CURRENT CHALLENGES FOR THE RULE OF LAW IN EUROPE

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Alejandro Torres Gutiérrez
(Coord.)

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INTRODUCTION

This book contains the proceedings of the International Conference titled "Current Challenges for the Rule in Europe", held at the Public University of Navarre (UPNA) on May 26th–28th, 2025, within the framework of the Erasmus+ Project "Europia", supported by the European Union. Erasmus+ Programme; Key action 2: Cooperation partnerships; Sector: Higher education. PIC 999888029. Grant Agreement No.: 2022–1–PL01–KA220–HED–000086334, coordinated by Prof. Dr. Spasimir Domaradzki, Lecturer in International Relations at the Faculty of Political Science and International Studies at the University of Warsaw (Poland).

This Project has been carried out by a consortium also consisting of the following institutions: the Transylvania University of Brasov (Romania), the University of Belgrade (Serbia), the University of Zagreb (Croatia), the PAX Rhodopica Foundation (Bulgaria), and the Public University of Navarre (UPNA) (Spain), whose teaching and research teams were coordinated by the following university professors: Prof. Arabela Briciu, Prof. Ivana Radic Milosavljevic, Prof. Goran Santek, Prof. Hristo Berov, and Prof. Alejandro Torres Gutiérrez.

It was an honour for the UPNA to host this International Conference, which served as the closing event of the activities carried out in the context of this Project over two and a half years, between 2023 and 2025. The results are available on the Project's websites: https://www.europiaproject.eu/ and https://www.unavarra. en/europia/

The final conference was attended by around fifty specialists from all over Europe, from some twenty Universities and Research Centres, not only the Universities in the project consortium that financed it but also from other Academic Institutions with which a close working relationship has been maintained. A notable example is the UNITA alliance, of which both the Public University of Navarre (UPNA) and Transylvania University of Brasov are members. It contributed researchers from the University of Brescia, the University of Turin, and West University of Timisoara. The meeting was also attended by other European universities, such as the University of Coimbra, the Catholic Institute of Toulouse, the Catholic Institute of Vendee – ICES, and American universities such as Cornell Law School. The proposal was additionally extended to other

Spanish universities, specifically the Universities of the Basque Country, Navarre, Valladolid, Zaragoza, Barcelona, Pompeu Fabra, Miguel Hernández of Elche and Seville.

The results of this monograph serve to reflect on the main challenges facing the rule of law in Europe. These affect, for example, the complex mechanisms for the configuration of some state institutions, such as the governing bodies of the judiciary, and their correct functioning, and where problems can be replicated in a surprisingly similar way across the old continent.

Certain aspects have to do with the need to have solid electoral procedures, or to harmonise European legislation, in particularly sensitive areas in the field of taxation. Additional questions are related to the correct use of regulatory instruments, especially by executive power, faced with the temptation to resort to legislating by means of Decree Laws, and even the risk of not legislating on matters in which it is necessary to do so, leaving minorities unprotected.

Other topics analysed include those arising from the emergence of populism and the problems derived from it, or those related to digitalisation and artificial intelligence. Many opportunities and challenges appear disturbingly linked in this area.

The book also serves to build bridges of academic cooperation between universities in Eastern and Western Europe, allowing researchers to work together from countries that were at war not so long ago, as was the case in the Balkans,. From this perspective it offers a real practical example of what European integration means, and should mean.

Professor Jorge Elso Torralba.
Vice-Rector for International Relations
of the Public University of Navarre (UPNA).

PART I.
CONCEPTUAL INTRODUCTION TO THE IDEA OF "RULE OF LAW"

WHAT DO WE MEAN WHEN WE TALK ABOUT "RULE OF LAW"?

Fernando Rey Martínez
Full Professor of Constitutional Law.
University of Valladolid. Spain.

SUMMARY. 1. INTRODUCTION: RULE OF LAW, A POLYSEMIC CONCEPT. 2. WHAT DO I UNDERSTAND BY RULE OF LAW? 3. A GOOD EXAMPLE OF AN ATTEMPT TO BREAK THE RULE OF LAW: THE AMNESTY LAW IN SPAIN (2024).

1. INTRODUCTION: RULE OF LAW, A POLYSEMIC CONCEPT.

There are countless doctrinal works on the concept of rule of law. It would be audacious to attempt to offer an answer that would clear up all the doubts. Among other reasons, because unravelling the meaning of the rule of law faces serious difficulties. Some derive from the various historical traditions through which the concept has been shaped: indeed, although close, the French idea of the principle of legality, the English idea of the rule of law or the German idea of it have different profiles in some respects.

Other difficulties around the concept stem from its polysemic nature: for some, the rule of law has only a formal dimension and alludes to the pre-eminent character of the law as an expression of the popular will as opposed to other types of norms, but for others, the rule of law has a denser content of a material nature that makes it practically coincide with the very idea of democracy as a form of government characterized by the radical limitation of political power and its control. Nor is there doctrinal consensus among those who adopt the material

and not simply the formal sense of the rule of law because they attribute different contents to it. How can we try to sort out this complex puzzle?

Furthermore, the idea of the rule of law does not have an identical profile for all states because, more than an idea, it is an *ideal* to be achieved. Even the most advanced democratic countries have aspects that can be improved; no country meets the ideal model of the rule of law with all its derived requirements.

Added to all this is an additional difficulty, an unwanted guest in all democratic countries throughout the 21st century: the spectre of *populism*. If there is one thing that populisms of all kinds, be they right-wing or left-wing, do not tolerate, it is precisely the rule of law. In the name of the charismatic legitimacy of the leaders of majorities who are triumphant in (more or less clean) elections – a triumph of democracy itself – they mercilessly attack all instruments and techniques of control, all counter-majoritarian institutions, and particularly the judiciary. Populist leaders repeat the same refrain in unison: the people love me, but judges have not been elected by anyone. The very independence of the judiciary is considered law-fare and attempts are made to weaken, undermine, or suppress it in various more or less subtle and more or less imaginative ways. An independent judge is to a populist leader what garlic is to vampires or kryptonite to Superman. The English tradition of the rule of law, which is eminently procedural and linked to the idea of independent judges, the rights of the person on trial and fair trials, had a brilliant start in the court of the Stuart kings and their attempt to become kings as absolute as their French counterparts. This was stopped in its tracks by some judges, among them the mythical Sir Edward Coke (1552–1634) at the dawn of the Modern Age. King Charles I Stuart called Coke and all judges like him a 'pest'. In my opinion, this is the best definition ever given of what an independent judge is and should be.

Perhaps it is not idle to recall that Coke's motto was "*Prudens qui patiens etenim durissima coquit*" ("prudent is he who, with patience, manages to cook even the toughest materials") and his coat of arms was an ostrich with a horseshoe in its beak (at that time it was believed that the ostrich had such a powerful digestive capacity that it could digest iron). Well, Coke's patience, tenacity and resistance in the face of all that he considered abuse of power certainly made our good judge a permanent source of inspiration for scholars of that "artificial reason" that is the Law and, in general, for all lovers of freedom. Incidentally, Coke was not exactly a lover of Spain. His opposition to Prince Charles marrying a Spanish *infanta* (princess) is famous, but also his phrase in the trial against Sir Walter Raleigh in 1603: "You have an English face, but a Spanish heart!" I would not even want to imagine what a terrible kind of mixture that must be!

From Coke in the 17th century to the present day, the rule of law, ultimately defended by independent judges, continues to protect us against the abuses of political power. It is enough to see what is happening in the United States to prove

this statement: it is the judges who, not alone (also the press and independent universities, organized citizens, etc.) but mainly, are standing up to an apprentice democratic dictator (with his large parliamentary majorities), i.e. to a tyrant.

2. WHAT DO I UNDERSTAND BY RULE OF LAW?

To put the conceptual puzzle in order, I think it is necessary first of all to bear in mind that the rule of law (I will use the two terms as if they were synonyms) is one of the three elements that make up the more general concept of "democracy". Art. 1, paragraph 1, of the Spanish Constitution, written by an eminent philosopher of law, Gregorio Peces-Barba, defines perfectly what democracy is: "Democracy is the rule of law, that is, submission of all public power to the law and to political, legal and social control; democracy is the social state, that is, a state that intervenes actively in social and economic life to level the living conditions of its inhabitants and ensure the real and effective equality of all; and democracy is the political participation of all in decision-making" (we could also say, democracy in the strict sense, not in the broadest sense). This same constitutional precept identifies the higher political values: freedom (linked, above all, to the rule of law), equality (linked above all to the social state) and political pluralism (linked to the democratic state). The fourth value mentioned is justice, which is, in my opinion, the element that brings harmony to the other three. Indeed, the Constitution develops these four values throughout its articles, but article 1 is the germinal nucleus, the DNA, the 'big-bang' of the entire constitutional text.

If this is so, the rule of law is not equivalent to the general concept of democracy, which ideally needs two other elements. The rule of law is a part of the democratic idea; it is a relationship between *species* (rule of law) and *genus* (democracy).

We also know that the rule of law (freedom), the social state (equality) and the democratic state in the strict sense (plural political participation) undergo dialectical tensions among themselves. Indeed, the rule of law can limit the scope of political decisions of leaders who are highly legitimized by the ballot box, for example. We also know that, in a democracy worthy of the name, i.e. a quality democracy, the three elements, the rule of law, the social state and the democratic state, need each other, they feed off each other (can there be real democracy without the rule of law, or the other way around, or both without the social state?). None of the three elements can be imposed without limits on the other two. That is why any kind of populism, even if it uses democratic methods to achieve power, is a radical enemy of the democratic system. A balance between

the three values is always necessary, and this balance must necessarily be fluid over time.

So, what is the specific content of the rule of law? We have said submission of political power to the law, which requires several techniques that have been coined over the last two centuries of constitutionalism. I will not overwhelm you with the list, but will only indicate that the very idea of the Constitution as a superior and supra-legal legal norm, with the need for judicial review and normative rigidity, the whole system of human and constitutional rights and all the mechanisms that ensure the separation of powers to prevent the abuse of executive power over others are framed in the concept of the state (now in the constitutional phase) of Law. Article 16 of the French Declaration of the Rights of Man and of the Citizen previously stated this.

However, and above all, the subjection of political power to the law is only ultimately ensured through powerful, impartial and independent judicial control, which, in turn, makes numerous demands on the legal system, the way in which judges are appointed (and ensuring their irremovability), determining a reasonable statute, etc. Finally, and this is something we see every day in every country, the separation of powers, fundamental rights, etc. are only ensured if the judiciary functions. The current fight against populism and other enemies of democracy will only succeed if, within the framework of a constitutional system that espouses freedom, equality and political pluralism, the judiciary and the constitutional judiciary are truly independent. This is the essential core of the rule of law.

Judicial control and, of course, other controls of all kinds: parliamentary, social (media), and control by other specialized institutions., In its periodic reports on the state of health of the rule of law in the European Union and its member states, the European Commission shares this idea because what is being reviewed is, first and foremost, the judicial system, together with the mechanisms for fighting corruption, the freedom and pluralism of the media and the effectiveness of other institutional counterpowers. In short, control, control and more control of the powerful: that is the rule of law.

3. A GOOD EXAMPLE OF AN ATTEMPT TO BREAK THE RULE OF LAW: THE AMNESTY LAW IN SPAIN (2024).

A good example of how, in my opinion, an attempt has been made to damage the rule of law in Spain is Organic Law 1/2024 of June 10 on amnesty for the institutional, political and social normalization of Catalonia. It completely amnesties the criminal, administrative and accounting responsibilities that could have been incurred by all those who, between 11 November 2011 and

13 November 2023 (more than 12 years!) had promoted the independence of Catalonia by any possible means. This law is pending trial before the Constitutional Court, which has announced a Judgment before this summer, although there are also some aspects (fundamentally, for administrative offenses and infractions linked to the abusive use of European funds by the Catalan nationalist authorities to support some acts in favour of Catalan independence) that are still to be decided by the Court of Justice of the European Union (CJEU).

The underlying political context here is the need of the ruling party in Spain, the Spanish Socialist Workers' Party (PSOE), to obtain the votes of the Catalan nationalist parties (Junts per Catalunya and Esquerra Republicana de Catalunya) in order to invest Pedro Sánchez as President of the Government (Prime Minister) in the national Parliament.

Rather than offering another opinion (which I will also do), I will try to propose a rational method of analysis based on the principle of proportionality, which is central to the rule of law.

There is agreement on an initial point: in general, an amnesty is a strictly exceptional measure, appropriate only for extraordinary situations, since it limits basic constitutional principles and rights. There is also consensus on what these principles and rights are: equality (arts. 1.1, 9.2, 14 CE), given that the same crimes are 'forgotten' (amnesty and amnesia belong to the same semantic family) for certain persons in a given period of time, but not for others; the right to effective judicial protection (art. 24 CE), both for the general duty to comply with judicial decisions and for the respect due to the rights of the victims; a judicial monopoly to judge and execute what has been judged (art. 117. CE); the principle of legal certainty (art. 9.3 CE), the division of powers of the Rule of Law (art. 1.1 CE), because a legislative act nullifies various judicial acts dictated up to that moment within the established guarantees of legality, etc. The legal recognition of an amnesty – any amnesty – puts maximum strain on all these rights and principles. Furthermore, it happens that our Constitution, unlike others, makes no reference to 'amnesty'.

From this observation, it is reasonable to conclude that the discussion on whether or not an amnesty law should be enacted in our constitutional system (this being, unsurprisingly, a central issue and above everything else) becomes, however, a less relevant issue at this time. I am among those who believe that it is a debatable issue because there are weighty arguments on both sides. Therefore, it would be reasonable for the Constitutional Court to say that such a law could be enacted, as well as if it were to say the opposite. The Constitution does not say anything expressly, so the argument goes that if it prohibits general pardons (*indultos*) it means there is all the more reason to implicitly prohibit amnesties. This argument does not seem solid to me because pardons and amnesties are figures not so far removed from each other (both are measures of clemency) but

they are qualitatively different; nor is the intention of the constituent conclusive (even if it were clearer than it is). Therefore, in the absence of a clearer rule, it could reasonably be inferred that the legislator has the capacity to grant an amnesty, but also the opposite.

I personally have serious doubts that the legislator can, even with an organic law, dictate an amnesty law without prior constitutional authorization because the principles which are limited by any amnesty are expressly stated in the Constitution. In Spain we have become so accustomed to operating without reforming the Constitution, which is a phenomenon as pathological as it is Spanish, that sometimes we use laws to try and reform the Constitution improperly. Finally, I have doubts that an amnesty law is valid without prior express constitutional authorization, because neither historical nor comparative law, nor jurisprudence by the Constitutional Court – which, to be honest, does not yet exist on this matter (and that which that exists is only on singular regional laws approved to circumvent adverse judgments of contentious-administrative justice that go in the opposite direction), and neither can a supposed parliamentary sovereignty fill this gap. The report of the Venice Commission on this matter also recommends explicit constitutional recognition of an amnesty and its limits.

Certainly, an amnesty is a criminal law matter and it has been argued that, if the legislator can dictate the criminal rule, it could also approve its exceptions. However, an amnesty is not just any exception to the criminal rule, it is an exception for some people and not for others for the same crimes, and it is also an exception *a posteriori* and not *a priori*. It has also been argued that an amnesty is incompatible with any democratic system, but this is not compatible with looking beyond our borders; sometimes even democratic regimes experience exceptional situations. Let us think, for example, of our country after the 1978 Constitution. In my opinion, in these 46 years there have only been two exceptional situations that could justify an amnesty (I will speak now of one of them and later of the other): first, one that would ensure the end of violence by ETA (or that of other terrorist groups). Of course, there has not been an amnesty of this type among us because probably neither the victims' associations nor the majority of society would have accepted it, but the fact that more than 300 murders out of more than 800 have not led to a criminal trial and conviction, together with other facts, alerts us, perhaps, that there has been a sort of crypto-amnesty. This, incidentally, does not shock me personally. I am aware that the comparison with the end of ETA is an uncomfortable and unpleasant one, but I think it is very expressive of what kind of general interest (i.e. the end of terrorist violence) we are talking about when, in case of social consensus, we resort to such an exceptional tool as an amnesty.

In any case, the debate on whether or not the legislator has the capacity to issue an amnesty law is more complex. It admits contradictory legal answers

(beyond my personal opinion) and currently lacks interest because we are not in a school debating society discussion; this amnesty law already exists and the review of its constitutionality by the Constitutional Court is pending. Let us accept, as a starting point, the reality. Let us assume that the legislator can do what it has already done.

So, the Gordian knot of the matter is another one: that of the limits of the legally configured amnesty, because nobody has any doubts about the existence of these limits, not even the supporters of the amnesty. Well, it is generally and peacefully accepted in law, and not only in our country but in all democratic countries and in the Strasbourg system, that, when constitutional rights and principles are limited a merely reasonable justification of the limits introduced in such a case by the amnesty is not enough, it must pass a stricter, more severe, harsher control: the so-called judgment, test, standard, principle or control of *proportionality*, because the limits of rights, any limit of any right, must be interpreted in a restrictive manner.

The legal idea of proportionality has a precise content, and has four elements that the amnesty law must overcome simultaneously. I will dwell especially on the first: an amnesty must fulfil a constitutional purpose, i.e. it must serve the general interest. The proposal is justified by an improvement in harmonious social coexistence in Catalonia, leading to its full normalization. An initial problem arises here because, from a realistic point of view, there is no one in Spain who ignores that the real cause of this amnesty has to do with the support of the beneficiaries of the amnesty so that those who grant it obtain the presidency of the [national] government and vital parliamentary support for the formation of a majority in exchange for the penal relief of the amnestied parties. More than a law, this amnesty is a mutual agreement in disguise where two or more parties commit to supporting each other. Nobody can ignore this because the protagonists have recognized this themselves. So, we find that this law pursues two purposes, one express/simulated, and the other manifest but officially hidden. It is hidden because this expressed purpose of mutual aid does not respond to any general interest, whichever way you look at it, but to partial interests. It would be a self-amnesty, and therefore clearly unconstitutional. Incidentally, a lesson to be drawn from all this is that a possible future general regulation of amnesties should absolutely prohibit amnesties during periods of formation of governments, as well as, of course, self-amnesties, that is, amnesties that clearly favour the potentially amnestied party or parties.

However, I do not want to focus on the real and misguided cause of the amnesty here. Let us accept, at least methodologically and for the sake of advancing, that the cause is the alleged one: full Catalan social normalization. Nor would a vague and vaporous appeal like this be enough to overcome the proportionality criterion, which should be demonstrated with data, figures and

facts. As far as I can see, to normalize is to adapt to the rules, not the opposite. The Law considers that the amnesty is the natural normalizing step after the pardons to the leaders of the *procés* and the repeal of the crime of sedition, but it could reasonably be observed that it has been precisely the convictions of the *procés* and the application of art. 155 CE that, with the real data in hand, have discouraged, and with great effectiveness, the slightest conduct of disobedience by the authorities and a sector of the citizenry in recent years.

I believe that if the pro-independence movement were to credibly renounce trying to achieve its objective outside or against the constitutional system, this could justify the general interest of an amnesty. This trade-off could justify an amnesty. Let us also remember that, in our constitutional system, the only constitutional procedure of independence for sub-state entities in Spain depends on one immovable factor: constitutional reform through art. 168 of the Constitution. Everything else is a breach of the Constitution.

In any case, coming back to the current amnesty, the announced purpose of the independence movement (at least, one should be grateful for their sincerity) is to repeat what they did in 2014 and 2017 when circumstances are favourable to them once more. Therefore, we still have no valid general interest to justify an amnesty such as the one envisaged at present.

Another word on the concept of "general interest". The delimitation of its content is a complex and debatable task, but the best demonstration that such interest is present is the approval of the measure limiting rights – in this case, the amnesty – through a broad social consensus. Certainly, the requirement of an absolute majority in Parliament is a qualified majority, but the Venice Commission has indicated several times in its Report that this should not be enough, while reminding us that some countries such as Finland or Norway require the same majorities for amnesty as for reforming their constitutions, which seems reasonable to me because an amnesty is not an exception of the penal code but one of the constitutional system itself as a whole. As Ruíz Soroa has said (quoting Carré de Malberg), this only appears on great days because it is an act of great politics.

I will remember only two amnesties in our history (and we are *the* country of self-amnesties). One amnestied the people sentenced for the *fets* (events) of 4 October 1934 during the II Republic: the declaration by Companys of the Catalan state within the Spanish federal Republic (it was not even complete independence like the case of 2017), and the other was the Amnesty Law of 1977. It should be remembered that the amnesty was a central theme of the 1936 election campaign, so the right wing did not oppose it. The situation in July 2023 was quite the opposite, with the parties that later governed not mentioning the possibility of amnesty during the campaign, which rather implied their absolute opposition to it. In relation to the second, the 1977 Law, we should affirm its

exemplary character of national reconciliation: it is the only amnesty law in all our history that is not only partial; it is not a self-amnesty but is clearly general and equal for all (which cannot be said of the current one). This also shows very clearly what an amnesty is for: to help reconcile a country at a time of political transition.

The second incorporates the principle of proportionality: suitability. An amnesty must be a suitable way of achieving the objective it claims to pursue, in this case the full normalization of Catalonia. Here again, considerable doubts emerge. The processing of this amnesty has so far managed to create social and institutional tensions between Catalans and Spanish 'autonomous communities' (regions) that did not exist before. The report of the Venice Commission confirms this, and it is also unclear how the amnesty normalizes something that is not clearly "normalized".

Third principle, indispensability: Is amnesty the only absolutely indispensable instrument to achieve the objective of normalization, or are there other techniques available that are less restrictive of the rights and principles under stress? The answer also seems obvious in this case: no, because, in addition to many other possibilities, the possibility of granting individual pardons could clearly achieve similar effects.

Furthermore, the restriction of rights and principles implied by the amnesty must be the minimum necessary. Let us not forget that this amnesty law is a singular law because of its addressees, and concrete because of its application, which is exhausted only once. It is a single-case law, which does not become self-applicable because it requires the judges concerned to apply it, but it is a law that reaches the highest possible degree of concreteness and, therefore, of inequality. There is a risk that the Parliament (realistically, the government) will overrule some adverse decisions of the independent judges in this way. If you want to know what the Constitutional Court thinks about this, even if it refers to another matter, do not forget to read the legal basis 15 of STC 233/2015. It is clear that the proposal configures a law of maximums in terms of its temporal duration and the crimes and unlawful conducts to which it refers (the issue is especially sharp with respect to the crimes of public corruption). In a disproportionate way with respect to usual European parameters, the Venice Commission is warning us.

