Respect of Rule of Law between "Internal Affairs" and the European Union. The Case of Poland and Hungary as a Political V. Functional Raison D 'être.

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Abstract: The present work is concentrated on the analysis of the rule of law in Hungary and Poland. Rule of law is a principle worth safeguarding at any time, but its relevance increases as it is being questioned and threatened; it is somewhat detached from national political discourses, and has a higher chance of addressing national rule of law issues in an unbiased way. The rule of law is commonly referred to, but it is seldom defined. It will become clear that the European Institutions conceives the rule of law as a substantive concept and part of a bigger "package" together with democracy and human rights.

Keywords: Rule of law; infringement procedure; Article 2 and 7 TEU; value conditionality; European constitutional law; Venice Commission; European Institutions

1. Introduction

On July 27, 2016 the European Commission (EC) adopted a Recommendation on the rule of law in Poland (Barnard & Peers, 2017, p. 707), (Briére & Weyembergh, 2017), (Pech, A Union founded on the rule of law: Meaning and reality of the rule of law as a constitutional principle of EU Law, 2016, p. 9) considering that a series of measures taken by the new Polish Government, and in particular some concerning the Constitutional Court of that country, configure "a situation of a systemic threat to the rule of law" (Burchardt, 2016, pp. 529-548). This is the first time that the EC has applied the "New Framework of the European Union to strengthen the rule of law"[2]. Presented on 11 March 2014 by the EC itself with a view to "countering future threats to the rule of law in the Member States before the conditions are met to activate the mechanisms provided for by article 7 TEU" (Vilaça, 2014), (Folsom, 2017, p. 278), (Barnard & Peers, 2017, p. 586), (Kaczorowska-Ireland, 2016), (Martucci, 2017), (Wind & Maduro, 2017, p. 321), (Schütze, 2015, p. 382), (Usherwood & Pinder, 2018), the New EU Framework

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[2]Communication from the Commission to the European Parliament and the Council. A new EU Frameworks strengthen the rule of law, COM/2014/0158 final.

allows the Brussels executive to react as soon as there are clear indications of a systemic threat to the rule of law in a Member State, stemming from the fact that they are endangered-for example, following the adoption of new measures or widespread practices of public authorities and the lack of remedies at national level-the political, institutional and/or legal system, the constitutional structure, the separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including, where envisaged by the constitutional order in question, constitutional justice (Sadurski, 2010, p. 112). The understanding of the rule of law in the European Union is inspired by the constitutional traditions of the Member States and by international treaties (Baere & Wouter, 2015, p. 244). Ensuring respect for the rule of law in the European Union amounts to an expression of the European Union's obligation to protect the general interest and its rational legitimacy in the Weberian sense (Sadurski, 2010, pp. 396-399), (Roland, 2008, p. 515). Therefore these substantial values give, at the end of day, a meaning to the organisation of the polity (Bauer & Calliess, 2009, p. 17), (Blumann, Mélanges en l'honneur, 2014, p. 375).

It should be noted that the rule of law is in the TEU referred to as a "value" in comparison with the Charter of Fundamental Rights of the European Union (CFREU), which refers to it as a "principle" (Blumann, Mélanges en l'honneur, 2014). In the art. 67 (1) TFEU the rule of law is not explicitly mentioned, but by reading the wording it could be argued that it is mentioned indirectly: "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States" (Galliess, 2015, p. 499). In this spirit the jurisprudence from the European Court of Human Rights (ECtHR) does bear implications for EU law, since all EU member states have ratified the ECHR. If or when the EU accedes to the ECHR it will become possible for individuals and undertakings to apply to the ECtHR for legal review of the acts of EU Institutions.

The purpose of the procedure is to seek, through structured contacts with the Member State concerned, a solution capable of preventing the worsening of the systemic threat and of preventing it from becoming an "obvious risk of serious violation" of one of the sanctioned values. art. 2 TEU (Bogdandy, Antpöhler, & Ionnidis, 2014), with the consequent need to resort to the mechanisms provided for by art. 7 of the same Treaty. The values of Article 2 TEU are elaborated for candidate countries of the EU in the Copenhagen criteria (Veebel, 2011), laid down in the decision by the European Council of 21 and 22 June 1993, to provide the prospect of accession for transitioning countries that still have to overcome authoritarian traditions. The Treaty on the European Union sets out the conditions (article 49) and values (article 6(2)) to which any country wishing to become an EU member must conform. Regarding constitutional democracy, the political criteria are decisive: stability of institutions guaranteeing democracy; the rule of law; human rights; and respect for, and protection of minorities.

2. New Mechanisms for Monitoring Respect for the Rule of Law in the European Union.

In the course of the year 2018, there were two initiatives from the European Union (EU) Institutions that were relevant to the protection of the rule of law as a core value of the EU. On 20 December 2017, the EC[1] activated the procedure provided for by art. 7, par. 1, TEU in relation to the measures taken by the government and the Polish parliamentary majority, damaging the independence of the judiciary. On 12 September 2018, the European Parliament (EP) (Sedelmeier, 2014, p. 106) decided to do likewise with reference to the Hungary to a series of inherent problems-inter alia-to the functioning of the constitutional system and the electoral system, the independence of the judiciary, the data protection personal, academic and religious freedom, the protection of the rights of minorities and migrants (Bogdandy, Antpöhler, & Ionnidis, 2014) and not only[2].

And all this, because of the constitutional reforms (Nicola & Davies, 2017, p. 472), the new electoral law and the laws on the media and religious confessions wanted by the absolute majority party *Fidesz* and Prime Minister *Viktor Orbán*, which raised a number of concerns as to the independence of the judiciary, the central bank and the personal data protection authority, on the conditions necessary to ensure political alternation, political, religious and information pluralism[3], as regards the feared reintroduction of the death penalty[4]; this project was not implemented, as well as the emergence of further situations prejudicial to the rule of law (Liakopoulos, 2018, p. 324) and, in particular, freedom of expression and teaching, freedom of association and the work of NGOs, the rights of women and minorities, the protection of asylum seekers[5]. In recent times, issues related to migrants, freedom of teaching and NGOs have given rise to further developments. The EC has appealed to the Court of Justice of the European Union (CJEU)[6], claiming the failure to comply with asylum legislation (Directive 2013/32/EU)

[1]Press release: Rule of law: European Commission acts to defend judicial independence in Poland, Brussels, 20 December 2017. for further details see also: J. WILDEMEERSCH, Contentieux de la lègalitè des actes de l'Union europèenne. Le mythe du droit à un recours effectif, ed. Larcier, Bruxelles, 2019.

[2]Including under this spirit the case from CJEU, C-364/10, *Hungary v. Slovakia* of 16 October 2012, ECLI:EU:C:2012:630, published in electronic Reports of cases, concerning the prohibition of the Hungarian president to enter Slovakian territory judgment of 16 October 2012. See also the Press Release No 131/12, Court of Justice of the European Union, Slovakia did not breach EU law by refusing entry into its territory to the President of Hungary (16 October 2012).

[3]European Parliament Resolution of 16 February 2012 on the recent political developments in Hungary (2012/2511(RSP), P7_TA82012)0053. European Parliament Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012), (2012/2130(INI)), P7_TA (2012)0053.

[4]European Parliament Resolution of 10 June 2015 on the situation in Hungary 82015/2700(RSP)), P8_TA (2015)0227.

[5]European Parliament Resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)), P8_TA (2015)0462. European Parliament Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), P8_TA (2017)0216.

[6]European Commission-Press release Migration and Asylum: Commission takes further steps in infringement procedures against Hungary, Brussels, 19 July 2018.

(Frelick, Kysel, & Podkul, 2016, p. 192), (Katz, 2017, p. 305) welcoming applicants for international protection (Directive 2013/33/EU) (Chetail, 2016, p. 586), (Heijer, Rrijpma, & Spijkerboer, 2016, p. 608), (Hristova, Apostolova, & Fiedler, 2016, p. 4), (Hruschka, 2016, p. 523) and repatriation of third-country nationals whose stay is irregular (Directive 2008/115/EC) (Oort, Battjes, & Brouwer, 2018) by Hungary. With regard to the second and third questions, infringement proceedings have been initiated (Jakab & Kochenov, 2017).

It is in the light of this context, addressed-at least at the beginning-on the basis of a case approach, that the EC chose to define a framework for the protection of the rule of law, with a view to taking preventive action, so as to prevent materialize a systemic threat that would make it necessary to activate the mechanism to protect the Union values referred to in article 7 of the TEU (Konstadinides, The rule of law in the European Union. The internal dimension, 2017). With a Communication of 2014[1], the EC clarified that this framework would be activated in situations where the authorities of a Member State had taken measures or tolerated situations that would systematically compromise the integrity, stability or proper functioning of the institutions and mechanisms safeguards set up at national level to guarantee the right by law (Strelkov, 2016, p. 506). This means that individual violations of fundamental rights would not be taken into consideration, but threats to the political, institutional or legal system of a Member State, its constitutional structure, the separation of powers, the independence or the impartiality of the judiciary and its system of judicial review, where the mechanisms provided at national level were not able to provide an adequate response in this regard.

The choices, although laudable on the political level, pose problems as to their timeliness-at least for Hungary and Poland, where the beginning of the crisis of the rule of law can be traced back to 2010-and their effectiveness, given the difficulty of actually sanctioning the two Member States for violations of the Union's system of values according to art. 7 TEU governs a direct procedure first to censure and subsequently to penalize (Niklewicz, Safeguarding the rule of law within the European Union: Lessons from the polish experience, 2017, p. 284), with the suspension of certain rights, including the right to vote, the Member State which imposes a serious violation of the fundamental values of the Union sanctioned by art. 2 TUE (Kellerbauer, Klamert, & Tomkin, 2019).

It is also known that the procedural complexities and the particularly high voting thresholds required, its being totally conditioned by the political evaluations of the European institutions, and above all and ultimately the Member States, the seriousness of the sanctions that it entails, have so far dissuaded the institutions from any hypothesis of appeal to art. 7 (Bribosia E. , Schutter, Ronse, & Weyembergh, 2000, p. 61)-significantly defined by the former President Barroso as “the nuclear option”, even in the face of an increasing presence of threatening

[1]Communication from the Commission to the European Parliament and the Council. A new Euframework to strengthen the rule of law, COM/2014/0158 final.

situations, if not even of blatant violation of the values of art. 2 TUE (Moorhead, 2014, p. 6) (Weatherili, 2016, p. 395).

