Coronavirus pandemic).

[12] "Aktuelle finanzielle Hilfsmaßnahmen der Europäischen Union oder der EZB im Zusammenhang mit der gegenwärtigen Corona-Krise sind nicht Gegenstand der Entscheidung" The English version of the press release is available at www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html

Noting that the ECB has gradually eased the requirements for access to the purchasing programme, the BVG then provides an extremely precise clarification. It states that "any further lowering of the criteria below a rating complying with at least Credit Quality Step 3" (§ 208) would lead to an excessive lowering of standards. This clarification was made for the future, and if the Court considers it applicable to the current PSPP, there would be no reason not to apply it to any future purchasing programmes.

Even more precise is the reasoning set out in §§ 222 to 228. Here, the BVG states that the PSPP risk-allocation scheme does not breach the principle of budgetary responsibility and autonomy of the *Bundestag*. The Court follows its own previous case law[13], citing "*die vom Senat entwickelten Grenzen der haushaltspolitischen Gesamtverantwortung des Deutschen Bundestages*", i.e. the limits set by the Second Senate of the Bundestag's general budgetary responsibility (§ 227, citing its own precedents from 2012 and 2019). According to this doctrine, the democratic principle requires the German Parliament to be responsible for the budget. International treaties that could have major financial consequences may not therefore be signed without the approval of the *Bundestag.*

The German Constitutional Court specifies that the *current-risk allocation structure* of the PSPP is compatible with the democratic principle (§ 228) as there is no redistribution of sovereign debt between Member States. The Court lists all the limitations on the redistribution and sharing of losses between Member States, stating that these limitations protect and enable the *Bundestag's* control over general budgetary policy. The current risk-sharing regime is a determining factor in this (§ 225).

Lastly, the *Bundesverfassungsgericht* clearly states that "in light of the volume of bond purchases under the PSPP, which amounts to more than EUR 2 trillion, such a risk-sharing regime, at least if it were subject to (retroactive) changes" would run counter to the principle of the budgetary responsibility of the *Bundestag* as outlined by this Senate "As this could possibly entail

[13] Lastly, the judgment of the *Bundesverfassungsgericht* of 30 July 2019, but even before that, the judgment of 12 September 2012 on the ESM, for which kindly see A. Ferrari Zumbini, *La sentenza del Bundesverfassungsgericht sul Meccanismo Europeo di Stabilità e sul Fiscal Compact*, in 27 Rivista giuridica del mezzogiorno 43 (1-2/2013).

a recapitalisation of the Bundesbank, it would essentially amount to an assumption of liability for decisions taken by third parties with potentially unforeseeable consequences, which is impermissible under the Basic Law" (§ 227). It is difficult not to see in these grounds some reference to the current discussions on purchasing programs to deal with the coronavirus health emergency, and, perhaps, the semblance of a precedent of the Court to refer to in future decisions.

4 The possible consequences of the judgment

What the real consequences of this judgment will be is not currently foreseeable. Some assumptions can be made, however.

Possible institutional reactions can come from two parties: the European Court and the ECB.

4.1. The CJEU's possible reactions

The Court of Justice has already published a press release following the *Bundesverfassungsgericht's* judgment[14], in which it responds categorically, pointing out that its judgments handed down as a preliminary ruling are binding on the referring court and that only the CJEU has jurisdiction to assess the legality of acts of European Union institutions.

Moreover, it seems likely that in its future case law the CJEU will find a way to "respond" to two *obiter dicta* from the judgment by the German courts in this regard.

First, to justify its disagreement with the European Court, the BVG states that the CJEU has "the mandate to interpret and apply the Treaties and to ensure uniformity and coherence of EU law" (§ 111), while the German Constitutional Court has the task of judging any ultra vires acts of the European institutions. In fact, such acts fall outside the authority of the European Union and breach German constitutional principles: first and foremost the democratic principle that political choices must be made by democratically legitimated actors ("it requires that any act of public authority exercised in Germany can be traced back to its

[14] Press release of 8 May 2020, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058it.pdf

citizens ", § 99). In essence, the Karlsruhe judges state that the European Court assesses the lawfulness of EU acts in the light of European law, whereas the constitutional perspective is alien to it. Therefore, the BVG must do this in the light of constitutional principles. Sometimes these two perspectives (*verfassungsrechtliche* vs. *unionsrechtliche Perspektive*) do not coincide, which explains the different conclusions reached by the two judges.

Secondly, the German Court states that the European Court must apply shared constitutional traditions. These do not, and cannot, coincide with the principles developed and applied by each national constitutional court. However, it adds, the ECJ cannot manifestly ignore a general constitutional principle common to the Member States (§ 112).

4.2. The ECB's possible reactions

As we have seen, the German Constitutional Court (indirectly) asked the ECB to adopt a new suitably substantiated decision explicitly setting out all the elements (in terms of consequences on economic, social and fiscal policies) assessed and balanced before reaching the decisions that gave rise to the PSPP. Only with this additional reasoning will it be possible to truly assess the proportionality of the measures taken.

The ECB might (in the abstract) follow up Karlsruhe's requests, but in this way it would give the BVG, if not jurisdiction, at least a power of control over its acts, which are not provided for by the Treaty. Moreover, it would set a dangerous precedent as future decisions of the ECB could be scrutinized by the constitutional courts of each country, which might reach different conclusions, making it impossible for the mechanism to work.

The ECB could also decide, on the other hand, not to respond to the BVG in any way, thus giving a strong signal, but risking a difficult *impasse*, given that the President of the Bundesbank, Jens Weidmann, declared[15] on 5 May itself that he will make every effort to obtain explanations from the ECB, and that after the end of the three-month transitional period the

[15] www.bundesbank.de/de/presse/pressenotizen/erklaerung-von-bundesbankpraesident-jens-weidmann-zum-urteil-des-bundesverfassungsgerichts-832412.

Bundesbank would not be able to buy government bonds according to the PSPP.

An intermediate solution seems more plausible, namely that the ECB will find a way to explain how it arrived at its conclusions, perhaps referring to the acts already adopted (with some minor clarifications) but without following up the BVG's requests to the letter.

It is interesting to note that the ECB too (which had decided not to participate in the oral discussion before the BVG on 30 July 2019) issued a rather piqued press release on 5 May 2019[16].

It states that the Governing Council of the ECB remains fully committed to its mandate to do whatever is necessary to ensure that inflation reaches its target levels. It adds that it will do its utmost to ensure that its monetary policy is implemented in all eurozone countries. It concludes by pointing out that the Court of Justice has already decided, with its judgment of December 2018, that the ECB has acted within the limits of its competence.

5. Conclusions

As we have seen, even through this brief analysis, the contradictions and criticalities of the judgment of 5 May emerge clearly. These contradictions partly reflect some fundamental issues that have long constituted a point for discussion.

Specifically, the judgment addresses two fundamental and widely debated issues – and not only in Germany. Firstly, the Court points out that the States are still *Herren der Verträge* and that the European Union has never evolved into a Federal State (§ 111). Second, the BVG holds that when a European institution or body acts ultra vires, i.e. beyond the powers conferred upon them by the Treaties (of which only the Member States are the 'masters', so that an extension of powers can only come from them), there is a lack, at least in respect of Germany, of the minimum necessary democratic legitimacy required by German constitutional law (§ 113).

However, in this case too, the Court's response to these legitimate questions is contradictory.

16 www.ecb.europa.eu//press/pr/date/2020/html/ecb.pr200505~00a-09107a9.en.html.

After clarifying that cases where EU bodies act ultra-vires are very rare and need to be resolved in a "cooperative manner", the BVG basically grants itself the authority to decide such cases. According to the Karlsruhe courts, while it is true that the primacy of EU law would be undermined if each State could examine the legitimacy of EU acts, it is also true that "if the Member States were to completely refrain from conducting any kind of ultra vires review, they would grant EU organs exclusive authority over the Treaties" (§ 111).

Essentially, the BVG states that it also exercised ultra-vires control in the interest of all other Member States (which would otherwise have lost control over the Treaties and the powers to be conferred on the EU). However, the other Member States have never given Germany this mandate; on the contrary, some of them have taken legal action before the CJEU to defend the work of the ECB.

Moreover, in the context of judicial review of ultra-vires acts, the BVG refers to general principles as defined in its case law (similarly, when defining the principle of proportionality, it complains that the CJEU has not explicitly adopted the three-phase scrutiny that has evolved in relation to this matter, distinguishing between *Geeignetheit*, *Erforderlichkeit*, and *Angemessenheit*, i.e. suitability, necessity, appropriateness[17]).

Such an approach, ascribing a pre-eminent role to national courts in resolving European issues, is certainly welcomed by some, and probably by the Germans first and foremost (or at least a large part of them). Nonetheless, in the European context as a whole it could also lead to a heterogenesis of goals, with the gradual diminusion of the importance of this judgment, whose most sensational element is not sustainable at European level. The *Bundesverfassungsgericht* could thus find itself – at least partially –

[17] The Court refers to the roots of the principle of proportionality, finding them not only in German law but also in the Common Law. Indeed, when it refers to the three-phase proportionality test model, it states that it is now widespread not only in the case law of the European Court of Human Rights and the CJEU but also in all European national courts. On this point, the Court cites (in the German text, while such quotations are not reported in the English text) the works of English-speaking authors, such as P. Craig, *Proportionality, Rationality and Review*, in 10 New Zealand L. Rev. 265 (2/2010), and the volume by A. Stone-Sweet and J. Mathews, *Proportionality Balancing and Constitutional Governance* (2019).

isolated in the European context, and the consequences of its sensational elements could be reduced.

In the end, it will be interesting to see the direction the Second Senate will take with the investiture of its new president, as the former president, Andreas Voßkule, ended his term of office just a few days after the publication of the ruling.

THE *KARLSRUHE* COURT'S RULING: HOW TO LAY BARE THE FRAGILITIES OF EUROPEAN INTEGRATION

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Abstract

This article draws attention to the hyper-responsibilization of the European Central Bank, linking it to the absence of a political counterweight at central level. It argues that the orthodoxy of the treaties, adopted by the German Federal Court, lays bare this fundamental fragility of European integration.

TABLE OF CONTENTS

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1. Introduction

The recent and serious conflict between the Court of Justice of the EU (ECJ) and the German Federal Constitutional Court (FCC) has rekindled the long-simmering debate on the problem of who should have the last word in the European Union (EU) legal area. The specific context on which the conflict took place has brought to light the presence of a significant fracture line which affects not only the relationships of coexistence between legal systems, but also the very functionality of the common institutions. The problem, as is widely known, concerns the possibility that the European Central Bank (or rather the System of European Central Banks, also known as ESCB) will continue to implement, even in the foreseeable future, its programs for the purchase of eurozone government bonds in the secondary market. The recent judgement by the German Federal Constitutional Court appears to call into question the conformity of the European Central Bank's (ECB) actions within the mandate defined in the Treaties, casting a sinister shadow upon the validity of the most recently launched pandemic emergency program. It is worth noticing that, on the basis of these programs, the ECB has managed to hold, through *Bankitalia*, a 17% share of Italian public debt. This share is inevitably destined to increase up to 30%, as a result of the new programs launched during the pandemic crisis.

It is not to difficult to imagine the drastic effects which could result from the adoption of such a large divestment program[2].

It can be argued that the ruling from Karlsruhe signals a real breaking point in the process of EU integration, not only because of the unprecedented act of rebellion by the German Court against the Court of Luxembourg, but above all because of the disruptive nature, for the purposes of the stability of the eurozone, of the issues at the heart of the conflict between the two jurisdictions. It is believed, therefore, that the ruling could be an opportunity for a decisive turning point in the process of European integration, and offer the opportunity to reflect on the number of available alternatives.

This article aims to examine four different problematic issues. The first concerns the question of hierarchy in the interpretation of EU law, strongly shaken by the conflict opened up by the FCC. It will be shown that the resolution of the problem of the conflict between jurisdictions transcends the mere legal horizon and more broadly concerns the reasons for coexistence between the different legal systems, the ideology that pervades the EU construction and the role played by the ECB, especially with regard to the stabilizing function of the eurozone. The argument put forward here is that the conflict between Courts has deeper roots and exemplifies larger problems and current imbalances within the entire eurozone. I will dedicate the next two sections of this essay to analyze this very point. My main thesis is that the EU project is currently characterized by a condition of radical disorientation in which monetary policies have become progressively politicized, while economic policies have undertaken an opposite path of depoliticization. This peculiar situation marks a departure from the institutional models traditionally known, according to which economic policies are fully part of the circuits of political and democratic representation, whereas monetary policies are, more or less rigorously, free from political influence[3]. The second part of this article will focus on the

[2] "*Unicredit: l'Italia ha il 66% del proprio debito e 4.400 miliardi per allontanare patrimoniali*", Milanofinanza, May 25, 2020, available on: https://www.milanofinanza.it/news/unicredit-l-italia-ha-il-66-del-proprio-debito-e-4-400-miliardi-per-allontanare-patrimoniali-202005250825439522.

[3] Forms of connection with varying intensity to political power are possible, as shown for example by the case of the British Central Bank which is linked to

process of depoliticization of economic policies. The analysis examines the barycentric role exercised by the single market by relaying on the paradigm of the "disembedded market economy", described by POLANYI in his 1940s essay. This works seems to provide a credible framework to understand the model of integration that has been so far followed and which is driven by the demolishing force of the market. The underlying idea is that the adoption of this paradigm has gradually shifted the state decision-making processes on economic policy towards a grey area characterized by an attenuation of political power, due to the deepening links of interdependence within the European arena and the single market.

Shading light on the effects of so-called destructive austerity will prepare the ground for the third part of the essay, where the attention will be focused on the action taken in recent years by the ECB. The idea sustained here is that the threat to the integrity and irreversibility of the single currency, fed by the growing nervousness of the markets, has led to a politicization of monetary policy, forcing the monetary authority to assume a substitute function for political power. This situation will be compared with the legal horizon outlined by the Treaties. On the legal level, attention will be given to the reinterpretation of the no bail-out clauses and the evolution of the concept of solidarity, marked by the emergence of conditional solidarity. I will try to demonstrate that the "catastrophic scenario" of the dissolution of the single currency has certainly legitimized a different interpretation of the fiscal and monetary rescue prohibitions enshrined in Art. 123 and 125 of the TFEU (the Treaty on the Functioning of the European Union), allowing forms of assistance consistent with the rationale of these prohibitions. It has not, however, let to extend the mandate of the ECB to the point of recognizing the eurozone's rescue power outside the cases of correction of the (episodic) irrationality of financial markets or the fight against deflation. It is precisely these considerations that

politics by a policy relationship (particularly in the determination of objectives). For a broader discussion of this topic, see O. Chessa *La costituzione della moneta. Concorrenza indipendenza della banca centrale pareggio di bilancio* (2016); G.B Pittaluga, G. Cama, *Banche centrali e democrazia. Istituzioni, moneta e competizione politica* (2004).

underpin the expression of strong doubts about the boundaries of the actions recently taken by the ECB.

These reflections will be developed in the fourth and last part of the essay, which examines the scenarios opened by the *Karlsruhe* Court ruling. With this ruling, the FCC seems to attempt to limit the ECB's actions, definitively blocking the way to creeping processes of mutualization/monetization of state debts. This could conceivably force the actors who play a major role in the European scenario to react accordingly. They could be pushed to rebuild the necessary instruments on political ground to achieve orderly coexistence of the different legal systems and economies, aware of constraints of monetary policy. The idea that will be supported is that, despite the constraints on the activity of the ECB, the FCC's ruling can provide the opportunity for the realization of more transparent choices in order to identify straightforward paths to deepen the EU economic and political integration.

SECTION I. RISE AND DECLINE OF CONSTITUTIONAL PLURALISM

2. Constitutional pluralism as an explanatory paradigm of integration between different legal orders

One controversial issue concerns, as mentioned previously, the problem of the uniform interpretation of EU law, jeopardized by the FCC's decision. Indeed, the German Constitutional Court claimed to review the legality of the measures adopted by different EU institutions, breaking the monopoly recognized by the Treaties to the Court of Luxembourg (Art. 19 TEU and 267 TFEU). The fact that a national court can declare itself competent to directly review the validity of EU acts and, what is more, disregarding a contrary ruling of the ECJ, seems not entirely surprising. The presence of a conflict between Courts in the European legal area constitutes the most evident form of the crisis of integration between legal systems. The publicist doctrine has long formulated new reconstructive paradigms in order to offer an explanatory key to the otherwise irresoluble relationship between European and national legal systems. At certain stages of the European integration process, the paradigm of constitutional

pluralism has established itself as the most refined attempt to get out of the shadows of the rigid opposition between two antithetical viewpoints of the legal phenomenon: the monist approach proposed by the ECJ, based on the primacy and originality of EU law, and the dualist perspective accepted by several national constitutional courts. As is well known, the national judges are little inclined to recognize a character of true autonomy of the EU law with respect to national systems. According to their view, EU law would still find its source of legitimacy in the national legal orders[4]. Both approaches, in their absoluteness and symmetric viewpoints, seemed at a certain point far too tied to a classic, hierarchical vision of the legal system to be able to explain the complex European legal space. The European legal order is characterized by relationships of mutual interaction, rather than of hierarchy, between systems at different levels[5]. The doctrine of constitutional pluralism, therefore, represents the most advanced attempt to systematize and mitigate a conflict that has always been latent in the integration process. This clash was already perceived in the field of fundamental rights during the 1970s and 1980s, but became clear only in the aftermath of the *Maastricht-Urteil* in 1993[6].

According to the doctrine of constitutional pluralism, the European legal space is characterized by the presence of

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[4] For an effective summary of this explanatory model, see M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, 3(4) Eur. Law J. 213 (2015).

[5] Among the most authoritative voices which supports the theory of constitutional pluralism is N. MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 2 Eur. Law J. 259 (1995); M. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. Walker (ed.), *Sovereignty in Transition* (2003) at 501; M. Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice,* 36 Common Mark. Law Rev. 351 (1999); F. Mayer, *The European Constitution and the Courts Adjudicating European Constitutional Law in a Multilevel System*, 9 Jean Monnet Working Paper 1 (2003); I. Pernice, *Multilevel Constitutionalism and the Crisis of Democracy in Europe*, 11(3) Eur. Const. Law Rev. 541-562 (2015); A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 Common Mark. Law Rev. 1417 (2011); J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14(4) Eur. Law J. 389-422 (2008).

[6] J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, cit.

heterarchical relations[7] (and not hierarchical ones). In such a complex framework, the problem of who is the final arbiter and "who has the last word" remains, by default, unsolved. It follows that each of the European and national courts retains, within the boundaries of their own system, the final word[8], provided that every single authority approaches the other with caution, respect and discretion. In this view, the objective is to strengthen the EU legal area and avoid its disintegration. Nevertheless, this discussion has slowly turned into a real conflict involving politically divisive issues, such as the limits of monetary policy and the interpretation of no bail-out clauses, where a leading role has been increasingly exercised by the FCC[9]. In summarizing the jurisprudence of this constitutional court, it should be kept in mind that the *Bundesverfassungsgericht* has developed two different answers aimed at protecting the integrity of the German constitutional order from potential damage caused by EU institutions: the *ultra vires* review and the identity control (*Identitatskontrolle*)[10], in which the counter-limit elaborated by the *Solange* judgement of 1974 has reemerged[11]. Both instruments are not explicitly rooted in any source[12]; needless to say, they result from the ongoing process of jurisprudential refinement that has made it possible to identify their legal basis within the German Constitution. Among the two, the first solution is well-grounded

[7] D. Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, 111 Public Law and Legal Theory Working Paper Series (2008).

[8] N. MacCormick, *The Maastricht-Urteil: Sovereignty Now,* cit.

[9] M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, cit.

[10] On the history of this conflict and the control instruments forged by the FCC, see M. Payandeh, *Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, 48(1) Common Mark. Law Rev. 9 (2011).

[11] Solange I, Judgment of 29 May *1974 - BVerfGE 37, 271*; on this assimilation process, see A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48(5) Common Mark. Law Rev. 1417 (2011). The judicial review was elaborated by Solange in order to ensure respect for fundamental rights. But the FCC undertook to withdraw from this kind of review as long as the EU and its Court would have been able to respect fundamental rights; see Judgment of 22 *October 1986*, 73 *BVerfGE 339*; see also M. Payandeh, *Constitutional Review of EU Law after Honeywell,* cit.

[12] J. Bast, *Don't Act beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, 15(2) Ger. Law J. 167 (2014).

in the jurisprudential elaboration of the 1970s[13], but it was only claimed and theorized in the *Maastricht-Urteil* of 1993[14]. In this judgment, it was associated with the democratic principle and the dualist approach to the examination of relations between legal orders[15]. In the construction of the theoretical foundation of the *ultra vires review,* one finds the crucial idea that the European legal order cannot, by itself, create the conditions to undermine, in conflict with the Treaties, the competences of the Member States (also known as *Kompetenz-Kompetenz*), even if the amendments of the Treaties were to take place via interpretation. This is the reason why in the *Maastricht-Urteil* the FCC committed to reserving for itself for the future the possibility of scrutinizing legal acts adopted by European institutions. Its objective is to verify whether the EU legal acts remain within the limits of the powers conferred to the EU or not. In the latter case, the performed *ultra vires* act would be considered legally non-binding within the framework of German sovereignty. The next period saw the FCC engaged in a challenging process aimed at defining the substantive and procedural conditions for the use of the *ultra vires review*. In this direction, the 2009 *Lissabon-Urteil*[16] and the 2010 *Honeywell* judgment[17] are milestones. More precisely, with

[13] M. Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, 10 Eur. Const. Law Rev. 263 (2014); M. Payandeh, *Constitutional Review of EU Law after Honeywell,* cit.

[14] Judgement of October 12 1993, BVerfGE 89, 155; Brunner v European Union Treaty CMLR [1994] 57. According to the Federal Court, democracy could only be fully realized at national level, but not yet at European level, given the absence of the necessary sociological and cultural pre-requisites. The democratic legitimacy of the EU would therefore be achieved indirectly through national parliaments, given the still marginal role played by the European Parliament. This explains the need for the competences conferred to the EU to be well defined (see S.J. Boom, *The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?,* 43(2) Am. J. Comp. *L.*, 185 (1995) so as not to deprive the States - and thus the EU - of the necessary democratic legitimacy and sufficiently clear in order to prevent the EU claiming additional competences that are beyond its power, which could encroach on the powers of the Member States. At a certain point in the judgment, the democratic principle intersects with the dualist approach to the construction of relations between systems.

[15] The relationship between democracy and *ultra vires review*, see J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement,* cit.

[16] Judgement of 30 June 2009, 2 BVerfGE, 2/08.

[17] Judgement of 6 July 2010, BVerfGE 2661/06.

the latter ruling the FCC offered the ECJ the opportunity to express its point of view, while reserving the power to disagree given the outcome of the substantive tests of the application of the *ultra vires*. In other words, the ECJ's ruling would be binding, but on the condition that it does not lead to a manifest breach of the principle of competence and that this would not result in a structurally significant change in the distribution of competences and to the detriment of the Member States. The procedural condition upheld in the *Honeywell* judgment was for the first time observed in the judgment on the "Outright Monetary Transactions" (OMT) programme[18]. The final act of this process took place in the judgment of 5 May 2020, with which the FCC disobeyed the ECJ for the first time and disregarded the ECJ's judgment, declaring *ultra vires* the European act.

While the development of the *ultra vires review* was somewhat completed with these judgments, the FCC laid the foundations for a second, innovative, option: the *identitätskontrolle*, forged with the 2009 *Lissabon-Urteil*[19] and subsequently refined by the OMT ruling of 2016, which also clarified its scope and function. The identity review makes it possible to verify whether the principles declared inviolable by Art. 79 sec. 3 of the German Constitution[20] are affected by the transfer of sovereign powers by the German legislature or by acts undertaken by institutions of the EU. Such a form of control would prevent not only the attribution to the EU of sovereign powers outside the areas liable to transfer mechanisms, but also the adoption of acts by the EU institutions able to produce an

[18] Judgement of 14 January 2014, BVerfGE 2728/13.

[19] Judgement of 30 June 2009, 2 BVerfGE, 2/08. This ruling also reiterated the need for the exercise of public authority at EU level to go no further than the integration program authorized in Germany by an act of Parliament, which was considered almost a kind of bridge between national and European law, of which the Federal Court was the controller. The metaphor of the bridge often appears in European doctrine, see M. Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, cit. and is to be attributed to an essay by one of the German judges published just before the *Maastricht-Urteil* (P Kirchhof, *Deutsches Verfassungsrecht und Europaiisches Gemeinschaftsrecht*, in P. Kirchhof, C.D. Ehlermann (eds.), *Europarecht Beiheft* (1991).

[20] This concerns the protection of human dignity, the principles of democracy, the rule of law, the welfare state and the federal state.

equivalent effect[21]. Over time, this jurisprudence has induced an emulation effect in other national jurisdictions. As a consequence, the aforementioned instruments of control[22] soon has spread to other national constitutional courts[23]. All of this has exacerbated the already existing perplexities, especially those regarding *ultra vires* control. Indeed, this type of review pushes the national courts to interfere with the ECJ's exclusive jurisdiction concerning the assessment of conformity of legal acts of European authorities with primary European law[24]. According to the ECJ, national courts do not have the power to declare acts of EU institutions invalid. It follows that the claim of the national courts to conduct an *ultra vires review* of EU acts has been viewed as being at odds with the centralized model of judicial review exercised by the ECJ, which does not tolerate the emergence of competing authorities, apart from exceptional cases. These include radically null or non-existent European acts where the judicial review takes place at widespread level, lacking a contrary presumption of validity of legal acts[25]. Of course, there have been diametrically opposed understandings of the legal phenomenon here under discussion. Those who look critically at the actions taken by the FCC underline a certain degree of circularity in the arguments used to escape the obligations provided by the Treaties (Art. 19 TEU and 267 TFEU). They argue that the FCC does not distinguish between two different issues represented on the one hand by the substantive limits posed to the competence of the EU and on the

[21] Judgement of 21 June 2016, BVerfGE 2728/13, para. 138.

[22] Some of these are related to Art. 4(2) TEU and to the clause on national identity provided therein, which makes it possible to support a pluralistic vision of the relations between European law and national law; in this regard see A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy*, cit.

[23] G. Anagnostaras, *Activation of the Ultra Vires Review: the Slovak Pensions Judgment of the Czech Constitutional Court*, 14(7) Ger. Law J. 959 (2013).

[24] See EU Court of Justice 22 October 1987, Foto-Frost v. Hauptzollamt Lubeck, CJEU Case 314/85). As it was pointed out in the judgment of 13 May 1981 (International Chemical corporation, 66/80, ECR 1191), the powers conferred by Art. 177 to the Court are essentially intended to ensure the uniform application of Community law by national courts. This need for uniformity is particularly pressing where the validity of a Community act is at issue. The existence of divergences on the validity of Community acts between the courts of Member States could undermine the very unity of the Community legal order and the fundamental need for legal certainty.

[25] J. Bast, *Don't Act beyond Your Powers*, cit. at 171.

other hand by the problem of jurisdiction over the validity of acts of the EU institutions. These different perspectives – they contend – should instead be considered separately, because the argument anchored on the principle of conferral are not sufficient to establish who should have the last say in the matter[26].

From a national perspective, the FFC's standpoint does not seem to be neither vague nor weak; it is aligned with the dualist approach to the relations between legal systems. This induces the constitutional judge to interpret the foundation act of the EU not as a new constitution but as an international treaty, of which the Member States remain 'their own masters'. According to this view, the primacy of EU law, although recognized, proceeds from the authorization provided by the law of ratification. This framework appears to have a significant influence on the FCC's argument on *ultra vires* review. According to this logic, the superordinate level cannot create, not even with the support of the body responsible for resolving conflicts of competence, the conditions to undermine the competences of the Member States. This is exactly the reason why the seditious act of the ECJ, which alters the competences regulated by the Treaties, is in turn *ultra vires*[27]. Nevertheless, the other type of control related to constitutional identity has also been subject to similar criticism. Also in this case the national courts of the Member States have claimed the power to suspend the effects of an act of an EU institution, considered detrimental to the constitutional identity of the Member States. What is even more serious, the national courts contested both the centralized system of jurisdiction and the principle of the primacy of EU law[28].

The debate about the *ultra vires review* shows, however, how unproductive the legal argument could be in the resolution of problems that do not belong solely and exclusively to the dimension of law but interfere with the development of the federal process, as it will soon be shown. For the moment, moving

[26] M. Payandeh, *see above* n. 9, 24.

[27] The stance adopted by the Federal Court is described in G. Luebbe Wolff, *Who Has the Last Word. National and Transnational Courts – Conflict and Cooperation*, 30(1) Yearb. Eur. Law 89 (2011).

[28] L.D. Spieker, *Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi Between the Court of Justice and National Constitutional Courts*, 57(2) Common Mark. Law Rev. 361 (2020).

the analysis to the case triggered by the *Karlsruhe* pronouncement of 5 May 2020, the main fact to be noted is that the explosion of the conflict between courts took place on a strong ground with a legitimate, recognized value for both systems: the EU and the national systems. Behind this conflict are hiding two different types of risk[29]: the disintegration of the eurozone, dependent (under the given institutional conditions) on the recognition or not of a sufficient margin of manoeuvre for the ECB, and the potential weakening of the competences of the Member States in politically important areas, such as those relating to fiscal drag. This corroborates the idea that the conflict between Courts was precisely triggered by these very debates that could be classified as 'existential'. It cannot rule out the possibility that this could also have initiated a phenomenon of politicization of the courts or, at least, of failing of their institutional impartiality, thereby influencing their respective perspective on the intensity of judicial review to be applied to the decision-making process of the ECB itself[30].

3. Overcoming conflict: on the risk of offering a legal-formal response to substantive political problem

As the dialogue between the Courts converged into open conflict, the criticism against the doctrines of constitutional pluralism became more intense. Different scholars have observed the unsustainability of a model that could threaten to compromise not only the rule of law but also the very integrity of the EU[31]. If public authority - it has been argued- is to be conceived as occurring in a multiplicity of autonomous settings, then constitutional pluralism fails to deliver precisely where an answer is most needed, that is, when the constitutional conflict cannot be

[29] Because of the systemic repercussions for the stability of the eurozone, what is at stake seems is different from the contentious situation concerning fundamental rights issues; a different position is expressed in D. Sarmiento, J.H.H. Weiler, *The EU Judiciary after Weiss, Verfassungblog, on matters constitutional* (2020) https://verfassungsblog.de/the-eu-judiciary-after-weiss/

[30] This constitutes the real bone of contention between the two Courts, see § 13.

[31] D. Kelemen, *On the Unsustainability of Constitutional Pluralism*, 23(1) Maastricht J. Eur. & Comp. L. 136 (2016); M. Loughhlin, *Constitutional Pluralism: An Oxymoron?*, 3(1) Glob. Con. 9-30 (2014).

prevented or resolved[32]. There is, therefore, a need for the EU to move towards some form of monism, through a newly found constitutional maturity. If the EU intends to survive as a coherent legal system, the principle of primacy of EU law and supremacy of its Court should be applied[33].

In some respects, calls to overcome the conflict through a new judicial monism have been proposed again also in the aftermath of the *Weiss* judgment of 5 May 2020. In order to offer greater guarantees to the Member States, some scholars have launched the idea of a different chamber within the ECJ with a different composition and powers to settle conflicts[34]. These proposals are not entirely new, especially if seen from a comparative and historical perspective. As is well-known, similar ideas emerged in the 1800's in the United States during the attempt to overcome the challenge to the supremacy of the Supreme Court posed by some states[35]. Nevertheless, it is reasonable to believe that the anti-pluralism of those who propose a solution by concentrating the ultimate authority in the hands of the ECJ only, as an alternative to the prospect of disintegration and exit strategy, represents a legal-formal response to a problem with broader political implications. *This is particularly true* when *considering* the European context, which is characterized by significant contradictions affecting the very nature of the EU as well as the solidarity links that bind the different Member States. To put it another way, the proposal of achieving a new form of monism through the recognition of the supremacy of the ECJ

[32] See A. Somek, *Monism*: *A Tale of the Undead?* in M. Avbelj, J. Komárek (eds.), *Constitutional Pluralism in the European Union and beyond* (2012); also M.P. Maduro, Three Claims of Constitutional Pluralism, in M. Avbelj, J. Komárek (Eds.), *Constitutional Pluralism in the European Union and beyond* (2012); L. Pierdominici, *The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?* 9(2) Persp. Fed. 127 (2017).

[33] Especially since such supremacy would not affect the sovereignty of the Member States; they would, in fact, keep the possibility of withdrawal should the organization develop in such a way to clash with their essential constitutional values. See R.D. Keleman, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozon*e, cit.

[34] See the proposal concerning the "Mixed Grand Chamber presided by the President of the Court of Justice", formulated from D. Sarmiento, J.H.H. Weiler, *The EU Judiciary after Weiss, Verfassungblog, on matters constitutional*, cit.

[35] See S.J. Boom, *The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?*, cit.

appears to lose sight of the broader picture. What is at stake goes far beyond the problem of the European judicial network to concern the entire architecture of the eurozone, its ideology and its current political fragility[36].

The real crux of the matter seems to be not so much the problem of how EU and national jurisdictions can cooperate[37], but rather how the different national constitutional systems can coexist harmoniously[38]. In short, the conflict between the Courts is just the tip of the iceberg, the apparent problem that is not necessarily the real one. The main issue, in effect, pertains to the institutional equilibrium of the eurozone: the rarefaction of political power, but also the problem, closely related to the former, deriving from the condition of hyper-responsibility of the ECB. It is exactly around this search for equilibrium amidst competing interests that a thorough analysis should be centered. The objective is to better comprehend the institutional context in which the conflict has arisen and think of ways and means to overcome the very crisis.

SECTION II. DEPOLITICIZATION OF ECONOMIC POLICIES

4. An explanatory model: the utopia of the disembedded market economy

In recent years, the economic and financial crisis and the subsequent phenomena of great social alarm has led many scholars to look back on past events, in order to ascertain possible solutions to the damages of today's society. This partly explains the resurgent interest, also in European public law studies, in the situations that occurred between the end of the nineteenth century and the two wars, strongly influenced by the massive social upheavals generated by the development of a single international

[36] I share the criticism formulated by M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, cit. at 221.

[37] S.J. Boom, *The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?,* cit.

[38] With or without the existence of a formal hierarchical relationship, this is a problem whose resolution goes beyond the legal horizon, as the American experience shows. See M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, cit. at 221.

market. This was characterized by the simultaneous presence of an international monetary system based on fixed exchange rates (the 'gold standard') and a competitive labor market[39]. This explains the frequent reference to KARL POLANYI's study, "The Great Transformation"[40], published in the forties of the last century. According to POLANYI, the attempt put forward by the elites of the time, under the impetus of the ideology of economic liberalism, to achieve a "disembedded, fully and self-regulating market economy" on a global level constitutes an unrealizable utopia. This reasoning is based on the awareness of the destructive power inherent in the autonomization of the economic sphere from the political and social ones (the disembedded market economy). The dissolution of the market from political and democratic bonds would be, in fact, unavoidably destined to lead to a disarticulated society— a consequence of the subjugation of the latter to the needs of the economy and the commodification of work. According to KARL POLANYI, in the long run these phenomena could trigger a counter-reaction and produced a perverse spiral during its intermediate stages, namely the rebellion of the social classes most affected by the crisis against the established order and the introduction of national protection mechanisms. All of this could determine the emergence of authoritarian regimes, favoring the race towards the formation of colonial empires fighting amongst themselves[41].

Starting in the 1970s, the objective of overcoming national sovereignty to create an effective international legal order has again been proposed as the dominant ideology. This has been justified as a necessary consequence of the liberal program of

[39] M. Goldmann, *The Great Recurrence: Karl Polanyi and the Crises of the European union*, 23(3-4) Eur. Law J. 272-289 (2017) and here for the references to previous studies, among which are those by M. Everson, C. Joerges, *Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts Law Constitutionalism*, 18(5) Eur. Law J. 644 (2012); C. Joerges, J. Falke, *Karl Polanyi: Globalisation and the Potential of Law in Transnational Markets* (2011); C. Holmes, *Whatever it takes: Polanyian perspectives on the eurozone crisis and the gold standard*, 43(4) Econ. Soc. 582 (2014). A critical and perhpas more elbarte perspective is offered by A. Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (2018).

[40] K. Polanyi, *The Great Transformation. The political and the Economic Origins of our Time* (2001) at 144.

[41] K. Polanyi, ibidem.

defending individual freedoms by the threats of public power, traditionally associated with the exercise of sovereignty at the national level[42]. In this way, the paradigm of the disembedded market economy was back in vogue within the new political programs. In addition, it has emerged that idea according to which the national arenas, within which redistributive conflicts are resolved, should be subject to tighter and deeper external constraints. This reveals a process of neutralization or rarefaction of political power[43], a corollary of the forced coexistence between national states and the globalized market, which is well summarized by the RODRIK trilemma[44]. According to this paradigm, it is not conceivable to have democracy, international economic integration and national sovereignty simultaneously, and it is only possible to choose two of them. If the choice falls on maintaining sovereignty of nation states, because of the strong levels of international economic integration the idea of developing an effective space for mass politics will necessarily be put aside. On the contrary, if the main aim becomes preserving vital space to allow mass politics without at the same time abandoning the objective of economic integration, it will become imperative to overcome the nation states and try to rebuild democratic arenas at a supranational level. If this last attempt is considered illusory, it would be then necessary to mitigate (but not to cancel) international economic integration, in order to preserve an acceptable level of democracy at a national level.

The use of these explanatory paradigms has been considered particularly relevant in European public law studies,

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[42] F.A. von Hayek, *The Economic Conditions of Interstate Federalism*, in *Individualism and Economic Order* (1948) at 255. For a discussion of the program of overcoming national sovereignty, see Q. Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism* (2018). For a reconstruction of the events starting from the end of Bretton Woods, see A.J. Menendez, *The Existential Crisis of the European Union*, 14(5) Ger. Law J. 453 (2013).

[43] This is widely discussed phenomenon in research on European affairs, albeit from apparently different angles and divergent explanations. For a constitutionalist approach, see D. Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21(4) Eur. Law J. 460 (2015).

[44] D. Rodrik, *The Globalization Paradox. Why Global Markets, States, and Democracy Can't Coexist* (2011).

since the weakening of politics[45] and the social and political unsustainability of the disembedded market economy[46] have appeared as the most tangible signs of the crisis affecting the EU for more than ten years now.

4.1. Integration through law

There are basically two paths through which disembeddedness[47], understood as the absence of social and political control over the process of production and distribution, has gradually taken place in Europe. The two paths are: integration through law and the realization of the European Monetary Union. I will mention both briefly, the first here and the second in the second section, to then move on to a more detailed examination of some specific issues.

The first road can be traced back to the process of constitutionalization of the Union's law and to the commitment embraced by the EU to protect the four fundamental economic freedoms. In this regard, GRIMM's reconstruction appears convincing. According to this author, modern constitutionalism is based on a delicate balance between democracy (reformism also in a redistributive sense) and the protection of fundamental rights (liberal conservatism); its function is to legitimize political power and, at the same time, to limit it without the objective of replacing it. Constitutions provide, therefore, a general framework of political viability, but cannot determine or have a constraints on the content of all political decisions[48]. In brief, the fragile equilibrium between political freedom and personal freedom or, in other words, between positive and negative freedoms lay at the root of every liberal-democratic system[49]. According to GRIMM, European constitutionalism, accelerated by the activism of the

[45] J. Snell, *The Trilemma of European Economic and Monetary Integration, and its Consequences*, 22(2) Eur. Law J. 157 (2016).
[46] M. Goldmann, *The Great Recurrence: Karl Polanyi and the Crises of the European union*, 23(3-4) Eur. Law J. 272 (2017).
[47] Here I am using a term which is not employed by Polanyi and has been coined by some scholars to refer to the autonomy of the market from society and politics, see V.M. Vančura, *Polanyi's Great Transformation and the Concept of the Embedded Economy*, 2 *IES Occasional Paper* (2011), http://ies.fsv.cuni.cz.
[48] D. Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, cit. at 464.
[49] See B.Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (2004) at 34, 35.

ECJ, is different. Driven by the need to ensure the functionality of the European order, the Court has elaborated since the 1960's the principles of the useful effect and supremacy of EU law over national systems, including national constitutional law[50]. At the same time, by interpreting the Treaties in a different way from what occurs in a conventional act, it has understood the same very competences of the EU in a wider sense. The result has been the multiplication of cases in which the four economic freedoms enshrined in the Treaties have come into conflict with national choices— often the result of difficult political compromises, as they are aimed at protecting values other than mere economic freedoms having significant social implications[51].

This explains why the main driving force behind the European project has been negative integration, based on the destructive force of the market.

The Union has been entrusted with competences which by default leave little room for manoeuvre of national legislators. This is particularly true when national political choices present situations of conflict with the four economic freedoms recognized by the Treaties[52]. Therefore, the problems of the positive integration have emerged, given the difficulty to reaching political agreements especially in a EU characterized both by deep heterogeneity (also from the economic and social point of view[53]) and divergent interests amongst the individual Member States[54]. A paralyzing heterogeneity has, for example, emerged in a striking way in the field of labor protection. In this specific field, the fundamental social rights have often been sacrificed for the principle of market competition. The EU Commission's legislative initiative has gradually become more and more rarefied. Integration has thus mainly developed through administrative

[50] Judgment of the *Court* of *Justice*, *Costa* v *ENEL*, *Case 6/64* (*15 July 1964)*. On the role of the ECJ in constitutionalization, see also A. Sandulli, *Il ruolo del diritto in Europa*, cit. at 161 et seq.

[51] See M. Dani, *Re-Imagining the Cosmopolitan Constitution: A Comment on Alexander Somek's The Cosmopolitan Constitution*, 19(6) Ger. Law J. 1152 (2018).

[52] F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (1999).

[53] Federalism between heterogeneous states are investigated by F.A. von Hayek, *The Economic Conditions of Interstate Federalism*, cit. at 255.

[54] F.W. Scharpf, *Governing in Europe,* cit.

and judicial channels, which are depoliticized in nature[55]. According to GRIMM, European constitutionalism has not limited itself to determining the procedures and delineating the applicable areas but has also tried to dictate the content of the rules of game, losing sight of the distinction between fundamental and ordinary rules. This would have undermined the room for manoeuvre of national politics, preventing it from making choices of strategic importance for society[56].

4.2 The realization of the monetary union

The second path of realization of the disembedded market economy has been produced by the asymmetry, designed by the Maastricht Treaty, between the centralization of monetary policy (Art. 105 of the Treaty of Rome, as modified at Maastricht) and the decentralization of economic and budgetary policies (Article 103 of the Treaty) — a consequence of the failure to provide a political union and federal government able to implement stabilizing policies through fiscal measures[57]. The functions of welfare have thus remained confined to the national level, where have been exposed to the conditioning forces of the market[58]. The danger of a

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[55] M. Dani, *The Rise of the Supranational Executive and the Post-Political Drift of European Public Law, 24(2)* Indiana J. Glob. Leg. Stud. 399 (2017).

[56] D. Grimm, *The Democratic Costs of Constitutionalisation*, cit. at 470 et seq.

[57] In particular, on the importance of a centralised budget able to remedy asymmetric shocks, see P. Kenen, *The Theory of Optimum Currency Areas: An Eclectic View. In Monetary Problems of the International Economy*, R. Mundell, A. Swoboda (eds.), (1969) and P. Krugman, *Revenge of the Optimum Currency Area*, 27(1) NBER Macroecon. Annu 439 (2013); F. Salmoni, *Stabilità finanziaria, Unione bancaria europea e costituzione* (2019).

[58] W. Streeck, *European Social Policy: Progressive Regression*, 18(11) *MPIfG Discussion Paper*, https://www.mpifg.de/pu/mpifg_dp/2018/dp18-11.pdf; Id., *Il modello sociale europeo: dalla redistribuzione alla solidarietà competitiva*, 1 St. merc. 3 (2000). According to this author, the heterogeneity of Member States makes it impossible to build a European social model through the identification of minimum standards. He mentions the exposure of national systems to international economic competition as an incentive for "structural reform", the subordination of "social policy, national and European, to the defense of a common hard currency through fiscal consolidation" and the transition from the "federal social democracy to competitive adjustment" of national social protection and social life to global markets"; W. Streeck, *Buying Time* The *Delayed Crisis of Democratic Capitalism* (*2014).* On the role of the market as a means of limiting and regulating the prerogatives of States, see G. Guarino, *Verso l'Europa ovvero la fine della politica* (1997) at 124; F.A. von Hayek,

misalignment between the policies pursued by the various Member States has been lurking behind this asymmetry. This risk has been made even more tangible by the difficulty of achieving an equally effective monetary policy for all countries. There has been, from the very beginning, a clear perception of these dangers, to the extent that the so-called the DELORS report of 1989[59], in summarizing the basic principles of the future monetary union, has clearly indicated the divergence between the economic and budgetary policies pursued by the individual countries as the source of dangerous imbalances within the monetary area. The same report has argued that it was unfeasible to solve these problems, as suggested by the doctrines on optimal currency areas[60], through the stabilizing function carried out at the central level, given the small budget at the supranational level.

While the risks related to the deepening of the interdependence links created by the monetary union were evident, what remained more uncertain was ascertaining which tools were necessary to prevent the creation of imbalances within the eurozone. The DELORS report itself has questioned the possibility that market forces could contribute to regulating national policies, penalizing state institutions with less rigorous budgets and policies through an increase in rates of debt financing. On the feasibility of such a solution the report has showed, however, a certain degree of prudence, if not real skepticism, deriving from the danger that markets misjudge the states' reliability level. Markets often find it difficult to understand solvency risks in time. Yet, once the risk has become apparent, they could operate under the pressure of panic, denying a state accessing the market in a too rapid and dangerous way[61]. Therefore, the solution outlined by the committee opted for the coordination of national policies and the introduction of

The Economic Conditions of Interstate Federalism, cit. and O. Chessa, *La costituzione della moneta*, cit. at 456, 471.

[59] Cfr. Report on economic and monetary union in the European Community, presented by the Committee for the study of economic and monetary union on 17 April 1989, available at: http://aei.pitt.edu/1007/1/monetary_delors.pdf, at 19-20; J. Delors, *Un anno cardine: Discorso del presidente Jacques Delors dinanzi al Parlamento europeo*, 29(2) *Riv. st. pol. int. 245 (*1992).

[60] See P. Kenen, *The Theory of Optimum Currency Areas*, cit.

[61] See the above mentioned Report on economic and monetary union in the European Community.

constraints on budgetary policies, starting from the identification of a desirable level of deficit. The choices made in Maastricht, in order to ensure the proper functioning of the eurozone in the future, clearly took into account the proposals contained in the DELORS report; the decentralization of economic and budgetary policies was accompanied by forms of coordination within the Council (Art. 103, of the Treaty, as revised at Maastricht) and instruments to control excessive deficits (Art. 104 TEC). These were then strengthened with the 1997 introduction of the Stability and Growth Pact, without entirely renouncing to market discipline, which was considered necessary to require Member States to comply with sound fiscal and economic policies[62]. There was strong confidence that this set of measures - together with a strong liberalization of the labor markets to guarantee price adjustments no longer achievable through the devaluation of the currency - would have made the eurozone able to react to possible asymmetric shocks in the future[63].

This basic, single currency's guiding philosophy has clearly been determined by Germany's dominant influence during the Maastricht negotiations. It is not surprising that the EU economic constitution has been shaped from the outset around the ordo-liberal principles of responsibility and stability[64]. The principle of responsibility requires that each market participant is held accountable for their own actions and decisions, without sharing negative results with others—a response which is considered unfavorably as it could encourage irresponsible conduct (*moral*

[62] The adoption of the Pact shows a certain mistrust of the market as a factor regulating national policies. On market discipline, see the study widely quoted by G. Bishop, D. Damrau, M. Miller, *1992 and beyond: Market Discipline Can Work in the EC Monetary Union* (1989); T.T. Minassian, J. Craig, *Control of Subnational Government Borrowing*, in *Fiscal Federalism in Theory and Practice*, Teresa Ter-Minassian (ed.) (1997) at 156 et seq.; T.D. Lane, *Market Discipline*, 40(1) *Staff Papers* (International Monetary Fund) 53 (1993). On the presence of a dual approach within the Maastricht Treaty, see K. Pantazatou, M. Rodopoulos, *A "Typus" as an Appropriate Legal Tool for the Interpretation of the "No Bail-out" Clause: The 'Private Investor Principle'*, 2 Eur. Pol. 7 (2015).

[63] P. Krugman, *Revenge of the Optimum Currency Area,* cit.

[64] This is also widely emphasized in legal doctrine. See in particular Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications*, 28 EUI LAW (2012) at 8.

hazard)[65]. To translate this principle into the EU economic constitution has required the establishment of specific legal arrangements. The introduction of peremptory no bail-out clauses and statutes prohibiting external bail-outs, both of a fiscal (see Art. 104 B TEC, now Art. 125 TFEU) and monetary nature (see Art. 104 TEC, now Art. 123 TFEU) should be understood as reflecting this very context, properly designed in order to avoid transferring risks from one Member State to the other. Establishing an independent central bank (Art. 108 TEC, now Art. 130 TFEU)[66]ב based on the model of the Deutsche Bundesbank[67], with the identification of a clear mandate focusing primarily on price stability (Art. 105 TEC, now Art. 127 TFEU) ב was also meant to strengthen such clauses by building a powerful firewall against the danger that a Member State could exert political pressure on the central bank[68]. The underlying idea is that only the risk of a

[65] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas* (2016) at 99–117.

[66] Already in early studies of the 1980s (in particular J. DELORS, Report on economic and monetary union in the European Community, presented on 17 April 1989, in http://aei.pitt.edu/1007/1/monetary_delors.pdf) the independence from politics and the objective of price stability were identified as salient features of the future ECB and in line with the requests of the Bundesbank which was, in fact, present (with its President Pohl) in the Committee. See M. Duckenfield, *Bundesbank-government relations in Germany in the 1990s: From GEMU to EMU*, 22(3) West Eur. Polit. 87 (1999); the fact that the establishment of an independent central bank represents the most important contribution of German ordo-liberalism to the establishment of the Treaties is widely recognized, see for instance in J. Hien, c. Joerges, *Dead Man Walking: Current European Interest in the Ordoliberal Tradition*, 3 UEI Working Papers LAW, (2018) at 14 and further on some related footnotes and references quoting the writings by E.J. Mestmäcker, *Europäische Prüfsteine der Herrschaft und des Rechts, ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 57 ORDO 3 (2007).

[67] The independence of the German Central Bank, described as independent and committed to the priority of guaranteeing price stability, from the federal government was enshrined in the Basic Law in the Revision Act of 21 December 1992, which introduced into Art. 88 of the Federal Law the provision that the tasks of the Central Bank could be transferred to the ECB. On this subject, see M. Everson, C. Joerges, *Between Constitutional Command and Technocratic Rule: Post Crisis Governance and the Treaty on Stability, Coordination and Governance* ("The Fiscal Compact", in C. Harlow, P. Leino, G. della Cananea (eds.) *Research Handbook on EU Administrative Law* (2017) at 175.

[68] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas*, cit. at 98, 99, 118.

direct default on the public debt, due to the prohibition of external rescue, would provide a real incentive for Member States to implement virtuous fiscal policies[69]. Eliminating this risk would represent a sort of stimulus for taking greater risks (moral hazard[70]). This also explains the reasons why the eurozone's economic constitution is reluctant towards forms of stabilization entrusted with fiscal transfer mechanisms, since such a scheme could easily turn into a permanent transfer mechanism and act as a sort of insurance mechanism which could postpone the structural adjustments necessary for individual members [71].

Behind this articulated but ideologically homogeneous framework of rules, another ordo-liberal principle was hiding: the stability of the currency. This has become self-evident with the independence of the ECB, its policies' primary objective of price stability (art. 105 EC Treaty) and the hostility to economic interventions. Forms of interference on the economy were considered harmful to the ethical order of the market, apart from rules designed to ensure the proper functioning of the market[72]. Ordo-liberal schools, in line with the other schools of neo-liberal thought, oppose monetary or fiscal stimuli, considered as capable of producing inflationary hotbeds but without offering real

[69] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas,* cit. at 111; A.L. Bovenberg, J.J.M. Kremers, P.R. Masson, *Economic and Monetary Union in Europe and Constraints on National Budgetary Policies*, 38(2) Staff Papers (International Monetary Fund) Special Issue on Europe 373 (1991). In regard to the credibility of the no bail-out clauses in controlling the degree of indebtedness of decentralized government levels, see T.T. Minassian, J. Craig, *Control of Subnational Government Borrowing, in* Teresa Ter-Minassian (ed.) *Fiscal Federalism in Theory and Practice* (1997) at 156 et seq.

[70] This phrase can be traced back to German ordo-liberals, who in turn drew it from the field of insurance law, on which see M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas*, cit. at 74.