Fourth and last, proportionality in the strict sense, i.e. the assessment of the costs and advantages of the amnesty. The costs are enormous in terms of the number and importance of the rights and principles that are severely affected and limited, of the legal insecurity and inequality that the application of the future law will entail, of the increase in public distrust of the independence of justice (which, obviously, will not be the same for everyone), not to mention the historical memory that is being formed at present because the state as a whole will assume the pro-independence victimhood story and the injustice in the

state's handling of the illegal challenges that have come from that movement, with the consequent effect of encouragement or emulation. Nor should we forget the message that the state will send to the international community, which is: who recognizes or does not recognize the new status? This amnesty law implies officially recognizing that we had a democratic constitutional system (approval of laws by majorities directly elected by the citizens and the application of those laws by independent judges subject to the law) which was considered an unjust system for a few hundred specific people. Can we still say today that our system is democratic and just? Until this Law, just order was equivalent to democratic order. With this Law, and for the first time, this is no longer the case. Furthermore, is it really worth having a law that serves to delegitimize or discredit our democratic system in such a serious way? Will we be able to ask the international community to positively value the Spanish state's democratic handling of the independence challenge in the future – even the most extreme challenge outside the rules – if the state itself qualifies it as unjust?

In short, the amnesty bill is arbitrary; it is unconstitutional because it is disproportionate. It does not pursue the general interest, nor is it adequate, nor is it suitable, nor do its costs outweigh its advantages. I have also argued that it is an obscenely unconstitutional bill. We can all see what it is: a self-amnesty that is tailor-made to protect specific persons, as the Venice Commission has denounced – incidentally, by pointing out that it is not an "impersonal" amnesty. This amnesty is a serious constitutional breach whose consequences go much further in terms of time and its effects than merely erasing the crimes of hundreds of people and the success of a legislature. Has the way been opened so that in the future whoever has an absolute majority in Parliament can grant an amnesty at his or her convenience? This Law opens the door to a very slippery slope. Law is, of course, force, but it is also, and above all, and with this will I end as I began, it is *reason*. This Law, in my opinion, is completely devoid of reason.

Nevertheless, it seems quite likely to me that the Constitutional Court, with its current majority of pro-government magistrates, will rule in favour of the constitutionality of the Law, claiming that it uses the principle of proportionality, but stressing that its purpose is of general interest: how can anyone oppose normalizing the Catalan problem? It will no doubt consider a couple of minor aspects unconstitutional, but right now there is almost total certainty as to what each of the twelve magistrates will vote, according to the party that put them in office. This is even more worrying for the rule of law in Spain than the Amnesty Law itself. Obviously, the task of defending the rule of law, also from the University, is a pressing and unfinished one.

HUMAN RIGHTS FROM AN ANTHROPOLOGICAL PERSPECTIVE

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1. INTRODUCTION.

This article explores the complex and evolving relationship between anthropology and the concept of human rights. It begins by analysing the basic tension in anthropological engagement with universal rights: the paradox between the claim to universality and the cultural specificity of human life. This tension was most prominently articulated in the 1947 statement by

the American Anthropological Association (AAA), which warned against the ethnocentric imposition of Western values through the Universal Declaration of Human Rights. Over time, however, the anthropological stance has changed. The 1999 AAA Declaration signalled a new commitment to activism, asserting the right to culture and calling anthropologists to protest against collective, social, and environmental rights violations. The 2020 AAA statement extended this commitment, urging decolonial engagement, intersectional analysis, and the recognition of multiple interpretations of personhood and rights. This recent approach rejects the binary of universalism versus relativism, viewing universality as emerging from human plurality.

The article then reviews representative scholarly contributions by Washburn, Renteln, Preis, Goodale, and Speed that make critiques of earlier relativist stances and advocate for ethically grounded and politically engaged anthropology. These scholars argue that rights are not only legal principles, but also cultural practices negotiated within power structures. Activist and collaborative research is presented to align anthropological study with human rights struggles. In the end, it is suggested that rather than resolving the paradox of universal rights versus cultural particularism, anthropology can use this tension productively to illuminate how rights are lived, contested, and transformed in diverse settings. Anthropology's role today seems to be to support the co-production of a more just and culturally grounded vision of human rights.

2. THE ANTHROPOLOGICAL PARADOX OF HUMAN RIGHTS.

While the United Nations was preparing the Universal Declaration of Human Rights (UDHR) in 1948, the American Anthropological Association (AAA) issued a strong statement against its acceptance. The AAA's main point can be summarized in the following question: "How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?"[1] We should consider this, because how can something pretend to be universal if it is framed and based on the ideas and principles of only one selected part of the world? As H. Englund[2] says: "Human rights, as described in documents such as the Universal Declaration of Human Rights, are a set of moral and legal principles that apply to all human beings irrespective of their age, sex, religion, nationality, and other such characteristics. Yet they can only ever be claimed and

1 American Anthropological Association (AAA), "statement on Human Rights." *American Anthropologist*, 49 (4), 1947, p. 539.

2 ENGLUND, H., "Human Rights", in *The Open Encyclopedia of Anthropology*, 2023. Online: https://www.anthroencyclopedia.com/entry/human-rights

applied in specific historical and cultural circumstances. It is from recognizing this basic paradox between a universal principle and its practical application that the anthropological study of human rights arises."[3] As anthropologists in the 1940s were mainly cultural particularists and relativists who were firmly against the idea of ethnocentrism, according to which culture of any group of people is central or superior to others, they were not ready to accept any universalist proclamation that is supposed to be equally valid and relevant to all the people in the world. Understandingly, the problem is broader and includes casting doubt on implementing something universal and general in all possible practical and specific circumstances. This resulting paradox – between an allegedly universal set of moral and legal principles and the irreducible specificities of cultural life – has shaped anthropological debate since the inception of the discipline. In solving that paradox, anthropology has made a full circle of possible answers, from being strongly opposed to universalistic ideas to accepting an activist approach and working on completing them.

To understand the anthropological approach to human rights, it seems necessary to briefly present the conceptualization of anthropology and its historical development. The possibility of universal rights in anthropology comes from the idea that all humankind is fundamentally the same, biologically and psychologically.[4] In the 19th century, monogenist or evolutionist thinking was accepted by early anthropologists, e.g. Lewis H. Morgan in the United States and Edward B. Tylor in the United Kingdom. They postulated a single human species progressing through stadial phases of savagery, barbarism, and civilization. These theories of cultural evolution depend on accepting everybody's essential biological and intellectual similarity. The monogenist camp, which established academic anthropology, was positioned in two organizations: the Aborigines Protection Society, founded in 1837, and the Ethnological Society of London, founded in 1843.[5] The first society was a human rights organization, and the latter developed from it for research purposes.[6]

Since its establishment, anthropology has been focused intensely on society and closely related to the earlier, mostly philosophical, thinking about societies and humans, especially in the UK and France. The anthropologist T.H. Eriksen summarizes this theoretical foundation of anthropology regarding the subject of this article: "Locke's empiricism […] had direct repercussions for his political

3 ENGLUND, H., "Human Rights", in *The Open Encyclopedia of Anthropology*, 2023. Online: https://www.anthroencyclopedia.com/entry/human-rights

4 BARNARD, A., *History and Theory in Anthropology*, Cambridge University Press, Cambridge, 2004, p. 24.

5 STOCKING, George W., Jr., "What's in a name? The origins of the Royal Anthropological Institute", *Man* 6, 1971, pp. 369-390.

6 BARNARD, A., *History and Theory in Anthropology*, Cambridge University Press, Cambridge, 2004, p. 24.

argument in favour of a principle of 'natural law '(*ius naturel*) – which is the basis of the modern idea of universal human rights. The notion that all humans are born with certain intrinsic rights goes back to the Middle Ages, when Thomas Aquinas (1225–74) held that God granted the Rights of Man. However, in the 17th century philosophers like Locke and Thomas Hobbes (1588–1679) argued that natural law was not 'given' from above, but implicit in the biological needs of the individual. Thus, the argument is turned on its head: being human means one has rights, not by divine (or royal) grace. This was a radical position in its time, and even when used explicitly to justify autocracy (as Hobbes does), it has revolutionary potential."[7] Anthropology accepted ideas that humans, just by being humans, have rights and that these rights are socially constructed. Indeed, anthropologists realized very early on that all cultural phenomena are socially embedded. A good example is Mauss' understanding of a gift, which Barnard summarizes as follows: "The gift [...] is not free; and it is embedded in a system of rights and obligations which in any society make up part of the social structure, and in some societies form a system of 'total services'."[8] In other words, any cultural phenomenon is deeply entangled in a closely knitted web with other cultural and social phenomena. Thus, a gift or an idea is part of a broader social structure and an expression of society itself. In addition, these function in a firmly integrated system of rights and duties; accordingly, rights are socially established and determined, an integral part of the social system.

This theoretical background was the basis on which the American Anthropological Association issued a lengthy statement in 1947, published in *American Anthropologist,* which warned against the cultural imperialism ostensibly inherent in the incipient Universal Declaration of Human Rights.[9] This statement indicates a strong culturally relativist position inspired by Franz Boas in American anthropology at the time.[10] For dominant cultural relativist anthropologists at the time, it was too much to swallow the new, universalist human rights rhetoric, which started to be seen as just another aspect of cultural colonialism of the West. By the middle of the 20th century, cultural relativism – most powerfully articulated by Franz Boas and his intellectual heirs in American anthropology – challenged evolutionist views. AAA's 1947 statement voiced the relativist concern: a universal bill of rights risked re-inscribing Euro-American notions of rights and norms to the global, universal norm. As Engle[11] shows, the

7 ERIKSEN, T.H. and F.S. Nielsen, *A History of Anthropology*, Pluto Press, London, 2001, p. 7.

8 BARNARD, A., *History and Theory in Anthropology*, Cambridge University Press, Cambridge, 2004, p. 65.

9 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947.

10 ERIKSEN, T.H. and F.S. Nielsen, *A History of Anthropology*, Pluto Press, London, 2001, p. 77.

11 ENGLE, K., "From Skepticism to Embrace: Human Rights and the American Anthropological Association, 1947-1999", *Human Rights Quarterly* 23, 2001, pp. 536-559.

AAA's ambivalence was less a rejection of rights per se than a warning against ethnocentric overreach.

3. ANTHROPOLOGY AND THE AAA'S THREE STATEMENTS ON HUMAN RIGHTS.

3.1. The 1947 AAA statement: Relativist Scepticism.

Invited to advise the UN Commission on Human Rights, the AAA Executive Board presented a document drafted by its president, Melville Herskovits. It posed a defining question: "How can the proposed Declaration be applicable to *all* human beings, and not merely reflect values prevalent in Western Europe and America?"[12] Three propositions summarized the critique: (1) personality is realized through culture; (2) there is no scientific system of measurement for ranking cultures; (3) standards and values are therefore culturally relative. Far from endorsing moral nihilism, the statement sought to guard against imperial imposition. To sum up, the memorandum revolved around a single, central question: "How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?"[13] It is interesting to note here that in the AAA's later critique of this statement "the actual views taken by the 1947 statement received less attention than the fact that it had been written by one person only and published as an AAA statement without a vote having taken place among its membership".[14]

The problem for the AAA is the balance of people and cultures. Addressing the UN Commission on Human Rights, the AAA board noted that a human rights declaration usually begins with "respect for the personality of the individual as such, and his right to its fullest development as a member of his society," yet insisted that "in a world order … respect for the cultures of differing human groups is equally important."[15] The problem, therefore, was to draft a declaration that honoured the individual and the social group "whose sanctioned modes of life shape his behaviour, and with whose fate his own is thus inextricably

12 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 539.

13 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 539.

14 ENGLUND, H., "Human Rights." In *The Open Encyclopedia of Anthropology,* 2023. Online: https://www.anthroencyclopedia.com/entry/human-rights

15 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 539.

bound."[16] It is so because "from the moment of his birth … hopes, aspirations [and] moral values … are shaped by the body of custom" of the group, a declaration that stresses that self-realisation must also recognise that "the personality of the individual can develop only in terms of the culture of his society."[17] So, if individual rights are equally respected, their cultures should be respected similarly. Also, each person "is convinced that his own way of life is the most desirable one," a cognitive bias that can fuel intolerance.[18] Particularly, it is problematic when this kind of idea comes from the West, with its history of colonialism and ideological systems that "stressed absolutes in the realm of values and ends," decrying alternatives and suppressing them, and where controls have been established over non-European peoples.[19] Rationalized through doctrines of cultural superiority, Western expansion produced a "demoralization of human personality and the disintegration of human rights among the peoples over whom hegemony has been established."[20] Consequently, the AAA reacted with the following statement: 1. "The individual realises his personality through his culture; hence respect for individual differences entails a respect for cultural differences"[21] – there is no genuine freedom if a person's group is depreciated; 2. "Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered"[22] – complexity is a historical, not biological, variable; 3. "Standards and values are relative to the culture from which they derive, so that any attempt to formulate postulates that grow out of the beliefs … of one culture must … detract from the applicability of any Declaration of Human Rights to mankind as a whole."[23] Accordingly, because "the Declaration must be of world-wide applicability," the rights of twentieth-century humanity "cannot be circumscribed by the standards of any single culture."[24] The statement thus called for "world-wide standards

16 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 539.

17 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, pp. 539-540.

18 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 540.

19 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 540.

20 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, pp. 540-541.

21 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 541.

22 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 542.

23 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 542.

24 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, pp. 542-543.

of freedom and justice" grounded in the principle that "man is free only when he lives as his society defines freedom" and that people have the right "to live in terms of their own traditions."[25] Far from advocating moral nihilism, the AAA sought a universal charter built on reciprocal respect for cultural plurality – a vision that would shape (and haunt) anthropological debate for decades to come.

It should be said that not all anthropologists agreed with the AAA' position, and there were divisions. As Engle[26] said: "In the late 1940s anthropologists were embarrassed because they saw the statement limiting tolerance. In recent years, embarrassment has derived from the sense that the document refused to place a limit on tolerance. [...] This debate among anthropologists over the limits of tolerance has occurred in the context of the development of an international human regime. In the debate, culture and human rights have largely been seen as opposed. To be for human rights would be to oppose the acceptance of cultural practices that might conflict with one's interpretations of human rights' norms. To support an acceptance of conflicting cultural practices would be to oppose human rights."[27] The letter concept later prevailed in anthropology despite some unsatisfied voices. For example, Steward and Barnett (1948) decried the "unscientific" insertion of value judgments into what should be objective inquiry.[28]

Subsequent decades witnessed a reversal. Where relativism once supplied anthropology's critical edge, by the 1990s accusations of ethical paralysis prompted many in the discipline to "embrace" human rights.[29] The AAA's Declaration on Anthropology and Human Rights on 1999 and its updated statement in 2020 signal a near-consensus that anthropological expertise can inform the practice of rights. Nevertheless, the core paradox endures, propelling fresh theoretical and ethnographic innovation.

3.2. The 1999 AAA Declaration: From Observation to Action.

After almost 40 years, the AAA concluded that silence amounted to complicity and created a new statement. In its 1999 Declaration on Anthropology

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25 American Anthropological Association (AAA), "statement on Human Rights", *American Anthropologist* 49(4), 1947, p. 543.

26 ENGLE, K., "From Skepticism to Embrace: Human Rights and the American Anthropological Association, 1947-1999", *Human Rights Quarterly*, 23, 2001, pp. 536-537.

27 ENGLE, K., "From Skepticism to Embrace: Human Rights and the American Anthropological Association, 1947-1999", *Human Rights Quarterly*, 23, 2001, pp. 536-537.

28 ENGLE, K., "From Skepticism to Embrace: Huma n Rights and the American Anthropological Association, 1947-1999", *Human Rights Quarterly*, 23, 2001, p. 536.

29 ENGLE, K., "From Skepticism to Embrace: Human Rights and the American Anthropological Association, 1947-1999", *Human Rights Quarterly*, 23, 2001.

and Human Rights, the AAA[30] stresses anthropology's role in promoting human rights, cultural diversity, and ethical responsibility. The preamble states that the human capacity for culture is the essence of humanity. Given that anthropology studies this capacity across all human groups, the Declaration requires a professional obligation to ensure that all individuals and groups have an equal opportunity to realize their cultural identities.

The Declaration condemns all forms of violence and deprivation, whether state-sponsored or driven by corporations, that hinder individuals' and collectives' cultural, social, and personal development. It asserts that the AAA must protest against any denial of such opportunities. While acknowledging the Universal Declaration of Human Rights (UDHR) and related international legal instruments, the AAA emphasizes an expanded definition of human rights, including collective rights, social and economic development, and environmental well-being.

The Declaration's central idea is that all people have a universal right to culture, under the condition that their actions do not limit the culture of others. The AAA's approach respects specific human differences over abstract legal standardization. In it, anthropologists are asked to actively participate in shaping the concept of human rights through research and dialogue.

In short, the 1999 Declaration reframed cultural diversity as a *basis* for enhancing rights rather than a barrier. Highlighting economic, social, cultural, and environmental entitlements, it implored anthropologists to "protest and oppose" abuses grounded in human difference.[31] Collective rights – especially those of indigenous peoples – were prioritized in an intentional challenge to the individualist bias of mainstream law.[32]

3.3. The 2020 AAA statement: Decolonizing Human Rights.

In July 2020, the American Anthropological Association (AAA) reaffirmed and expanded its commitment to human rights through the "2020 Statement on Anthropology and Human Rights."[33] Building upon its 1999 Declaration, the AAA emphasized that human rights are inherent to human existence and not

30 American Anthropological Association (AAA), "Declaration on Anthropology and Human Rights", 1999. Online: https://americananthro.org/about/policies/declaration-on-anthropology-and-human-rights/

31 American Anthropological Association (AAA), "Declaration on Anthropology and Human Rights", 1999. Online: https://americananthro.org/about/policies/declaration-on-anthropology-and-human-rights/

32 MESSER, E., "Anthropology and Human Rights", *Annual Review of Anthropology* 22, 1993, pp. 221-249.

33 American Anthropological Association (AAA), "statement on Anthropology and Human Rights", 2020. Online: https://americananthro.org/advocacy-statements/2020-statement-on-anthropology-and-human-rights/

solely defined by legal frameworks. The statement underlines the importance of recognizing the diversity of cultural interpretations of human rights. Anthropology knows that conceptions of what a person is – and what rights an individual and a collective – differ across cultures. The AAA urged anthropologists to engage in decolonization efforts and support marginalized communities.

Recognizing the complexities and potential risks involved in addressing human rights violations, the AAA advised anthropologists to engage with such issues thoughtfully and, when appropriate, inform the public through established guidelines. The 2020 Statement serves as a living document, guiding anthropologists in aligning their work with universal human rights principles while respecting cultural specificities.

We could say that the 2020 Statement integrates three decades of scholarship on power, coloniality, and intersectionality. It affirms that laws recognize rather than create rights, stresses the contingency of rights language, and calls for research that "helps redress histories of oppression and exploitation."[34] Notably, it treats universalism and relativism as a false dichotomy: universality derives from the very plurality of human experience.

The three pronouncements chart anthropology's trajectory from its role as an external critic to reflexive interlocutor, and sometimes activist insider. However, each retains an undercurrent of caution about ethnocentrism – even when the discipline embraces talk about rights.

4. WHAT COULD ANTHROPOLOGY DO WITH HUMAN RIGHTS?

Anthropologists have offered different ideas on how their discipline can solve the human rights paradox while remaining both scientific and activist. Their thoughts have incorporated not only anthropological concepts but also relevant and influential ideas of the time. Some authors and articles give us an informative review of the intellectual context of anthropological research on human rights, or the historical development of various understandings. We present a short review of selected articles and authors below.

4.1. "Cultural Relativism, Human Rights, and the AAA" – Wilcomb E. Washburn (1987).

Wilcomb E. Washburn studies the philosophical foundations and historical development of cultural relativism in American anthropology.[35] The base for it

34 American Anthropological Association (AAA), "statement on Anthropology and Human Rights", 2020. Online: https://americananthro.org/advocacy-statements/2020-statement-on-anthropology-and-human-rights/

35 WASHBURN, W.E., "Cultural Relativism, Human Rights, and the AAA", *American anthropologist*, 89/4, 1987, pp. 939-943.

is the American Anthropological Association's (AAA) 1947 Statement on Human Rights. The author confirms that cultural relativism, once a dominant concept in anthropology, has been abandoned. We should note that cultural relativism initially functioned as a protector from ethnocentric and imperialist ideologies and supported the idea that there is no single culture, which, through its values, can be above others. However, Washburn argues that this position often conceals a more profound alienation from Western norms among anthropologists, and was more an expression of moral and political commitment than a scientifically grounded theory.

According to Washburn, the AAA's 1947 Statement was meant to caution the United Nations against imposing Western notions of human rights on non-Western societies. It asserted that rights should be defined relative to the cultural context in which people live and critiqued Western absolutist traditions, especially those rooted in the Enlightenment and colonial legacies. Nevertheless, the statement was internally contradictory; while advocating for tolerance and cultural self-determination, it also included vague concessions aimed at critics who pointed to regimes that oppressed their citizens.

Ultimately, Washburn argues that the anthropological invocation of cultural relativism has become a flawed and often misused rationale, primarily when employed to express disdain for Western societies or to justify silence in the face of authoritarian abuses in post-colonial states. He concludes that anthropology should abandon the misuse of cultural relativism as a moral shield and needs to confront its theoretical and empirical limitations to stay relevant, both as a science and as a voice in global human rights discourse.

4.2. "The Concept of Human Rights" – Alison Dundes Renteln (1988).

Alison Dundes Renteln studies the philosophical foundations and cultural norms beneath the modern discourse on human rights.[36] She begins by challenging Western definitions of rights, particularly those that fail to see the correlative nature of rights and duties. Contrary to critics who claim that rights can exist separately from duties, Renteln argues that duties and rights are always interconnected, and she enables a broader understanding of rights, especially across diverse cultural systems.

Renteln critiques several key dichotomies common in Western thought, such as positive versus negative rights, legal versus moral rights, and individual versus group rights, and shows how these distinctions often reflect Western political ideologies rather than universal moral truths. She also dismantles the

36 RENTELN, A.D., "The Concept of Human Rights", *Anthropos*, 83, 1988, pp. 343-364.

presumption of universality that underpins many international human rights instruments, highlighting how foundational documents like the Universal Declaration of Human Rights implicitly embed Western liberal values such as individual property rights, electoral democracy, and the nuclear family model. These embedded values often conflict with non-Western traditions and practices, including collectivist cultural norms, arranged marriages, and different interpretations of justice.