Naturally nothing would prevent that in some cases situations of this kind could be opposed by the Union with the use of instruments equally provided for by the Treaties, but less "explosives" from the political and media point of view (Scheinin, The state of our Union: Confronting the future, 2015, p. 560).

In fact, it can not be ruled out, but the likelihood of serious violations of the principles that characterize the rule of law and of the values set forth in art. 2, therefore liable to fall within the scope of application of art. 7 (Petrov & Elsuwege, 2014, p. 46), (Kuzelewska, 2015, p. 160), (Williams, 2010, p. 92), are configured, in relation to specific situations, also as violations of specific norms of primary or secondary law, of the Union (2016, p. 601), thus being able to incinerate the competence of the EC and the CJEU to react under the infringement procedure referred to in articles 258-260 Treaty on the Functioning of the European Union (TFEU) (Martín, 2018).

This is the case, for example, with respect to Poland, in which the EC, even in the face of an overall situation at risk of violating the principles of the rule of law, has chosen[1] to resort to the infringement procedure for certain specific violations of the secondary legislation of the Union[2].

[1]See the resolution in relation on the situation in Hungary of 16 December 2015 82015/2935(RSP): "(...) regrets that the current approach taken by the Commission focuses mainly on marginal, technical aspects of the legislation while ignoring the trends, patterns and combined effect of the measures on the rule of law and fundamental rights; believes that infringement proceedings, in particular, have failed in most cases to lead to real changes and to address the situation more broadly; Reiterates the call on the Commission to activate the first stage of the EU framework to strengthen the rule of law, and therefore to initiate immediately an in-depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary, including the combined impact of a number of measures, and evaluating the emergence of a systemic threat in that Member State which could develop into a clear risk of a serious breach within the meaning of Article 7 TEU" (parr. 7-8).

[2]CJEU: sentence: C-286/12, European Commission v. Hungary of 6 November 2012, concerning early retirement of judges carried out in violation of Directive 2000/78/EC on equal treatment in employment and sentence of 8 April 2014, the early termination of the mandate of the personal data protection supervisory authority in violation of Directive 1995/46/EC on the protection of individuals with regard to the processing of personal data. In the first case, the Court followed the prospect contained in the Commission's appeal where reference was made exclusively to articles 2 and 6, par. 1 of Directive 2000/78/EC which, by establishing a general framework for equal treatment in the field of employment and working conditions, implements the principle of non-discrimination on grounds of age. Explicit references to the CFREU appear, for interpretative purposes, in the position statement of the Advocate General Kokott. Although the European Commission limited the charge to the infringement of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data, the Court introduced the part of the judgment by referring to the primary law. It was thus stressed that "the need for an independent authority to monitor compliance with the Union's rules on the protection of individuals with regard to the processing of personal data also results from the primary law of the Union, in particular Article 8 (3) of the CFREU and Article 16 (2) TFEU "(paragraph 47). A third procedure concerning the independence of the Hungarian central bank was subsequently closed by the Commission. On 15 December 2015, the Commission also opened an infringement procedure against the Asylum in the field of asylum. In argument see also the Report FIDH, Hungary: Democracy under threat-six years of attacks against the rule of law, November 2016, n. 684a.

It is clear, however, that this will not always be possible since the EC can initiate an infringement procedure only in the presence "of a violation of a specific provision of EU law" (Martín, 2018), while art. 7 TEU has notoriously a wider scope of application by giving the Union "the power to intervene to protect the rule of law, including in areas involving the autonomous action of the Member States"[1]. To this it must be added that the dispute pursuant to art. 7 has a political value (Liakopoulos, 2018, p. 247) greater than the importance of respect for those values by the Member States. The Pre-article 7 TEU Procedure were mixed. Some concerned the establishment of the mechanism as such, whereas other criticized the Commission for not using it in specific cases. Some authors hold that it "falls short of what is required to effectively address internal threats to EU values" but, at the same time prefer it largely to "the Council's alternative proposal to hold an annual rule of law dialogue (...)" (Kochenov & Pech, 2015, p. 514). In particular the EC's already mentioned "Rule of Law Framework" of 2014 (A potential constitutional moment for the European rule of law. The importance of red lines, 2018, p. 8), which was designed as an instrument whose quick implementation could avoid escalating the situation into Article 7 TEU territory. Read as an "*a maiore ad minus*" approach that is permissible under Article 7(1) TEU and Article 292 TFEU, it provides the Commission with a procedure for engaging-through an opinion and later recommendations-in a dialogue with a Member State in case of an observed "(...) systemic threat to the rule of law (...)" (Martín, 2018).

This explains why the political institutions of the Union have been led to seek rather more forms of control of respect for the rule of law in the Member States (Bingham, 2011, pp. 10-33), (Kochenov, Biting intergovernmentalism: The case for the reinvention of article 259 TFEU to make it a viable rule of law enforcement tool', 2016, p. 690), complementary to the instrument offered by art. 7, but at the same time softer and less formal (Toshkov, 2012, p. 96), because they are more explicitly based on the "light power of political persuasion"[2]. The new EU framework established by the EC pursues these aims, built as it is around a mechanism of "low media resonance"[3] and of equally low formality.

The procedure which it envisages, which is intended to be applied when there are systemic threats to the rule of law when it is established that the national guarantee mechanisms do not appear capable of adequately addressing these threats, is based on a process designed to take place in three phases. A first EC evaluation can be followed by a recommendation and subsequent follow-up. The mechanism in question does not seem to stand comparison with reality, at least in the light of its

[1]See the Communication from the Commission to the European Parliament and the Council, New EU framework for strengthening the rule of law of 11 March 2014, par. 5ss.
[2]See the 2013 EU State Speech delivered on 12 September 2012 to the European Parliament by the President of the Commission.
[3]Significantly the first act of the procedure against Poland, the opinion on the rule of law in Poland adopted on June 1, 2016, has not been published, since the Commission released only a press release, IP/16/2015, and with introductory note: MEMO/16/2017.

application to Poland. The adoption of four recommendations[1] over a two-year period has had no effect and has even led to the postponement of the decision to activate the procedure pursuant to art. 7, par. 1. Furthermore, it seems very incongruous that similar initiatives have not been taken with regard to the Hungary (Pech & Sceppele, Cambridge Yearbook of European Legal Studies, 2017, p. 6) but partially in the case of Poland.

In practice, the EC has committed itself to seeking, in the course of the procedure, a solution through dialogue with the Member State in question, and to ensure, in compliance with the principle of equal treatment of the Member States, an objective and in-depth assessment of the situation. The first evaluation phase ends with an opinion on the rule of law, whose content is intended to remain confidential, in which the findings are motivated and the Member State is invited to respond. If the issue is not resolved satisfactorily and the EC considers that there is objective evidence of a systemic threat without the national authorities taking the appropriate measures to deal with it, it may recommend the appropriate actions by setting a deadline by which the Member State he will have to solve the question. During the procedure, the EC will be able to avail itself of the assistance and advice of specialized bodies, including those outside the Union, including, in particular, the Council of Europe and its Venice Commission and the European Agency of Fundamental Rights.

Given the dialogic nature of this procedure and its non-binding outcome, it is therefore a soft law tool, by which the EC seeks an informal solution with the Member State concerned, before formally proposing the opening of the procedure pursuant to art. 7 TEU or, where appropriate, in the event of threats to the rule of law which give rise to specific breaches of EU law, that of article 258 TFEU (Hatze, 2013). In this case we can say that the softness derives-alternatively or cumulatively-from the softness of the source (*soft instrumentum*) and the softness of what the instrument provides for, i.e. its content (*soft negotium*), conversely, an obligation is hard when both the source and the content are hard.

For its part, immediately after the EC, the Council, together with the Member States meeting within the Council, decided to experiment with further ways of exercising its control over respect for the rule of law within the Union. With the formal conclusions approved on December 16, 2014, it has activated a mechanism of political dialogue on the rule of law to be conducted on an annual basis among all the Member States within the General Affairs Council[2]. As established in those conclusions, political dialogue should be based on the principles of objectivity, non-discrimination and equal treatment between all Member States and should be conducted with an impartial and detailed approach. Furthermore, the initiative must not undermine the principle of allocation powers, of the national identity (Cloot,

[1]EC-Press release: Rule of law: European Commission acts to defense judicial independence in Poland, Bruxelles, 20 December 2017.
[2]Press Release, 3362nd Council meeting, General Affairs, 16862/14 COR 1, p. 20.

2015) of the Member States inherent in their political and constitutional structure and must be carried out in compliance with the principle of sincere cooperation (point 4 of the conclusions) (Bogdandy, Antpöhler, & Ionnidis, 2014, p. 64) (Jakab & Kochenov, 2017).

Starting from art. 7 TEU, the reflection intends to expand to other figures, identifying their strengths and weaknesses. According to our opinion, none of the instruments identified is, by itself, suitable to adequately protect the axiological structure of the Union and that, however, a combination of these could lead to convincing results, given that art. 7 of the TEU (Derlén & Lindholm, 2018) is at the center of the news because of the decisions of the EP and to activate the mechanism provided for in Poland can not be attributed to safe and efficient choices and has now become clear to anyone that defined as an option nuclear energy by the then Commission President Josè Barroso[1] is, in reality, little more than a toy weapon.

This can be supported in light of the fact that, to arrive at the application of the sanctions provided for by art. 7, par. 2, a unanimous decision is required by the European Council. As far as art. 354, par. 1, of TFEU excludes from the deliberation the Member State under accusation, it is very difficult for the other member States to reach a unanimous decision, above all in the event that the problems concerning the protection of the rule of law concern several States (Avbelj, 2018). Not surprisingly, Hungary and Poland promised mutual aid, where such a situation would come. The possibility of resorting to a decision by the European Council concerning several States at the same time, with the consequence, therefore, of excluding all of them from voting, clashes with the literal tenor of art. 354 TFEU (Liakopoulos, 2018) and, therefore, could hardly be implemented and pass a screening before the CJEU, where the resolution was challenged.

Last but not least, the EP has also expressed itself in the matter, proposing for the moment only at the level of the proposal (Keszthelyi, 2017), (Matthijs & Kelemen, 2015, p. 98), (Tavares & K.L., 2016) (Oliver & Stefanelli, 2016, p. 1076), (Dawson & Muir, 2013, p. 1962). On 5 April 2016 the Committee on Civil Liberties, Justice and Home Affairs suggested the conclusion of an inter-institutional agreement ("EU Pact for Democracy, the Rule of Law and Fundamental Rights (DRF) in the form of an inter-institutional agreement") on a more effective use of the Article 7 TEU mechanism[2].