[71] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas*, cit. at 119; H.W. Sinn, *Austerity, Growth and Inflation: Remarks on the Eurozone's Unresolved Competitiveness Problem*, 37(1) World Econ. 1 (2014); similarly P. Krugman, *Revenge of the Optimum Currency Area*, cit. at 439-448.

[72] Ordo-liberalism differs from the doctrines of laissez faire precisely because of the strong role that it attributes to the State in ensuring the conditions for the proper functioning of the market, through prior determination of the rules of the game (the so-called economic constitution). See in this respect R. Hillebrand, *Germany And Its Eurozone Crisis Policy: The Impact of the Country's Ordoliberal Heritage*, 33(1) Ger. Polit. Soc. 6 (2015); W. Sauter, *The Economic Constitution of the European Union*, 4(1) Columbia J. Eur. Law 27 (1998).

advantages in terms of economic growth, which is said to be achieved in the long term only through structural adjustments aimed at improving the productivity of economic factors. The advent of the economic crisis revealed, however, the fragility of this perspective. On the one hand, the decentralization of economic policies had also instigated their misalignment, widening the gap in the level of competitiveness between different countries and paving the way for asymmetric shocks[73]. On the other hand, the creation of the single currency had fomented the onset of internal imbalances through the alignment of interest rates, which had become too high in Germany bringing stagnation and low inflation, and too low in southern Europe causing excessive inflation growth. When the imbalances resulting from this set of factors emerged, the circulation of credit in Europe reached a standstill, leading to higher spreads[74].

Different proposals were outlined in order to realign the levels of competitiveness between North and South Europe. Two of them were based on the idea of the political and social unsustainability of adjustments through internal deflation which, despite the fact that it was considered as necessary to reduce production costs in Southern countries, would lead to a deepening of the recession due to austerity measures, worsening the debt situation of the countries involved[75]. While sharing this premise, the two solutions differed in the final proposal put forward, reflecting divergent views on how to address the moral hazard problem. Those who neglected its importance proposed a

[73] The reference is to the wage repression policies launched by Germany, see F.W. Scharpf, *L'Europa. La democrazia sospesa. L'Unione monetaria, la crisi economia e la politica bloccata (*2016) at 25; P. De Grauwe, *The Governance of a Fragile Eurozone*, 346 *CEPS Working Document* (2011). On the misalignment of the levels of competitiveness of the different economies in the aftermath of the introduction of the single currency, see most recently C.J. Day, *Continental Drift: Is the Euro's Fixed Exchange Rate Regime Undermining Cohesion Policy?* Eur. Rev. 1 (2020). The misalignment of policies constitutes a consubstantial risk to the asymmetry between the market and social policies, which remains confined within national borders. These different dimensions are investigated in A. Sandulli, *Il ruolo del diritto in Europa,* cit. at 68; A. Rusek, *Eurozone's Future: The political Economy of Structural Convergence,* 4(1) Eur. J. Econ. Law Pol. 1 (2017).

[74] There is a minimum of consensus on this analysis, see P. Krugman, *Revenge of the Optimum Currency Area*, cit.; H.W. Sinn, *Austerity, Growth and Inflation*, cit.

[75] P. De Grauwe, *The Governance of a Fragile Eurozone*, cit.

strengthening of the Union through the creation of a central budget, while those who emphasized its centrality suggested exiting the single currency, either permanently through the dismantling of the eurozone, or temporarily through the introduction of the mechanism known as revolving door[76].

These two different strategies have, however, been assessed as politically and legally impracticable, albeit from opposite perspectives. The moral hazard has been seen by Northern countries as an obstacle to the provision of common guarantee instruments. Fiscal transfer, debt mutualization mechanisms, and the unification of the banking system have not fully developed. With regard to the banking union, this is partly related to the danger – according to its detractors – that the guarantee on bank deposits, by providing an indirect guarantee of public debt of the Member States, could result in an incentive to indebtedness. The plan to create a European unemployment insurance scheme has been subject to a similar hesitation, as this kind of funds could provide an incentive for the countries of Southern Europe to postpone the measures to liberalize the labor market. The model of a fiscal union, itself seen as a central pillar of EU project, aimed at overcoming the imbalances generated by the monetary union has increasingly appeared to lack feasibility. Such a solution would not, of course, violate any provision of the Treaty and let alone Art. 125 TFEU[77], given the implementation of EU transfer mechanisms. Nevertheless, even this path has received a certain degree of skepticism, given the difficulty of preventing automatic forms of tax transfer from favoring moral hazard.

The discussions around the creation of an adequate central budget have also historically been shaped by the inflexible position expressed by the German Federal Court since the *Maastricht-Urteil* in 1993. The German constitutional judge has repeatedly expressed the idea that the agreement on a stability community is one of the essential conditions for Germany's adherence to the monetary integration project[78]. The very

[76] H.W. Sinn, *Austerity, Growth and Inflation, ibidem.*

[77] A. De Gregorio Merino*, Legal Developments in the Economic and Monetary Union during the Debt crisis: The Mechanisms of Financial Assistance*, 49(5) Common Mark. Law Rev. 1613 (2012).

[78] Judgment Oct. 12, 1993, BVerfGE 89, para. 90. See also V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, 9(1) Eur. Const. Law

provision of a fiscal union would limit the democratic principle which is a core concept of national constitutional identity, thus contrasting with the eternity clause established in Art. 79 of the German Constitution. In other words, according to the German judge the transfer of further functions and resources to EU bodies would excessively debase the national democratic arena. What is more is that this violation of the democratic principle would not be compensated at a higher level either, considering that the eurozone itself would continue to be characterized by democratic deficit. The third and last solution, the exit from the single currency, has been considered unfeasible by all the European elites, given the associated economic and political risks[79]. Therefore, the only option left in the field was the provision of macro-economic adjustment mechanisms aimed at achieving internal devaluation[80] and implemented through instruments of the liberalization of labor markets and austerity in budgetary policies[81].

5. The crisis of legitimacy

What has been described so far explains why the European reforms undertaken during the years of the crisis were driven by the objective of making the mechanisms for implementing the "disembedded market economy" more effective. The need of a form of intervention was widely felt, especially in those areas where important dysfunctionalities had emerged, for instance in national political arenas. These were seen as resisting forces, to be subdued in order to impose on them the structural reforms necessary for the survival of the eurozone[82]. A first package of

Rev. 7 (2013) and J.V. Louis, *Guest Editorial: the No-bailout Clause and Rescue Packages*, 47(4) Common Mark. Law Rev. 971 (2010). This principle is frequently reiterated in the judicial decision which have followed since the judgement of 7 September 2011, BVerfGE 987/10, para. 137 and the judgement of 12 September 2012 2 BVerfGE, 1390/12, para. 115.

[79] While economic risks are unpredictable, political risks often reflect the fear of damaging the integration project permanently.

[80] R. McCrea, *Forward or Back: The future of European Integration and the Impossibility of the Status quo*, 23(1-2) Eur. Law J., 84 (2017).

[81] P. De Grauwe, *The Governance of a Fragile Eurozone*, cit.

[82] The agenda of European technocratic institutions are analyzed in see F.W. Scharpf, *L'Europa. La democrazia sospesa* at 20 et seq.

reforms, launched with the six-pack which came into force in 2011, contained provisions relating to both fiscal policies and macroeconomic imbalances. In respect to the former, the Stability and Growth Pact was revised in a restrictive manner by strengthening monitoring and sanctioning powers. With regard to macroeconomic imbalances, a specific surveillance system was introduced, providing the possibility for the European institutions to intervene with recommendations and impose sanctions. A second reform intervention was carried out with an international treaty known as Fiscal Compact, which came into force in 2013. Its aim was to strengthen the limits set out in the Stability and Growth Pact by committing the contracting countries to introduce a balanced budget in constitutional rules. A third package of rules was introduced with the so-called two-pack which came into force in 2013, and consisted of two regulations. The first strengthens monitoring and surveillance mechanisms on Member States that are, or risk being, facing difficulties with regard to their financial stability. The degree of monitoring and surveillance is closely related to the financial situation faced by the Member States. This measure is designed not only for Member States under or about ti leave financial assistance programs but also for Member States with high financial instability or receiving financial assistance even on a precautionary basis[83]. The second measure concerns scrutiny and evaluation of the eurozone budget, with the Commission having the power to revise it[84]. This strengthening of control instruments[85] has, however, gone hand in hand with some increase in market discipline; its efficiency has been improved via the strengthening of supranational surveillance mechanisms[86].

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[83] J. Snell, *The Trilemma of European Economic and Monetary Integration,* cit.

[84] F. Salmoni, *Stabilità finanziaria, Unione bancaria europea e costituzione*, cit. at 128 et seq.

[85] Instruments, it is worth noting, strongly limiting the prerogatives of Member States in terms of economic and budgetary policies, see K. Tuori, K. Tuori, *The Eurozone Crisis. A Constitutional Analysis (*2014) at 105. *Contra* D. Adamski, *Economic Policy Coordination as Game Involving Economic Stability and National Sovereignty*, 22(2) Eur. Law J. 180 (2016) at 188.

[86] This is demonstrated by the financial markets reactions to the economic policies adopted in recent years by populist governments (see, for instance, the Italian government in office until 5 September 2019), which were not supported by supranational governance. The markets have, in fact, made the most of this lack of support to exercise a function of pressure and control over national

With regard to the reading of the institutional set-up resulting from the reforms described above, there are differing opinions. The idea, supported by some, that the integration process could be developed through the strengthening of executive federalism[87] hides an element of truth. National governments came up with important proposal to face the crisis, starting from the identification of new rescue mechanisms[88]. The final outcome of this renewed interventionism at national-level led to common institutions, for instance the European Commission, playing a central role in examining national budgets and policies. Nevertheless, the paradox is only an apparent one. To regain importance have been mainly technocratic institutions, which advocate a clear neo-liberal agenda as the only viable way to allow the maintenance of the monetary union[89]. The result has been an increased technicalization and an even more marked weakening of politics[90]. These observations confirm the validity of RODRIK's trilemma about the impossibility of achieving and maintaining national sovereignty, supranational economic integration and democracy all together[91]. What has been sacrificed in this model of technocratic integration dictated by market forces is the legitimation of public power [92].

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governments, helping the Commission and the Council to make effective the European guidelines on the containment of national deficits.

[87] C.J. Bickerton, D. Hodson, U. Puetter, *The New Intergovernmentalism: European Integration in the Post-Maastricht era*, 53(4) J. Common Mark. Stud. 703 (2015). See also L. De Lucia, *The Rationale of Economics and Law in the Aftermath of the Crisis: A Lesson from Michel Foucault*, 12 Eur. Const. Law Rev. 445 (2016) at 454. According to this author, the dynamics triggered by the most recent institutional reforms could represent a model of "pastorship" and "discipline", two notions occurring in Foucault's thought.

[88] J. Snell, *The Trilemma of European Economic and Monetary Integration,* cit.

[89] F.W. Scharpf, *L'Europa. La democrazia sospesa*, cit. at 45.

[90] J. Snell, *The Trilemma of European Economic and Monetary Integration,* cit. at 168-170; J. Habermas, *Nella spirale tecnocratica. Un'arringa per la solidarietà europea* (2014) at 18. On the presence of unresolved issues (due to the implementation of policies made with no political input) and the complexity of the institutional framework, see A. Sandulli, *Il ruolo del diritto in Europa*, cit. at 116, 117.

[91] M. Hartmann, F. de Witte, *Ending the Honeymoon: Constructing Europe Beyond the Market*, 14(5) Ger. Law J. 449 (2013).

[92] F. W. Scharpf, *De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe*, 23(5) Eur. Law J. 315 (2017).

It is not surprising, therefore, that this mode of integration has encountered several challenges on its way. The growth of radical political movements well exemplifies this challenging situation. There is no doubt in fact that this political phenomenon testifies to the exasperation felt by parts of the electorate towards an institutional model in which political alternatives are structurally inhibited. The profound, subsequent frustration and disappointment resulted in increasing calls for an exit option[93]. It is also clear that the reasons for dissatisfaction can diverge among the different EU Member States. For instance, for many European citizens the maintenance of the *status quo* could constitute the realization of a legitimate political idea in which the distributive justice is seen as a threat to the abstractness of law, the principle of equality, and negative freedoms[94]. In so doing, they adhere to a perspective that resolves the tensions between liberalism (protection of fundamental rights) and democracy (distributive justice) by attributing a predominant role to the first and posing strong limits to the second. Nevertheless, the main criticism made against the advocates of the *status quo* is that this potential (legitimate) balance is not the result of democratic political decisions but the inevitable consequence of an *ex ante* choice made once and for all by the Treaties.

SECTION III. POLITICIZATION OF MONETARY POLICY

6. The wishful thinking of the Treaties: the systemic crisis as a scenario excluded from the legal horizon

The European Commission is not the only technocratic institution to have gained power and influence during the unfolding crisis. If we look at the events of the last decade carefully, it becomes clear that the fragile balance of the single

[93] The dynamics of this phenomenon are investigated in A.O. Hirschman, *Exit, Voice, and Loyalty. Responses to Decline in Firms, Organizations, and States* (1970).

[94] F.A. von Hayek, *The Constitution of Liberty* (1960). The idea that a steady decline of the rule of law and liberalism would satisfy the demand of social justice is widespread. See Q. Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism,* at 272.

currency has been largely ensured by the work of the ECB[95]. The monetary Authority has often been called upon to intervene in a territory not clearly defined by the Treaties. This extended interventionist approach by the ECB has strong correlations with the crisis of the sovereign debt. Although necessary to recover competitiveness level of the Southern Member States, austerity has produced adverse social and financial effects, pushing the most vulnerable economies into recession, deflation and increasing deficits and debt[96]. Whereas debtor countries were suffering from the increase in budget deficits because of the repressive policies they had to implement, the increasingly nervous financial markets were showing little confidence in the ability of these countries to serve their debt. These often irrational reactions have nonetheless been capable of leading States towards a crisis of liquidity and solvency[97].

This situation found the Eurozone completely unprepared[98]. As a former Italian Finance Minister has often pointed out[99], the European Treaties were not familiar with the word "crisis", having been prepared at a time when there seemed

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[95] P.D. Tortola, *The Politicization of the European Central Bank: What Is It, and How to Study It?* 58(3) J. Common Mark. Stud. 501 (2020).

[96] P. De Grauwe, *The Governance of a Fragile Eurozone*, cit. at 9 observes that "The countries that lost competitiveness from 1999 to 2008 (Greece, Portugal, Spain, Ireland) have to start improving it. Given the impossibility of using a devaluation of the currency, an internal devaluation must be engineered, i.e. wages and prices must be brought down relative to those of the competitors. This can only be achieved by deflationary macroeconomic policies (mainly budgetary policies). Inevitably, this will first lead to a recession and thus (through the operation of the automatic stabilizers) to increases in budget deficits". On the resulting role played by the ECB, see A. Hinarejos, *Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union: European Court of Justice, Judgment of 16 June 2015, Case C-62/14*, 11(3) Eur. Const. Law Rev. 563 (2015).

[97] A situation that laid bare the condition of greater vulnerability of countries adhering to the monetary union, due to the absence of a lender able to reassure the markets; see P. De Grauwe, *see above* n. 71, 7, 9; C. Gerner-Beurle, E. Kucuk, E. Schuster, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, 15(2) Ger. Law J. 288 (2014).

[98] V. Borger, *The ESM and the European Court's Predicament in Pringle*, 14(1) Ger. Law J. 113 (2013) at 114.

[99] This is a reference to Minister Tremonti; his interview can be accessed at: https://www.ilgiornale.it/news/intervista-tremonti-1847400.html

to be no end to the possibility of economic growth. According to another thesis, the crisis was seen as an opportunity to achieve the necessary political and fiscal union. If the architecture designed by Maastricht is examined more closely, it can be seen that the exclusion of a systemic crisis scenario from the horizon outlined by the Treaties is rooted in an exclusively preventive strategy focused on what has been defined as negative solidarity[100], aimed at segregating systemic risk within the borders of nation states. The real aim of the sound fiscal policies imposed by the Treaties on the Member States is the need to ensure that national imbalances are to be ascribed to a national level exclusively, without compromising the economic conditions in the other members of the EU community—defined indeed, as a "stability community". It is for this reason that Art. 123 and 125 TFEU have outlined so-called no bail-out clauses; these, however, have received little interest from scholars[101]. In their peremptoriness, the regulatory provisions on the prohibition of monetary and fiscal rescue seem to follow the aforementioned perspective outlined in the post-*Maastricht* Treaties, in which the bonds of trans-national solidarity are confined within very narrow limits.

The principle of solidarity is contemplated in Art. 2 TEU, but not in the section (the one enclosed in the first sentence) indicating the founding values, thus reflecting the already exposed tension between strong and weak States and the well-known fear of not encouraging moral hazard enough[102]. Even the principle of social justice, recognized in Art. 3 TEU third paragraph, is represented as solidarity between States and not between citizens, so to be subject to the limits provided by Art.123 and 125 TFEU regarding the prohibition of aid or funding to States. The only form of positive solidarity appeared in the provisions contained in Art. 122 TFEU, which legitimized the EU to grant assistance to States facing difficulties due to events beyond their control, and in Art. 143 TFEU, which authorizes the

[100] On the distinction between negative and positive solidarity, see V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, cit. at 20, 21.

[101] P.J. Castillo Ortiz, *The Political De-determination of Legal Rules and the Contested Meaning of the 'No Bailout' Clause*, 26(2) Soc. Leg. Stud. 249 (2017).

[102] A.V. Bogdandy, *I principi fondamentali dell'Unione europea. Un contributo allo sviluppo del costituzionalismo europeo* (2011) at 134 et seq.

Council to grant assistance to States outside the euro area if they experience balance of payments problems. Solidarity emerges therefore with a negative dimension: the obligation to not accumulate debt.

7. The debate following the onset of the crisis: in search of an ambitious compromise between market disciplines and the irreversibility of-currency

Financial markets behaved for a long time as if those bans did not exist and kept ignoring, until the outbreak of the Greek crisis, the diverging financial solidity between the states in determining the interest rate on loans[103]. The initial market sentiment was not entirely groundless. For the reasons explained above, the Treaties did not contemplate a potential systemic or existential crisis. Moreover, they were not equipped with an adequate solution to face worse scenarios, had these occurred despite precautions. Yet, precisely this evident gap in the Treaties should have justified a more pragmatic approach to the interpretation of the no bail-out clauses. It was, in fact, almost 'as if the Eurozone had dictated a perfect regulation to prevent fires, but then forgot to set up a fire brigade in the event that a fire had really broken out, threatening the common structures'[104]. The Treaties were dealing too summarily with the crisis affecting Member States; by responding with the default or voluntary external rescue mechanism under Art. 122 TFEU they were dismissing the worst-case scenario of a systemic crisis able to seriously damage the entire eurozone. It can be argued that the rules prohibiting rescue mechanisms were certainly more tangled and multifaceted than what theorized by legal doctrine[105]. Their real nature started emerging only with the advent of the crisis, that is to say, in front of a serious scenario until then taken into consideration only by economic doctrine— which, in fact, was

[103] J.V. Louis, *Guest Editorial,* cit.
[104] P. De Grauwe, *Fighting the Wrong Enemy*, https://voxeu.org/article/europe-s-private-versus-public-debt-problem-fighting-wrong-enemy; Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications,* cit. at 22; P. Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20(1) Maastricht J. Eur. & Comp. L. 10 (2013).
[105] P.J. Castillo Ortiz, *The Political De-determination*, cit. at 260.

skeptic about the efficacy of the prohibitions[106]. The budgetary code of the Union was being reconsidered in political debate, with the aim of relativizing its scope and adapt it to the increasing emergency situation[107].

A new way of understanding the no bail-out clauses emerged from a set of acts of the EU institutions, including the decisions taken by the EU Council, the European Council and the Member States. The conditional solidarity, that is, financial assistance conditional on compliance with strict macroeconomic recovery and adjustment programs, was presented as a solution in line with the scheme outlined by the Treaties and the rationale of the rescue bans. More precisely, this solution appeared in the first form of financial assistance built in 2010, with the establishment of the European financial stabilization mechanism (EFSM) and the European Financial Stability Facility (EFSF). These mechanisms were codified in subsequent years (2011/2012) not only through the creation of a permanent type of assistance mechanism, namely the European Stability Mechanism (ESM), intended to replace the previous funds and vehicles[108], but also through the amendment

106 Since the Maastricht Treaty, economic doctrine has explained how, in a monetary and economic union, the need for bail out mechanisms derives from the deep interdependence links between States; these links could generate a situation in which public debt securities of countries at risk of default could be held by private citizens, companies and banks of Member States with sound financial system. See A.L. Bovenberg, J.J.M. Kremers, P.R. Masson, *Economic and Monetary Union in Europe and Constraints on National Budgetary Policies*, 38(2) *Staff Papers* (International Monetary Fund), Special Issue on Europe 374 (1991). See also P.J. Castillo Ortiz, *The Political De-determination*, cit. at 260.

107 Dynamics which could be opened up by an emergency situation, also with reference to the identification of the rule of recognition, are explored in H.L.A. Hart, *The Concept of Law* (1961) at 92, 104; in the specific interpretation of the no bail-out clause , see K. Dyson, *Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency*, 35(3) J. Eur. Integr 207 (2013) e P.J. Castillo Ortiz, *The Political De-determination*, cit.

108 In addition to Council Regulation (EU) No 407/2010 of 11 May 2010 on the EFSM, adopted under Art. 122 TFEU, one should also refer to EU Council Decision No 9614/10 of 9 May 2010, considered as a decision subject to international law which decides on the establishment of a Special Purpose Vehicle, the *European Financial Stability Facility* (EFSF). These measures followed the *Greek Loan Facility*, decided on 2 May 2010, consisting of a package of bilateral loans granted to Greece and administered by the Commission. At the meeting that took place on 28-29 October 2010, the European Council decided to replace both mechanisms with a permanent instrument. The ESM Treaty, all

of the Art. 136 TFEU[109] which authorizing the Member States to establish a permanent mechanism to safeguard the stability of the euro area[110].

This different interpretation of the no bail-out clauses found also support in the debate that arose within legal doctrine. It was noted that the scenario outlined in the Treaties was more articulated than initially thought due to a sort of misinterpretation of Art. 123 and 125 TFEU. This became self-evident in the possibility authorized by the Treaty on the functioning of the EU to offer assistance to Member States facing difficulties for which they could not be directly responsible (Art. 122 TFEU), demonstrating the non-absoluteness of the prohibitions of rescue[111]. The debate could certainly have offered a wider range of solutions beyond Art. 122 TFEU, given that this provision refers to well-defined interventions of financial assistance: those made one-off (and not permanently) by the EU (and not by the states) to benefit individual countries (without systemic implications related to the stability of the euro area) in difficulties for reasons not directly attributable to them[112]. After all, the fragility of this legal

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euro area Member States were signatories, was ratified on 2 February 2011 and entered into force on 27 September 2012.

[109] Promoted by the European Council on 17 December 2010, Euco 30/10 and approved via a simplified procedure. The decision on the amendment of Art. 136 TFEU was adopted on 25 March 2011, 2011/199/EU. The text contained in Art. 136 entered into force after the approval of the Member States whose currency is the euro, in accordance with their respective constitutional procedures. For a survey of the different measures and mechanisms, see A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union,* cit.

[110] B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism, European Policy Analysis*, EPA (2011).

[111] J.V. Louis, *Guest Editorial,* cit. According to this author, the provision of Art. 122 TFEU was the result of a compromise between countries with a strong currency and economy on the one hand, and countries with weaker currencies and economies on the other hand; similar considerations are found in V. Borger, *The ESM and the European Court's Predicament in Pringle,* cit. at 120.

[112] The fact that a state cannot always be held responsible if facing challenging circumstances (principle of state liability) seems to play a major role when interpreting Art. 122 TFEU and Art. 125 TFEU. If the forms of assistance under Art. 122 TFEU can be granted even in the event of a crisis due to fiscal indiscipline, the discipline on excessive deficits contemplated in the Stability Pact would not be actualised (see V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, cit. at 27). B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, cit. at 5

basis[113], unable to deal with a systemic crisis partly triggered by the economic turmoil of a country not completely blameless in this regard (Greece)[114], pushed the various European actors to promote the amendment of Art. 136 TFEU, with a view to consolidating a less rigorous interpretation of Art. 125 TFEU[115].

What should be underlined here is that this scenario allowed a latent tension to emerge in the legal debate between two conflicting pillars of the Economic and Monetary Union: 1) the no bail-out clauses, able to ensure through market discipline the pursuit of sound fiscal policies by Member States, and 2) the pursuit of stability of the eurozone which, by imposing the deployment of fiscal (and perhaps even monetary) interventions, seemed to push in the opposite direction and encourage moral hazard[116]. Therefore, there slowly started to emerge an idea, both among economic theorists and political circles that a form of solidarity depending on the adoption of macro-economic

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stresses the importance for the assistance to be granted of the non-attributability of the state of difficulty on the basis of Art. 122 TFEU. Whether assistance under Art. 122 TFEU could also be provided in cases of countries facing difficulties resulting from their own initiatives remains a controversial topic, as mentioned by Kaarlo Tuori, *The European Financial Crisis*, cit. at 26.

[113] On the applicability of the aforementioned article to the sovereign debt crisis, there was no unanimous consensus among economic theorists, since some authors believed that Art. 122 TFEU was perfectly applicable also to cases of financial difficulties caused by a public debt crisis; its compatibility with the following Art. 125 TFEU would have been entrusted to the provision of appropriate conditionality. This latter is the view expressed in the aforementioned publication by J.V. Louis, *Guest Editorial,* cit. and in A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union,* cit. at 1634, who, however, stresses the necessarily temporary nature of the aid mechanism set out in Art. 122 TFEU and V. Borger, *The ESM and the European Court's Predicament in Pringle*, cit. at 128, which identifies Art. 122 TFEU as a sufficient legal basis also for the construction of a permanent rescue mechanism.

[114] Regulation 407/2010 of 11 May 2010, establishing the European financial stabilization mechanism, does not mention the fault of the Member State. The fund, established under Art. 122 TFEU, was not, in fact, used for Greece; see Kaarlo Tuori, *The European Financial Crisis*, cit. at 26.

[115] B. de Witte, *The European Treaty Amendment*, cit.

[116] Kaarlo Tuori, *The European Financial Crisis*, cit. at 22, 24; P. Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology,* cit. at 10; M. Wilkinson, *The Euro Is Irreversible! … Or is it?: On OMT, Austerity and the Threat of "Grexit"*, 16(4) Ger. Law J. 1052 (2015).

adjustment measures could ensure an optimal balance between these two opposing forces[117]. The main argument in favor of the intervention was that the aid, if conditional, would not have discouraged Member States' pursuit of sound fiscal and economic policies. Moreover, this compromise would ensure the compliance with the rationale behind the rescue bans, to be identified in the encouragement to achieve fiscal rigor. Market discipline would be replaced by a different kind of stimulus, that is, aid conditionality, in order to satisfy the needs elucidated in the Treaties[118]. Of course, there were also more restrictive interpretations of the prohibitions, which relied on a literal understanding of the Treaties. But the teleological approach described above emerged overwhelmingly in jurisprudence.

After the German Federal Court between 2011 and 2012 freed up new emergency instruments devised in the European legal area from the accusation of creating an unlawful transfer union[119], the ECJ also intervened on the subject. With the well-known 2012 Pringle case, the Luxembourg Court of Justice used the teleological criterion based on the identification of the rationale pursued by Art. 125 TFEU to establish the compatibility with the Treaties of forms of assistance granted, under certain conditions, by the Member States. In the Court's view, the ESM Treaty fell within the Member States' area of competence and did

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117 On the role of conditionality, see C. Pinelli, *Conditionality and Economic Constitutionalism in the Eurozone,* 11(1) Ital. J. Publ. Law, 22 (2019).

118 A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union,* cit. at 1626.

119 In opposition to the dogma of stability community. This dogma has been the *conditio sine qua non* for Germany's commitment to participation to the monetary union since Maastricht-Urteil. In the judgment of 7 September 2011, BVerfGE 987/10, para. 133 et seq., concerning financial aid to Greece and the validity of the rescue mechanism (the EFSF), the Court ruled out the possibility that the obligations put forward by the Federal Republic of Germany could subvert the principles underpinning the idea of mutuality to achieve economic stability, since no forms of automatic liability and no transfer mechanisms were provided, and not to such an extent as to undermine the budgetary autonomy of the Parliament and, by default, the democratic principle. The most explicit considerations on the interpretation of the Treaties appear in the 2012 ESM ruling, in which the Federal Court states that the new Art. 136 TFEU does not exempt from budgetary discipline and allows voluntary assistance subject to certain conditions and aimed at saving the eurozone; see Judgment of 12 September 2012 -2 BVerfGE 1390/12, para. 129 et seq.

not interfere with those conferred to the EU in respect to monetary policies and the coordination of economic policies. It was argued that the objective pursued by the signatory states was to grant economic aid and save the eurozone as a whole[120]. This did not, however, exempt the signatory states from complying with primary EU law, for instance in respect to the prohibition of fiscal rescue measures set out in Art. 125 TFEU.

According to the Court's interpretation, the paradigm of market discipline, and with it the dogma of stability community, would not been obscured by the introduction of emergency instruments specifically designed to deal with a solvency crisis if experienced by a Member State, which could jeopardize the stability of the euro area as a whole[121]. The preventive logic of market discipline and the stability community dogma will be respected insofar Member States aim to pursue sound fiscal policies. This explains the need for forms of fiscal assistance characterized by strict conditionality clauses to ensure the stability of the entire eurozone[122]. Nevertheless, in order to comply with the no bail-out clause it is equally important that other Members do not become liable for the debts of a Member State receiving aid. According to European jurisprudence, the legal basis of the ESM Treaty should not be Art. 122 TFEU but Art. 125, based on that evolutionary interpretation seen above. It thus considers Art. 136(3) TFEU, introduced for the implementation emergency reforms, as confirming a power which is, in effect, already recognized in the Treaties[123].

8. Unconventional monetary policies: an overview

Some identify a line of continuity between the political and legal debate that has arisen around the interpretation of the fiscal

[120] According to the Court (EU Court of Justice, 27 November 2012, in Case C-370/12, paras. 56, 96 et seq.), the ESM Treaty's objective is safeguarding the stability of the euro area as a whole, which is clearly distinguished from the objective of maintaining price stability—arguably the main objective of the Union's monetary policy.

[121] EU Court of Justice 27 November 2012, para. 59.

[122] EU Court of Justice 27 November 2012, Case C-370/12, paras. 121, 133 ff. V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, cit. at 24 stresses the need for these two different assistance requirements.

[123] V. Borger, *The ESM and the European Court's Predicament in Pringle,* cit. at 132.

no bail-out clause and the (unconventional[124]) monetary policy decisions taken by the ECB during the last decade. It was argued that the ECB's decisions would have accepted the idea of solidarity conditional on the adoption of reforms or adjustment program[125]. Behind this line of reasoning - albeit in non-explicit forms – lies the conviction that the integrity of the eurozone is an essential component of the ECB's mandate, deductible starting from the objective of price stability. It follows, in accordance with this view, that the monetary authority would be fully legitimated to act as an active player in eurozone rescue operations, reconciling the two opposite poles of values, present in the Treaty: the irreversibility of the currency and the no bail-out clauses. Nevertheless, that the ECB may indeed play an explicit role in the euro bail-out, provided the strict conditions set out under Article 125 TFEU are observed, is an idea that is not readily accepted in the legal debate. Moreover, as will be explained later, such an idea appears unconvincing unless surrounded by further cautions, given its tendency to lead to a questionable overlapping of tasks and functions regarding the prerogatives of EU Member States. In fact, the problem focuses on the redistributive effects associated with such monetary interventions, which are not legitimized by prior decisions taken within the European or national democratic circuit. As regards the problematic relationship between the stabilization of the eurozone and the boundaries of the ECB's mandate, I will argue that an emergency intervention can also be carried out by the Central Bank but only if certain conditions are met. Without these, the intervention, although commendable, would be unlawful since it would not only damage the prerogatives of the Member States but also the very nature of the Union based on the dogma of stability community. This problem will be examined in the following sections.

What is important for the moment to highlight is the administrative behavior of the monetary authority, characterized by the ECB's growing activism. As is well known, the preservation of the integrity of the eurozone has taken shape through the purchase of government bonds on the secondary market and the

[124] O. Chessa, *La costituzione della moneta*, cit. at 345 et seq.
[125] V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, cit.

consequent attenuation of spreads. The first intervention program dates back to May 2010, with the establishment of the *Securities Markets Programme* (SMP)[126]. The intervention was aimed not only at the purchase of public debt securities, but also at their sterilization, in order not to increase the mass of money in circulation and the subsequent risk of inflationary shocks. The program was justified by the need to provide liquidity in the markets in order to restore the proper functioning of monetary policy transmission mechanisms; the ultimate objective was, however, to ensure the stability of the currency, threatened by speculation that was beginning to attack the public debt of Greece, Ireland and Portugal. On that occasion, the commitments made by the States at European headquarters to intensify the process of fiscal consolidation were considered sufficient by the ECB to intervene in the secondary market with the purchase of government bonds[127]. With the spread of the financial crisis during 2011, the program was extended to Spain and Italy with specific conditions imposed on them in two different letters dated August 2011[128]. The importance linked to the implementation of the necessary reforms by the aided states was such that the purchase of the securities was reduced when it emerged that the Italian Government was unwilling to carry out the adjustments and structural reforms indicated in the aforementioned letter[129]. It

[126] Decision 14 May 2010 (ECB/2010/5).

[127] Point 4 of the preamble to Decision ECB/2010/5 reads as follows: "The Governing Council will decide on the scope of the interventions. The Governing Council has noted the statement of the euro area member state governments that they 'will take all measures needed to meet their fiscal targets this year and the years ahead in line with excessive deficit procedures' and the precise additional commitments taken by some euro area member state governments to accelerate fiscal consolidation and ensure the sustainability of their public finances". R. Smits, *The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments*, 38 Fordham Int. Law J. 1167 (2015) underlines the presence of an implicit conditionality *ab origine*.

[128] For the text of the ECB's letter of August 5 2011, see https://st.ilsole24ore.com/art/notizie/2011-09-29/testo-lettera-governo-italiano-091227.shtml?uuid=Aad8ZT8D; similar letter was sent to the Spanish government headed by Zapatero at the time: https://english.elpais.com/elpais/2013/12/04/inenglish/1386168519_020729.html.

[129] V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area,* cit. at 20, 21.

should be added that the introduction and implementation of the program was affected by the presence of a serious conflict within the ECB's directorate. According to some of its member, there was a lack of a clear and direct link between the aids and the conditionality[130]. In addition, the ECB's own promise to sterilize purchases was broken at some point[131].

As early as December 2011, the ECB launched a further program (the *Long-Term Refinancing Operations*, LTRO). This financial instrument, formally aimed to provide liquidity to banks, was in fact a way to provide liquidity to sovereign states through the financing of the banking channel. The resurgence of the crisis, especially following the joint statements made by MERKEL and SARKOZY in Deauville on 18 October 2010[132] has, however, led to the need for further stabilization interventions by the monetary authority. In this context took place the famous speech on "*whatever it takes*" given by Draghi on 26 July 2012: the ECB President announced that, within its mandate, the ECB would do everything necessary to save the euro. Although legally questionable, the intervention carried out by the ECB had succeeded in preserving the common currency, also avoiding the risk of a dangerous judicial dispute, thanks to a statement released to the media[133].

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[130] See K. Dyson, *Sworn to Grim Necessity?* cit. at 217.

[131] C. Jones, *European Central Bank Unleashes Quantitative Easing*, *Financial Times* (2015), available online at https://www.ft.com/content/aedf6a66-a231-11e4-bbb8-00144feab7de.

[132] The statement concerns the need for private participation in the restructuring of public debt (the so-called *private sector involvement*) as a condition for the intervention of the rescue instruments developed in Europe. On the existence of a causal link between those statements and the reaction of the markets, see M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas,* cit. at 108, 343. The qualified journalistic sources of the time do not give a different representation of the events, see C. Bastasin, *The Franco-German Ballet on Greece at the Origin of this Midsummer Crisis*, August 4, 2011, which can be accessed online at: Il Sole 24 Ore, https://st.ilsole24ore.com/art/commenti-e-idee/2011-08-03/balletto-francotedesco-grecia-origine-214854.shtml?uuid=AazjPZtD. As Bastasin explains, although the agreement had commenced from 2013 it was considered immediately operational by the German banks which had disposed of the Greek securities, giving rise to market speculation, which involved the securities of all the states of the so-called suburbs communities.

[133] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas,* cit.; S. Kennedy, J. Black, *Draghi's 'Whatever It Takes' Still Works As Euro Revives*,

In order to overcome the legal objections raised against the previous program, in September 2012 the ECB announced the launch of the OMT, declaring its willingness to purchase a potentially unlimited number of euro area government debt securities, without acting as a preferred creditor (so-called *pari passu*), providing certain conditions were met. Among these was the condition that the Member State in question should adhere to a financial assistance program under the *European Stability Mechanism* (ESM). The link with these conditions therefore became more evident due to the adherence to the ESM's financial assistance program. The OMT program was, in fact, never used[134], but, in 2014 the ECB once again came to the eurozone's aid by setting up the *Expanded Asset Purchase Programme* (EAPP). The aim of this was to enable the purchase of financial assets and to provide credit to the economy and the transmission of monetary policy, with the stated objective of reducing inflation rates to levels close to 2%, consistent with the ECB's main objective of maintaining price stability within the euro area (the program is better known as *Quantitative Easing*, QE)[135]. Within this program, with a series of other more detailed decisions, the ECB was setting up the so-called *Public Sector Purchase Programme* (PSPP), aimed also at allowing the purchase - under certain conditions depending, *inter alia*, on the fiscal conduct and creditworthiness of the states - of the euro area Member States' public debt securities, in order to contribute to the achievement of the desired inflation target[136].

Bloomberg online (2014), available online at: http://www.bloomberg.com/news/2014-01-10/draghi-s-whatever-it-takes-still-works-as-eurorevives.html.

134 M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas,* cit. at 99–117.

135 This is a highly articulated program designed to facilitate the transmission of monetary policy, and it consists of several programs: The *Corporate Sector Purchase Programme* (CSPP); the *Public Sector Purchase Programme* (PSPP); the *Asset-Backed Securities Purchase Programme* (ABSPP); and the *Third Covered Bond Purchase Programme* (CBPP3).

136 As also clarified by the ECJ, the specific reasons for the activation of this program can be found in the statements made by the President of the ECB at subsequent press conferences. According to these statements, it was the exceptionally low inflation rates, compared to the objective of maintaining price stability through a return to annual inflation rates closer to 2%, that justified the introduction of the PSPP, and the regular adjustments made to this program.

Finally, in order to respond to the coronavirus-related crisis (COVID-19), the Governing Council of the ECB decided in March 2020 to launch a new *Pandemic Emergency Purchase Programme* (PEPP)[137]. In June 2020, the program was further strengthened with additional resources and extended until mid-2021. Compared to previous programs, the ECB decided to accept securities from countries without creditworthiness. It also deliberated not to take into account the so-called *capital key*, i.e. the principle that the ECB was bound to allocate purchases in proportion to the states' capital shares of the Central Bank. As clearly seen from the analysis of the various programs, the motivation for the intervention appears, in many cases, to be closely related not to the stabilization of the eurozone in the strictest sense of the word, but to the need to restore the correct functioning of the transmission mechanisms of monetary policy, obstructed by the widening of the so-called spreads. Having clarified the programs implemented by the ECB in recent years, it is now appropriate to shift the focus to the problematic issue of the relationship between the extension of the ECB's mandate and the rescue of the eurozone.

9. The dark side of a controversial power: unconventional monetary policies between price stability and currency rescue

Almost all of the monetary policy decisions mentioned above have become the target of a barrage from German populist movements. The guarantees of direct access to judgement, together with a broad interpretation of active legitimation, have, over time made the FCC a type of privileged forum for German Eurosceptic movements[138]. For its part, the FCC has understood its role as custodian of the Constitution in a very conservative way. In fact, the FCC has acted as guardian of the European integration

Before the adoption of Decisions 2015/774, 2015/2464, 2016/702 and 2017/100, the annual inflation rate was -0.2%, 0.1%, 0.3% and 0.6% respectively. It was only at the press conference on 7 September 2017 that the President of the ECB announced that the annual inflation rate had reached 1.5%, thus approaching the target. Court of Justice of EU, 11 December 2018, Case C-493/17 *Weiss* and others, para. 39.

[137] Decision (EU) 2020/440 of the ECB of 24 March 2020.

[138] M. Wendel, *Exceeding Judicial Competence in the Name of Democracy*, cit. at 283.

program[139], although seeking a dialogue with the Court of Justice, in accordance with a *modus procedendi* of theoretical openness to EU law already advocated in the 2010 *Honeywell* judgement[140]. With this ruling, the Federal Supreme Court clarified the conditions of access to *ultra vires* review, committing itself to offering the Court of Justice the opportunity to express its views on the issue at stake in the proceedings. Nevertheless, this was an unfriendly opening, given that it was part of a type of procedure in which the German General Court reserved for itself the power to review the content of the judgement of the ECJ, thus breaking the monopoly held by the Court of Luxembourg in the review of European acts. These profiles, closely related to the paradigm of constitutional pluralism, have already been sufficiently discussed. It is important here to note that European jurisprudence on the ECB unconventional policies has been formed precisely as a result of the preliminary rulings of the German judge during the constitutional proceedings relating to the OMT and PSPP monetary policy programs.

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[139] The metaphor of the bridge, of which the Court would be the guardian, often appears in European doctrine, see M. Wendel, *Exceeding Judicial Competence in the Name of Democracy*, cit.

[140] Judgement of 6 July 2010, BVerfGE 2661, 06. The ruling refers to a very specific case in which the ECJ had intervened for a preliminary ruling to interpret EU law, but with a judgement largely contested in its contents (judgement C-144/04 Mangold). A. Wiesbrock, *The Implications of Mangold for domestic legal systems: The Honeywell case*, 18(1-2) Maastricht J. Eur. & Comp. Law 208 (2011). In this ruling, the FCC clarifies the conditions of access to the ultra vires union. From a substantive point of view, the court calls for a recurrence of a qualified infringement, characterized not only by a manifest breach of the principle of competence but also by a structurally significant change in the distribution of competences, to the detriment of the Member States. From a procedural point of view, the court also affirms the need for the ECJ to be given the opportunity to rule on the validity of the scrutinized European legal acts and on the interpretation of EU law, before it itself takes the final decision in the case. The homage to the principle of openness to European law also does not imply an attitude of condescension towards the judgement of the Court of Luxembourg; on the contrary, the *Bundesverfassungsgericht* expressly declares that it reserves itself the power to disregard the European judgement if, on the result of the application of the substantive tests examined beforehand, it should in turn be affected by the ultra vires stigma (M. KUMM, *Rebel without good cause: Karlsruhe's misguided attempt to draw the CJEU into game of chicken and what the CJEU might do about it,* 15(2) Ger. Law J. 203 (2014). M. Wendel, *Exceeding Judicial Competence in the Name of Democracy*, cit. at 274.

In the first 2015 *Gauweiler* judgement[141] on the validity of the OMT program, the functional aspect of the ECB's mandate is at the heart of the European Court's reasoning. It is precisely the cross-cutting nature of the ECB's competences - resulting from its link with the objective of maintaining price stability, in accordance with Art.127(1) and 282(2) TFEU - that allows the European Court to rule out the illegality of non-conventional monetary policy measures, even in the face of interventions affecting the areas covered by economic policies. What matters, according to the European courts, is that the objective pursued by the ECB is price stability[142]. On closer inspection, the legal reasoning followed by the European judges appears more articulated. In the ECJ's view, the primary objective of price stability is linked to the adoption of measures aimed at ensuring the uniqueness of monetary policy and its functionality, against the distorting effects caused by the irrational increase of interest rates. The widening of spreads on government bond yields would undermine monetary policy, frustrating it in the peripheries most affected by speculation[143]. Certainly, in the perspective accepted by the European judge, it is necessary that such monetary interventions do not result in the violation of the no bail-out clause. As well as in the previous *Pringle* ruling, concerning fiscal assistance interventions (suspected of violating Art. 125 TFEU), as in the *Gauweiler* ruling concerning monetary assistance interventions (suspected of violating Art. 123 TFEU), the use of teleological criterion, based on the identification of the rationale pursued by the Treaty provision, allows the ECJ to limit the rigor of Art. 123 TFEU. Monetary assistance interventions would therefore be prohibited not in absolute terms, but only where they are likely to frustrate the rationale of the prohibition and deter states from pursuing sound budgetary policies[144].

In the ECJ's view, the OMT program is compatible with Art. 123(1) TFEU. The reasons given in support of this conclusion are, firstly, the subordination of monetary intervention to the condition of prior accession of the Member State concerned by the

[141] Court of Justice of the EU, 16 May 2015, Case C-62/14 *Gauweiler*.
[142] Court of Justice of the EU, 16 May 2015, Case C-62/14 *Gauweiler*, para. 46.
[143] O. Chessa, *La costituzione della moneta*, cit. at 357 et seq.
[144] Court of Justice of the EU 16 May 2015, Case C-62/14 *Gauweiler*, paras. 99/102.

purchase of the securities to the ESM program (which in itself imposes clear conditionality). But also the containment of the purchases to an extent which preserves the monetary policy transmission mechanism, in order to ensure the cessation of purchases as soon as the objectives are achieved. In other words, the aim cannot be to ensure a complete harmonization of securities yields, i.e. without paying attention to the different degree of reliability of the budgetary measures adopted by the different countries. According to the Court, other precautions associated with the program[145] would be suitable to prevent the diversion from the states' tension towards the implementation of sound fiscal policies and thus safeguard the *ultima ratio* of Article 123 TFEU[146]. The core of these arguments is taken up in the subsequent *Weiss* 2018 judgement on the PSPP program, which differs in part from the previous judgement due to the partial diversity of the factual context. Price stability continues to be one of the ECJ's main concerns. But the reasoning is developed in a factual framework of clear deflation of the economies of the EU Member States. As noted before, this economic situation had called for the adoption of unconventional monetary policies, including the purchase of public debt securities aimed at facilitating the raising of the level of inflation to a lower level, but still close to 2%[147]. Responding to the new objections raised by the FCC[148], Luxembourg judges reiterate that, in the absence of an explicit definition, monetary policy is defined primarily on the basis of a teleological criterion, thereby attention must be paid to the objective of price stability. Such an objective would be defined by the Treaty only in qualitative terms, through reference to the abstract concept of price stability, but not in quantitative terms. It follows that the Treaty doesn't preclude monetary policies of the kind undertaken by the ECB within quantitative easing (QE).

[145] Such as the limitation of purchases to certain security categories, as well as the reservation of the power to sell securities, depending on the fiscal discipline ensured by the State concerned.

[146] Court of Justice of the EU 16 May 2015, case C-62/14 *Gauweiler*, paras. 103/107.

[147] Court of Justice of the EU, 1 December 2018, Case C-493/17 *Weiss* and others, paras. 39, 41.

[148] Order 18 July 2017, BverfGE 859/15.

Faced with the new objections raised by the FCC, the European Court ruled out the possibility that the results of the effects on the real economy, although recognized before and therefore foreseen and accepted by the ECB, could imply defining the actions taken into the PSPP program as an equivalent economic policy measure. In the ECB's view, to exert an influence on inflation rates the ECB is necessarily inclined to adopt measures which have certain effects on the real economy. To introduce such a ban, albeit limited to cases where the effects are foreseeable and consciously accepted, would be tantamount to prohibiting the ECB from using the means available to it under the Treaties to achieve its monetary policy objectives[149]. The European Court also comes to very similar conclusions with the other questions. With regard to the infringement of the prohibition on State funding provided for in Art. 123 TFEU, the ECJ again points out that the precautions adopted (the absence of guarantees regarding the continuation of the purchase of the government securities, the dependence of the program on the need to achieve the monetary policy objective of achieving inflation close to 2%, the selectivity of these acquisitions, the distribution of the acquired program according to the key for the subscription of the ECB capital, the capital key, and the credit quality of the State), are such as to ensure that the States are not diverted from the incitement to pursue sound fiscal policies[150].

The examination of European case law provides, at this point, a sufficiently clear overview of the problem of the legal basis for the ECB's intervention. The joint reading of the *Pringle*, *Gauweiler* and *Weiss* judgements makes it possible to distinguish clearly, at least in theory, between the exclusive competences of the Union in monetary policy and those of the Member States in economic policy. A line of demarcation can be traced by using a functional and teleological criterion. According to this, only the objective of price stability can justify a monetary policy intervention (including non-conventional ones) by the ECB. Conversely, the economic policy objectives, pursued through fiscal leverage, including fiscal assistance to countries in debt

[149] Court of Justice of the EU, 11 December 2018, Case C-493/17, *Weiss* and others, paras. 61 to 67.

[150] Court of Justice of the EU, 11 December 2018, Case C-493/17 *Weiss* and others, paras. 132-142.

crisis, would be the responsibility of the Member States. In turn, price stability constitutes an objective that can be pursued, according to the above-mentioned jurisprudence, both through the non-selective acquisition of large quantities of public debt securities[151] and the elimination of obstacles to the correct transmission of monetary policy[152]. Certainly, the teleological criterion leads to the drawing of transversal competences, by their nature productive of interferences and overlaps. Although motivated by different, and in some ways even opposite needs, monetary and fiscal policies produce similar effects. It follows that it seems quite normal for monetary policies to produce consequences also in the economic field, given that economic policies produce effects also on the price level. Therefore, it is not surprising that the danger of overlap is also present in some aspects of the eurozone's own rescue measures.

Whereas the objective of price stability is a prerogative of the European Central Bank and should be implemented through the elimination of obstructions to the functionality of monetary policy, financial assistance to countries in difficulty, motivated by the danger of compromising the stability of the eurozone as a whole, falls within the prerogatives of individual Member States, within the ESM mechanism. Nevertheless, there is a significant stabilization profile of the euro area that continues to fall under the umbrella of monetary policies. Achieving the objective of the uniqueness of monetary policy, which is functional to the primary objective of price stability, can stabilize the euro area through the elimination of obstacles to the transmission of monetary impulses (i.e. the compression of spreads). This does not alter the nature of the power exercised. The power remains monetary in nature, precisely on the basis of a functional criterion which looks at the objective pursued (the uniqueness and functionality of monetary policy)[153]. One could say that there is one side of the stability of the euro area that is relevant to monetary policies and a second

[151] With the aim of bringing the price level back to a certain desirable value (as in the case of the PSPP), as in the case of the EQF (PSPP), see Court of Justice of the EU, 11 December 2018, Case C-493/17, Weiss and others, paras. 82 and 90.
[152] In order to ensure the uniqueness of this policy, as in the case of the OMT. See Court of Justice of EU, 16 May 2015, Case C-62/14 *Gauweiler*, para. 46 et seq.
[153] T. Tridimas, N. Xanthoulis, *A Legal Analysis of the Gauweiler Case*, 23(1) Maastricht J. Eur. &Comp. L. 7 (2016) at 33.

that is relevant to the Member States. These reflections are important as they allow the exclusion of the presence of overlaps between the OMT program and the interventions of the ESM mechanism[154]. The accession of a Member State to the rescue mechanism is a necessary but not a sufficient condition to justify intervention by the ECB, which can only intervene because of the need to remove obstacles to the correct transmission of monetary policy[155]. Not every obstruction in the transmission instruments of monetary policy appears capable of justifying intervention by the ECB, which makes the line of demarcation between these two sides of eurozone stabilization more evident.

The presupposition, on which the ECJ bases its interpretation of Art. 123 and 125 TFEU, is that there are forms of market pressure completely removed from the power of control of individual countries, since they are not related to the soundness of the budgetary policies. The market discipline, not always guided by rationality, can result in sudden and unwarranted worries. For example, a fear of a break-up of the eurozone could lead to a baseless rise in interest rates, fueling distrust towards the sustainability of the debt of a certain member country. According to the multiple equilibrium theory, unjustified changes in market sentiment may shift a Member State's position towards rates that are less sustainable for public finances. The greater severity of national debt would justify a higher level of rates *ex post*, although the macroeconomic and budgetary position remains unchanged. In short, with unchanged policies, the state position would shift towards a bad equilibrium. As in a self-fulfilling prophecy, all this can lead the state towards a solvency crisis without ECB intervening to bring the rate curve back to sustainable levels in line with the fundamentals[156].

The intervention of the ECB is therefore justified by the need to preserve the functionality of monetary policies from alterations generated by the irrationality of the market (and not by the fiscal choices of the various states), as the ECJ states clearly in

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154 Court of Justice of EU, 16 May 2015, Case C-62/14 *Gauweiler*, para. 65.