To support her claims, Renteln analyses global perspectives on human rights, particularly in non-Western societies, and emphasizes the need for a cross-cultural approach to human rights discourse. She critiques major philosophical theories for their ethnocentric assumptions and warns that human rights theory risks becoming a form of cultural imperialism if it fails to consider local moral frameworks. Renteln proposes a more culturally sensitive and philosophically grounded conception of human rights that balances the need for universal moral principles with respect for cultural pluralism. She suggests that international human rights standards must be justified not merely through Western rationalist traditions, but by engaging with the moral systems of various cultures through comparative ethical inquiry.

4.3. "Human Rights as Cultural Practice: An Anthropological Critique" – Ann-Belinda S. Preis (1996).

Ann-Belinda S. Preis critiques the static and binary opposition between universalism and cultural relativism in human rights discourse.[37] She begins by revisiting the American Anthropological Association's 1947 critique of the Universal Declaration of Human Rights. Preis argues that anthropology's historical commitment to cultural relativism has contributed to its marginal role in mainstream human rights debates, which are still dominated by legal frameworks.

Preis states that the 'universalism versus relativism' debate is grounded in the outdated idea of culture as bounded and homogenous. Modern anthropology, she stresses, sees culture differently, as hybrid and multivocal, dynamic and heterogeneous. Human rights, therefore, should not be viewed as external impositions on "other" cultures but as part of broader cultural processes.

Through ethnographic cases, Preis shows that human rights are constantly interpreted and reshaped within particular social contexts. As a result, they cannot be seen as simple legal norms but as practices which are embedded in any culture's understanding of meaning and power. Consequently, Preis calls

37 PREIS, Belinda S., "Human Rights as Cultural Practice: An Anthropological Critique", *Human Rights Quarterly*, 18/2, 1996, pp. 286-315.

for a new understanding of human rights as cultural practices that are sensitive to local voices and agency. She criticizes relativists and universalists for seeing culture as static and advocates an understanding of human rights as complex, contested, and evolving.

4.4. "Toward a Critical Anthropology of Human Rights" – Mark Goodale (2006).

Mark Goodale outlines the need for a renewed and reflexive engagement between anthropology and human rights.[38] He begins by tracing the ambivalent historical relationship between the American Anthropological Association (AAA) and human rights discourse, particularly the 1947 AAA Statement on Human Rights, which opposed the universalization of rights based on cultural relativism and moral imperialism. This early rejection, Goodale argues, led to decades of disciplinary silence while the international human rights regime matured without significant anthropological input. From the late 1980s onward, anthropology began reengaging with human rights, culminating in the AAA's 1999 Declaration on Anthropology and Human Rights, which affirmed that people have a generic right to realize their capacity for culture.

Goodale criticizes both naïve cultural relativism and uncritical human rights universalism, advocating a "critical anthropology" that engages with rights discourses, not as fixed legal instruments but as socially embedded, contested, and culturally interpreted phenomena. Drawing from critical theory, especially the work of Adorno and Horkheimer, he calls for an emancipatory anthropology that interrogates the normative foundations and hegemonic tendencies of human rights frameworks. Central to this vision is "normative humanism," which posits that collectivities, if uncoerced, tend to establish ethical systems prioritizing human dignity and meaningful social interactions, although not necessarily through Western-derived legal rights.

Goodale promotes methodological pluralism as a central instrument for understanding how human rights are produced, interpreted, and contested at the local level. He proposes a third way that avoids the binary of cultural relativism and liberal universalism by emphasizing intersubjectivity, cultural critique, and lived practice. Finally, Goodale's work calls on anthropology to study human rights and transform them through collaborative scholarship and advocacy.

38 GOODALE, M., "Toward a Critical Anthropology of Human Rights", *Current Anthropology*, 47/3, 2006, pp. 485-511.

4.5. "At the Crossroads of Human Rights and Anthropology: Toward a Critically Engaged Activist Research" – Shannon Speed (2006).

In this article, Shannon Speed advocates a critically engaged activist anthropology that bridges cultural critique and political action within the field of human rights.[39] Drawing on her fieldwork with indigenous communities, Speed explores how anthropologists can ethically and productively engage in rights-based struggles without abandoning critical reflexivity. She critiques the traditional anthropological tension between universalism and cultural relativism, arguing that activist research offers a methodology to navigate, rather than resolve, this dichotomy.

Speed forms her argument within the crisis of the anthropological representation framework. She argues that knowledge production is intrinsically political and must be held responsible to the communities it pretends to represent. By engaging in collaborative, activist research, anthropologists can help decolonize research practices, support marginalized groups, and co-produce empirically grounded and politically relevant knowledge.

The article also highlights ethical and epistemological tensions in activist anthropology, such as the role of the anthropologist as a "culture expert," the potential reinforcement of legal essentialism, and the difficulty of balancing long-term cultural critique with short-term legal advocacy. Speed suggests that anthropologists embrace these tensions and concludes that activist anthropology enables anthropologists to engage meaningfully with human rights. Ultimately, she offers a new and transformative model for anthropological research that is ethically, scientifically, and politically acceptable.

5. CONCLUSION: ANTHROPOLOGY AND HUMAN RIGHTS.

5.1. What has anthropology learnt?

It is clear that anthropological engagement with human rights reflects a complex intellectual trajectory shaped by historical transformations, theoretical debates, and ethical commitments. Central to anthropological discourse is the persistent paradox: how can human rights claim universal validity while remaining culturally sensitive? This article traces this tension through the shifting positions of the American Anthropological Association (AAA) and the

39 SPEED, S., "At the crossroads of human rights and anthropology: toward a critically-engaged activist research", *American Anthropologist* 108, 2006, pp. 66-76.

broader anthropological community. From early scepticism toward universalist frameworks to a more nuanced engagement that now supports critical, activist participation in global rights discourse and practice, anthropology has moved from critique to constructive involvement.

The 1947 AAA Statement was based on cultural relativism in the tradition started by Boas. This view was a reaction against the ethnocentrism and grounding of the Universal Declaration of Human Rights (UDHR) in Western liberal ideals. The AAA's main critique was that the UN was forgetting that values are part of cultural systems, so any declaration of rights based on the values of one culture risks fostering cultural imperialism. Nevertheless, this relativist standpoint drew criticism over time in the face of rights abuse.

By 1999, anthropologists had changed their stance following changing political circumstances and criticism for ethical indifference. The AAA's 1999 Declaration constituted a vital change of direction and highlighted the responsibility of anthropologists to oppose violence and inequality and work to advance human rights. In this document, the AAA extended human rights to include collective rights.

The latest AAA Statement, in 2020, develops this commitment further and integrates decolonial, intersectional, and ecological perspectives. It reframes the human rights discourse as legal, moral, and culturally produced, and under continuous development. It rejects the opposition between relativism and universalism, and states that universality must be grounded in concrete plural experiences. The Statement calls on anthropologists to be activists who challenge oppressive structures and care for local cultures in the conceptualization of human rights.

To complement this institutional trajectory, this article has presented representative scholarly contributions that critique and refine anthropological perspectives on human rights. Washburn[40] critiques the misuse of relativism, Renteln[41] calls for a culturally comparative ethic, Preis[42] promotes a dynamic and hybrid understanding of culture in rights discourses, and Goodale[43] proposes a "critical anthropology" rooted in normative humanism. Speed[44] offers a compelling model of activist anthropology that simultaneously engages with

40 WASHBURN, W.E., "Cultural Relativism, Human Rights, and the AAA", *American anthropologist*, 89/4, 1987, pp. 939-943.

41 RENTELN, A.D., "The Concept of Human Rights", *Anthropos*, 83, 1988, pp. 343-364.

42 PREIS, Belinda S., "Human Rights as Cultural Practice: An Anthropological Critique", *Human Rights Quarterly*, 18/2, 1996, pp. 286-315.

43 GOODALE, M., "Toward a Critical Anthropology of Human Rights", *Current Anthropology*, 47/3, 2006, pp. 485-511.

44 SPEED, S., "At the crossroads of human rights and anthropology: toward a critically-engaged activist research." *American Anthropologist*, 108, 2006, pp. 66-76.

rights advocacy and cultural critique through field-based, collaborative methods. These studies collectively demonstrate that anthropology now embraces complexity, adopting both critical reflexivity and ethical engagement.

5.2. What has anthropology concluded?

The evolution of anthropological thought on human rights presented in this article reflects a growing recognition that neither relativism nor universalism alone can resolve the normative and practical challenges in global human rights discourse. Anthropologists acknowledge that cultures are not static containers of difference, nor are human rights neutral or universally self-evident. Instead, human rights are socially embedded, historically situated, and politically contested. As a scientific and ethical discipline, anthropology is well-positioned to mediate this terrain by providing context-sensitive analysis and advancing unbiased dialogue between global and local justice frameworks.

Rather than resolving the paradox between cultural specificity and universal ethics, contemporary anthropology seeks to use it productively. Through their work, anthropologists can shed light on how rights are experienced, resisted, or redefined in everyday life. They can advocate for justice without assuming superiority, or contest oppression without silencing cultural voices. The discipline's historical tradition of self-criticism has made anthropologists aware of the power relations inherent in research and rights advocacy.

We can conclude that the future of human rights in anthropology lies not in abandoning cultural complexity for abstract legalism, nor in retreating into relativist inaction, but in advancing a culturally grounded, ethically strong, and politically engaged vision of rights. We can expect that anthropology will continue its attempts to be both an interpreter and an actor in the unfolding human struggle for dignity, justice, and rights.

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RULE OF LAW, STATE OF EXCEPTION AND ARBITRARINESS IN ANCIENT LAW

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SUMMARY: 1. INTRODUCTION. 2. LEGALITY AND ARISTOCRATIC CONSTITUTIONALISM IN GREEK MAGISTRACIES. 2.1. The model of community life and citizen status. 2.2. The principle of equality and the drawing of lots for magistrates. 3. EQUALITY AND THE PLEBEIAN FUNCTION IN ROMAN–REPUBLICAN MAGISTRACIES. 3.1. The "civitas'' and the "iudicia populi''. 3.2. "Dignitas'' and public service ethics. 4. NEUTRALITY AND *IUS PRIVATUM* IN THE CULTURE OF JURISPRUDENCE. 4.1. An autonomous space for inter-individual relations. 4.2. "Iuris scientia" and the legitimacy of knowledge. 5. BIBLIOGRAPHY.

1. INTRODUCTION.

Today, the principle of the rule of law has universal value, albeit fragile but real.[1] It is considered to be one of the three normative pillars on which any genuine democracy is founded, alongside individual freedom and political liberty.[2] It can

1 HEUSCHLING, L., *Etat de droit. Rechstaat. Rule of law*, Paris, Dalloz, 2002, p. 658.

2 GODEFRIDI, D., "*Etat de droit, liberté et démocratie*", in *Politique et Sociétés*, 23, 2004, p. 164: "Coercion exercised in accordance with pre-established rules is predictable and avoidable. Insofar as it makes it possible to avoid coercion, the rule of law is the instrument for achieving individual freedom".

be defined as an institutional system in which public power is subject to the law.[3] As such, it is associated with the idea of opposition to arbitrariness.[4] Of Germanic origin (*Rechtsstaat*), the concept was taken up at the beginning of the 20th century by Hans Kelsen, in the sense that the state's legal norms are hierarchical in such a way that its power is limited.[5] Within this general framework, the rule of law presupposes the establishment of independent courts,[6] competent to settle disputes between different legal persons by applying both the principle of legality, which derives from the existence of a hierarchy of norms,[7] and the

3 COGLIANDRO, G., *Lo stato di diritto. Dibatti teorici e analisi funzionale*, Dottorato di ricerca in diritto europeo su base storico comparatistica, Roma, Universita degli Studi di Roma Tre, 2009, pp. 30-34.

4 The rule of law is therefore both a type of state, i.e. an object that we describe, and an idea of the state, i.e. an objective that we set ourselves. It is both a descriptive and normative concept. See JOUANJAN, O., "*Etat de droit*", in *Dictionnaire de la culture juridique*, Paris, PUF, 2003, p. 649.

5 The complexity of the debate on the rule of law in Germany in the time of Hans Kelsen (1881-1976) is based on the antinomy between supporters and opponents of the Weimar Republic. The dispute centred on the question of loyalty to the republican and parliamentary democracy established by the Weimar Constitution. The vast majority of positivist jurists stated more or less clearly: "Respecting established law also means respecting the popular representation that establishes it". Anti-positivists, on the other hand, found it more difficult to show such respect. One historical document that bears witness to their motivations is an essay written by Heinrich Triepel (1868-1946) in early 1919. In it, he argued that the fallen monarchy had protected freedom better than pure democracy could. Indeed, the more consistently the democratic principle was applied, the less likely it was that the minority would be oppressed by the majority. Moreover, he pointed out that socialism tended towards a strong extension of state power. Triepel therefore called for constitutional precautions against democratic absolutism. The first line of defence for the protection of individual freedom had to be fundamental rights, which meant protection "above all against legislation". The second line of defence was to be a "free right of review" by the courts of the constitutionality of laws. H. Triepel never left any doubt as to the anti-parliamentary orientation of these demands. See HERRERA, C.-M., "Heinrich Triepel et la critique du positivisme juridique à Weimar", in *Crise et pensée de la crise en droit. Weimar, sa république et ses juristes,* ed. by J.-F. Kervégan, Lyon, ENS Editions, 2002, pp. 87 et seq. In this controversy over the sources of state unity, which pitted positivists against anti-positivists, among others, H. Kelsen asserted that the unity of the state resides in submission to a common legal order, as it emerges from the deliberations of the legislature. According to Kelsen, the people is one only from the legal point of view; its unity, in normative terms, results from a legal fact: the submission of all its members to the state order. Cf. PITSEYS, J., "Le statut de la représentation et de la visibilité politique chez Kelsen et Schmitt", in *Revue française de science politique*, vol. 66, 2016, pp. 17-135.

6 COTE-HARPER, G., "L'Etat de droit et l'indépendance judiciaire", in *Revue québécoise de droit international*, 11, 1998, 2, p. 151: "Judicial independence is one of the pillars of the organisation of a democratic society governed by the rule of law. The two fundamental values of the rule of law and judicial independence are interrelated. The rule of law and respect for human rights can only be guaranteed in a context where the legal profession and the judiciary are free from interference".

7 RUIZ MIGUEL, A., "El principio de jerarquía normativa", in *Revista Española de Derecho Constitucional*, 24, 1988, pp. 138-139: one of the consequences of the applicability of the principle of hierarchy of norms "is the establishment of a review procedure, whether judicial or similar, to guarantee respect for the higher rank of certain norms. The best-known examples are the systems for reviewing the constitutionality of laws and the legality of administrative acts. However, these

principle of equality, which rejects any differentiated treatment of legal persons.[8] This model implies the recognition of a separation of powers, and therefore of an independent judiciary.[9]

It is clear that the principle of the rule of law aims to protect the individual – all individuals – whoever they may be, by proclaiming that they are all on an equal footing in legal terms. The concern of any modern constituent, in terms of equality, is therefore centred on the human person as the individual beneficiary of equality.[10] In short, this formulation of equality is in line with traditional liberal philosophy, based on the premise that every human being has inherent dignity and value. According to this philosophy, everyone must be treated equally, i.e. in the same way, by the law and the Administration, so as to ensure equal rights.

Furthermore, while the rule of law can make distinctions and deprive some people of rights generally granted to others, it can only do so if these distinctions are justified in the common and general interest.[11] The respect due to each human being and the most elementary justice, seen from an individual point of view, which constitute the two pillars of legal equality, prohibit differentiated treatment. While scholarly analyses of the State as a source of legal legitimacy are not new,[12] questions about the rule of law, its forms, its practices and its relevance

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mechanisms only serve to ensure, as far as possible and only in part, respect for the higher rank of the norm in question. This is not a necessary manifestation of the relationship of hierarchical superiority. Indeed, it may happen that there is no real review procedure - for example, if the determination of the constitutionality of laws is entrusted exclusively to Parliament - without this preventing the superiority of a given norm from being upheld".

8 PAZE, E., "Uguaglianza e diritto", in *Teoria politica. Nuova serie Annali*, 11, 2021, p. 213: "With regard to the rules governing relations between persons, which come under civil law, the question of equality arises from a twofold angle: on the one hand, it is a question of verifying the attribution of reciprocal rights and duties, as is classically the case for the regulation of family relations; on the other hand, it is necessary to ensure balance in relations where there is an exchange of benefits".

9 CRAIG, P., "Definición y conceptualización del estado de derecho. La importancia de la independencia judicial", in *Teoría y Realidad Constitucional*, 50, 2022, pp. 170-173.

10 However, equality cannot be absolute. See PROULX, D., "L'objet des droits constitutionnels à l'égalité", in *Les Cahiers de droit*, 29, 1988, p. 572: *"L'égalité, en tant que norme opposable au législateur, ne peut donc se définir que par l'égalité en droits.* Realising, moreover, that all laws cannot always treat everyone in the same way, we have inevitably come to the conclusion that a law may make distinctions, but on condition that they are reasonable or justified by the common good, i.e. not arbitrary".

11 It should therefore be understood that the principle of equality does not preclude the legislature from regulating different situations in different ways, or from derogating from equality on grounds of the general interest. The Court of Justice of the European Union adopts the same reading of equality insofar as, according to it, the imperative of equality may be breached whenever the protection of the general interest or a difference in objective situations so requires. Cf. SAGOT, J., "*L'inégalité par la loi*", in *Les Petites Affiches*, 28 November 2002, no. 238, p. 9.

12 Three principles appear to be decisive in defining the relationship between the state and society: sovereignty, freedom and equality. In each case, the state is called upon to play a role in

have never ceased to fascinate critics over the years because of their plasticity over the long term. For legal historians, particularly those in ancient times, the notion of the rule of law poses a methodological difficulty insofar as, while there is reflection on the political order, there is never a theory of the state, understood in the strict sense.[13]

However, the thwarted efficiency of the construction of the ancient state does not invalidate the constitution of hybrid forms of power that first emerged from Alexander the Great's conquests and the founding of the Hellenistic kingdoms, and later, in the Roman Republic, giving rise in particular to the first signs of a right to security, in a singular context of embedded sovereignties.[14] This is why a doctrinal study of the rule of law from the earliest times helps to weave the Ariadne's thread that enables us to understand its evolution and grasp its epistemological significance. At the same time, it warns that, from the outset, the concept has been based on an ambiguity of meaning that explains its historical fortunes. Ancient law built up a system in successive stages that was basically very coherent, making the security of people and property a matter of private law governed by the authority of the magistrate.[15] While it is difficult to

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pacifying social relations in contexts where violence is often present, in particular through its ability to define compromises that make it possible to integrate essential social demands. See DUPRAT, J.-P., *Les fondements de la théorie de l'Etat moderne*, Paris, LGDJ, 2019, 180 p.

13 The notion of the state has been applied to the *polis* in various ways, but always with explicit or implicit recognition of its state character, using different terms to describe it (Greek state, city-state, polis-state, citizen-state). At the same time, one of the drawbacks often highlighted by researchers is the impossibility of clearly separating state and society within the Greek *polis*. A lively debate has emerged in recent years following the intervention of Moshe Berent. In several articles, he has argued that the *polis* is not a type of state, but rather a society or community without a state. The crux of his argument lay in the fact that the *polis* had only a rudimentary public coercive apparatus. See DUPLOUY, A., "Deux échelons de citoyenneté? En quête de la citoyenneté archaïque", in *Clisthène et Lycurgue d'Athènes. Autour du politique dans la cité classique*, ed. V. Azoulay & P. Ismard, Paris, Ed. de la Sorbonne, 2011, pp. 89 et seq. Consequently, the characteristic of the monopoly of violence, a central and defining element of a state, would be practically absent. See GALLEGO, J., "La pólis griega antigua y el moderno concepto de Estado", in *Mare Nostrum*, 9, 2018, pp. 84-85.

14 In Rome, there was no control of the constitutionality of laws *a posteriori* in the sense that we might conceive of it in our modern political systems, but rather an *a priori* examination. The Senate was the *auctoritas* and moral authority responsible for verifying the legality of bills in the Roman Republic, in the same way as the Conseil d'État in the current French Republic. Bills formulated by higher magistrates, praetors or consuls, or by a tribune of the people, are first submitted to the Senate for its opinion. The Senate certifies that the bill complies not only with custom, but also with *the mos maiorum*, the system of ancestral values on which civic life in Rome is based. The Senate then issues a *senatus consultum*, an opinion. In their most classic form, laws were then voted on by the people in an assembly - *comitia* - on the initiative of a higher magistrate, praetor or consul, or a tribune of the people. See BUR, C., "*Auctoritas* et *mos maiorum*", in *L'auctoritas à Rome. Une notion constitutive de la culture politique*, ed. J.-M. David & F. Hurlet, Bordeaux, Ausonius Editions, 2020, pp. 65 et seq.

15 CANTO-SPERBER, M., "*Démocratie: la matrice antique*", in *Constructif*, 61, 2022, pp. 13 et seq.

see the genesis of the modern state in this, it is nevertheless possible to verify the effectiveness of administrative structures and processes of territorialisation, designed to provide a framework for common law that was certainly complex, but which gradually enveloped a unitary, specialised and sometimes egalitarian judicial system.[16]

2. LEGALITY AND ARISTOCRATIC CONSTITUTIONALISM IN GREEK MAGISTRACIES.

2.1. The model of community life and citizen status.

The first historical and cultural reference pointing to the formative process of political organisation adopted by Western society, as an element of identity, is the community life trial conducted by Athens in ancient Greece.[17] It was here, for the first time, that a new concept of the individual in society was born, characterised by his status as a citizen.[18] In contrast to the civilisations of the Ancient East, which were built on relationships of subordination,[19] Greek culture emphasised the autonomy of the individual within the political community. In Greek intellectual thought, the existence of a legal conscience is certainly perceptible, and we can even appreciate that the law constitutes a common

16 This means that the proportion of those who participate directly in a model of democratic life must be put into perspective: *"Estimates can only be made on the basis of scattered figures, for example on military levies in Athens, which only count the number of men capable of equipping themselves to become 'hoplites' in the infantry. The number of adult men with full political rights may have peaked at around 60,000 shortly before the outbreak of the Peloponnesian War in 431 B.C.. The total number of inhabitants is even more difficult to estimate, as it includes the wives and children of citizens, resident foreigners (metagods) and slaves of both sexes; it could be between 300,000 and 400,000 (according to the most generous estimates)".* Quoted in NIPPEL, W., *Liberté antique, liberté moderne. Les fondements de la démocratie de l'Antiquité à nos jours*, trans, by O. Mannoni, Toulouse, Presses Universitaires du Midi, 2010, p. 15.