With a Resolution of 25 October 2016[3], the EP invited the EC to present, by

[1]See the State of the Union 2012 address of 12 September 2012.
[2]European Parliament, Motion for a Resolution of 5 April 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).
[3]Recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).

September 2017, a proposal for an interinstitutional agreement containing a Union Pact on Democracy (Choudhry, 2006), (Müller, 2015, p. 122), (Varol, 2015, p. 1674), (Jakab & Kochenov, 2017, p. 78), the rule of law and fundamental rights (DRF) (Oliver & Stefanelli, Strengthening the rule of law in the European Union: The Council's inaction, 2016, p. 1078), for the purpose to establish a new EU mechanism on democracy[1], the rule of law and fundamental rights to complement the existing ones put in place by the EC and from Council. The new mechanism should monitor annually on violations of democratic principles, the rule of law and fundamental rights in the Member States and in the Union, ensuring that the evaluation criteria to be used in this regard are based on "objective findings" and not subject to influences external political ones; that respect the principles of subsidiarity, necessity, conditionality (Vita, 2017, p. 6) and proportionality. The Pact should be based on a progressive approach comprising a preventive volatility and a corrective volatility; including the possibility of providing for sanctions which have a dissuasive effect. In practice, each year the Commission, in consultation with an independent group of experts, should draw up a report on the *status* of DRFs in the Member States, with country-specific recommendations, based on indices such as the separation of powers, freedom and pluralism media and access to justice. The report should form the basis for every possible action to be taken, from the dialogue with the Member State, to the interparliamentary debate, to the debate in the Council, not excluding the use of art. 7 TEU (Derlén & Lindholm, 2018).

There is then a further criticism to be carried out. The EC proposal to activate art. 7, par. 1, in relation to Poland dates back to 20 December 2017. Ten months later, the Council did not meet to resolve the existence of a clear risk of violation in that state and, at the moment, such a meeting does not appear to be scheduled. To date, there is only one discussion that took place during the Council of General Affairs[2] of 26 June 2018 which allowed the participating ministers "to have an in-depth exchange with Poland on the concerns identified in the Commission's reasoned proposal"[3].

The judgment on the remedy pursuant to art. 7 can only be negative, as must be the assessment on the framework[4] to strengthen the rule of law, defined in 2014 by the EC. Given the fact that already the procedure provided for by art. 7, par. 1, was introduced, with the Treaty of Nice, to encourage greater reflection on the

[1]T. Jagland, State of democracy, human rights and the rule of law in Europe, (124th Session of the Committee of Ministers, Vienna 2014. R. Tavares, Report on the situation of fundamental rights: standards and practices in Hungary, (European Parliament, Brussels, 2013, actually the report calls on the EC to institutionalize a new system of monitoring and assessment.

[2]See outcome of the Council meeting 3629. The Council meeting-General Affairs, Luxembourg, 26 June 2018, Press office n. 105/1918.

[3]Council of the European Union, Bruxelles 22 December 2017, 2017/0360 (NLE) and General Affairs Council of 18 September 2018.

[4]See the Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the rule of law, COM/2014/0158 final.

controversial issue (Jakab & Kochenov, 2017) and, in this way, lead to a solution of the problem that goes beyond the adoption of sanctions, it is clear that the framework defined by the Commission ends up delaying even more the moment of clear choices and becoming, therefore, an instrument that, contrary to what was hoped for, risks favoring a progressive complication of the situations underway.

Finally, we could say the the legal and "political" actions taken so far against Hungary (Hummer, 2015, pp. 625-627) and Poland illustrate according to our opinion the discrepancy between, on the one hand, the self-understanding of the Union as founded on universal values and as the guarantor of their protection within the Union's territory and, on the other hand, the limited capacities of the European Union to involve itself and intervene in the internal orders of its Member States. The crisis shows that the EU is reaching a "natural plateau" based on a pragmatic division between national policy and supranational policy. In particular the movement toward the "ever-closer union" (Hummer, 2015) of which the EU's founding fathers dreamed when they signed the Treaty of Rome in 1957 will have to stop at some point; there will never be an all-encompassing European federal State. This European "sonderweg" will yet again affirm the primacy of the national communities as the deepest source of legitimacy in the integration process. In the matter of fact while trying to protect democracy and the rule of law within the EU, otherwise, they risk undermining democracy and the rule of law inside the EU.

3. A Similar Function between the New Framework of the European Commission and the Political Dialogue of Council.

Regardless of the follow-up to the Resolution of EP, already today the mechanisms implemented by the EC and the Council do not lack, in some respects, points of contact (Besselink, 2016, p. 6), (Kochenov & Pech, Monitoring and enforcement of the rule of law in the EU: Rhetoric and reality, 2015), (Peers, 2014). Both aim to avoid the difficulties presented by art. 7 TEU, but not to exclude its application, so as to present both as a prodromal to the use of this: the New Framework in a declared manner, the Council's political dialogue in a more implicit but no less open way, given the precautions States wanted to include in the Conclusions that have established it, the possibility of being able to work, on the occasion, in a preliminary key to art. 7 (Albert, 2008, p. 4), (Wilkinson, 2013, p. 528). Both are presented, then, as mechanisms of less political and media intensity than those governed by art. 7 TEU, which still involves parliamentary debate (Kochenov, Biting intergovernmentalism: The case for the reinvention of article 259 TFEU to make it a viable rule of law enforcement tool', 2016, p. 154).

Both are placed, finally, strictly within the framework of the powers recognized to the two institutions by the Treaties. This is certainly true for the Council, given the

very bland characteristics of the political dialogue, but it is also true for the EC[1], despite the different opinion expressed in this regard by the Council Legal Service. This, in fact, called for a ruling on the New Framework, argued that "there would be no legal basis in the Treaties authorizing the institutions to create a new mechanism to supervise respect for the rule of law by the Member States (...)" (Legal, 2014, p. 9).

However, even without the need to leverage the non-binding character of this "new" mechanism (BARATTA, 2016, p. 366) which can at most be linked to that general obligation of loyal cooperation (Klammert, 2014) that art. 4, par. 3, TEU imposes on Member States on the tasks performed by the institutions (BARATTA, 2016, p. 366), it is easy to see how, already on a general level, EC action in the context of the New EU framework can be fully included in the power conferred by art. 17 TEU to ensure compliance with the Treaties by the Member States. But to this is added, then, it is quite clear that, independently of this general power, the power to monitor in advance the respect for the rule of law and the values referred to in art. 2 TEU must be considered to be logically linked to that, which art. 7 TEU (Beck, 2013) also confers on the EC to propose the initiation of the procedure envisaged by it. In fact, it is an acquired concept that the general prerogative of discretionally organizing the powers attributed to them by the Treaties is the responsibility of the institutions (BARATTA, 2016); so much so that, not by chance, the procedure introduced by the New Framework was also defined as "pre-article 7" (Klammert, 2014).

4. (Follows) But a Different Range…

Despite these undoubted points of contact, the two mechanisms already put in place by the EC and from Council are however proving, in practice, not very different from each other as regards the respective scope or if you want, given the institutional origins of one and intergovernmental of the other, with regard to the conception that inspires them at the bottom.

The New EU framework managed by the EC is in fact emerging as a real procedure for monitoring compliance by Member States with the principles of the rule of law, a procedure marked by precise formal steps, consisting of the adoption of an opinion, first, and a recommendation, then, explicitly attached, the latter, by a term to comply with it, in clear resemblance to the pre-litigation phase of the infringement procedure pursuant to art. 258 TFEU.

While not leading to the adoption of binding measures, the New EU framework therefore ends up being a preliminary phase to the proposal, as set out in art. 7 TEU, of finding an obvious risk of serious violation by a Member State of the

[1]European Commission, Recommendation of 27 July 2016 regarding the rule of law in Poland, C(2016) 5703 final.

values of article 2 TEU; a passage that is obviously not indispensable or explicitly envisaged by the Treaty, but which could prove politically useful for the Member State to identify together with the Commission, also in the light of any indications of the Council of Europe and its bodies, solutions to avoid the formal activation of art. 7 TEU (Beck, 2013).

On the other hand, the political dialogue on the rule of law which the Council has committed itself to carry out each year within its "General Affairs" training is rather outlined, at least in its practical application. It seems in fact to maintain, at least for now, the level of debate on general issues.

This is how the first annual Dialogue, which took place in November 2015 under the Luxembourg Presidency, was dedicated to the issues of prevention and the fight against anti-Semitism and anti-Islamism, to the examination of good practices at national level and to the rule of law in the digital age[1]; while the second, which took place in May 2016 under Dutch presidency, when EC already opened the structured dialogue with the Polish authorities, was focused on the challenges posed by refugee and migrant flows with regard to fundamental rights.

That this could be the inevitable outcome of the annual dialogue before the Council was easily predictable. This was suggested by the same foundations of the Council and the Member States of 2014, with their explicit underlining of the possibility that, through it, the Council "will consider, as needed, to launch debates on thematic subjects matters"[2].

It should also be noted that very rarely the Governments of the Member States are willing to put other governments in the spotlight in order to censure their behavior in political and even less jurisdictional grounds. We remind you here that, like art. 7 TEU, also the analogous mechanism to protect the rule of law foreseen by art. 8 of the Statute of the Council of Europe was activated only once against Greece, after the military coup, but was interrupted following the unilateral decision by the Greek Government to withdraw from the Council of Europe. But it also confirms the small number of cases of recourse to the CJEU by a Member State to assert the non-fulfillment of another Member State pursuant to art. 259 TFEU and the equally small one of the inter-state appeals to the ECtHR (Schukking, 2018, p. 154) (Lautenbach, 2013, p. 192). According to our opinion the use of art. 259 TFUE in combination with rule of law demonstrate the lack of Member States' initiative in this regard as an expression of "diplomatic considerateness" and/or another interpretation its infrequent use by as an expression of Member States' trust in the Commission's effectiveness as Guardian of the Treaties (TEU and TFEU) (Groeben, 2015). As the CJEU has constantly held, "(...) every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of

[1]Press Release, 3427nd Council meeting, General Affairs, 17-18 November 2015, Presse 70 PR CO 62, 14185/15 and the Document of the Presidence of 9 November 2015, 13744/15.
[2]Council of the European Union of 12 December 2014, 16862/14.

evolution (...)" (Schorkopf, p. 158), (A.Bouveresse & D. Ritleng, 2018), (Clêment-Wilz, 2019).