155 T. Tridimas, N. Xanthoulis, *A Legal Analysis of the Gauweiler Case,* cit. at 26.

156 P. De Grauwe, Y. Ji, A. Steinbach, *The EU debt crisis: Testing and revisiting Conventional Legal Doctrine,* 51 Int. Rev. Law Econ. 29 (2017).

specific passages of the 2015 *Gauweiler* judgement[157]. In these circumstances, the financial stabilization intervention of the ECB - functional to ensure the uniqueness of monetary policy - is aimed at eliminating that share of the spread that can be linked to the irrationality of the market. As long as the objective is limited to this, the ECB's activity would appear to fall within the scope of its mandate. In other words, it acts without encroaching on the Member States' competences about rescuing a Member State in difficulty. This would instead occur if the removal of obstacles to the transmission of monetary policy also includes that part of the spread that is linked to the bad budgetary policies pursued by individual states. In the latter case, if the eurozone as a whole is endangered, it will be necessary to call for the intervention of the Fund for the Rescue of States. It will, therefore, be this fund that will provide necessary aid, imposing the conditions needed to subrogate the market regulation required by Art. 123 and 125 TFEU, temporarily deactivated for reasons of preservation of the eurozone. In such a framework, the ECB will then be in a position to intervene not to save the eurozone through monetary aid, but only to remedy the irrational reactions of the markets which, driven by the fear of a break-up of the eurozone, would otherwise lead to a tightening of the states' financing conditions[158].

In conclusion, a well-founded argument is that the risk of the collapse of the eurozone is a matter for monetary policy when it is fueled by irrational market sentiment. This is the reason why the ECB should act, even under existing treaties, as a last resort lender, to calm the markets from unfounded fears— for instance, those related to the break-up of the eurozone or the exit of some eurozone Member States. In such cases, the ECB intervenes to

[157] Paragraphs 72, 76 and 77 where, with reference to the MTO program, it is noted "that the above-mentioned program is based on an analysis of the economic situation in the euro area according to which, at the date of the announcement of the program, the interest rates on the public debt securities of the various euro area countries were characterized by high volatility and extreme yield spreads. According to the ECB, these yield spreads were not exclusively due to macroeconomic differences between these countries but were partly due to the need for excessive risk premium for securities issued by some Member States to cover the risk of the collapse of the euro area."

[158] C. Gerner-Beuerle, E. Kucuk, E. Schuster, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, cit. at 291 et seq.

prevent a liquidity problem from turning into a solvency problem for the Member States. On the contrary, where the risk of collapse arises from real solvency problems in Member States' finances, leading to a requirement of fiscal aid from other countries, there will be an economic policy problem that is the exclusive responsibility of the Member States. This would require the activation of funds managed by the ESM, also through an explicit political decision by national parliaments if the fund's capital was insufficient. Yet, the risk of eurozone collapse is a matter for monetary policy also where it is propitiated by a persistent condition of deflation, so as to justify unconventional policies of the ECB, aimed at providing a monetary stimulus to the economy. In theory, not even an intervention of this kind seems capable of undermining the incitement to pursue a sound budgetary policy. The temporary nature of the measure – resulting from its functionalization to achieve the objective of lower inflation, close to 2% – should indeed makes it possible to avoid the states reaching some certainty regarding the support function performed by the ECB. Such a conviction would, moreover, be prevented by the adoption of other precautions, made explicit in European jurisprudence, such as the quantitative limitations to the purchase of securities, deriving from their containment within the limits of the shareholding held by the state in the ECB's capital, and the need to purchase only securities with precise guarantees of creditworthiness[159].

Of course, it is a prerequisite that all unconventional monetary policy interventions are part of a scenario in which price stability is to be achieved or preserved. According to the Treaty, the only thing that the ECB cannot do is to adopt monetary policies that threaten to give rise to inflationary spirals, reducing the value of the currency. The currency that the ECB can, within the limits just shown, help to sustain is, therefore, still a non-inflationary currency, which is why the need for monetary policy measures is to ensure the preservation of the primary objective of price stability.

[159] Court of Justice of the EU, Delors. 11 2018, Case C-493/17, *Weiss* and others, para. 132 et seq.

10. The politicization of monetary choices as a protean phenomenon with global diffusion

As previously stated, the action of the monetary authority has found widespread hostility in the populist movements of Northern countries, motivated by the negative externalities (for those countries) attributable to a long season of negative rates, guaranteed under the QE program. In reality, critical voices against the action of the monetary authority have also been raised outside the political arena by scholars and jurists of different backgrounds, in whose arguments there is frequent reference to the accusation of politicization of monetary policies[160]. These criticisms are all based on the acknowledgement of the central role played by the ECB in avoiding the alleged eurozone breakup. It is worth remembering that this role was not sought by the ECB. Perhaps it has even been carried out with a certain reluctance and, nevertheless, accepted for reasons of necessity, due to the absence of a real political counter power which, assuming full responsibility for the management of a common budget, is able to engage a dialogue with the monetary authority, with a view to greater coordination. It could be argued that it was precisely the lack of a real unitary economic policy, capable of ensuring through an adequate common budget the investments necessary to ensure the balanced development of the whole Union that generated an overexposure of the ECB[161].

Firstly, we should try to clarify what is meant by the politicization of monetary policies, and verify how this politicization relates to the Treaties. This expression can certainly be used to denote a context in which the redistributive effects of monetary policy choices become more accentuated or in which the scope of the administrative discretion is broadened. Redistributive effects are normally observable in ordinary and conventional monetary policy choices[162]. It could not be otherwise, since monetary policies aim to change the basic conditions of the economy, so that inevitably they are bound to produce some redistributive effect within society: for example, the increase or

[160] This is a recurring theme in the post-crisis debate, as recalled by P.D. Tortola, *The Politicization of the European Central Bank,* cit.; A. Hinarejos, *Gauweiler and the Outright Monetary Transactions Programme*, cit.

[161] P.D. Tortola, *The Politicization of the European Central Bank,* cit. at 504.

[162] P.D. Tortola, *The Politicization of the European Central Bank,* cit. at 505.

reduction of rates can affect the economic reality, in terms of slowing down or accelerating production, with all the consequences that can be imagined in terms of variation in the process of job creation[163]. Nevertheless, in the unconventional monetary policies, the redistributive effects appear more evident and marked, due to the fact that the subjects or the beneficiary states of the heterodox operations are more directly (almost physically) identifiable[164]. With reference to the breadth of discretion granted to the administration, this appears very low when, as in the case of the ECB, the mandate of the institution is polarized about the objective of price stability. In this case, the monetary authority is freed from the reminders to seek a balance (trade-off) between inflation and the level of unemployment, through a weighting between interests well known to public law scholars. Nevertheless, the breadth of discretion of monetary policy decisions seems significantly higher in economic contexts exposed to the risk of deflation, for reasons also linked to the nature of the decision-making process. When the interest in price stability is not threatened and a monetary policy aiming at relaunching the economy is required, the graduation or the hierarchy of the different public interests seems to reflect different priorities. It follows that the other interests (economic growth, employment and citizens' welfare) can acquire larger attention, handing over a wider range of operational instruments to the monetary authority. In the case of the ECB, the extension of tasks and responsibilities seems almost institutionalized, given that the support of the Union's general policies is expressly mentioned in Art. 119(2) TFEU[165].

A closer look shows that the politicization of monetary policies is a widespread phenomenon at a global level, and it has taken place in conjunction with the advent of a period of economic growth characterized by very low levels of inflation. Certainly, in Europe this phenomenon has presented itself in more controversial and debated forms. The reasons are different: for instance, 1) the structural deficit from which the eurozone continues to suffer on an institutional level (it suffices here to

[163] J. Fernandez Albertos, *The Politics of Central Bank Independence,* 18 Annu. Rev. Polit. Sci. 217 (2015) at 224.
[164] J. Fernandez Albertos, *The Politics of Central Bank Independence,* cit. at 230.
[165] Cfr. CGUE, 2018 Weiss, para. 60.

mention the lack of political countervailing power and adequate central budget), which compromises its balanced growth, and also 2) the greater difficulty of recognizing more profound political powers in supranational agencies, in which the link with political representation appears more rarefied when compared to the same international standards[166]. Nevertheless, this type of politicization does not seem to escape, for reasons which have already partly emerged, the boundaries drawn by the Treaties for the viability of monetary policies. The fact that redistributive effects are produced does not place monetary intervention outside the mandate of the authority if, as the ECJ has pointed out, the objective targeted by the ECB is genuinely linked to price stability. Monetary activity will suffer from a more pronounced politicization but cannot be considered as unlawful or *ultra vires*. In the same way, the ECB can also contribute to the development of further values of the Union through monetary policy, provided that the value of price stability is not betrayed.

11. The politicization of monetary policies as a possible effect of the deformation/avoidance of the ECB's mandate

In a broader sense, politicization implies a manipulation of the decision-making criteria. In this case, a political purpose replaces a technical task, distorting or circumventing the objectives set by the institutional mandate[167]. A phenomenon of this kind can take place especially when the ECB addresses the urge to solve the complex dilemma between the duty to operate in a depoliticized manner and bound to its mandate, and the pursuit of objectives which, although not strictly within its sphere of competence, are nevertheless of great political importance, such as safeguarding stability values and the existence of the EU[168]. As already observed, with a certain amount of caution the issue of the eurozone bail-out can legitimately fall within the ECB's task. In certain circumstances, the ECB is empowered to act as an

[166] See J. Fernandez Albertos, *The Politics of Central Bank Independence,* cit. at 230. On the presence of different models, see O. Chessa, *La costituzione della moneta*, cit. at 270 et seq.
[167] P.D. Tortola, *The Politicization of the European Central Bank,* cit. at 505.
[168] P.D. Tortola, *ibidem.*

emergency authority, either by eliminating the irrational sentiments of the financial market, which prevent the correct transmission of monetary policy impulses, or by favoring a reflation of the economy to bring it towards more desirable levels of inflation. In these cases, the ECB is, of course, the bulwark of the eurozone, but within a framework of devices designed however to achieve monetary policy objectives. Nevertheless, in an emergency situation, characterized by a persistent stalemate of the other institutional forces, the deformation of the institutional mandate can also constitute the expedient through which the ECB promotes itself as a rescue authority, without any limitations. In such a case, there may occur a clear and radical detachment between the formally declared objective of the ECB and the real intention, realizing a *de facto* bail-out of a Member State or of the euro area as a whole, outside any credible link with monetary policy objectives. This is an extremely topical issue when one considers that, as a result of the huge purchase program forged by the ECB in the aftermath of the 2020 pandemic crisis, the monetary authority will be able to hold significant shares of the debt of the countries with the most distressed public finances. Therefore, the problem that arises regards the intensity of judicial review necessary to effectively verify the existence of such a disconnection. This very problem, which is the real subject of dispute between the various national and European courts, will be discussed below. Here I shall dwell longer on the role of the ECB by briefly examining the reasons which - in the view of those in favor of an orthodox interpretation of the Treaties - would advise against elevating the ECB to the ultimate rescue authority of the eurozone. As has been highlighted, the main question does not involve the possibility of central banks buying government bonds, since such purchases have now become part of the central banks' toolbox at international level. The real risk is instead that the banks buy a too large amount of government bonds, and for the wrong reasons. These purchases could result in excessive monetization, motivated by objectives of sustainability of public finances rather than by objectives of financial stabilization (market irrationality) or price stability (fight against deflation)[169].

[169] O. Blanchard, J. Pisani-Ferry, *Monetisation: Do not panic,* VOX, CEPR, (2020).

Repeated interventions by the ECB in the purchase of public debt securities present a tangible risk that the ECB will remain trapped in its role as a last resort lender. It would also expose it to increasing political pressure which will make it more difficult for the authority to withdraw from the need to renew the purchase of securities. In other words, the reiteration of unconventional interventions and, above all, the size of the public debt shares held by the ECB would have the effect of trapping the monetary authority in a condition of dependence on the fiscal policies of the Member States, neutralizing the possibility of a non-traumatic exit plan[170]. After all, it is precisely the difficulty of imagining an exit plan from unconventional policies capable of not compromising the hold of the eurozone that contributes to making the risk of a politicization of the future choices of the monetary authority perceptible. The reasons relating to price stability could be tempered by other reasons relating to the endurance of the eurozone as a whole. If the conditions of deflation were to cease and there was a need to raise interest rates, the ECB could, in fact, be forced in virtue of political realism to stand still[171], in order not to compromise the solvency of the Member States[172]. Further objections can be found also in national constitutional systems. In dealing with these topics, it is necessary to come back to the no bail-out clauses. Art. 125 TFEU excludes the existence of co-responsibility on the part of the states or the Union for the obligations entered into by any of them. Nevertheless, it does not prohibit financial aids from being granted voluntarily if they do not lessen the pressure on the states to pursue sound fiscal policies[173]. But not prohibiting, under certain conditions, the bail-out of the eurozone does not mean that the preservation of the eurozone's integrity is an obligation. In short, even if justified by the rescue of the eurozone, financial aid from states under Art. 136 TFEU, or from common Union instruments under Art. 353 TFEU, will have to be the subject of a specific political decision, excluding any form of automatism. This

170 A. Belke, *Driven by the Markets? ECB Sovereign Bond Purchases and the Securities Markets Programme*, Ruhr Economic Paper 194 (2010).

171 This would favor overheating of the economy and excessive growth in inflation.

172 Kaarlo Tuori, *The European Financial Crisis*, cit. at 38.

173 Court of Justice, November 27, 2012, in Case C-370/12, para. 67.

seems entirely reasonable. Although it is granted in the form of loans and not transfers, fiscal aid presents the concrete risk of default by the recipient state, entailing a danger for present and future budgets of the Member States contributing to the granting of the loans in question. This calls out for an explicit political position to be taken by states and voters, through their national Parliaments, as fiscal drainage from one country to another could, in fact, occur.

Notwithstanding that the Member States have agreed to the possibility of granting assistance to countries in difficulty through the ESM Treaty, they have not made unlimited commitments. Their responsibility is limited to a clear financial threshold (€ 700 billion)[174], and a new act of consent is required to adjust the ESM capital to the new rescue measures[175]. Therefore, if it is true that within the eurozone bail-outs require specific authorization from the various national Parliaments, which could also opt for a different strategy (for instance the refusal of risk sharing, with possible exit from the eurozone), then it is clear that the need for such authorization cannot be circumvented through monetary policy and unconventional manoeuvres.

The default of the Member State, *de facto* financed by the ECB, constitutes an event that could alternatively lead to the monetization of public debt if the losses created by the non-repayment of securities by the Member State were compensated with the same amount of money put in circulation by the ECB, or with capital increases by the individual Member States if it was intended to prevent monetization while keeping the supply of money circulation unchanged. In both cases, there would be a transfer of resources between the different states: a direct transfer in the case of a capital increase through the use of tax leverage,

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[174] With reference to the ESM Treaty, this decision was made by the signatory states, but limited to the paid-up capital in the amount defined in Art. 8 of the Treaty. The capital may be adjusted where necessary to cope with new crises, but this requires an explicit amendment to the Treaty, with the necessary involvement of national parliaments. Moreover, the law ratifying the ESM Treaty was deemed unconstitutional by the German Federal Supreme Court precisely because "none of the disputed statutes creates or consolidates an automatic effect whereby the German Bundestag would waive its right to decide on the budget", thus judgement of 7 September 2011, 2 BvR 987/10, para. 136.

[175] See R.D. Keleman, *On the Unsustainability of Constitutional Pluralism*, cit.

and indirect in the case of monetization due to the risk of an increase in inflationary phenomena[176]. Moreover, this would happen without the involvement of national democratic circuits, based on the decision of an authority without necessary legitimacy. It seems evident then that, if the ECB were to opt for an explicit monetization of public debt through the perpetual renewal of owned government bonds, as proposed in the current economic debate, it would take an explicitly redistributive decision which, if not justified by an objective of price stability, would seem to fall within the economic policy competence of the Member States[177]. Other objections can be found in respect to European law; in fact, a decision that did not offer sufficient reassurance regarding the non-inflationary nature of monetization would directly conflict with the ECB's mandate[178]. At the very least, the compatibility of such an option with the no bail-out clauses would also be controversial. The reason is that the irredeemable government bonds could be interpreted as an incentive to moral hazard and the consequent accumulation of new debt. Although the possibility of a revocation or a different determination by the ECB, depending on the fiscally irreproachable behavior of the assisted Member States, has been proposed as a suitable measure to avert expectations[179], the plausibility and credibility of a solution of this kind, which in fact configures a type of permanent *sub iudice* monetization, remains controversial.

[176] The transfer would be indirect in the case of monetization, since in such a case the debt crisis of a Member State would be converted into an increase in inflation in the entire economic area covered by the monetary union.

[177] On the fact that the democratic principle requires an explicit decision to mutualize risk between the different States, see O. Blanchard, J. Pisani-Ferry, *Monetisation: Do not panic,* cit.

[178] For the compatibility of monetization and irredeemable government bonds held by the ECB, see P. De Grauwe, S. Diessner, *What Price to Pay for Monetary Financing of Budget Deficits in the Euro Area*, Vox Cepr, 18 June 2020.

[179] Similarly in P. De Grauwe, S. Diessner, *What Price to Pay for Monetary Financing of Budget Deficits in the Euro Area,* cit.

SECTION IV. CONFLICT AS A DRIVER OF INTEGRATION

12. The Karlsruhe Court's ruling: how to lay bare the fragilities of European integration

The foregoing argument brings the discussion back to some of the initial points I have made, in particular the conflict that has arisen between the ECJ and the FCC with respect to the validity of the PSPP program. In this regard, it is possible to take an approach with different levels of analysis, in order to better understand the reasoning followed by the German Court. One analysis focuses on the problem of the ECB's circumvention of its institutional mandate. It is interesting to note that the FCC openly refers to the abuse of law[180]. In doing so, it clearly intends to allude to a case of misuse of power. More precisely, the FCC wants to refer to a power that has been exercised in order to achieve objectives that are, in fact, outside the ECB's mandate.

This calls into play the problem of the intensity of judicial review and its suitability (or otherwise) to intercept cases of misuse of power by the ECB. A second level of analysis concerns broader aspects relating to the relations woven by the European supranational system with the individual national systems and, consequently, to the problems of the legal nature of the European Judicial Network. In this perspective, the issue regards uniformity in the interpretation of EU law. In brief, the question is who should have the last word within the EU legal area, especially in the resolution of conflicts of competence between the Union and the Member States.

There are close correlations between the two different levels of analysis outlined. According to the view put forward by the FCC, it would be precisely the weakness of the judicial review exercised by the ECJ that would be conducive to an exercise of the ECB power outside its mandate, such as to generate a *de facto* transfer of additional powers from the Member States for the benefit of the Union. Examination of these problematic issues will make it possible to appreciate the disruptive nature of the ruling. Insofar it seems to draw strict limits to the role of the ECB, the FCC seems, in fact, to lay bare the fragile balances of European integration, pointing out with extreme clarity the limits that the

[180] Expressly mentioned in the judgement of 5 May 2020, Bvr 859/15, para. 137.

politicization of monetary policies cannot overcome, except at the cost of an illegitimate deformation of the ECB' institutional mandate. I shall now focus on the analysis of these different limits.

13. The intensity of review as a reflection of a different view of the ECB's stabilization function

A main problem to examine involves the different types of scrutiny exercised by the two courts about the ECB's discretionary power. It is, in fact, precisely in respect to the standard of judicial review, i.e. the amount of deference given by the courts in reviewing the ECB's decisions, that the conflict between judges has opened up. Behind this diversity of positions are clearly hidden deeper considerations that impinge on the multidimensional and complex nature of the European project and the Treaties, elements partly already illustrated (*see above* § 2, 3). The different German and European pronunciations of the PSPP saga follows, in effect, an identical pattern. At first glance, the judges seem have focused their efforts on identifying "misuse of power". Secondly, their analysis shifts to a different level to verify whether the exercise of power is contrary to the European legal system professed values, such as those protected by Art. 123 and 125 TFEU.

With regard to the first part of judicial scrutiny conducted by the judges, despite the question referred by the FCC formally concerns the lack of competence of the ECB[181], in substantive terms the grounds on which the judicial review is made seems the misuse of power. With reference to this basis of the judicial review, the rulings apply a strategy based in two successive stages. In order to better appreciate its content, however, one should look synthetically at the morphology of misuse of power and start from the schemes elaborated by the philosophy of law, in order to assume a perspective not contaminated by national or European traditions. Following this approach, the misuse of power always presupposes the existence of a constitutive rule. In

[181] The relationship between lack of competence and misuse of power is explored in P. Gasparri, *Eccesso di potere (dir. amm.*), Enc. *dir*., *(1965) at 123*; P. Craig, G. de Burqa, *Eu Law, Text, Cases and Materials* (2015) at 576

according to HART's classification scheme[182], the constitutive rule determines the realization of a certain effect, which modifies the legal reality, through the exercise of the power. Nevertheless, the typical legal effect is always linked to further effects or states of fact. It is precisely the link that binds power to these further states of affairs that is decisive in qualifying the misuse of power (the "*détournement de pouvoir*"). This particular defect of the administrative act manifests itself every time power is exercised in order to produce further consequences, which are in contrast with a certain principle of the legal system and are extraneous to the exercise of power. This is a definition of misuse which, despite the peculiarities of the individual legal orders, can be said to be common to the entire European legal culture. Taking all of this into consideration, it is now possible to appreciate, in the argumentative strategy followed by the two different rulings, the two-stage control mentioned earlier. In the first phase, the scrutiny aims to verify the existence of a direct link between the exercise of power and the further consequences, ascertaining whether the decision-maker intends to obtain the production of further consequences. In a subsequent phase, it aims to examine the existence of an indirect link between the exercise of power and the further states of fact, through the principle of proportionality, which is moreover provided for by the Treaty on European Union as a bulwark of the principle of conferral[183].

With regard to the first test, according to the argumentative strategy developed by the German court in its request for a preliminary ruling, the volition and the production of these additional consequences would constitute an infringement of the principle of conferral, because they are effects which can normally

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[182] See H.L.A. *Hart, The Concept of Law*, cit. This issue enables a clear distinction to be made between misuse of power and abuse of rights, behind which there is not a constitutive rule but a regulatory rule, that is to say, a rule governing conduct. See more in M. Atienza, J. Ruiz Manero, *Illeciti atipici. L'abuso del diritto, la frode alla legge, lo sviamento di potere* (2004) at 75.

[183] The application of the principles in order to verify the correct exercise of public power does not diminish the usefulness of the misuse of power: the techniques are not alternatives to each other, but rather complementary (see M. Atienza, J. Ruiz Manero, *Illeciti atipici. L'abuso del diritto, la frode alla legge, lo sviamento di potere*, cit. at 97). The connection between claims based on misuse of power and those based on proportionality, in the EU legal order, are analyzed in P. Craig, G. De Burca, *EU Law. Text, Cases and Materials*, cit. at 576.

be achieved by the exercise of different powers entrusted to the Member States. To put it another way, the PSPP monetary policy program was intended to produce certain effects – such as improving the refinancing conditions of commercial banks and Member States – which, according to the German court, can be attributed to economic policy interventions. According to the FCC, since these effects are recognized *ex ante* and are also sought by the ECB, they would not merely be indirect. This would proof, in the FCC'S view, the exercise by the ECB of powers not attributable to the monetary policy area. This opinion, expressed in the FCC's request for a preliminary ruling in 2017, did not seem, however, particularly convincing. The ECJ had no difficulty in overcoming that objection, reiterating the instrumental nature of these effects with respect to the (monetary policy) objective of lowering rates and increasing inflation up to the 2% limit. In simple terms, without interventions of that kind, it would not have been possible for the ECB to exercise its prerogatives to achieve the (legitimate) monetary policy objective of reflate the economy. The reasoning of the Luxembourg judges is convincing, to the point that it is not effectively replicated in the subsequent ruling of the FCC[184]. In the judgement of 5 May 2020, the FCC focuses rather on the objective of finding, through the control on proportionality, an indirect link between power and further states of affairs.

Regarding the proportionality review, this is a form of scrutiny imposed by the very law of the Treaties to make it possible to verify whether the institutions' action is limited to what is necessary in order to achieve the objectives set out in the Treaties, as required by Article 5(3) TEU. Nevertheless, in the current case such review is also used to reveal the presence of any misuse of power[185]. It is precisely the approach to proportionality that marks a clear distance between the two courts, not only cultural[186], but also political-institutional, which goes beyond the specific case of the PSPP program to embrace the nature of the

[184] One gets this very impression when reading the decision of *5* May *2020*, *2 BvR 859/15*.

[185] P. Craig, G. De Burca, *EU Law. Text, Cases and Materials*, cit. at 576.

[186] This data is underlined by D.U. Galetta, *Karlsruhe über Alles? The Reasoning on the Principle of Proportionality in the Judgement of 5 May 2020 of the German BVerfG and its Consequences*, 14 *federalismi.it* (2020).

integration project[187]. The Luxembourg Court's review of the institutions' acts is based on its constant concern to ensure wide discretionary powers of the Union institutions, especially when measures are taken in areas involving complex economic or technical assessments[188]. This explains why, in the European Court's view, only the manifestly inappropriate nature of the measure can affect the validity of the act in question[189]. It can therefore be said that the proportionality test carried out by European case law does not fully exploit the potential of this type of control. This conclusion is further confirmed by the fact that the ECJ normally limits the application of proportionality only to the tests of adequacy (with respect to the purpose) and necessity (aimed at directing the administration towards the identification of the least afflictive or restrictive measure), with the exclusion of the proportionality test in the strict sense, aimed at verifying the correctness of the balance between the different and opposing interests[190].

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[187] See G. Della Cananea, *L'amministrazione europea*, in S. Cassese (eds.) *Trattato di Diritto Amministrativo*, (2003) at 1916, 1917, also for the relevant references to legal doctrine, where the author links the not particular intensity of judicial control to the favor shown by the ECJ towards integration, and to the detriment of the autonomy of national powers.

[188] For example, in the field of the competition law, see M. van der Woude, *Judicial Control in Complex Economic Matters*, 10(7) J. E. C. L. & Pract. 415 (2019); A. Kalintiri, *What's in a Name? The Marginal Standard of Review of "Complex Economic Evaluations" in EU Competition Enforcement*, 53(5) Common Mark. Law Rev. 1283 (2016).

[189] Most recently, Court of Justice EU, 19 September 2019, in case C-251/18, para. 47; Court of Justice EU, 18 October 2018, in case C-100/17, para. 63; Court of Justice of the EU, 6 September 2017, in Case C-643/15, para. 207; Court of Justice EU, 4 May 2016, Case C-358/14, EU:C:2016:323, para. 79; EU Court of Justice, 10 September 2002 in case C-491/01, para. 123. A broader discussion of this benchmark in doctrine is found in D.U. Galetta, *Principio di proporzionalità* (voce), diritto on line, 2012, Treccani; D. De Pretis, *I principi nel diritto amministrativo dell'Unione europea. Pensare il diritto pubblico liber amicorum per Giandomenico Falcon*, in M. Malo, B. Marchetti, D. De Pretis (eds.), *Quaderni della Facoltà di giurisprudenza (*2015) at 143; also T. Harbo, *The Function of the Proportionality Principle in EU Law*, 16(2) Eur. Law J. 158 (2010); M. Poto, *The Principle of Proportionality, Comparative Perspective*, 8(9) Ger. Law J. 835 (2019).

[190] D. De Pretis, *I principi nel diritto amministrativo dell'Unione europea*, cit. at 142; D.U. Galetta, *Karlsruhe über Alles?* cit.; P. Craig, G. De Burca, *EU Law. Text, Cases and Materials*, cit. at 577.

The *Weiss* judgement of the ECJ is coherently inscribed within this framework, presenting no significant update in respect to the previous case law of the ECJ. Here too, as in previous rulings, the court is based on the particular complexity of the assessments and technical forecasts made by the monetary authority in order to recognize a wide discretion of the ECB. Hence the particular deference shown by the Court of Justice towards the ECB, whose actions were considered well censurable, but only in the presence of *manifest* errors of appreciation or assessment. The proportionality test itself in the strict sense of the term has been barely considered. It can be understood that the application of the proportionality test has also taken place in this case, as in the previous cases (starting from the *Gauweiler* ruling), with a very light criterion of judgement[191].The FCC's criticism of the ECJ's ruling is therefore methodological. In the FCC's view, such a type of review in itself seems totally inadequate to detect any "abuse of rights", since it wouldn't make it possible to demonstrate the monetary authority's pursuit of "other" objectives, linked to a framework of interests and values that falls within the competence of the Member States[192]. Nevertheless, the FCC's argument does not always appear persuasive, at least on this latter profile. This seems particularly evident in the identification of the counter-interests allegedly omitted by the ECB. In fact, the German judge seems to give priority to negative externalities – such as, for example, the negative effects of the policy of low interest rates on the protection of savings, the creation of financial bubbles and the growth in real estate prices – that are by far concentrated in specific countries. In doing so, it fails nevertheless consider the possibility not that such externalities may find their own counterbalance in benefits, much greater, for the entire monetary area[193]. However, the question remains unresolved at present, since the FCC requires the ECB to define the prominence of the interests that would justify the drive towards the implementation of the monetary program, also considering the

[191] See M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, cit.at 218 which speaks of a "feather" review, although with reference to the previous OMT decision.

[192] Decision May *5, 2020, 2 BvR 859/15*, paras. 132, 133.

[193] See M. Poiares Maduro, *Some Preliminary Remarks on the PSPP Decision on the German Constitutional Court, (*2020), https://verfassungsblog.de/.

PSPP's effectiveness in combating the deflationary phenomenon that has been gripping the eurozone for years. On the other hand, where the censorship of the FCC appears to be more persuasive is when it points out, in its argument concerning the counter-interests to be weighed up on the basis of the proportionality test in the strict sense, the risk that the ECB may become dependent on the policies of the Member States. In this regard, the FCC's judgement is supported by considerations concerning the scale and duration of the program, which would make the interruption of purchases a serious threat to the stability of the Union. Such a dependence could easily lead the ECB to sacrifice the value of price stability on the altar of the euro area, thereby compromising its institutional mandate[194]. This warning issued by the German Court is further reiterated in the paragraphs of the ruling concerning the infringement of Art. 123 TFEU, which constitutes - alongside the two-stage verification described so far - the other ground of the judicial review of the ECB's activity. The recurrence of such a defect was excluded at this stage of the proceedings, but only because of the absence of an unambiguous circumstantial framework.

In short, in the perspective of the German Constitutional Judge, there are very strict limits that the ECB cannot overcome. Among them, there is not only the need for a genuine and long-lasting link between the monetary policy program and the objective of price stability, but also a precise demonstration of the benefits of the programs undertaken with respect to the negative externalities, also attributable to those programs. This is why there is the need for a very strict review of the technical assessments and forecasts made by the ECB, in order to prevent the monetary authority from becoming the ultimate authority legitimated to rescue the eurozone, using the free margin of action allowed by the more permissive jurisprudence of the Court of Justice. According to the German court's point of view, it would be precisely the weakness of the Court of Justice's review that would produce the effect (*or perhaps the objective*) of providing the ECB with a wider margin of action in the stabilization functions of the euro area. In turn, this greater room of maneuver by the ECB would favor a *de facto* transfer of additional competences from the

[194] Decision of *5 May 2020, 2 BvR 859/15*, paras. 175, 176.

Member States to the Union, contrary to the principle of conferral set out in Article 5 TEU[195]. Based on *ultra vires review*, FCC concluded that *Weiss* judgement was, indeed, adopted in manifest violation of the mandate conferred on ECB and contributes to a structurally significant change in the distribution of competences, to the detriment of the Member States. Consequently, the German constitutional bodies should take steps to ensure that the ECB conducts a proportionality assessment of the PSPP. If then the German Constitutional Court were to find itself dissatisfied with the arguments put forward by the ECB, the Bundesbank would be forced to disengage from its existing programs with obvious consequences for the credibility and effectiveness of the ECB's monetary policies.

Overall, there is no doubt that behind this harsh stance of the German judge is hidden the attempt to restrict as much as possible the ECB's room for manoeuvre. The objective is to prevent forms of creeping monetization of sovereign debts, by imposing an orthodox interpretation of the Treaties. The problem is that the ECB is actually moving towards the result feared by the FCC, forced by the presence of a situation of necessity. The seriousness of the arguments used by the German Court, in reaffirming the orthodoxy of the Treaties, can indeed be fully appreciated by looking at the most recent developments, which led the ECB to forge yet another monetary program, on the occasion of the pandemic. In relation to this new intervention, the risks of creeping monetization of public debt and entrapment of monetary authority, already feared by the Federal Court, would seem, in fact, to be even more concrete. This conclusion is based on the fact that the ECB failed to adopt some of the minimum precautions required by the Court of Justice to ensure compliance

[195] It is interesting to note that, as evidence of the unsustainability of the light control carried out by the Court of Justice, the FCC reminds not only the ECJ case law, concerning other contexts, but also that of the European Court of Human Rights on the principle of fair trial under Art. 6 of the ECHR, where the Court calls for a full review of complex technical assessments, see M. Allena, F. Goisis, *Full Jurisdiction Under Art. 6 ECHR: Hans Kelsen v. The Principle of Separation of Powers*, 26(2) Eur. Public Law 287 (2020) at 296. Regarding the possibility of realizing the accountability through the judicial review, see M. Dawson, A. Maricut-Akbik, A. Bobić, *Reconciling Independence and accountability at the European Central Bank: The false promise of Proceduralism*, 25 Eur. Law J. 75 (2019).

with Article 123 TFEU, as the compliance with the capital key and the need to purchase securities with creditworthiness. It is not surprising, therefore, that yet another appeal to the FCC is already being announced.

14. Some final remarks

In the light of what has been widely examined here, it seems that the danger for the disintegration of the EU legal order does not come from the conflict between the Courts themselves, but from the very field on which the conflict has arisen. This, in fact, is marked by a deep fracture which affects the formation of the entire eurozone and its underlying philosophy. At the center of the judicial conflict lies the stabilization function carried out by the ECB, accused of acting in a territory where the risk of monetization of debts or, in any case, of ECB dependence on the fiscal policies of the Member States is looming on the horizon. As already emphasized, this is a function which, although carried out with a degree of reluctance on the part of the Monetary Authority, has often been the only bulwark of stability in the eurozone. In order to clarify this increased interventionism of the ECB, it has been mentioned the politicization of monetary policies in previous pages. To explain its origins, it has been referred to the asymmetric development of the Union and to questions that concern deeply the structure of the eurozone as well as the ideology that pervades it.

It is, therefore, in this complex institutional context that the German Court's ruling must be understood. When reading some of the censures made by the German constitutional judge one is under the impression that that the judges' target is rather radical and invests the legitimacy of the entire unconventional monetary policies. But besides some passages marked by a more pronounced one-sidedness and partiality of views, the legal arguments used by German judges seem anything but peregrine, especially where they aim to stigmatize the danger of a creeping monetization of public debts. It is easy to see what the verdict of the *Bundesverfassungsgericht* might entail, especially in the current economic climate, in terms of the integrity of economic and

monetary union, should the final outcome see the *Bundesbank* abandon the continuation of its current monetary programs[196].

Should this scenario develop, also as a result of new legal actions undertaken against the new unconventional monetary policy programs, the risk of a Union break-up would be too real not to impose a resolution of the current institutional deadlock. This could be done by means of the creation of an institutional and political power able to counterbalance monetary policies in order to ensure a more balanced development of the Union. A solution to the Eurozone imbalances could be to deepen the Union's redistributive functions by strengthening Europe's fiscal capacity and deepening its budget, well beyond the 1% of GDP limit on which it currently stands. This measure is considered to be largely insufficient to ensure the centralized stabilization function deemed necessary to remedy the negative externalities arising from the incompleteness of monetary union[197]. But no less important would also be the establishment of a European Minister of Finance, subject to parliamentary control, capable of interacting with the Monetary Authority to improve the coordination of monetary and fiscal policies. This new institution should also provide the ECB with the necessary political legitimacy for the implementation of non-conventional monetary programs, called upon to support the general policies of the Union[198].

[196] This is the hope expressed by M. Dani, J. Mendes, A. J. Menendez, M. Wilkinson, H. Schepel, E. Chiti, *At the End of the Law* (2020) https://verfassungsblog.de/at-the-end-of-the-law/.

[197] See a. Arahuetes garcía, g. Gómez Bengoechea, *Fiscal Union, Monetary Policy Normalization and Populism in the Eurozone*, 28(2) Eur. Rev. 238 (2020) and L. Lionello, *Establishing a Budgetary Capacity in the Eurozone. Recent Proposals and Legal Challenges*, 24(6) Maastricht J. Eur. & Comp. L. 822 (2017).

[198] With regard to the need for strengthening the political legitimation of the European institutions, see A. Sandulli, *Il ruolo del diritto in Europa*, cit. at 118.

DEFINING ENGLISH NON-JUSTICIABILITY USING FOUNDATIONS AND TAXONOMY

*Michael McCagh**

Abstract

Justiciability is an English term that is used to refer to the limits of the courts' power to conduct judicial review. For example, issues of national security are famously outside the limits as to what the courts should be able to decide. Justiciability in England remains an inadequately defined principle, particularly for those not accustomed to the common law method. The Independent Review of Administrative Law is a current review of judicial review in the United Kingdom, and has included in its scope a question of whether justiciability is ripe to be considered for reform. To properly consider a reform, one must first properly understand the underlying principles, which can be difficult in the case of justiciability. Precious few have investigated English justiciability using a foundational or taxonomical method. This article seeks to do just that.

TABLE OF CONTENTS

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1. Introduction

The judicial review of administrative actions plays a crucial role in a functional State apparatus by allowing an independent arbiter to assess the legality of those actions. Citizens benefit from having an independent outlet to resolve claims of illegality and State abuses of power, and States benefit from the increased legitimacy that the presence of the independent judiciary creates. Its importance should not be understated. However, not every administrative decision ought to be overseen by the courts in the same manner. The courtroom decision-making process is inappropriate for some types of political decision, which need to consider and implement public opinion. Overuse of judicial review can lead to undemocratic and technically flawed results.[1] For this reason, the scope of what is reviewable by the courts in common law countries is restrained by the concept of justiciability, which is primarily determined by the courts.[2] Its ideal scope is difficult to state due to the number and complexity of influential factors. Due to the complexity of influences, the foundations and taxonomy of justiciability in the United Kingdom are often unsatisfactory, which has caused misunderstandings of its principles at all levels. It is also confusing to those outside the common law tradition, since justiciability was based entirely on common law over many years. Solving the question of the ideal scope of justiciability requires that the foundations and taxonomy of justiciability be clearly stated.

In England, the scope of judicial review has changed over time. As Lord Wilberforce argued, although the consistency that precedent provides is valuable, the scope of judicial review need

[1] See E. Jordao, S. Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 Admin. L. Rev. 1 (2014).

[2] See *R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 240.

not stand still.[3] It is free to develop organically as any other type of law. The last half of the twentieth century saw the scope of judicial review widen considerably,[4] and it has recently been widened further by the legislature by enacting the *Human Rights Act 1998*. That enactment allows judicial review on the basis of individual rights. Further amendment is foreseeable. Paragraph 2 of the ongoing Independent Review of Administrative Law (IRAL)[5] in the United Kingdom has posed the following question:

> "Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government".

However, if there is to be any development in the scope of judicial review, it must be in a principled manner, and not for its own sake.

This article will posit a theory of the justiciability of administrative actions as it currently stands in the United Kingdom. The first part of this article outlines the foundations of judicial review, which are twofold. After all, we cannot know the limits of judicial review if we do not properly understand its basis. First, judicial review in the UK is based in the constitutional principles of separation of powers, the rule of law and democracy. Secondly, judicial review is based on empirical evaluations as to the institutional benefits it provides, such as by ensuring correct underlying practices and by opposing the problems with a liberal democratic mindset. This provides the basis from which judicial review occurs, ideally universally covering all administrative decisions. However, as is well known, justiciability has its limits. The second part of the article identifies the correct taxonomy of the rationales for non-justiciability in the UK, which divides non-justiciability into constitutional and institutional incompetence. The accuracy of taxonomy is crucial since it leads to individual consideration of the foundations for each category of non-

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[3] See *R v Inland Revenue Commissioners; ex Parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 631.

[4] See *R v Hull University Visitor, ex Parte Page* [1993] AC 682, 709.

[5] See Terms of Reference at *https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf*.

justiciability. The difference in the grounds of non-justiciability, which is discussed further in the third part of this article, means that the courts ought to be determining each ground distinctly, using a two-step process.

The third part of this article synthesises the theory with the recognised grounds of judicial review in the UK. This part aligns each category of non-justiciability with the foundation of judicial review that it contradicts. This creates an objective contradiction that public law must grapple with. Constitutional incompetence is based on constitutional ideals, which interact with the constitutional underpinnings of judicial review. The argument presented will be that the constitutional ideals of rule of law and democracy precede the executive's power. Therefore, while constitutional incompetence nullifies the separation of powers basis of judicial review, the rule of law and democracy bases are not nullified. As a result, the grounds of review based on rule of law and democracy ought to remain available: namely improper purpose, legitimate expectation, procedural fairness and adequate provision of reasons. On the other hand, institutional incompetence is based on empirical observations, which interact with the institutional foundations of judicial review. The constitutional arguments have no role to play since institutional incompetence is based on an empirical question of whether the courts are able to competently conduct judicial review in respect of a particular category decision. The argument will be that the institutional factors that weigh against each other ought to be balanced to reveal whether, in respect of each ground of judicial review, the virtues or vices of reviewing a decision on that ground ought to prevail. This article will argue that the irrationality, unreasonableness, improper purpose, legitimate expectations, procedural fairness and adequate provision of reasons remain open.

The approaches generally taken towards questions of the scope of judicial review in the UK are most often based on practical implications and respect for the other arms of government. The importance of this article is that it approaches the questions using foundations and taxonomy; it steps back to view justiciability in the UK as a whole from a distance. Foundational and taxonomical elements are seemingly unimportant to the courts on an individual case level. However,

determining the proper scope of judicial review requires analysing those foundational and taxonomical elements. The result of this approach is a minor broadening of the courts' power by allowing review for unreasonableness for decisions where the court lacks institutional competence. Where the courts lack constitutional competence, this article suggests that review for procedural fairness and adequate reasons for decision ought to be open, subject to public interest immunity, even if the fairness test would generally militate against the provision of reasons.

2. Foundations of Judicial Review

Judicial review relies for its existence upon its constitutional and institutional foundations, which are closely interrelated. As will become clear, each supports the broadening of the scope of judicial review by combatting non-justiciability.

2.1. Constitutional Foundations of Judicial Review

The United Kingdom famously possesses a constitution in unwritten form. Judicial review is derived from that unwritten constitution through the support of three interrelated constitutional principles: separation of powers, democracy and rule of law.[6]

2.1.1. Separation of Powers

Lord Diplock stated in *Duport Steel*[7] that the constitution "is firmly based upon the separation of powers", and that parliamentary sovereignty defines the UK separation of powers.[8] In the UK, legislative supremacy is the most important part of the concept of constitutionalism. The constitution holds that Parliament is supreme, thus producing a monolithic view of sovereignty.[9] Judicial review has its primary foundations in the doctrine of parliamentary sovereignty [10] because it is

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[6] See M. Elliott, *The Constitutional Foundations of Judicial Review* (2001), 247.

[7] *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157.

[8] See also R. Masterman, *The Separation of Powers in the Contemporary Constitution* (2011), 23.

[9] Id., at 20.

[10] See M. Elliott, *The Constitutional Foundations of Judicial Review*, cit. at 6, 10.

unconstitutional for the courts to fail to uphold legislation. Elliott describes this basis of judicial review as the theory of ultra vires. According to that theory, judicial review is the means by which the courts protect the legislative will by ensuring the executive acts in accordance with it. Without judicial review, the executive would not be accountable for acting in accordance with the legislative will. It does not matter that the courts are unelected, since judicial review is merely the vehicle of enforcement of the legislature's express will; the judicature does not make its own decisions per se. It is important to note, however, that the ultra vires doctrine cannot be the only basis for judicial review since the judiciary has the power to review decisions made under non-legislative powers.

2.1.2. Rule of Law

The UK constitution also prescribes the rule of law. At a fundamental level, the constitution is based on it.[11] However, the rule of law should not be mistaken for the court inventing obligations to impose idealistically upon the other arms. The rule of law is not based on common law; its basis is the executive's historic embedding of the rule of law by convention. The executive submits to such constraints to obtain the benefits of doing so.[12] For example, it is indispensable for public order and coordinating activities.[13] It thus covers all arms of government, arguably overriding legislative supremacy.[14] Unsurprisingly, the courts' power is also limited by the rule of law.[15] The problem then becomes defining the rule of law, since its definition is contentious. However, it is clear that it must require that, as accounted for by Fuller, the system possesses legality, which requires it to have generality, be prospective, consistent and have possibility of being complied with.[16] However, rule of law goes

[11] Id., at 20.

[12] See S. Holmes, *Lineages of the Rule of Law*, in J.M. Maravell (ed.), *Democracy and the Rule of Law* (2009), 20.

[13] See M. Kramer, *Objectivity and the Rule of Law* (2009), 102.

[14] See W. Wade, C. Forsyth, *Administrative Law* (11th ed., 2014), 28.

[15] See Lord Woolf, *Droit Public-English Style*, PL 68 (1995).

[16] See D. Dyzenhaus, *Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review*, in C. Forsyth (ed.), *Judicial Review and the Constitution* (2000), 161.

further than legality.[17] Whilst not universally agreed, there are those who argue that the rule of law is a morally neutral ideal that requires all government actions to have legitimate public purposes,[18] and that, as Allan points out, government actions are not inconsistent with substantive equality before the law.[19] Jowell argues that the ensuring of the rule of law is the central reason for judicial review,[20] for which the courts have responsibility. Elliott argues that the rule of law is the basis for the review of prerogative powers; in other words, it broadly fills the gap left by the ultra vires doctrine.

2.1.3. Democracy

The above constitutional doctrines are supplemented by democracy, which is a relative newcomer to the UK constitution. Citizen participation, and hence democracy, is underpinned by the provision of information.[21] Judicial review is often criticised for being undemocratic, the claim being that, in effect, it is a means by which political decisions are made by judges who are unelected and unaccountable.[22] However, such a view derives from a mistaken view of both democracy and judicial review. Actually, democracy requires judicial review. First, democracy requires legislative supremacy, which, as discussed above, judicial review facilitates. Secondly, democracy requires that administrative decision makers provide public reasons for decisions. In turn, administrative decisions must be justifiable. This provides an avenue of accountability to the legislature but also directly to citizens. Reasons allow the public to properly understand decisions and hold the government accountable for decisions it disapproves of. The requirement for reasons serves

[17] See M. Kramer, *Objectivity and the Rule of Law*, cit. at. 13, 144.

[18] See D. Dyzenhaus, *Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review*, cit. at 16, 162.

[19] Id., at 161.

[20] See J. Jowell, *The Rule of Law Today*, in J. Jowell, D. Oliver (eds.), *The Changing Constitution* (1994), 73.

[21] See *Kennedy v The Charity Commission* [2015] 1 AC 455, [1].

[22] See C.A. Gearty, *The Paradox of United States Democracy*, 26 U. Rich. L. Rev. 259 (1991).

transparency and demands there exist a right to be heard.[23] Thus, democracy is a constitutional basis for the corresponding grounds of judicial review. Thirdly, judicial review ensures in an independent manner that the executive's adoption of majoritarianism does not damage democratic values such as autonomy.

2.2. Institutional Foundations of Judicial Review

The above constitutional bases for judicial review posit desirable characteristics, an obvious example being the strengthening of democracy. However, there are other related benefits that the judicial process offers the political system. They are "institutional benefits" since it is the existence of the judiciary as an institution that causes these empirical benefits. It is these benefits that are said to have catalysed the recent trend of juridicisation of the political system.[24]

Most liberal democracies hold elections every 3-5 years, which provokes a short-term focus in politicians, whose primary aim is to be re-elected. Judicial review works to offset the short-term focus of liberal democracies by ensuring administrative decisions adhere to continuing values[25] that have been historically determined by the elected arms of government, such as the prevention of discrimination against particular groups. The upshot is that judicial review counters political pressures to disregard the law, and also rectifies unforeseen breaches of the law, since elected branches cannot foresee every application of a policy.[26] However, not only does judicial review resolve actual legal breaches, it also increases the legitimacy of the government to have independent body oversee it.[27] Ostensible legality is also important.

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[23] See E. Jordao, S. Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, cit. at. 1.

[24] See A. Banfield, G. Flynn, *Activism or Democracy? Judicial Review of Prerogative Powers and Executive Action*, 68 Parliam. Aff. 135 (2015).

[25] See J. Fox, M. Stephenson, *Judicial Review as a Response to Political Posturing*, 105 Am. Polit. Sci. Rev. 398 (2011).

[26] See J. Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1370 (2005).

[27] See C. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 Duke L. J. 525 (1989).

Judicial review has further positive consequences. Having judicial review overseeing decisions forces decision makers to mimic the judicial review process.[28] This precipitates a change in practice,[29] by forcing decision makers to carefully consider each application of their power, and by forcing them to seek broad public input in policies.[30] The change in practices becomes custom, by having a spillover effect to those decisions that the judiciary cannot review. [31] Having decision makers undertake a more rigorous process routinely is clearly desirable.

3. Foundations and Taxonomy of Non-Justiciability

Non-justiciability is a slippery term of uncertain reference.[32] Broadly speaking, it refers to a case that contains an issue "inherently unsuitable for judicial determination by reason only of its subject-matter" [33]. But there has been confusion as to the taxonomy of the rules that render an administrative decision non-justiciable.

There are two distinct grounds of non-justiciability that limit the courts' competence to review administrative decisions. The two categories were most famously described by Jeffrey Jowell[34] as being the courts' constitutional competence and their institutional competence. First, a decision will be non-justiciable under the ground of constitutional competence if it is outside the courts' powers according to the constitutional separation of powers. For example, the court is not constitutionally competent to review matters affecting Britain's relations with foreign States.[35] Constitutional incompetence "is pre-eminently an area in which

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[28] See A. Cohen, *Independent Judicial Review: A Blessing in Disguise*, 37 Int'l Rev. L. & Econ. 218 (2014).

[29] See M. Fordham, *Judicial Review Handbook* (4th ed., 2004), 112.

[30] See E. Jordao, S. Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, cit. at. 1.

[31] See N. Almendares, P. Le Bihan, *Increasing Leverage: Judicial Review as a Democracy-Enhancing Institution*, 10 Quart. J. Polit. Sci. 357 (2015).

[32] See *Thomas v Mowbray* [2007] HCA 33, [105] (Gleeson C.J.).

[33] *Khaira v Shergill* [2014] UKSC 33, [41].

[34] J. Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, PL 448 (1999).

[35] *Khaira v Shergill*, cit. at. 33, [37].

the responsibility for a judgment that proves to be wrong should go hand in hand with political removability"[36]. On the other hand, the ground of institutional competence is about the recognition of the limits of judicial expertise.[37] As the Supreme Court stated in *Carlile*:[38]

> "It does not follow from the court's constitutional competence to adjudicate … that it should decline to recognise its own institutional limitations".

The Supreme Court in Carlile confirmed that institutional competence was "not a constitutional limitation"[39]. The courts will lack institutional competence over decisions applying wide-ranging issues of general policy that affect a large number of people[40] and decisions requiring an account of an infinite number of considerations. Each ground of non-justiciability will be discussed in greater detail later in this article.

There has been confusion about the taxonomy of non-justiciability. The Queen's Bench has on occasion failed to distinguish between the two types[41] and the Supreme Court has shown some reluctance to separate them.[42] Similar ambiguity also exists in the United States[43] and Australia. Even when the two categories have been recognised, there is confusion as to their boundaries, since they are closely related.[44] However, the grounds are distinct. In *R (Conway) v Secretary of State for Justice*,[45] the Court of Appeal confirmed the difference between the two grounds, identified that there is large overlap between the two and explained that the trial justice did not sufficiently reflect the

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[36] *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [32].

[37] See *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), [55].

[38] *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32].

[39] Ibid.

[40] *R v Secretary of State for Education and Employment; Ex parte Begbie* [1999] 1 WLR 1115, 1131.

[41] See *R (Gentle) v Prime Minister* [2007] QB 689.

[42] See *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32].

[43] See *Baker v Carr*, 369 US 211 (1962) (Brennan J.).

[44] See E. Fisher, *Is the Precautionary Principle Justiciable?*, 13 Eur. Law J. 321 (2001).

[45] [2017] EWCA Civ 275, [33].

distinction. A misunderstanding of the proper taxonomy has produced consequences, because the two grounds of non-justiciability allow a different ambit of judicial review[46] and use distinct tests to determine its application. Importantly, they ought to have been allowed to develop separately. A natural result of the proper taxonomy is that the courts should be investigating each ground distinctly. This claim is in accordance with the strongest and most recent authorities. The House of Lords decision in *Secretary of State for the Home Department v Rehman*,[47] which has been praised by the Supreme Court as the most authoritative analysis on non-justiciability,[48] applied a two-step process by stating:

> "However broad the jurisdiction of a court or tribunal … it is exercising a judicial function and the exercise of that function must recognise the constitutional boundaries between judicial, executive and legislative power. Secondly, the limitations on the appellate process. They arise from the need, in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker".