17 LANNI, A., "Social Norms in the Courts of Ancient Athens", in *Journal of Legal Analysis*, 9, 2009, pp. 716-718.

18 SEBILLOTTE CUCHET, V., "Citoyens et citoyennes dans la cité grecque classique. Où joue le genre?", in *Revista Tempo*, 21, 2015, 38, p. 288: "Aristotle further recalls that "in practice" or "in usage", πρὸς τὴν χρῆσιν, Greek cities define as citizens an individual "born of two citizen parents (πολίται), and not only of one, the father or mother. Sometimes, some cities require the birth of citizen parents over two or three generations. In practice, the term πολίται, which is translated as citizens, covers both men and women. The term citizen often used in the masculine singular, πολίτης, is also found in the feminine singular, πολίτις, notably when Aristotle explains that "in some democracies the citizen (πολίτης) is so by his mother (πολίτιδος = of πολίτις)".

19 MARGUERON, J.-C., "Temples et pouvoir en Mésopotamie: position du problème et étude de cas fournis par l'archéologie", in *Ktèma: civilisations de l'Orient, de la Grèce et de Rome antiques*, 14, 1989, pp. 7-17.

reality, present in the various manifestations of civic life. But it is still confused with morality and politics; in Greek culture, the boundaries between politics and morality, society and the individual, ethics and law, are still poorly defined, and there is no concept of differentiated treatment for each of these disciplines.[20]

The Greek influence on Western legal culture is no less real in the field of thought. In particular, the idea of justice understood in a moral sense, which was one of the fundamental issues in the intellectual speculation of the Athenian Enlightenment,[21] gave rise to the first approach to the ethical relationship between justice and law, taking natural law into account.[22] According to the Athenian tradition, the first foundations of its democratic constitution were laid by Solon after his election as chief magistrate in 594 B.C.,[23] but its definitive establishment came with the political reform of Clisthenes (508 B.C.)[24]; essentially, this was a compromise between the nobility and the people, without altering the structure of society: the citizens' assembly was given control over access to the judiciary

20 NICHOLAS, F.-J., *Politics and society in Ancient Greece*, Wetsport, Praeger Publishers, 2008, pp. 19, 68 and 114.

21 SIRON, N., "*Les tribunaux athéniens sont-ils un lieu de savoir? Ombre et lumière des discours judiciaires de l'Athènes classique*", in *Dialogues d'Histoire ancienne, Supplément,* 27, 2023, pp. 103-104.

22 WINKEL, L., "*Deux conceptions du droit naturel dans l'Antiquité*", in *Revue historique de droit français et étranger*, 93, 2015, 3, pp. 341-350.

23 LAPE, S., "Solon and the Institution of the "Democratic" Family Form", in *The Classical Journal,* 98, 2003, p. 117: "It is widely accepted that Solon's political reforms were an essential step in this process. In 594 B.C., Solon was called upon to solve problems of deep social unrest linked to the aristocratic monopoly of political power and land practices, where 'the many were becoming slaves to the few'. To deal with this crisis, Solon divided the population into four censal classes based on wealth and made these classifications the criterion for access to political power. Previously, the "eupatridai", the "well-born", controlled the highest offices in the state, access to the law, and probably the assembly. By making economic status, rather than membership of a noble family, the basis for political participation, Solon effectively separated political power from aristocratic kinship. At the same time, Solon's laws offered new legal protections and rights to all citizens. Among these, the abolition of debt bondage was crucial to the development of the institution and conception of citizenship. By prohibiting loans secured by the body of the citizen, the law created a right to bodily liberty".

24 The historian Pierre Vidal-Naquet (1030-2006), a specialist in the history of ancient Greece, approached the problem of ancient democracy with a very significant bias. In his book *Clisthenes the Athenian*, he helped to clarify the issue of the formation of the Athenian citizen, in particular through the reform of the tribal system and the organisation of an egalitarian civic space. P. Vidal-Naquet not only devoted himself to the study of democratic normality, he also sought to shed light on its limits: in the rites of integration of young people into civic life (such as the institution of ephebes in Sparta and Athens), but also in the status reserved for slaves, which, paradoxically according to him, hardened as democracy progressed. See MORENO PESTAÑA, J.-L., "Sobre la democracia antigua como problema filosófico en Foucault, Castoriadis y Rancière", in *Logos. Anales del Seminario de Metafísica*, 51, 2018, p. 148.

through the elective system, as well as legislative powers on the proposal of magistrates, establishing mechanisms for monitoring legality.[25]

2.2. The principle of equality and the drawing of lots for magistrates.

The term 'democracy' was not yet used; it was coined after the new constitutional reform led by Ephialtes (462 B.C.), which resulted in a gradual shift in the organisation and functioning of political life towards the primacy of popular power.[26] In order to make the principle of equality effective, the system of drawing lots from among all citizens was introduced, with the aim of guaranteeing everyone the right to hold office; in addition, remuneration was established for the exercise of public functions.[27] The assertion of popular power brought about a profound change in the concept of legality. The populism from which the original model derived ended up being incompatible with the widespread dissemination of the political will of the citizens' assembly; the mechanisms for controlling legality were superseded, being assumed by the assembly itself.

The legislative procedure introduced meant that the initiative of any citizen could lead to the conversion into law of anything approved by the assembly. In this way, the legality of Athenian democracy was completely free of any limitations.[28] The administration of justice was entrusted to popular judges and jurors appointed annually by lot from among the members of the assembly. In judicial practice, the rhetorician played a predominant role, his art of discursive

25 BARRE, P.-H., "Le contrôle de constitutionnalité dans l'Antiquité athénienne: la procédure de la *graphê paranomôn*", in *Revue Française de Droit constitutionnel*, 135, 2023, 3, pp. 699-706.

26 GALLEGO, J., "La révolution athénienne. Penser l'événement démocratique", in *Dialogues d'Histoire ancienne*, 43, 2017, 1, p. 54.

27 There are many courts with their own jurisdiction. Justice was often dispensed by the people. The popular court of the Heliastes, which tradition attributes to Solon, is a case in point. The Heliastes were judges drawn by lot each year from among six thousand Athenians over the age of thirty. They received a salary of three obols for each day they attended court. C. Mossé recalls the extent to which the opponents of democracy attacked the way in which these judges were recruited, which left it up to the most humble to sit on the bench and therefore encouraged them to be greedy. He also mentions the difficulties encountered at certain periods in the history of Athens in honouring judges' salaries, the often political pressure to which magistrates were subjected and the numerous attempts at corruption to which they were subjected. The Greeks sought to remedy the situation, clearly anxious to guarantee calm and honest justice. Demosthenes reported that the law made anyone who tried to corrupt court judges and members of the Council liable to an action before the thesmothetes. See MOSSE, C., *Au nom de la loi: justice et politique à Athènes à l'âge classique*, Paris, Payot, 2010, p. 26.

28 TEFAN, A., *The Case of Multiple Citizenship Holders in the Graeco-Roman East in Citizens in the Graeco-Roman World Aspects of Citizenship from the Archaic Period to ad 21*, ed. by L. Cecchet & A. Busetto, Leiden & Boston, Brill, 2017, pp. 118, 127.

reasoning being decisive in an oral procedure developed before judicial bodies[29] of popular composition which, without the need for deliberation, cast their vote to form the majority meaning of the sentence.[30]

Literary sources contain several negative references to the work of the popular courts, which were very frequently used in the political struggle;[31] however, this information should be put into perspective, insofar as criticism of the administration of justice is a constant feature of social life, and in no way allows the Athenian model of popular juries to be disqualified. After all, Greek culture had a comparative advantage over the other peoples of the Eastern Mediterranean. It had been created by the aristocracy around a set of human and political ideals, and the struggle for democracy in the 5th century B.C. was an attempt to transfer these values to the people as a whole. The protagonists of this movement were the intellectual circles linked to the Athenian Enlightenment and their political agents, namely certain members of the nobility. This enlightened thinking had attempted to create a world on a human scale, in which the possibility of agreement and conciliation between opposing interests and wills was considered possible thanks to man's openness to reason.[32]

During the period of democratic anarchy in the fourth century, a whole political and populist movement came to challenge this ideal. This was the case of Socrates (399 B.C.), Plato and, in a more reformist vein, Aristotle.[33] This negative assessment was taken up by Cicero, who considered the system for organising society where *omnia per populum reguntur* (everything is governed by the people) to be perverse,[34] and by mediaeval thought, dominated by the

29 Against the government of experts, Aristotle held that the people, provided they were not of too low a level, possessed a wisdom that enabled them to deliberate and judge. Read PERNOT, L., "L'invention de la rhétorique démocratique en Grèce ancienne", in *Charmer, convaincre: la rhétorique dans l'histoire*, Actes du 24ème colloque de la Villa Kérylos à Beaulieu-sur-Mer les 4 et 5 octobre 2013, Paris, Académie des Inscriptions et Belles-Lettres, 2014, p. 36.

30 SCHOULER, B., "Comment et pourquoi les Grecs enseignaient la rhétorique?", in *Tréma. Revue Internationale en science de l'éducation et didactique*, 17, 2000, pp. 55-80.

31 LORAUX, N., "Le procès athénien et la justice comme division", in *Archives de Philosophie du Droit*, 39, 1994, pp. 25-37.

32 Pericles (495-429) shared this ideal and practised a policy that sought to reconcile authority and freedom, integrating the social classes, using the abilities of the nobility and facilitating popular control of political life. He had the rare privilege of giving his name to a "century", embodying the political and cultural apogee of the Greek world. Read AZOULAY, V., *Pericles. La démocratie athénienne à l'épreuve du grand homme*, Paris, Armand Colin, 2010, 270 p.

33 GOUPAYOU, H., *La conception platonicienne de la démocratie et sa critique par Aristote: bilan et perspectives. Essai sur les fondements épistémologiques, éthiques et politiques de la démocratie à l'époque classique et dans la modernité*, PhD thesis in philosophy, Laval, Université de Laval, Québec, 2019, pp. 256 *et seq*.

34 Within any democracy, even one constituted by a people *iustum ac moderatum*, the principle of equal rights is denied, because differences between citizens based on *gradus dignitatis* do not exist. The principle of *aequabilitas*, which provides for the allocation of responsibilities on

figure of Saint Thomas Aquinas, who described democracy as *iniquum regimen* (an iniquitous regime*)*.[35]

The continuity of this thinking was maintained in Renaissance Humanism and in the intellectual circles of the Enlightenment; when the republican ideal began to take hold, there was initial resistance to its identification with democracy, and this language was even present among those who were the protagonists in the process of drawing up the US Constitution, who preferred to speak of a representative republic, as was also the case in the currents of republican thought in revolutionary France.

The modern democratic experiment has introduced corrective elements into the historical life of the West, whose genetic element of progress has rested on the ability to correct the models of thought and organisation of the society it experiments with. The Greeks themselves had started down this path, formulating proposals in the intellectual reflections of the 4th century B.C. to introduce corrections into the functioning of the democracy of their time in order to avoid the degenerative process that ultimately led to its failure.

3. EQUALITY AND THE PLEBEIAN FUNCTION IN ROMAN-REPUBLICAN MAGISTRACIES.

3.1. *Civitas* and *iudicia populi.*

The Roman Republic was also a frustrated experience of the democratic organisation of society, although the causes were different from those in Greece.[36] In both North America and France during the 17th and 18th centuries the thinking that contributed to the formation of modern public law established an intellectual dialogue with the experiences of Antiquity (both Greek and Roman), especially in the reflections and debates preceding the new institutional articulation of the state.[37]

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the basis of every citizen's *gradus dignitatis*, can only exist within the regime of the *optimates*. The exaltation of the mixed constitution hides, in reality, the praise of the regime of the *optimates*. See IACOBONI, A., *"Le sens de la "libertas" au sein du "mos maiorum" chez Cicéron*", in *Camenulae*, 11, 2014, p. 11.

35 For Aquinas, democracy is the worst of the regimes, because it is associated with timocracy in the classification of political regimes. However, timocracy only deserves to be called a state (*urbanitas) secundum quid*, because in this regime it is wealth that opens the way to participation in public affairs, unlike monarchy or aristocracy, where virtue is the only means. Read MOLNAR, P., "Saint Thomas d'Aquin et les traditions de la pensée politique", in *Archives d'histoire doctrinale et littéraire du Moyen Âge*, 69, 2002, 1, pp. 67-113.

36 ROUGE, J., *Les institutions romaines*, Paris, Armand Colin, 1991, pp. 42-43.

37 GROULT, M., *Savoir et Matières. Pensée scientifique et théorie de la connaissance de l'Encyclopédie à l'Encyclopédie méthodique*, Paris, CNRS Editions, 2011, p. 207: "Antiquity, constantly

The historical and temporal distance between the trials of Antiquity and the succession of events that preceded the adoption of the democratic state under the rule of law as an expression of the identity of Western political culture provides much food for thought.[38] Every election begins with the candidates' *professio* (declaration of candidacy) filed with the presiding magistrate (the *nominatio* phase). As with legislative committees, on the day of the election the auspices are taken and the citizens are summoned; then a *contio* (a meeting to inform and persuade the public about political matters prior to a vote) is organised. Unlike votes on laws, there were hardly any prior *contiones*. During the Republican era, electoral *contiones* were neither a place for *professio* nor a tool for electoral propaganda. Candidates took the floor *in contione* in order to turn an initially unfavourable situation to their advantage. Once the *contio* had been dissolved, the actual voting began, after the *carmen* of the *comitia* (the prayer that took place before the comitial procedure) and the division of the people into groups had been completed.[39]

In the Roman constitutional tradition, *civitas* is seen as a political community legally organised under the rule of public law, to which magistrates, judicial bodies and citizens are subject. The *ius publicum* is conceived as an order guaranteeing the liberty and individual rights of citizens,[40] and the *civitas* as the place where these rights are protected.[41] It is here that we can see a difference in perception between the Greek *polis* and the Roman *civitas*. In both the Athenian *polis* and the Roman *civitas*, the people appear as the basic reference point for political organisation, but in the Roman-Republican constitution, they are structurally in a very different position to the one they occupy in the Athenian model of democracy. In this respect, the creation of the term *res*

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used, occupies a prominent place with d'Alembert's translation of Tacitus and Diderot's complicity with the ancients. The former placed Archimedes alongside Homer and the latter set out to discover true philosophy. Greek philosophers were highly regarded and served as models. Which is not to say that they were unsurpassable. In the Encyclopaedia, there is no question of wiping the slate clean of the ancients, but rather, on the one hand, as with Aristotle, of re-establishing their true philosophy and, on the other, of learning from them how to use a model".

38 According to Theodor Mommsen (1817-1903), the collegiate principle of magistracy existed in Rome as early as the monarchy, when it was used to unify the three groups identified as the *Tities*, the *Ramnes* and the *Luceres*. However, it was not until the transition to the *res publica libera* that this principle found its full legal expression, applying from then on to the consuls (created as early as 509, according to Mommsen), and then to the holders of the other magistracies added over time. Mommsen's interpretation of collegiality is therefore linked to his rather traditional vision of the transition from monarchy to republic. After him, numerous hypotheses were put forward.

39 GIOVANNINI, A., *Les institutions de la République romaine des origines à la mort d'Auguste*, Schwabe AG, Basel, 2015, pp. 115 *et seq*.

40 ROBAYE, R., *Le droit romain. Tome I. Sources of Law. Personnes. Successions et biens*, Louvain-la-Neuve & Bruxelles, Bruylant, 2001, p. 39.

41 RIBAS ALBA, J.-M. & SERRANO VICENTE, M., *Derecho romano. Volumen I. Introducción histórica. Derecho de personas y de familia. Derecho procesal*, Madrid, Editorial Tecnos, 2015, p. 111.

publica is significant; it designates organised society as a whole, but does not imply that power is referred to the people as a specific subject, but to the whole of the institutional system diversified into areas of competence, within which a framework of limitations and controls has gradually been configured with the aim of preserving civic freedom as a fundamental value of political culture.[42]

The republican constitution is based on the popular legitimisation of magistracies, laws and *iudicia populi* (decisions of the people), but the structure of the *res publica* gives popular sovereignty a limited dimension, insofar as political activity as a whole is the result of cooperation between different constitutional bodies.[43] The popular assemblies and the Senate could only meet on the initiative of a magistrate with the power to summon the people or the senators, but constitutional practice required the magistrates to issue a *iussum populi* (people's order) for the approval of laws, together with the consultative intervention of the Senate for everything that affected the general interest of the Republic. This is why Cicero contrasts the Roman Republic with Greek democracy, where *totae res publicae sedentis contionis temeritate administrantur* ("entire states are governed by the recklessness of a seated public assembly.).[44]

One of the essential values of Roman-Republican constitutionalism, which had a decisive influence on its development, was the continuity of the elective system for access to the judiciary.[45] With the establishment of the Republic, the democratic legitimacy expressed in the *suffragium* by citizens gradually created a new ruling group formed around the management of the highest magistracies.[46] Not all the old patrician families were able to join this new group; initially, plebian members also joined, giving the system a more egalitarian nature. We know that the patrician-plebeian differentiation did not operate formally in the internal

42 MABBOUX, C., *Cicéron et la Commune. Le rhéteur comme modèle civique (Italie, XIIIe-XIVe s.)*, Rome, Publications de l'Ecole française de Rome, 2022, pp. 249 *et seq*.

43 The aristocratic component of the Roman-Republican political class had the particularity of being forged around public service and with the social legitimisation derived from the honourable exercise of magistracies; from this point of view, the oligarchic character attributed to the composition of the ruling class is relativised; the elective system kept it open to the incorporation of new members (*homines novi*), which manifested itself in the integrative conciliation that made it possible to overcome the confrontation generated by the conflict between the patricians and the plebians.

44 D'ORS, A., *Derecho privado romano*, Pamplona, EUNSA, 2008, pp. 62-63.

45 HUMM, M., "Hiérarchie de pouvoirs et hiérarchie des magistratures dans la Rome républicaine", in *Hiérarchie des pouvoirs, délégation de pouvoir et responsabilité des administrateurs dans l'Antiquité et au Moyen Âge,* Actes du colloque de Metz, 16-18 juin 2011, ed. by A. Bérenger & F. Lachaud, Metz, Centre de Recherche Universitaire Lorrain d'Histoire, 2012, pp. 105-134.

46 The *lex curiata* confers additional legitimacy on the previously elected magistrate, making him or her a *magistratus iustus*. In other words, the person elected by the *comices centuriates* or tribunes is certainly a magistrate but is not a *magistratus iustus* or *optima lege*: to become one, a *lex curiate* is required. See VAN HAEPEREN, F., "Auspices d'investiture, loi curiate et légitimité des magistrats romains", in *Cahiers du Centre Gustave Glotz*, 23, 2012, pp. 71-111.

composition of this assembly, but its census-based nature, with reference to the landed wealth in the hands of the patriciate, produced this differentiating effect, by establishing the weighting of the *ius suffragii* on the basis of the different weight that corresponded to citizens in political life according to their level of contribution in the military and fiscal spheres. The voting system and the criteria applied in the formation of majorities for the adoption of decisions ensured that the patriciate controlled the decisions of the assembly in political practice. Although there was some anti-census tension in the history of the Republic, the reforms introduced did not lead to any substantial changes in the structure of the assembly for centuries.[47]

The plebeian movement of the 5th century B.C. had a political dimension in its demand for the principle of legal equality in the face of the patriciate, a process that could not be understood without the active presence of the plebeian minority, which made up integrated the economic oligarchy together with the patriciate at the time.[48] The patriciate also had to accept a series of populist initiatives by the plebians, which followed the constitutionalisation of its magistrates: the election of a decemviral commission (451 and 450 B.C.) to satisfy the plebeian demand that the *ius* should be set down in writing; the recognition of the validity of marriages between patricians and plebeians (445 B.C.); the creation of a council of magistrates (445 B.C.); the creation of an extraordinary magistracy as an alternative to the consulate, to which both patricians and plebeians could accede, and the recognition of the right of plebeian tribunes to speak at Senate sessions (457 B.C.).[49]

47 BLÖSEL, W., *Roma: l'età repubblicana.* Forum *ed espansione del dominio*, trad. it. a cura di U. Colla, Torino, Piccola Biblioteca Einaudi, 2016, pp. 24-35.

48 The events that forced the patriciate to make concessions to avoid civil confrontation were the revolt of 493 B.C. by the plebeian elites, which resulted in a pact with the Senate recognising the plebs' right to elect their own magistrates to defend their interests. These magistracies were incorporated into republican constitutional law, which implied the recognition of an autonomous sphere of power for part of the *populus*, and for the tribunes of the plebians, the ability to stop act of any magistrate or of the Senate by veto (*intercessio*). See LACAM, J.-C., *La République romaine des années d'or à l'âge de sang*, Paris, Ellipses, 2019, p. 114.

49 Relations between the ruling class and the plebians were pacified with the compromise expressed in the *Liciniae Sextiae leges* of 367 B.C., which helped to stabilise the republican constitution. From then on, all magistracies gradually became accessible to plebeians by election, and plebeian magistracies to patricians after the patrician's *transitio ad plebem*. The *lex Ovinia*, from the end of the 4th century B.C. entrusted the election of senators to the censors, from among the former magistrates and according to the places available; at the end of the 3rd century B.C. or at the beginning of the 2nd century B.C., the tribunes of the plebians were granted the power to convene and preside over the Senate (*ius agendi cum patribus*) and, subsequently, the former tribunes could be incorporated into the Senate. See PERINO, C., *La lex Licinia Sextia de modo agrorum*, Tesi in Storia Romana, Napoli, Università degli Studi di Napoli Federico II, Dipartimento di Studi Umanistici, 2015, pp. 7, 25 *et seq*.

3.2. *Dignitas* and public service ethics.

The expansion of the elective system and its openness to non-patricians also extended to priestly functions; after the constitutional compromise of 367 B.C., plebeians were able to join the college of pontiffs and augurs.[50] The course of historical events highlights the dynamic force of the elective system as a means of integration into the ruling class, and the open nature of the elective system made this possible by giving effect to the principle of equality before the law.