If we try, then, to consider the alternative tools made available by EU law, it should be noted that, pursuant to art. 10, par. 3, of Regulation n. 1141/2014[1], on the statute and funding of European political parties (Conti, 2013), (Kilpatrick, 2015, p. 325) and European political foundations, the EP, the Council or the EC may submit a request for verification of compliance to the authority for European political parties and European political foundations, by a European political party or a European political foundation, registration conditions, among which is the adherence to EU values.

The initiative can also be taken by the authority itself and lead to a revocation of the registration, which enters into force only if neither the EP nor the Council raise objections within the period of three months from the date of notification or if, before of the expiry of this term, both the EP and the Council inform the authority that they do not intend to raise objections. Given the importance that the European political parties, Polish rectius have-at least capable of expressing the relative majority of EP, the activation of such a mechanism seems highly unlikely the responsibilities of individual members would result in a withdrawal that would undermine both the political realities as a whole (Pech & Sceppele, Cambridge Yearbook of European Legal Studies, 2017). Equally important the statute of the EEP Congress[2], in identifying the aims pursued by this movement, recalls, in art. 3, also respect for the rule of law, while, in art. 9, provides that the exclusion of a member can be decided by the assembly body, on the proposal of the President or of seven ordinary members or associated representatives of five States (Schroedr, 2016, p. 284).

Further taking into account other mechanisms of protection, can remember how, in 1999, the political elections that took place in Austria ended with a victory of the Social Democratic Party but, above all, with a significant affirmation of the Austrian Freedom Party, rightist nationalist movement, known for his xenophobic and racist positions, led by the governor of Carinthia Jörg Haider. Thanks to an alliance with the People's Party, the government until then but third in the recent election, the Austrian Freedom Party was involved in the coalition that expressed the new executive (Happold, 2000, p. 954).

The then 14 Member States of the European Union reacted to what was perceived as a threat to the values of the Union, through instruments of a diplomatic nature. As announced by the rotating presidency of the European Council of 31 January 2000[3], it was decided not to entertain any political relationship with the Austrian

[1]Regulation (UE, Euratom) n. 1141/2014 of European Parliament and of Council of 22 October 2014 on the statute and funding of European political parties and European political foundations, OJ L 317, 4.11.2014, p. 1-27.
[2]Approved by the EEP Congress on 29 March 2017 in Malta.
[3]See the settlement by the Portuguese presidency of the E on behalf o XIV member States of 31

government, not to support Austrian candidacies in international organizations and to maintain relations with Austrian ambassadors in European capitals in an exclusively technical level.

The diplomatic quarantine thus decreed against Austria lasted for a few months, until, in accordance with the opinion expressed by an ad hoc expert group on request of the President of the European Council, it was not decided to end it, considering that it had the effect of reaffirming the European system of values and that a continuation of it could have been counterproductive (Jakab & Kochenov, 2017).

Given that the ruling coalition between the People's Party and the Austrian Freedom Party continued to exist until 2002, one can discuss the effectiveness of the measures taken by EU Member States on that occasion and the opportunity for their re-proposal against Hungary and Poland. Since, even then, the diplomatic sanctions were not sufficient to dissolve the alliance between the two parties, they are unlikely to have any effect in relation to States led by governments as the expression of a single party. On the contrary, the risk is that adequate internal use of propaganda tools and the spread of Alamo syndrome topics will lead to a strengthening of these political forces.

In addition to these considerations, it must also be said that the choice of the diplomatic quarantine is difficult to re-propose today. If, at the time, the triumph of a movement such as Haider's was an exception in the European political landscape, the current situation is very different. The dissemination of the movements of sovereign inspiration in all Member States, the positive results reported by them in the electoral sphere, their involvement in the form of government prevent a uniform response from the European executives. Even in those states where non-sovereign forces express the parliamentary majority and the government, the presence of such parties and movements would make such an initiative difficult to implement and risky in terms of electoral consent. The loss of land recorded in recent years by the political forces most sensitive to European integration, rectius integration through law, both conservative and reformist, prevents the use of this instrument and the poor effectiveness of which it has proved pushes in the sense not to travel a similar path.

It should however be noted that it was the Austrian story that led, first, to the reform of the protection mechanism of art. 7, with the inclusion of par. 1, and subsequently to the establishment of European Agency for Human Rights (Sadurski, 2010, p. 386).

Trying to find economic remedies, it may be worth noting that, in 2014-2020, Hungary (Hristova-Kurzydlowski, 2013, p. 24) will obtain, through European funds, 25 billion euros to be invested-among other things-in infrastructure, research and development, innovation, measures to support employment and fight poverty.

January 2000.

In the same period, Poland will receive a total of €86 billion, to be used for similar purposes. In light of these data, the proposal to exploit a provision of Regulation no. 1303/2013[1], laying down provisions common to the various European funds, to push these states to reforms as regards the rule of law.

Pursuant to art. 142, lett. a), of Regulation, the EC may suspend all or part of interim payments at the level of priorities or operational programs if there are serious shortcomings in the effective functioning of the management and control system, which jeopardize the EU contribution to the program and for which no corrective measures have been taken. The thesis supported, then, is that states in which a systematic crisis of the rule of law is in place can not ensure the effective functioning of the management and control systems (Habermas, 2012, p. 8). The proposal is undoubtedly interesting, but poses three sets of issues. The first concerns the economic impact that such an initiative could have. Consequently, the impact of such measures would be limited, at a practical level, to at least the second hypothesis.

The second order of questions concerns the verification of concrete situations. The fact that, in one or more States, a crisis of the rule of law is in place does not automatically imply that all control mechanisms are compromised, both in general and in relation to European funds. In light of the aforementioned data, the Polish judicial authorities in twenty cases reported by the European Anti-fraud Office (OLAF) have not taken any initiative, while in seventeen others have initiated proceedings, eight of which led to at least one indictment. As for the Polish judicial authorities, while thirteen notifications did not give rise to any initiative, eleven pushed the start of proceedings, nine of which led to the filing of an accusation.

It is to be considered how, pursuant to art. 142 above, the EC may and should not suspend interim payments. This raises the question of whether there is the political will of the European executive to follow such a path.

5. The Activation of the New Framework by the European Commission and the Political-Institutional Question in Poland.

The reforms initiated in Poland by the Government, which came out of the parliamentary elections of 25 October 2015 and led by PiS, the conservative party *Prawo i Sprawiedliwość*[2], law and justice, and the constitutional Crisis (Calliess,

[1]Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20.12.2013, p. 320-469.

[2]Inter alia: a) some amendments to the Law relating to the Trybunał Konstytucyjny (Polish Constitutional Court) in order to be able to recalculate the appointments already made by the previous

2015, pp. 499;535-536) that followed, soon raised the alarm of the EC for the possible repercussions detrimental to the rule of law in the country. With a first letter dated 23 December 2015 addressed to the Polish Government, the vice-president of the EC, Timmermans, has therefore requested clarification on the complex political-institutional crisis in the country, recommending, among other things, the Polish authorities to consult the Commission of Venice[1].

The crisis was in fact exacerbated by the law adopted on 19 November 2015[2], with an accelerated procedure and retroactive effects, with which the Sejm, the Lower House of Parliament, amended the law on the Constitutional Court by drastically reducing the mandate of its President and Vice President and introducing the possibility of canceling the appointment of the five judges carried out before the elections and to appoint others to replace them. On these issues, the Constitutional Court itself, on 3 and 9 December 2015, made two judgments that were neither executed nor published, while the Sejm approved a further reform law of the Court on 22 December, which the other, strongly limited the independence of its judges (Dallara, 2014).

On 9 March of 2016 the Polish Constitutional Court also considered this last law unconstitutional, but the sentence, as well as the rest of the subsequent ones, was not carried out nor, by the will of the Government, ever published in the national official journal. For its part, the Polish Parliament has adopted a further series of acts in sensitive matters that appear to strongly limit fundamental freedoms[3].

A few days later the Venice Commission[4], requested by the Polish Government,

majority and to condition their work, changing the rules relating to the quorum and quorum deliberative; b) the merger of the office of the Attorney General with that of the Minister of Justice, with the consequent attribution to the latter of significant powers as regards the exercise of the prosecution and the carrying out of investigations; c) the reform of the National Council of the Magistracy, with the removal of the appointed members in office before the scheduled deadline and the division of the body into two assemblies, one composed mostly of deputies, the other by judges identified by Parliament; d) the reform of the Sąd Najwyższy (Supreme Court), which has, on the one hand, lowered the retirement age of the members of the Court, recognizing however to the President of the Republic the power to define exceptions ad personam; on the other hand, the introduction of lay members elected by the Senate in the section responsible for deciding politically sensitive cases (for example, electoral litigation) and in the disciplinary section; e) the reform of ordinary courts, with the assignment to the Minister of Justice of significant powers such as the appointment and dismissal of the presidents of the courts and the definition of the procedures for assigning cases to the individual magistrates.

[1]Venice Commission, Hungary-Opinion on the Draft Law on the Transparency of Organisations Receiving Support From Abroad, CDL-AD(2017)015-e, Strasbourg, 20 June 2017, the Law adopted on 13 June 2017 "(...) will cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination(...)" (para 68).

[2]M. Szuleka, M. Wolny, M. Szwed, The constitutional crisis in Poland 2015-2016, Helsniki Foundation for Human Rights, 2016.

[3]Press Release, 3467nd Council meeting, General Affairs, 24 May 2016, PRESSE 27 PR CO 26, 9340/16. See also the non-paper of the Presidency of 13 May 2016, 8774/16.

[4]Venice Commission, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, Opinion 663/2012, CDL-AD(2012)001; Venice Commission, Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD(2012)001, Opinion 683/2012, CDL-AD(2012)020; International Bar Association's Human Rights Initiative (IBAHRI), Courting

evaluated the reform law of December 22nd and protracted conflict over the composition of the Constitutional Court as likely to pose a serious threat to the rule of law, democracy (Neyer, 2010, p. 905), (Scliesky, 2014, pp. 825-829; 873), (Middelaar & Parijs, 2015, p. 56) and respect of human rights[1] and urged the Polish political parties and institutions to find a solution that respects the role of the Constitutional Court.

Throughout this period the EC has held open dialogue with the Polish authorities. In particular, her representatives participated in a debate in the plenary session of the Sejm (Börzel & Buzogány, 2010, pp. 158-182), (Liakopoulos, 2018); EC was faced with a forced road. Believing that, where provided for by national law, a check of effective constitutionality is one of the essential safeguards of the rule of law, on 1 June 2016 the Brussels executive decided to formalize the procedure provided for by the New Framework by adopting an opinion on the rule of law in Poland[2].