In *Rahmatullah v Ministry of Defence and Foreign and Commonwealth Office*,[49] the Court of Appeal applied the two-step approach in determining the non-justiciability claim:

> "We consider that the claims … are clearly justiciable … There is here no requirement to adjudicate on questions of policy in the absence of "judicial or manageable standards" suitable for application by the courts. There is nothing constitutionally inappropriate in a court in this jurisdiction applying the local law to determine the lawfulness of the claimants' detention".

The Court of Appeal applied the two-step process advocated by this article. This supports the idea that the institutional and constitutional grounds are distinct. The detailed descriptions below of each respective ground will further prove their distinctness.

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[46] See E. Fisher, *Is the Precautionary Principle Justiciable?*, cit. at 44, 322.

[47] [2003] 1 AC 153.

[48] See *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [26].

[49] [2015] EWCA Civ. 843, [323]. See similar in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs*, cit. at 37.

3.1. Constitutional Incompetence

Courts have long acknowledged their jurisdictional limits on the basis of constitutional competence. The earliest known case is the 1460 case of *Duke of York's Claim to the Crown*.[50] The courts' limits to review on the basis of constitutional competence became more formally developed 150 years later. Despite the fact that it had been established just three years earlier that it was the courts, and not the King, which had responsibility for the ultimate resolution of the disputes,[51] the King's Bench of the High Court held in 1610 that, at that time, the King had a prerogative power to prevent dangers that cannot later be prevented, and to make proclamation "upon pain of fine and imprisonment".[52] However, it was within the powers of the court to find as void the King's proclamations that are against law and reason. In other words, the King's acts of discretion pursuant to prerogative powers are for the King, but the court can review whether the prerogative power exists and what the scope of that power is.

The modern limits to constitutional competence are different. The House of Lords in *Council for Civil Service Unions v Minister for the Civil Service*[53] decided that the fact a decision is an exercise of a prerogative power does not mean it is necessarily unreviewable, though the subject matter of prerogative power means it often has that effect. The House of Lords has long held that it is the subject matter of the administrative decision that renders it beyond court's constitutional competence. [54] Those subject matters are those that should be dealt with by the democratic limbs of government, because they are grave and affect many people.[55] The more purely political a question is, the more it will be suited for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller will be the potential role of the court.[56] It is simply not within the

[50] (1460) 5 Rot. Parl. 375.

[51] *Prohibitions del Roy* (1607) 12 Co. Rep. 63.

[52] *Case of Proclamations* (1610) 12 Co. Rep. 74.

[53] [1985] 1 AC 374.

[54] See *R v Secretary of State for the Home Department, ex Parte Hosenball* [1977] 1 WLR 766.

[55] See *Marchiori v Environment Agency* [2002] EWCA Civ. 3, [38].

[56] See *A v Secretary of State for the Home Department* [2005] 2 AC 68, [29].

courts' constitutional function to decide the legality of such decisions.[57] For example, authorities demonstrate that decisions within the following areas are outside of the courts' constitutional competence:

- Decisions in relation to deployment of armed forces;[58]
- Decisions to enter into treaties;[59]
- National defence policy;[60]
- Foreign affairs;[61] and
- State spending on health, education and police.[62]

This article has already outlined that the separation of powers in the form of legislative supremacy is a basis that judicial review relies upon. The House of Lords in *Rehman* confirmed that it is the separation of powers that is the basis of constitutional incompetence.[63] It is entrusted to the executive and is thus outside legislative supremacy and the judicial discretion that such oversight would require in the circumstances. The House of Lords has also held that constitutional incompetence does not mean the matter cannot proceed, rather that the court cannot determine the considerations relevant to the impugned decision.[64] The proper scope of review will be discussed later in this article.

3.2. Institutional Incompetence

Non-justiciability based on institutional competence is less well-known, partly due to it being a far newer ground; this is perhaps the source of the confusion about the dichotomy. In short, the institutional incompetence doctrine applies when the courts are asked to review a decision that they lack the ability to measure

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[57] See *Ex Parte Molyneaux* [1986] 1 WLR 331, 336.

[58] See *Allbutt Ellis Smith v MOD CA* [2011] EWHC 1676; *Chandler v Director of Public Prosecutions* [1964] AC 763. See a similar position in the United States: *Johnson v Eisentranger*, 339 US 789 (1950).

[59] See *Blackburn v Attorney-General* [1971] 2 All ER 1380.

[60] See *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, [50], [53]; *Marchiori v Environment Agency*, cit. at 55.

[61] See *Council for Civil Service Unions v Minister for the Civil Service*, cit. at 53.

[62] See *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [23].

[63] See *Secretary of State for the Home Department v Rehman*, cit. at. 47, [50]-[53].

[64] See *Council for Civil Service Unions v Minister for the Civil Service*, cit. at 53, at 406 (Scarman L.J.).

properly. The courts have recognised this limitation on their own abilities. In *R (Lord Carlile) v Secretary of State for the Home Department*,[65] the Supreme Court stated:

> "Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically".
>
> The Court continued in the same paragraph:
>
> "A recognition of the relative institutional competence of the executive and the courts in this field is a pragmatic judgment and not a constitutional limitation, it is consistent with the democratic values which are at the heart of the Convention".

The judiciary lacks institutional competence when it lacks manageable judicial standards, by which the decision can be judged.[66] That may be because the decision is overly complex on account of the multiplicity of factors, or because it is simply a value judgment. The boundary of when this will apply is very difficult to draw.[67] Some examples may prove helpful. The courts have held that the doctrine will apply in relation to matters of macro-economic policy.[68] Many such decisions that apply the institutional competency test would often also fail the constitutional competence test. However, the relevant point for institutional competency is that macro-economic policy decisions often have too many factors for the court to consider and the court cannot properly understand the considerations. That is why institutional competence prohibits courts from reviewing polycentric decisions to spend money in one way instead of another.[69] Further, the decision maker will have advice and a perspective that the courts do not.[70] For the same reasons, the court lacks institutional competency in respect of decisions that

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[65] [2014] UKSC 60, [32].

[66] See *States of Guernsey v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 1847, [67]-[69].

[67] See *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [101].

[68] See *Ex parte Hammersmith and Fulham LBC* [1991] 1 AC 521; *Ex parte Nottinghamshire County Council* [1986] AC 240.

[69] See J. Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, cit. at 34.

[70] See *R (Geller) v Secretary of State for the Home Department* [2015] EWCA Civ. 45.

are made in "the national interest", and in respect of those decisions that require a degree of speculation of the actions of humans.[71] Similarly, the House of Lords noted in *Gouriet v Union of Postal Workers*,[72] in relation to a decision made by the Attorney-General in the public interest, that "the decisions to be made as to the public interest are not such as courts are fitted or equipped to make", and thus non-justiciable. Further examples are the entrusting of decisions to revenue commissioners, who have "unique knowledge of fiscal practices and policy" [73] and administrators who are entrusted with regulatory and welfare schemes.[74] In respect of human rights review, the Supreme Court has twice held that it is institutionally incompetent to determine if a law criminalising assisted suicide contravened ECHR.[75] As the above examples demonstrate, this doctrine covers those areas that rely on political and diplomatic areas, rather than neutral principles of law.[76] The result of being deemed non-justiciable on the basis of institutional incompetence is that the court must accept the assessment made by the political branch.[77]

Non-justiciability due to institutional competence should not be mistaken for the mere deference that is given to the elected arm of government in complex cases. Deference refers to the judiciary granting the decision maker a margin of appreciation, a scope of latitude.[78] The decision maker thus possesses a broader scope of discretion. Importantly, deference is not a complete submission to the executive by the judiciary; the relationship continues to be defined by mutual respect.[79] The degree of respect to the legislature varies on a sliding scale, depending upon the subject matter.[80] On the other hand, the institutional competence

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71 See *A v Secretary of State for the Home Department*, cit. at 56, [29].

72 [1978] AC 435 (Lord Wilberforce).

73 *R v Inland Revenue Commissioners; ex Parte Preston* [1985] AC 835, 864.

74 *Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430, [56].

75 *Pretty v DPP* [2001] UKHL 61; *R (Nicklinson) v Ministry of Justice*, cit. at 67.

76 See A. Banfield, G. Flynn, *Activism or Democracy? Judicial Review of Prerogative Powers and Executive Action*, cit. at 24, 139.

77 See *Gerhardy v Brown* [1985] 159 CLR 70, 138.

78 See *Re McGlinchey* [2013] NIQB 5, [21].

79 See *Re Johnstone* [2017] NIQB 33, [48].

80 See *R (Countryside Alliance) v Attorney-General* [2007] 1 AC 719, [45]; *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, [69].

ground is still a demarcation of functions and not deference.[81] In effect, it is a submission by the judiciary. It is the point where the decision cannot be reviewed at all.[82] Although both are based on the complexity of the decision before the decision maker, institutional competence is not the courts granting the decision maker an especially broad scope of discretion, rather is the decision being completely outside the realm of what the judiciary may review.

Institutional competence has gained heightened importance since the enactment of human rights legislation into UK law. Section 6 of the *Human Rights Act 1998* mandates that courts adjudicate on infringements of human rights by public authorities, which removes the constitutional competence ground of non-justiciability when that enactment applies. This is also the position in Canada.[83] However, two recent Supreme Court cases have demonstrated that, in the United Kingdom at least, that area is still subject to the ground of institutional competence.[84] After all, even though the courts have been granted jurisdiction to determine a question of fact under that legislation, the courts still have limits to what they are able to do. Although constitutional competence is foregone, the court is sometimes still ill-placed to determine the question at hand. Masterman points out that this is yet another means by which we can see that the constitutional and institutional bases of non-justiciability are distinct.[85] The above said, Conor McCormick points out a recent trend amongst the courts of adopting other reasons to reject applications for judicial review of decisions made by the Attorney-General,[86] which perhaps denotes a general narrowing of the institutional competence basis, or at least a reluctance amongst the courts to apply it.

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[81] See *A v Secretary of State for the Home Department*, cit. at 56, [29]; *R (Prolife Alliance) v British Broadcasting Corporation*, cit. at 2, 240.

[82] See *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32].

[83] See *Black v Canada (Prime Minister)* (2001) 199 DLR (4th) 228 (CA).

[84] See *R (Nicklinson) v Ministry of Justice*, cit. at 67, [166]; *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32].

[85] See R. Masterman, *The Separation of Powers in the Contemporary Constitution*, cit. at 8, 91.

[86] See C. McCormick, *Reviewing the Reviewability of the Attorney-General for Northern Ireland*, PL 22 (2018).

4. The Objective Contradictions and their Resolution

The analysis thus far clearly demonstrates that there exists a set of objective contradictions. First, there are constitutional reasons for the existence of judicial review, which oppose the constitutional underpinnings for limiting judicial review in respect of particular categories of decision through the constitutional ground of non-justiciability. They are seemingly incompatible constitutional principles that cannot both be maximised. Secondly, there are institutional benefits to judicial review, which pull against the empirical factors that underpin the institutional incompetence ground of non-justiciability. Such incompatible institutional observations also cannot both be maximised. These contradictions are distinct. There is little point pitting institutional factors against constitutional factors.

When investigating justiciability, the court starts with an assumption that decisions are generally reviewable and then asks whether the decision at hand falls within the categories of exception within either ground of non-justiciability. If so, the court applies the exception. In effect, the court appropriately adopts a categorical approach to resolve the respective contradictions. The subject matters that render a decision non-justiciable have long been fixed as a matter of constitutional law and will not be contested by this article. However, the common law rules that shape which grounds of judicial review can be undertaken by the courts in respect of non-justiciable decisions do not appear to have been formed with consideration of the respective contradictions. This article will now investigate each contradiction to determine which grounds of review ought to remain when the courts are asked to review a decision that fits within the respective categories of non-justiciability.

4.1. Constitutional Competence

The constitutional competence ground of non-justiciability raises a contradiction between the constitutional foundations of judicial review and the constitutional basis for limiting it. Resolving the contradiction must involve investigating the competing constitutional norms for the purposes of identifying whether, in respect of non-justiciable decisions constitutionally assigned to the executive, there is any constitutional basis for

some of the grounds of judicial review that can overcome the constitutional grounds for restricting such review.

The constitutional support for constitutional incompetence is in the separation of powers. As explained by the House of Lords in Rehman, the purpose behind non-justiciability is the upholding of separation of powers.[87] That is because those decisions are designated to the role of the executive, since that is a body with direct political accountability to the people. This has two effects on justiciability. First, it provides a positive basis for applying the doctrine. Secondly, this reasoning destroys some foundations for judicial review of these decisions. In short, the separation of powers basis for judicial review falls away completely when the doctrine of constitutional incompetence is applied. Thus, separation of powers cannot be a basis to maintain judicial review in such circumstances. However, that does not mean there is no basis for any judicial review. There remain two other bases: the rule of law and democracy, which the courts have not grappled with through discussion of constitutional priorities. One of two deductions might be made from the courts' silence on these points. First, it might be deduced that the separation of powers basis for the doctrine simply cannot be overcome by any countervailing considerations. Therefore, there is no point considering any other factors. Secondly, it could be deduced that both the rule of law and democracy as constitutional principles are subordinate to the separation of powers as a constitutional doctrine. In other words, the separation of powers precedes democracy and the rule of law. However, both of these deductions are untenable. An investigation into the nature of democracy and the rule of law demonstrates that they actually oversee the powers being exercised by the executive in non-justiciable decisions. Thus, they continue to provide a basis for judicial review.

Lord Hope contentiously argued in *Jackson v Attorney-General* [88] that the legislature does have limits. Legislative sovereignty is not absolute. While that is a controversial statement, there is a reasonable argument to support it. Of course, it by no

[87] See *Secretary of State for the Home Department v Rehman*, cit. at. 47, [50]-[53].
[88] [2006] 1 AC 262, [120].

means suggests that the courts can strike down legislation.[89] Elliott has observed that Parliament derives its power as sovereign from democracy as an ideal and consequently argued to this effect that since Parliament derives its power from democracy, the principles of democracy logically must override legislative supremacy.[90] Democracy must not derive from the legislature, but must be located above it. Though, of course, it is not the power of the legislature, but that of the executive that is relevant. The executive power is inferior and answerable to the legislative power. The legislature can redefine and shape the executive powers, even prerogative powers. So, logically, if democracy precedes legislative powers, then similarly it must precede executive powers. Thus, it must be the case that the principles of democracy are above the executive powers exercised in non-justiciable decisions, whatever their source. This means that the separation of powers cannot be a reason to limit judicial review without consideration of its democratic foundations.

A similar argument may be made with respect to the priority of the rule of law over legislative supremacy. Trevor Allan argued that the importance of legislative supremacy is limited by the political morality of the constitution, which means it is matched by, and coexists with, the rule of law.[91] Lord Woolf stated that it was the courts' responsibility to uphold the values, such as the rule of law, which limit Parliament.[92] Once again, the executive, being subservient to the legislature, must logically be beneath the rule of law. Perhaps more persuasive and more direct is the notion that, ever since the Magna Carta in 1215, the executive has been forced to act in accordance with the rule of law, the executive, through the King, having made that concession itself. The rule of law is expressly entrenched within the UK constitution as a limit to executive power. While the rule of law provisions of the Magna Carta have no bearing on individual cases, they continues to require the State to act according to the

[89] See C. Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 55 Cambridge L.J. 122 (1996).

[90] See M. Elliott, *The Constitutional Foundations of Judicial Review*, cit. at 6, 58.

[91] See T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 Cambridge L.J. 112 (1985).

[92] See Lord Woolf, *Droit Public-English Style*, cit. at 15, 69.

rule of law.[93] Since the rule of law thus precedes the executive's powers, it must also precede any non-justiciability arguments based on the separation of powers. The separation of powers cannot be a reason to abandon judicial review without any consideration of its rule of law foundations.

This article earlier demonstrated that there are three key foundations for judicial review, each of which enables particular types or characteristics of judicial review. This article has now argued that rule of law and democracy foundations for judicial review remain on foot in respect of decisions where the courts lack constitutional competence, and that the rule of law and democracy override the counter-foundation, namely the separation of powers. It must follow that "non-justiciable" decisions must be still susceptible to judicial review, but only insofar as it can be supported by the democracy and rule of law foundations. Of course, the negation of the separation of powers basis means that the doctrine of ultra vires is ruled out. The grounds of judicial review based on the ultra vires doctrine become unavailable, such as irrelevant and relevant considerations and Wednesbury unreasonableness.[94] However, there are other grounds that remain available. Support for this argument can be found in the Court of Appeal in *R (International Transport Roth GmbH) v Secretary of State for the Home Department*.[95] In that case, Laws LJ stated that non-justiciable decisions are not immune from judicial review, because "that would be repugnant to the rule of law". By way of example, the courts can still review whether the power exercised actually existed. After all, democracy requires that the courts ensure that no power exceeds its constitutional bounds.[96] The availability of such review has never been in question. What is perhaps more contentious is that this article proposes that the improper purpose, legitimate expectation, procedural fairness and adequate provision of reasons grounds of review ought to remain open due to their foundations in the rule of law and democracy.

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[93] See *Mayor Commonalty and Citizens of London v Samede* [2012] WLR(D) 41, [30].

[94] See *R v Director, Government Communications Headquarters, ex Parte Hodges* [1988] COD 123.

[95] See [2002] EWCA Civ 158, [85].

[96] See *Marchiori v Environment Agency*, cit. at 55, [40].

The improper purposes ground of judicial review is supported by both the rule of law and democracy foundations. Even though the executive may be entrusted with a particular decision, it would completely undermine democracy and the rule of law if it could exercise that power for some purpose other than that for which the power exists. The rule of law requires that the State not improperly use the powers conferred on it for some illegitimate purpose that would constitute an abuse of power. Therefore, review for improper purposes must remain open. The Court of Appeal in *Marchiori v Environmental Agency* has agreed with this proposition, stating in obiter dicta that:[97]

> "There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness. Judicial review remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy".

Although the application was dismissed, *Marchiori* supports the argument made by this article that constitutional incompetence merely wipes out one foundation of judicial review, along with all of the relevant grounds that rely upon it, and leaves the other foundations, and that which they support, intact.

The legitimate expectation ground of review affords two types of protection. First, the courts' enforcement of a substantive expectation by holding that authority to that expectation derives from the ground of irrationality. Accordingly, it is based on ultra vires and accordingly negated in respect of non-justiciable decisions. Secondly, the procedural requirement imposed upon public authorities to make fair decisions by providing an opportunity to be heard, where it disappoints a legitimate expectation, is clearly founded in the rule of law. Such review falls within the rule of law requirement for formal equality. There is mixed case law as to whether this ground is reviewable in practice. The courts have held, even in respect of decisions relating to national security, that where a legitimate expectation is created from an express statement or regular practice, the government is

[97] Ibid. See also *Jahromi v Secretary of State for the Home Department* [1996] Imm AR 20, 26.

required to consult if it wishes to deviate from that legitimate expectation.[98] On the other hand, an earlier case held that the unfairness created by legitimate expectation was overridden by national security since the disclosure to the affected person was not in the interests of national security.[99] The court noted in the latter case that the decision would have been unfair if it had not been overridden by national security. However, according to the argument made by this article, that decision is incorrect. The legitimate expectation ground is reviewable irrespective of the nature of the impugned decision. However, that merely refers the decision makers to consider what disclosure is fair in the circumstances. Upon consideration of fairness, national security plays a significant role in minimising or completely militating against any disclosure, which is justiciable in the courts, though it often remains subject to public interest immunity. The practical outcome is that national security information will generally not be disclosed. However, it requires the balancing process nevertheless. The key difference is that the balancing test performed by the decision maker remains reviewable by the courts, subject to public interest immunity.

For similar reasons as above, as Lord Millett has stated, the rule of law also provides foundations for review based on procedural fairness.[100] The courts have held that there is no requirement to consult and invite representations from affected persons if to do so would disclose information about national security. The hearing rule does not apply in such circumstances.[101] On the other hand, the House of Lords held that review for procedural fairness was open for Jamaica, since procedural fairness is specified in Jamaica to be a constitutional right.[102] But one must question how that is different to the UK since the rule of law, which includes procedural fairness, is a constitutional obligation upon the United Kingdom government. As in the case

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[98] See *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [81]-[100].

[99] See *Council for Civil Service Unions v Minister for the Civil Service*, cit. at 53

[100] See *Thomas v Baptiste* [1999] 3 WLR 249, 259.

[101] See *R v Secretary of State for the Home Department; ex Parte Fayed (No 1)* [1998] 1 WLR 763, 776; *Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409, [57] (Laws L.J.).

[102] See *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50.

of legitimate expectations above, the argument made by this article is that procedural fairness remains justiciable in respect of non-justiciable decisions, but the execution of the hearing rule in the name of fairness may consider the national security interest as a strong weight against disclosure. Once again, the weighing of fairness would be reviewable by the court, subject to public interest immunity. This reasoning forces the decision maker and the courts to consider the seriousness of the rights of the individual, ensuring that they are not blindly ignored, even if the result is often the same. The High Court adopted equivalent reasoning in *AHK*, where it expressed that decision makers need not fulfill any duty to advise of concerns and accept submissions if to do so would disclose information about national security, because it "is a limit on what fairness requires in any particular case, recognised by the common law".[103] The High Court was indicating that national security always trumps the fairness deliberation. However, stating that so categorically undermines the process of judicial review that the rule of law requires.

The reasons for decision ground of review also ought to remain open. There is no common law obligation upon an administrative decision-maker to provide reasons for a decision, it being only grounded in statute. Though if reasons are given, they must be adequate in respect of non-justiciable topics.[104] That is because the decision maker has volunteered the obligation. However, the High Court has stated that the position in relation to the provision of reasons is the same as that of procedural fairness. Fairness dictates that reasons need not be provided if to do so would affect national security.[105] Reviewing a decision on the basis of the non-existence or inadequacy of reasons is supported by the democracy foundation for judicial review. Democracy requires that citizens understand why decisions are made by the State so that the citizens are able to take a critical stance on them. Accordingly, this article argues that the non-justiciability of a decision ought not to remove the courts' ability to review since the foundation for the review remains. The fairness test ought to be

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103 *AHK v Secretary of State for the Home Department* [2012] EWHC 1117, [26].

104 See *Secretary of State for the Home Department v Special Adjudicator* [1997] EWHC Admin 759, [41].

105 See *AHK v Secretary of State for the Home Department,* cit. at 103 [29].

reviewable, again subject to public interest immunity for the same reasons.

4.2. Institutional Competence

This article earlier outlined the rationale behind why the courts are said to lack institutional competence in respect of particular categories of decisions. The approach of the courts, which have the role of determining the question of justiciability, appears to be one of "there are benefits to reviewing decisions such as this one, but we simply cannot review this decision", without consideration of the benefits that judicial review produces. For example, in *Lord Carlile*, the Supreme Court evaluated institutional competence in detail, yet at no point cited the benefits of the court actually performing the judicial review. It simply explained the reasons why it could not review the impugned decision in that case. However, institutional competence is not a simple "we cannot". The courts, such as the High Court in *Rideh*, [106] have labeled the term as "relative institutional competence", which denotes that the approach is actually "it would better if we did not", because the executive is better placed than the courts. In light of this observation, combined with the benefits available to performing judicial review, the scope of judicial review should strike a balance between deference to those with technical knowledge and review for transparency.[107] There is scope for a typical balancing process since there are vices and virtues in place that weigh against each other in what this article earlier labeled the objective contradiction. It seems odd to forego the virtues since balancing is possible, and in any given category of decisions it may be more prosperous for, say, democracy to have the decision reviewed despite a relative incompetence. The result is that even if judges are not better at making the impugned decision, it does not mean they should not have power to make it.[108] The balancing ought not to take place in the application level, but at the rule-forming level. The courts lack institutional competence to review decisions related to speculation as to future

[106] See *Secretary of State for the Home Department v Rideh* [2007] EWHC 804, [57].

[107] See E. Jordao, S. Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, cit. at. 1.

[108] See A. Harel, *Why Law Matters* (2014), 69.

human actions, high-level economic policy and consideration of the "national interest". Of course, the virtues and vices of reviewing such decisions will vary depending on what ground of review is being performed. The balance appears to weigh in favour of review for irrationality, unreasonableness, improper purpose, legitimate expectations, procedural fairness and adequate provision of reasons remaining open where the courts lack institutional competence.

Judicial review for irrationality ought to remain open in the face of institutional incompetence, which is in line with the law's current position.[109] The courts use a Socratic approach, which allows them to determine whether the reasoning adopted by the decision maker is irrational without overstepping their judicial function. The courts merely question the decision maker and can determine whether what it has presented is rational. Consequently, the argument that the executive is better placed falls away. Legitimacy is increased by the ensured rationality, and it appears likely that ensured rationality would have flow-on effects for broader decision-making.

The court also ought to be able to review for unreasonableness. The Supreme Court has held that institutional incompetence will mean that the courts can review the decision for neither proportionality[110] nor unreasonableness.[111] The lack of capacity for unreasonableness review is on the basis that the courts are not in a position to be able to set limits on the decision makers' discretion. An older decision of the Queen's Bench held that reasonableness covers all decisions, but it must be applied more cautiously, [112] which is in line with the position in Australia[113] and the United States.[114] The latter approach is correct according to the argument made by this article. Of course, this article concedes that in these types of decisions there must be an

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[109] See *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32]; *R (Gurung) v Ministry for Defence* [2002] EWHC 2463, [40].

[110] See *R (Nicklinson) v Ministry of Justice*, cit. at 67, [166].

[111] See *Marchiori v Environment Agency*, cit. at 55, [40].

[112] See *R v Ministry of Defence; ex Parte Smith* [1996] QB 517, 556.

[113] See *Maloney v The Queen* [2013] HCA 28; *Gerhardy v Brown*, cit. at 77, 138; *R v Poole; Ex parte Henry (No 2)* [1939] 61 CLR 634.

[114] See *Baker v Carr*, cit. at 43.

especially wide ambit of discretion awarded to the decision maker.[115] The Supreme Court has been clear about the premise that there must be a wide room for the exercise of judgment in questions such as national security and economic and social policy.[116] That cannot be contested, since, of course, the executive is better placed to determine the bounds of reasonableness, which, as is well known, constitute the width of decision a reasonable decision maker could come to. However, once again, the court can assess the bounds since it merely adopts a Socratic method to analyse the reasonableness of, and not replace, the original decision. The court only determines whether what the decision maker presents to it is reasonable, rather than declaring the scope of reasonableness. So the weight to be given to the vices of justiciability is relatively light. This is clearly outweighed by the weight in favour of reviewing. The reviewing for unreasonableness prevents the abuse of discretion. This in turn increases the legitimacy of government and its decisions, prevents abuses caused by political pressures, and is likely, to some extent, to positively influence wider decision making.

Decisions that are non-justiciable on the basis of institutional incompetence are still susceptible to judicial review on the basis of bad faith on the decision maker.[117] That is correctly so. On one side of the ledger, although the executive is in a better position to judge the impugned decision, it is not using that position properly. Consequently, the argument against justiciability falls away. In any event, the judiciary is able to competently determine whether a purpose is improper, which is the point of such review. On the other side of the ledger, the arguments in favour of justiciability are strengthened. Reviewing for bad faith consolidates the broader practice of ensuring that decisions are not made in bad faith, the decision is being judged by a judiciary that lacks political pressures to make such decisions for improper purposes, and it increases legitimacy if government must make decisions for proper purposes.

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115 See *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 289, [146]-[148].

116 See *Bank Mellat v Her Majesty's Treasury (No 2)*, cit. at 80, [93].

117 See *Ex parte Hammersmith and Fulham LBC*, cit. at 68, 596.

Review for relevant or irrelevant considerations is often one of statutory construction. To that extent, it can always remain justiciable since the legislature is specifying the relevant considerations, and not the court. The review in such a case is for whether jurisdiction existed at all. Outside of that, the approach of this article dictates that it ought to remain non-justiciable. Where the considerations are unspecified, courts cannot know the extent of the considerations that effect the decision. There is strong weight attached to the decision makers being better placed. The judiciary's inability means there can be few flow-on effects to broader decision making and little increase in the legitimacy to government decision making. There is some benefit to the decision being reviewed by a body that does not have political pressures to make decisions based on considerations it ought not to, but that would appear to be outweighed by the aforementioned factors.

Review for legitimate expectation, procedural fairness and provision of reasons can be dealt with together due to their similarities. In respect of each, the decision maker is not better placed to understand the procedural aspects than the court. Further, the benefits of allowing review for such proper procedural requirements have significant weight. There is pressure for government to take some action in economic or security crises,[118] and the reasons for such actions ought to be publicised as much as any other decision. Thus, review for these three grounds of review clearly ought to remain open in the face of institutional incompetence.

4.3. Engagement of Both Doctrines

Where the courts lack both constitutional and institutional competence in respect of a particular decision, the non-justiciability must apply cumulatively. However, it should be noted that constitutional incompetence prohibits all of the grounds that institutional incompetence does. Therefore, once a decision is deemed to be the subject of constitutional incompetence, its institutional standing is irrelevant. This article earlier espoused a two-step approach to justiciability. An

[118] See J. Fox, M. Stephenson, *Judicial Review as a Response to Political Posturing*, cit. at 25, 398.

observation of the respective scopes of the doctrines means that the first step ought to be constitutional competence.

5. Conclusion

The crucial role that judicial review of administrative actions plays in many jurisdictions is well recognised. However, it is also generally accepted that the judiciary has its limits, which must be incorporated into the scope of judicial review. Many factors affect the line where the judiciary's limit ought to be drawn, which makes the ideal scope of justiciability a complex notion. The complexity and historical changeability of the scope of justiciability means that a systematic approach ought to be undertaken to define justiciability correctly and provide a framework for further developments in the scope of justiciability. While particular outcomes may appear unlikely, one should never say never in the realm of judicial review.[119] As alluded to by Fordham, change is needed in shaping the parameters of judicial review, but it requires knowledge of its foundations combined with an element of creativity.[120]

This article has argued that the appropriate scope of justiciability in the United Kingdom should be determined by adopting a foundational and taxonomical approach. The proper taxonomy of legal doctrines is important in all areas of law. Similarly, while all areas of law ought to also consider their foundations, that is particularly so in relation to areas of public law, such as judicial review. Judicial review owes its existence to its constitutional and institutional foundations. It owes its limits of justiciability to corresponding constitutional and institutional incompetence. It is important to use the correct taxonomy of non-justiciability and distinguish these two grounds of non-justiciability since they are based on distinct reasons and work to militate against different foundations of judicial review.

Judicial review has its constitutional foundations in the separation of powers, rule of law and democracy. Each provides a constitutional basis for judicial review, though the scope of review each supports differs. However, the courts lack constitutional

[119] See *R v Panel on Takeovers and Mergers; ex Parte Fayed* [1992] BCC 524, 536.

[120] See M. Fordham, *Judicial Review Handbook*, cit. at 29, 667.

competence in respect of certain categories of administrative decisions, such as those that require judgment as to what is required for national security, because separation of powers dictates that such decisions ought to be left to the executive. Importantly, the executive's power to make such decisions is still subordinate to the rule of law and democracy. Therefore, constitutional incompetence cannot remove those grounds of review that are based on the rule of law and democracy, namely the improper purpose, legitimate expectation, procedural fairness and adequate provision of reasons grounds of review. The openness of those grounds of review still remains, subject to public interest immunity.

Judicial review also has foundations in the institutional benefits that it produces, such as the negating the vices associated with the liberal democratic process and the flow-on effects of legal decision making onto those decisions that are not subject to judicial review. However, those benefits are not always categorical. The courts lack institutional competence with respect to another category of decisions, which admittedly overlaps heavily with the category that produces constitutional incompetence, because the courts are not as well placed as the executive to evaluate the impugned decision. However, institutional incompetence must also fail to eliminate all grounds of review since it is based on merely an empirical observation of the ideal. Rather, the competing institutional observations ought to be weighed for each ground of review to determine whether that ground of review ought to remain available once a decision renders the courts institutionally incompetent. The balancing process reveals that the irrationality, unreasonableness, improper purpose, legitimate expectations, procedural fairness and adequate provision of reasons remain open, again subject to public interest immunity.

Non-justiciability in the UK is currently not a blanket prohibition on review of the impugned decision. However, the argument made by this article has the effect of widening justiciability. The practical effects of what this article has argued are that the constitutional incompetence ground of judicial review is developed to leave open review for procedural fairness and adequate provision of reasons. The institutional incompetence ground of non-justiciability is developed to leave open unreasonableness. These are important developments, but less

than the correct approach to justiciability, which is one based on foundations and taxonomy.

RELIGON-BASED REFUSAL TO PERFORM SERVICES FOR HOMOSEXUALS IN POLAND

*Łukasz Mirocha**

Abstract

The article concerns the problem of religiously motivated refusal to provide services for homosexuals. The study is dedicated to the Polish approach to the problem, it comments on views of Polish scholars as well as recent case-law of Polish courts. Nevertheless, broader international legal context is also outlined. The author put forward the thesis that because of low probability of achieving legal changes of the status of homosexuals in Poland, LGBT society` activists have moved their attempts to judicial sphere and adopt so called strategic litigation as a tool of legal change. The Polish experiences reveal that the application of such measures could bring results contrary to theirs` authors intentions. Strong social backlash towards judgements that foster LGBT society` demands was eventually accompanied by the judgement of the Constitutional Tribunal, that has reversed previous decisions of common courts and Polish Supreme Court.

TABLE OF CONTENTS

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1. Introduction

The Polish legal discourse regarding the issue of homosexuality has been for years dominated by the problem of the institutionalization of same-sex partnerships and marriages. One might assume that the key milestone in this tendency was the article published by Ewa Łętowska and Jan Woleński in 2013 in response to the legal opinion provided by the Office of Studies and Analyses of the Supreme Court, according to which the introduction of same-sex partnerships or marriages in Polish legal system would be contrary to article 18 of the Polish Constitution[1]. The discussion presented two rival interpretations. First, still prevailing in the Polish legal discourse[2], states that the content of article 18 should be understood as a legal definition of the marriage as a relationship between the man and the woman, which is deemed to be a legal obstacle to the institutionalisation of same-sex relationships. The proponents of this position hold that any attempt to establish an institution analogical to marriage, but applicable to same-sex couples, should be seen as a circumvention of article 18 of the Constitution[3]. In one of its judgements, the Polish Constitutional Tribunal reminded that "in the Polish domestic law, the marriage (as a relationship of the man and the woman) has acquired the independent constitutional status by virtue of article 18 of the Constitution. The change of this status would be possible solely with observance of the provisions concerning the change of Constitutions specified in article 235"[4]. The judgement is portrayed as a serious argument against the institutionalisation of same-sex relationships in Poland. The second stance is based on the assumption that article 18 of the Constitution does not provide the legal definition of the marriage; instead, it rather states that marriages composed of the man and the woman should be ac-

[1] A. Jezusek, *Możliwość instytucjonalizacji związku osób tej samej płci w świetle art. 18 Konstytucji RP*, 4(129) rok XXIII Przegląd Sejmowy Dwumiesięcznik 67 (2015).

[2] P. Sut, *Relacje prawo–intymność "ukryte" w Konstytucji Rzeczypospolitej Polskiej (problem instytucjonalizacji małżeństw homoseksualnych w Polsce wobec nieokreśloności prawa)*, 7/1 Filozofia Publiczna i Edukacja Demokratyczna 235 (2018).

[3] P. Mostowik, *Kilka uwag o ochronie małżeństwa na tle Konstytucji i prawa międzynarodowego*, in J.M. Łukasiewicz, A.M. Arkuszewska, A. Kościółek (eds.), *Wokół problematyki małżeństwa w aspekcie materialnym i procesowym*, 45, 59 (2017).

[4] Case no. K 18/2004.

corded special protection by the state. According to this interpretation, the Polish Constitution does not ascertain any restriction in this respect; hence, it is not necessary to amend the Constitution in order to establish legally binding same-sex partnerships[5].

Regardless of the question of constitutionality of same-sex partnerships in Poland, its institutionalisation would require that an action be undertaken by legislator, which is rather improbable in the current political context. Therefore, we may put forward a thesis that the course of actions undertaken by LGBT activists has shifted towards the problems that could be resolved without any involvement of the law-maker, i.e. demanding only judicial decisions. One of such problems is the question of mostly religion-based refusal of services to LGBT society members[6]. Unlike in the United States or United Kingdom, where legal disputes concerning refusal of services for homosexuals, in overwhelming majority of cases, followed or accompanied the legalisation of same-sex marriages[7], in Poland this problem outpaces the institutionalisation of same-sex partnerships or marriages.

To date, Polish courts have examined two widely commented cases concerning the refusal of providing services for homosexuals, in which the accused party attempted to defend them-

[5] Comprehensive defence of this stance in: A. Jezusek, *Możliwość instytucjonalizacji związku osób tej samej płci*, cit. at 1. It is worth to underline that in the western legal culture the concept of marriage as a different-sex relationship used to be rooted so strongly that even when a constitution did not provide definition similar to the Polish one, constitutional courts defended the different-sex interpretation, see German discussion on the subject described by P. Łącki, *Zmiana znaczenia pojęcia małżeństwa w niemieckiej ustawie zasadniczej. O meandrach dynamicznej wykładni postanowień konstytucyjnych*, 2(46) Forum Prawnicze (2018).

[6] What is interesting, the leading Polish organisation representing demands of LGBT society – *Kampania Przeciw Homofobii* (Campaign against Homophobia) – qualifies such a phenomenon as a form of violence (see M. Świder, M. Winiewski eds., *Sytuacja społeczna osób LGBTA w Polsce. Raport za lata 2015–2016*, 76 2017, accessible: https://kph.org.pl/wp-content/uploads/2017/11/Sytuacja-spoleczna-osob-LGBTA-w-Polsce.pdf, last accessed: 28.6.2019).

[7] For information on history of institutionalisation of same-sex relationships see P. Pogodzińska, *Status prawny małżeństwa i związków partnerskich w Unii Europejskiej*, in C. Mik (ed.) *Prawa człowieka w XXI w. – wyzwania dla ochrony prawnej* (2004); G.J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, 25/2 The Future of Children (2015); E.D. Rothblum, *Same-Sex Marriage and Legalized Relationships: I Do, or Do I?*, 1 Journal of GLBT Family Studies" (2005).

selves by relying on their religious beliefs. Both cases were decided in favour of LGBT organisations pleading as victims. However, most recently the Polish Constitutional Tribunal has issued the judgement pursuant to which the provision, on the basis of which the accused were found guilty, is unconstitutional[8]. It creates the possibility of overturning previous judgements of Polish common courts.

The article intends to present the Polish perspective of the problem of religion-based refusal to perform services to LGBT society members or their representatives. The second part of the text aims at presenting the broad legal context of the problem. It indicated also the cases similar to the Polish ones, examined particularly by the courts in the Anglo-Saxon countries. Furthermore, the European legal background is analysed in this respect, yet contrary to the paragraph devoted to Anglo-Saxon case-law, predominantly the legal provisions are analysed; however, certain relevant ECHR case-law is also presented. Part three of the article quotes the Polish provisions that could be applied to the problem, particularly constitutional principles and statutory law. These two parts of the paper contribute to outlining all problematic legal spheres influencing the problem, i.e.: the freedom of economic activity (and the freedom of contract), freedom of religion (with reference to the conscientious objection), prohibition of discrimination[9], and also the consumer law. Fourth part of the article comments on the recent Polish case-law regarding the religion-based refusal of services. It presents the facts and justifications delivered by the courts, introduces certain doubts raised by law scholars towards the decisions and puts forward some remarks of more theoretical nature. In Conclusions I will demonstrate how the actions of LGBT groups in Poland, pursuing to fulfil their demands, has almost entirely shifted towards the judicial sphere, which allows to enforce legal changes without the need to reach the democratic consent – the support of the majority of society.

[8] Case no. K 16/17.

[9] It seems that these three issues play the crucial role in similar disputes (at least in the Polish context and when it comes to the substantive law). Theoretical arguments concerning these three issues are analysed by W. Ciszewski, *Czy wolność uprawnia do dyskryminowania? Rozważania teoretycznoprawne na kanwie sprawy drukarza z Łodzi*, 5(43) Forum Prawnicze (2017).

II. International and European legal context

1. Anglo-Saxon contribution to the problem

The United States were the country where the disputes around the issue of refusal to perform services for homosexuals due to one`s beliefs emerged for the first time and were quite common. The circumstances of such cases were rather similar: owners of small, private business used to refuse performing services requested by gay or lesbian couples, which led to certain legal consequences: generally, defendants were either fined, or, optionally, obliged to reimburse costs of proceedings at law[10]. Significantly, great majority of the cases concerned wedding services, such as providing wedding cakes, photo sessions or preparing bunches of flowers for a same-sex couple. Some of the cases took place in states which did not formally recognised same-sex partnerships or marriages at the moment of events under consideration.

To outline background of the dispute in a proper way it is worth to notice that by virtue of *Obergefell v. Hodges*[11] judgement of the US Supreme Court same-sex marriages were eventually legalised in the entire United States. On the other hand, in its previous ruling to the case *Burwell v. Hobby Lobby*[12], the Supreme Court accepted a kind of consciousness objection for those running commercial enterprises. Accusations raised against business-owners refusing to perform services were formally anchored in the so-called SOGI laws (abbreviation from: Sexual Orientation Gender Identity), which were aimed at combating discrimination

[10] About American cases see in Polish: Ł. Mirocha, *Odmowa wykonania usług weselnych dla par jednopłciowych w Stanach Zjednoczonych*, 4 Państwo i Prawo (2019), in English: J. Bauers, *The Price of Citizenship: an Analysis of Anti-Discrimination Laws and Religious Freedoms in Elane Photography, LLC v. Willock*, 15 Rutgers Journal of Law and Religion (2014); B. Knox, *A Fundamental Standoff Post-Obergefell: Which Fundamental Right Should Prevail When Claims of Free Exercise Clash With Claims of Discrimination in the Private Marketplace?*, 68 Alabama Law Review (2016); C. Schube, *A New Era in the Battle Between Religious Liberty and Smith: SOGI Laws, Their Threat to Religious Liberty, and How To Combat Their Trend*, 64 Drake Law Review (2016); A. Riley, *Religious Liberty vs. Discrimination: Striking a Balance When Business Owner Refuse Service to Same-Sex Couples Due to Religious Beliefs*, 40 Southern Illinois University Law Journal (2016).

[11] Case no. 576 U.S. (2015).

[12] Case no. 573 U.S. (2014).

in every field of social life, including market sphere. Few of such statutes expressed religious exemptions in direct way (e.g. the so-called Utah Compromise[13]), however most of them had absolute character.

Two main arguments were raised by defendants in favour of refusal, both of them grounded in the First Amendment of the US Constitution. Firstly, defendants claimed that providing wedding services for homosexuals remains in opposition to their religious beliefs. They referred to *free exercise clause*. Secondly, they maintained that their creative work is a kind of art, so forcing them to ensure same-sex couples with effects of their work should be considered as a sort of "compelled speech" (*freedom of speech* argument). In contrary to caveats claiming that refusal was based on the features or *identity* of potential contractors (homosexuality), defendants argued that it was expressed due to *actions* of potential contractors (or just the intent to conclude same-sex marriage). One of the defendants explained the difference, claiming that they have always been performing services for their friends – a homosexual couple, but they denied to do so when it came to wedding services[14]. Similar arguments occur regularly in disputes related to the conflict of religious liberty and equality demands. In comparison to alike disputes in other countries, the lack of arguments derived from economic freedom is characteristic in American conditions.

The overwhelming majority of the cases taking place in the United States was resolved in favour of homosexuals. However, most recent judgement of the US Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[15] has brought alteration. The judgement was favourable to defendant; still, it was too profoundly connected to the facts of specific case to be deemed as any plausible sign of a new tendency in the US case-law regarding the problem of religion-based refusal. Relying on the justification of *Masterpiece Cakeshop* verdict we can cautiously predict that arguments referring to the freedom of expression (or speech) might

[13] SB 296 Utah Antidiscrimination Act.
[14] Case *Washington v. Arlene's Flowers, Inc.*
[15] Case no. 584 U.S. (2018).

be more convincing for American judges than these recalling the freedom of religion[16].

The United States were not the only country where similar disputes occurred. As Wojciech Ciszewski[17] points out, the case most similar to the Polish one took place in Canada. The judgement in *Ontario Human Rights Commission v. Brockie*[18] was decided in favour of an LGBT association, which had met with refusal when ordered a kind of printing service. The defendant – Scott Brockie – proclaimed himself as a new-born Christian and explained his behaviour as motivated by his beliefs. This elucidation was not considered as convincing for the Ontario Supreme Court, which decided that defendant violated relevant counter-discrimination laws. The case-law of European countries also provides us with decisions concerning tensions between religion beliefs and antidiscrimination. In 2018 the Supreme Court of the United Kingdom overruled judgements of lower instance courts in case regarding the refusal to prepare cake for homosexuals. *Lee v. Ashers Baking Company Ltd. and Others*[19] seems to deliver quite similar conclusion to the verdict in *Masterpiece Cakeshop* case. Just as the American judgement, it is also deeply anchored in the facts of the specific case. It could be difficult to derive any general clues from this judgement, except the obvious one stating that antidiscrimination tendencies do not always have to prevail in market sphere.

2. European system of the protection of human rights

Judgements quoted above do not have any direct impact on the Polish legal system; however, the most famous verdict in this field – the one delivered by the US Supreme Court in the case *Masterpiece Cakeshop* – was mentioned by the Polish Supreme Court in

[16] The judgement have not finished legal struggles of the *Masterpiece Cakeshop* owner; he is burdened by clearly provocative requests accompanied by complaints to the state`s Civil Rights Commission. See D. Laycock, *The Broader Implications of Masterpiece Cakeshop*, 1 Birgham Young University Law Review issue 196-202 (2019).

[17] W. Ciszewski, *Czy wolność uprawnia do dyskryminowania?*, 38, cit. at 9.

[18] Case no. O.J. No. 2375 [2002].

[19] Case no. [2018] UKSC 49. Gareth Lee decided to issue motion to European Court of Human Rights, the case is pending (application no. 18860/19).

the justification of the judgement commented in part IV of the article. On the contrary, the provisions contained in the European system of human rights` protection have binding character for both the Polish legislator and Polish courts. Because of that it is necessary to at least outline provisions that may affect the analysed problem. The following considerations shall be limited to conclusions developed by the European Court of Human Rights on the basis of the Conventions on Human Rights and Basic Freedoms and stipulations provided by the Charter of Fundamental Rights of the European Union.

When it comes to the ECHR case-law it should be noticed that until now no case underpinned by the facts exactly related to the aforementioned ones was decided by this body. However, there were few cases somehow similar or delivering useful clues for the presented equality v. religious freedom conflict[20]. Firstly, the judgement to the case of *Eweida and others v. United Kingdom*[21] is worth mentioning. The judgement concerned *inter alia* situations in which claimants refused to perform services for homosexuals, to which they were obliged by a kind of codes of good practice. Mr McFarlane was associated as a counsellor in private organisation providing confidential sex therapy and relationship counselling service and described himself as a practicing Christian. He refused to lead therapies for same-sex couples. Ms Ladele – also a Christian – denied to assist in the ceremonies of concluding same-sex civil partnerships. They met with severe consequences of such behaviour, which was considered as misconduct by their employers. As a result, they were made redundant. Before the ECHR both claimants recalled article 9 of the Convention (*freedom of thought, conscience and religion*); nevertheless, their applications were unsuccessful. The judgement is usually presented as an argument against effectiveness of using conscience reasons in confrontation with equality demands[22]. In spite of this, it should be underlined

[20] For comprehensive analysis of so-called "Łódź printer" case from the point of view of ECHR see Ł. Mirocha, *Prywatna dyskryminacja ze względu na orientację seksualną w relacjach cywilnoprawnych. Perspektywa Europejskiego Trybunału Praw Człowieka*, 2(70) Studia Prawnicze KUL, 85-105 (2017).

[21] Applications no. 48420/10, 59842/10, 51671/10 and 36516/10.

[22] M. Hara, *Refleksje nad odpowiedzialnością za wykroczenie z tytułu odmowy świadczenia usługi (art. 138 k.w.) w kontekście unormowań cywilnoprawnych*, 1(13) Ius Novum 122 (2019).

that the ECHR has treated both religious reasons and provisions securing equal access to some services regardless of sexual orientation as interests at risk, which – in effect – requires fair balancing. It implies that in different context the result of the case could be altered[23].

Leaving aside the commented case, it should be noticed that earlier the Court was faced with cases whose main question referred to the problem of equal treatment of homosexuals in civil-law relations. Despite the fact that the Convention does not provide any provisions directly concerning this sphere, the cases were always decided in favour of a homosexual claimant[24]. While considering circumstances in which homosexuality is under discussion, one should remember that article 8 of the Convention could be regarded as a quite universal basis for demands that otherwise had no legal ground in the document. The *right to respect private and family life* in conjunction with article 14 (*prohibition of discrimination*)[25], could be deemed as a legal measure for combating discrimination in market sphere. Some doubts concerning this interpretation may result from the problem of horizontal effect of the Convention (do human rights take effect between individuals, or only in state-individual relation?). However, the ECHR more and more often acknowledges horizontal effect of the Convention referring to positive duties of a state[26].

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[23] Comprehensive study of the cases: I. Leigh, A. Hambler, *Religious Symbols, Conscience, and the Rights of Others*, 3/1 Oxford Journal of Law and Religion (2014).

[24] See *Karner v. Austria*, application no. 40016/98; *Kozak v. Poland*, application no. 13102/02; *P.B. and J.S. v. Austria*, application no. 18984/02.

[25] It should be noticed that the Protocol no. 12 to the Convention establishes general prohibition of discrimination, what significantly broadens equality guarantees in the system of Convention.

[26] See J.-F. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights. A Guide to the Implementation of the European Convention on Human Rights, 7* Human Rights Handbooks (2007); J. Czepek, *Szczególny charakter ar. 8 EKPC w teorii zobowiązań pozytywnych państw-stron*, in C. Mik, K. Gałka (eds.) *Między wykładnią a tworzeniem prawa. Refleksje na tle orzecznictwa Europejskiego Trybunału Praw Człowieka i międzynarodowych trybunałów karnych*, 192, 202 (2011); D. Chorąś, *Prawo do poszanowania życia prywatnego i rodzinnego w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka – granice ingerencji w sferę praw jednostki*, in M. Cezarego, G. Katarzyny (eds.), *Między wykładnią a tworzeniem prawa* (2011).

On the other hand, the ECHR` case-law also delivers examples of application of conscientious objection, establishing a kind of conscience clause[27], to date limited to medical professions[28] and people refusing military service[29]. Judgements issued in such cases convince that one`s beliefs could be considered as the basis for refusal; however, the right to refuse is not absolute. The Polish Supreme Court in the justification of the judgement commented below as an example recalls the case *Pichon and Sajous v. France*[30] concerning the co-owner of the pharmacy who, basing on religious beliefs, refused to sell contraceptives to patients having validly issued prescriptions. The case was not decided by the ECHR in compliance with the pharmacist`s demands.

It should be emphasised that article 9 of the Convention does not directly mention the right to conscientious objection, which distinguishes it from the Charter of Fundamental Rights of the European Union. The article 10.2 of the main EU document on human rights acknowledges that "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right". In my opinion, the provision should be interpreted is such a way that although the EU law gives independent, sufficient basis for religion-based refusal, the specific conditions of such refusal should be clarified by the domestic law. The application of the right to conscientious objection is not limited to predetermined situations, nor is the catalogue of entitled subjects restricted to medical professions and people refusing military service[31].

Except the abovementioned ones, there are at least three more aspects of the problem which are affected by the Charter. Articles 16 and 17 concern respectively *the freedom to conduct a business* and *the right to property*. Both rights were indicated – in Polish discussion over the problem – as arguments in favour of business-

[27] On the distinction of the two: W. Ciszewski, *Wyłączenia światopoglądowe jako przedmiot dyskusji teoretycznoprawnej – próba systematyzacji*, 2(34) Forum Prawnicze (2016).
[28] See O. Nawrot, *Conscientious objection and European vision of human rights*, 6.1 Progress in Health Sciences 150-157 (2016).
[29] Famous case *Bayatyan v. Armenia*, application no. 23459/03.
[30] Application no. 49853/99.
[31] I.C. Kamiński, *Komentarz do art. 10*, in A. Wróbel (ed.) *Karta Praw Podstawowych Unii Europejskiej. Komentarz* 14-15 (2013).

owners refusing to meet demands of the potential customers. This dimension of the problem (particularly *the freedom of contract*), although raised by defendants, was neglected by Polish common courts and the Supreme Court. Nevertheless, it was taken into consideration by the Polish Constitutional Tribunal[32].

There are also two further provisions of the Charter that should be outlined here: the article regarding consumer rights protection and – last but not least – principles concerning equality protection. Pursuant to article 38 of the document: "Union policies shall ensure a high level of consumer protection". The stipulation is meaningful in the context under study, especially when we take into consideration that the concept of "consumer" was relevant in settling Polish court cases. According to certain interpretation, discussed below in more detail, the misdemeanour of which the defendants in Polish court cases were accused, was designed to provide protection for natural persons. In spite of that, Polish courts decided that these provisions apply to legal persons as well. Nevertheless, it should be reckoned that the European Court of Justice did not derive independent normative content from article 38 of the Charter, but used it as an interpretative clue fostering consumer interests[33].