The political culture of the patrician nobility also gave rise to the value of *dignitas*, which refers to the moral quality of those who aspire to hold public office. The ideology of the patriciate used this concept to assert its pre-eminence, succeeding in maintaining control of the priestly colleges and higher magistracies for a long time, despite their elective nature.[51] The plebeian ruling minority adopted the value system of the patriciate, which allowed it to survive in the political culture represented by *nobilitas*; it is to this ruling class's ability to compromise and its ethic of public service that we owe the stability of the republican constitution.[52]

Remarkably, some initiatives with populist tendencies succeeded in prospering, such as the introduction of the secret ballot (139 B.C.), but the influence of the oligarchy meant that others were rejected, such as an attempt in 67 B.C. to change the structure of the assembly by centuries, or quickly repealed, such as the popular composition of the *album iudicum* for the formation of

50 LANFRANCHI, T., "Le développement des magistratures à Rome dans son contexte italien", in *Mélanges de l'École française de Rome. Antiquité*, 133, 2021, 2, pp. 321-346.

51 The prestige derived from the exercise of these magistratures was carefully cultivated within aristocratic families by means of inscriptions (*tituli*) that appeared beneath wax portraits of their ancestors (*imagines maiorum*), arranged like family trees in the *atrium* or *tablinum* of their urban dwelling (*domus*), and displayed publicly at the funeral of a member of their family (*pompa funebris*), where they were worn by extras who dressed up for the occasion in the insignia of power (*insignia imperii*), the highest exercised by each of them (pretextual or triumphal toga, bundles with lictors, etc.).On this occasion, the funeral eulogy (*laudatio funebris*) delivered from the top of the Rosters in the Forum by a close relative of the deceased recalled his deeds and virtues (*res gestae et virtutes*), in line with those of all his ancestors whose honours (*honores*) were then recalled. The competition for these magistracies ultimately led to the emergence of an aristocratic elite within society, which controlled the destiny of the Republic. See FLOWER, H.-I., *Ancestor Masks and Aristocratic Power in Roman Culture*, Oxford, Oxford University Press, 1996, pp. 36-38, 91-158, 185-222.

52 The plebeian model of the magistracy was to be constantly renewed right up to the outskirts of the Empire: "Magistrates, like the cities that had given birth to them, were diverse despite appearances, which discourages us from looking for elements of unity and codified behaviour among them at all costs. The communities themselves evolved over more than two centuries before more or less fitting into the mould of a regulated and universalised civic and provincial life, which does not mean uniformity. Far from being a novelty or a break with the past, Flavian municipal expansion led to an institutional simplification of local governments". Cf. LE ROUX, P., *L'empire romain. Histoire et modèles. Scripta varia III,* Rennes, Presses Universitaires de Rennes, 2022, p. 229.

criminal court juries (89 B.C.).[53] Clashes within the ruling class and the disruption of political life became particularly virulent as a result of plans for economic reforms aimed at redistributing the *ager publicus* in order to reconstitute the old peasant middle class.[54]

4. NEUTRALITY AND *IUS PRIVATUM* IN THE CULTURE OF JURISPRUDENCE.

4.1. An autonomous space for inter-individual relations.

The concept of *ius publicum* seems to have been formed in intellectual circles at the end of the Republic, configuring it to the organisational domain of the *res publica.*[55] *Although most of the legal literature on the subject of ius publicum* has been lost, the references that have survived show that it was the focus of attention for certain jurists.[56]

It was in the intellectual circles of the judiciary that the contraposition between *ius publicum* and *ius privatum*, understood as an autonomous space of inter-individual relations, was formulated. The uniqueness of Roman-Republican legal culture lies in the fact that the conditions were created in this space for the emergence of the professional figure of the jurist, and the configuration of the *ius privatum* as a normative whole from which the jurist operates creatively through an intellectual activity of interpretation.[57]

Jurists give the law a technical character and endow it with its own terminology, thus creating a legal language; they introduce logical reasoning into the treatment of normativity, thus giving rise to a method that provides a guarantee of neutrality in the application of the law within any legal system.[58]

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53 HIEBEL, D., "Les élections romaines, emblèmes de la souveraineté populaire ou artifices politiques de l'oligarchie?" in *Voter en Grèce, à Rome et en Gaule. Pratiques, lieux et finalités*, ed. by A. Borlenghi, C. Chillet, V. Hollard, L. Lopez-Rabatel & J.-C. Moretti, Lyon, NOM Editions, 2019, pp. 159-178.

54 DE MARTINO, F., *Nuovi studi di economía e diritto romano. A cura di Federico d'Ippolito*, Roma, Editori Riuniti, 1988, 244 p.

55 BAUMAN, R.-A., *Lawyers in Roman Republican Politics. A study of the Roman jurists in their political setting 316-82 B.C.*, München, C.-H. Beck, 1983, XIV + 148 p.

56 PARICIO, J. & FERNANDEZ BARREIRO, A., *Historia del derecho romano y su recepción europea*, Madrid, Marcial Pons, 2010, pp. 40 et seq.

57 CANNATA, C.-A., *Potere centrale e giurisprudenza nella formazione del dirrito privato romano in Poder pólitico y derecho en la Roma clásica*, ed. by J. Paricio, Madrid, Ed. Universidad Complutense de Madrid, 1996, pp. 69 *et seq*.

58 HUMBERT, M., "Equité et raison naturelle dans les œuvres de Celse et de Ulpien", in *Seminario Complutenses de derecho romano,* 19, 2006, pp. 137-203.

If the culture of jurisprudence that had developed by the end of the Republic was maintained, this was due to the persistence of a tradition that had emerged at the founding moments of the City. The autonomy that the gentililian groups and patrician families that remained within the city also enabled them to maintain the framework of their relations outside the normative control of political power, represented by the magistracy of the *rex*. In later historical memory, the expression *ius Quiritium* refers to a set of rules originating from the *ius civile*, which regulated relations between *patres familiarum.*[59] *It is therefore a law created by the patriciate, whose culture and system of values inform the institutions; the genetic link of the ius Quiritium* with the *mores maiorum* imbued it with a cloak of religious respectability and a nature of permanence over time.

The culture of *ius Quiritium* was not altered by the republican constitutional change promoted by the patriciate, but what was truly significant was that the plebeian revolution did not lead to any substantial changes in the model of private law relations created by this culture,[60] which brought with it the content of Decemviral legislation in the form of normative precepts, as well as a civil ritual procedure with its procedural characteristic.[61]

4.2. *iuris scientia* and the legitimacy of knowledge.

The intellectual activity of jurisprudence ends up producing a legal literature that gives the law a new dimension by becoming a product of high culture.[62] However, knowledge of the law is taken away from those who do not possess this specialised knowledge, which requires a corresponding apprenticeship; at the same time, this knowledge (*iuris scientia*) gives rise to a legitimacy based on the recognition of this knowledge.[63]

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59 BISIO, E., "Il ''ius Quiritium'' concesso ai Latini Iuniani e la liberazione de Flavio Giuseppe: brevi spunti di reflessione", in *Rivista di Diritto romano*, XXI, 2021, pp. 9-13.

60 There were, however, a few exceptions with the development of trade and the opening up of jurisdictional protection to non-Romans, with the creation of the magistracy of the Peregrine praetor (242 B.C.). See DAVID, J.-M., "*Le tribunal du préteur : contraintes symboliques et politiques sous la République et le début de l'empire*", in *Klio*, 77, 1995, p. 371.

61 MAGDELAIN, A., *La loi à Rome. Histoire d'un concept*, Paris, Les Belles Lettres, 2021, pp. 55 et seq. The author recalls that at the beginning, it was the holder of power, the king and then the magistrate, who dictated the law, which the people only had to ratify - in Latin *accipere legem* ("to receive the law") –, and even then it only came into force when the Senate had given it its "authority", the only thing likely to make it operative. It was only gradually that the principle of popular sovereignty came to the fore and that the law appeared to emanate from the will of the people.

62 WIEACKER, F., "Fundamentos de la formación del sistema en la Jurisprudencia romana", in *Bulletino dell'Istituto di Diriotto Romano Vittorio Sciloja*, 3, 1991, p. 181.

63 ZIMMERMANN, R., *Europa und das römische Recht* in *Archiv für die civililistiche Praxis*, 202, 2002, pp. 243 *et seq*.

Roman tradition presents the publication of the *ius* as a conquest based on the realisation of the principle of equality (*aequare leges omnibus:* equal laws for all) advocated by the plebeian movement.[64] The *auctoritas* of jurisprudence, based on the legitimacy derived from *scientia iuris*, as well as its secularisation, favoured the technicalization and autonomization of the ancient judicial order.[65]

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CANTO-SPERBER, M., "Démocratie: la matrice antique", in *Constructif*, 61, 2022.

64 VIRVOULET, C., *La citoyenneté romaine* in *Citoyenneté et droits de l'homme*, ed. by P. Schmitt-Pantel. Marseille, MUCEM, 2016, p. 56: "Citizens' rights and duties were originally based on the principle of geometric equality extolled by Cicero: the more property a citizen possessed, the more rights he had, but also the more duties he owed to the city. We therefore need to go back to the first centuries of the Roman Republic, when it functioned within the geographical framework of one city among others, to fully understand the spirit in which citizenship was conceived".

65 DI CINTIA, L., *Organizzazione del diritto romano* in *Diritto romano e diritto actual. Casi e regole*, ed. by F. Fasolino & F. Fernandez de Bujan, Torino, Giapichelli, 2023, pp. 8-9: "Ultimately, it can be said that Roman law is developing as a living science, fundamental to the understanding and formation of contemporary norms. It must be considered both in its institutional and systematic coordinates, and in its concrete manifestation, i.e. casuistry. Law is therefore an experience, and it is on the basis of this experience that human reason acts to formulate abstract concepts. Thus, studying concrete cases means approaching the law in a critical, rigorous and, at the same time, creative way, as the ancient 'prudents' did in an unparalleled way".

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PART II.
THE RULE OF LAW AND THE EUROPEAN UNION

EUROPEAN MULTI-LEVEL DEMOCRACY AS SEEN FROM THE PRINCIPLE OF CONSTITUTIONAL LOYALTY.

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SUMMARY: 1. MULTI-LEVEL EUROPEAN CONSTITUTIONALISM. THE "BLURRING" OF POWER. 2. RECOURSE TO THE PRINCIPLE OF CONSTITUTIONAL LOYALTY IN THE EUROPEAN ORDER. ORIGINS AND CONFIGURATION. 2.1. The duty of loyalty of the states to the European constitutional project. 2.2. The Union's duty of loyalty to the constitutional acquis of the states. 2.3. The duty of interinstitutional loyalty. 2.4. The legal-procedural consequences of the principle of European loyalty. 2.5. Where is loyal cooperation heading? The principle of European constitutional loyalty. 3. BIDIRECTIONALITY AND POLARISATION. IMPERFECT LOYALTY. 4. LOYALTY AND EUROPEAN CONSTITUTIONAL SENTIMENT. 4.1. Identity(ies). 4.2. Leadership(s). 5. BY WAY OF EPILOGUE. LOYALTY AND CROSS-LEVEL CONSTITUTIONALISM.

1. MULTI-LEVEL EUROPEAN CONSTITUTIONALISM. THE "BLURRING" OF POWER.

The European constitutional order, multi-level by nature, has been moving in a complex dynamic for decades that obliges us to reformulate the classic dogmatic categories (division of powers, sovereignty, fundamental rights, constitutional justice...). The different levels of government that interact in our European constitutional order are mutating internally, but also in their relations with each other, both horizontally and vertically, in such a way that it is

complicated to understand how they work and to make them really operational. There is thus a 'blurring' of power and, with it, of the limits and contours of people's rights, with necessarily shared spaces and responsibilities where the public and the private domains are constantly intertwined.

Together with BAUMAN, who speaks of powers and 'liquid' societies,[1] FERRARESE also reminds us that none of the subjects and entities that have been attributed power in one way or another is, in itself, "complete".[2] The decision, execution, responsibility, control... over a matter, are constantly shared between powers, in collaboration with the counter-powers and at the different levels of government, it being practically impossible to find aspects or matters where several of them do not converge. In short, it is such a rearrangement of public and private powers and counterpowers where, in our opinion, the principle of European constitutional loyalty (on which we will focus below) takes on its full meaning. A principle that represents, in broad terms, the degree of assimilation, knowledge and consideration that some instances have of others, as well as that which any operator – public and private – has of this shared common system and its basic principles. Ultimately, the aim is the constant integration of an order, with sub-orders, which by nature is permanently open, but necessarily connected, if it is to really function. A system that operates through the confluence and balance that is achieved around three types of identities: national cultural identities based on a cultural heritage, i.e. a language, myths and symbolic ties; secondly, an instrumental identity that has presided over much of the EU's evolution and which is present in its daily dynamics, according to which identity is chosen according to the benefits and utilities to be obtained; and finally a civic identity, also of a "rational" type like the second, sustained by agreement on common legal-constitutional rules, principles and values.[3] It is in the search for coherent and rational balances and connections between these three identities that the principle of European constitutional loyalty operates, in an attempt to ensure that the European political project can be consolidated.

In fact, balances are not always achieved, nor are identities always sustained, so the European project reacts to crises and tensions of a constitutional-normative nature by contracting and accentuating the intergovernmental element. This sometimes leads, dangerously, to a functional interpretation of democracy in the service of interests that are assessed from the point of view of normative effectiveness/efficiency.

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1 BAUMAN, Zygmunt, BORDONI, Carlo, *Estado de crisis*, Paidós, Barcelona, 2016, pp. 45 ff.

2 FERRARESE, Maria Rosaria, "Governance. Sugli effetti politici e giuridic di una soft revolution", *Politica del Diritto*, vol. 45, no. 2, 2014, p. 163.

3 RUIZ JIMÉNEZ, Antonia María, "Identidad europea y lealtad a la nación. Un compromiso posible", *Revista Española de Ciencia Política*, no. 12, 2005, p. 103.

Indeed, the various European crises that have occurred in recent decades –identity, economic, the rise of populism...– tend to lead to an increase in European power. National governments perceive the risks and end up falling into governmentalism, with the consequence of an increase in the European democratic identity deficit in a dangerous vicious circle. By not giving Europe a share of power, in short, states end up reinforcing governmental elements, both internally and within the Union itself.

It is clear, therefore, that the time has come to stop answering the question of "who has the power?", which is irrelevant in today's multi-level European constitutionalism, and to ask ourselves more pragmatically; "how do the different levels of government interact?" and how a solid and coherent European project can be built. This is no longer sufficient, however, because it is no longer a 'European' problem, nor properly speaking a problem 'of the states', but a problem at the heart of the system: the deterioration of constitutional principles and the breakdown of state balances in the Union – due to crises, European enlargement, the Brexit experience, the economic governance in place... –. Because pluralist democracy is being abandoned on the one hand, and because on the other hand, such dangerous concepts as security, which is nothing more than control in the absence of constitutional pillars, are being resorted to. Civic identity, in short, could be failing.

It is on the basis of these dynamics that a principle of loyalty is established, which, in our opinion, goes beyond mere "loyal cooperation". To this end, it is absolutely necessary to consider the underlying context in which European constitutional loyalty should operate: the culture of the pact, bidirectionality and the will to work for a shared, collaborative and cooperative commitment, which is based on *self-restraint* and not on the desire for control and security. Because "democracy should be the search for and satisfaction of common needs and interests, for which, in addition to defining and naming them and establishing priorities, it is necessary to *build a climate* of collaboration and cooperation".[4] The demand for constitutional loyalty consequently emerges as a reaction to the systemic crisis in which state political projects are moving, and in particular what is occurring at the heart of the European project itself: classic disputes over the European democratic deficit, the economic crisis with all its effects, the drift towards intergovernmentalism in critical periods, European agencification, and with it the flight from the core of European power without clear constitutional bases and solid political leadership, the illiberal discourses and practices – more or less explicit – of some states, the lack of a solid political culture... among other elements.

4 CAMPS, Victoria, *Virtudes públicas. Por una ética pública, optimista y feminista*, Arpa & Alfil Editores, Barcelona, 2019, p. 25.

It is in this context that there is a need to "return" to the principles in order to bring state orders and the European project to fruition, since the European level alone will not replace that of the states, and it is necessary to balance sensibilities and reinforce the European multi-level architecture in constitutional terms. The principles, in fact, "act as a guide and inspiration for it, in such a way that they are configured as instruments responsible for conveying the values that make up the prevailing philosophy at each historical moment",[5] providing structure, order, legitimisation and harmony, and thus transcending a merely formal configuration of the legal-political sphere. Among them, the principle of European constitutional loyalty is of particular value; in our opinion, it goes somewhat further than the mere principle of loyal cooperation or, in any case, reformulates the latter. In any case, we share Pulgar's opinion when she warns us of the difficulties presented by the principles: in their configuration, in their compliance, because of their breadth and diffusion, and because of the same context of technical-legal decline in which we sometimes find ourselves, without it being useful to appeal chaotically to any type of principle.[6] In the end, the much-vaunted principle of legal certainty and, above all, the constitutional project itself, may end up failing.

2. RECOURSE TO THE PRINCIPLE OF CONSTITUTIONAL LOYALTY IN THE EUROPEAN ORDER. ORIGINS AND CONFIGURATION.

European constitutional loyalty emerges from the need to bring the different powers that operate in the European legal space together in a harmonious coexistence, both normatively and institutionally. The most immediate and recurrent recognition of constitutional loyalty in the European sphere is found in Art. 4.3 of the Treaty on European Union (TEU), which embodies what is known in European law as the principle of "loyal cooperation".

It is a principle that informs relations between the European Union and the member states, imposing a reciprocal and sincere duty of loyalty, and whose basic objective is to ensure the full effectiveness of European law and the commitments enshrined in the European treaties. Art. 4.3 TEU thus states that "Pursuant to the principle of sincere cooperation, the Union and the member states shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The member states shall take any appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or

5 PULGAR LANZACO, Mónica, "El principio de lealtad institucional como nervio y motor del Estado autonómico: unidad o fragmentación?", *Revista Española de Derecho Administrativo*, no. 223, 2022, p. 236.

6 PULGAR LANZACO, Mónica, "El principio de lealtad...", *op. cit.*, p. 237.

resulting from the acts of the institutions of the Union. The member states shall facilitate the achievements of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

This is one of the framework principles of the Union, with a long history, inspired by German law,[7] which is projected in various parts of the European treaties, is connected with the aspiration to shape a "European identity" and transcends the mere collaboration innate to the system of competences, as we will show in the following pages.

From the text, in particular Art. 4.3, various contents emerge which, interconnected with other precepts and, together with the case law of the Court of Justice of the European Union, form the initial reference framework of the principle of European constitutional loyalty.

2.1. The duty of loyalty of states to the European constitutional project.

As the literal wording of Art. 4.3 TEU shows, this is a precept that effectively highlights the commitment that the states acquire when they join the European project. It indicates that it is up to them not only to respect the European missions – avoiding jeopardising the objectives of the Union – but also to contribute to and assist in the effective fulfilment of all the obligations arising from the treaties and their implementation, by means of all appropriate general or specific measures. Of particular relevance in this regard is the impact that the principle of loyalty has on the Union's foreign and security policy, when Art. 24.3 TEU states that the member states shall support that policy "actively and unreservedly", "in a spirit of loyalty and mutual solidarity", respecting "the Union's action in this area".

The aforementioned precept undoubtedly evokes the purpose of safeguarding a shared political design and the union and amalgamation of the various states in a single legal-political commitment towards the outside world. In this way, the contours of the principle of European constitutional loyalty become clear; it serves precisely to safeguard, in an integrated and merged manner – and not as the mere sum of various parts – the European constitutional project in which very dissimilar states integrate.

7 The origins are to be found in the relations of reciprocal aid generated in the 16th and 17th centuries between the Kaiser and the states, and later with Bismarck, in order to sustain the unity of the Reich. SOSA WAGNER, Francisco, "Estatutos de Autonomía y fragmentación de la Administración. La lealtad federal", in *Anales de la Cátedra Francisco Suárez*, no. 42, pp. 73 ff.

2.2. The Union's duty of loyalty to the constitutional *acquis* of the member states.

Although this is a less visible aspect in the article we are commenting on, and in general throughout the Treaty on European Union, insofar as the Union is built on the constitutional tradition of the states, it is to some extent given the responsibility of ensuring responsible and committed interaction with them, in an interesting legal-political 'game'.

From this point of view, the Preamble to the TEU points to the commitment to strengthen the constitutional values of the states: "DESIRING to deepen solidarity between their peoples, while respecting their history, their culture and their traditions". However, other precepts allude to this powerful inspiration of the European Union in the constitutionalism of its member states (and through the Rome Convention itself, in the sphere of the Council of Europe). Thus, Art. 4.2 states that "The Union shall respect the equality of member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential state functions, including ensuring the territorial integrity of the state, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each member state".

The above provision is linked to Art. 6.3, according to which "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law".

The emphasis is thus placed on the relationship between the two legal systems, thus contributing to their harmonisation. However, an "illiberal" interpretation cannot be drawn from these precepts – essentially the first one – whereby there would be an absolute exception left to the member states, which would come to justify, if necessary and on the basis of an "abusive" national identity, the non-application of European law.[8]

To this end, it is worth recalling the Declaration on European Identity adopted in Copenhagen in 1973 and, in particular, that the European constitutional identity is largely constructed "by reference to the other". Thus, the starting point is a focus on the European sphere itself (internal, European

8 This is highlighted by CRUZ MANTILLA DE LOS RIOS, Pablo, in "La identidad constitucional de la Unión Europea: una categoría jurídica en construcción", *Deusto Studies*, vol. 70/2, 2022, pp. 4-5, when he alludes to the illiberal episodes of the Hungarian and Polish political systems.

institutions, common market, European policies, etc.), but above all, as far as we are concerned, it is set in its relationship with others (the states and entities outside the Union) and that its elements "drink" and "feed" from the member states in an evolutionary way, i.e. it will mutate over time, so that the European project is the result of a constant effort of adaptation/synchronisation. Since this Declaration, various subsequent milestones 'mark' the permanent configuration of the European identity, approaching or generating the constitutional loyalty that concerns us. Thus, the "Copenhagen Criteria" (1993) can be mentioned: the requirements in accordance with the democratic principle, which the states must fulfil and which imply a shared *acquis* (institutions, the state of Rights and entitlements, a common market, and fundamentally a "predisposition" to assume and accept the European objectives, which have been built 'from' the constitutional premises of the states).