In finis we could say that with the Order C-619/18 (European Commission v. Poland) filed on 19 October[3], the CJEU gave an intervention, giving reason, at least at this stage, to the EC that had lodged an appeal for non-compliance. The CJEU upheld the request for provisional measures and ordered Poland to suspend the application of the rules on lowering the retirement age of the judges of the Supreme Court, also requesting that the courts concerned be allowed to continue to exercise their functions with the status prior to the entry into force of the law. Also blocked the possibility of appointing judges according to the new rules, as well as the new President of the Supreme Court. For the CJEU vice-president the requirement of judges' independence is an essential element of the fair process and functional to preserving the common values of the Member States enunciated by article 2 of the TEU (Beck, 2013). To this it should be added that the reform involves the judges of the Supreme Court and, therefore, due to the adoption of definitive judgments, there is a risk of serious and irreparable damage to each subject. Poland is required to inform the EC about the measures taken to comply with the ordinance[4].

controversy: The impact of recent reforms on the independence of the judiciary and the rule of law in Hungary, Report September 2012. IBAHRI, Still under threat: The independence of the judiciary in Hungary, Report October 2015.

[1]Article. 8 of the Statute of the Council of Europe, provides that the Committee of Ministers may decide that any member of the Council of Europe who contravene the principles of the pre-eminence of human rights and rights is suspended from the right of representation and possibly expelled from the Council of Europe. As is known, the procedure was activated after the military coup in Greece but was interrupted following the withdrawal of the latter on 12 December 1969.

[2]Editorial Comments, About Brexit negotiations and enforcement action against Poland: The EU's own song of ice and fire, in Common Market Law Review, 54, 2017, pp. 1310ss.

[3]Press release n. 159/18, Luxembourg, 19 October 2018. Order of the vice President of the court in case C-619/18 R, European Commission v. Poland.

[4]See from the Venice Commission: European Commission or democracy through law. Poland opinion on the draft act amending the act on the national Council of he judiciary, on the draft act amending the act on the Supreme court, proposed by the President of Poland and on the act on the organisation of ordinary Courts (adopted by the Venice Commission at its 113th plenary session (8-9 December 2017). Opinion n. 904/2017 of 11 December 2017.

6. The Recommendation of European Commission on Respect for the Rule of Law in Poland.

As emerges from the text of the Recommendation, the EC has in fact considered that even the amendments made by the latter law of the Polish Parliament are not capable of eliminating the criticalities of the previous reform, as, in its view, numerous provisions, including but not only, those relating to the quorum and voting majorities, the order in which the cases are dealt with, the procedural deadlines, the powers of the Attorney General, deprive the Union that the Constitutional Court is called to exercise in its substance of independence and effectiveness in the Polish constitutional system.

In addition to this in the Recommendation it is noted that the impediments posed by the new Government to the performance of the functions of the Constitutional Court, by affecting its integrity, stability and functioning, in particular imply the impossibility of exercising a real constitutional review of respect of fundamental rights by the laws recently adopted by the Sejm. In recent months, it has adopted numerous laws, often with an accelerated procedure, and presented new legislative proposals in sensitive matters, such as the media, the public administration, the structure and powers of the police forces[1], the role of the public prosecutor, the powers of the ombudsman, the discipline of anti-terrorism.

Raising "serious concerns in respect of the rule of law" (Pech, A Union founded on the rule of law: Meaning and reality of the rule of law as a constitutional principle of EU Law, 2016, p. 362), (Closa & Kochenov, 2016) this set of factors has led the EC to believe that there is "a situation of a systematic threat to the rule of law in Poland"[2]. The Recommendation also stresses the need for the publication of such judgments, as of all the other judgments, to take place automatically and does not depend on acts of executive or legislative power[3]. As it is further recommended

[1]Venice Commission: Opinion on amendment to the act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th session (Venice, 11-12 March 2016, 833/2015; Opinion on the Act of 15 January 2016 amending the police Act and certain other Acts, adopted by the Venice Commission at its 107th session (Venice, 10-11 June 2016); Opinion on the Act on the Constitutional Tribunal adopted by the Venice Commission at its 108th Plenary session, (Venice, 14-15 October 2017, 860/2016.

[2]In particular, the law entailed the possibility of canceling the designations of the judges carried out on October 8, 2015 by the previous Parliament, which should have been appointed by the President of the Republic. Three of these would have had to fill vacant posts during the outgoing legislature; the other two should have filled the places that would have been available in the new legislature, starting from 12 November. On 25 November the *Sejm* annulled the appointment of these judges and on 2 December elected five more.

[3]CDL-AD(2016)001-and Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016): "(...) the provisions of the Amendments of 22 December 2015, affecting the efficiency of the Constitutional Tribunal, would have endangered not only the rule of law, but also the functioning of the democratic system, as set out above. They cannot be justified as a remedial action against an absence of "pluralism" in the composition of the Tribunal. Rather than speeding up the work of the Tribunal these amendments, notably when taken together, could lead to a serious slow-down of the activity of the Tribunal and could make it ineffective as a guardian of the Constitution (...)" (par. 137).

that any reform of the Constitutional Court, including that provided for by the most recent law of July 22, is in accordance with the jurisprudence of this jurisdiction and takes full account of the opinion of the Venice Commission of 11 March 2016[1], so that the Constitutioanl Court can effectively and independently fulfill its mission as guarantor of the Polish Constitution (R.D.Kelemen & Blauberger, 2016, p. 318). Finally, the authorities of this country are asked to refrain from any act or public declaration that could compromise the legitimacy and efficiency of the Supreme Court (Dawson & James, 2016, p. 22), (Bugaric & Ginsburg, 2016, p. 69).

The Recommendation closes with a formal invitation to the Polish Government to resolve the problems detailed in it within three months and to keep the EC informed of the steps taken in this direction[2]. Shortly thereafter, on September 14th, the EP, intervening in support of the work of the EC, approved by a very large majority a Resolution inviting the Polish Government to collaborate with the EC under the principle of loyal cooperation enshrined in the Treaty for the purpose to resolve the current constitutional crisis (Pernice, 2015, p. 542), (Dawson M. , Beyond the crisis: The governance of Europe's economic, political and legal transformation, 2015, p. 174) in full compliance with the opinion of the Venice Commission and the recommendation of the European executive. In parallel, the EC, as "guardian of the Treaties", is urged to monitor the follow-up that the Polish

[1]Venice Commission: "(..) A refusal to publish judgment 47/15 of 9 March 2016 would not only be contrary to the rule of law, such an unprecedented move would further deepen the constitutional crisis triggered by the election of judges in autumn 2015 and the Amendments of 22 December 2015. Not only the Polish Constitution but also European and international standards require that the judgments of a Constitutional Court be respected. The publication of the judgment and its respect by the authorities are a precondition for finding a way out of this constitutional crisis" (opinion 833/2015 of 11 March 2016, op. cit., par. 143). The Venice Commission calls both on majority and opposition to do their utmost to find a solution in this situation. In a State based on the rule of law, any such solution must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal. The Venice Commission therefore calls on all State organs and notably the Sejm to fully respect and implement the judgments of the Tribunal (...) in addition, the Venice Commission recommends that Poland should hold a principled and balanced debate, which provides enough time for full participation by all institutions, on: reform of the procedure and on the organisation of the Court and whether and what types of proceedings warrant reasonable time limits before the Tribunal (...)" (parr. 136 and 139). Venice Commission, C-860/2016 of 14-15 October 2016, op. cit.,: "(...) the effect of these improvements is very limited, since numerous other provisions of the adopted Act would considerably delay and obstruct the work of the Tribunal and make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning (par. 123) (...) by adopting the Act of 22 July (and the Amendments of 22 December), the Polish Parliament assumed powers of constitutional revision which it does not have when it acts as the ordinary legislature, without the requisite majority for constitutional amendments. Individually and cumulatively, these shortcomings show that instead of unblocking the precarious situation of the Constitutional Tribunal, the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves. They have created new obstacles to the effective functioning of the Tribunal instead of seeking a solution on the basis of the Constitution and the Tribunal's judgments, and have acted to further undermine its independence. By prolonging the constitutional crisis, they have obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights" (parr. 127- 128). On which the Venice Commission has also expressed itself critically in its opinion 839/2013 of 13 June 2016.

[2]The duration of the mandate has been reduced from nine to three years, also envisaging that the mandates in progress will end automatically within three months from the date of adoption of the law.

authorities will give to these recommendations[1].

After underlining the fundamental importance of fully guaranteeing the common European values listed in art. 2 TEU and in the Polish Constitution, values "that were approved by the Polish people with the 2003 referendum", as well as the rights enshrined in CFREU (Bogdandy & Sonnevand, 2015, p. 126), the EP expresses concern, "in the absence of a fully functional Constitutional Tribunal, for the recent and rapid legislative developments taking place in other sectors without adequate consultation"[2]. To tackle this situation the EP urges the EC "to carry out an evaluation of the legislation adopted regarding its compatibility with the primary and secondary EU law and with the values on which the Union is founded, taking into account the Recommendations formulated by the Venice Commission on 11 June 2016 and the Council of Europe Commissioner for Human Rights on 15 June 2016 (CommDH (2016) 23) (Schumahl & Breuer, 2017).

[1]The debate on the statements by the Council and the Commission pursuant to Rule 123(2) of the Rules of Procedure on recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP)). See Resolution of 13 April 2016 on situation in Poland (2015/3031(RSP)). In the same spirit see also: W. Van Ballegooik, T. Evans, An EU mechanism on democracy, the rule of law and fundamental rights. Interim European added value assessment accompanying the legislative initiative report (Rapporteur Sophie in 't Veld), European Parliamentary Research Service, October 2016, PE.579.328; Annex I, L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo and H. Spanikova, Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights; Annex II, P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe, Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights.