When it comes to equality issues, it is worth to stress that one of the Charter`s chapters is entitled "Equality". This value is mentioned as third one in the Charter, after "Dignity" and "Freedom", leaving behind chapters referring to "Solidarity", "Citizens` rights" and "Justice". Article 20 establishes a kind of formal equality principle stating that "Everyone is equal before the law.", whereas the latter provision is closer to the substantive ideal of equality: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited". In contrast to article 14 of the Convention on Human Rights and Basic Freedoms, the Charter explicitly

[32] Polish Constitutional Tribunal recognises the freedom of contract as stemming from the freedom of economic activity, see judgement in case no. SK 24/02.

[33] See B. Stępień-Załucka, *Ochrona konsumentów, użytkowników i najemców*, in H. Zięba-Załucka (ed.) *Wolności i prawa ekonomiczne, socjalne i kulturalne w Konstytucji RP z 1997 r.*, 272 (2018).

forbids to use sexual orientation as the reason for different treatment[34]. What is even more significant is that provision under study states the following: "Any discrimination (…) shall be prohibited". This wording allows to avoid interpretative doubts arose in the context of the Convention regarding the horizontal effect of the protected right. On the grounds of the Charter it is obvious that a state is not the only addressee of the prohibition of discrimination, or it is at least the subject obliged to prevent discrimination in each sphere and each sort of social relations – therefore, it has positive duties in preventing discrimination. The horizontal effect of the prohibition of discrimination was acknowledged by the ECJ *inter alia* in its judgement of 10 July 2008[35]. High status of equality principle in horizontal relations is confirmed by EU directives, e.g. the Council Directive 2004/113/EC implementing the principle of equal treatment of men and women in the access to and supply of goods and services[36]. The way the EU directives are implemented into the Polish legal system shall be illustrated in the following part, but firstly we should focus on Polish constitutional provisions affecting the problem.

III. Polish legal background of the problem

Despite the fact that cases under study, settled by Polish common courts, directly concerned only one provision of the Code of Petty Offences, both the Polish Supreme Court and Constitutional Tribunal attempted to analyse broader legal context of the problem. Doing so, they needed to take into account at least three groups of rights: religious freedom with its consequences, equality and counter-discrimination provisions, and, finally, principles governing the market activity, from both sides: business-owners

[34] The Convention provides open catalogue of such reasons, and after previous disputes whether discrimination of homosexuals fits into premise "sex" or "other status", the ECHR have decided that it is forbidden as fitting into "other status".

[35] Case no. C-54/07; the case concerned racial discrimination. See W. Brzozowski, A. Krzywoń, M. Wiązek, *Prawa człowieka*, 274 (2018); A. Bierć, *Freedom of Contract against the Constitutional Non-discrimination Principle*, 3(215) Studia Prawnicze 47-49 (2018).

[36] On horizontal effect of the Charter: E. Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the European Union: Rediscovering the Reasons for Horizontality*, 21/5 European Law Journal (2015).

and customers. Their content shall be outlined here, whereas the analysis of the Petty Offences provision is delivered in part IV of the article alongside with the study of the Polish judgements.

The Constitution of the Republic of Poland of 1997[37] provides comprehensive regulation of freedom of thought, conscience and religion. Article 53 warranting this rights encompasses *inter alia* "the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching". Section 6 of the article states that "No one shall be compelled to participate or not participate in religious practices", while section 7 assures: "No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief". The right to conscientious objection is not expressly mentioned in this part of the Polish Constitution; however, the conscience clause is warranted by the article 85.3 for citizens refusing military service. What is more, Polish statutory law ensures persons practicing medical professions with the right to conscience clause. There is no legal act that directly provides business owners with any form of the right to the conscientious objection, whereas the Polish Constitutional Tribunal, in the widely commented judgement concerning the conscience clause in medical professions[38], admitted that the Constitution is the independent, sufficient source of such a right. In the academic disputes arose around this statement two contradictory stances could be identified: one defending the thesis that conscience clause should be anchored in the statutory law to be applicable in practice[39], and second, compliant with the Tribunal`s view[40], which seems to open door for all sorts of applications of the right to the conscientious objection in the market square.

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[37] Dz.U.1997.78.483. Hereinafter I use official translation accessible on webpage: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (last accessed: 29.6.2019).

[38] Case no. K 12/14.

[39] E.g. W. Ciszewski, *Kazus łódzkiego drukarza (uwagi do artykułu Mikołaja Iwańskiego z perspektywy teorii prawa)*, 7/2018-6/2019 Czasopismo Prawa Karnego i Nauk Penalnych 13 (2018-2019).

[40] E.g. M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi (art. 138 Kodeksu wykroczeń) na tle kolizji zasad konstytucyjnych. Rozważania na kanwie kazusu łódzkiego drukarza o styku prawa karnego sensu largo oraz prawa*

When it comes to equality protection, the article 32 needs to be indicated. It states that: "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities" (sec. 1) but also that "No one shall be discriminated against in political, social or economic life for any reason whatsoever" (sec. 2). The second section is particularly problematic. It is – in conjunction with article 8.2 of the Constitution[41] – perceived as a legal basis for the horizontal effect of constitutional provisions, as it indicates "social or economic life"[42]. However, it could be convincingly claimed that the identification of the sphere of the prohibited discrimination is not equal with the outlining of the scope of actors being addressees of the provision. The Constitutional Tribunal still does not present a consequent stance towards this problem[43].

When looking for legal arguments in favour of the thesis that equality principle is binding in the market sphere and, as a result, potential parties of civil-law contract should treat each other equally, it is worth to investigate the EU law's influence on the Polish legal system. Firstly, it should be noticed that the result of conforming the Polish legal system in order to access the EU is that the premise of "sexual orientation" was directly prohibited as a basis of different treatment, for example in the Polish Labour Code[44] (prohibition of any form of discrimination at work). Secondly, it has to be stressed that by establishing the Act on the implementation of certain European Union provisions concerning equal treatment[45] (so-called "Equal treatment act" or "Non-discrimination act") Poland has made the relevant EU directives enforceable. The act was pointed out by the proponents of the erasing of provision establishing misdemeanour committed by defendants in Polish cases as an example of non-criminal law measure employed in prevention of discrimination. As such it was portrayed by the Attorney General in his motion issued to the Consti-

konstytucyjnego, 7 Czasopismo Prawa Karnego i Nauk Penalnych 43 (2018 preprint).

[41] "The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise".

[42] See A. Bierć, *Freedom of Contract* 41, cit. at 35.

[43] M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi* 40, cit. at 40.

[44] Dz.U.2019.1040.

[45] Dz.U.2016.1219.

tutional Tribunal concerning the question whether the controversial petty crime is in compliance with the Polish Constitution[46]. In fact, in case of the refusal to perform services for homosexuals, the Equal treatment act is rather useless. The exemptions from its application are formulated in such a way that it does not provide protection for homosexuals on the market. According to article 5.3, the act is not to be applied in the choosing of the contractor provided that the choice is not based on sex, race, ethnic origin or nationality. It means that the refusal to perform services for homosexuals surpasses the scope of application of the act. This fact was recognised by the Polish Commissioner for Human Rights in his official response to the Attorney`s General motion, it is also confirmed by legal scholars[47]. Moreover, the act limits its application to natural persons in many places. Additionally, it could be noticed that the Polish civil law could be used as a counter-discrimination measure, the protection of personal rights is an example of such a function.

To sum up, it could be difficult to find an unquestionable legal basis for equal treatment in business-customer relations in the Polish legal system. Both proponents and opponents of this thesis can put forward equally strong arguments.

There are at least two – mention worthy – provisions in the Polish Constitution regarding rights of business owners operating on the market. Article 20 of the Constitution states that "A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland". The principle of economic freedom is acknowledged in the stipulation, and – as mentioned above – it is the freedom of contract that was derived from it by the Constitutional Tribunal. It is claimed that the "social" aspect of market economy means that state is entitled to correct negative effects of free market mechanisms, e.g. in order to protect consumers as the disadvantaged party of a potential contract[48]. Such actions are not to be considered as state`s preference towards consumers, but

[46] See further part of the article.
[47] M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi*, 20, 38, cit. at 40.
[48] W. Brzozowski, A. Krzywoń, M. Wiązek, *Prawa człowieka*, 282, cit. at 35.

rather as an attempt to compensate for their weaker position[49]. The consumer`s status is strengthened by the content of article 76 of the Constitution, pursuant to which: "Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute". The concept of the "consumer" has autonomous meaning in the Polish Constitution, therefore it should not be identified with its definitions contained in the Polish Civil Code (restricting the definition of consumers to natural persons concluding legal acts not connected with their business activity) or the concept present in the Polish criminal law. Article 22 of the Constitution is also meaningful in the problem under study as it states: "Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons". In accordance with the provision penalising refusal to perform commercial service ought to be underpinned by an important public reason. Opponents of the right to refuse convince that what embodies such a reason are equality demands. Significantly, articles 20 and 22 are contained in chapter entitled "The Republic", which includes basic principles of Polish political and social order, while article 76 is included in the chapter devoted to rights and freedoms, as the last one of them.

Strong connections between the constitutional rights outlined above and the civil law relations that may be affected by them, demonstrate that the thesis about publicization of private law must be taken as serious one[50]. However still controversial, the recognition of horizontal effect of human rights should be perceived as an increasing tendency in the contemporary Polish legal discourse. The following part of the article aims at presenting how abovementioned principles were applied in real cases concerning the analysed problem.

[49] B. Stępień-Załucka, *Ochrona konsumentów, użytkowników i najemców*, 277-278, cit at 33.

[50] See A. Bierć, *Freedom of Contract*, 38, 49, cit. at 35.

IV. Recent Polish case-law

1. The facts and justifications of the judgements

The facts behind the two cases regarding the problem under study were very close. The first case concerned the situation in which an employee of the private company based in Łódź and specialised in commercial printing refused to prepare a so-called roll-up for *LGBT Business Forum* – the foundation (legal person) aimed at promoting advantages of hiring LGBT society members. Once a volunteer, acting on behalf of the foundation, revealed the design of the roll-up, the order was met with refusal (the technical details were already settled). The refusal took the form of an email stating the following: "Hello, I refuse to create the roll-up using received graphics, We don`t contribute to promoting LGBT movements by our work" ["Witam, Odmawiam wykonania roll-up, uz otrzymanej grafiki, Nie przyczyniamy się do promocji ruchów L. nasza pracą"]. It became the subject of a heated debate whether at the moment of the abovementioned events the printer`s webpage contained the statement that the company does not provide ideologically-oriented services[51]. The events underlying the second case under study took place in Poznań. A *Krav maga* trainer having expressed his consent to provide the self-defence lessons to members of *Stonewall Poznań* (association of people supporting LGBT postulates), eventually refused to render the service. Although initially he motivated his refusal with the lack of time, ultimately, he referred to his convictions. His explanations were not consistent[52]. Moreover, the defence of both accused parties tried to justify their decisions by bringing up the issue of freedom of economic activity, particularly the principle of freedom of contract.

In both cases, the applications were issued by the Police after the intervention of the Polish Commissioner for Human Rights[53]. In both cases the defendants were found guilty of com-

[51] Polish Supreme Court case no. II KK 333/17.

[52] I rely on media information, especially: P. Żytnicki, *Instruktor, który odmówił zajęć z osobami LGBT, prawomocnie skazany. To drugi taki wyrok w Polsce* (2018) accessible: http://poznan.wyborcza.pl/poznan/7,36001,23998805,instruktor-ktory-odmowil-zajec-z-osobami-lgbt-prawomocnie.html (last accessed: 29.6.2019).

[53] P. Walczak, *Glosa do wyroku Sądu Okręgowego w Łodzi z dnia 26 maja 2017 roku, V Ka 557/17*, 1 Internetowy Przegląd Prawniczy TBSP UJ 22 (2018).

mitting misdemeanour described in article 138 of the Code of Petty Offences, which states the following: "Whoever, when dealing professionally with the provision of services, requests and charges a higher payment than the one in force, or intentionally, without a justified reason, refuses to provide a service to which he is obliged, is subject to a fine"[54]. Nonetheless, no penalties were imposed on the defendants. The courts decided that founding them guilty is a sufficient measure.

In both cases appeals were issued by the barristers of the defendants and also by the public prosecutor (in favour of the accused); however, the second instance courts upheld first instance decisions. It is worth to emphasise that the second instance court in the case of the Łódź printer adopted the clearly hostile approach towards religious convictions of the accused. Its reasoning refers for example to "subjective understanding of confessed religion" and, basing on purely anecdotal evidence, states that "[g]ranting individual people the right to be guided with their subjective understanding of religion in public sphere or in the market could not be accepted or justified by the state. It could lead to extremely dangerous precedents, and, in extreme cases, to the complete chaos"[55]. The court pointed out the examples of the Islamic terrorism and "*Gott mit uns*" statements present on uniform belts of the Third Reich soldiers; it failed to see the insulting character of such comparisons. What is crucial, according to lower instances' interpretation, is that religious beliefs may not be considered as a "justified reason" in the understanding of article 138 of the Code of Petty Offences. Referring to pronouncements of law scholars, the courts supported the view that only objective reasons fulfil this premise[56].

It is the judgement by the Supreme Court dated 14th June 2018 that brought about a change in this state of affairs[57]. In the reasoning, the Court acknowledged that religious beliefs could be considered as "a justified reason" when the character of provided service clearly stands in opposition to religious convictions, even

[54] Dz.U.2019.821.

[55] Łódź District Court judgement, case co. V Ka 557/17.

[56] For the comprehensive overview of the literature concerning the problem of "justified reason" see M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi,* 7-9, cit. at 40.

[57] Case no. II KK 333/17.

if there are other values, such as the constitutional prohibition of discrimination, which indicate the reverse procedure as appropriate. The Court emphasised that no refusal shall be based on features of the contractor, but on the nature of service[58], which makes the *ratio decidendi* similar to the concurring opinion worded by Justice Thomas to the US Supreme Court ruling in the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, delivered few days earlier[59]. This remarkable alteration (in comparison to the rulings of the lower instances) does not, however, change the result of the case – the Supreme Court upheld the previous decisions, claiming that the character of service (preparing a roll-up) could not be perceived as standing at odds with religious beliefs of the accused who referred to his Catholic faith. The Court, relying on the official teaching of the Catholic church, assumed that it proclaims empathy and tolerance for people of different sexual orientation.

The analysed disputes received extensive media coverage and were widely commented by officials, i.a. the Polish Commissioner for Human Rights and also the current Minister of Justice, who simultaneously performs the function of the Attorney General. The latter, using his powers, in order to investigate the constitutionality of the provision in question, addressed the motion to the Constitutional Tribunal ordering it to investigate whether article 138 of the Code of Petty Offences is compliant with article 2 of the Constitution[60], article 53 section 1[61] (protecting freedom of religion and freedom of conscience) – with article 31 section 3[62] (concerning conditions to be met in order to limit the constitutional rights and freedoms), and article 20 (the principle of social market

[58] Compare consideration contained in part II.1 of the article.

[59] Quoted above in part II.1 of the article. See also Ł. Mirocha, *Polskie orzecznictwo w perspektywie wyroku w sprawie Masterpiece Cakeshop*, 2(46) Forum Prawnicze (2018).

[60] "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice".

[61] "Freedom of conscience and religion shall be ensured to everyone".

[62] "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

economy) – with article 22 (concerning conditions to be met in order to limit the business freedom) and article 31 section 2[63] and 3.

The Constitutional Tribunal in its ruling of 26th June 2019 has decided that article 138 is partially contrary to article 2 of the Constitution and chose to discontinue the proceeding in further matters[64]. It can be assumed that the reason for making the decision on purely formal, instead of substantive, basis, was to avoid potential worldview controversies concerning the problem. The judgement implies that the sentenced perpetrators have the right to resume the proceedings by virtue of article 113 of the Code of Proceeding in Petty Offences Cases[65]. When it comes to the LGBT activists, the judgement, on the one hand, is perceived as invalid due to the procedural reasons concerning the problem of election of one of the judges hearing the case; on the second hand, it is seen as a means of depriving homosexuals of the last effective defence instrument against discrimination in the market sphere[66].

2. Doubts concerning judgements

Many allegations against the decisions of the common courts were raised during the course of the proceedings and later. There were two most controversial problems regarding the interpretation of article 138. The first problem deals with the issue of obligation to provide services, in particular with possible reasons for such an obligation; the second one concerns the interpretation of "a justified reason for refusal of service". Below I would like to focus on these doubts. Likewise, a number of other dilemmas that

[63] "Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law".

[64] Information from the Constitutional Tribunal webpage: http://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/10678-odmowa-swiadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/ (last accessed: 29.6.2019).

[65] Dz.U.2019.1120. The right was already exercised – relevant motions have been successfully issued.

[66] A. Ambroziak, *LGBT, osoby z niepełnosprawnością i osoby starsze bez ochrony przed dyskryminacją – adw. Knut o wyroku TK* (2019), accessible: https://oko.press/lgbt-osoby-z-niepelnosprawnoscia-i-osoby-starsze-bez-ochrony-przed-dyskryminacja-adw-knut-o-wyroku-tk/ (last accessed: 29.6.2019).

appeared in the legal discourse will be commented on later in this part.

In their decisions, the Polish common courts interpreted the premise of duty or obligation in close conjunction with the premise of "dealing professionally with the provision of services". The Supreme Court states that it accepts the view that the source of obligation indicated in article 138 of the Code arises already from the fact of professional manner of providing services. Contrary to the stance of the District Court in Łódź, which pointed out that it is the agreement that can be the source of obligation as interpreted in the commented provision, the Supreme Court eventually combined these – in my opinion independent – premises, thus violating the basic principles of legal interpretation[67]. The interpretation adopted by the Supreme Court was firmly anchored in historical context in which the analysed provision was established, and also grounded in law scholars' writings published in the past[68]. The provision in question was previously introduced into the Polish legal system in 1957 in the conditions of socialist economy in which, due to the shortages of goods on the market, it was crucial to ensure that traders would not select their customers[69]. The obligation to provide services was self-evident in the case of state-owned service-providers. To counter possible doubts based on the claim that article 138 has lost its legitimacy, the Supreme Court decided to give it a brand-new anti-discrimination character[70],

[67] Identifying "obligation" with the premise of professional character of providing services makes "obligation" superfluous, which, i.a., violates the prohibition of *per non est* interpretation, see L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, 150-152 (2002).

[68] Commentaries edited by Tadeusz Bojarski, Tomasz Grzegorczyk or Marek Mozgawa agreeably point out that the obligation of provision of service should be identified with the fact that a trader remains on disposal of everyone who demand and pay for the service he/she provides, so there is no right to select customers. The quoted commentaries are based in this matter on the work edited by Jerzy Bafia, which was first released in 1974, when the presented definition could have its legitimacy.

[69] P. Walczak, *Glosa do wyroku Sądu Okręgowego w Łodzi*, 27, cit. at 53. Current Polish Code of Petty Offences was enacted in 1971; the provision in question have never been amended.

[70] It should be noticed that such interpretation does not necessarily lead to the conclusion that the defendant violated article 138 of the Code of Petty Offences. Mikołaj Iwański, however, supporting the view that the commented provision remains in close connection with counter-discrimination statutory provisions,

which however does not change the fact that the adopted interpretation of abovementioned premises is doubtful. The premise of "professional provision of services" should be distinguished from the premise of "being obliged to provide services", which refers the interpreter to purely civil law ascertains which were omitted by the Supreme Court. The doubts are even stronger when we take into consideration serious problems with finding in the Polish legal system a convincing constitutional or even statutory basis for equal treatment in horizontal relations.

Before the Supreme Court has released its interpretation, law scholars, referring to the opinion of the Łódź District Court, regardless of the fact that the conclusion of contract between parties was doubtful, wondered whether entering into an agreement automatically entails the obligation within the meaning of article 138 of the Code of Petty Offences. This strand of argumentation is based on the supposition that civil law obligations have no peremptory character, whereas criminal law should be applied solely to obligations of this nature. In conclusion, the character of the "obligation" indicated in the discussed provision should be stronger than civilian[71]. To some extent, the motion directed to the Constitutional Tribunal by the Attorney General follows this line of argumentation, when it recalls the content of article 31 paragraph 2, according to which: "Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law"[72].

The second crucial interpretative problem concerned the premise of "a justified reason for refusal". As mentioned above,

expressly admits that the defendant in this specific case was not obliged to service (M. Iwański, *Odpowiedzialność za odmowę świadczenia* usługi, 45, cit. at 40).

[71] P. Walczak, *Glosa do wyroku Sądu Okręgowego w* Łodzi, 23-26, cit. at 53.

[72] In the discussion about the legal character of the duty to perform services at least three positions are presented: 1) proponents of the civilian character of the duty recall the content of article 138, as using civil law terms and not referring to other legal standards (e.g. M. Hara, *Refleksje nad odpowiedzialnością za wykroczenie*, cit. at 22); 2) supporters of the public law character of the duty build their stance on various dignitarian or egalitarian provisions (eg. M. Iwański, *Odpowiedzialność za odmowę świadczenia usługi*, 37-38, cit. at 40); 3) defenders of the thesis that "the professional provision of services" could be perceived as sole basis of the duty (following the majority of legal doctrine and commented judgements).

according to the stance of lower instance courts, such a "justified reason" should be of exclusively objective or technical nature. Hence, a craftsman who is not physically able to render an ordered service is entitled to refuse; so is a trader who does not have the ordered goods at his disposal. The lower instance courts considered religious beliefs as an insufficient basis to deny services. This interpretation was altered by the Supreme Court. However, despite the fact that the interpretation of the "justified reason" premise was broadened by an addition of a religious conviction, the Court upheld the position that religious convictions must be understood in compliance with the official teaching of the denomination to which a person belongs. Even cursory analysis of this stance shows that it is hardly restricting from the perspective of religious liberty; it also could be deemed as contrary to the contemporary trends of legal interpretation of "convictions", e.g. the concept of "sincere religious beliefs" present in the US Supreme Court judgement in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case, previously developed by the Canadian Supreme Court in the judgement of 30 June 2004, [2004] 2 SCR 551, 2004 SCC 47[73]. What is more, the standpoint presented by the Polish Supreme Court begs to the question whether the state is entitled to evaluate someone's beliefs – a question that is frequently raised before the European Court of Human Rights.

To conclude the considerations above, it should be noticed that the Polish Supreme Court, having issued its creative interpretation, has remarkably broadened the scope of application of analysed provision; however, alongside this change it is the range of possible exemptions that is also broadened[74].

The last allegation which is worth considering – and which has been already pointed out in the previous parts of the article – regards the question of eligible scope of the subjects protected by virtue of article 138. The title of the chapter in which the provision

[73] The presented judgements are examples of the so-called subjective interpretation of religion, whereas Polish Supreme Court seems to apply objective concept; on the distinction: W. Ciszewski, *Kazus łódzkiego* drukarza, 9, cit. at 39.

[74] See Ł. Mirocha, *Polskie orzecznictwo w perspektywie wyroku w sprawie Masterpiece Cakeshop*, 76-77, cit. at 59.

is placed states "Offences against consumer interests"[75]. Article 138 considered separately from others does not restrict the scope of potential victims, albeit according to the principle of systematic interpretation, the interpretation of the provision should take the chapters title into account[76]. It could be claimed that other provisions of the discussed chapter directly refer to consumers; thus, *a contrario*, if the article 138 does not specify the concept of a consumer, it should be deemed as more general in its scope of application. However, the provisions directly referring to consumers in the analysed chapter were added to the Code of Petty Offences during its recent amendments. Hereby they should not affect the result of the systematic interpretation based on the chapter`s title. In both cases which have been examined by the Polish court so far the legal persons appeared as victims of committed misdemeanours. This raises a question whether indeed it was them who were the subjects entitled to protection[77], particularly when it is crucial to compare the bargaining power of "perpetrators" and "victim", in the context of the horizontal effect of human rights. Finally, one should raise the issue of association of a legal person with a feature which – for obvious reasons – it could not have, i.e. sexual orientation[78].

[75] Evaluation of this arguments must reckon that Polish criminal law provides us with other examples of the situation in which the chapter`s title suggest a narrower interpretation of subjects under protection, while court`s practice have broadened the circle of entitled actors, see article 300 of the Criminal Code which is equally applied in the cases of persons conducting business and others, despite the fact that is contained in the chapter entitled "Offences against business transactions and property interests in civil law transactions".

[76] L. Morawski, *Wykładnia w orzecznictwie sądów*, 198-199, cit. at 67.

[77] Wojciech Ciszewski convinces that this distinction is not legally meaningful, because – shortly speaking – the message issued by the refusal eventually reaches the natural person, even if previously the refusal was directed to the legal one (W. Ciszewsk, *Kazus łódzkiego drukarza*, 7, cit. at 39).

[78] Adam Bodnar, Polish Commisioner for Human Rights, rejects the allegation that discrimination took place because of associating legal person with the sexual orientation of its members, see A. Bodnar, *Posądza łódzkiego drukarza o czyn niedozwolony, którego nie zna polskie prawo* (2017), accessible: https://ordoiuris.pl/wolnosci-obywatelskie/adam-bodnar-posadza-lodzkiego-drukarza-o-czyn-niedozwolony-ktorego-nie-zna (last accessed: 30.6.2019).

3. Some theoretical remarks

The judgements under study could be perceived as handbook examples of a hard case, which seems to be obvious considering how many contrary and often unclear principles are involved in their resolution. A more interesting question arises when it is the distinction between the judicial activism and the doctrine of judicial restraint (passivism)[79] that is applied as the interpretative key to the analysis.

The fact that decisions of the common courts and the Polish Supreme Court illustrate the doctrine of judicial activism leave no space for doubts. By establishing the meaning of the applied norms, the courts went beyond their literal meaning and were inclined to "repair" some (real or alleged) defects of the applied provisions to achieve the predetermined end. At least when it comes to the justification of the Supreme Court decision, the legal reasoning took the form of argumentation rather than syllogistic manner of law application. The justifications did not only refer to legal arguments, but also reckoned with possible – in judges' eyes – consequences of the decisions. It could be difficult to resist the impression that (in spite of their assertions) the courts were politically engaged – this phenomenon seems to be particularly evident in the case of the Łódź District Court.

It is clear that the way the cases were decided by the common courts and the Supreme Court is rather liberal than conservative. It is not surprising. The doctrine of judicial activism is traditionally connected with the liberal approach, according to which one of the main functions of the courts is to protect minorities[80]. In contrast, conservatives are usually seen as proponents of the judicial restraint, and *vice versa* – the supporters of the idea of judicial restraint are perceived as conservatives[81].

The analysis of the Polish Constitutional Tribunal judgement brings more unexpected result. The judgement overturned the effects of the decisions of the common courts; as a result, it could be seen as an expression of the conservative approach.

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[79] See L. Morawski, *Legal policy and courts*, in T. Biernat, M. Zirk-Sadowski (eds.), *Politics of Law and Legal Policy. Between Modern and Post-Modern Jurisprudence*, 186-189, (2008).

[80] See F. Ciepły, *Oryginalizm interpretacyjny czy żyjące źródła prawa? Polityczny wymiar aktywizmu sędziowskiego*, 2(46) Forum Prawnicze, 43-44 (2018).

[81] See F. Ciepły, *Oryginalizm interpretacyjny czy żyjące źródła* prawa, 43, cit. at 80.

However, the way it was achieved resembles the approach associated with the judicial activism rather than the application of the doctrine of judicial restraint. If the Constitutional Tribunal's decision was based on the fact that provision in question was not sufficiently clear (not compliant to the rules of good legislation)[82], it would be easy to recall numerous counter-examples of criminal law provisions based on premises that are even more open-texted than article 138 of the Code of Petty Offences. However, doubts about meaning of the analysed provision were not the reason of acknowledging that article 138 is not pursuant to the Constitution. The Tribunal provides us with a rather unusual reasoning in which conjunction of the two factual premises is considered as the sufficient basis of stating that the principle of proportionality (stemming from the rule of *Rechtsstaat* grounded in article 2 of the Polish Constitution) was violated when it comes to article 138 of the Code of Petty Offences. Firstly, the Tribunal admits that offenders committing a deed penalised by the provision are generally granted lenient or not very severe legal consequences. Furthermore, the justification of the judgement recognises the fact of poor effectiveness of the provision as a counter-discrimination measure[83]. Secondly, the Tribunal recognises the problem of ineffectiveness of other counter-discrimination provisions contained in the Polish legal system. The conclusion derived from linking these two facts should be – in my opinion – contrary to the one reached by the Tribunal. Accurate conclusion is closely related to the arguments raised by the Commissioner for Human Rights and it states that when we are faced with the ineffectiveness of legal regulations in a given area, we should not deprive ourselves of any potentially useful instrument. Unfortunately, the result of the Tribunal`s reasoning was opposite.

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[82] The justification of the commented judgement supports this intuition by claiming that "[t]he Tribunal has noticed that the content of concepts included in article 138 is ambiguous. Already when lingual interpretation is applied the provision might raise doubts, especially when the expression «justified reason» of refusal is taken into consideration" (quoted judgement, 9).

[83] To cite: "Article 138 does not fulfil counter-discrimination aims. The analysis of its application confirms that in cases recalling article 138 penalties applied are low, or courts refrain from imposing punishment. As a result, it is hard to consider that the norm has any preventive or educational meaning. It does not realise repressive function as well" (16).

The thesis that the Constitutional Tribunal has overstepped the margin of necessary intervention can be defended. It demonstrates that there is no direct link between the judicial activism and the liberal engagement of the courts (seen in political terms). Albeit the "conservative activism" would rather take the form of counter-measures, it would be aimed at combating legal or social changes supported by liberals[84].

This notion is connected to another remark that should be inferred from the analysed legal dispute. Activity of NGOs appearing as victims in both cases could be perceived as an example of the so-called strategic litigation. (Adam Bodnar, the Commissioner on Human Rights supporting their initiatives, formerly – as human rights activist – applied the strategic litigation in course of his conduct.) The proceedings were directed to publicly expose certain problems of the sexual minority, and this aim was indeed achieved. Moreover, as the cases were won by their initiators, they should be deemed as successful (at least until the Constitutional Tribunal's judgement). However, the strong backlash against the results of the judgements – regardless if genuinely social or supported by the current government – has led to the situation which is – at least from the perspective of the initiators of the proceedings – even worse than before. The thesis that, as a result of the decision of the Constitutional Tribunal, the Polish legal system does not provide minorities with effective measures against discrimination is too severe. However, it is the distant side effect of the strategic litigation conducted by NGOs that actually weakens the potential protection of many groups (not only defined by sexual orientation of the members). It reveals how remarkably disadvantageous is the judicial activism of the courts when driven by strategic litigators. It leads to the conclusion that it is the democratic process that should remain the main tool of social change.

[84] Paradoxically the Tribunal almost directly recalls the doctrine of judicial restraint by saying that: "The character of the raised allegation of inconsistency with the Constitution (lack of proportionality due to aim of the statute) *favours the far-reaching restraint of the Constitutional Tribunal* in its evaluation of the legislator`s actions from the perspective of purposefulness and effectiveness" (11).

V. Conclusions

The judicial branch remains the main area of legal changes as far as the demands of sexual minorities in Poland are concerned. The presented problem is not the only question in which significant changes were achieved. Other examples of such phenomenon include the recognizing of the same-sex partner as the closest person within the meaning of relevant provisions of the Civil Code and Penal Code, which, i.a. had an impact on the issue of the right to continue rent agreements[85] or the right not to testify against a partner. The rulings of courts confirm changes occurring in the sensitive sphere of nomenclature applied to sexual minorities, consequently acknowledging that some ways of naming them are offensive and can be considered a criminal offence[86].

The problem commented in the article distinguishes somehow from abovementioned issues. It unavoidably involves rights and interests of the various parties, which makes it particularly difficult to resolve. In my opinion the Polish Supreme Court coped with such a hard task of balancing interests better than the Constitutional Tribunal; however, we should assume that both judgements are only an introduction to the real discussion over demands of sexual minorities in Poland.

[85] See the ECHR judgement in the case *Kozak v. Poland*, 2 March 2010, application no. 13102/02.

[86] See P. Knut, A. Kwaśniewska, J. Lendzion, K. Michalski, *Prawa osób LGBT w Polsce – orzecznictwo* (2015), accessible: https://kph.org.pl/wp-content/uploads/2016/05/Broszura_KPH_2015_v9_DRUK_bezznacznikow.pdf (last accessed: 2.7.2019).

DEMOCRACY UNDER SIEGE: THE POPULIST FACTOR IN THE CONTEMPORARY CRISIS OF CONSTITUTIONAL DEMOCRACIES

Carlo Alberto Ciaralli[*]

Abstract

The essay analysis the relentless rise of populist political and cultural phenomenon in a global perspective and, mainly, in the political context of EU Member States. Populism, in XXI century, represents a critical challenge for national and EU institutions and, in a broader perspective, for representative democracy itself. Anyway, in essence, what is populism? On closer inspection, populism is not a monolithic phenomenon, but it is a multifactorial experience, where the usual political categories appear undetermined, often mixed and reassembled. The paper aims to study, with a legal perspective and a comparative and multidisciplinary approach, some relevant populist political experiences in the EU space, their communicative and political strategy, the features of their leadership, to better understand its origins, policy contents, differences among various national experiences, political and social perspectives and, indeed, the impact on European constitutional democracy's principles.

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TABLE OF CONTENTS

1. Introduction

For an extended period of time, the populist factor has been studied and analysed as a residual or minority phenomenon in constitutional democracies, especially with reference to the contestation of the institutional, social and economic framework of Western societies. The academic analyses of this political category were mainly focused on the political implications of populist presence in specific societies, especially those with an unstable democracy and subject to constant institutional fluctuations. With the global growth of populist movements and the rise to power of their leadership also in Western liberal democracies, populism has become one of the most relevant contemporary challenges for democratic legal orders. Our time, not only in Europe, is the "golden age" of political, institutional and social populism[1].

Particularly in Europe, populism has produced significant consequences with reference to the functioning of institutions,

[1] With reference to the rise of populism and its "hegemonic diffusion" in Western liberal democracies, see, among others, E. Laclau, *On Populist Reason* (2005); M. Rooduijn, S.L. de Lange & W. van der Brug, *A populist Zeitgeist? Programmatic Contagion by Populist Parties in Western Europe*, 20 (4) *Party Politics* 563 ff. (2014); Y. Stavrakakis, *Populism and Hegemony*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 536 ff.; T. Lochocki, *The Rise of Populism in Western Europe* (2018).

social and political approach to contemporary global issues and political parties' role[2].

First of all, in these pages I would like to point out that populism is not only a mere political or "ideological" form of protest against the *status quo* (understood as a political and economic ruling class and as a political system), but it is an original political evolution of nationalist political approach (especially the right-wing populism), from which it partially differs to assume original and innovative features. Populism is not always a threat for democracy. This phenomenon could also arise in libertarian forms against authoritarian regimes or illiberal governments. However, the concrete experience leads us to believe that the majority forms of populism in Europe and, more broadly, in a global dimension (nowadays, the right-wing populism) can produce a direct or indirect contrast with principles, values and procedural rules of constitutional democracies.

In this way, some factual experiences of populists in power show us that the fundamental constitutional principles are in a serious threat, due to the populist intent of change national Constitutions, in order to better deploy their political action and to achieve their institutional and electoral goals. In this sense, in accordance with the suggestion proposed by Landau, «constitutional change under populism carries out three core functions: deconstructing the existing political regime, serving as an ideological critique that promises to overcome flaws in the prior constitutional order, and consolidating power in the hands of the populist leadership»[3].

In this framework, the same constitutional role played by political parties is questioned. Populism is reaching its goal of "replacing" political parties in the society through innovative

[2] An interesting research on the origins of populist phenomenon in a comparative perspective (with particular reference to the United States and Europe experiences) is offered by N. Urbinati, *Democracy and Populism*, 5 (1) *Constellations* 110 ff. (1998). On this topic, see also K.P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 *S. Clara L. Rev.* 1037 ff. (2001); C. Mudde, C. Rovira Kaltwasser, *Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America*, 48 (2) *Gov. Oppos.* 147 ff. (2013).

[3] D. Landau, *Populist Constitutions*, 85 *Univ. Chi. L. Rev.* 521 ff., 522 (2018).

communication methods and cultural models, disrupting the "politically correct" cage that has often imprisoned the traditional political parties. In a constitutional perspective, political parties are the fundamental and "natural" transmission chain between "power" and "people". The disintermediation process, favoured by populist approach and new technologies applied to political communication and procedure, constitutes a relevant issue for the preservation of democratic representation system.

In parallel, I argue that the globalisation process has played a crucial role in the process of social and institutional proliferation of populist "political methodology" in Western societies. In this way, with particular reference to the Eastern Europe area, the combination between globalisation process and the "traumatic" shift from socialist system to liberal democracy has also produced a certain upsurge of nationalist tendencies which stand in contrast with the common European project. In this sense, in order to tackle the institutional challenges of populism, I claim that the main way is the strengthening of democracy (in its double sense, formal and substantive), neutralising institutional and social critical factors that make the populist appeal so strong in Western societies.

In this way, despite the differences due to the national specificities, the progressive growth of populism in Western societies is a "warning signal" of the sustainability of "traditional" constitutional model in the new global scenario. Global constitutionalism and its fundamental principles could be the necessary therapy against nationalist tendencies and closed attitudes, in order to guarantee a new type of global democratic model, based on the respect of civil freedoms, social rights and the rule of law. In essence, the present study aims to explore, with a legal, comparative and multidisciplinary approach, the main features of populist phenomenon in order to understand its origins, policy contents, differences among the various national experiences, political and social perspectives and, indeed, the impact on European constitutional democracy's principles and national legal orders.

2. Populism, nationalism and democracy

The conceptual debate about populism is related to its real categorisation as a political, legal and social phenomenon. With reference to the mere textual data, the first impression is to be in front of a political phenomenon that places *demos* at the centre of its own ideological approach. In a famous essay published in 1966, the Italian political scholar Giovanni Sartori was the first one to emphasise the existence of a political pattern called "anti-system party"[4], understood as a political and social force organised in a political movement or party that stands in a radical opposition to national and supranational economic, social and political framework ("political order")[5]. In this sense, when we talk about the populist political movements and parties, we refer to really different political experiences with dissimilar "ideological" backgrounds[6].

Populism is a composite and heterogeneous political factor and it can be analysed under various cultural and academic perspectives[7]. However, an academic categorisation of "populism"[8] is proposed by Cas Mudde, according to which

[4] With reference to the different meanings of "anti-system parties", see, among others, the analysis proposed by M. Zulianello, *Anti-System Parties Revisited: Concept Formation and Guidelines for Empirical Research*, 53 (4) *Gov. Oppos.* 653 ff. (2018).

[5] G. Sartori, *European Political Parties: The Case of Polarized Pluralism*, in J. La Palombara, M. Weiner (eds.), *Political Parties and Political Development* (1966), 137 ff. In this way, see also M. Canovan, *Populism* (1981).

[6] Populist national experiences can arise from left-wing movements, right-wing movements or, third way, from antipolitics protest (without a "traditional" political background) against the old national and supranational political leaderships. A remarkable study relating to the various typologies of populist parties is proposed by P. Norris, *Varieties of populist parties*, 45 (9-10) *Philos. Soc. Crit.* 981 ff. (2019).

[7] On the distinguishing features of radical right in Europe (before the contemporary rise of right-wing populism), see C. Mudde, *The Ideology of the Extreme Right* (2000). On the right-wing populism in Europe, see also H.G. Betz, *Radical Right-Wing Populism in Western Europe* (1994).

[8] With reference to the different meanings of the word "populism" in the United States, South America and Western Europe academic debate, see the remarkable analysis of M. Rooduijn, *The Nucleus of Populism: in Search of the Lowest Common Denominator*, 49 (4) *Gov. Oppos.* 573 ff. (2014). On this topic, see also I. Balcere, *What Does Populism Really Mean? A Political Science Perspective*, in A. Kudors, A. Pabriks (eds.), *The Rise of Populism: Lessons for the European Union and the United States of America* (2017), 17 ff.

populism must be understood as «an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'pure people' versus 'corrupt elite'[9], and which argues that politics should be an expression of the *volonté générale* (general will) of the people»[10]. In this way, we can talk of a real one "barrier axiom", based on a rigid, Manichean, division between good and bad, *demos* and ruling power, democratic and antidemocratic. The barrier axiom is an essential pillar in populist rhetoric and action. Populist players need a political "enemy" to attack, proposing themselves as the only one political alternative legitimised by the people and skilled for troubleshooting[11]. A political and popular alternative legitimised by popular consensus.

A great part of the academic literature underlines how it is extremely complex to identify an accurate description of populist phenomenon, especially with reference to the populism understood as an authentic "political ideology" or, in a different mean, a peculiar "political strategy" [12]. In this multifaceted

[9] Regarding to the "elites theory" in Western societies see, among others, C. Wright Mills, *The Power Élite* (1956); P. Bachrach, *The Theory of Democratic Elitism* (1967); T.B. Bottomore, *Elites and Societies* (1977); H.D. Lasswell, A. Kaplan, *Power and Society: A Framework for Political Inquiry* (1977); S.J. Eldersveld, *Political Elites in Modern Societies* (1989); L. Garrido Vergara, *Elites, Political Elites and Social Change in Modern Societies*, 28 *Rev. Sociología* 31 ff. (2013); M. Tomsic, *Elites in the New Democracies* (2016).

[10] C. Mudde, *The Populist Zeitgeist*, 39 (4) *Gov. Oppos.* 541 ff., 543 (2004). With reference to the academic categorisation of populist phenomenon, see also J. Hopkin, M. Blyth, *The Global Economics of European Populism: Growth Regimes and Party System Change in Europe*, 54 (2) *Gov. Oppos.* 193 ff. (2018).

[11] In this way, it is relevant to emphasise the suggestions proposed by J.L. Cohen, *Hollow Parties and their Movement-ization: The Populist Conundrum*, 45 (9-10) *Philos. Soc. Crit.* 1084 ff. (2019).

[12] Barr, among others, defines populism not as a real "political ideology", but as a specific "political strategy". See, in this sense, R.R. Barr, *Populism as a Political Strategy*, in C. de la Torre (ed.), *The Routledge International Handbook of Global Populism* (2019), 44 ff. In this way, see also H. Kriesi, *Populism. Concepts and Conditions for its Rise in Europe*, 2 *Com. Pol.* 175 ff. (2015); P. Aslanidis, *Is Populism an Ideology? Refutation and a New Perspective*, 64 (1 suppl.) *Pol. Stud.* 88 ff. (2016); B. Bonikowski, *Three Lessons of Contemporary Populism in Europe and the United States*, 23 (1) *BJWA* 9 ff. (2016). However, in the opinion of L. Bustikova, P. Guasti, *The State as a Firm: Understanding the Autocratic Roots of Technocratic Populism*, 33 (2) *East Eur. Pol. Soc. Cult.* 302 ff., 306 (2019), populism «is both an ideology and a strategy». On this topic, see also J. Frank, *Populism*

scenario, trying to give a "satisfactory" explanation of populist phenomenon (despite the "definitional precariousness" of this phenomenon)[13], it can be argued that populism is the political, social, legal and economic phenomenon in strong opposition to supranational and national ruling elites (in the framework of a liberal representative democracy or even an authoritarian or illiberal regime) that aims to overcome the *status quo* in order to restore the effective decision-making power to the people. On the other hand, some academic scholars argue that similar experiences such as the current political form called "populism", in the history of Western liberal democracies, have not always been harmful to democracy[14].

As a general rule, populism is a global political and social factor that can arise from the crisis of constitutional democracies, but it is not a distorting component of democracy or innately existent in it. It is a political, social, economic and legal experience which has its own life[15].

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and Praxis, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 630 ff.

[13] The conceptual difficulty to identify some common features among the various populist experiences and, at the same time, to develop a correct categorisation of populist phenomenon is underlined by S. Tormey, *Populism: Democracy's Pharmakon?*, 39 (3) *Pol. Stud.* 260 ff., 270 (2018), according to which populism «has to be understood as one kind of politics, one approach among other approaches, whether technocratic or elitist – or indeed "horizontal" and leaderless».

[14] In this way, see M. Laruffa, *The Absolutist Dream of Democracies in Crisis. The Political Culture Inspiring Soft and Hard Populism*, 2 *Pol. Soc.* 269 ff. (2019). Particularly, the Author refers to the seventh President of the United States of America, Andrew Jackson, and his political movement, the so-called "Jacksonian". In the same way, with reference to the dynamics of contemporary representative democracy, G. Cerrina Feroni, *Ripensare la democrazia rappresentativa. Aldilà del "mito" populista*, 2 *Oss. Fonti* 1 ff. (2019), suggests that populist phenomenon should not only be understood in a "negative" perspective. In this regard, the Author highlights that a "democratic populism", in the framework of a "mature democracy", could be an "effective 'tonic' for the constitutional State". In opposition to the latter approach, see, among others, A. Mueller, *The Meaning of 'Populism'*, 45 (9-10) *Philos. Soc. Crit.* 1025 ff. (2019).

[15] It is relevant to emphasise the original approach proposed by R.S. Jansen, *Populist Mobilization: A New Theoretical Approach to Populism*, 29 (2) *Sociol. Theory* 75 ff., 81 (2011), which proposes a different analytical plan, based on the «shift away from the problematic notion of "populism" and toward the concept of populist mobilization».

Secondly, populism is not a social factor presents exclusively in Western liberal democracies, but it can be born and grow under illiberal regimes[16] as well, as a reaction to the lack of freedom and democracy generated by an authoritarian and illiberal national establishment[17]. Hypothetically, populism could be a "good option" to counteract despotic governments and inspire a progressive return to constitutional democracy[18]. In this context, the populist method is linked to the need to save democracy from undemocratic ruling classes and authoritarian governments[19].

The conflict between "oppressed people" and "oppressive elites" is the cornerstone of populist political approach[20]. Populist political movements and parties shake democratic institutions' foundations, criticising the closed attitude of elites to the *demos*

[16] In accordance with the approach proposed by C. Pinelli, *Illiberal Regimes in the Perspective of Comparative Constitutionalism*, 1 *Riv. Dir. Comp.* 3 ff., 3 (2017), it can be argued that «illiberal regimes are generally defined as regimes in which neither democracy nor fundamental rights are granted, and in which rule of law is substantially disregarded».

[17] In this way, see K.M. Roberts, *Populism and Political Representation*, in C. Lancaster, N. Van de Walle (eds.), *The Oxford Handbook of the Politics of Development* (2018), 518 ff. An original approach to the "diarchic character" of contemporary populism is proposed by N. Urbinati, *Populism and the Principle of Majority*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 572 ff.

[18] On this point, see in particular E. Mavrozacharakis, *Populism and Democracy: An Ambiguous Relationship*, 7 (4) *EQPAM* 19 ff. (2018).

[19] With reference to this profile, see, among others, A. Arato, *How we got here? Transition Failures, their Causes and the Populist Interest in the Constitution*, 45 (9-10) *Philos. Soc. Crit.* 1106 ff., 1111 (2019). In this way, the Author also emphasises that the populist approach is not always aimed at strengthening the democratic process. In fact, in accordance with the analysis proposed by Arato, «when there is social resistance and even mobilization against those in power, and especially as conflicts with the host ideologies and their carriers emerge, free and fair democratic elections become a threat, and authoritarian options easily come to be favored by populist governments».

[20] In this way, in accordance with the suggestion proposed by C. Mudde, C. Rovira Kaltwasser, *Populism*, in M. Freeden, M. Stears (eds.), *The Oxford Handbook of Political Ideologies* (2013), 494 ff., 503, it can be claimed that «most populists not only detest the political establishment, but will also critique the economic elite, the cultural elite, and the media elite. All of these are portrayed as being one homogeneous corrupt group that works against the 'general will' of the people».

and the abyssal distance between citizens and ruling elites[21]. With reference to the relationship between democracy and populism, it is relevant to emphasise the relevant role played by the legal category of "pluralism"[22]; as is well known, pluralism is a key principle of contemporary Western liberal democracies. The populist movements and parties do not deny, *prima facie*, the constitutional principle of political pluralism; nevertheless, in their arguments can be clearly seen the purpose to delegitimise any political actor who supports a different thesis from his own. In the populist frame it is possible to identify the theoretical foundations of an authentic "constitutional theory", based on three fundamental elements, "constituent power", "popular sovereignty" and "constitutional identity"[23].

These key elements represent the populist legal approach to democratic institutions, the connecting point between

[21] In this framework, regarding the different approaches on the relationship between populism and democracy, P. Blokker, *Populist Nationalism, Anti-Europeanism, Post-nationalism, and the East-West Distinction*, 6 (2) *German L.J.* 371 ff., 379 (2005), underlines that «populism should be understood as entailing a rather one-sided and particular view of democracy, emphasizing its emancipatory, redemptive features, rather than the fulfilment of ideal democracy. In contrast, the 'pragmatic' view of democracy is about order and the rule of law, and in this sense emphasises an opposed but equally one-sided view of democracy». On this topic, see also K. Abts, S. Rummens, *Populism versus Democracy*, 55 *Pol. Stud.* (2007), 405 ff.; N. Lacey, *Populism and the Rule of Law*, 15 *Ann. Rev. L. Soc. Sci.* 79 ff. (2019); C. Pinelli, *The Rise of Populism and the Malaise of Democracy*, in S. Garben, I. Govaere & P. Nemitz (eds.), *Critical Reflections on Constitutional Democracy in the European Union* (2019), 27 ff.

[22] With reference to the category of "pluralism" as a fundamental pillar of Western legal orders, see, among others, K.D. McRae, *The Plural Society and the Western Political Tradition*, 12 (4) *Can. J. Pol. Sci.* 675 ff. (1979); J. Griffiths, *What is Legal Pluralism?*, 18 *J. Leg. Plur. Unoff. L.* 1 ff. (1986); S.E. Merry, *Legal Pluralism*, 22 (5) *L. Soc. Rev.* 869 ff. (1988); G. Teubner, *Global Bukowina: Legal Pluralism in the World-Society*, in G. Teubner (ed.), *Global Law Without a State* (1997), 3 ff.; M. Davies, *Legal Pluralism*, in P. Cane, H.M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (2010); P.S. Berman, *Global Legal Pluralism*, 80 *S. Cal. L. Rev.* 1155 ff. (2007); G. Swenson, *Legal Pluralism in Theory and Practice*, 20 (3) *Int'l Stud. Rev.* 438 ff. (2018); K. von Benda-Beckmann, B. Turner, *Legal Pluralism, Social Theory, and the State*, 50 (3) *J. Leg. Plur. Unoff. L.* 255 ff. (2018).

[23] In this sense L. Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 (1) *Eur. Const. L. Rev.* 6 ff., 8 (2016). On this topic, see also D. Kelly, *Populism and the History of Popular Sovereignty*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 512 ff.

constitutional framework and political model[24]. In this way, populists utilise the category of popular sovereignty to support the continuous recall to the electoral phase and the strong criticism towards supranational and nonelected institutions. With reference to the populist cultural approach, constitutional identity represents the national legal and historical traditions that populists utilise to defend the category of "national identity" against any political actors who would like to affirm a general project of multicultural society[25].

In the field of populist theoretical approach, national Parliaments are described as bodies unable to give concrete and real answers to the needs of the people. In this sense, this type of attitude involves the implementation of direct democracy tools, often with opaque (or not completely transparent) decision-making procedures[26]. In this way, Mudde and Rovira Kaltwasser talk about an "elective affinity" between populism and direct democracy[27].

In this sense, in accordance with the analysis proposed by Bilancia, the populist phenomenon should be interpreted as «no more than the most evident output of the distance between the people and the intellectual aristocracy of the governing bodies»[28].

[24] In this way, see the remarkable analysis proposed by L. Corso, *What does Populism have to do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions*, 2 *Riv. Fil. Dir.* 443 ff. (2014).

[25] A populist ideological pillar at the basis of the American and European far-right populist experiences is the theory of "nativism": in essence, in every national experience the prevalence must be recognised to native citizens and, on the other hand, migration policies should be reduced to a minimum or even completely stopped. This approach is substantially based on the fear that the "cultural amalgam" could hybridise or destroy local cultures and traditions on which the society hinges. In essence, populist model is based on the rejection of globalism theory and the idea of a multicultural society. Particularly, right-wing populist political movements and parties propose a cultural approach based on the "defensive closure" and on the electoral slogan "owners at home" or "stop the migrant invasion". In this regard, see, among others, C. Mudde, *Populist Radical Right Parties in Europe* (2007).

[26] In this way, see, among others, M. Belov, *Direct Democracy and European Integration*, in S. Knezevic, M. Nastic (eds.), *Globalisation and Law* (2017), 19 ff.; K. Sengul, *Populism, Democracy, Political Style and Post-truth: Issues for Communication Research*, 5 (1) *Comm. Res. Prac.* 88 ff. (2019).

[27] C. Mudde, C. Rovira Kaltwasser, *Populism*, cit. at 20, 505.