In a process of constant feedback, the Copenhagen Criteria determine the loyalty of the states to the Union, while the Union assumes the *acquis* of the states, these criteria and the philosophy that underpins them. They will be incorporated into Art. 2 and 49 TEU, generating a duty of mutual loyalty that is only sustained when both sides become balanced and fit together.

In any case, the success of the European project also has to do with the ability of the European institutions to 'drag' the states towards a common European constitutionalism, for which the Union needs to develop sufficient capacity to be close to the states and integrate the existing constitutional variety into a common project, assimilating, harmonising and even improving the advances that the national political systems have been able to develop since World War II.

2.3. The duty of inter-institutional loyalty.

This is a dimension that affects the European institutions themselves, and which requires each of them to act within the limits of the powers conferred on them by the Treaties, in accordance with the procedures, conditions and purposes established therein (Art. 13.2 TEU). All this, considering that we are dealing with a unique division of powers, with institutions that are strongly interconnected, thus breaking with the patterns of the states, and where cooperation and loyalty make more sense than ever, as they are projected onto the institutional framework of the Union, but also with respect to the institutional system of the states at the central and regional level. This, moreover, is not limited to the classic core of power, as interactions with independent authorities and agencies are essential, insofar as they balance the most varied interests.[9]

9 Let us recall that by virtue of Art. 295 TEU the Council and the Commission may conclude interinstitutional agreements and that, by way of example, Art. 284 TFEU provides that the Presidency of the European Central Bank may be invited to participate in Council meetings; or that

Indeed, as has been said, in reality the European division of powers has a dual dimension: horizontal, which affects the European institutions themselves, and vertical, which refers to the relationship between the European institutions and state and regional institutions. It is on this last point that European constitutional loyalty is moving towards interconnections that are absolutely necessary within the framework of the Union, with the links between the European Parliament, national parliaments and regional assemblies taking on particular importance. The establishment of the early warning mechanism would prove to be one of the great mechanisms, essentially since the Treaty of Lisbon, by alleviating the European democratic deficit through the control of the principle of subsidiarity, which is also to some extent a manifestation of the misgivings of the states. However, although cooperation between the different parliamentary levels has intensified, it is true that fruitful dialogue has not yet been generated, largely due to the lack of resources made available by the member states for this purpose at their various levels, the lack of internalisation of European policies at the state – and even more so at the regional – level, but also due to a procedural structure and short response times that hinder coordination, debate and serene dialogue.[10]

2.4. The legal-procedural consequences of the principle of European fairness.

Undoubtedly, one of the most significant aspects in the European configuration of the principle of constitutional loyalty is the major configuration carried out by the Court of Justice of the European Union, as well as its application and use as a parameter to measure production and regulatory and institutional activity. Unlike the difficulties encountered at the state level, where the Constitutional Courts have serious problems in using and controlling the application of this principle, in the European sphere the violation of the principle of loyal cooperation can effectively give rise to legal action before the Court of Justice of the European Union.

As has been the case in other areas, this general principle of European law has evolved positively over the years: from a generic general obligation of

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the EU countries, the Commission and the European Central Bank work together in the Economic and Financial Committee. In any case, the mode of operation has been mutating over the years and the institutions' own internal regulations are incorporating new dynamics, not to mention a particular casuistry in various situations.

10 SÁNCHEZ-ABARCA GORNALS, Carmen, "Parlamentos nacionales y Unión Europea. El papel de las Cortes Generales en la cooperación interparlamentaria europea", *Revista de las Cortes Generales*, no. 104, 2018, pp. 573 ff; MESTRE AIZPURUA, Francesc, "El control del principio de subsidiariedad en España tras el Tratado de Lisboa: la aplicación del mecanismo de alerta temprana por las Cortes Generales y los Parlamentos autonómicos", *Revista de las Cortes Generales,* no. 88, pp. 109 ff.

good faith, which would serve as an inspiration for the states, to a principle that could give rise to an autonomous infringement before the Court of Justice, as it is considered a manifest breach of European law.[11]

2.5. Where is loyal cooperation heading? The principle of European constitutional loyalty.

On the basis of the above considerations, the TEU contains a number of references to cooperation between institutions and with states: when recalling that the Union is to establish an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation (Art. 8.1); when insisting on interparliamentary cooperation between national Parliaments and the European Parliament (Art. 12); by regulating enhanced cooperation within the framework of non-exclusive competences of the Union (Art. 20); by stating that it is an objective of the Union to achieve a high degree of cooperation in all areas of international relations in the pursuit of strong multilateral cooperation and good global governance (Art. 21.2); by conferring on the Union the task of strengthening cooperation between states in matters of common foreign and security policy (Art. 25); in the field of diplomatic and consular missions of the member states and Union delegations in third countries (Art. 35): with regard to more demanding structured cooperation in the case of those member states that meet higher military capability criteria (Art. 42.6), or by assigning the management of specific cooperation programmes to the European Defence Agency (Art. 45.1).

In any event, one of the conclusions provisionally derived from this principle of loyal cooperation is the search for the coherent and harmonious functioning of the system and harmony between institutions and people. It constitutes a broader approach that makes European constitutional loyalty the main ally of multi-level constitutionalism, for without it this multi-level governance is not possible.

However, certain paradoxes can be observed in this appearance of constitutional loyalty on the scene. Indeed, on the one hand, perhaps because it is somewhat obvious, constitutional loyalty has not received proper treatment in the states, to the point of being invisible in some of them, as in the case of Spain. It could also be said that the European legislator paradoxically had a better vision of the complexity of his political system, realising the need to make visible – and reinforce – the unity that multi-level governance dismembers in principle.

11 LASO PÉREZ, Javier, *La cooperación leal en el ordenamiento comunitario*, Cólex, Madrid, 2000; BLÁZQUEZ PEINADO, María Dolores, *El procedimiento contra los Estados miembros por incumplimiento del derecho comunitario*, Universitat Jaume I, Castellón, 2000.

Indeed, loyal cooperation would be configured as a principle inherent to the very nature of the European Union, one that nevertheless goes beyond the literal wording of the aforementioned Art. 4.3 TEU and which has clear federal roots of a pact and participation in the common good, as has already been pointed out.

The principle of European constitutional loyalty represents a stage that is partly different and partly more advanced than the principle of loyal cooperation, as it aims to help the different actors in the European project (European institutions, states and citizens) to seek a commitment to act in the exercise of their own competences. This takes the institutional and personal development of these actors into account, avoiding populist behaviour, and fundamentally taking into consideration the effects generated by their successive actions, both in terms of respect for the development of competences and functions by other entities and actors and the rights that are at the basis of the political system. In short, the harmonious functioning of the constitutional-democratic model, anchored in the principles and values of our European multi-level system.

3. BIDIRECTIONALITY AND POLARISATION. IMPERFECT LOYALTY.

We have started from the premise that Europe assumes the *acquis* of the states at the same time as they assume the European *acquis*, and that this implies respect for common commitments made. In this way, European constitutional loyalty becomes a reciprocal limit.

As announced, the principle of European loyalty is no more than a kind of adaptation of the principle of federal loyalty of German origin, and therefore basically entails a twofold obligation. On the one hand, of a negative nature: states must refrain from adopting measures that could jeopardise the objectives of the Treaty. However, this also entails a dual positive duty, since it implies, firstly, the adoption by them of the necessary measures to ensure the obligations deriving from the Treaty or resulting from the activity of the European institutions, and, secondly, the obligation to ensure that the Union itself fulfils its mission.

In a way, a kind of paradox is thus produced: a federal-inspired principle is adopted when the European Union shows a kind of 'allergy' to the construction of a federal system in its political dimension. In fact, the term was rejected during the drafting of the Maastricht Treaty in 1992, when the principle of subsidiarity was introduced. A less reluctant attitude is shown, however, in the fiscal dimension, as a result of the mechanisms launched from Brussels around the European fiscal pact in the first decade of the 21st century, and which aimed precisely to bring together European budgetary and fiscal stability around the European centre

of power in search of strong unity.[12] Furthermore, this happened at the same time as the following paradox was taking place: in European fiscal federalism the principle of constitutional loyalty was conspicuous by its absence as the democratic mechanisms of participation, cooperation and consensus failed.

Indeed, European constitutional loyalty does not sit well with polarisation and extremism. Multi-level governance is actually antagonistic to polarisation because polarisation implies acting with the other and never at the expense of the other. This is a trend that should preside over European policy and which is undoubtedly projected onto the states themselves, which are called upon to shape diversity through unity, balance and integration. Loyalty is therefore not limited to mere respect for the other; it rather implies taking the other into account in the context of each one, which they share, and on the basis of the principles that govern the European rule of law. That supposed loyalty – mere compliance with formalisms or simple respect – is nothing more than the half-loyalty (or false loyalty) that has emerged in recent times in some states and which also seems to prevail at times in the European project, as occurred with the economic crisis at the beginning of the 21st century.

In any case, there is an underlying debate that should not be underestimated: are the old cooperative formulas useful? As has been argued, loyal cooperation is only possible when the question of competences is well resolved and, therefore, when it is perfectly clear to whom the exercise and ownership of the specific competency corresponds.[13]

The principle of European loyalty is particularly intense since the fulfilment of the Union's objectives depends on its effective consideration and implementation. The unity of the European bloc is indeed paramount in a globalised and fragmented or bloc-divided world. As has been argued, it is a matter of creating a homeland, both at European and national level, but in the same project, bearing in mind that European loyalty is linked to internal constitutional loyalties, thus contributing to stabilising the order of competences, not only between the Union and the states, but also within the states themselves,

12 All this takes place within the framework of a constitutionalisation process at the national level - in the member states - of poor quality, with measures aimed at fiscal surveillance and discipline without addressing related matters, with unusual speed, over-strengthening various technical bodies and agencies, with provisions in extra-European Treaties and with a clear intergovernmental accent, as mentioned above. See CLOSA MONTERO, Carlos, "Los cambios institucionales en la gobernanza macroeconómica y fiscal de la UE: hacia una mutación constitucional", *Revista de estudios políticos*, no. 165, 2014, pp. 65 ff.

13 In this sense, it is worth considering how cooperative elements have been giving way in Germany to more competitive elements. ARROYO GIL, Antonio, *El federalismo alemán en la encrucijada: sobre el intento de modernización del orden federativo en la República Federal de Alemania*, Centro de Estudios Políticos y Constitucionales, Madrid, 2006.

insofar as both contribute to, and feed back into, the stability of the internal competence systems.[14]

For all of the above reasons, it is necessary to review the very institutional structure of the states, i.e. their machinery. This has not been done, however, as in the particular case of Spain the system remains the same as it was when it joined the EU. In this sense, the much-demanded territorial reform with a demanded increase in autonomous regional intervention in state affairs is not only still pending, but has even implied ignoring the European reality itself.[15]

Furthermore, the European Union continues to be built to facilitate autonomous participation "through" the states, as is the case with the Subsidiarity Control Mechanism, which passes through the central institution. Therefore, logic dictates that, in matters with regional intervention (which are more numerous than it seems) the European dynamic imposes that the participation of those institutions where the Autonomous Communities (regions) are present should be accentuated. The problem arises when there is no such institution as such, since, as is well known, the Spanish Senate has still not become a territorial chamber.

In short, a breakdown in the various loyalties or an insufficient or insufficiently harmonised participation of the various entities in the formation of the European will breaks the European project itself, because the will of the states, the will of the Union and the will of European citizens must be brought together. The shortcomings in the machinery will only be alleviated if the different wills that make up the Union are involved procedurally. This commitment is institutional and procedural in nature, but also emotional or sentimental, if you will. However, the commitment of the above actors is not enough, as we should not forget that the independent administrations also play a key role within the Union.[16] Perhaps it is no longer possible to escape from this new political configuration in which the independent administrations assume an important role, but what is relevant is to observe the conditions under which this mutation takes place, asking ourselves how to verify that these entities understand the political discourse and assume the constitutional postulates, while the central political authorities do not abandon their leadership functions.

At this point it is worth remembering that in this whole process of feedback between the states, the European institutions and the European project as a whole, the work of the Court of Justice of the European Union stands out. This paper is not the place to go into detail on its evolution, but its efforts in the

14 PULGAR LANZACO, Mónica, "El principio de lealtad..." *cit.,* p. 261.

15 GONZÁLEZ ALONSO, Alicia, "La lealtad constitucional. La Constitución como orden de valores o como procedimiento", *Revista de Estudios Políticos*, no. 120, 2003, p. 348.

16 GARCÍA ÁLVAREZ, Gerardo, "La Unión Europea como "Estado regulador" y las administraciones independientes", *Revista de Administración Pública*, no. 194, 2014, pp. 80-88.

gradual configuration of the general principles through which it "approximates" the various legal systems to generate a different "reality" (from *Stauder*, through the European Charter of Fundamental Rights, and up to the Treaty of Lisbon, followed up with subsequent judicial decisions) are more than obvious. This is because the European will is not, in fact, the mere sum of individual wills, to paraphrase Rousseau.

It is for this reason, and by way of a provisional conclusion, that the need to incorporate the European idea into the Constitutions is particularly pressing, even if the European Treaties themselves are constitutions in a material sense.[17] As Habermas points out, it is only possible to shape a project if both entities share values as well as history, language and culture.[18] Elements which, as is well known, are not all equally shared in the European project in its connection with national and regional projects, which generates quite a few problems. In any case, the role of the state constitutions, as the axes of the system, is to function as agents in the task of recognising and shaping the identity of a political community, thus generating civic attachment.[19] It is a question of incorporating the idea of Europe into the constitutions of the states in such a way that, starting from the fact that the state conquests have been assumed by Europe, it is then reintroduced into the constitutional dimension of the states in a constant bidirectional mechanism. Although the Union is not structured by a Constitution, there is a material European constitutional project which, moreover, must then formally fit into the hierarchically superior norms, since form is also substance.

4. LOYALTY AND EUROPEAN CONSTITUTIONAL SENTIMENT.

4.1. Identity(ies).

At this point we should recall that the principle of European constitutional loyalty transcends mere inter-institutional collaboration to enter the field of the search for a European legal-political project under the banner of a European identity, going beyond the sum of state wills to configure a community that is nourished by the constitutional tradition of the states and, in turn, sponsored by the Council of Europe.

17 In this sense, , in the case of the Spanish legal system it is still necessary to recover the reformist movements that took place at the beginning of the 21st century. In this respect, see the Opinion of the Council of state of February 2006.

18 HABERMAS, Jürgen, *Identidades nacionales y postnacionales*, Tecnos, Madrid, 1989.

19 CRUZ MANTILLA DE LOS RIOS, Pablo, "La identidad constitucional..." *cit.*

We argued above that European constitutional loyalty represented a plus over and above the classic principle of loyal cooperation. This now implies, as far as we are concerned, that the political-cultural aspect that the legal rules themselves help to generate must be added to the strictly legal configuration of the principle, without one being conceivable apart from the other, in such a way that the principle of European constitutional loyalty is not complete if law, politics and culture are not united, or at least if the more cultural identities in the states, more utilitarian in the Union, are intertwined in a civic identity presided over by the principle of European constitutional loyalty.[20]

European identity or consciousness is often referred to as a kind of "civic feeling of belonging to the Union based, from a rational point of view, on the awareness of sharing common ideals, values and principles", so that we have a "set of characteristics that individualise the European Union and distinguish it from other groups of states, defined on the basis of the fundamental values shared between the European Union and its member states".[21] The fact that the basic rules reflect the constitutional identity helps to generate the sense of attachment and community to which we have alluded. The original law shows this commitment in its Preamble, and also in the first precepts of the articles of the Treaty on European Union (fundamentally in Art. 1 to 4) in an attempt to emphasise the objectives, values and principles that the states share. However, this allusion is not enough: the internal Constitutions themselves are the reverse side of the coin that represents European constitutionalism, as they should also show a commitment to the shared project. It is necessary for them to allude to the European constitutionalism in which they are inserted, as this is demanded by the principle of European constitutional loyalty that permeates this multi-level governance and where the concept of the Constitution itself has clearly mutated. Loyalty is only present when the "inter-level" interconnection is reasonable and works, interacts and feeds back. It is not a question of people having several loyalties that have to be compatible, with one being left out when this is not achieved; rather, they may have several identities – cultural, instrumental, civic... to which we alluded –, which should be made compatible precisely through the principle of loyalty itself.

Europe will remain a puzzle of deep-rooted but heterogeneous identities; the aim should not be to move towards homogenisation. Paradoxically, the success of the European project lies in respecting and understanding differences in terms of loyalty. It is well known, for example, that Europe attracts migration, but therein precisely lies the virtue of this project: its ability to "digest" this process. We also know that there are problems in assimilating this reality and there are outbreaks of disloyalty (antagonism, reticence and rejection) due to the

20 RUIZ JIMÉNEZ, Antonia María, "Identidad europea...", *op. cit.*

21 *Pan-Hispanic Dictionary of Legal Spanish*, https://dpej.rae.es/lema/identidad-europea

fear of losing national identity: basically cultural in nature and with an irrational and more emotional component.

However, one of the main obstacles to reconciliation between and within different identities may be the existence of a kind of new 21st century *laissez faire, laissez passer*. A kind of unconcern and apathy with regard to our national-European identity, which we neither foster nor reflect it in a convinced manner in our daily coexistence, paradoxically showing ourselves to be "disloyal" to our own project or to ourselves, even with regard to the commitments made at international level to the Council of Europe enshrined in the Charter of Fundamental Rights of the European Union and in the Treaty on European Union. All this while then seeking to shield this European identity "at the expense of the other", with the simple argument of the threat it represents.

This is a contradiction that has been poorly resolved on the continent and which does not sit well with the interculturality, human wealth and equity that we seek, because under no circumstances is European society absolutely uniform, hegemonic and with assimilationist pretensions from its theoretical foundations. All that is required, then, is to build the channels, mechanisms and strategies, without absolute "regimes of truth",[22] so that those who contribute to creating a project feel it as their own and respect it, even though they may come from different cultures and are even antagonistic to the European civic project itself.

We find ourselves, then, in a union based on diversity[23] where the eternal question is whether it is possible to build an intercultural European identity.[24] Iin fact, territoriality is not the element that unites the European project, but rather its values and a shared cultural heritage, as mentioned above. However, differences are clearly evident across the continent, and any attempt at political construction must start from efforts to unite and consolidate the project with these values and culture. A strong political will is required to lead and give meaning to this project, but what is certain is that different disintegrating elements work against it: the predominance of governmentalism in some institutions and historical moments, quotas of state power, private powers that are scarcely constitutionalised and are interested in individual negotiation and not in entering into major agreements or compromises, independent authorities where more politics is needed, and a citizenry that is generally willing but disenchanted.

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22 The "regime of truth" is a Foucauldian concept that describes the way in which a society or a system determines what is true. Cf. FOUCAULT, Michael, *The Courage of Truth. El gobierno de sí y de los otros*, Akal, Madrid, 2014.

23 This is the motto of the European Union, as set out in Declaration no. 52 annexed to the Treaty of Lisbon.

24 RODRIGUEZ LESTEGÁS, Francisco, "Europeans versus non-Europeans: towards the construction of an intercultural European identity", *RIPS*, vol. 5, no. 2, 2006, p. 21.

While it is true that the economy was the first element where there was a serious attempt to converge, it is also true that this immediately implied the incorporation of the *status* of the person, as could not be otherwise. With this, the trafficking and renegotiation of the constitutional elements of freedom, equality and power began, with various influences and elements that have helped to shape them (religion, history, etc.).

In short, the purpose of creating a culture and community of civilisation over and above the political divisions that have taken place over time is what has determined the idea of a common European cultural heritage. Although it may be complex to configure Europe as a "unity in diversity", it is true that it can be alluded to as a "family of cultures" that aims to share certain common values and objectives, led by the will to create a legal-political unity while respecting the different traditional cultures that make it up, seeking a rapprochement between them to form an entity that "transcends" individual wills. Ultimately, it should be clear to us that we have already created an intangible nucleus that must not – and cannot – be destroyed, otherwise we will generate a political-legal 'orphanhood' that European citizens could pay dearly for, given the threatening globalising movements we are witnessing.

At this point, the question arises as to where this irreducible core lies in the Treaty on European Union itself. The fact that there are no intangibility clauses in a legal-political project, as is the case in original European law (in particular in Art. 48 TEU), does not imply that there is no implicit identity or constitutional core that is specially protected and unavailable.[25] In fact, although this core is envisaged in the literal wording of the Treaty, its maintenance – which implies keeping it up to date and not conceiving it as an irrefutable and absolute truth – is essential in any advanced democracy that places the human being at the centre of the system as its subject, and not as its object. From the point of view of the principle of European constitutional loyalty, we are faced with an indispensable premise, since, as we have been arguing with regard to the non-existence of intangibility clauses in the Spanish Constitution, European constitutionalism is such precisely because it is defended. It is militant, in that sense, and it could not be otherwise.

Of particular interest in this regard is the CJEU Opinion of 18 December 2014, which ruled against the Union's accession to the Rome Convention, despite the fact that it is provided for in the TEU. The CJEU considers that the Court's role in the exclusive interpretation of its own Treaties is not sufficiently guaranteed, and is reluctant to see its sphere of action threatened when the Union itself is based

25 This has been pointed out by the CJEU in several decisions: CJEU of 14 December 1991, 1/91, ECLI:EU:C:1991:490; CJEU of 8 March 2011, 1/09, ECLI:EU:C:2011:123, para 80; and CJEU of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, para 164. Also, CJEU of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*.

on these various shared sovereignties. The Court does not see how there can be a kind of supranational co-jurisdiction. This is precisely what demonstrates the need to continue to find ways to find a reasonable and fruitful dialogue between the two European realities. In any case, there is a clear attempt to set limits for the European Council, in the same way that the states also seem to set limits for the Union (the so-called counter-limits, in this case "European"). It would be, to use a more colloquial expression, a "warning to seafarers". However, far from considering this type of pronouncement as a threat to the system, we could interpret it simply as a warning to prevent the other entity from overstepping certain limits or ceasing to engage in dialogue. It is precisely constitutional loyalty that imposes that there is no "alleged absolute primacy" without dialogue,[26] allowing any of the entities to issue a warning when they observe that there is a risk that these intangible cores (not only what each entity considers "its own" but also the "shared" core) may be undermined. It could be said that, in the multi-level dynamic, it is precisely the principle of constitutional loyalty that imposes the implementation of mutual counter-limits when any of the entities infringes the common constitutional core of coexistence. These counter-limits cannot simply remain an irrational or poorly argued exposition of the existence of limits, but must be accompanied by ways or responses for dialogue and rapprochement. The novelty, as we have been announcing, is that the Union – essentially the CJEU – is now showing itself to be belligerent with regard to a European constitutional nucleus that must be protected. What we do not know is whether this is still done with full constitutional conviction, not merely functional or utilitarian at the service of the market interests and outside its own human and civic interests.