[2]In particular, the Resolution draws attention to "the law on public media, bearing in mind the need for a regulatory framework for public service media to ensure that they provide independent, impartial and accurate content reflecting the diversity of Polish society, as well as the relevant jurisprudence of the European Court of Human Rights and the EU acquis in the field of audiovisual media, the law amending the law on police and other laws, bearing in mind its disproportionate interference in the right to respect for private life and the incompatibility between indiscriminate mass surveillance activities and the massive processing of personal data of citizens with the jurisprudence of the EU and the European Court of Human Rights, the law amending the penal code and the law on power of attorney, taking into account the need to respect the EU acquis concerning criminal proceedings and the fundamental right to a fair trial; the law amending the law on the civil service, taking into account the serious risk of politicization of the Polish administration, which would jeopardize the impartiality of the public service; the law on combating terrorism, taking into account the serious threat to the right to respect for private life and the right to freedom of expression represented by the extension of the powers of the Internal Security Agency in the absence of adequate judicial guarantees; other issues of concern, since they can be seen as violations of EU law, the jurisprudence of the ECHR and fundamental human rights, including women's rights' (paragraph 8). Among other issues, the Resolution cites the fact "that the Polish Environment Minister has approved a project that provides for the increase of timber extraction in the Białowieża forest; that after the objections raised by the National Council for Nature Conservation, the Government has replaced 32 of its 39 members; that the slaughter of trees in the Białowieża forest began in May; whereas the Commission initiated an infringement procedure, on 16 June 2016, concerning the deforestation of the Białowieża forest (...)" (par. Z).

7. An Improper Reference to the Notion of Interference in Internal Affairs as a Response by the Polish Government.

On October 27, 2016, at the end of the three-month deadline indicated in the recommendation, the Polish government responded to the EC. In the statement with which the Foreign Minister gives notice of the Government's letter to the EC, it is stated that the Commission's recommendation, defined as non-binding, is "groundless" because it does not respect principles "as objectivism, or respect for sovereignty, subsidiarity, and national identity "and that the" interferences into Poland's internal affairs are not characterized by adherence to such principles"[1]. In particular, the work of the EC would be "largely based on incorrect assumptions which lead to unwarranted conclusions"[2] and on an incomplete knowledge of the functioning of the legal system and of the Polish Constitutional Court.

Well, although the overall attitude of the Polish authorities does not presage any willingness to accept the Recommendations of the EC and the Council of Europe bodies, these statements, as well as the position on the opinion of the Venice Commission on the law on Constitutional Court of July 22, 2016[3], arouse particular confusion.

The repeated appeal by the Polish Government to the idea that the EC's action, like that of the Venice Commission[4], constitute an interference in Poland's internal affairs, in fact ends up re-echoing the dynamics of international relations between States and international organizations today at least partly resized. It seems that it evokes, in a way not too implicit, the so-called exception of the reserved domain or domestic jurisdiction that, sanctioned in art. 2, par. 7, of the United Nations Charter (Fassbender, 2018), constitutes a general limit to the organization's activity, i.e.

[1]Ministry of Foreign Affairs statement on the polish Government response to Commission Recommendation of 27 July 2016.

[2]Ministry of Foreign Affairs statement on the polish Government response to Commission Recommendation, op. cit.,

[3]Venice Commission, Opinion of 14-15 October 2016 on the law of 22 July 2016 (par. 128): "(...) individually and cumulatively, these shortcomings show that instead of unblocking the precarious situation of the Constitutional Tribunal, the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves. They have created new obstacles to the effective functioning of the Tribunal instead of seeking a solution on the basis of the Constitution and the Tribunal's judgments, and have acted to further undermine its independence. By prolonging the constitutional crisis, they have obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights (...)".

[4]Position regarding draft Opinion of the Venice Commission on the Act on the Constitutional Tribunal of 22 July 2016, 2016/060: "(...) the Opinion is unreliable; it presents one-sided approach, lacks in thoroughness and is ridden with factual errors. It also exceeds the terms of reference of the request for examining the case. It reveals a clear political commitment of the experts who drafted it on the side of the opposition (...) the Government of the Republic of Poland would like to thank the Venice Commission for its offer of further assistance in solving the issues around the Constitutional Tribunal. In the light of the above remarks that refer to the partisan and legally defective draft Opinion, the Government of the Republic of Poland is in doubt over the advisability of further cooperation with the Venice Commission on that matter. The Government holds the view that the problem at hand, as falling into the domain of Poland's internal affairs, will be dealt with by the Polish Sejm in partnership with other state authorities (...).

excluding its competence on the issues of "domestic competence" of one of its Member States. Such dynamics, however, must be considered extraneous within the European Union and among the Member States of the Council of Europe.

The positions taken by the Polish Government seem in fact to support the lack of competence of the European institutions, and especially of the Commission, to establish that there is a clear risk of serious violation by a Member State of the values referred to in art. 2 TEU, including respect for the principles of the rule of law. But this competence is expressly provided for by art. 7, par. 1, TEU, where it attributes to a third of the Member States, the EP and the EC, which moreover has under article 17 TEU a general supervisory power over the application of the Treaties, the power to initiate the sanctioning procedure referred to in art. 7 or to that referred to in articles 258-260 TFEU (Beck, 2013). Instead, as we have seen in the previous paragraphs, the new legal framework can well be considered as prodromal to the activation of those two procedures.

Nor could it invoke to react to an alleged interference in internal affairs the principle of respect for the national identities of the Member States enshrined in art. 4, par. 2, TUE (Freyburg & Solveig, 2010, p. 265). In the wording introduced by the Treaty of Lisbon, the provision actually requires the Union to respect "the equality of the Member States before the Treaties and their national identity inherent in their fundamental, political and constitutional structure, including the system of local and regional self-government" (Bluman, 2015, pp. 722-755), (Börzel & Risse, Oxford handbook of comparative regionalism, 2016, p. 538). But, whatever the function and the normative scope that one wants to attribute to the principle, it is certain that it can not lead to justify an exception to the values established by art. 2 TUE (Burgorgue-Larsen, 2011), (Burgorgue-Larsen, L'identitè constitutionnelle, 2014).

If, in fact, the "neutrality of the legal system (of the European Union" with respect to the organizational structure of the member states" (Limbach, 2015, p. 142), (Rosas & Armati, 2018), (Fink, 2017, p. 122) and the freedom of these to share their internal competences according to their constitutional order is in fact out of the question, it is equally certain that it is precluded to invoke internal procedures to circumvent the obligations imposed on them by EU law, and in the same way, any derogations from the fundamental freedoms of the Treaty justified by reasons connected to respect for national identity do not allow the Member State to disengage from the general regime of the obligations deriving from the Treaty and, in particular, from the CJEU (Barbato & Mouton, 2010, p. 21), (Dawson M. , The governance of European Union fundamental rights, 2017, p. 181)). The principle of respect for the national identity enshrined in article 4 (2) TEU is therefore subject to interpretation and application on the part of the CJEU in coherence with the other norms and principles of primary law, among which evidently, article 2 of this or the Treaty itself, but above all, and ultimately, respect for the values referred to in this last article, as it is a condition for the accession of new States to the Union

and a behavioral standard for the Union, is in its action internal as well as external, it is also a condition sine qua non for the permanence of its members, whose failure is sanctioned by art. 7 TEU (Beck, 2013).

8. The Principle of Mutual Trust and the Rule of Law in the European Union: Political v. Formal, Functional Logic?

In light of the above considerations, the relationship between the principle of the rule of law and that of mutual trust is particularly relevant, as highlighted in the Recommendation of the EC (Schütze & Tridimas, 2018). The principle of mutual trust is based in the idea of the duties toward others, became a core element of the natural law tradition, enshrined in the concept officia erga alios. It functioned in a tripartite sequence of duties, together with the *officia erga Deum and the officia seipsum* (Liakopoulos, Mutual recognition in criminal matters: building a European Union investigation, prosecution and punishment legal order, 2012).

Taking into account the jurisprudence of the Courts of Strasbourg and Luxembourg and the documents of the Council of Europe and of the Venice Commission[1], the Recommendation identifies the essence of the rule of law in the set of principles which constitute common values of the Union within the meaning of art. 2 TFEU (Petrov & Elsuwege, Post soviet constitutions and challenges of regional integration. Adapting to European and eurasian integration projects, 2017) and the respect of which is an unavoidable condition of belonging to it: the principle of legality, which in turn involves a transparent, responsible, democratic and pluralistic legislative process; that of legal certainty; the prohibition of arbitrariness of the executive power; the independence and impartiality of judges; the effectiveness of the judicial remedies, also for the respect of human rights (Bárd, 2016, p. 5), (Dawson & Witte, Constitutional balance in the EU after the euro-crisis, 2013, p. 820), (Adams, Meeuse, & Ballin, 2017), (Vöneky & Neuman, 2018); the principle of equality before the law.

According to our opinion mutual trust creates extraterritoriality in particular in a borderless Area of Freedom, Security and Justice, the will of an authority in one Member State can be enforced beyond its territorial legal borders and across this area. The acceptance that such extraterritoriality requires a high level of mutual trust between the authorities which take part in the system is premised upon the acceptance that membership of the European Union means that all EU Member States are fully compliant with fundamental rights norms. Mutual trust is used as a tool for pluralism in providing a procedural system enabling the free movement of judicial decisions across the EU via the recognition and execution of "foreign" judgments and not only but also in other European matters between member States with a minimum of formality and very limited grounds for refusal (Schiff, 2012, p.

[1]See, Liste des critères sur l'Etat de droit, Etude 711/2013, published from Venice Commission, 18 March 2016.

16). although presumed to exist, has not yet acquired a normative status. It appears to be more like a declaration of intent, i.e. the result of a top-bottom approach. A truly European Area of Justice can only work if there is trust in each other's justice systems, as confirmed from EC, too (Willems, 2016, p. 212). The EC declared that "(...) mutual trust among EU Member States and their respective legal systems is the foundation of the Union (...) the bedrock upon which EU justice policy should be built (...) EC, the CJEU authorized a deviation from this principle if there is a real risk that the individual concerned might suffer inhuman or degrading treatment (...)" as we can see also in different spirit from the CJEU in case *Aranyosi and Caldararu* of 5 April 2016[1], and in C-578/16 PPU, *C.K v. Slovenia* of 16 February 2017 (Mayoralal, 2017, p. 552), (Ostropolski, 2015, p. 168). In case C-241/15, *Niculaie Aurel Bob-Dogi* of 1st July 2016 (Lenaerts, 2017, p. 807), the CJEU did not directly refer to the CFREU, but it is plain that the conclusions drawn are of the utmost importance for protecting the rights of requested persons (Carrera, Guild, & Hernanz, 2013), (Sievers & Schmidt, 2015, p. 114).