[28] F. Bilancia, *The Constitutional Dimension of Democracy within a Democratic Society*, 11 (1) *IJPL* 8 ff., 21 (2019).

Nevertheless, the continuous recall made by populist political movements to the instruments of direct democracy does not necessarily mean a clear separation between populist voters[29] and non-populist voters[30]. The populist ideological approach is strongly oriented to the enhancement of instruments of direct democracy and, on the other hand, to denouncing the contradiction between popular will and ruling classes[31].

Anyway, although they often coincide, populism does not always coincide with nationalism. Populism and nationalism are different political categories, despite populism has gathered many elements present in nationalist movements (the ambition to the national supremacy in international competition, defense of national identity, refusal to integrate cultural elements other than natives). In this regard, an erroneous "conflation" has often been made between the categories of nationalism and populism[32]. In

[29] For an empirical study related to the political intentions of young people voters (and their opinion on the populist political movements and parties), see G. Pollock, T. Brock & M. Ellison, *Populism, Ideology and Contradiction: Mapping Young People's Political Views*, 63 (2) *Sociol. Rev.* 141 ff. (2015).

[30] With reference to this point, see in particular K. Jacobs, A. Akkerman & A. Zaslove, *The Voice of Populist People? Referendum Preferences, Practices and Populist Attitudes*, 53 (4) *Acta Politica* 517 ff. (2018).

[31] However, the constant reference of populist political movements and parties to forms of direct democracy does not always prove to be founded on solid reasons. In this way, taking a cue from the analysis of C. Pinelli, *The Populist Challenge to Constitutional Democracy*, 7 (1) *Eur. Const. L. Rev.* 5 ff., 11 (2011), it can be argued that «contemporary populist movements and parties are far from proposing alternative solutions to representation as practiced in constitutional democracies, nor necessarily favour the referendum, in spite of it frequently being believed as restoring democracy to the people. To the contrary, they regularly participate in elections and accept the rules of the representative system». In this way, see also F. Graef, *Populists as Strangers: How the 'Politics of the Extraordinary' Challenges Representative Democracy in Europe*, 09 *Dahrendorf FWP* 1 ff. (2019).

[32] In accordance with the analysis proposed by B. de Cleen, Y. Stavrakakis, *Distinctions and Articulations: A Discourse Theoretical Framework for the Study of Populism and Nationalism*, 24 (4) *J. Eur. Inst. Comm. Cult.* 301 ff., 303 (2017), this "conflation" is generated because «populist political parties and movements usually operate on a national level, the populist appeal to "the people" (like democratic appeals to "the people" in general) tends to be an appeal to a "people" defined on the level of the nation-state. Moreover, both nationalism and populism revolve around the sovereignty of "the people", with the same signifier often being used to refer to "the people" in both the populist and the nationalist sense».

fact, there are significant differences between these political concepts. Nationalist approach is based on the concept of "nation", as a "superior" entity, in which a people with common language, culture, history and tradition joins together to defend their internal historical heritage against "foreign enemies". Nationalist movements do not reject the presence of a national ruling elite, but contrast the foreign ruling elites in competition with the internal ruling class[33].

The other way around, in the populist vision there is a deep opposition between "people" and "ruling elites", at national and supranational level. The cornerstone of populist approach is based on the negation of political and institutional legitimacy of each elite, seen as usurpers of the authentic power of *demos* (especially if not democratically elected).

The political organisations of contemporary radical right have had a progressive evolution of their language and their political methods. In particular, the gradual convergence between populist and nationalist approach has contributed to the formation of a hybrid form of political "ideology", which attempts to reconcile the new social needs with the roots of 20th century right-wing nationalism. Regarding to the contact points between populism and nationalism, another relevant profile is related to the identification of the supremacy of "people" (against ruling elites) and the restatement of the "supreme" value of "national sovereignty" [34]. In this framework, it can be argued that the

[33] According to the nationalist approach, the enemies are not only "elites" or "technocrats". The target of nationalist politics is not the reaffirmation of people's sovereignty as such, but the recognition of the supreme position of the concept of nation. In this sense, see D. Stockemer, *Conclusion*, in D. Stockemer (ed.), *Populism Around the World. A Comparative Perspective* (2019), 125 ff.

[34] With reference to the legal and political category of "sovereignty", analysed in the light of contemporary global changes, see, among others, D.A. Smith, D.J. Solinger & S.C. Topik (eds.), *States and Sovereignty in the Global Economy* (1999); W. Twining, *Globalisation and Legal Theory* (2000); G. Simonovic, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 (3) *Ga. J. Int'l & Comp. L.* 381 ff. (2000); E. Ip, *Globalization and the Future of the Law of the Sovereign State*, 8 (3) *Int'l J. Const. L.* 636 ff. (2010); M. Troper, *Sovereignty*, in M. Rosenfeld, A. Sajò (eds.), *The Oxford Handbook of Comparative Constitutional Law* (2012), 350 ff.; J.L. Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy and Constitutionalism* (2012); L.E. Grinin, *New Basics of State Order or Why do States Lose Their Sovereignty in the Age of Globalization*, 3 (1) *J. Glob. Stud.* 3 ff. (2012); J. Westaway, *Globalization, Sovereignty and Social Unrest*, 5 (2) *J. Pol. & L.* 132 ff. (2012); R.

category of sovereignty is a concept structurally connected to the origin and evolution of modern State and, in the last two centuries, to the consolidation of representative democracy in Western societies[35]. National sovereignty and representative democracy, in this sense, are categories that have developed and interweaved over the years, to become the qualifying elements of modern Western democracies[36].

3. Disintermediation, post-ideological societies and crisis of political parties

The rise of populist and nationalist political movements and parties is, parallelly, the crisis of traditional political parties and, in general, of traditional instruments of democratic representation. Moreover, populist political movements and parties require a "big-man" that, only himself, can speak with the people and solve citizens' problems. The fundamental role played by leadership in populist rhetoric is based on the originality and innovativeness that populist model has imposed in national and international political scenario[37].

Rawlings, P. Leyland & A. Young (eds.), *Sovereignty and the Law – Domestic, European, and International Perspectives* (2013); J.D. van der Vyver, *Sovereignty*, in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013), 380 ff.; S.D. Krasner, *The Persistence of State Sovereignty*, in O. Fioretos, T.G. Falleti & A. Sheingate (eds.), *The Oxford Handbook of Historical Institutionalism* (2016), 523 ff.; A. Stein, *The Great Trilemma: Are Globalization, Democracy, and Sovereignty Compatible?*, 8 (2) *Int'l Theory* 297 ff. (2016); G. Gee, A.L. Young, *Regaining Sovereignty? Brexit, the UK Parliament and the Common Law*, 22 *Eur. Pub. L.* 131 ff. (2016); J. Agnew, *Globalization and Sovereignty. Beyond the Territorial Trap* (2017).

[35] With regard to the relationship between sovereignty and constitutionalism, see in particular N. Walker, *Sovereignty and Beyond: The Double Edge of External Constitutionalism*, 58 *Va. J. Int'l L.* 799 ff. (2018).

[36] Indeed, several scholars emphasise that the categories of sovereignty and democracy are nodal points of populist and nationalist theoretical and dialectical approach. On this profile see, among others, T. Macdonald, *Sovereignty, Democracy, and Global Political Legitimacy*, in C. Brown, R. Eckersley (eds.), *The Oxford Handbook of International Political Theory* (2018), 401 ff.

[37] In this sense, taking a cue from the analysis proposed by K. Weyland, *Populism: A Political-Strategic Approach*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 49 ff., 61, it can be argued that «the central role of personalistic leadership, which allows the leader great latitude for opportunistic calculations and

Furthermore, the populist rise, as is well known, coincided also with the decline of traditional political parties. It is relevant to emphasise that traditional political parties are in difficulty to represent the renewed demands coming from society and, in this way, voters move towards more radical and not politically correct electoral positions. The crisis of political parties should not be understood as the only factor in the growth process and spread of populist political approach. However, the inability of contemporary political parties to grasp the intense discomfort of large part of public opinion has contributed over the years to bringing citizens to populist model and its political practices. At the same time, voters cannot be blamed for this dynamic, arguing that the majority of electoral supporters of populist political movements and parties are people with a low level of education[38]. From a theoretical perspective, in a liberal and constitutional democracy, this is not a valid argument. First of all, in the field of electoral competition, European constitutional democracies do not make differences among citizens (especially, for their personal wealth, status or assets) and, on the other hand, do not make differences based on the qualification obtained[39].

The central point of this profile is related to the correct comprehension of this electoral tendency and why the traditional political parties fail to achieve the popular *favor* (also) of disadvantaged social classes. In this way, populist political movements and parties do not join a specific traditional ideology and, for this reason, they are free to speak with a basic and simplified language to an indistinct mass of people. In this respect, populism tends to be critical of democratic institutions, seeking direct contact between leader and citizens.

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manoeuvrings, also gives populism the striking unpredictability, shiftiness, and disorganization in the exercise of government power and in public policy-making that observers have noted».

[38] In this way, see the analysis of K.L. Scheppele, *The Opportunism of Populists and the Defense of Constitutional Liberalism*, 20 (3) *German L.J.* 314 ff. (2019). See also A. Akkerman, C. Mudde & A. Zaslove, *How Populist Are the People? Measuring Populist Attitudes in Voters*, 47 (9) *Comp. Pol. Stud.* 1324 ff. (2014).

[39] With reference to the political leadership selection methods, it is relevant to underline the remarkable analysis of S. Gardbaum, R.H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 (4) *N.Y.U.L. Rev.* 647 ff. (2018).

Their political approach is centred in a strong opposition to the ruling elites, often claiming to be "neither right nor left", in the framework of so-called "post-ideological society". In this sense, some academic scholars, referring to a new political approach, talk about a "thin-centred" ideology, based on the simultaneous presence of ideas and suggestions originally belonging to extremely different ideologies[40]. Based on what has been argued so far, it can be claimed that the historical and ideological background of populism is quite limited. The ability to adopt, when required, any type of political attitude, adapting superficially to the demands of the *demos*, makes populist political movements and parties difficult to counteract on the level of a political dialectic that looks at the needs of the future and not only at the needs of the present time.

In the opinion of some academic scholars, a relevant critical point of contemporary Western democracies concerns the electoral power of populist political movements and parties and the related threats against supranational and, particularly, national democratic institutions. The appeal to the "people" is a central element in populist rhetoric. An appeal to the popular pronouncement, disintermediated from any kind of intermediation carried out by political parties, political institutions or, of course, intermediate bodies[41], delegitimizing the traditional role played by political parties in Western liberal democracy[42].

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[40] A relevant definition of "thin-centred" ideology is proposed by B. Kramer, *Populist Online Practices: The Function of the Internet in Right-wing Populism*, 20 (9) *Inf. Commun. Soc.* 1293 ff. (2017). On this topic, see also C. Noble, G. Ottmann, *National Populism and Social Work*, 3 (3) *J. Hum. Rts. Soc. Work* 112 ff. (2018).

[41] With reference to the relationship between populist leadership and *demos* and the role played by the intermediate bodies or institutions, in accordance with the analysis proposed by M. Rooduijn, *The Nucleus of Populism: in Search of the Lowest Common Denominator*, cit. at 8, 557, it could be argued that «populists want to get rid of intermediate institutions and organizations that stand in the way of a direct relationship between themselves and their followers».

[42] In this way, based on the analysis proposed by T. Fournier, *From Rhetoric to Action, a Constitutional Analysis of Populism*, 20 (3) *German L.J.* 362 ff., 365 (2019), it could be argued that the leadership of populist political movements and parties tends to homogenise the "demos", establishing a direct relationship with the people without mediation, given that «populist rhetoric refuses any pluralistic vision of the majority. Populist leaders claim to be the spokesperson of the Nation which, because of its unity, can have only one representative».

Furthermore, on this issue there are two key points. On the one hand, the populist idea of disintermediation between leadership and people[43]. On the other hand, the refusal of a heterogeneous social context, proposing a unitary social and cultural model, in which leadership becomes "spokesman" of the people. In this way, it is crucial to emphasise the "paradox of populism" proposed by Urbinati, according to which the paradox of populism concerns the circumstance for which «as a movement, it arises as intense partisanship when rallies against existing parties; but its inner ambition is towards incorporating the largest number to become the only-party-of-the-people and dwarf all partisan affiliations and party opposition»[44]. In this regard, populism aims to be recognised as the only one representative political force of *demos*.

In this frame, "disintermediation" is another relevant keyword for a better comprehension of populist approach related to the "old politics". But, at a closer inspection, "disintermediation" does not represent the main factor for overcoming representative democracy, which still remains the essential tool to connect *demos* to legislative and political powers in Western constitutional democracies[45].

In the age of populism and disintermediation process, it is relevant to underline the role played by social networks in the current political and institutional framework. With the appearance of an "unmediated" or "disintermediated" method of political communication, political leaders can speak directly to voters, bypassing press, radio and, in more recent years, television. In the contemporary age, politics communication is the most important activity of each political organisation. An effective transmission

[43] A concrete responsibility must be recognised to the ruling elites and political parties, guilty of having often legitimised an attitude very close to the "institutional rupture", relying only on the weapon of "politically correct" language. In this way, see B. Crick, *Populism, Politics and Democracy*, 12 (5) *Democratization* 625 ff. (2005).

[44] See N. Urbinati, *Liquid Parties, Dense Populism*, 45 (9-10) *Philos. Soc. Crit.* 1069 ff., 1075 (2019).

[45] In this regard, see B. Moffitt, *Populism 2.0. Social Media and the False Allure of 'Unmediated' Representation*, in G. Fitzi, J. Mackert & B.S. Turner (eds.), *Populism and the Crisis of Democracy* (2018), 30 ff.

creates a powerful political message[46]. In this regard, the most relevant point about political communication concerns the means by which the political message is conveyed[47].

The importance of (multimedia) communication in the current political dialectic is confirmed by the phenomenon of "fake news" (digital disinformation), by which a strong sense of social hatred is directed and channelled, especially towards the elites in power. It must be emphasised that a correct "control" of information sources, especially in digital era, plays a crucial role in a correct information of citizens and prevents public opinion from choosing one political movement over another, based on erroneous or, at worst, artfully created information[48].

At the time of social networks, such political delegitimization can also take place through personal attacks directed towards other political leaders. In the above-mentioned traditional mass media there is (there was?) a filter, represented by press, between voters and political leadership. In this sense, it must be further emphasised that the new media have profoundly changed the people's way of thinking, their customs and behaviours, even how to read and understand political and social events[49]. A "daily social storytelling" in opposition to the ruling elites and citizens' common sense, with the evident target to

[46] On this topic, see, among others, M. Ekström, M. Patrona & J. Thornborrow, *Right-wing Populism and the Dynamics of Style: A Discourse-analytic Perspective on Mediated Political Performances*, 4 (1) *Palgrave Commun.* 1 ff. (2018).

[47] In this way, see the analysis proposed by W.P. Nagan, S.R. Manausa, *The Rise of Rightwing Populism in Europe and the United States*, 6 (10) *Int'l J. Soc. Sci. Stud.* 50 ff. (2018).

[48] In this sense, it is important to emphasise the Report "A multi-dimensional approach to disinformation", released by the European Commission's High-Level Group on Fake News and Online Disinformation (HLEG) in March 2018. In this way, the Report utilises the word "disinformation", because the use of the term "fake news" could be "misleading". On this topic, see, among others, O. Pollicino, E. Bietti, *Truth and Deception Across the Atlantic: A Roadmap of Disinformation in the US and Europe*, 11 (1) *IJPL* 43 ff. (2019).

[49] On this point, in accordance with the suggestion proposed by C. Pinelli, *The Populist Challenge to Constitutional Democracy*, cit. at 31, 7, it is relevant to underline that «the decline of ideologies and social classes of the past century has been accelerated by, and complemented with, the advent of communicative systems that are believed to structure the public debate in terms of singular events rather than of principles, thus supplying the awareness of a common future with mediatically driven perceptions».

achieve electoral consensus and a growing cultural influence in the social body[50].

Populist leaders are often skilled communicators and, avoiding the mediation circuit, they pursue the target of spreading their messages directly to voters and dialogue in real time with citizens. In this way, it could be argued that right-wing populist political movements and parties (and their political leaderships) are very skilled to exploit the potentiality of new technologies[51] and, consequentially, to spread their political messages[52].

4. The populist phenomenon in time of globalisation and economic and financial crisis

The severe economic and financial crisis, "detonated" in United States since 2007 as crisis of private debt, has gradually expanded to European States, especially in Euro-Mediterranean area, in form of sovereign debt crisis[53]. European Union Member

[50] In this framework, E. De Blasio, M. Sorice, *Populism Between Direct Democracy and the Technological Myth*, 4 (15) *Palgrave Commun.* 1 ff. (2018), talk about "technopopulism", in order to emphasise the importance of the new social media in the populist rhetoric and popular consensus. In this way, see also A. Rozukalne, *Is Populism Related Content the New Guilty Pleasure for Media and its Audiences?*, in A. Kudors, A. Pabriks (eds.), *The Rise of Populism: Lessons for the European Union and the United States of America* (2017), 37 ff.

[51] On this point, see the remarkable and innovative study proposed by A. Adimi Gikay, C.G. Stanescu, *Technological Populism and Its Archetypes: Blockchain and Cryptocurrencies*, 2 *Nordic J. Com. L.* 66 ff. (2019).

[52] With reference to the populist social and communicative strategies, see, among others, P. Ostiguy, *Populism: A Socio-Cultural Approach*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 74 ff.; T. Aalberg, F. Esser, C. Reinemann, J. Strömbäck & C.H. de Vreese (eds.), *Populist Political Communication in Europe* (2017); M. Mancosu, *Populism, Emotionalized Blame Attribution and Selective Exposure in Social Media*, 1 *Com. Pol.* 73 ff. (2018); G. Mazzoleni, R. Bracciale, *Socially Mediated Populism: The Communicative Strategies of Political Leaders on Facebook*, 4 (50) *Palgrave Commun.* 1 ff. (2018); S. Waisbord, *Populism as Media and Communication Phenomenon*, in C. de la Torre (ed.), *The Routledge International Handbook of Global Populism* (2019), 221 ff. Moreover, the contemporary approach of politics and economics to the new mass media induces further analytical studies on the real extent of messages conveyed by communication tools. In this way, see D. Yarrow, *Progressive Responses to Populism: A Polanyian Critique of Liberal Discourse*, 88 (4) *Pol. Q.* 570 ff. (2017).

[53] On the detonation of private debt as a trigger for the economic and financial crisis, see A. Pettifor, *Debtonation: how globalisation dies*, *Opendemocracy.net*

States found themselves essentially unfit to manage this global crisis. Conditioning measures on national economic policies decided by European Union institutions have been increasingly implemented by Maastricht Treaty in 1992, the adoption, in 1997, of Stability and Growth Pact, and even intensified through the Treaty on the Functioning of the European Union, in 2009.

Basically, economic policies of Member States are developed as part of a "multilevel constitutionalism"[54], on which the targets inherent deficit and public debt, that Member States are called to implement, are first established at supranational level and then accomplished by each Member State, whatever the internal allocation of powers between State and decentralised entities takes.

On the other hand, the role played by political actors and public decision makers has been progressively weakened. The increasing shift of decision-making level from national States to supranational institutions has involved the exclusion of important decision-making sectors, in particular the potentially unlimited national spending capacity, from national politics to supranational entities. In this framework, the introduction in some national Constitution of severe budgetary rules (the so-called "golden rule" of balanced budget) has involved a process, defined by a part of academic literature of "juridification" of economic concepts, which has significantly reduced the role of "politician" (and, consequently, of elective representation) in favor of the centrality of "cryptic" and technical economic and financial rules[55].

The deep economic and financial crisis has also expanded the social hardship areas in the European Union space[56]. Starting

(2007). See, moreover, R. Boyer, *The Global Financial Crisis in Historical Perspective: An Economic Analysis Combining Minsky, Hayek, Fisher, Keynes and the Regulation Approach*, 3 (3) *De Gruyter online* 93 ff. (2013); D.D.E. Andersen, S. Krishnarajan, *Economic Crisis, Bureaucratic Quality and Democratic Breakdown*, 54 (4) *Gov. Oppos.* 715 ff. (2019).

[54] Nevertheless, especially in the last twenty years, constitutional principles that seemed to be consolidated are being questioned by populist parties and movements. In this sense, see P. Blokker, *Varieties of Populist Constitutionalism: The Transnational Dimension*, 20 (3) *German L.J.* 332 ff. (2019).

[55] In this way, see the analysis proposed by F. Bilancia, *Juridification, società civile e identità nazionali nel processo di integrazione europea*, 3 *Dir. Pubbl.* 937 ff. (2016).

[56] In this framework, see A. Pottakis, *'Soft' Approaches to 'Harsh' Realities: The EU Failings at Crisis Management*, 25 (1) *Eur. Pub. L.* 1 ff. (2019).

from these feelings of deep scepticism and frustration, populist political parties and movements have built their current cultural and electoral successes[57]. Especially in times of economic and financial crisis[58], populist political approach is also revealed in their economic approach at national and supranational level[59]. In the populist theoretical and rhetorical approach, each national or supranational independent institution, composed of technicians not democratically elected, should be subjected to the power of democratic political authorities, in order to avoid limiting the "sovereignty" of "politician" as an expression of "popular will"[60].

In fact, observing their political programs, the censures of populist political movements and parties are focused in contraposition to European migration policies, the unbalanced liberalisations in the fields of labour, service and financial markets and EU decision-making mechanisms. The European Union framework is even severely criticised, but the current European and, more generally, global economic framework based on the free market approach is never questioned.

As seen before, the populist forces (especially right-wing populists) dispute the "global" dimension of current economic neoliberal framework, proposing a gradual return to a more domestic dimension of capitalism. In this way, right-wing populist approach tends to strongly criticise the technical supranational

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[57] On the progressive weakening of European economic and political governance, see, among others, C. Kombos, *Constitutional Review and the Economic Crisis: In the Courts We Trust?*, 25 (1) *Eur. Pub. L.* 105 ff. (2019).

[58] On this topic, an interesting analysis is developed by V. Hatzopoulos, *From Economic Crisis to Identity Crisis: The Spoliation of EU and National Citizenships*, 1 *Eur. Legal Stud.* (2017).

[59] With reference to the relationship between neoliberal and populist economic approaches, see, among others, J. Berzins, *Neoliberalism, Austerity, and Economic Populism*, in A. Kudors, A. Pabriks (eds.), *The Rise of Populism: Lessons for the European Union and the United States of America* (2017), 57 ff. Regarding the crisis of contemporary global capitalism, see the original approach proposed by W. Streeck, *The Crises of Democratic Capitalism*, 71 *New Left Rev.* 5 ff. (2011). In the field of democratic capitalism's crisis and the notion of "authoritarian liberalism" in the European Union framework, see the remarkable study of M.A. Wilkinson, *The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, 14 (5) *German L.J.* 527 ff. (2013).

[60] With particular reference to the issue of "economic populism" (and also on the relationship between populism and supranational institutions), see, among others, D. Rodrik, *Is Populism Necessarily Bad Economics*, 108 *AEA* 196 ff. (2018).

institutions and to claim, if necessary, the enhancement of domestic economic and cultural dimension, with a consequent aversion to "inclusion policies", seen as onerous and discordant with the "fundamental values" of the European and Western societies[61]. In this framework, it is relevant to emphasise that the "technocratic enemy"[62] is not always clearly identified, given that «elites are always rather vaguely specified: unaccountable Brussels bureaucrats, mainstream politicians, experts of various kinds, the traditional (i.e. liberal) media, the IMF and more besides»[63]. In the populist perspective, it is crucial to evoke an enemy of the people (especially if invisible or opaque), in order to direct popular hatred towards their own electoral interest.

On the other hand, the "aggressive" approach of populist political parties and movements towards liberal democracy has its historical roots in the epochal change represented by globalisation process, as a consequence (also) of the Soviet Union collapse[64]. In this way, the globalisation process has led to the progressive reaffirmation of a self-regulated market framework, relegating national dimension to a limited role on the global economic sphere[65]. At the same time, the globalisation of Western markets, legal orders and societies has indubitably played a leading role in

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[61] In this way, see especially M.D. Poli, *Contemporary Populism and the Economic Crisis in Western Europe*, 5 *Baltic J. Pol. Sci.* 40 ff. (2016).

[62] In this way, according to the analysis proposed by H. Bang, D. Marsh, *Populism: a Major Threat to Democracy?*, 39 (3) *Pol'y Stud.* 352 ff., 357 (2018), the real challenge for Western democracy «concerns how to govern beyond neoliberalism's depoliticizing technocracy, without falling prey to populism's repoliticized bureaucracy».

[63] G.F. Thompson, *Populisms and Liberal Democracy – Business as Usual?*, 46 (1) *Econ. Soc'y* 43 ff., 49 (2017).

[64] In this way, in the opinion of C. Mudde, *The Populist Zeitgeist*, cit. at 10, 555, it could be argued that «the end of the cold war has changed the political relationships both within and towards liberal democracies. Most importantly, democracy has lost its archenemy, to which it was always compared favourably, and "real existing democracies" are now being increasingly compared unfavourably to the theoretical models».

[65] Regarding to this topic, it is a nodal point the relationship between globalisation process and contemporary crisis of national States. See, in this way, J. Leaman, *Reversing the Neoliberal Deformation of Europe*, in J.E. Fossum, A.J. Menéndez (eds.), *The European Union in Crises or the European Union as Crises?* (2014), 43 ff.

the rise of "anti-system" movements and parties[66]. In this sense, the globalisation process has brought new levels of development and opulence in Western societies. In the meanwhile, it has also created new inequalities among national States and different social classes[67]. In this multifaceted scenario, the resentment experienced by those who in the globalisation process have suffered more negative than beneficial effects have been the perfect breeding ground for the birth and rise of widespread "anti-system" sentiments, which were then routed to various populist political movements and parties in the whole world, not only in Europe.

However, the "new" evolution of populist political movements and parties is articulated in a strong connection between "political nationalism" and "economic protectionism", with an intense antagonistic approach to the common market principles of liberalisation in the field of labour market and free competition. In this sense, migration crisis has further polarised the continental political framework along a deep fracture between "Europeanists" and "sovereigntists"[68].

With reference to the legal aspects, populist political movements and parties often reject the legal legitimation of national constitutional Courts and supranational justice systems (e.g., European Court of Justice). Constitutional Courts are frequently seen as an interference with the supreme "general will" of the people, in particular when national and supranational

[66] In this sense, in accordance with the analysis of M.E. Szatlach, *European Identity and Populism*, XXXVI *Polish Pol. Sci.* 69 ff., 87 (2007), it could be argued that «a clear rise of populist tendencies in West Europe is not a result of an accidental convergence. It seems to be inseparably connected with an identity crisis caused by global and integration transformations in the contemporary world, and by inability to oppose the processes of changes».

[67] On this topic, see in particular D. Swank, H.G. Betz, *Globalization, the Welfare State and Right-Wing Populism in Western Europe*, 1 (2) *Socio-Econ. Rev.* 215 ff. (2003).

[68] Relating to the relationship between right-wing populist security approach and management policies of migration crisis, see B. Bugaric, *The two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 (3) *German L.J.* 390 ff. (2019).

judgments tend to preserve supreme constitutional principles that populists aim to exploit for their own political goals[69].

The institutional approach adopted by populists reproduce their irrational political leverage, based on the imaginative fascination of people, starting from concrete issues but with extreme or often not realistic solutions. Populist approach calls into question the displacement of decision-making centres from domestic dimension to supranational bodies (called by many populist "technocrats"), often not democratically elected, demanding, also with demagogic arguments, the need to give back to the people a real decision-making power, also through the instruments of direct democracy[70]. The reference to "technique" and "technicians", authoritative or not, produces the effect of increasing popular aversion towards ruling class[71] and the electoral *favor* of populist political movements[72]. In this way, if political parties or national public institutions cannot be held accountable, becoming "irresponsible" subjects of relevant legislative and economic policies, also in the field of important economic strategies implemented by European Central Bank[73],

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[69] In the same sense, see J.W. Mueller, *Populism and Constitutionalism*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 591 ff.

[70] The reference goes to the well-known "Rousseau platform", used by Five Star Movement in Italy to allow its members and militants to determine the political line of the Movement on individual measures or policies, by an electronic and secret voting procedure managed by a private company. For an analysis about the main features of Five Star Movement, see, among others, A. Pirro, *The Polyvalent Populism of the 5 Star Movement*, 26 (4) *J. Contemp. Eur. Stud.* 443 ff. (2018); M. Bassini, *Rise of Populism and the Five Star Movement Model: an Italian Case Study*, 11 (1) *IJPL* 302 ff. (2019).

[71] On this topic, see the analysis proposed by G. Rico, M. Guinjoan & E. Anduiza, *The Emotional Underpinnings of Populism: How Anger and Fear Affect Populist Attitudes*, 23 (4) *Swiss Pol. Sci. Rev.* 444 ff. (2017).

[72] In this way, see B. Moffitt, S. Tormey, *Rethinking Populism: Politics, Mediatisation and Political Style*, 62 *Pol. Stud.* 381 ff. (2014).

[73] In the EU framework, an interesting analysis of role and *status* of the European Central Bank is proposed by D. Howarth, P. Loedel, *The European Central Bank. The New European Leviathan?* (2005). On this topic, see, among others, M. Fratianni, H. Huang, *Reputation, Central Bank Independence and the ECB*, in P.L. Siklos (ed.), *Varieties of Monetary Reforms. Lessons and Experiences on the Road to Monetary Union* (1994); J. de Haan, *The European Central Bank: Independence, Accountability and Strategy: A Review*, 93 (3-4) *Public Choice* 395 ff. (1997); C. Zilioli, M. Selmayr, *The Law of the European Central Bank* (2001); P.

they will not even be able to claim the positive results obtained, showing, on the other hand, that they are almost helpless facing of political and economic processes, which take place at a higher level than national level[74].

EU democratic deficit, in this way, is another example of the contemporary weakness of politics, in a time characterised by the "supremacy of technique". This weakness, perhaps paradoxically, reinforces the social thrust in the populist leadership against democratic institutions. At the same time, democratic deficit assumes the image of a European Union dominated by technicians, partially or largely disconnected from democratic and representative circuit and, therefore, not "evaluable" in their work through the electoral procedure. In this regard, populism could also be seen as an original type of popular "reaction" to the excessive power of technique and technicians over politics and politicians[75].

In essence, despite various political and national differences, the ideological and cultural narrative of populism aims at self-legitimisation in front of public opinion, in order to be recognised as the only ones able to restore decision-making power to the "base of the pyramid", without radical changes in the

Magnette, *Towards 'Accountable Independence'? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model*, 6 (4) *Eur. L.J.* 326 ff. (2000); D. Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the European Union* (2016); A. Verdun, *Political Leadership of the European Central Bank*, 39 (2) *J. Eur. Integr.* 207 ff. (2017); D. Curtin, *'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency*, 23 (1-2) *Eur. L.J.* 28 ff. (2017).

[74] Regarding to the "usurpation" of decision-making power by technocratic elites, in accordance with the suggestion proposed by P. Aslanidis, *Populism and Social Movements*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 306 ff., 311, it can be argued that «the populist frame offers a diagnosis of reality as problematic due to the usurpation of sovereign authority by "elites" suggesting that the "people" should mobilise to reclaim what is rightfully theirs». In this way, see also J.E. Fossum, *The Crisis, a Challenge to Representative Democracy in the European Union?*, in J.E. Fossum, A.J. Menéndez (eds.), *The European Union in Crises or the European Union as Crises?* (2014), 637 ff.

[75] On this topic, see, P. Mair, *Political Opposition and the European Union*, 42 (1) *Gov. Oppos.* 1 ff. (2017).

political and economic system. In this sense, it can be defined as a particular kind of "revolution without revolution"[76].

The actual political agenda, especially in some EU national experiences, is monopolised by populist topics and slogans. Against these keywords, traditional political parties seem to be unarmed, unable to reply to the stresses coming from populists and, specifically, from their leadership. In this way, Pinelli argues that political parties and also national governments «appear responsible for the inadequate responses to the basic needs of their electors due, *inter alia*, to EU failures, together with the holes and the fictions affecting the narrative of the European crisis»[77].

In the theoretical and political populist approach, charismatic leadership is a central element of electoral successes[78]. In this framework, it is important to emphasise that the political successes of populist political movements and parties are often linked to their leaderships. Better said: if a political leadership loses respect, populist movements is also strongly affected, to the point of risking the political disappearance. The "aggressive" approach of populist political movements and parties is based also in their hard methods of political communication, based on the direct conflict with the "great powers", a latent refusal of political pluralism and liberal rules and a clear attack to the institutional *status quo*.

What we are discussing here does not exclusively involve the electoral plan or its relationship with representative democracy, but includes the cultural sphere of Western societies and their change of cultural paradigm, with reference to the influence on public decision maker. In this way, academic literature for a long time has studied and debated about the appearance and evolution of contemporary populism.

[76] With reference to the "revolutionary potential" of populism and the need to defend the principles of constitutional democracy, see, in particular, B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (2019).

[77] C. Pinelli, *The Rise of Populism and the Malaise of Democracy*, cit. at 21, 44.

[78] In this sense, L. Viviani, *A Political Sociology of Populism and Leadership*, 8 (15) *Soc. Mutam. Pol.* 279 ff., 279 (2017), argues that «the relationship between populism and leadership plays a key role in the reconfiguration of political forms».

Particularly, as seen earlier, economic and financial crisis[79] has been a crucial event in the relevant growth of antisystem political groups, because it has expanded an economic and social discomfort within Western middle class and pushed citizens towards radical political positions opposed to the current economic and political system[80].

5. Populism in Europe: a challenge to the EU institutions

The populist spread in the EU space, with its pervasive propagandistic models, against the European '*ancient régime*', inspires to reflect on the European cultural, economic and legal framework[81]. The pressure exercised to achieve the power by

[79] However, the economic and financial crisis is not the only reason to explain the growth of populist political movements and parties. On this point, in accordance with the suggestion proposed by J. Hopkin, M. Blyth, *The Global Economics of European Populism: Growth Regimes and Party System Change in Europe*, cit. at 10, 195, «populism as a political movement in Europe did not start with the 2007-8 crisis. It has been growing continuously since at least the 1980s in the form of Green parties, various National Fronts and an assortment of so-called Progress parties».

[80] With reference to the rise of populism in time of economic and financial crisis, it is important to underline that a period of economic and financial difficulty is not enough to justify the global spread of populism. In this way, D. Halikiopoulou, S. Vasilopoulou, *Breaching the Social Contract: Crises of Democratic Representation and Patterns of Extreme Right Party Support*, 53 (1) *Gov. Oppos.* 26 ff., 28 (2018), argue that «economic crisis in itself is not enough to facilitate the rise of extreme right parties. This outcome is only likely if economic crisis is accompanied by severe problems of governability, resulting in a crisis of democratic representation».

[81] In Europe, the effects of the economic and financial crisis manifested themselves with extreme harshness in Greece. In this field of analysis, for an academic debate on the Greek economic and social crisis, see, among others, Y. Stavrakakis, P. Angelopoulos, *The People, Populism and Anti-Populism: Greek Political Discourse Against the Shadow of the European Crisis*, 2 (54) *Actuel Marx* 107 ff. (2013); S. Vasilopoulou, D. Halikiopoulou & T. Exadaktylos, *Greece in Crisis: Austerity, Populism and the Politics of Blame*, 52 (2) *J. Common Mkt. Stud.* 388 ff. (2014); T.S. Pappas, *Populism and Crisis Politics in Greece* (2014); C. Arvanitopoulos, *Populism and the Greek Crisis: A Modern Tragedy*, 17 (1) *Eur. View* 58 ff. (2018); J. Rama, G. Cordero, *Who Are the Losers of the Economic Crisis? Explaining the Vote for Right-Wing Populist Parties in Europe After the Great Recession*, 48 *Rev. Esp. Cienc. Pol.* 13 ff. (2018); M. Lisi, I. Llamazares & M. Tsakatika, *Economic Crisis and the Variety of Populist Response: Evidence from Greece, Portugal and Spain*, 42 (6) *W. Eur. Pol.* 1284 ff. (2019).

populist political movements and parties determines, when the target is reached, the implementation of every necessary effort to preserve the "new" *status quo*[82].

Actually, one of the most important manifestation of the threat represented by populism in Europe is the so-called "Brexit", understood as the exit process of United Kingdom from European Union, through a popular referendum held on 23 June 2016[83].

In this way, with reference to the approach proposed by the "Leave Movement", Brexit electoral campaign was based, *inter alia*, on the restatement of British people's power and its own sovereignty in its own territorial space, against the supposed "Brussels elite's impositions"[84]. In this sense, political and communicative approach adopted by movements in support of Brexit process (especially "Hard Brexit")[85], have revealed

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[82] In this way, taking a cue from K. Weyland, *Populism: A Political-Strategic Approach*, cit. at 37, 55, it could be argued that «populism is notorious for its twists and turns, driven by the opportunistic efforts of personalistic leaders to concentrate power and stay in office. The driving force behind populism is political, not ideological». In the same sense, see A. Batory, *Populists in Government? Hungary's "System of National Cooperation"*, 23 (2) *Democratization* 283 ff. (2016).

[83] With reference to the "Brexit" referendum and, more broadly, on the impact of British populism on the Brexit process, see, among others, P. Craig, *Brexit: A Drama in Six Acts*, 41 (4) *Eur. L. Rev.* 447 ff. (2016); M. Goodwin, *Explaining the Vote for Brexit*, in A. Kudors, A. Pabriks (eds.), *The Rise of Populism: Lessons for the European Union and the United States of America* (2017), 87 ff.; S. Usherwood, *Shooting the Fox? UKIP's Populism in the Post-Brexit Era*, 42 (6) *W. Eur. Pol.* 1209 ff. (2019); P. Norris, R. Inglehart, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism* (2019); C.S. Browning, *Brexit Populism and Fantasies of Fulfilment*, 32 (3) *Cambridge Rev. Int'l Aff.* 222 ff. (2019); D. Marsh, *Populism and Brexit*, in I. Crewe, D. Sanders (eds.), *Authoritarian Populism and Liberal Democracy* (2020), 73 ff.

[84] In this sense, see, among others, F. Panizza, *Populism and Identification*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 407 ff.

[85] The main political player of electoral campaign for the United Kingdom's exit from European Union has been Nigel Farage, former leader of the UKIP party. For an exhaustive analysis of this political phenomenon, see, among others, R. Hayton, *The UK Independence Party and the Politics of Englishness*, 14 (3) *Pol. Stud. Rev.* 400 ff. (2016); M.R. Steenbergen, T. Siczek, *Better the Devil you Know? Risk-taking, Globalization and Populism in Great Britain*, 18 (1) *Eur. Union Pol.* 119 ff. (2017); L. March, *Left and Right Populism Compared: the British case*, 19 (2) *Brit. J. Pol. Int'l Rel.* 282 ff. (2017); A. Pareschi, A. Albertini, *Immigration, Elites and the European Union. The Framing of Populism in the Discourse of Farage's UKIP*, 2 *Com.*

important common features with many European populist political movements and parties, highlighting how, with democratic procedures, populism could destabilise national and European legal systems.

Basically, European populism proposes a critical approach towards the European integration process and the continental economic and legal governance. Populism assumes that the correct way for the well-being of people is a return to a regional dimension, understood as enhancement of national traditions, cultures, ethnics, values, in the EU framework[86]. In this way, taking a cue from the analysis proposed by Taggart, it can be claimed that «the issue of Euroskepticism has been a hardy perennial for populist parties in Western Europe»[87].

In this framework, populist political movements and parties utilise democratic procedures in order to affirm their own political vision, concentrating directly the decision-making power in the hands of citizens, with the purpose of circumventing democratic procedures. Moreover, populist institutional approach aims to conquer the power within constitutionally methods and then, subsequently, change the Constitution to pursue their own political principles[88]. Clearly, it cannot be argued that populists are intrinsically bearers of an illiberal or anti-democratic ideology. On the other hand, the disruptive proliferation of populist

Pol. 247 ff. (2018); T. Bale, *Who Leads and Who Follows? The Symbiotic Relationship between UKIP and the Conservatives – and Populism and Euroscepticism*, 38 (3) *Politics* 263 ff. (2018); G. Evans, J. Mellon, *Immigration, Euroscepticism, and the Rise and Fall of UKIP*, 25 (1) *Party Pol.* 76 ff. (2019).

[86] With reference to the relationship between "national traditions" and "supranational order", it is relevant to emphasise the approach proposed by G. Soroka, F. Krawatzek, *Nationalism, Democracy and Memory Laws*, 30 (2) *J. Democr.* 157 ff. (2019).

[87] P. Taggart, *Populism in Western Europe*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo, P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 249 ff., 257.

[88] With reference to this issue, see, among others, M. Tushnet, *Popular Constitutionalism as Political Law*, 81 *Chi.-Kent L. Rev.* 991 ff. (2006); C. de la Torre, L. Scuccimarra, *Global Populism and Processes of de-Democratization. An Interdisciplinary Dialogue*, 1 *St. Pens. Pol.* 129 ff. (2019). Regarding the constitutional reforms as a means of imposing the populist approach in the legal system, see, in particular, S. Chambers, *Democracy and Constitutional Reform: Deliberative versus Populist Constitutionalism*, 45 (9-10) *Philos. Soc. Crit.* 1116 ff. (2019).

phenomenon should be considered, with reference to national and supranational legal framework[89].

In May 2019 EU Member States' citizens have voted for the election of the new European Parliament. The recent electoral developments show us a general increase, although it has been less than expected, of right-wing populism in the EU space. However, this populist electoral increase in Europe has not occurred in a homogeneous form, but it has involved some EU Member States to a greater extent. Particularly, in Italy, France, Hungary, UK, Belgium and Poland the most voted movements and parties belong to the political area of populism[90].

The populist growth is evident, but not so strong to shift the institutional balance within the European Parliament, where the alliance between European Popular Party and European Socialist and Democratic Party remains the only one able to offer a solid and reliable majority, since it can also be open to the support of European Liberals and, perhaps, European Greens. In any case, the challenges facing the EU institutions remain of considerable importance. It is evident that the electoral escalation of populist forces is a political and institutional fact that should be considered, especially with reference to the populist movements and parties that adopt a marked anti-European approach. The new legislature of European Parliament and European Commission will have to regain confidence in relevant sectors of European societies, especially as regards the proximity of institutions to EU citizens.

In this way, despite the immense tragedy and threat represented by the pandemic, the continental strategy in order to provide common tools to deal with the health crisis and the subsequent economic shock could represent the point of

[89] With a clear stand on this point, N.W. Barber, *Populist Leaders and Political Parties*, 20 (2) *German L.J.* 129 ff., 130 (2019), suggests that «populists are not tyrants or dictators, though, as populism develops, they might slide into these forms of state. Tyrants and dictators' rule without the support of the bulk of the people, using fear and coercion as primary tools of government. Populists, in contrast, rely on the support of the people for their power – though, like all rulers, they buttress this support with coercion against some state members».

[90] The reference is to *Lega* (Northern League, Italy), *Rassemblement National* (National Gathering, France), *Fidesz* (Hungarian Civic Alliance, Hungary), *Brexit Party* (UK), *Vlaams Belang* (Flemish Interest Party, Belgium), *Prawo i Sprawiedliwość* (Law and Justice, Poland).

advancement in the problematic European integration process and the rediscovery of a new European solidarity dimension. On this path, the effects of economic and financial crisis (combined with the current health and migration crisis) will require an extensive participation of the EU institutions and Member States' governing bodies in order to design the future economic and political governance of the European Union[91]. In this way, it is not possible to postpone a deep analysis on the future of the European Union and, furthermore, it would be essential imagine a new way for the EU, based on a federal evolution of the distribution of powers and competencies between European Union and national entities. In this sense, the shift to a federal union could be an effective response to the crisis of the EU legal and political legitimation and a useful, but not entirely satisfactory, institutional method to contrast centrifugal tendencies[92].

6. Populism in some relevant EU case studies

Unquestionably, populist political movements and parties have greatly affected the institutional, social and political framework of some EU Member States[93]. An accurate analysis of

[91] An interesting study on the effects of economic and financial crisis in the growth process of populism in Europe is proposed by Y. Algan, S. Guriev, E. Papaioannou & E. Passari, *The European Trust Crisis and the Rise of Populism*, *BPEA* 309 ff. (2017).

[92] In accordance with this suggestion, see F.W. Scharpf, *Legitimacy Intermediation in the Multilevel European Polity and its Collapse in the Eurocrisis*, in J.E. Fossum, A.J. Menéndez (eds.), *The European Union in crises or the European Union as crises?* (2014), 93 ff.

[93] An important European case study is represented by the "Catalan affair", understood as the insistent request from large sectors of Catalan society for the independence from Spain. On this topic, see, among others, A. Hernández-Carr, *¿La hora del populismo? Elementos para comprender el «éxito» electoral de plataforma per Catalunya*, 153 *Rev. Est. Pol.* 47 ff. (2011); G. Ferraiuolo, *La via catalana. Vicende dello Stato plurinazionale spagnolo*, 18 *Federalismi.it* 1 ff. (2013); A. Galán Galán, *Del derecho a decidir a la independencia: la peculiaridad del proceso secesionista en Cataluña*, 4 *IdF* 885 ff. (2014); F. Bilancia, *Il "derecho a decidir" catalano nel quadro della democrazia costituzionale*, 4 *IdF* 985 ff. (2014); M. Porta Perales, *El Secesionismo en Cataluña: Metafísica nacionalista, populismo antiguo e intereses creados*, 50 *Cuad. Pens. Pol.* 129 ff. (2016); A. Dowling, *The Rise of Catalan Independence. Spain's Territorial Crisis* (2017); D. Gamper Sachse, *Ambivalences of Populism: The Case of Catalan Independentism*, 57 (4) *Soc. Sci. Info.* 573 ff. (2018); A. Barrio, O. Barberà & J. Rodríguez-Teruel, *'Spain steals from us!' The 'Populist*

the most relevant national experiences in the European Union area (with a comparative approach and a critical point of view) makes it possible to frame more precisely the essential features of populist political action.

Despite the different national experiences, some common factors could be found in the approach of populists to democratic dynamics, political communication and relations with national institutions. In some Member States that will be taken into consideration, populist political movements and parties have achieved national government, in coalition with other political movements (populists or not) or alone. In other national experiences, populists are still opposition forces. However, the rise of populists has deeply changed the political paradigm within the EU Member States. The populist challenge to the EU institutions and legal framework is more evident, especially in the Member States formerly belonging to the Warsaw pact[94], due to the presence of special forms of government, so-called "illiberal democracies", a hybrid form of government that combines formally democratic structures and authoritarian factual tendencies[95]. A difficult transition that has also produced the growth of movements which, within the Eu framework, affirm a different model of domestic political management. Until twenty years ago it seemed impossible to debate about the existence of an illiberal or authoritarian government within the advanced

Drift' of Catalan Regionalism, 16 *Comp. Eur. Pol.* 993 ff. (2018); A. Queralt Jiménez, *The Populist Drift of the Catalan Pro-independence Movement*, in J.A. Kämmerer, M. Kotzur & J. Ziller (eds.), *Integration and Desintegration in Europe* (2019), 255 ff.

[94] In this way, for an analysis of populist rise in Baltic area, see, among others, D. Brentin, T. Pavasovic Trost, *Populism from Below in the Balkans*, 3 (2) *Contemp. S.E. Eur.* 1 ff. (2016); D. Auers, *Populism in the Baltic States*, in A. Kudors, A. Pabriks (eds.), *The Rise of Populism: Lessons for the European Union and the United States of America* (2017), 151 ff.

[95] About this debated topic, see, among others, F. Zakaria, *The Rise of Illiberal Democracy*, 76 (6) *Foreign Aff.* 22 ff. (1997); G. Palombella, *Beyond Legality-Before Democracy: Rule of Law Caveats in the EU Two-Level System*, in C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (2016), 36 ff.; C. Pinelli, *Illiberal Regimes in the Perspective of Comparative Constitutionalism*, cit. at 16, espec. 6-7; G. Halmai, *How the EU can and Should Cope with Illiberal Member States*, 2 *Quad. Cost.* 313 ff. (2018).

European legal, institutional and social model[96]. This critical situation must necessarily lead the academic scholars to reflect more on the current limits of the European integration model and on the possible solutions to these issues.

We are talking about national governments that implement political and legislative proposals extremely distant from European legal framework and its set of values and principles, recognised by all Member States[97]. The rise of populist political movements and parties in Europe is also a social, political and legal fact in other European national experiences (for example, Germany, Netherlands, Scandinavian countries), but until now with less impact on Member States' domestic policies.

6.1. Italy

In Italy, the deep distrust of citizens in domestic political class and the internal political instability are due to various factors, which are, among others: *a)* the deep economic and financial crisis, also exacerbated by the current health crisis; *b)* the ambiguity about the fate of the Italian public debt and the solidity of the national financial system; *c)* the pervasive corruption; *d)* the effects of high unemployment levels; *e)* the conclusion of Berlusconi's era and the usual bipolar political system; *f)* the technical governments, supported transversely by moderate right-wing and left-wing parties, who tried, with poor results, to limit the devastating effects of the economic crisis.

In this frame, populist ideas have spread in Italian society as a reaction, often indignant and resentful, towards ruling political class, perceived as too detached from social difficulties and unable to provide effective remedies.

In 2013 political elections, the main Italian populist party, the Five Star Movement, has come into the Italian Parliament with a relevant number of members, placing itself as an alternative to the "old politics" represented by centre-right and centre-left

[96] On this point, see the analysis proposed by R.D. Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, 52 (2) *Gov. Oppos.* 211 ff. (2017).

[97] In this way, see C. Pinelli, *Conditionality and Economic Constitutionalism in the Eurozone*, 11 (1) *IJPL* 22 ff. (2019); B. Bugaric, *Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism*, 17 (2) *Int'l J. Const. L.* 597 ff. (2019).

coalitions[98]. Defining itself as a "post-ideological" political movement, Five Star Movement was five years in opposition to the national government, composed by centre-left parties and a part of the old centre-right coalition, attacking every political and economic governmental measure with extreme force and invoking a change in government leadership, based on the appeal to the popular vote, the ethical principle of morality against the pervasive corruption and the continuous consultation with its own voters through the telematic platform *Rousseau*. Initially, the Five Star Movement has supported the "Italexit" from the single European currency, opening the debate on the need for a popular referendum in order to decide whether to remain or leave the European Union and the complete review of national and European rules regarding common financial regulations and budgetary constraints[99].

At the same time, another populist political movement has been renewed, born in the 80's as an anti-unitary and federalist party, with a clear far-right political connotation, founding its political approach on the citizens' safety and the opposition to the massive and unlawful migratory flows. The "new" *Lega* (without the old word "North") has quickly spread in the whole country, coming to be in 2018 political elections the greatest right-wing political force in Italy[100], leading, with its national secretary (Matteo Salvini), the whole Italian centre-right coalition.

In this way, in the electoral round of 4 March 2018, the political debate was centred on the European and national

[98] In this sense, it will remain famous in the popular imaginary the sentence pronounced by the founder of Five Star Movement, Beppe Grillo, during an election rally, in which he affirmed that the movement "will open the parliament like a can of tuna". This sentence, beyond the unusual speech, symbolises the aim of the movement to completely undermine the party system, opening the Parliament to transparency and legality (at that time, several members of the Italian Parliament were subject to judicial investigations and there was talk of the "Parliament of investigated and sentenced").

[99] As is well known, art. 75, second paragraph of Italian Constitution prohibits the popular referendum "for tax and budgetary laws, amnesty and indult, authorisation to ratify international treaties".

[100] The change of name from "Lega Nord" to "Lega" would like to symbolise the change of political party's paradigm, aimed at seeking electoral support also in Southern Italy, leaving the "Northern border" where it was historically closed.

migration policies, the high national public debt and the very high level of unemployment (especially the youth unemployment in Southern Italy)[101]. Following an ambiguous electoral result and through a difficult programmatic agreement, the two main Italian populist forces (Five Star Movement and *Lega*) gave life to an "atypical" coalition government.

The "government contract" between the two populist movements has produced the first populist government in Italy and the marginalisation of liberal and pro-European Italian parties[102]. In Italy, the "yellow-green" government has surprised the international observers for its severe disagreement with EU policies, based on the request for greater flexibility on public budget and closed attitude towards the migration phenomenon. The Italian populist "yellow-green" government resigned in August 2019, due to irreconcilable internal conflicts between the government partners (and to the 2019 European elections which placed *Lega* as the first Italian party while Five Star Movement losing almost half of the votes compared to the previous year), replaced by a government headed by the same President of Council of Ministries, Giuseppe Conte, but composed by Five Star Movement and a pro-European force, the Democratic Party, with a more condescending approach to the European institutions and policies. The right-wing component of the old government (*Lega*) is now in opposition, with its nationalist allied, *Fratelli d'Italia* (Brothers of Italy), a far-right party, that polls place around 15% of hypothetical electoral consensus.