In this respect, we will now focus on a series of mechanisms that have already been regulated – apart from the case law of the CJEU – in which the Union intends to guide the states towards respect for the constitutional and democratic rule of law.

On the one hand, Art. 7 TEU provides the Union with an instrument that allows the Council, at the proposal of a third of the member states, the Parliament or the Commission, to verify a clear risk of a state violating European values (democracy, dignity, equality, rule of law and protection of human rights), and to adopt the necessary measures to reverse the situation. If the procedure fails to remedy the situation, the Council could sanction the state with the suspension of rights, including the right to vote in the Council. The difficulty, however, lies in the unanimity required, as in practice it has proved to be substantially ineffective beyond highlighting the anti-democratic drifts that have been occurring on the European continent.

26 In a similar vein, but from the side of the states, see the *Solange* and *Frontini* cases.

On the other hand, there is an instrument that seems to be proving to be more effective, as it simply chooses to make access to European funding conditional on respect for the principles of the rule of law. These are the so-called "budgetary conditionality clauses". They have existed for a long time, but their importance has grown significantly since the 2007–2013 Multiannual Financial Framework, coinciding, moreover, with the populist drifts of certain states. Regulation 2020/2092 provides for a mechanism that allows it to suspend or cancel European funds for a state when they directly violate principles of the rule of law.[27] However, this is a complex mechanism that arouses misgivings among states, which doubt its purely utilitarian interpretation. Consequently, there is a risk of a mutual episode of disloyalty.

Following the actions for annulment brought by Poland and Hungary against the Regulation, the CJEU handed down two rulings on 16 February 2022 in reaction to various EU initiatives against these states.[28] This took place at a time when other countries were requesting the need to activate this new conditionality mechanism with some urgency, clearly seeing, along with the Union itself, the respect owed to Art. 2 TEU, which reflects the principles and values of the rule of law, articulated, as we have pointed out, in the traditions of the states themselves. This, however, is not the opinion of the Polish and Hungarian governments, who distance themselves from the principle of European loyalty and proclaim the Union's lack of competence to proclaim the principles and values linked to the rule of law, as well as pointing out that in doing so it is circumventing Art. 7 TEU.

The CJEU, in its rulings, is forceful: it states that the European legal order establishes binding norms of the rule of law, which must be applied in any field of action affecting the Union, including, of course, the budgetary field; it also points out that these values and principles linked to the rule of law are precisely a requirement for acquiring the status of member state, and that all this implies, in short, a kind of "mutual trust". It draws on the Union's long history of recognised and applied values.

Naturally, the mechanism seems to be a challenge to the states, and the interpretation of the Regulation has evolved for this very reason, since it is not so much a question of providing a sanctioning mechanism in the style of Art. 7 TEU to protect the rule of law, but rather of making them financially conditional in order to protect a higher good. This involves difficulties, however, as it is not easy to "fairly" determine the cause-effect relationship between the erosion of

27 Regulation 2020/2092 is part of the Commission's multiannual financial framework 2021-2027 and aims to combat the populist drifts of certain member states, insofar as failure to respect the principles of the rule of law prevents the sound management of European funds.

28 C-156/21, *Hungary v. European Parliament and Council of the European Union* and C-157/21, *Poland v. European Parliament and Council of the European Union.*

the rule of law and the damage to the Union's financial interests.[29] The lesson to be drawn is that the principle of European constitutional loyalty is ill-suited to the mere incorporation of sanctioning mechanisms.

Indeed, the application of the Regulation following the judgment was not immediate, nor was its interpretation unanimous. In contrast to the European Parliament's conviction, there was reluctance on the part of the European Council and the Commission (subsidiarity, proportionality...). Furthermore, a whole process of delays and waiting occurs, with debates and controversies between states and European institutions.

In any case, the Union's intention – and with it the intention of many of its member states – to show its concern for the effective enforcement of the rule of law should be valued. The subsequent work on this and other aspects, of ironing out differences and strengthening the European rule of law on the basis of the principle of loyalty, will be at a constitutional engineering level, because although we have a new element to protect European constitutional democracy, the key will be the ability to determine whether an infringement of the rule of law is linked or not, and with what scope and contours, to the financial – and, by extension, humanist and civic – interests of the Union, determining whether it is a mechanism intended only to protect the Union's economic interests or whether it also has a political projection, so it is necessary to look at it from a broader and structural view of the Union, which is not yet available.[30]

Undoubtedly, although the CJEU is once again acquiring a meritorious notoriety here – unlike other "political" institutions that oscillate more –, and may exercise a pedagogical task of considerable interest in the future, at present it seems that the conditionality clause remains a budgetary tool, and more than that, a dissuasive instrument.

However, as we have argued, the "utilitarian" effect that predominates in the Union is not satisfactory without a link to civic and cultural identities. For this very reason, the principle of loyalty is needed, which would indicate that mutual trust between states and with the Union will always be at the heart of these mechanisms. However, it is not sufficient to simply proclaim this trust, as it is generated through daily coexistence. In fact, the CJEU itself admits this when it points out that the legal control of the Union's values is stronger when a member state initially accedes to the EU than when it has acquired full status. As is the case in the states, the key lies precisely in the subsequent work of *manutenzione costituzionale*, to use a very apt expression elaborated by Italian

29 KÖLLING, Mario, "Conditionality for the protection of the European Union budget: a protection of the rule of law or a guarantee for the EU's financial interests?", *ReDCE*, no. 37, 2022.

30 In this sense, there has been criticism that the increased functionality of this mechanism has not been accompanied by resources, as the Multiannual Financial Framework (MFF) 2021-2027 cuts traditional European solidarity policies. See KÖLLING, Mario, "La condicionalidad...", *op. cit.*

doctrine.[31] In the present case, it is a matter of generating it with the capacity of the states to dialogue with the Union, while the Union itself would be coherent if it did not simply conceive of a dissuasive and repressive instrument, trying to insert mechanisms such as Regulation 2020/2092 into a policy of education and European constitutional democratisation. Imposing obligations that condition states will not simply mean that this will contribute to the full affirmation of the rule of law, because, as is well known from the criminal sciences, repressive instruments are not by their very nature a pedagogical instrument, not even a dissuasive one. In this sense, the dialogue generated by the implementation of this mechanism is more important for the desired loyal effects. The states would have to assimilate the idea – something that has not happened, or has disappeared, in Hungary and Poland – that a material European constitutionalism has been generated which, although it has not deposited the "last word" in the European institutions, does condition the word of the states to an extreme – always through dialogue – and, above all, it does so by showing itself to be particularly vigilant about European democracy through the Union, although this is not an absolute truth, as it becomes an entity especially authorised to safeguard the constitutional traditions of the states.

In this respect, the CJEU's firm defence of the nature of European norms – and with them, we believe, of constitutional traditions themselves – is particularly relevant from the point of view of the principle of European constitutional loyalty. In contrast to what the respective Constitutional Courts of Hungary and Poland maintain, for the European Court the constitutional values of the Union are not "merely political" in nature, as they "entail legally binding obligations for the member states". These obligations are the result of achievements that cannot be renounced, so that there is no room for regression on the basis of a supposed "national identity" that is opposed, in this sense, to the European identity itself. In fact, as soon as the states commit themselves to the European project by virtue of the principle of European constitutional loyalty, a kind of constitutional fusion takes place between national and European identities in a system of checks and balances in which each of the conquests, by the very principle of democracy, is fixed for future movements, while at the same time maintaining and promoting deliberative and dialogical democratic processes. To break the normativity of European constitutionalism is basically to mortally wound the constitutional project generated after the Second World War on the continent. It is, quite simply, contrary to the principle of constitutional loyalty, which aims precisely to work towards unity, without taking this for granted, on the basis of normativity.

31 LANCHESTER, Fulco, *Le istituzioni costituzionali italiane tra globalizzazione, integrazione europea e crisi di regime*, Giuffrè, Milano, 2015; FUSARO, Carlo, OLIVER, Dawn (ed.), *How Constitutions change. A comparative study*, Oxford, Hart, 2011.

Indeed, as Mantilla states, two new elements should be noted here and now: 1) the European constitutional identity goes far beyond the mere judicial control of fundamental rights, and 2) this European constitutional identity is no longer only constructed through reaction to international law but also, and this is of particular interest, to the states themselves.[32] Consequently, the Court now recognises this European constitutionalism in a more incisive manner, which represents a strong conditioning factor for the states, to the point that while there is a last word in the hands of the state axis that cannot be denied, this is practically reduced to the moment in which a state intends to withdraw from the Union. In the meantime, the instruments of European dialogue are being – or should be prone to being – strongly increased, leaving repressive mechanisms on a lower level.

It is precisely the principle of loyalty that seeks to find the link between them. All this means, in principle, that such a project should also be perfectly compatible with regional diversities. In fact, this is what explains why the Union itself – and the nationalist interests – allows for territorial diversity, but not at any price. The Union is aware of these tensions and therefore argues that the movement of regional entities seeking to carry out a unilateral declaration of independence constitutes a breach of the principle of loyalty, as does that of those member states that allow such secessions, not only without taking into account their constitutional rules but also without considering the interests and the rules of the European Union.[33]

Although it may seem paradoxical, this is actually one of the great achievements of the European project, where it is possible to claim autonomy while strengthening the state axes and integrating into a common European project from which we recognise that it is neither possible nor desirable to escape, as long as this is done while safeguarding the values and heritage that sustain the Union, i.e. with loyal civic identity. In this way, Europe becomes strong when its achievements are passed on to the states, which should then proceed to constitutionally fix the European postulates. It could then be argued that national identities – and sub-state diversities – remain rooted while a strong collective European identity is generated,[34] because European citizenship is superimposed on national ones, which – assuming European postulates – simultaneously anchor different identities by trying to merge them into one. Indeed, European awareness campaigns can be a way to deepen this identity, but they are not effective unless there is a constant internalisation of these campaigns at the state level and a dialogue and dovetailing of the various identities. Moreover, it

32 CRUZ MANTILLA DE LOS RIOS, Pablo, "La identidad constitucional...", *op. cit.*

33 In this regard, GONZÁLEZ CAMPAÑA, Nuria, *Secession and EU Law. The deferential attitude*, Oxford University Press, 2023.

34 RODRIGUEZ LESTEGÁS, Francisco, "Europeos versus no-Europeos...", *op. cit.*, p. 22.

is a question of not losing sight of the shared civic-constitutional and cultural itinerary, which sometimes implies transcending the system of competences to a certain extent in order to establish certain positions on common values, principles and rights. This has not been infrequent, for example, in the legal-political and discriminatory sphere.

The balance is therefore delicate, as it is difficult to balance what we have in common with the constant European expansion linked to the Union's economic objectives. Migratory issues, the religious element, or the integration of cultures that are more distant from the classic core of the Union (e.g. Turkey), among other aspects, cannot be issues that are alien to the European project.[35] The Union's stance is therefore necessary, although it must be made compatible with the competences that effectively correspond to the states and their cultural identity, and with respect for the principle of subsidiarity as one of the keystones of the European system.

It is dangerous to build a Europe on classic dualisms based on the friend-enemy dialectic.[36] To this end, the European identity will have to mutate, showing itself to be sensitive to change and evolving towards a 'porous' constitutional configuration, beyond the debate on the system of competences, as we argued, since the latter is a reductionist approach that does not fit in well with the 'inter-level' nature of European governance. Otherwise, by using rigid and obsolete interpretations we could be giving rise to undesirable populisms that end up wearing down and weakening the European project.

Indeed, "the traditional identification between citizenship and the nation-state, despite considerable resistance, seems to have definitively entered into crisis".[37] We could therefore be witnessing, rather, the configuration of an 'intersectional' citizenship; one where different identities interact, intertwine and interconnect, manifesting themselves in a unique way in each subject, but at the same time helping to generate bridges or bonds of union between different people, given the degree of understanding and empathy that is acquired, since legal-political systems are by no means neutral.[38] Thus, with the term

35 The type of discourse used, the approach or interpretative framework adopted, the language used, etc., can create categories of people who do not correspond to reality and who dismember the European project. For this reason, the Union must be especially careful and be sufficiently attentive to problems where its humanist facet is at stake. Vid. ORTEGA GIMÉNEZ, Cristina, *El lenguaje de los derechos de las personas migrantes: entre la libertad y la discriminación*, Aranzadi, Pamplona, 2024.

36 CORTINA, Adela, "¿Para qué sirve la democracia?", *El País,* 1 June 2016.

37 ZAPATA BARRERO, Ricard, "Ciudadanía y Estados de Bienestar o De la ingravidez de lo sólido en un mundo que se ''desnewtoniza'' social y políticamente", *Sistema. Revista de Ciencias Sociales*, no. 130, pp. 75 ff.

38 The term "intersectionality" is widely used in anti-discrimination law and was coined by Kimberlé CRENSHAW in the late 1980s. CRENSHAW WILLIAMS, Kimberlé, "Demarginalizing the

'intersectional' it is possible to better understand the complexity of today's legal and political systems in a loyal approach.

4.2. Leadership(s).

In the European project, in order for the principle of loyalty to be fully effective institutional balances and, consequently, the role of each of the entities that make up the project are decisive. This is where the task of leadership is key; this not only implies *potestas* but also and perhaps above all *auctoritas*: to inspire, motivate, influence, lead, persuade, encourage interaction, guide, convene, care, grow, dream... to achieve.

Although the different authorities have autonomy and owe respect to each other, it is also true that they do not all bear the same responsibility and do not all carry the same weight. In the European project, it is certainly the Union that takes the lead. It is a matter of understanding that there is one sovereignty, but not a single sovereign, although the co-sovereignties, without being fragmented, are not in the same position either. It is the leading entity that has the task of pulling the strings to find points of connection, and which must be especially attentive to ensure that these connections are not lost, involving all subjects and entities in the project. There is a part of the state leadership – the key to its internal borders – that gives way to a certain extent. To this end, the leading entity must be able to make each and every one of the entities involved feel that they are part of the project, but without pretending to act in a monopolistic manner. Because the constitutional loyalty that is, by definition, connatural to multi-level governance does not sit well with centralism and with an old vision of sovereignty that has clearly been superseded.

Although it may seem paradoxical because it is sometimes used in a different sense, loyalty does not imply centralism, as has sometimes been made to appear. It is not a way of propping up or sustaining centralism. Constitutional loyalty is about consideration and balance, checks and balances from friendly leadership. It is more than procedural balances, from a substantively material point of view; it is "creating a political culture of unity, pride, respect and, ultimately, love of country"[39]. Consequently, it represents and promotes a confluence of shared values where the Council of Europe's own *acquis* is also key, providing a strong value potential for the Union. The principle of loyalty aims to unite the two European truths, although, as we pointed out, the task of leadership in this European interconnection is still pending; it is an issue that has not yet been resolved.

Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum*, 1989, p. 139.

39 PULGAR LANZACO, Mónica, "El principio de lealtad...", *op. cit.,* p. 242.

In any case, leadership will not be possible without accompanying the pedagogical-emotional element, seeking to rearm the ideological element in order to unite European constitutional legality – which represents pact and compromise – and its democratic legitimacy, especially when a significant reinforcement of values and principles is needed. The fact that the European ideological project cannot simply be imposed – or punished when it is not fulfilled – does not mean that it should not be promoted, properly understood and worked on with critical thinking and seeking common ground, because loyalty is not mere fidelity or blind and passive obedience.

The full force of loyalty implies "compassion" and "empathy" and thus the consideration of the effects of our actions on others and on the system, as an ability to understand their circumstances and needs, where one only arrives when one understands oneself. Loyalty is therefore precisely the opposite of a weak, indolent and lenient European legal-political project. Translated into in juridical-political terms, it means a two-way commitment: a kind of national appropriation of 'the European' flagged by the Union which would revert to Europe again. The real task, therefore, is to feel the European as one's own in each state, while the Union is receptive – but not passive – to constitutional traditions. Undoubtedly, the role of parliaments in this respect should be key, as true counterpowers of European governance in general. In particular, the European Parliament should act as a counterweight to the national parliaments, while the regional parliaments do the same to the national parliaments. It is a question of preventing the European project from distancing itself from the pluralist democracy that has characterised it, despite the innate tendency (even more so with the European fiscal pact, crises, etc.) to create a utilitarian Europe, in certain aspects governmental, centralised, and with judges – above all Constitutional Courts – with excessive protagonism. In short, it is a question of avoiding the risks of hyper-governmentalism, exacerbated judicialisation, democratic deficit and unwanted hegemony.

National projects are not, by virtue of some pseudo-divine will, indestructible. They continue to respond accordingly to the need to fit the Constitution-Democracy binomial. At the same time, the Union intends to emphasise the message – through the proclamation of a principle that is directly deduced from the original law – that the construction of a great European constitutional project implies *per se* a will and effort on the part of those who make it up to integrate the diverse collectivities and interests that converge in its political system. It is therefore legitimate, and almost obligatory, for the Union to play a certain role and take responsibility – not necessarily "mediating" – in possible conflicts between powers, territorial powers, etc., that may arise. It is not a question of involving a foreign subject in an internal issue, but of assuming

that multi-level constitutionalism entails a diffusion of responsibilities that requires the construction of common solutions.

For all these reasons, the Union must avoid solutions that imply compartmentalisation, because true freedom is only possible when the autonomy of an entity is made compatible with integration into that common project in a harmonious way. Therefore, it is said that "freedom is not equal to independence, just as disobedience is not equal to democratic freedom";[40] because freedom only becomes a reality when there is a pact that balances and respects interests, with renunciations and compromises, i.e. when "Politics" in capital letters is conducted and community is generated with it. Freedom is, Hannah Arendt tells us, "the reason why in the communal life of man there is such a thing as politics.[41] That is why law is needed, but it also needs to be accompanied by politics, understood in a certain way as good government, a sense of state and a vocation for service. It is true that this does not guarantee peaceful solutions, but it can offer mechanisms for resolution and attitudes of understanding that are particularly important insofar as they help the cohesion of the project. Europe needs publicity, encouragement, stimulus, repetition and belief in it, without viscerality or undesired state, infra-state and supra-state patrimonialisation. It should be recognised that many of the advances and decisions come from this shared project and are the fruit of consensus of an 'inter-level' nature, because it is necessary to generate confidence and European constitutional sentiment.

5. EPILOGUE. LOYALTY AND CROSS-LEVEL CONSTITUTIONALISM.

The European project is in crisis. However, not because its basilar elements, around which progress continues to be made, are being called into question, but because it seems to be at a moment of *impasse* and indeterminacy due to current democratic oscillations and drifts, both internal (within the Union itself, in the states, in the sub-state entities...) and external (with respect to other continents and countries). In this context, and when constructive solutions are urgently needed, the praetorian work of the Court of Justice of the European Union cannot be the only bastion.

The resizing of powers (vertical and horizontal), the coherent construction of a complex system of rights and duties, and the rethinking of the very elements that make up European multi-level constitutionalism must permeate the European political-legal spectrum from the approach of the principle of

40 PULGAR LANZANO, Mónica, "El principio de lealtad...", *op. cit.*, p. 239, citing Professor BAYONA.

41 ARENDT, Hannah, *Freedom and Politics. A conference*, Página Indómita, Barcelona, 2023, p. 15.

constitutional loyalty. This approach, far from being a kind of 'constitutional idealism', aims to influence the ways for dialogue and the notions of empathy and compassion, consideration and kind respect, and where repressive mechanisms are kept to a minimum while preventive dynamics are strengthened. European citizenship must not be orphaned, so multi-level structures must be solidified through effective leadership; the rule of law must be addressed in order to submit it to a review based on the principle of European constitutional loyalty. In short, it is a matter of creating order to achieve a European constitutional 'fusion' that should already be moving towards a 'cross-level' system in which the various entities and operators intertwine in a kind of mesh, feeding off each other and thus overcoming the idea that it is merely a matter of a superimposition of levels of government. For this to happen, more politics is required, and for politics to really accompany power and law, with more capacity and ability to make loyal decisions through which a responsible and serious project is built.

To conclude with Foucault, "It is not a question of liberating truth from all systems of power – this would be a chimera, since truth is itself power – but of separating the power of truth from the forms of hegemony".[42] A "separation" that evokes allegiance: to separate through the analysis of discourses, practices and hegemonic dynamics, not to take away their power but to problematise, to generate resistance, to counteract the consequences, to understand, to consider what citizens need... to allow new discourses.

42 FOUCAULT, Michael, "Verdad y poder", in *Microfísica del poder*, Las Ediciones de la Piqueta, Madrid, 1979, p. 189.

THE RULE OF LAW AND EUROPEAN INTEGRATION. THE (NOT) OBVIOUS NEXUS.

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SUMMARY: 1. 1. INTRODUCTION. 2. POLITICAL VALUES AND INTEGRATION DILEMMAS. 3. ASSOCIATION, VALUES AND THE QUEST FOR MEMBERSHIP. 4. CONCLUSIONS. 5. BIBLIOGRAPHY.

1. INTRODUCTION.

Today, the rule of law has become one of the main, if not the most important, aspect of the European Union's political dimension. Its importance is evidenced by the fact that while other problems facing the European Union can be solved by implementing various policies, the rule of law primarily concerns the non-material or axiological dimension of European integration. This dimension is not only resistant to external stimuli and susceptible to rapid modification, it has become a source of fierce political clashes between the advocates of further integration and their opponents. Furthermore, despite the frequent usage of the term, there is no consensus, neither on its definition nor as to the procedures and practices related to its application. Moreover, the rule of law exists in many different (sometimes even contradictory) forms. While the strength of the rule of law lies in its sublimity and superiority, together with other political principles that are indispensable in liberal democracy such as political pluralism, constitutionalism, or respect for human rights, any attempt to specify or adapt the rule of law raises concerns about its practical instrumentalization.

Of course, this does not mean that the rule of law should not be considered, pondered, and its essence recognized. In the context of European integration,

however, the question remains: where and what should be its role in the process of European integration? Following the American 18th century dilemma on the state vs federal government competences, is the question about whether the national or European level is more important still valid?

This means that the rule of law should be approached with extraordinary caution, because either a too narrow or too broad interpretation of it can have far-reaching negative effects on European integration. With the awareness that, in its essence, the rule of law has as many faces as the people who treat it,[1] it is necessary to consider its evolution in the process of European integration. Hence, in this paper I would like to focus on the question of rule of law *sensu stricto,* and the emergence of political values *sensu largo* in the early days of the European integration process during the Cold War.