But, as the EC observes, respect for this set of principles, and therefore for the rule of law, is itself a prerequisite for the guarantee of the common values of the Union pursuant to art. 2 TEU. And again, and more widely, it is a prerequisite for the respect of the rights and obligations deriving from the Treaties and international law, because it is a condition for the existence and consolidation of a feeling of mutual trust between citizens, businesses and authorities. national laws of the various Member States, or between all the subjects of Union law (Foster, 2014). The principle of mutual trust seems to have a general value as a founding principle of the entire legal order of the Union, not limited to specific areas of Union action (Ballegooij & Bárd, 2016, p. 440). Together with the principle of mutual recognition, to which it is closely interconnected, it has formed the basis on which the entire development of the Union's legal system has been built, both in its component of the four fundamental freedoms and the internal market, and subsequently in that of the area of freedom, security and justice. (Cardonnel, Rosas, & Wahl, 2012, p. 142) (Pedrazziand, 2011, p. 182) (Janssens, 2013)

In this regard, the CJEU opinion on the planned EU accession to ECHR (Cragl, 2013, p. 316) (Pattersn & Södersten, 2016, p. 166), (Liakopoulos, La volonté de la Cour de justice de privilégier la Convention européenne des droits de l'homme dans sa protection des droits fondamentaux, 2012) can not be ignored, from which the Recommendation adopted by the EC towards Poland seems to have drawn more than one element of inspiration. Within this spirit we recall from the CJUE the *Radu* case[2]. The human rights orientated judgment of the referring Court was ultimately quashed by the Romanian High Court of Cassation and Justice, which asked the Court of Appeal to decide in favour of giving priority to the EU

[1]ECLI:EU:C:2016:198, published in electronic Report of cases, para. 82-94
[2]CJEU, C-396/11, Radu of 29 January 2013, ECLI:EU:C:2013:39, published in electronic Reports of cases

principles of mutual recognition and "mutual trust"[1].

On the other hand[2], the opinion, although sometimes misunderstood, represents a cardinal point of European jurisprudence, perhaps constituting the most advanced moment in defining the characteristics of the current legal order of the European Union with particular reference to the complex system of fundamental principles and rights and the function of CFREU (Bogdandy & Sonnevand, 2015) which constitutes the parameter of the legitimacy of the action of the Union and its Member States when implementing Union law. In its opinion, in fact, the CJEU, systematically reiterating the specific features and characteristics of EU law, emphasizing how these characteristics have given rise to a structured network of mutually interdependent principles, norms and legal relations, binding reciprocally, the Union itself and its Member States, as well as, among themselves, the Member States, which are engaged in a process of creating an ever closer union among the peoples of Europe. The resulting legal system is based on what the CJEU defines as the fundamental premise for which each Member State shares and mutually recognizes with all the other Member States those common values set forth in art. 2 TEU and the fundamental rights enshrined in the CFREU. This premise implies and justifies the existence of mutual trust between the Member States as regards the recognition of these values and, therefore, the respect of the Union law which implements them (Morano-Foadi & Vickers, 2015), (Horspool & Humphreys, 2016), (Liakopoulos, Der Beitritt der Europäischen Union zur EMRK: Jurisprudenz und kriminelle Profile, 2018), (Canor, 2013, p. 384), (Gáspár-Szilágy, 2016, p. 198), (K.H.P & Eerdt, 2016, p. 112), (Meyer, 2016, p. 277), (Niblock, 2016, p. 250). That principle requires each of those States, particularly as regards the area of freedom, security and justice, to consider, except in exceptional circumstances, that all other Member States respect Union law and, more in particular, the fundamental rights recognized by the latter (Schorkopf, Wertsicherung in der Europäischen Union. Prävention, Quarantäne und Aufsicht als Bausteine eines Rechts der Verfassungskrise?, 2016, p. 148) With the consequence that, when implementing Union law, Member States are bound to presume respect for fundamental rights by the other Member States.

It is clear, in fact, that in such an integrated legal system, as is that of the Union,

[1]Romanian High Court of Cassation and Justice, file No. 1230/36/2009, Judgment of 17 July 2013.

[2]Opinion 2/13 has included a specific part dealing with mutual trust in EU law. The Court has distilled its current thinking on mutual trust in the following two key paragraphs: "(...) it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (...) the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. P. Eeckhout, Opinion 2/13 on EU accession to the ECHR and judicial dialogue-Autonomy or autarchy?, Jean Monnet Working Paper 01/15, pp. 36ss.

systemic violations of the principles of the rule of law by a Member State, compromising the relationship of mutual trust on respect for these principles among the actors of the European scene, be it the Member States, the Institutions or the private subjects, seriously undermines the existence of the same European system (BARATTA, 2016). The loss of mutual trust would in fact have the inevitable effect of altering the functioning mechanisms of the Union for that very reason and thus determining a breakdown of its substantial constitution with the final effect of undermining its foundations.

It is therefore not surprising that the EC, in censuring the current situation of the Polish state, has attributed the principle of mutual trust to the general principle as a founding principle of the entire legal order of the Union. And that this is the value to be attributed to the principle is also confirmed by the Resolution of EP of September 14, 2016[1].

While we must be surprised, if not scandalize the finding that, faced with the materialization of a situation of systemic violations of the principles of the rule of law in one of its Member States, the Union has for now reacted, in political terms, only thanks to its two non-governmental institutions, the EC and the EP. Moreover, the role that the CJEU could assume, first of all through the preliminary reference procedure, can not be forgotten, even if the sentence LM of the CJEU gives the impression of a lost opportunity[2].

Call to determine whether the reforms implemented in Poland pose a problem with regard to the preservation of mutual trust, the foundation of European Arrest Warrant (EAW) (Efrat, 2018), (Klimek, 2014, p. 321) as a tool for judicial cooperation between Member States, the Court of Justice has recognized that it is for the judicial authority of the enforcing Member State to consider whether there are serious and proven reasons to believe that the surrender of the addressee of an EAW to the authorities of the issuing State exposes the first to a real risk of a fair trial infringement due to systematic deficiencies or generalized regarding the independence of the judicial power of the issuing State. This therefore allows the courts of the enforcing Member State to decide on the suspension of the surrender procedure. The law cannot be abused for alien purposes and cannot be retrospectively changed. The precondition of upholding the rule of law is independent judiciary." These principles came from the *Locke*-an and *Montesquieu*-an doctrines proving that what these two thinkers drew upon nation-state level has been 'upgraded' to international level as well.

What seems to be able to say without a doubt is that, based on the previous sentences of the CJEU: C-404/5 and C-659/15 PPU, *Pàal Aranyosi and Robert Găldăram* of 5 April, 2016, it adopted a case-by-case approach, believing that it

[1]European Parliament Resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931 (RSP)), P8_TA(2017)0442, parr. H and I.
[2]See, CJEU: C-216/18 PPU, LM of 25 July 2018, ECLI: EU: C: 2018:586, published in electronic Report of cases.

was the most appropriate solution for a problem not having an individual, but a systemic nature (Scheinin, Judges as guardians of constitutionalism and human rights, 2016, p. 5), (Piccone, 2016, p. 216), (Micklitz & Witte, 2012, p. 66).

This raises the question of whether this was the right choice, since the consequence of this approach is that it will be up to the national courts to determine whether or not the rule of law in one Member State is respected in another Member State. This implies that a national judge wishing to recognize the existence of the violation of the rule of law will have to deal with the responsibility of triggering a diplomatic crisis. Furthermore, this paves the way for a situation in which judges of different states-or even different judges of the same state-will be able to reach different conclusions regarding the problem under consideration, with obvious risks to the principle of legal certainty.

So, the CJEU seems not to have seized an important opportunity to put a stop to the crisis of the rule of law-at least, in Poland-seeing that, drawing on its own jurisprudence, it could itself deny the nature of judicial authorities of the Polish authorities issuers, thus excluding them from the mechanism of the EAW. Indeed, enhancing the previous sentences of the CJEU: C-452/16 PPU, *Krzystof Marek Poltorak* of 10 November 2016 (Briére & Weyembergh, 2017) and C-477/16, *Openbaar Ministerie v. Ruslanas Kovalkovas* of 10 November 2016 (Usherwood & Pinder, 2018) the court of Luxembourg could have asked whether the issuing authority fully respected the requirement of independence with respect to the executive power as identified in those judgments, presumably arriving at a negative answer. In particular in the case *Poltorak* the CJEU held that a "judicial authority" is an autonomous concept of EU law that extends to "(...) the authorities required to participate in administering justice in the system concerned". The CJEU explained that the term "judiciary" must be distinguished, in accordance with the principle of the separation of powers, from the executive. Thus, judicial authorities are traditionally construed as the authorities that administer justice, unlike, inter alia, administrative authorities or police authorities, which fall within the executive's mandate. As the CJEU already put it in case *Jeremy F.* must be "carried out under judicial supervision" so as to ensure that decisions relating to EAWs 'are attended by all the guarantees appropriate for decisions of such a kind (...)" (Gelter & Siems, 2014, p. 36), (Bradley & Travers, 2014, p. 42). In any case, it seems that the possibility of intervening again on the subject of the protection of the rule of law in Poland, given the preliminary ruling decided by the Polish Supreme Court in order to establish whether the early retirement of the supreme judges contrasts with the European discipline[1].

It should also be remembered as the CJEU through the sentence: C-286/12, *European Commission v. Hungary* of 6 November 2012 (Vincze, 2013, p. 492), (Nicola & Davies, 2017), had found that the national legislation requiring the

[1]See press release: European Commission takes further steps in infringement procedures against Hungary, Bruxelles of 19 July 2018.

cessation of the professional activity of judges, prosecutors and notaries at the age of 62 was in conflict with the directive on equal treatment and working conditions and the decision was not able to reinstate the dismissed judges into their original position, and 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 it was the EC, which formulated the petition, apparently, the CJEU 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. The sentence C-288/12, *European Commission v. Data Protection Supervisor* (EDPS) of 8 April 2014[1], had noted that Hungary, by putting an end to the mandate of the personal data protection supervisory authority, had failed to fulfill its obligations under the Directive on the protection of individuals with regard to the processing of personal data and the free movement of such data[2].

The use of infringement procedures in this sense appears worthy of support. One can certainly raise a question as to the political will of the EC to initiate these procedures but, considering the information provided above, it seems that, after some initial hesitation, the European executive no longer hesitates to resort to such initiatives (Closa & Kochenov, Reinforcing rule of law oversight in the European Union, 2016, p. 314). Eventually, the problem could be overcome through the action of a Member State which, because of a greater European sensitivity, decided to make use of the option under article 259 TFEU. On the other hand, it should however be considered that this remedy is based on a case-by-case approach, which leads not to the problem of maintaining the rule of law as a whole, but to single violations.