Actually, the peculiar Italian anomaly with its political contradictions (two populist movements in government with very heterogenous programs and electoral basis), it would seem to be resolving in a revival of a political bipolarism, in which there are on the one side Five Star Movement, Democratic Party, pro-

[101] In this way, see L. Fazzi, *Social Work, Exclusionary Populism and Xenophobia in Italy*, 58 (4) *Int'l Soc. Work* 595 ff. (2015).

[102] In accordance with the suggestion proposed by T. Boros, M. Freitas, G. Laki & E. Stetter, *State of Populism in Europe* (2018), 77, it could be argued that Lega and Five Star Movement «are intensely Eurosceptic and their coalition agreement contains proposals that clearly run afoul of EU policies and Italy's obligations in the realm of fiscal policy (including budget balance and public debt) and asylum policy. Additionally, contrary to the austerity measures expected by the EU, the parties agreed on cutting taxes, amending the pension law and introducing a universal basic income».

Europe movements and Italian Left and, on the other side, *Lega*, liberals, Eurosceptic movements and far-right parties[103]. In this frame, Five Star Movement seems to have lost most of its anti-system profile and, in parallel, the populist scenario seems to have moved to the far-right political field, in opposition to the government[104]. The watchwords of the "new" Italian opposition are directed on the opposition to national and supranational migration policies, tax policies (defined as "oppressive" for citizens) and finally on the health crisis management, due to the asserted marginalisation of the oppositions and regional governments and a solitary management of the health crisis by the head of the government.

6.2. Hungary

Hungary is a paradigmatic model of the problematic transition from socialist legal and social framework to free market economy and democratic legal system. Hungary is an Eastern Europe's State[105], EU member, which has made remarkable progress in recent years, consolidating its constitutional

[103] On this topic see, among others, M. Tarchi, *Italy: the Promised Land of Populism?*, 7 (3) *Contemp. Italian Pol.* 273 ff. (2015); B. Verbeek, A. Zaslove, *Italy: a case of Mutating Populism?*, 23 (2) *Democratization* 304 ff. (2016); L. Mosca, F. Tronconi, *Beyond Left and Right: the Eclectic Populism of the Five Star Movement*, 42 (6) *W. Eur. Pol.* 1258 ff. (2019).

[104] Nowadays, the polls indicate us a clear majority in favor of right-wing populist coalition, with the main political force (Lega) over 25% of electoral consensus and the traditional far-right parties close to 16%. Five Star Movement should get 15% of the votes, compared to 33% of last national political elections. In this way, also the main Italian pro-European party, Democratic Party, should get only 20% of the electoral votes.

[105] With reference to the rise of populist political movements and parties in Central and Eastern Europe, see, among others, B. Bugaric, *Populism, Liberal Democracy, and the Rule of Law in Central and Eastern Europe*, 41 (2) *Communist post-Communist Stud.* 191 ff. (2008); U. Brunnbauer, P. Haslinger, *Political Mobilization in East Central Europe*, 45 *Nat'lities Papers* 337 ff. (2017); B. Stanley, *Populism in Central and Eastern Europe*, in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo & P. Ostiguy (eds.), *The Oxford Handbook of Populism* (2017), 142 ff.; S. Engler, B. Pytlas & K. Deegan-Krause, *Assessing the Diversity of anti-Establishment and Populist Politics in Central and Eastern Europe*, 42 (6) *W. Eur. Pol.* 1310 ff. (2019); V. Havlik, *Technocratic Populism and Political Illiberalism in Central Europe*, 66 (6) *Probs. Post-Communism* 369 ff. (2019).

democracy and the rule of law[106]. However, in the last years, it is possible to observe a clear deterioration of country's democratic conditions, especially due to the achievement of power by populist political parties.

In the year 2004, when it joined European Union, Hungary was considered a nation on the path of democratic reforms, one of the most advanced post-communist experiences in Eastern Europe. During the financial crisis and before the rise to power of populists, Hungary was experiencing a phase of deep economic difficulty, combined with a general lack of confidence in democratic institutions.

The electoral victory of populist front in 2010 was favoured by popular distrust and protests generated by the legal and financial measures adopted by the governments chaired by Gyurcsany and Bajnai to face economic and financial crisis which has hit the country and was intensified by international economic and financial crisis of 2008. In this phase, Hungarian Socialist Governments had been forced to request the assistance of International Monetary Fund, European Commission and World Bank, obtaining loan for 20 billion euros, at the cost of severe internal economic measures. The Hungarian Civic Alliance (*Fidesz*), the main opposition party, had directed the protests and supported a popular referendum initiative that led to the rejection of two of the most important measures presented by Gyurcsany Cabinet, forcing him to resign.

Since 2010, the Hungarian populist' electoral successes and following rise to power have produced, in a short time, a climate of deep aversion towards European institutions, as well as a weakening of democratic institutions[107]. Moreover, the parallel

[106] In this sense, see B. Bugaric, *A Crisis of Constitutional Democracy in post-Communist Europe: 'Lands in-between' Democracy and Authoritarianism*, 13 (1) *Int'l J. Const. L.* 219 ff. (2015). In this way, taking inspiration to the suggestion proposed by E.K. Jenne, C. Mudde, *Can Outsiders Help?*, 23 (3) *J. Democr.* 147 ff., 151 (2012), unlike other experiences of the post-communist Eastern European countries, it can be argued that «the Fidesz government came to power through free and fair elections; Fidesz enjoys significant support among parts of the Western establishment, particularly on the European right; and despite its fiscal woes, Hungary is not a poor country».

[107] On this point, see S. Donato, M. Lovec, *"Poor" Students or Poor Students? Institutional Quality and Economic Change as Drivers of Populism in CEE in a*

global economic and financial crisis (and its effects on national economic system) has produced a deep confidence in national populist leadership, creating a political atmosphere in which oppositions, free press and guarantee institutions are seen as interferences to government activity. In this way, it is taking place the phenomenon of "authoritarian or illiberal democracy"[108], understood as a legal system with formal guarantees for oppositions and freedom of speech but, upon closer examination, the system is moving towards a highly illiberal centralised system[109].

Indeed, according to the suggestion proposed by Bugaric, it can be argued that the new Hungarian Constitution of 2011, «contains several provisions that radically undermine basic checks and balances of the old Constitution»[110]. Despite social and academic mobilisation against the constitutional reform, which intended to establish a strong illiberal turning point in the heart of Europe, the large parliamentary majority and the high popular consensus of government led to the approval of the new Hungarian Constitution (Fundamental Law).

In 2018, Hungarian populist President Viktor Orban and his party *Fidesz* won the third consecutive legislative election with a large majority in national Parliament, which further cemented

Longitudinal Perspective, in M. Lovec (ed.), *Populism and Attitudes Towards the EU in Central Europe* (2019), 13 ff.

[108] Regarding to this topic, see A. Batory, S. Svensson, *The Use and Abuse of Participatory Governance by Populist Governments*, 47 (2) *Pol'y Pol.* 227 ff. (2019).

[109] With reference to the Hungarian state of affairs and, particularly, the analogies and differences among "illiberal democracy", "authoritarian regimes" and "autocratic regime", see, among others, M. Bogaards, *De-democratization in Hungary: Diffusely Defective Democracy*, 25 (8) *Democratization* 1481 ff. (2018). On this topic, see also M. Tushnet, *Authoritarian Constitutionalism*, 100 (2) *Cornell L. Rev.* 391 ff. (2015).

[110] B. Bugaric, *A Crisis of Constitutional Democracy in post-Communist Europe: 'Lands in-between' Democracy and Authoritarianism*, cit. at 106, 226. In this way, G. Halmai, *Populism, Authoritarianism and Constitutionalism*, 20 (3) *German L.J.* 296 ff., 302 (2019), emphasises that «the main argument of Central and Eastern European populists to defend their constitutional projects is grounded in a claim to political constitutionalism, which favours parliamentary rule and weak judicial review».

their central position in national political context[111]. The success and strength of this movement (and its leader) in Hungary is due, in particular, to two main factors. First of all, the charisma and communication ability of President Orban, which presents itself as a staunch defender of Hungarian citizens against internal and, mostly, external threats[112]. For a better and clearer transmission of its political approach (particularly about the EU immigration challenge[113]), Orban stands in strong conflict with the EU institutions[114]. Secondly, the issue of "migrants' threat", an approach that aims to create fear among citizens and push them towards a strong leadership to entrust the security of country and its borders.

As indicated above, a powerful aggregation factor used by populist political movements and parties, especially in countries subject to the transition from socialism order to liberal democracy, has been the opposition to the policies implemented by the institutions of the European Union, particularly with reference to

111 On this point, see, among others, T. Toth, D. Kékesdi-Boldog, T. Bokor & Z. Veczán, "*Protect our Homeland!" Populist Communication in the 2018 Hungarian Election Campaign on Facebook*, 12 (2) *Cent. Eur. J. Comm.* 169 ff. (2019).

112 The main features of Orban's political approach are well defined by A. Körösényi, *The Theory and Practice of Plebiscitary Leadership: Weber and the Orban regime*, 33 (2) *E. Eur. Pol. Soc. Cult.* 280 ff. (2019).

113 On this topic see, among others, J. Fetzer, *Public Opinion and Populism*, in M.R. Rosenblum, D.J. Tichenor (eds.), *Oxford Handbook of the Politics of International Migration* (2012), 301 ff.; L. Davis, S. Deole, *Immigration and the Rise of Far-Right Parties in Europe*, 15 (4) *Ifo* 10 ff. (2017); C. Ruzza, *Populism, Migration, and Xenophobia in Europe*, in C. de la Torre (ed.), *The Routledge International Handbook of Global Populism* (2019), 201 ff. With reference to the European Union's migrant relocation programme, see A. Pottakis, '*Soft' Approaches to 'Harsh' Realities: The EU Failings at Crisis Management*, cit. at 56, espec. 4-5.

114 In this way, in accordance with the suggestion proposed by T. Boros, M. Freitas, G. Laki & E. Stetter, *State of Populism in Europe*, cit. at 102, 67, the Hungarian President's party have «launched a massive anti-immigrant campaign right before the refugee crisis in 2015, and the intensity of this campaign has not decreased throughout the years. Fidesz's xenophobic rhetoric, in combination with the country's economic boom and the ruling power's tough attacks on media freedom, did not leave much chance for the fragmented and paralysed opposition».

the European economic framework, common market rules and migration flows policies[115].

On the current state of democratic legal order in Hungary, the independent international organisation *Freedom House*, in its Report "Freedom in the World 2019", tells us that democratic level of Hungarian institutions and society is gradually decreasing, due to the reforms approved by governmental majority of President Orban, which has significantly limited civic freedoms, especially in the field of freedom of information[116].

More recently, in partial contradiction with the past, *Fidesz* party of Hungarian premier Victor Orban has lost the control of Budapest municipality and over half of the provincial capitals of Hungary. In this sense, national public opinion and civil society have sent a vibrant signal of discontinuity with reference to the compression of civic freedoms, implemented by authoritarian and populist democracy existing in Hungary.

6.3. Poland

Poland is another EU Member State that until the end of the 80's belonged to the Warsaw Pact, in the framework of socialist bloc. Until 2015, Poland has experienced a period of economic

[115] Regarding this issue, taking a cue from the suggestion proposed by A. Danaj, K. Lazanyi & S. Bilan, *Euroscepticism and Populism in Hungary: The Analysis of the Prime Minister's Discourse*, 11 (1) *J. Int'l Stud.* 240 ff., 241 (2018), it could be argued that «populist parties, at the regional level, have been opposing the policies of European institutions, creating, or fostering mistrust in the institutions of the European Union. Thus, Eurosceptic discourse, using a narrative with a realistic background, has become a crucial component of campaigning for rising populist parties».

[116] *Freedom House*, Report "Freedom in the World 2019". With reference to the analysis proposed by this independent international organisation, Hungary is classified as a State "partly free", with an aggregate freedom score of 70/100. This aggregate ranking consists of two fundamental parameters, such as "political rights" (Electoral Process, Political Pluralism and Participation, Functioning of Government) and "civil liberties" (Freedom of Expression and Belief, Associational and Organisational Rights, Rule of Law, Personal Autonomy and Individual Rights). In this way, the Report underlines that «Hungary's status declined from Free to Partly Free due to sustained attacks on the country's democratic institutions by Prime Minister Viktor Orban's Fidesz party, which has used its parliamentary supermajority to impose restrictions on or assert control over the opposition, the media, religious groups, academia, NGOs, the courts, asylum seekers, and the private sector since 2010». This *status* of "partly free" country has been confirmed in the 2020 Report.

growth combined with the progressive development of an advanced model of liberal Western democracy. Nevertheless, the hegemonic affirmation of Western neoliberal model in Poland was not unanimously accepted and, at the same time, was not accompanied by a fair spread of wealth. In this sense, paradoxically, it was the far-right movements, in continuous political growth, that disputed the dominant model of economic development following the end of the Warsaw Pact.

In this way, according to the analysis proposed by Shields, it could be argued that the «resistance to the rise of neoliberalism in Poland has often been centred on a set of anti-political, populist gestures associated with the emergence of a new right and the steady disappearance of the left since 1989»[117]. The progressive growth of far-right in Poland and, more generally, in the whole Eastern post-communist scenario, has produced the revival of nationalism, undemocratic tendencies and, now, populist waves. Despite its membership of the European Union, populists in government with their strong and nationalist political program represent a significant challenge for the rule of law and European constitutional democracy[118].

In 2015, populist political party Law and Justice (*Prawo i Sprawiedliwość*) won national political elections, establishing itself as a hegemonic party in Polish political framework[119]. With a weak opposition, *PiS* has gradually expanded its institutional and social influence, even penetrating constitutional guarantee bodies of Polish constitutional State[120]. In this sense, the independent international organisation *Freedom House*, in its Report "Nation in Transit 2018", highlights that Poland political framework could get worse, due to the institutional reforms proposed and

117 S. Shields, *Neoliberalism Redux: Poland's Recombinant Populism and its Alternatives*, 41 (4-5) *Crit. Soc.* 659 ff., 662 (2015).

118 With reference to the Poland's admission to the European Union and the political consequences of this adhesion in the Polish State's political dynamics, see M. Gora, K. Zielinska, *Competing Visions: Discursive Articulations of Polish and European Identity after the Eastern Enlargement of the EU*, 33 (2) *E. Eur. Pol. Soc. Cult.* 331 ff. (2019).

119 In this way, see B. Stanley, M. Cześnik, *Populism in Poland*, in D. Stockemer (ed.), *Populism Around the World. A Comparative Perspective* (2019), 67 ff., 78.

120 With reference to this point, see W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, 18 (1) *Legal Stud. Res.* 1 ff. (2018).

approved by Law and Justice's government majority that could cause the deterioration of democratic conditions in the country, especially with reference to the principles of balanced powers and oppositions' visibility[121].

As in Hungary, also in Poland the electoral success of polish populist nationalism has given way to a quick process of constitutional order review in an illiberal sense. In a short time, fundamental guarantee bodies for the protection of liberal democracy and constitutional order have been blocked, as the constitutional court, governing bodies of judiciary power and also the authority for media and data protection. Law and Justice has engaged in a tough battle with the constitutional justice body, not publishing or applying its sentences, until the replacement of part of Polish Supreme Court members, with candidates chosen by the new majority[122].

The ideological approach proposed by Polish populism in power is very complex, based, according to the suggestion advanced by Bugaric, also in «a mix of ethnic nationalism and anti-capitalism reminiscent of that present in the interwar period»[123]. However, at least until today, Poland is in a less deteriorated situation than the fragile Hungarian liberal

[121] In this regard, *Freedom House*, in its Report "Nation in Transit 2018", outlines a rather worrying picture of Polish political situation: «Poland's democracy faced unprecedented challenges in 2017. The governing Law and Justice (PiS) party used its popularity to put forward a reformist agenda that—if implemented—will change the character of democracy in Poland. After taking over and crippling the Constitutional Tribunal in 2015, PiS pushed through a judicial reform in 2017 that undermines separation of powers. Additionally, the ruling party proposed changes to the electoral law that could threaten the integrity of elections». On this topic, see, among others, A. Młynarska-Sobaczewska, *Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review*, 23 (3) *Eur. Pub. L.* 489 ff. (2017).

[122] On this point see, among others, K. Kovacs, K.L. Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland and the European Union*, 51 (3) *Communist post-Communist Stud.* 189 ff. (2018).

[123] B. Bugaric, *Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism*, cit. at 97, 602. The Author also identifies some common features between Hungarian and Polish populisms: *a)* "moralized anti-pluralism"; *b)* "non-institutionalized notion of the people"; *c)* "conservative and authoritarian ideology". With reference to the relationship between the rise of far-right populism and popular culture in Poland, see, among others, M. Kotwas, J. Kubik, *Symbolic Thickening of Public Culture and the Rise of Right-Wing Populism in Poland*, 33 (2) *E. Eur. Pol. Soc. Cult.* 435 ff. (2019).

democracy. Although a populist political party is in power and in absence of an effective opposition force in the country, *Freedom House* qualifies Poland as a "consolidated democracy" and «looking at the polls, Polish society seems to be predominantly happy with the direction the country is headed in»[124].

In this way, an appropriate example of the impact of populist policies on national legal order is provided by Polish judicial reform, concerning the lowering of retirement age of Polish Supreme Court judges and the power granted to the Polish President of the Republic to extend the period of judicial activity of Polish Supreme Court's judges beyond the newly established retirement age. With reference to this impacting national reform (beyond the other specific contents), it is relevant to emphasise a relevant judgement of the European Court of Justice[125]. The European Commission asked the ECJ rule on the compatibility of Polish judicial reform with European law, especially with the art. 19 TEU and the art. 47 of EU Charter of Fundamental Rights.

In this way, the Court has expressed its own distrusts about the impact of Polish judiciary reform on the principles of European legal system that Poland must respect as EU Member State, arguing that «in the present case, it must be held that the reform being challenged, which provides that the measure lowering the retirement age of judges of the *Sąd Najwyższy* (Supreme Court) is to apply to judges already serving on that court, results in those judges prematurely ceasing to carry out their judicial office and is therefore such as to raise reasonable concerns as regards compliance with the principle of the irremovability of judges»[126].

The guarantees of irremovability, impartiality and independence of judiciary bodies are fundamental pillars in the EU legal framework and «require that the body concerned exercise its functions wholly autonomously, being protected against external interventions or pressure liable to impair the

[124] According to the constant evaluation proposed by the international organization *Freedom House*, the aggregate freedom score of Poland (84/100) is that of a "free" country.

[125] European Court of Justice (Grand Chamber), Judgment 24 June 2019, Case C‑619/18, *European Commission vs. Republic of Poland*.

[126] ECJ, Case C‑619/18, pt. 78.

independent judgment of its members and to influence their decisions, with due regard for objectivity and in the absence of any interest in the outcome of proceeding»[127].

In this way, the discretionary power granted to the President of Polish Republic to extend the period of judicial activity of some Supreme Court's judges constitutes a deep fracture in the balance of powers and stands as a measure conflicting with the European Union legal order and its fundamental legal principles.

More recently, Polish parliamentary elections have seen a clear electoral success of sovereigntist and populist governing party Law and Justice (and its leader Jaroslaw Kaczynski), which have achieved the absolute majority of parliamentary seats. In this way, Polish parliamentary elections represent a further emblem of the deep rooting of governing party and its political proposals in Polish society and a strong signal to the EU institutions. In addition, on July 12, 2020, the Polish president Andrzej Duda, main exponent of conservative populism, won the second round of elections for Polish Presidency, defeating Rafał Trzaskowski, liberal mayor of Warsaw, with about a 51.2% of preferences, against about 48.8% of the contender.

7. Conclusions

As seen above, populism is an evolving phenomenon and also for this reason it is extremely difficult to draw lasting conclusions. Anyway, some empirical researches show us how globalisation process and crisis of traditional democratic representation have favoured the rise of populist political movements and parties (especially right-wing populism). This growth changes regarding to the different national experiences. On closer inspection, some of them have proved to be more "receptive" to the appeal of populist arguments, especially those who are facing the difficult transition from socialism legal and economic system to liberal democracy (a transition, perhaps, too rapid and drastic for legal and economic national frameworks)

[127] ECJ, Case C-619/18, pt. 108.

and, on the other hand, those who are in a difficult economic and financial condition[128].

The growth of populist political, legal and cultural model is particularly relevant in European Union, in which populist movements and parties are well organised at continental level and skilled to gather and mobilise growing masses of population against European Union institutions (Euroscepticism) and the implementation of their policies. With reference to this topic, an interesting suggestion is advanced by Taggart, according to which «the ubiquity of Euroskepticism in Western European populism is a testimony to the difficulty of constructing an integrated Europe. A complex, opaque, and distant political architecture has fed the populist distrust of the political institutions in general»[129].

This analysis has also underlined the current crisis of the Western model of representative democracy. Constitutional democracies and their ruling classes are the most sensitive targets of populist political and social action. The same form of liberal and democratic government of Western societies is a contributory factor in the growth process of populist model. In this way, it can be claimed that the same liberal Constitutions are in a potentially dangerous condition, given that the concrete experiences of populism in power show us the interest of populist political movements and parties in changing national Constitutions to weaken the system of institutional balance and guarantee among powers[130]. The importance of safeguarding the principles of constitutional democracy requires the guarantee of a correct equilibrium among powers, that represents one of the most

[128] In this way, D. Swank, H.G. Betz, *Globalization, the Welfare State and Right-Wing Populism in Western Europe*, cit. at 67, 238-239, emphasise that «specifically, our findings support the argument that international integration, or the notable increases in transnational flows of trade, capital and people in recent decades, has contributed to the electoral success of new far-right parties in Western Europe». On this topic, see also T. Pauwels, *Populism in Western Europe: Comparing Belgium, Germany and the Netherlands* (2014).

[129] P. Taggart, *Populism in Western Europe*, cit. at 87, 260.

[130] With reference to the popular constituent power in a populist perspective, according to the analysis proposed by G. Halmai, *Populism, Authoritarianism and Constitutionalism*, cit. at 110, 306, it is relevant to note that «unlike liberal constitutionalism, populists claim not only that the power to create a constitution belongs to the people alone, that is, that the people have a monopoly over the original or primary *pouvoir constituant*».

important features of liberal democracy[131]. In this regard, to contrast the populist growth in the European Union framework, it is essential to reinforce representative democracy and its "intermediate bodies" (political parties[132], trade unions, environmental, cultural and social associations) and, on the other side, promote a path of greater proximity of national and supranational institutions to the people, also through the improvement of direct democracy instruments.

Constitutional democracy hinges on three fundamental pillars: legal majority's decision-making power, recognition of minority's constitutional role and principles of rule of law. This equilibrium allows the democratically elected majority to decide but, at the same time, it foresees that there are fundamental constitutional principles, rights and freedoms that cannot be affected (parliamentarism, guarantee of international recognised inviolable rights, freedom of speech, freedom of assembly, freedom of association, right to vote etc.). This equilibrium between majority decision-making power and protection of political minorities is the founding pillar of political dialectics within the framework of democratic legal order[133]. In the same way, for a functioning legal system, mutual recognition among political players of their own constitutional role is essential. If populists aim at the delegitimization of political adversaries (or "enemies"), the same "social agreement" that acts as the pivot of Western democratic society is questioned. In the event that social agreement fails, the consequences for constitutional democracy

[131] On this topic, see, among others, the analyses proposed by F. Bilancia, *Constitutional Roots of Democracy*, 3 *Costituzionalismo.it* 33 ff. (2019).

[132] The importance of a truly competitive party system for a correct functioning of the structures of representative democracy is underlined by N.W. Barber, *Populist Leaders and Political Parties*, cit. at 89, espec. 134-135. In this sense, with reference to the importance of traditional parties in the legal and democratic order, see N. Urbinati, *Liquid Parties, Dense Populism*, cit. at 44, espec. 1079 ff.

[133] On this topic, in accordance with the suggestion proposed by J.L. Cohen, *Hollow Parties and their Movement-ization: The Populist Conundrum,* cit. at 11, 1090, it can be argued that «party competition and party government in a well-functioning democracy entails acknowledgement and acceptance of plurality, alternation, the legitimacy of the opposition, willingness to compromise, self-limitation and self-restraint although this taming of conflict does not rule out polarization or radical partisan positions regarding even constitutional change».

and legal order could be disastrous. In this regard, one could speak of a rupture of constitutional balance, to the point of reaching, as sometimes has happened, the "authoritarian drift" of the State, even if masked by democratic electoral process in order to choose the government majority.

In this way, it is also useful to develop a deep analysis on the actual role played by "traditional" political parties in the current social and legal framework. Analysing the factual data, it appears that political parties are detached from social context, leaving a relevant space to the populist forces, which are well-organized and skilled to communicate their political messages more effectively. In this sense, to contrast the populist spread, the traditional political parties should review their own internal organisation, in order to open up political parties more to civil society and avoid a self-referential dimension. In this sense, overcoming the traditional internal dynamics and promote a deep comprehension of social and cultural changes could be the correct way in order to achieve a "new" relationship between people and political "apparatus" and also to counter populist tendencies.

In another respect, as is well known, European experiences of populism in power confirm that the main target of these "illiberal" or "authoritarian" democracies are the independence of judicial power, media freedom, rights of minorities and constitutional principle of rule of law. In this frame, the so-called "Visegrad group" (composed of Hungary, Poland, the Czech Republic and Slovakia) represents a relevant challenge of some Eastern European States to the common rules of European Union, especially in the field of migration policies. An alliance that stands in strong opposition to the European Union institutions, creating a wound in the continental unity and a powerful factor of cohesion among European populist nationalisms.

We are talking about legal principles that set themselves as an essential pillar of Western legal framework, as well as the EU legal framework. The real threat for constitutional democracy represented by populist constitutional approach is related to the failure to recognise legal limits to the affirmation of its own political and institutional targets[134]. The progressive growth of

[134] In this sense, according to the suggestion proposed by T. Fournier, *From Rhetoric to Action, a Constitutional Analysis of Populism*, cit. at 42, 365, it can be

populist movements and parties is not an occasional event or exclusively due to external conditions to national political systems. Personalism, opportunism and strategic flexibility are therefore essential features of populist leaderships.

In essence, I argue that populism is an "anti-ideological ideology", understood as a political model that expresses strong and manifest ideological elements, but it is based on a deep negation of "traditional" ideologies and stands in strong opposition to the rule of law and, in general, to the general principles of European legal order.

Fighting populist tendencies means strengthening democratic instruments at national and supranational level, inside and outside the decision-making centres. It is essential to revitalise the principles of global constitutionalism as a fundamental pillar around which to build the conditions to counter the decline of representative institutions and contrast the advance of political and social forces that are in opposition with democratic rules and procedures. In this way, a functional European integration, based on the solidarity among Member States, European institutions and citizens, could be an effective reaction to the populist challenge[135].

On the other side, democratic resistance to the populist advance can be built up by making citizen's participation channels more open to the institutions. The democratic "antibodies" that Western societies must develop to contrast the rise of populism must necessarily consider an intense consolidation and efficiency of democratic processes. In this way, although it is not possible to hypothesise (how it is done in many areas of ideological populism), that every governmental decision must be taken directly by citizens, contemporary representative democracy

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argued that «populist rhetoric is the use of political arguments aimed to convince a fictional majority that a constitutional democracy gives rise to a tyranny of minorities».

[135] In this way, in the opinion of G. de Burca, *Is EU Supranational Governance a Challenge to Liberal Constitutionalism?*, 85 *Univ. Chi. L. Rev.* 337 ff., 367 (2018), it is correct to affirm that «the project of supranational European integration clearly challenges the functioning of liberal constitutional democracy at the national level in various ways and, to some extent, has posed challenges to the functioning of democracy that liberal constitutionalism is designed to protect». On this topic, see also L. Guiso, H. Herrera, M. Torelli & T. Sonno, *Global Crises and Populism: the Role of Eurozone Institutions*, 34 (97) *Econ. Pol'y* 95 ff. (2019).

provides various types of public control mechanisms (the most important and effective are democratic elections).

In the framework of democratic answers to populism, Bugaric emphasises that «if European democrats of various political colors do not start offering a more compelling agenda, Europe is on a dangerous political path»[136]. This is a nodal point in the conflict with populist tendencies in Europe. EU institutions must produce effective policies to face the challenges of financial, migration and health crises, guarantee of social rights, unemployment issue and climate change.

Moreover, it is also essential a process of deep review and consolidation of common institutional governance, in order to make the image and substance of European Union closer to the citizens and not just a set of cumbersome and rigid legal and financial rules, experienced by Member States and citizens like an insurmountable steel cage[137]. At the same time, it is relevant to underline that a greater attention and proximity of EU institutions could be a decisive factor to stem populist advance in Europe and defend the principles of European constitutional framework[138].

Ultimately, populism is also a legal and cultural issue for Member States, European Union and European societies. The model of political representation of twentieth century seems to be in a process of dissolution. Nevertheless, the old system is dying and the new one cannot be born. In this context, the founding values of common European experience must be appreciated and reinforced, allowing them to live effectively in European society by defeating, or at least arresting, the populist and nationalist tendencies which, today as in the past, arise as a factor of potential disintegration of European legal culture and values.

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[136] See B. Bugaric, *Could Populism Be Good for Constitutional Democracy?*, 15 *Ann. Rev. L. Soc. Sci.* 41 ff., 54-55 (2019).

[137] In this frame, taking a cue from the suggestion proposed by B. Stanley, *Confrontation by Default and Confrontation by Design: Strategic and Institutional Responses to Poland's Populist Coalition Government*, 23 (2) *Democratization* 263 ff., 278 (2016), it is correct to argue that «populist governance may be thwarted more effectively by the design of institutions than by the strategies of political opponents».

[138] In this sense, see in particular G. Gerim, *Re-thinking Populism within the Borders of Democracy*, 8 (3) *Italian Sociol. Rev.* 423 ff. (2018).

THE USE OF NATIONAL AND COMMON CONSTITUTIONAL TRADITIONS IN ITALIAN LEGAL SCHOLARSHIP AND HIGH-LEVEL COURTS

Riccardo de Caria[*]

Abstract

The article analyses how the Italian legal scholarship and highest courts have construed the Italian constitutional tradition and the notion of common constitutional traditions. It starts with a brief overview of the notion of "legal tradition" in comparative legal scholarship, and then considers the differences between the latter and other neighbouring, but different, concepts. After that, the work gives an account of the authors who have provided the most valuable contributions in the field, and then surveys how the high courts have made use of the expression of (common) constitutional traditions. The conclusion suggests a categorization of such uses**.

TABLE OF CONTENTS

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«Comparison is thus a *process* of peaceful coexistence of those who are taken as equals, in spite of even major difference in belief, circumstance or tradition»
P.H. Glenn, *The National Legal Tradition*,
in *General Reports of the XVIIth Congress of the International Academy of Comparative Law*, edited by K. Boele-Woelki and S. Van Erp,
Brussels, Bruylant, 2007, 15

1. The framework: the relevance of the notion of "legal tradition" in the comparative legal literature and the purposes and methodology of the analysis

«Comparative law, understood as a science, necessarily aims at the better understanding of legal data. Ulterior tasks such as the improvement of law or interpretation are worthy of the greatest consideration but nevertheless are only secondary ends of comparative research»[1]. I would like to begin this brief inquiry into the substance of the Italian constitutional tradition from this observation on the benefits of a comparative perspective. Comparative law – affirmed the prominent Italian legal scholars who convened in Trento in 1987 – is a scientific effort *per se*, because of its contribution to the advancement of knowledge.

Moreover, comparative law can also serve a specific purpose. As Ajani, Pasa and Francavilla explain, facilitating the task of legal interpretation is among these aims: an example in point is «the use, by the European legal interpreter, […] of the "*constitutional traditions common to the Member States*" [art. 6 TEU, that incorporates the Charter of Fundamental Rights of the European Union of 2000, by equating it to the Treaties] in order to distil the rule to apply to a particular case»[2]. And this is precisely the purpose that this work will try to serve.

To be sure, the background of comparative legal scholarship is even more relevant to the study of common

[1] First Trento thesis, as cited by R. Sacco, *Legal Formants: A Dynamic Approach To Comparative Law*, 39 Am. J. Comp. L. 1 (1991), 4-5, footnote 6.

[2] G. Ajani, B. Pasa, D. Francavilla, *Diritto comparato. Lezioni e materiali* (2018), 6 (the translation is mine). The Authors also refer to B. Markesinis, J. Fedtke, *Judicial recourse to foreign law: a new source of inspiration?* (2006), 9 ff. of the Italian translation, *Giudici e diritto straniero. La pratica del diritto comparato* (2009).

constitutional traditions (from now on also referred to as CCTs), because of the in-depth studies it performed on the very notion of legal tradition[3]. Merryman was the first author to offer a definition of this expression, in the following terms: «A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective»[4].

Krygier was another prominent scholar who investigated the notion of tradition in relation to law: «Like all complex traditions, law records and preserves a composite of (frequently inconsistent) beliefs, opinions, values, decisions, myths, rituals, deposited over generations. […] Traditions, particularly recorded traditions, provide us with store-houses of possibly relevant analogies to our present problems, and successful and unsuccessful attempts to solve them […]. The relevance of this to law is obvious. Law deals with myriad practical problems which individuals who use it have not, indeed could not, alone foresee or forestall»[5].

This Author made a substantial contribution to the understanding of the dynamic nature of constitutional traditions, that he showed were not in opposition to the notion of 'change'. As Sadurski captured very well, Krygier «helpfully suggested [that] we use the language of a (legal) tradition when we attempt to describe how legal past is relevant to the legal present. It is about the power of the past-in-the-present»[6].

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[3] See broadly G. Ajani, B. Pasa, D. Francavilla, *Diritto comparato*, cit. at 2, 16-17.
[4] J.H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* (1969), 2.
[5] M. Krygier, *Law as Tradition*, 5 Law & Phil. 237 (1986), 241 ff.
[6] W. Sadurski, *European Constitutional Identity?*, EUI Working Papers LAW No. 2006/33, available at https://cadmus.eui.eu/bitstream/handle/1814/6391/LAW-2006-33.pdf, 4. The

In the following pages, after providing some necessary clarifications on how the notion of constitutional tradition differs from others that typically come up in this domain (par. 2), I will present the result of an analysis of how the Italian literature and case-law have contributed to defining the national constitutional tradition, which – together with the other national constitutional traditions – is to be intended as a building block of *common* constitutional traditions (Art. 6 TEU).

To be sure, a fully-fledged treatment of the challenging task to define the Italian constitutional tradition in all its main components still appears to be lacking, and it is beyond the purposes of this work to present a comprehensive picture[7]. However, an attempt will be made to contribute to the reflection in the field in an indirect way, *i.e.* by looking at how the notion of *common* constitutional traditions has been understood and used by the Italian constitutional scholarship and case-law: this effort is

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quotation proceeds in the following way: « Krygier goes on by identifying three indicia of such past-in-the-present. First, a subject of tradition is drawn from a real or imagined past […]. Second, the hold of the past over the present is authoritative: it is not a mere description of what elements of the past are incrusted into our modern world but in a presence-talk the past is treated as significant. It has a normative force. […] Third, there is a factor of transmission of the past into the present: the past is not dug out from the profound layers of history but passed on to us from an immediate predecessor era; hence, there is a real or imagined continuity between past and present». On top of Krygier's article mentioned above in the previous footnote, Sadurski refers to the following works of his: *Traditionality of Statutes*, 1 Ratio Juris 20 (1988); *Tipologia della tradizione*, 5 Intersezioni: Riv. storia id. 221 (1985); *Thinking Like a Lawyer*, in W. Sadurski (ed.), *Ethical Dimensions of Legal Theory* (1991), 67 ff.. See also, *Tradition*, in A.-J. Arnaud (ed.), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (1988), 423 ff.; *Legal Traditions and Their Virtue*, in G. Skąpska, K. Pałecki (eds.), *Prawo w Zmieniającym Się Społeczeństwie* (1992), 243 ff.; cf. as well the following writings with A. Czarnota are worth mentioning: *Revolutions and the Continuity of European Law*, in Z. Bańkowski (ed.), *Revolutions in Law and Legal Thought* (1991), 90 ff.; *From State to Legal Traditions? Prospects for the Law After Communism*, in J. Frentzel-Zagórska (ed.), *A One-Party State to Democracy: Transition in Eastern Europe* (1993), 91 ff.. Finally, much more recently, see *Too Much Information*, in H. Dedek (ed.) *Cosmopolitan Jurisprudence. Essays in Memory of H. Patrick Glenn* (forthcoming 2020).

[7] I would anyway like to refer to my reflections on what I submit to be the quintessential feature of the Italian constitutional traditions, *i.e.* the "social principle", currently being peer-reviewed by the law review Federalismi.it.

meant to be read in the context of a broader research project, the one of the European Law Institute on common constitutional traditions [8]. The methodological assumption is that *common* constitutional traditions are best identified once *national* constitutional traditions have been carefully described[9].

I will therefore briefly review the most relevant national legal scholarship in the field (par. 3), and then move on to the judicial formant, considering how frequently Italian high-level courts use the notion of constitutional tradition (and some other closely connected notions) (par. 4). In the final paragraph, I will offer my conclusive remarks, by proposing a possible classification of the different uses of this notion by top Italian courts (par. 5).

2. The need to trace boundaries with other concurring (but different) notions

First of all, before proceeding with the actual analysis, a linguistic caveat is in order: the aforementioned Art. 6 TEU refers to the word "traditions" ("*tradizioni*", in the Italian version). It would go beyond the scope of this work to investigate the implications of such a choice. For the purposes of this article, the term (national) constitutional tradition can be taken as encompassing the fundamental features of a certain constitutional order. From a slightly different perspective, a tradition is a set of principles, so it can arguably be used to encompass the word "principles"[10]. In the text, the word 'principle' will therefore be employed as a subset of the word 'tradition': from this perspective, a series of particularly relevant principles make up a tradition. In the Italian case, such principles can arguably be grouped under the label "social principle", which will be the

[8] The article mentioned in the previous footnote is part of the same inquiry and should be read in close connection to the present one.

[9] Cf. Glenn, *Doin' the Transsystemic: Legal Systems and Legal Traditions*, 50 McGill L.J. 863 (2005): «By examining the traditions that form the foundations of particular legal systems, it is possible to gain a fuller understanding of the interrelationship of the laws of the world and to move beyond the theoretical constraints of traditional legal positivism» (abstract at p. 863).

[10] A recent study of the latter is the one by N.W. Barber, *The Principles of Constitutionalism* (2018).

underlying theme of this analysis. In summary, when the article mentions principles, it takes them as strands of the *genus* 'tradition'.

However, reference will inevitably be made to another key word: "identity". In fact, what I am interested in is trying to set out the features that make the Italian constitutional tradition stand out in relation to the constitutional traditions of the other EU Member States. In other words, the present analysis attempts to capture a few distinctive features that are typical of the Italian tradition to such an extent that they define the country's constitutional identity [11]. This work is then intended to be compared with similar national reports on other EU Member States, in order to comparatively assess the distinctive features of the respective '*iura propria*', and use this groundwork to help define, by contrast, what is "really" *common* among the various national constitutional traditions[12]. Hopefully, this type of analysis might be of some use to the courts, especially European ones, which have so far have shied away from in-depth considerations

[11] From this perspective, the present article lays out the basis for the further research performed by my closely connected article already mentioned in footnotes 7 and 8, which carries out the task described in the text in even greater detail. On the relationship between tradition and identity, P. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (2000), 30 ff.. By this Author, see also *A Concept of Legal Tradition*, 34 QLJ 427 (2008), on top of the works cited in the epigraph at the beginning of the article, and above in footnote 9. More broadly, some fundamental works on the subject include M. Rosenfeld, *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture, and Community*, (2009); G.J. Jacobsohn, *Constitutional Identity* (2010); E. Cloots, *National Identity in EU Law* (2015) (cf. especially the first part); C. Calliess, G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (2019). See also T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, 21 Germ. L.J. 105 (2020).

[12] In this regard, B. Markesinis, J. Fedtke, *Judicial Recourse to Foreign Law: a new source of inspiration?*, cit. at 2, 119-20: «the formula so frequently found in ECJ judgments – that the Court 'draws inspiration from the constitutional traditions common to the Member States' – is in fact often a code for comparative work previously conducted by the Advocate Generals. Moulded into a corpus of Community law by the ECJ, the lines between national ideas thereby eventually fade and, over time, disappear». Again, the comparative effort described in the text is envisioned within the framework of the mentioned ELI project.

when asserting the existence of a common constitutional tradition[13].

Inevitably, as well, the question arises of the intersection between the outcome of this inquiry and the notion of 'counter-limits' ('*controlimiti*')[14], on the one hand, and the connected study on non-amendable parts of the constitution[15]. There is indeed a partial overlap between what makes up the national constitutional identity and the fundamental choices of a constitutional order that cannot be reversed, or even questioned, either by superior legal orders such as the EU legal system, or by way of national constitutional amendment[16].

However, major differences exist: by definition, the notion of counter-limits is a tool to that can be made use of only in borderline cases, to defuse a potential conflict between the national constitutional order and that of the EU. They may never actually be employed, only "threatened" (as, most recently, in the case of the well-known *Taricco* saga), and only in residual, highly controversial and highly sensitive situations. A national constitutional identity, instead, is a more general notion: it almost certainly encompasses everything that could be activated as a counter-limit, but is definitely not restricted to this last-resort notion.

Similarly, the unamendable parts of the constitution of a country are typically a component of its constitutional identity, or

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[13] R. de Caria, M. Graziadei, *The «Constitutional Traditions Common to the Member States» in the Case-law of the European Court of Justice: Judicial Dialogue at its Finest*, 67 Riv. Trim. Dir. Pub. 949 (2017).

[14] Among many contributions of the Italian scholarship in English on the subject, see one of the most recent, D. Paris, *Limiting the 'counter limits'. National constitutional courts and the scope of the primacy of EU law*, 10 It. J. Pub. Law 205 (2018). This doctrine was introduced by the Italian and German constitutional courts, respectively with judgments *Frontini* (18 December 1973, No. 183) and *Solange I* (29 May 1974, BVerfGE 37, 271 [1974]), as a response to ECJ's judgment in *Internationale Handelsgesellschaft*, the ruling where the European Court introduced the notion of CCTs; see also B. Markesinis, J. Fedtke, *Judicial Recourse to Foreign Law: a new source of inspiration?*, cit. at 2, 117.

[15] On this topic, broadly Y. Roznai, *Unconstitutional constitutional amendments. The Limits of Amendment Powers* (2017).

[16] For some enlightening reflections on these issues, M. Cartabia, *La Costituzione italiana e l'universalità dei diritti umani*, in Astrid (2008), available at www.astrid-online.it.

tradition, but this latter notion is arguably broader[17]: a tradition is a lasting feature that is destined to remain unchanged even though it is not declared unchangeable, at least until or unless a complete paradigm shift takes place, bringing up a *Grundnorm*[18] change. In other words, unamendable parts of a constitution, in spite of their name, appear less immutable than the inner, often unwritten underpinnings of a legal system that make up its tradition (and define its identity). I would therefore argue that what it takes to amend an unamendable part of a constitution, is merely the political will and consensus to bring about such change[19].

Admittedly, a distinguished line of thinking on constitutional scholarship argues that fundamental principles also constrain a new constituent power[20], and in the same vein the literature in the field of international law usually affirms the existence of some international constitutional limitations for the adoption of a new constitution, such as its cornerstones (which it is the job of international organisations offering constitutional advice to identify, the Venice Commission above all)[21]. However, one could be more cynical and acknowledge that, should the popular will be strong enough to bring about an unconstitutional constitutional change, such a change would be effective, no matter how fundamental the principle was in the previous legal order. On the contrary, a tradition does not simply change by an act of political will, not even a very popular one[22]: a tradition has its

[17] Broadly on this subject M. Cartabia, *Principi inviolabili e integrazione europea* (1995), 26 ff., where the Author deals with the role of CCTs in the shaping of general principles of EU law.

[18] The obvious reference is to H. Kelsen, *Pure Theory of Law* (1960, 1934).

[19] C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (1922).

[20] Among many, M. Dogliani, *Potere costituente e revisione costituzionale*, 15 Quad. cost. 7 (1995).

[21] In this regard M. De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 Am. J. Comp. L. 963 (2015).

[22] Let me just refer here to the touchstone by S. Romano, *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto* (1918), recently translated into English by M. Croce (*The legal order*, 2017): Santi Romano writes, for instance: «it is, in the first place, the complex and multi-faceted organization of the Italian and French states, the numerous mechanisms and gears, the links between authorities and forces, that produce, modify, enforce, guarantee legal norms,

roots in different pre-constitutional moments, or anyway in constitutional moments that precede the Constitution that happens to be in force at any given moment[23].

3. An overview of the relevant national literature

I believe it is necessary to begin my analysis with a brief inquiry into the scholarship that has investigated this subject.

First of all, it should be noted that most of the relevant Italian literature appears to be focused mainly on the constitutional traditions common to the EU, rather than on explicitly trying to define the Italian constitutional tradition *per se*, a line of research that has been comparatively less investigated.

After a number of seminal works by Alessandro Pizzorusso, who raised some important points regarding what he defined as «the dialectic between the national and supranational principles»[24], and by Luigi Lacchè, who envisioned that the principles derived from constitutions and from common constitutional traditions might lead to the processing of a "new common right" that took into account the past and the history of single member States and, at the same time, looked to the future[25], the Italian literature on CCTs has grown extensively, welcoming contributions from a number of prominent scholars, and is in fact too broad to be effectively summarized here[26].

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but cannot be identified with them» (p. 7 of the English translation). The legal tradition has arguably much to do with the notion of legal order in Santi Romano's sense.

[23] From this perspective, some connections also appear to exist with the 'conventions', that are deemed to be a crucial unwritten component of the UK constitution: see, among many, G. Marshall, *Constitutional Theory* (1980).

[24] A. Pizzorusso, *Common constitutional traditions as Constitutional Law of Europe*?, Sant'Anna Legal Studies Research Paper No. 1/2008, available at www.stals.sssup.it, and Id., *Il patrimonio costituzionale europeo* (2002); it is also worth recalling the two seminal volumes edited by the same Author, *Italian Studies in Law* (1992 and 1994).

[25] L. Lacchè, *Europa una et diversa. A proposito di ius commune europaeum e tradizioni costituzionali comuni*, *Forum Historiae Iuris* (2003), *available at* forhistiur.de.

[26] F. Belvisi, *The "Common Constitutional Traditions" and the Integration of the EU*, 6 Dir. & quest. pub. 21 (2006); Id., *Fundamental Rights in the Multicultural European Society*, in B. Henry, A. Loreton (eds.), *The Emerging European Union:*

Among the authors who have written most extensively on the subject in recent years, Oreste Pollicino and Marta Cartabia are certainly among them. As for the former, on top of substantially contributing to the ongoing revitalization of studies on the subject (insightfully characterizing the discourse regarding their death as a premature chronicle[27]), he carefully reflected on the intersection

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Identity, Citizenship, Rights (2004), 177 ff.; P. Carrozza, *Tradizioni costituzionali comuni, margine di apprezzamento e rapporti tra Corte di Giustizia delle Comunità europee e Corte europea dei diritti dell'uomo. Quale Europa dei Diritti*?, in P. Falzea, A. Spadaro, L. Ventura (eds.), *La Corte costituzionale e le Corti d'Europa* (2003), 567 ff.; M. Cartabia, *L'ora dei diritti fondamentali nell'Unione europea*, in Ead. (ed.) *I diritti in azione* (2007), 13 ff.; L. Cozzolino, *Le tradizioni costituzionali comuni nella giurisprudenza della Corte di giustizia delle Comunità europee*, in P. Falzea, A. Spadaro, L. Ventura (eds.), *La Corte costituzionale e le Corti d'Europa*, cit. just above, 3 ff.; G. De Vergottini, *Tradizioni costituzionali comuni e Costituzione europea*, in www.forumcostituzionale.it (2005); S. Gambino, *Identità costituzionali nazionali e* primauté *eurounitaria*, 32 Quad. cost. 533 (2012); A. Guazzarotti, *Il paradosso della ricognizione delle consuetudini internazionali. Note minime a Corte cost. n. 238 del 2014*, in www.forumcostituzionale.it (2014); G. Marini, *La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione*, 1 Compar. Dir. Civ. 31 (2010); G. Martinico, B. Guastaferro, O. Pollicino, *The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?*, in A. Albi, S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019), 493 ff.; S. Ninatti, *Ieri e oggi delle tradizioni costituzionali comuni: le novità nella giurisprudenza comunitaria*, in G. D'Elia, G. Tiberi, M.P. Viviani Schlein (eds.), *Scritti in memoria di Alessandra Concaro* (2012), 533 ff.; C. Pinelli, *Il momento della scrittura: contributo al dibattito sulla Costituzione europea* (2002); Id., *The Formation of a Constitutional Tradition in Continental Europe since World War II*, 22 Eur. Pub. Law 257 (2016); G. Repetto, *Argomenti comparativi e diritti fondamentali in Europa. Teorie dell'interpretazione e giurisprudenza sovranazionale* (2011); P. Ridola, *La Carta dei diritti fondamentali dell'Unione Europea e le "tradizioni costituzionali comuni" degli stati membri*, in Id. (ed.), *Diritto comparato e diritto costituzionale europeo* (2010), 163 ss; A. Ruggeri, *"Tradizioni costituzionali comuni" e "controlimiti", tra teoria delle fonti e teoria dell'interpretazione*, 5 DPCE 102 (2003); A. Ruggeri, *Trattato costituzionale, europeizzazione dei "controlimiti" e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici)*, in S. Staiano (ed.), *Giurisprudenza costituzionale e principi fondamentali* (2006), 827 ff.; V. Sciarabba, *Tra fonti e corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali* (2008); L. Trucco, *Carta dei diritti fondamentali e costituzionalizzazione dell'Unione europea. Un'analisi delle strategie argomentative e delle tecniche decisorie a Lussemburgo* (2013).

[27] O. Pollicino, *Common constitutional traditions in the age of the European bill(s) of rights: Chronicle of a (somewhat prematurely) death foretold*, in L. Violini, A.

between the notion of CCTs and the one of constitutional identity: «the concept of common constitutional traditions crosses the notion of constitutional identity»[28] and this intersection cannot be simply considered as a clash of common traditions against a specific national tradition[29]. As for Cartabia, the notion of CCTs surfaces and underlies many of her writings[30], and has been a recurring theme also in her judgeship at the Italian Constitutional court, of which she became President in the final year of her tenure.

In summary, such authors are undoubtedly among those who should be most credited for reviving this concept in Italian public law scholarship, which until now has perhaps not attributed much relevance to it: there appears to be no trace of extensive works on the notion of constitutional tradition before its use by the ECJ in 1970, and its potential has never been fully exploited up until now.. Instead, the initiative of authors such as Cartabia and Pollicino appears to have paved the way for facilitating the fullest deployment of this concept and its potential within the national constitutional framework as well as within

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Baraggia (eds.), *The Fragmented Landscape of Fundamental Rights Protection in Europe* (2018), 42 ff..

[28] O. Pollicino, *Corte di giustizia e giudici nazionali: il moto "ascendente", ovverosia l'incidenza delle "tradizioni costituzionali comuni" nella tutela apprestata ai diritti dalla Corte dell'Unione*, Consulta Online (2015, No. 1), 244, available at www.giurcost.org (the translation is mine).

[29] Besides the writings mentioned in the previous footnotes, see M. Bassini, O. Pollicino, *Article 8*, in R. Mastroianni, O. Pollicino, O. Razzolini, S. Allegrezza and F. Pappalardo (eds.), *Commentary to the Charter of Fundamental Rights of the European Union (in Italian)* (2016), 134 ff.; O. Pollicino, *Presentazione. Costruendo le tradizioni dei diritti in Europa: il senso di un gerundio, e di un seminario*, 7 La cittadin. Eur., fasc. supp. *Costruendo le tradizioni dei diritti in Europa* (2016), 5 ff.; Id., *Della sopravvivenza delle tradizioni costituzionali comuni alla Carta di Nizza: ovvero del mancato avverarsi di una (cronaca di una) morte annunciata*, 21 Dir. Un. Eur. 253 (2016); Id., *Las tradiciones constitucionales comunes en la edad de la codificación (europea) de los derechos*, in C. Pizzolo, L. Mezzetti (eds.), *Tribunales supranacionales y tribunales nacionales*, II (2016), 183 ff.; Id., *"Transfiguration" and Actual Relevance of the Common Constitutional Traditions: Past, Present and Future*, 18 *Global Jurist* (2018); M. Fichera, O. Pollicino, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, 20 Ger. L. J. 1097 (2019).

[30] See in particular, among many, the ones referenced *supra* in footnotes 16, 17 and 26.

that of the EU. From this decidedly Euro-friendly perspective, CCTs are a possible means to connect the two, by framing the Italian identity as part of a multi-level set of identities, compatible with the EU legal order, to which it contributes, and not in contrast with it, as the opposing sovereigntist narrative puts it.