The EU horizon is anything but rosy. The response to crises in Hungary (*in itinere*) and in Poland, based on the activation of art. 7 and, as regards Poland, also on the use of the framework on the rule of law, it was too late and ineffective and this, on the one hand, led to the worsening of the problems already emerging, on the other, the emergence of new situations which are becoming increasingly worrying in Romania and Bulgaria (Dimitrova, 2010, p. 139), (Dimitrova & Buzogány, Post-accession policy-making in Bulgaria and Romania: can non-state actors use EU rules to promote better governance?, 2013, p. 142), mainly in relation to corruption phenomena (Bogdandy & Sonnevand, 2015), (Smilov, 2010, p. 68), (Yanakiev, 2010, p. 46).

[1]ECLI: EU: C: 2014:237, published in electronic Report of cases.
[2]Press release: European Commission: Rule of law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court, Bruxelles 24 September 2018.

9. (Follows) There are Reasons for Hope…

The proposals circulated in European circles indicate the progressive diffusion of the desire to link European funds to the introduction of adequate forms of control and, more generally, of instruments to strengthen the rule of law.

Not later than last year, the European Commissioner for Justice, Consumer Protection and Gender Equality advocated the idea of making the granting of funds conditional on participation in enhanced cooperation on the European Public Prosecutor's Office, so as to guarantee a further form of verification with regard to the management of European funding[1].

In May of 2018, the EC presented a proposal of Regulation[2] on the protection of the EU budget in the event of generalized deficiencies concerning the rule of law in the Member States. Where qualifying situations are identified as threats to the independence of the judiciary, the hypothesis of omitted prevention, rectification and sanction of arbitrary or illegitimate decisions taken by public authorities or limitations of the right to a fair trial, the Commission may suspend payments, not enter into new commitments or reduce commitments or pre-financing. The prospects these initiatives seem to open are certainly worthy of interest, but it remains to be seen whether they will be transposed from the de iure dimension to the one of the ius conditum.

Beyond this, the above analysis seems to confirm that the EU has at its disposal an entire arsenal to counteract the crises of the rule of law and that, at least in certain cases, it is inclined to use it. In any case, two caveats are required: each of these instruments has shortcomings; with the exception of that referred to in art. 7 of the TEU, none of them would make it possible to tackle the crises as a whole, given that each would lead to focus on individual issues.

However, these shortcomings seem to be able to be filled through a combination of the various mechanisms. Therefore, the reaction of the Union should not rest on the activation of a single instrument -either that referred to in art. 7 of the TEU or others-but on a holistic approach, based on the use of all the tools available (Magen, 2016).

Overall, the current Polish undermining of the independence of its judiciary is likely to count towards defining the European rule of law, facilitating similar developments in other places and compromising large parts of European foreign policy.

In finis we couls say thart in the recent case C-619/18 of 24 June 2019[3] the CJEU

[1]Press release, European Commission reports on the application of the Charter of Fundamental Rights in the European Union in 2017, Bruxelles, 6 June 2018.
[2]Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final-2018/0136 (COD).
[3]CJEU, C-619/18, ECLI: EU: C: 2019:531 of 24 June 2019, published in the electronic Reports of the

found a violation of article 19 TEU with respect to both profiles disputed by the Commission: On the one hand, CJEU concluded that the decision to reduce the retirement age of judges of the Supreme Court affects the principle of immovability of the judge; on the other, the faculty granted to the President of the Republic to grant judges the right to continue their mandate violates the "external" aspect of the principle of independence of judges (on the distinction between the external and internal aspect) (Kent, 2008, p. 326), (Conway, 2015, p. 172), (Kellerbauer, Klamert, & Tomkin, 2019). In its judgment, the Court of Justice begins by rejecting, based on its constant jurisprudence regarding infringement procedures (the existence of a default must be assessed based on the situation existing at the end of the deadline indicated in the reasoned opinion, and any intervention subsequent cannot be assessed by the CJEU) the argument presented by the Polish government on the inadmissibility of the action following the changes to the law on the Supreme Court, adopted in December 2018 (paragraphs 30 and 31). The CJEU then dwells on the applicability and scope of article 19 TEU (Prete, 2016). If, on the one hand, CJEU admits that the organization of justice is a national competence (paragraph 52), on the other, it clarifies that this competence must be exercised in accordance with the obligations imposed by the law of the Union. Making extensive references to the recent cases ASJP[1], Achmea (Soloch, 2019), (Monsenego, 2019), (A. Biondi & Kendrick, 2018) and LM[2], in which CJEU has helped to clarify and partially redefine the structure of the European judicial system, especially with reference to the role of national judges and the mechanism of preliminary ruling. CJEU confirms the obligation to ensure "that the organs forming part, as a "court" in the sense defined by EU law, of its system of judicial remedies in areas governed by EU law meet the requirements of effective judicial protection" (par. 55). Since the Polish Supreme Court is undoubtedly among the courts that may be called upon to apply or interpret EU law, "it is of primary importance to preserve the independence of this body" (para. 57), and therefore the reforms that concern you can be assessed on the basis of article 19 TEU (Kellerbauer, Klamert, & Tomkin, 2019).

As already mentioned, CJEU accepted both arguments presented by the Commission. With regard to the first-the violation of the principle of irremovability of the judge- CJEU considers, first of all, that the reform of the system of the Supreme Court is "suitable to generate legitimate concerns with respect to the principle of immovability of judges" (paragraph 78), since it forces some judges to

cases.

[1]CJEU, C-64/16, ASJP of 27 February 2018, ECLI: EU: C: 2018:117, published in the electronic Reports of the cases.

[2]CJEU, C-216/18 PPU of 25 July 2018, ECLI: EU: C: 2018:586, published in the electronic Reports of the cases. For further analysis see also: M: KRAJEWSKI, Who is afraid of the European Council? The Court of justice's cautions approach to the independence of domestic judges: ECJ 25 July 2018, case C-216/18 PPU. The Minister for justice and equality v. LM, in European Constitutional Law Review, 14 (4), 2018, pp. 794ss. P. BÁRD, W. VAN BALLEGOOIJ, judicial independence as a precondition for mutual trust? The CJEU in Minister for justice and equality v. LM, in New Journal of European Criminal Law, 9 (3), 2018, pp. 354ss.

conclude their mandate prematurely. A measure of this type, CJEU continues, could be abstractly justified only if adopted to achieve a legitimate objective, if proportionate with respect to the objective, and "provided that it is not apt to arouse legitimate doubts in the individual as regards the impermeability of the jurisdictional body concerned with respect to external elements and its neutrality with respect to opposing interests"(paragraph 79). According to CJEU, however, the Polish reform does not comply with any of these conditions, and therefore violates the principle of independence of judges established by article 19 TEU. As is evident, this represents a significant extension of CJEU mandate and opens up new ways to guarantee the independence of the courts and therefore the rule of law in the Union. After affirming the principle in two previous cases (after ASJP, in Escribano Vindel[1]), in which, however, the Court concluded that the national rules in question did not violate the requirements set by article 19.

CJEU, as also stated from the Advocate General Tanchev[2] (par. 52 to 60, and then 65-67), evaluated the national rules only on the basis of article 19 TEU (par. 59). This confirms what has already been suggested in the ruling on the Portuguese judges regarding the different field of application of article 19 and CFREU[3]: In short, the first applies also to situations not covered by the second one. More generally, the scope of art. 19 seems to be wider than any other EU law provision, with the exception of only articles 2 and 7 TEU[4] which remain indifferent to any distinction between situations governed by EU and non-EU law. However, the different applicability of articles 19 and 47 does not produce a significant difference at a substantial level, since the CJEU has aligned the content of the two standards, stating that article 19 itself obliges member states to guarantee the independence of the court national legislation, although the text of the provision makes no explicit reference to this principle.

It should also be emphasized that the Polish courts themselves have proved extremely active, operating a series of preliminary references to CJEU on various aspects of judicial reform, also focusing on article 19 TEU (M.Derlén & Lindholm, 2018).

After the successes in Luxembourg, it therefore seems essential to reinforce the political pressure between Brussels and Strasbourg.

[1]CJEU, C-49/18 of 7 February 2019, ECLI: EU: C: 2019:106, published in the electronic Reports of the cases.
[2]CJEU, C-192/18 of 20 June 2019, ECLI: EU: C: 2019:529, published in the electronic Reports of the cases.
[3]L.J. CONANT, Justice contained. Law and politics of the European Union, Cornell University Press, Ithaca, 2018.
[4]L.J. CONANT, Justice contained. Law and politics of the European Union, op., cit.

10. Concluding Remarks.

The rule of law and the protection of fundamental rights are among the values of the European Union and, therefore, the test applied to verify the violation of one could abstractly also refer to possible violations of the other. However, it is equally true that the Aranyosi and Căldăraru test presents an undeniable case nature. So, it is worth asking if a case-by-case approach is the most appropriate solution for a problem that is not individual, but systemic and if the choice of the CJEU to "unload" on the shoulders of the national courts the full weight of the decision as to the fact that the rule of law in a Member State is not respected. In fact, nothing prevents judges of different States-or even different judges of the same State-may come to different conclusions regarding this problem, with the consequence, worthy of the paradox of the Schrödinger cat, which the Polish judges will same, to be and not to be independent. The concern is far from being merely theoretical, given the fact that Poland is one of the most active Member States for the issue of EAW. The consideration according to which such an approach would be consistent with the nature of the preliminary reference for interpretation, as a remedy which clarifies issues of a hermeneutical nature but does not offer a solution to the case, only partially helps, since it will be up to the national courts to take responsibility for the decision on the fact that the rule of law in a Member State is not respected. A few words more about the concrete case - in the form at least of an acknowledgment of the findings of the EC and the Venice Commission-would have helped. Then, all this raises doubts about the fact that the ruling on the deficiencies of the judicial system can be seen as constitutional moment in the process of European integration, leading to believe, rather, that it was a lost opportunity for the CJEU. The reason for this is to be identified in the elements that are unclear-when not contradictory-which end up pronouncing the pronunciation and which may be harbingers of difficulty in terms of interpretative application, when the time comes, for national courts, to determine whether the Polish counterparts and Hungarians are independent or not!

According to our opinion this vision of Europe 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. 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. Nothing else is needed but political will!

Let me close with a quote by US-President *Dwight D. Eisenhower.* When he opened the first Law Day in 1958 he said: "(...) the clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there

is no rule of law (...)"[1].

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