In parallel, the Italian-led ELI research project on CCTs has already seen the involvement of several scholars. Their preliminary writings were hosted by the *Rivista Trimestrale di Diritto Pubblico*, in a 2017 issue to which Cassese, Comba, Graziadei-de Caria and Porchia[31] contributed.

As observed above, the Italian literature on the subject has perhaps been keener to define and identify the CCTs, and to look at them from the European perspective, instead of defining the fundamental components of the Italian constitutional tradition. However, some interesting debates have taken place in this direction, especially with regard to the so-called economic constitution, a typically controversial topic. For instance, some divergence exists among different authors on whether the balanced budget rule is the expression of a constitutional tradition or not[32].

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[31] Issue 4 of 2017. Cassese was also the leading mind behind the ELI project mentioned in the text, in which Cartabia, Comba, della Cananea, Pollicino (as well as the Author of this article) were involved. Within the framework of this project, Cassese prepared two very important articles: *Ruling from below. Common Constitutional Traditions and their role*, and *Toward the end of solitude of national legal orders?*, both currently forthcoming. The ELI project was also brought forward in connection with the ERC-awarded project on the Common Core of European Administrative Law, led by Giacinto della Cananea (by this Author, an in the framework of this project, see also *Il nucleo comune dei diritti amministrativi in Europa* (2019)).

[32] For the former thesis, O. Chessa, *Fondamenti e implicazioni della norma costituzionale sul pareggio di bilancio*, in A. Ruggeri (ed.), *Scritti in onore di Gaetano Silvestri*, I (2016), 558 ff., 561; for the latter one, Chessa himself mentions G. Della Cananea, *Lex Fiscalis Europea*, 34 Quad. cost. 7 (2014), and A. Morrone, *Pareggio di bilancio e stato costituzionale*, Riv. AIC (2014, No. 1), 1 ff., in particular 12. Also by G. Della Cananea, see, among many, Ius Publicum Europaeum: *Divergent National Traditions or Common Legal Patrimony?*, in M. Ruffert (ed.), *Administrative Law in Europe: Between Common Principles and National Traditions* (2013), 125 ff., and *Le tradizioni costituzionali comuni prese sul serio*, 2 Riv. dir. comp. 17 (2018, No. 1), where he reflects on the possible «complementarity between constitutional traditions».

Overall, it does not seem possible to actually identify different schools of thought in the field: the different authors have all contributed to a better understanding of the notion, from their respective standpoints, and their contributions appear complementary, rather than antagonistic. Also, it would be possible to go back several decades, and identify several "*monstres sacrés*" of Italian legal scholarship who reflected on the relationship between Italian legal culture and tradition, and other national experiences. For instance, Vittorio Emanuele Orlando, in his famous Programme opening the new publication *Archivio di diritto pubblico*, observed that «the various national scientific schools […] infuse the subjective varieties of the single peculiarities of the different populations in the objective unity of the subject (an issue that I would define as international scientific cooperation)» [33] , thus acknowledging that, while theoretical national representations diverged, there was a substantive commonality of principles.

In any case, much has been written by many prominent legal scholars but a lot arguably remains to be investigated, particularly with regard to the Italian contribution to the development of CCTs and to the focalization of the quintessential elements of the Italian constitutional tradition; this work specifically attempts to provide a small contribution to studies on the subject with such a perspective in mind.

4. A quantitative analysis

Moving on to how Italian high-level courts relate to the notion of CCTs, I will immediately submit that neither the Constitutional Court, nor the Court of Cassation, nor the Council of State have dealt with this notion in any depth. Nevertheless, it is possible to identify certain bedrocks that, in the case-law of all the three high-level courts, make up the building blocks of the Italian constitutional tradition.

Despite its deep reflection on the relationship between national law and EU law, which has led it to carefully consider the extent to which the Italian constitutional tradition can embrace the

[33] V.E. Orlando, *Programma*, 1 Arch. Dir. Pub. 3 (1891).

principles of EU law (and to overturn its own initial rulings along the way), the Constitutional Court has not developed a proper jurisprudence on what it means by common constitutional traditions (nor for that matter – at least explicitly – on what makes up the Italian constitutional tradition).

A search into the database of the Constitutional Court[34] returned only the following results: four entries for "tradizione costituzionale" (constitutional tradition) [35], twenty-five for "tradizioni costituzionali" ("constitutional traditions")[36]; none for "tradizioni comuni" (common traditions); one for "tradizione comune" (common tradition)[37]; none for "tradizioni nazionali" (national traditions); one for "tradizione nazionale" (national tradition)[38].

Even the judgment with perhaps the highest number of textual references, ruling No. 80 of 2011 [39], concerning the relationship with the European Court of Human Rights, is not particularly helpful in determining the content of common (or

[34] The figures in the text result from a search in the database of the Constitutional Court performed in July 2020; in making these queries, I built on a previous search performed in May 2018 by Professor Paolo Passaglia, to whom I express my deepest gratitude.

[35] Judgment No. 223 of 2012 (only in the "Facts of the case" part); judgment No. 1 of 2014 (only in the "Facts of the case" part); order No. 24 of 2017 (also mentioned in the following footnote); judgment No. 142 of 2018 (only in the "Facts of the case" part, quoting from the referring order).

[36] Judgment No. 393 of 2006; order No. 93 of 2007; order No. 266 of 2007; judgment No. 348 of 2007 (only in the "Facts of the case" part); judgment No. 349 of 2007; judgment No. 72 of 2008 (only in the "Facts of the case" part); judgment No. 215 of 2008; judgment No. 106 of 2009; judgment No. 80 of 2011; order No. 179 of 2011; order No. 215 of 2011; order No. 216 of 2011; judgment No. 236 of 2011; order No. 295 of 2011; order No. 306 of 2011; order No. 311 del 2011; judgment No. 223 of 2012 (only in the "Facts of the case" part); judgment No. 230 of 2012 (only in the only in the "Facts of the case" part); judgment No. 214 of 2013 (only in the "Facts of the case" part); order No. 24 of 2017 (also returned in the search referred in the previous footnote); judgment No. 269 of 2017; judgments No. 20 and 112 of 2019; order No. 117 of 2019 (explicitly citing "common constitutional traditions" in the questions referred to the CJEU); judgment No. 102 of 2020 (the latter three were written by judge Viganò).

[37] Judgment No. 380 of 1999.

[38] Judgment No. 443 of 1997 (the reference here is to a tradition not concerning the law).

[39] Constitutional Court, judgment 11 March 2011, No. 80.

national) constitutional traditions. Essentially, this ruling reaffirmed the practical difference between the EU legal order, and the ECHR system: laws contrary to the latter still normally need to be declared unconstitutional by the Constitutional Court and cannot be directly disapplied by the ordinary judges.

In spite of being cited very often by other judgments in relation to common constitutional traditions (together with the subsequent judgment No. 210/13, which does not mention constitutional traditions), judgment No. 80 of 2011 does not provide any relevant indications on how to construe them. This is even truer for the other judgments (including two of 2019 that have appeared to signal a revival of the notion within the Court[40]), with only minor exceptions[41]. I would mention the following two: judgment No. 380/1999, identifying an Italian remote tradition, shared with «countries of ancient and consolidated democracy», of not punishing «the offenses contained in the writings presented or in the speeches given by the parties or their sponsors in the proceedings before the judicial authority»; and judgment No. 106/2009, identifying an Italian tradition, that is also a common constitutional tradition, that prohibits the practice of so-called extraordinary renditions, as well as one establishing the relatively wide reach for the protection of state secrets[42].

Similar conclusions apply when we consider textual references in the other two top courts of the Italian legal order, *i.e.* the Court of Cassation and the Council of State. From the research in the database of the former (limited to the years from 2013 to 2018[43]), 85 results emerge using the keywords "constitutional tradition" or "constitutional traditions", 79 results using the keyword "common constitutional traditions", 88 results using keywords "common traditions" or "common tradition", and 11 results (all not relevant) using the keywords "national tradition" or "national traditions".

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[40] Judgment No. 20 of 21 February 2019 and order No. 117 of 10 May 2019

[41] Constitutional Court, judgment 30 September-7 October 1999, No. 380.

[42] Constitutional Court, judgment 3 April 2009, No. 106.

[43] Last performed in November 2018: the database of all the judgments and orders of the Court of Cassation is indeed freely accessible only with regard to the rulings of the past five years.

By cross-checking the different results and eliminating the rulings containing several keywords, it emerges that there is a total of 105 rulings (81 judgments and 24 orders) that contain the chosen keywords, with a slight numerical prevalence of the decisions of the criminal sections of the Court of Cassation (58 to 47). The distribution of rulings over time would appear to indicate a reduction in the use of these concepts in the Court's arguments over the years: in 2018, there were 7 decisions, in 2017 only 1, 11 in 2016, 8 in 2015, 25 in 2014, while there were 53 in 2013 (over half of the total).

As for their content, 83 judgments contain only a generic reference to the constitutional traditions common to the Member States, 2 concern the prohibition of discrimination, 5 the principle of legality, 45 the principle of the retroactive application of the more lenient penalty, and 14 judgments that are not relevant. In fact, out of the total 105 rulings, 44 actually contain a reference to common constitutional traditions only because of the fact that they refer to the judgment of the CJEU in the case *El Dridi*[44], of which they often quote entire passages, again concerning the principle of the retroactive application of the more lenient penalty.

From an overall analysis of the rulings examined, it also emerges that the Italian Supreme Court never formally examined the notion of Italian constitutional traditions, almost always dealing with the topic of common constitutional traditions in a generic way. Indeed, leaving out the generic references to common traditions, the only judgment deserving a particular mention is No. 1804/2013[45], concerning the expropriation of private property, which affirms that the legality of the expropriation procedure is a necessary precondition of the acquisition of the condemned property by the state, «consistently with a solid constitutional tradition that originates from art. 29 of the Albertine Statute ("[…] when legally ascertained public interest requires it, one may be obliged to give up […] property wholly or in part, with just compensation and in conformity with the law)[46], and was sanctioned in the Italian Constitution (Article

[44] CJEU, Section I, 28 April 2011, in the proceeding C-61/11 PPU, *El Dridi*.
[45] Court of Cassation, judgment 28 January 2013, No. 1804.
[46] This translation was taken from users.dickinson.edu.

42, paragraphs 2 and 3 […]). Similarly, Article 1 of the Additional Protocol to the Convention on Human Rights states that "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law"». Instead none of the considered judgments makes a comparable analysis with regard, for example, to the principle of retroactive application of the more lenient law, that – as I briefly mentioned above – is instead recalled in many rulings.

Finally, from a search into the case-law of the Council of State[47], by using as keywords "common constitutional traditions", "constitutional tradition", "constitutional traditions", "national tradition", and "national traditions", only six rulings emerge (1 in 2016, 1 in 2014, 2 in 2012, and 2 in 2010), containing generic references to Article 6, paragraph 3 TEU, mostly with regard to the right to education[48], property and occupation *sine titulo*[49], the right to respect of private and family life[50], and the right to an effective judicial protection[51], on top of an irrelevant document.

Finally, it is worth mentioning order 754/2014[52], that quotes in full sizeable paragraphs of the above-mentioned judgment No. 80/2011 of the Constitutional Court (as well as the subsequent judgment No. 210/2013, that reaffirmed the same principles), where the latter is credited for accomplishing a «precise reconstruction of the relations between the ECHR, European law and domestic law in their recent evolution».

5. Conclusion: a possible categorisation

The analysis of the Italian scholarship on common constitutional traditions has shown that the latter seems to address its efforts towards the construction of the CCT notion, rather than on trying to define what parts of the Italian constitution define the Italian constitutional identity.

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[47] Also performed in November 2018.
[48] Interim opinion No. 960/2016.
[49] Judgment No. 4808/2012.
[50] Judgment No. 7200/2010.
[51] Opinion No. 5679/2010.
[52] Order N. 754/ 2014.

The case-law study has showed that the Italian high-level courts very rarely engage in an explicit definition of what comprises part of the national constitutional tradition (and, even less, the meaning of CCTs). With a few notable exceptions, such as the *Taricco* order, there are several fundamental rulings that simply do not mention the word 'tradition', and, conversely, those that do never engage in an in-depth analysis of the distinctive features of the Italian tradition, simply using the term as a rhetorical tool.

When some cornerstone of the Italian tradition is involved, other notions tend to be referred to, such as the fundamental principles, unamendability, limits to the revision process and counter-limits. But these are indeed different notions, and also it happens rarely that single elements are discussed: for example, counter-limits are typically evoked much more than they are actually employed. In any case, even though many judgments mentioned do not include a reference to the Italian constitutional tradition, or explicitly state their goal to build it, it is beyond doubt that they instead contribute to define it and better understand it.

Admittedly, the analysis of the case-law shows an increase, over recent years, in the use of the notion by top Italian courts. However, this does not yet seem to correspond to a quantum leap in the qualitative use of this formula. In other words, the more recent surge in registered references does not mean that a more thorough discussion of the notion has become part of the case-law, with only limited exceptions.

In this vein, the rulings of the three highest Italian courts can arguably be categorised in three groups[53].

A first type of reference to common constitutional traditions is the one made with "defensive" purposes. The most

[53] I would like to express my deepest gratitude to Professor Giacinto della Cananea for suggesting this classification to me. For a broad discussion on the "argumentative techniques" employed by the Italian constitutional court, see the systematic analysis conducted by the research group led by Mario Dogliani at the University of Turin: http://www.dircost.unito.it/SentNet1.01/def/sn_presentazione.shtml. See also some very insightful remarks in S. Cassese, *Dentro la Corte: Diario di un giudice costituzionale* (2015).

prominent example is the very famous Constitutional Court order No. 24 of 2017 (*Taricco I*)[54].

A second subset is represented by the rulings that instead use the notion of common constitutional traditions to foster a dialogue with the other courts; referral order 117 of 2019 on the principle of *nemo tenetur se ipsum accusare* is the most prominent ruling falling into this category[55].

Finally, by far the largest category is the one grouping rulings whereby the notion of constitutional tradition (or equivalent ones, for that matter) are used with a merely ornamental or rhetorical purpose.

This approach is in line with the one I identified in the Court of Justice of the European Union in a similar analysis I performed, again within the framework of the ELI research project[56].

This conclusion does not mean that the (rising) importance of this notion for the highest Italian courts should be downplayed. After all, as Sabino Cassese brilliantly wrote in his behind-the-scenes account of his nine years at the Constitutional Court: "*Non c'è dubbio che il lavoro della Corte consista in un grande esercizio di logica e di retorica, la prima usata per analizzare e capire, la seconda per convincere*" ("There is no doubt that the Court's work consists of a great exercise in logic and rhetoric, the first used to analyse and understand, the second to convince")[57].

However, as important as rhetoric can be in the Court's job, it seems to be warranted to conclude, from the analysis carried out, that both the Italian legal scholarship and the Italian high-

[54] Recourse to the "defensive" strategy reached one the most extreme levels in judgment No. 238 of 2014: this judgment does not refer to "constitutional traditions"; however, its recourse to the counter-limits makes it close to the *Taricco I* order from this perspective.

[55] A similar dialogical approach is adopted by the judgment of the Constitutional Court No. 115/2018 (the so called *Taricco II* judgment): however, neither this judgment refers to "constitutional traditions", only making a cursory reference to the "countries of continental tradition".

[56] I published the results of that inquiry in an article written with Michele Graziadei: R. de Caria, M. Graziadei, *R. de Caria, M. Graziadei, The «Constitutional Traditions Common to the Member States» in the Case-law of the European Court of Justice: Judicial Dialogue at its Finest*, cit. at 13.

[57] S. Cassese, *Dentro la Corte: Diario di un giudice costituzionale*, cit. at 53.

level courts still have a long way to go before exploiting the reference to (common) constitutional traditions in the Treaties to its fullest potential. It is this author's hope that this article can humbly contribute to the great effort needed in this direction.

PROVINCIAL AND METROPOLITAN PLANNING PROCEDURES FOLLOWING IN THE WAKE OF THE REFORM OF PROVINCIAL GOVERNMENT. REFLECTIONS IN RELATION TO THE CONCEPT OF ADMINISTRATIVE CORRUPTION.

Matteo Pressi[1]

Abstract

This paper aims to highlight some critical aspects contained within the reform of the Provinces implemented with law no. 56/2014, also known as "Delrio reform". In particular, the paper focuses on the analysis of the relationship between provinces and municipalities in the particular context of exercising their respective urban planning functions. The reflection is carried out in the light of the notion of "administrative corruption" developed by the National Anti-Corruption Authority.

TABLE OF CONTENTS

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1. The concept of administrative corruption and its relevance within the urban and territorial planning sector.

For many years, various legislation has been enacted in order to combat corruption by the Italian legislature, which has been steadfastly committed to identifying new instruments for preventing, combatting and punishing the scourge of corruption and maladministration that afflicts various sectors of the central and local public administration.

It is a particularly complex phenomenon, which cannot be encapsulated within the mere criminal law concept of corruption[2]. It is precisely for this reason that the Italian administrative law literature[3] has developed a concept of corruption broader than that provided for under Article 318 of the Italian Criminal Code[4]. It covers not only the conduct of public officials who, when performing their duties or exercising their powers, unduly receive or accept the promise of cash or other benefits, either for themselves or for a third party, but also "conduct that gives rise to liability of any other type or does not expose them to any sanction, but is nonetheless undesirable for the legal order: conflicts of interest, nepotism, clientelism, partisanship, the occupation of public offices, absenteeism and waste"[5].

This paper will consider in particular the definition of corruption developed by the National Anti-Corruption Authority (NACA), as also set out in the national anti-corruption plans issued by the Authority. The definition developed by the NACA within this plans is not only broader than the specific offence of corruption and the overall body of offences against the public administration, but also coincides with "*maladministration*", construed as the adoption of decisions (concerning constellations of interests upon the conclusion of procedures, the resolution of phases within individual procedures, and the management of public resources) that are not conducive to the furtherance of the

[2] See, R. Cantone, *Il sistema della prevenzione della corruzione* (2020).

[3] See, *inter alia*, F. Merloni, L. Vandelli (ed.), *La corruzione amministrativa. Cause, prevenzione e rimedi* (2010); F. Cerioni, V. Sarcone (ed.), *Legislazione anticorruzione e responsabilità nella pubblica amministrazione* (2019); A. Marra, *L'amministrazione imparziale* (2018).

[4] R. Cifarelli, *Corruzione "amministrativa" e controlli: spunti di riflessione*, in 14 Amministrazione in Cammino 1 (04/2013).

[5] B. G. Mattarella, M. Pelissero, *La legge anticorruzione* (2013).

general interest as a result of improper conditioning by special interests[6].

Therefore, this paper will consider to be relevant also "any act or conduct that, whilst not constituting a specific offence, is at odds with the necessary requirement to further the public interest and runs contrary to the legitimate expectations of citizens in the impartiality of the administration and of the persons carrying out activities in the public interest"[7].

Turning to local administrations, it is readily apparent that the most instances of corruption *lato sensu* involve in particular the urban planning sector in which the competence of the local authorities is particularly broad[8]. Moreover, this sector is characterised by the existence of decision-making processes that envisage broad scope for discretion when exercising public powers[9]. In addition, there has been a gradual abandonment of the traditional concept of mandatory urban planning choices towards a search for consensus involving the conclusion of dedicated agreements with private interests which occurs - as has been pointed out by authoritative statements within the literature from

[6] On the concept of "maladministration", see S. Cassese, *"Maladministration" e rimedi*, in 115 Il Foro Italiano 243 (1992). According to the author, "the phenomenon has two different variants. There is the more widely known variant where the administration draws on financial resources in order to conclude contracts for works and supplies. In such cases, there is a disbursement by the state and the "malpractices" are more apparent when contracts are not awarded according to the criteria of impartiality and merit. However, there is also a less apparent variant, where which non-monetary assets are monetised. For example, administrations grant concessions, authorisations, clearances and licences. In such cases, the adoption of an administrative measure may be rendered conditional by the administration on payments being made by private individuals". This issue can also be explored in depth on the light of the concept of institutional corruption, on point see D. F. Thompson, *Theories of Institutional Corruption*, in 21 Annual Review of Political Science 495 (2018).

[7] A. Joannone, I. Maccani, *Corruzione e anticorruzione in Italia*, 57-59 (2017).

[8] For a more detailed study of the relationship between discretion and corruption in the town planning sector, see M. Cappelletti, *La corruzione nel governo del territorio* (2015).

[9] B. Boschetti, *La discrezionalità delle scelte di pianificazione generale tra fatti e limiti normativi*, in 15 Urbanistica e appalti 755 (11/2011). As is stressed by the author, "general planning choices […] are an expression of broad discretion, which may only be reviewed on the grounds of manifest illogicality and inconsistency".

the phase in which urban planning configurations are determined onwards[10].

In view of the above, this paper will seek to highlight some critical aspects surrounding to the exercise of the powers vested by the law on urban planning in the supra-municipal bodies provided for under Italian law, namely the provinces and metropolitan cities. These critical aspects are at least theoretically liable to expose such areas to interference by special interest holders - not necessarily from the private sector - thereby compromising administrative impartiality and the proper conduct of the administration.

2. The role of the provinces and metropolitan cities within territorial planning procedures.

In order to introduce the central issue within this paper, it is important to analyse briefly the current allocation of powers over urban planning as provided for under Italian law, areas which now fall under the broader concept of "territorial government"[11] as provided for under Article 117 of the Italian Constitution[12].

A variety of public sector actors are involved, each of which is charged with upholding specific interests pertaining to different levels of planning, which are identified with reference to the principles of subsidiarity, adequacy and differentiation pursuant to Article 118 of the Italian Constitution. It may therefore be readily concluded that public interests that should be protected in

[10] P. Urbani, *L'urbanistica*, in F. Merloni, L. Vandelli (ed.), *La corruzione amministrativa. Cause, prevenzione e rimedi*, 423-436 (2010).

[11] See the definition contained in Article 1(2) of Draft Law no. 3519 of 2005, according to which the expression "territorial government" means "the totality of information gathering, evaluative, regulatory, programming, localisation and implementation activities as well as oversight and control activities intended to achieve the protection and enhancement of the territory, to regulate its uses and transformations as well as mobility in relation to the development objectives for the territory. Territorial government also includes urban planning, construction, the totality of infrastructure programmes, soil defence, the protection of environmental amenities as well as the furtherance of public interests that are functionally related to such matters". On this issue, see also F. Merloni, *Infrastrutture, ambiente e governo del territorio*, in 35 Le Regioni 45 (1/2007).

[12] A. Iacoviello, *La competenza legislativa regionale in materia di governo del territorio tra esigenze unitarie e istanze di differenziazione,* in 9 Rivista AIC 360 (2/2019).

a uniform manner throughout the entire country are regulated by state legislation, whilst it falls to the regions to regulate those aspects of urban planning that are of strictly regional relevance[13].

In addition, local authorities are also involved in urban planning processes, including specifically municipalities, which are responsible for planning at municipal level, and provinces and metropolitan cities, which are responsible for so-called "supra-municipal" [in Italian "*area vasta*", literally "vast area"] planning or "coordination"[14].

The main urban planning function of those bodies lies precisely in planning activity, which consists in the adoption of special administrative measures by municipalities, provinces and metropolitan cities, which are known as "plans"[15].

At the same time, the literature has elaborated a series of conceptual distinctions, introducing the concepts of urban planning plans and territorial plans, which may be distinguished between above all with reference to their compelling effect[16].

Specifically, urban planning plans, for which the municipalities are responsible, have particular effects on private property in regulating "the use of land, stipulating types of building, intended usage, etc."[17]. Territorial plans on the other hand do not have any normative effect on the territory. Rather their objective is to regulate urban planning powers in substantive terms through directives aimed at planning bodies, which do not have any direct effects on the territory or on private property[18].

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[13] On this issue, see R. Gallia, *Il governo del territorio tra Stato e Regioni*, in 28 Rivista giuridica del Mezzogiorno 65 (1-2/2014); G. Pagliari, *La materia "governo del territorio" nella giurisprudenza costituzionale*, in 30 Rivista giuridica di urbanistica 315 (3-4/2014).

[14] G. Pagliari, *Manuale di diritto urbanistico*, p. 65 (2019); D. De Pretis, E. Stefani, *La legislazione regionale in materia di governo del territorio dopo la riforma costituzionale del 2001*, in 33 Le Regioni 811 (5/2005).

[15] F. G. Scoca, P. Stella Richter, P. Urbani (ed.), *Trattato di diritto del territorio*, pp. 477-490 (2018).

[16] M.S. Giannini, *Istituzioni di diritto amministrativo* (1981). According to the author, the normative effect of urban planning instruments results from its manifestation as "a power that the law vests in certain administrations to stipulate characteristics applicable to persons, property and objects, legal relations and *de facto* relations, acting under discretion within the limits laid down by law".

[17] M.S. Giannini, *op. cit.*

[18] G. Pagliari, *Corso di diritto urbanistico*, pp- 41-49 (2015).

It is possible to discern a further category, specifically the coordination of territorial planning, an activity traditionally reserved to the provinces and the metropolitan cities. Coordination plans, which are sometimes referred to as "supra-municipal" plans, have some features that are typical of urban planning (compelling effect) and others that are typical of territorial planning (normative-regulatory effect), a characteristic that has led the literature to define them as "mixed content plans"[19].

As regards such plans, Article 20 of Italian Legislative Decree no. 267 of 2000 (known as the "Consolidated Text on Local Authorities") is undoubtedly relevant in assigning to the provinces the task of adopting the "territorial coordination plan" which must set out "general guidelines for territorial configuration", and in particular:

a) the various potential usages of the territory depending upon the prevailing vocation of its individual parts;
b) the general location of major infrastructures and the principal lines of communication;
c) lines of intervention for water management, hydro-geological and hydro-forestry projects and in general for the purpose of soil consolidation and water regulation;
d) the areas in which it would be appropriate to establish natural parks or reserves.

It is apparent from an analysis of the provision that, whilst it is a "mixed content" planning instrument, the provincial coordination plan may also be considered to be predominantly a plan setting out directives as it is required to stipulate "general guidelines for territorial configuration", which are directed mainly at the municipalities.

This aspect is rendered even clearer by Article 20(6) of the Consolidated Text on Local Authorities, which provides that "for the purposes of the coordination and approval of the territorial planning instruments drawn up by the municipalities, the province shall exercise the functions vested in it by the regions,

[19] P. Urbani, S. Civitarese Matteucci, *Diritto Urbanistico, organizzazione e rapporti* (2017).

and shall under all circumstances have the task of ascertaining the compatibility of those instruments with the terms of the territorial coordination plan". The Provincial Territorial Coordination Plan (PTCP) is thus "the instrument that sets out not only general planning guidelines but also local arrangements for implementing provincial choices and stipulates directly the 'territorial invariances' on which the municipalities have limited or no scope at all for discretionary assessment when drawing up their own urban planning instruments"[20].

This is therefore an instrument capable of incisively delineating the scope of discretionary assessments within municipal planning in terms of the various options for the development and conservation of the territory, the latter aspect being particularly significant. In fact, according to Article 57 of Italian Legislative Decree no. 112 of 1998, every region must stipulate through dedicated legislation that the PTCP "shall have the value and effects of protection plans within the sectors of nature protection, environmental protection, groundwater protection, soil protection and the protection of environmental amenities"[21]. This means that regions have the task of introducing specific constraints with the aim of protecting the environment and the ecosystem, which are capable of further limiting the scope for discretion vested in the municipalities in relation to the elaboration of their own urban planning plans[22].

In keeping with the above, legislation in a number of regions vests the provinces with broad sanctioning and oversight powers in order to ensure compliance by municipalities with Provincial Territorial Coordination Plans.

For example, Veneto Regional Law no. 11 of 2004, entitled "*provisions on territorial government and landscapes*", contains numerous provisions to this effect[23]. In particular, according to Article 14 of the Regional Law, it is for the province to approve the urban planning plans of the municipalities (along with any

[20] P. Urbani, S. Civitarese Matteucci, *Op. cit*, p. 225.
[21] *Ibidem.*
[22] Cf. P. Falcone, *Pianificazione territoriale di coordinamento e pianificazione di settore,* in 4 Urbanistica e appalti 5 (1/2000).
[23] On point, see V. Domenichelli, *La nuova legge urbanistica della Regione Veneto*, in E. Ferrari, P. L. Portaluri, E. Sticchi Damiani (ed.), *Poteri regionali e urbanistica comunale*, pp. 379-386 (2005).

variants), whilst the provincial authorities may also make any changes on their own initiative that are necessary in order to ensure that municipal urban planning plans are compatible with the PTCP[24]. Moreover, Article 30 of Veneto Regional Law no. 11 of 2004 provides that the president of the province may appoint a special commissioner in the event that "any municipality fails to adopt any act or carry out any action, or fails to do so within the time limits prescribed by law, which it is expressly obliged to do by law in relation to the formulation or amendment of urban planning instruments". In addition, the Regional Law also vests the president of the province with the power to annul "municipal measures that authorise any action that is not compliant with the requirements of urban planning instruments or building regulations, or that otherwise violate the urban planning or construction law applicable at the time they were adopted".

It is evident that these powers of oversight are particularly far-reaching, so much so as to entail the power of a province or metropolitan city to annul municipal down planning measures under certain circumstances.

It has been considered on various occasions within the literature whether this institute constitutes the specific manifestation of a general rule, consisting in the power to "annul a measure issued by a different body", namely the municipality, "which is naturally vested with the power to annul the act in question, and the autonomy of which is guaranteed under the Constitution"[25].

According to the case law, that power of annulment vested in the provinces and the metropolitan cities constitutes a "special exercise of the general power of annulment *ex officio* [...], which is characterised within this specific legislation by the allocation of powers not to a body that is hierarchically superior to the municipality, but rather to the body that shares [...] jurisdiction over urban planning with it, according to a model under which

[24] Article 14 of Veneto Regional Law no. 11 of 2004.

[25] P. Marzaro, *Il potere di annullamento dei provvedimenti comunali in materia urbanistico-edilizia: profili sistematici ed esegetici*, in 15 Rivista Giuridica di Urbanistica 513 (3-4/1999).

functions are allocated concurrently, with both bodies on an essentially equal footing"[26].

However, if the province has the power to annul municipal urban planning or construction measures, or even the power to act *in lieu* of the municipal authorities in the event that the latter fail to adopt urban planning plans, it is logical to suppose that, when exercising its own powers of supervision and control, it must necessarily have third party status vis-a-vis the municipalities, so as to guarantee respect for the principle of impartiality within its own administrative procedures, in particular in the area of urban planning, far removed from any form of "improper conditioning by special interests"[27].

3. The procedure applicable to the adoption and approval of supra-municipal plans in the light of Italian Law no. 56 of 2014.

The position stated above appears to be difficult to reconcile with the current reality of Italian provinces and metropolitan cities. In fact, in 2014 the legislature adopted a radical reform of the governance of supra-municipal areas, establishing an entirely new model under which the provinces and metropolitan cities were reduced to the status of "second-level" bodies, no longer directly elected[28].

Before setting out the current configuration of the provinces, it is important to recall albeit briefly their salient characteristics before the 2014 reform.

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[26] Regional Administrative Court for Lombardy, Brescia, 23 June 2003, judgment no. 873. On this point see also A. Frigo, *L'annullamento dei provvedimenti comunali in materia edilizia,* in 4 Rivista di Giurisprudenza ed Economia d'Azienda 1 (2008).

[27] NACA, National Anti-Corruption Plan for 2016.

[28] G. Vesperini, *La legge "Delrio": il riordino del governo locale* in 19 Giornale di diritto amministrativo 786 (8-9/2014); C. Benetazzo, *Le Province a cinque anni dalla legge "Delrio": profili partecipativi e funzionali-organizzativi*, in 17 Federalismi.it 1 (5/2019); F. Pizzetti, *la legge Delrio: una grande riforma in un cantiere aperto. Il diverso ruolo e l'opposto destino delle città metropolitane e delle province,* in 5 Rivista AIC 1 (3/2015); F. Merloni, *Sul destino delle funzioni di area vasta nella prospettiva di una riforma costituzionale del Titolo V*, in 35 Istituzioni del Federalismo 215 (2/2014); L. Vandelli, *La provincia italiana nel cambiamento sulla legittimità di forme ad elezione indiretta*, in 46 Revista catalana de dret públic 90 (2013).

In particular, prior to the entry into force of Italian Law no. 56 of 2014, the province was defined as an intermediate local body between the municipality and the region charged with the function of representing the local community, pursuing its interests and promoting and coordinating its development. In order to do so, the provinces were able to count on broad autonomy under provincial statutes and law, and also in terms of organisation, administration, taxation and finance. As far as governance is concerned they were headed by a president and a council, both directly elected by local residents, a fact which ensured their autonomy also on a political level[29].

With the approval of Italian Law no. 56 of 7 April 2014, the Italian legislature launched a process intended to transform local government for so-called "supra-municipal areas"[30]. This operation, which affected both the provinces and the metropolitan cities, was based on a twofold approach:

1. the almost complete redefinition of the identity, functions and institutional structure of the provinces[31];
2. the establishment of the metropolitan cities, which have been listed as one of the constituent elements of the Republic since the 2001 reform of Article 114 of the Italian Constitution, which had not however been followed up in the intervening period with the enactment of any legislation providing for their establishment[32].

[29] On point, see F. Pinto, *Diritto degli Enti locali*, pp. 312-316 (2012).

[30] C. Pinelli, *Gli enti di area vasta nella riforma del governo locale di livello intermedio*, in 36 Istituzioni del Federalismo 569 (3/2015).

[31] M. Bertolissi, G. Bergonzini, *Province: decapitate e risorte*, pp. 6 et seq (2017). As regards the "new" bodies for provincial governance, the most significant aspect is the manner in which they are elected. Specifically, the president of the province and the provincial council are now elected through so-called "second level" elections. The electorate (and the persons eligible for election) is comprised of the mayors and municipal councillors of the municipalities from each province. Alongside these (indirectly) elected bodies there is also a third non-elected body: the assembly of mayors. It is vested with particularly significant tasks, including in particular the approval of the balance sheet for the body.

[32] For a detailed consideration of the institutional structure and the functions of the metropolitan cities, see D. Mone, *Città metropolitane. Area, procedure, organizzazione del potere, distribuzione delle funzioni*, in 12 Federalismi.it 1

The extent of the change is already apparent from the new definition of the province (Article 1(5)), which the legislation intended should turn into a "supra-municipal territorial body"[33] vested with certain fundamental functions as well as certain so-called "contingent" functions.

The core of the fundamental functions may in turn be subdivided into three categories: management (environment, roads, school buildings), planning (urban planning, public transport and the schools network) and the provision of assistance to local authorities[34].

Specifically, insofar as of interest for the purposes of this paper, it should be recalled that pursuant to Article 1(85) of Italian Law no. 56 of 2014, the province exercises fundamental powers in relation to "the coordination of provincial territorial planning, as well as the protection and enhancement of the environment, in relation to the areas falling under its competence".

In addition, Italian Law no. 56 of 2014 made significant changes to the institutional framework of the provinces, severing the link between the electorate and provincial governmental bodies by introducing a system of so-called "indirect election" under which the electorate is comprised only of the mayors and municipal councillors of the municipalities within the province[35] and no longer of local residents entitled to vote. Similarly, the position of president of the province may only be held by mayors, whilst only mayors and municipal councillors are permitted to serve on the provincial council.[36]

To sum up, according to the applicable legislation, the governmental bodies of provinces (presidents and provincial council) are elected by representatives of the municipal authorities within the province, with only municipal councillors being eligible

(2/2014); L. Vandelli, *Ruolo e forma di governo delle Città metropolitane. Qualche riflessione*, in 11 Osservatorio sulle fonti 1 (2/2018).

[33] G. F. Ferrari (ed.), *Nuove province e città metropolitane: Atti del Convegno dell'Unione Province Lombarde, Milano*, p. 6 (2017).

[34] G. Tarli Barbieri, *Le Città metropolitane. Dimensione costituzionale e attuazione statutaria: considerazioni introduttive*, in 11 Osservatorio sulle fonti 1 (2/2018).

[35] F. Straderini, P. Caretti, P. Milazzo, *Diritto degli enti locali*, pp. 142-149 (2011).

[36] Cf. L. Vandelli, *Il sistema delle autonomie locali*, (2015); L. Vandelli, *Città metropolitane, province, unioni e fusioni di comuni. La legge Delrio, 7 aprile 2014, n. 56 commentata comma per comma* (2014); F. Pizzetti, *La riforma degli enti territoriali. Città metropolitane, nuove province e unione di comuni* (2015).

to serve as provincial councillors, and only mayors as presidents of the province.

The institutional framework for the metropolitan cities as laid down by Italian Law no. 56 of 2014 is not entirely dissimilar. In this case, the mayor of the principal municipality of the metropolitan city automatically serves as the metropolitan mayor, and is assisted in the governance of this special supra-municipal body (which is in reality nothing other than an amalgamation of provinces) by a council elected by the mayors and municipal councillors of the municipalities falling within the metropolitan city. Also in this case, the position of metropolitan councillor may only be held by the mayors and municipal councillors of the municipalities falling within the metropolitan city[37].

As regards the tasks allocated to the metropolitan cities, Article 1(44)(b) of the Delrio Law vests the metropolitan cities with the fundamental function of "general territorial planning, including communications structures, the network of services and the infrastructure falling under the competence of the metropolitan community, also", it is important to stress, "imposing constraints and objectives on the activities carried out and the functions performed by the municipalities falling within the metropolitan territory". In addition, the Law also vests the metropolitan cities with the same fundamental functions as the provinces, including the coordination of provincial territorial planning.

According to the combined effect of the two provisions cited above, the metropolitan cities are under an obligation to adopt a general territorial plan for the metropolitan city (PGTM), which is a "twin" of the Provincial Territorial Coordination Plan planning instrument (PTCP)[38].

The procedure governing the adoption of both instruments, PGTM and PTCP, is governed by the specific individual town planning laws enacted by each region. For example, Article 23 of Veneto Regional Law no. 11 of 2004 (cited above), entitled "*provisions on territorial government and landscapes*" governs the

[37] E. Carloni, F. Cortese, *Diritto delle autonomie territoriali,* pp. 141-146 (2020).
[38] On this issue see R. Briganti, *Città metropolitana tra pianificazione e territorio*, in 16 Federalismi.it 1 (12/2018); R. Gallia, *Il governo del territorio nella riforma degli Enti territoriali*, in 28 Rivista giuridica del mezzogiorno 725 (4/2014).

procedure applicable to the adoption of and any variation to the Provincial Territorial Coordination Plan.

According to the legislation cited, power of initiative lies with the president of the province (who, as mentioned above, is also the mayor of one of the municipalities within the province)[39], who is required to draw up a preliminary document setting out the general objectives of the PTCP. Thereafter, the provincial council (comprised only of mayors and municipal councillors) adopts the plan, which is lodged at the central administration of the province for a period of 30 days in order to enable any person to consult it and to submit any observations considered appropriate. Upon expiry of the time limit for submitting observations, the province transmits the plan to the region within the following sixty days for final approval along with any observations received and the relative rebuttal arguments of the provincial council[40].

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[39] In fact, the provision establishes a power of initiative for the provincial council, a body abolished with the entry into force of Italian Law no. 56 of 2014. Subsequent legislation has clarified that the powers of the provincial councils, which have in the meantime been abolished, have been transferred to the president of the province.

[40] To date Veneto Region has not yet made provision to regulate the procedures for approving the GTPM. Provision has been made in this area by Regional Law no. 30 of 30 December 2016, "In relation to the Regional Stability Law for 2017", including in particular Article 3 "Urban planning functions of the Metropolitan City of Venice", paragraphs 1 and 4 of which respectively provide as follows:
"1. Until the approval of the three-year strategic plan for the metropolitan territory and the general territorial plan provided for under Article 1(44)(a) and (b) of Italian Law no. 56 of 7 April 2014, the Regional Executive shall exercise all powers relating to urban planning previously vested in the Province of Venice following the approval of the Provincial Territorial Coordination Plan (PTCP) pursuant to Article 48(4) of Regional law no. 11 of 23 April 2004 'Provisions on territorial government and landscapes'"
"4. Following the approval of the strategic plan and the general territorial plan provided for under paragraph 1, the Regional Executive shall make provision within sixty days of the publication of the decision to approve the latter of the two plans concerning the arrangements applicable to the transfer of urban planning functions to the Metropolitan City of Venice.".
However, Veneto Region has not yet amended its own sectoral legislation in line with the provisions of Italian Law no. 56 of 7 April 2014 with the result that, at the present time, the previously applicable framework under Regional Law no. 11 of 23 April 2004 "Provisions on territorial government and landscapes" is still in force, which applies where compatible also to the Metropolitan City of Venice.

It is apparent that the municipalities may play a fundamental role within the procedure for adopting territorial coordination plans (albeit indirectly through the choices made by their representatives on the governance bodies of the supra-municipal area bodies) due to their ability to impinge upon the contents of an instrument - the PTCP - that has *inter alia* also the function of directing and delineating the discretion of the municipalities in relation to urban planning.

The effective result is to overturn the hierarchical relationship between the municipalities and supra-municipal bodies, as the former are able to heavily condition the political and administrative choices made by the latter owing to the control exerted over its governance organs.

It must now be considered whether this fact is at least theoretically liable to impair the proper exercise of the urban planning powers vested in the provinces and the metropolitan cities, with reference to one of the core issues considered in this paper, namely the ability of Provincial Territorial Coordination Plans (and the general territorial plans for metropolitan cities) to prevail over municipal level urban planning instruments.

In other words, it is necessary to ask, also in the light of the content of the concept of administrative corruption, whether or not the current institutional framework for the provinces and metropolitan cities is able to guarantee their impartiality, above all vis-a-vis the municipal administrations affected by the choices made within supra-municipal area planning.

4. The necessary distinction between municipal urban planning and the coordination of territorial planning: the risk of short-circuits within decision-making.

The reform of the provinces implemented in 2014, which overhauled the electoral system and provided that institutional positions within the province should be held by the equivalent official from the municipality, gave rise to a risk of genuinely "short-circuited decision making"[41]. In particular, it is possible to

[41] The expression has been adapted from M. Pompilio (ed.), *Le Funzioni di Governo del Territorio nella Riforma delle Autonomie,* p. 8 (2017).

identify a serious lack of coordination between the legislation that governs in general terms the division of construction and urban planning powers between the local authorities and the legislation that now governs the framework of the provinces and metropolitan cities, which are rooted in an opposing perspective.

The above is confirmed by Article 19(1) of Italian Law no. 135 of 2002, which lists the fundamental functions of the municipalities, clearly stating in letter (d) that they have competence over urban planning and construction at municipal level, which is clearly distinct from the territorial planning function (competence over which lies with the provinces and metropolitan cities), to which the municipality contributes only through the participation of its officials. The same concept is also apparent within Articles 5 and 7 of the 1942 Law on urban planning, which is still in force.

On the other hand, since the Delrio Law entered into force the same people have served as municipal and provincial councillors, thereby interfering with the separation which, at least theoretically, should prevail between the planning procedures of these two bodies. This change will inevitably end up exposing the provinces and the metropolitan cities to significant interference by the municipalities, which will no longer be mere addressees of provincial and metropolitan city urban planning requirements, but will *de facto* be elevated to co-decision makers by virtue of their almost complete control over the governance bodies of the provinces and metropolitan cities.

In addition, the oversight function performed by the provinces over the municipalities appears to have been significantly undermined. In fact, as noted shortly above, under applicable legislation municipal urban planning instruments and any variants thereof only become fully effective once they have been approved by the province or, where established, the metropolitan city. As has been clarified, those bodies are highly dependent on the municipalities on a political level, a fact which is difficult to reconcile with the need to assess the planning choices made by the municipalities as objectively as possible.

A similar consideration may be made in relation to the power of the president of the province to annul any municipal acts or resolutions that do not comply with the requirements laid down in urban planning instruments. It must be stressed in

relation to such a scenario that the choice made within the Veneto regional legislation is highly singular, in vesting that power of annulment in a political authority - the president of the province - which as such operates with reference to considerations that are not exclusively technical in nature, thus leaving scope for conditioning, including undue conditioning, by the municipalities. This scenario is clearly liable to undermine the foundations on which the entire structure of supra-municipal area planning is based since, in order to be fully effective, such planning must feature a high level of impartiality vis-a-vis specific local interests.

5. Possible high-risk events and measures to combat corruption in the National Anti-Corruption Plan (NAP) and within the planning of provinces and metropolitan cities.

The particular configuration of the relationship between municipal urban planning functions and the planning functions of the provinces and metropolitan cities has also attracted the interest of the NACA. In fact, in the NAP for 2016, the authority identifies some "potentially risky events" in relation to the dynamics of that relationship, such as:

1. the failure to act prior to the expiry of the statutory deadline for the provinces and metropolitan cities to adopt a decision;
2. the acceptance of rebuttal arguments submitted by the municipality in response to previous observations made by the province and the metropolitan city, notwithstanding the lack of adequate reasons;
3. the failure to appoint a special commissioner in the event of the failure by the municipality to adopt a municipal urban planning instrument;
4. the failure by the president of the province to exercise the power to annul municipal acts or resolutions that do not comply with the requirements laid down in urban planning instruments.

For these reasons, the authority decided to lay down rules to prevent corrupt practices, including in relation to the various phases of the procedure for adopting and approving territorial plans. These guidelines, which are contained in the National Anti-

Corruption Plan, are reiterated and substantiated in the anti-corruption and transparency plans adopted by the individual provincial and metropolitan administrations.

The following considerations result from an analysis of the plans drawn up by the Provinces of Verona and Vicenza and the Metropolitan Cities of Turin and Naples, which are emblematic in terms of their completeness and depth of analysis of corrupt practices in the area of urban planning.

One shared aspect becomes clear upon reading these plans: all administrations identify territorial planning and urban planning procedures as being particularly exposed to corruption, classifying them as medium to high risk. As highlighted by the NACA in the NAP for 2016, the existence of that risk is strongly related to certain characteristic features of the situation:

a) the extreme complexity and breadth of the area of law, which is reflected in the lack of cohesiveness within the reference legislation (also due to the continuing validity of fragmentary pre-constitutional legislation enacted with reference to Law no. 1150 of 17 August 1942 on urban planning);
b) the difficulty in identifying and delineating the powers vested in the various administrations involved in planning procedures;
c) the variety and number of public and private interests that must be taken into account;
d) the difficulty in applying the principle of distinguishing between politics and administration within decision making (broad discretion);
e) the existence of information asymmetries between public bodies and private persons underlying planning choices;
f) the scope of the land registry income in play[42].

In view of the above, all provincial and metropolitan administrations considered as examples have taken steps to map the individual decision making processes occurring within the various stages of the planning process. These have accordingly identified at-risk events, as well as possible means of countering

[42] National Anti-Corruption Authority, National Anti-Corruption Plan for 2016, pp. 55 et seq.

them in relation to the phases of drafting, publication-consultation and finally definitive approval of the plan.

As regards the first phase mentioned, the drafting phase, in all cases a risk is identified in relation to the lack of clear and specific preliminary indications from political bodies regarding the development policy objectives that are to be pursued through the territorial plan. These policy indications constitute a necessary precondition for the development of appropriate project instruments, but above all for the establishment of a process for verifying that the technical solutions adopted are consistent with the underlying policy choices.

The Anti-Corruption Plan of the Province of Vicenza identifies certain corrective measures that are particularly effective, and at the same time easy to implement. In particular, it lays down an obligation to publish a preliminary document setting out the general criteria that will be used during the investigation phase for assessing planning choices. As a result, the choices made are always transparent and identifiable, and it is also possible for major stakeholders to participate in the planning procedure right from the outset. The formalisation of a variety of preliminary indications that must be adhered to when drafting the plan is particularly important where the drafting of the plan is left predominantly to self-employed experts from outside the administration.

In such an eventuality, the 2016 National Anti-Corruption Plan requires the administrations to publish the reasons for the choice to outsource drafting of the plan, should they decide to do so, and also to explain the manner in which the self-employed professional appointed is to be elected, after establishing that there are no grounds for incompatibly or conflicts of interest.

In this sense the Anti-Corruption Plan for the Metropolitan City of Naples is particularly far-sighted in that, when confronted with the need to secure specialist resources from outside the administration, it has decided to work if possible in partnership with universities, public research bodies and professional associations, all of which are particularly qualified and capable of guaranteeing a high degree of impartiality vis-a-vis the interests at stake. Similar measures are contained in the Anti-Corruption Plan for the Metropolitan City of Turin, which reiterates the need to use on a priority basis any resources from inside the administration.

As far as the second phase is concerned, specifically the publication of the plan following its adoption, there is a risk of the emergence of information asymmetries between public administrations and private individuals, committees and associations. In order to deal with that risk, the National Anti-Corruption Plan imposes an obligation on administrations to put in place suitable instruments to facilitate awareness of planning choices, including the preparation of summary documents written in non-technical language or the establishment of information points for the general public in order to promote so-called "social control" by the public of the choices made by administrations.

As regards the last of the three phases identified, namely the definitive approval of territorial plans, the main risk identified consists in the possibility that certain persons from outside the administration (in the case of Provinces and metropolitan Cities, these external parties can also be Municipalities) may improperly direct and condition planning choices as a result of the improper use of the right to present observations and objections[43].

To that end, the National Anti-Corruption Plan drawn up by the NACA includes an obligation to provide detailed reasons for decisions to accept observations that have the affect of altering the plan adopted, with particular reference to environmental, landscape and cultural impacts. This requirement has been implemented in particular within the Anti-Corruption Plan of the Province of Vicenza which, in contrast to others, requires the

[43] For a more detailed consideration of the concepts of "observation" and "objection", see the Regional Administrative Court for Sicily, Palermo, 3rd Division, judgment no. 1865 of 11 September 2012.
"[T]*here is an ontological difference between the concept of 'observation' concerning the draft plan and 'opposition' to the plan adopted* […] *which arises out of the provisions of the so-called Law on urban planning (no. 1150 of 1942) and has been reiterated by the regional legislature within Regional Law no. 71 of 1978, both of which are still in force. Indeed, private individuals may become involved during the adoption of the urban planning instrument, participating actively through both remedies. As regards the former, it is a widely held view within the case law that they must be regarded as a mere form of civic cooperation, so much so that their rejection may be motivated ob relationem by the rebuttal arguments of the municipality, it being sufficient that the rebuttal arguments, even if provided in summary form, be capable of demonstrating that the cooperative and critical contributions of private individuals have been taken into account. Objections may only be filed by the owners of properties affected by the plan, have the status of genuine legal remedies and oblige the competent authorities to examine and decide in relation to them."*

conduct of a detailed technical investigation in order to avoid the risk of the territorial plan being altered as a result of the acceptance of observations and objections that are at odds with the general interests of the protection and rational configuration of the territory, which must apply throughout all planning activity. This solution thus tends to reduce the margin of discretion available to political bodies when analysing observations and oppositions, thus tendering more remote the possibility that the prerogatives of political authorities may be exercised inappropriately.

6. Conclusions.

It is clear from the above that urban planning activity is particularly exposed to the occurrence of corrupt practices or maladministration for a variety of reasons: complexity within the law, the scale (including financial) of the interests, and the broad discretion within planning choices[44]. These critical issues affect all stages of the planning process and may be encountered at all levels of planning.

One highly controversial aspect, as this paper has attempted to demonstrate, concerns the relationship between planning at municipal level and at supra-municipal area level, which is particularly exposed to corrupt practices and maladministration, as noted also in the NACA.

As has been argued above, this is a particularly insidious relationship, which ends up curtailing the effect of systems of administrative controls over urban planning activity, thus increasing the likelihood of the occurrence of corrupt practices and instances of maladministration.

It is without doubt true that municipalities and supra-municipal bodies, provinces and metropolitan cities are required, in accordance with the competences vested in them, to exercise town planning functions from an integrated and systemic perspective; however, it is important not to overlook the fact that

[44] For an analysis of the impact of socio-economic and financial factors on urban political corruption, see B. Benito, M. D. Guillamòn, F. Bastida, *Determinants of urban political corruption in local governments*, in 63 Crime Law and Social Change 191 (3-4/2015).

the two levels of planning can in some cases protect mutually conflicting interests.

Whereas municipalities pursue the objective of the highest level of development of their local territory and their socio-economic structure, supra-municipal bodies on the other hand seek to coordinate (and in some cases to halt) the choices made by individual municipalities in the light of the principles of rational exploitation of the local territory, safeguarding the environment and ensuring sustainable urban development (by for example requiring municipalities to upgrade traffic infrastructure).

In order for the right balance to be struck between conflicting interests, there has to be a relationship of parity between stakeholders. As has been seen, this principle has been called into question on a factual level by the enactment of Italian Law no. 56 of 2014, which vested the municipalities with significant influence over provincial and metropolitan city bodies. This potential imbalance *de facto* limits the real effect of the regulatory measures adopted by supra-municipal bodies in the area of urban planning.

It is therefore necessary to restore effective and substantive political and administrative autonomy to provinces and metropolitan cities so as to enable them to engage with municipalities as (genuinely) overarching bodies, which as such are called upon to coordinate local government in an effective manner according to the principles of impartiality and proper administration, pursuing only the general interest.