In terms of a temporal research framework, this paper will encompass the period of European integration from the early 1950s to the end of the Cold War. With regard for the vast amount of materials available and the narrow limits of this article, the paper will rely on two parallel methodological approaches, aiming to explore the presence, role and place of the rule of law and other political values in European integration at that time. Based on critical content analysis of relevant official European Communities documents, the paper will analyse the presence and usage of the rule of law in the framework of the rhetoric of political values. Secondly, it will explore the context in which political values, and in particular the rule of law, are being used. The selection of documents was based on available collections of extracts of key European documents, published by the Polish Institute of International Affairs[2] and available in online document repositories (CVCE and pitt.edu). The list of analysed documents was narrowed to those containing references to political values such as political pluralism, democracy, human rights and of course, the rule of law. The study set out to explore the meaning and context of European values, and particularly of the rule of law in the early period of European integration during the Cold War.

2. POLITICAL VALUES AND INTEGRATION DILEMMAS.

European integration is a unique process. The tragedy of World War II and the creation of the post-war order created fertile ground for the reassessment

1 The wide range of the debate around the rule of law can be seen in the Venice Commission report titled Report on the Rule of Law, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), Study no. 512/2009, CDL-AD(2011)003ev, Strasbourg, 4 April 2011.

2 Integracja Europejska w dokumentach, Wybór i opracowanie Stanisław Parzymies, Polski Instytut Spraw Międzynarodowych, Warszawa, 2008.

of relations between European states. Most European countries faced the destructive and devastating consequences of the war, which brought the need for economic and political reconstruction. It became clear to Western European societies that the rejection of violence was an absolute necessity to ensure lasting prosperity.

Whereas the idea of united Europe swiftly turned into the only reasonable solution for western European countries, alternative views emerged. The proponents of a consistent pursuit of an "ever closer union" aiming at federalization would be countered by the supporters of a more modest, intergovernmental form of inter-state cooperation.

The establishment on 5 May 1949 of the Council of Europe, an intergovernmental international organization in which the governments of the member states cooperate based on the instructions of their governments, fulfilled the confederalist search for an international political organization that brought European countries together around shared values. A novelty, in the post-war context, was the reference in the preamble of the Statute of the Council of Europe that the states forming the organization recognize that only through "the consolidation of peace based on justice and international cooperation is fundamental to the survival of human society and civilization"[3] could they find a common denominator in the form of "a deep attachment to the spiritual and moral values which constitute the common heritage of their peoples and the source of the principles of individual liberty, political freedoms and the rule of law which form the basis of every true democracy".[4]

The main objective of the Council of Europe became "to achieve greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage..." by "discussing common problems, concluding agreements and taking joint action" in all possible fields except military matters.[5] Article 3 stated that "Each Member of the Council of Europe recognizes the principle that all persons under its jurisdiction enjoy human rights and fundamental freedoms and must co-operate sincerely and effectively in the realization of the aim of the Council as defined in Chapter I".[6]

At the same time, developments in the late 1940s and the intensification of Cold War rhetoric required further steps, not only to bring Western countries closer together but also to bring post-war Germany into the processes of political and economic unification. Another overriding goal was to simultaneously

3 Statut Rady Europy Dz.U. 1994 nr 118 poz. 565, http://isap.sejm.gov.pl/DetailsServlet?id=WDU19941180565

4 *Op. cit.*

5 There art. 1.

6 *Ibid.* art. 3.

eliminate the threat of German militarism and to get Germany out of post-war political isolation.

The answer was a plan put forward by the French Foreign Minister Robert Schuman for the joint coordination of coal and steel production, to be managed by a High Authority. This was a concrete step, the purpose of which was to create "the immediate common foundations of economic development," [the creation – SD] "the first stage of a European Federation."[7] The resulting solidarity of industrial production would "…show that any war between France and Germany is not only unthinkable but physically impossible".[8] Importantly, in the context of this study, the only mention of the rule of law in the European Coal and Steal Community (ECSC) in art.31 and 33, refers to the competence of the Court established by the treaty, whose task is to "ensure the rule of law in the interpretation and application of the present Treaty and its implementing provisions."[9]

As Daniel Thomas notes, during the drafting of the ECSC Treaty at no time were democracy or human rights mentioned, either as a principle of the emerging community or as a requirement for membership. Instead, the treaty assumed that "Any European state may apply for membership."[10] This did not mean that human rights and democracy were not important to the member states, but above all that the Council of Europe secured the subject of values, and the ECSC was to regulate the practical dimension of how integration would work in a concrete sense.

The success of the ECSC emboldened advocates of a swift federalization to move on with the proposal for a European Defence Community (EDC) and European Political Communities (EPC). The European Political Community was supposed to be of a supra-national character. "The Community is founded upon a union of peoples and states, upon respect for their personality and upon equal rights and duties for all. It shall be indissoluble." (art.1) Among others, in art. 2 "The Community has the following mission and general aims: to contribute towards the protection of human rights and fundamental freedoms in member states; to co-operate with the other free nations in ensuring the security of member states against all aggression; to ensure the co-ordination of the foreign policy of member states in questions likely to involve the existence, the security

7 Schuman Declaration, May 1950 https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_pl

8 *Ibid*.

9 Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951) https://www.cvce.eu/en/obj/treaty_establishing_the_european_coal_and_steel_community_paris_18_april_1951-en-11a21305-941e-49d7-a171-ed5be548cd58.html Art.31

10 THOMAS, Daniel C. "Beyond identity: Membership norms and regional organization", *European Journal of International Relations*, s.1-25 (s.8).

or the prosperity of the Community;…" Importantly, "the provisions of Part 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, together with those of the protocol signed in Paris on 20 March 1952, are an integral part of the present Statute."[11] While the question of human dignity and rights appeared several times in the proposed document, the rule of law was articulated only twice, in arts. 38 (The Court) and 92 (Association). In the latter, the "The Court shall ensure the rule of law in the interpretation and application of the present Statute and of the laws and regulations of the Community." whereas, in the former "The treaty of association shall provide for procedure to uphold the rule of law in the interpretation and application of the treaty of association."[12]

Although the EPC was eventually rejected, several observations need to be made. Firstly, the authors of this document acknowledged the already existing political framework in Western Europe within the CoE. Secondly, whereas human dignity (personality), rights and duties were stressed, one of the main EPC mission and aims was supposed to be merely "to contribute towards the protection of human rights and fundamental freedoms in member states", thus acknowledging the primary role of the member states in this regard. Thirdly, it considered the rule of law in very narrow, formal terms. The Court provision was copied *de facto* from the ECSC, and in the context of the association it was simply the expectation that the treaty would be duly applied.

Six years later, when the treaties establishing the European Economic Community and Euratom were signed in Rome, the scope of the Court of Justice's competences was further clarified.[13] In the context of further considerations, it is worth mentioning that the only condition for potential future members was the geographical criterion, in the event of German unification.[14] As R. Janse correctly notes, although the preamble to the Treaty of Rome refers to freedom (to preserve and strengthen peace and freedom), Article 237 (EEC) does not establish a link between membership and the reference to freedom in the preamble, which was understood in terms of a liberal economy as the free movement of goods, services and labour.[15]

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11 Draft Treaty embodying the Statute of the European Community, Adopted by the Ad Hoc Assembly in Strasbourg on 10 March 1953, Document 10 pp. 25-72, https://aei.pitt.edu/991/1/political_union_draft_treaty_1.pdf

12 *Ibid*.

13 Par. 173.

14 WHITEHEAD, Laurence, "International Aspects of Democratization", w red. O'DONNELL, Guillermo, SCHMITTER, Phillippe C., WHITEHEAD, Laurence, *Transitions from Authoritarian Rule: Comparative Perspectives*, The John Hopkins University Press, Baltimore and London, 1991, s.3-46 (s.21).

15 THOMAS, Daniel C., "Beyond identity: Membership norms and regional organization", *European Journal of International Relations*, s.1-25 (s.10-11).

Moreover, in the context of the political failure of the European Political Community and the European Defence Community projects, the content of the Treaties of Rome indicates a "movement away from constitutionalisation"[16] in favour of preserving the functional nature of cooperation and then the free market.[17] The lack of reference to fundamental values in the Treaties encouraged federalist circles to find another way to sanction them, in line with the vision of strong supranational institutions.[18] The French initiative for political integration (the Fouchet Plan), which among other things defined "dignity, freedom and equality of men, regardless of their status, race or creed…" as fundamental values that need to be safeguarded and "to work for the advent of a better world in which these values would permanently prevail".[19] The plan, which also affirmed "their attachment to the principles of democracy, to human rights and to justice in every sphere of social life", was a good pretext for the European Parliamentary Assembly to take the initiative in the context of the Birkelbach report, discussed below.

The European Communities continued to develop under the logic of rather narrow, technocratic formula. The 1965 Merger Treaty did not contain a single reference to European values. However, an effort for the framing of the political values guiding the process of European integration has become more explicit in the perspective for the first enlargement of the European Communities. In October 1970 the Report of the foreign ministers of the member states on the challenges for political unity expressed their determination to pave "the way for a united Europe capable of assuming its responsibilities in the world of tomorrow and of making a contribution commensurate with its traditions and its mission".[20] Among other things, they considered that "A united Europe should be based on a common heritage of respect for the liberty and rights of man and bring together democratic states with freely elected parliaments. This united Europe remains the fundamental aim, to be attained as soon as possible, thanks to the political will of the peoples and the decisions of their Governments".[21]

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16 After THOMAS, Daniel C., "Constitutionalization Through Enlargement: The contested origins of the EU democratic identity", *Journal of European Public Policy*, 2006, 13, s.1190-1210; THOMAS, Daniel C., "Beyond Identity: Membership Norms and Regional Organization", 2017, *European Journal of International Relations*, 2017, 24, s.217-240.

17 JANSE, Ronald, "The evolution of the political criteria for accession to the European Community", 1957-1973, *European Law Journal*, 2018, 24, 57-76 (s.57).

18 THOMAS, Daniel C., "Beyond identity: Membership norms and regional organization", E*uropean Journal of International Relations*, s.1-25 (s.10-11).

19 Draft Treaty - Fouchet Plan I (2 November 1961), https://www.cvce.eu/en/obj/draft_treaty_fouchet_plan_i_2_november_1961-en-485fa02e-f21e-4e4d-9665-92f0820a0c22.html

20 REPORT BY THE FOREIGN MINISTERS OF THE MEMBER STATES ON THE PROBLEMS OF POLITICAL UNIFICATION, Reproduced from the Bulletin of the European Communities ~o. 11-1970, https://aei.pitt.edu/4543/1/epc_first_report_oct_1970.pdf

21 Par. 5 *Ibid*.

Again, in October 1972, when the Summit of the enlarged nine was held in Paris, the final declaration underlined the will to ground the development of their Community on democracy, freedom of opinion, free movement of people and ideas, and the participation of the people through their freely elected representatives.[22] The document endorsed the establishment of political cooperation, which should be further developed, and identified the end of the 1970s as a deadline for the establishment of the European Union.[23] Importantly, however, the push for political cooperation meant the pursuit of coordination of member states' foreign policies and a search for common positions.

In 1973 the Nine Foreign Ministers adopted the Document on European Identity. "The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights. All of these are fundamental elements of the European Identity. The Nine believe that this enterprise corresponds to the deepest aspirations of their peoples who should participate in its realization, particularly through their elected representatives."[24]

This extraordinarily rich definition contains the key elements of the European or, one could argue, Western identity, which consists of respect for human dignity and life, recognition of the individual, and sharing the principles of representative democracy, rule of law, social justice and human rights, all entangled in the rich variety of national cultures. This declaration defined the benchmarks for future candidates, which had to "share the same ideals and objectives".[25] Importantly, the aim of this declaration, among others was to enable the Nine, "…to achieve a better definition of their relations with other countries and of their responsibilities and the place which they occupy in world affairs."[26] This externally driven factor is an important trigger for the framing of European identity.

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22 Deklaracja przyjęta na zakończenie spotkania na szczycie dziewięciu przywódców państw lub rządów poszerzonej Wspólnoty, Paryż 21 października 1972, p. 260 [in:] Integracja Europejska w dokumentach, Wybór i opracowanie Stanisław Parzymies, Polski Instytut Spraw Międzynarodowych, Warszawa 2008.

23 *Ibid*.

24 Declaration on European Identity (Copenhagen, 14 December 1973), p.2 https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf

25 *Ibid*. p. 2-3.

26 *Ibid*. p. 1.

Another interesting source of reflection was the 1975 Tindemans report, which aimed at "…[improving] the functioning of the institutions, give shape to yesterday and today's political options and work out new ones".[27] Riding the wave of the Communities' pursuit for political integration, Tindemans considered it important to embed European integration into citizen's daily lives. As he said, "It remains now for me to set out additional courses of action. I propose that we should adopt two: (1) the protection of the rights of Europeans where this can no longer be guaranteed solely by individual states and (2) concrete manifestation of European solidarity by means of external signs discernible in everyday life."[28] In terms of fundamental rights, the report identified "The gradual increase in the powers of the European institutions which will make itself felt while the Union is being built up, will make it imperative to ensure that rights and fundamental freedoms, including economic and social rights, are both recognized and protected. In this the Union will find confirmation of its political objectives."[29] Tindemans also included consumer rights and environmental protection. While the importance of human rights and fundamental freedoms was acknowledged, there was no temptation to define their nature and meaning. Instead, the search was for protection of the existing principles in a growing process of concentration of power in the EC institutions.

In April 1978 the European Council adopted a Declaration on Democracy, which confirmed the text of the Copenhagen Declaration on European identity, "to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights. The application of these principles implies a political system of pluralist democracy which guarantees both the free expression of opinions within the constitutional organization of powers and the procedures necessary for the protection of human rights." The Declaration explicitly underlined that "that respect for and maintenance of representative democracy and human rights in each Member state are essential elements of membership of the European Communities."[30]

Probably the most far-reaching values-related proposal was framed in the Draft treaty establishing the European Union, known also as the Spinelli Draft.[31]

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27 Report by Leo Tindemans, European Union, Bulletin of the European Communities, Supplement 1/76, p. 4. https://aei.pitt.edu/942/1/political_tindemans_report.pdf

28 *Ibid*. p. 26.

29 *Ibid*. p. 26-27.

30 Declaration on Democracy, Annex D, Conclusions of the Presidency, European Council, Copenhagen, 7-8 April 1978, Final text 20 April 1978, pp.12-13 https://www.consilium.europa.eu/media/20773/copenhagen_april_1978__eng_.pdf

31 Draft Treaty establishing the European Union, 14.2.1984, https://www.cvce.eu/en/obj/draft_treaty_establishing_the_european_union_14_february_1984-en-0c1f92e8-db44-4408-b569-c464cc1e73c9.html

Although the proposal was eventually only endorsed by the Italian parliament, it contained the most advanced reference to political values. The preamble contained a "commitment to the principles of pluralist democracy, respect for human rights and the rule of law." A separate paragraph (no. 4) was devoted to fundamental rights, acknowledging the Union's duty to "protect the dignity of the individual and grant every person coming within its jurisdiction the fundamental rights and freedoms derived in particular from the common principles of the Constitutions of the member states and from the European Convention for the Protection of Human Rights and Fundamental Freedoms."[32] Economic, social and cultural rights were also to be maintained and developed in accordance with the Constitutions of the member states. and from the European Social Charter the Union was supposed to join international human rights instruments and adopt its own declaration on fundamental rights. Interestingly, the draft contained a punishment procedure "In the event of serious and persistent violation of democratic principles or fundamental rights by a member state", which assumed penalties in accordance with the provisions of Article 44 of this Treaty.[33]

A direct consequence of Spinelli's Draft was the Single European Act, which contained, in its preamble. the member states' determination to "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the member states, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."[34] This, however, was the only reference to political values included in the Act. One explanation for this obvious contrast between the content of the non-binding federalist inspired drafts and declarations and the modest values–related provisions of the Act could be the emerging dissonance among the member states on the future of European integration, with two blocks of federalist prone members like Germany, Belgium and the Netherlands and another, sceptical towards such ideas like Great Britain,

32 *Ibid*. par. 4.

33 *Ibid*. Par. 44. Sanctions.

In the case provided for in Article 4(4) of this Treaty, and in every other case of serious and persistent violation by a Member state of the provisions of the Treaty, established by the Court of Justice at the request of the Parliament or the Commission, the European Council may, after hearing the Member state concerned and with the approval of the Parliament, take measures: suspending the rights deriving from the application of part or the whole of the Treaty provisions to the state in question and its nationals without prejudice to the rights acquired by the latter, which may go as far as suspending participation by the state in question in the European Council, the Council of the Union and any other organ in which that state is represented as such.

The state in question shall not participate in the vote on the sanctions.

34 Single European Act, Official Journal of the European Communities, No L 169/1, 29.6.87, https://eur-lex.europa.eu/resource.html?uri=cellar:a519205f-924a-4978-96a2-b9af8a598b85.0004.02/DOC_1&format=PDF

France, Denmark or Greece.[35] This division would soon be exposed to the external geopolitical shock of the end of the Cold War and the newly emerging challenges for European integration.

3. ASSOCIATION, VALUES AND THE QUEST FOR MEMBERSHIP.

Another dimension, in which the question of shared values emerged, was the European Communities' relations with third countries that were attracted by the integration process. Starting from the mid-1950s, the European Communities commenced the signing of association agreements. The first one was between the ECSC and Great Britain in 1954, followed by the EEC's agreements with Greece (1961), a number of African states and Madagascar (1963), and Turkey (1963).[36] Furthermore, the interest of Franco's Spain and Salazar's Portugal in European integration posed the question about the indispensable basic principles for the European Communities.

In the context of Spain's interest in rapprochement with the European Economic Communities, in the autumn of 1961 the European Parliamentary Assembly's (EPA) political committee authorized the German social democrat Willi Birkelbach to prepare a report on the political and institutional aspects of the association and membership processes. The Birkelbach report established a "democratic form of government" as a condition for membership for the first time. Embedded in the federalist vision of integration, the report assumed that the political structure [of the candidate country] should not make it an alien body to the Community. Furthermore, the candidate country had to recognize and support the Community's ultimate aim of establishing political union and have domestic structures and a foreign policy in line with this aim. In addition, the state was to be willing to cooperate with Western or Atlantic alliances.[37]

According to the report, "the guaranteed existence of a democratic state, in the sense of a free political order, is a condition of membership. states whose governments do not have democratic legitimacy and whose citizens do not participate in the decisions of their governments, either directly or indirectly through their elected representatives, cannot expect to be accepted into the circle of people who make up the European Communities".[38] In turn, on the issue of

35 ŁASTAWSKI, Kazimierz, *Historia integracji europejskiej*, Wydawnictwo Adam Marszałek, Toruń, 2006, p. 206.

36 FELD, Werner, "The Association Agreements of the European Communities: A Comparative Analysis", *International Organization*, vol. 19, no. 2 (Spring, 1965), pp. 223-249, p. 230.

37 THOMAS, Daniel C., "Beyond identity: Membership norms and regional organization", *European Journal of International Relations*, s.1-25, p. 14.

38 *Ibid*. p. 15.

human rights the report referred to the Statute of the Council of Europe, but did not mention it directly. It should be noted that the Birkelbach Report, even if it received support of the Commission, did not introduce new legal obligations for the member states. The report also referred to the issue of association (Article 238), stating that "association must be in accordance with the essence of the political specificity of the Communities".[39]

The content of the Birkelbach report clearly outlined a framework of necessary internal criteria for countries applying for membership but did not guarantee that meeting them was tantamount to membership. However, their extension to the issue of association also took into account the need for a prudent decision in the context of relations with countries that are distant from the Communities' political values. It is worth noting that, taking the historical context into account, the issue of community values appears as a shield against external entities striving for membership or closer relations with the EC. As Daniel C. Thomas quoted Jean Duviersart on the Birkelbach report, "This document is more than a report... it will constitute a constitutive text, almost a law".[40]

The Greek case was no less important. For both Turkey and Greece, the EEC long-term commitment was to "'to promote a continuous and balanced strengthening of the commercial and economic relations between the contracting parties with full consideration of the need to ensure the accelerated development of the economy of Greece/Turkey as well as the elevation of the level of employment and of the living standards of the Greek (Turkish) people."[41] Nevertheless, the association agreement with Greece was much more generous, automatically triggering the process of establishment of a customs union, with various safeguards for the Greek economy.

Meanwhile, as a consequence of the 'colonels' coup in Greece in June 1967 the EEC's European Parliament, on the initiative of some of its Italian members, had decided that the EEC's association agreement with Greece could not operate, because the EEC-Greece Joint Parliamentary Committee, which was essential to the proper working of the agreement, could not function in the absence of elected institutions in Greece.[42] As a result, negotiations about association-based future rapprochement, especially on harmonizing agricultural policies, were suspended. Moreover, the EEC withheld funds assigned through the European

39 THOMAS, Daniel C., "Beyond identity: Membership norms and regional organization", *European Journal of International Relations*, s.1-25, p. 15.

40 THOMAS, Daniel C., "Beyond identity: Membership norms and regional organization", *European Journal of International Relations*, s.1-25, p. 15.

41 FELD, Werner, "The Association Agreements of the European Communities: A Comparative Analysis", *International Organization*, vol. 19, no. 2 (Spring, 1965), pp. 223-249, p. 230.

42 XYDIS, Stephen G., "Coups and Countercoups in Greece, 1967-1973" (with postscript), *Political Science Quarterly*, vol. 89, no. 3 (Autumn, 1974), pp. 507-538, pp. 518-519.

Investment Bank and de facto froze efforts to implement the association's goals. Finally, in a resolution dated 7 May 1969, the European Parliament reserved its right to have the association agreement revised or suspended.[43]

The 'Greek case' revealed the existence, even if not completely, of a natural dependence between the EC's political values and the political situation in the external partner, which led to a "limited association" in relations between Athens and the European Communities in the aftermath of the 1967 coup.[44] Compared to the association agreements with Ankara and Tel Aviv, the agreement with Athens, which came into force on 1 November 1962, was particularly generous and assumed "raising the standard of living in Greece to a level at which Greece could become a member of the EEC".[45] Although the EEC did not suspend the implementation of the agreement in its entirety, its enforcement was deprived of financial resources.[46]

The experience of the European Communities in the context of Spain and Greece is important because it set a path of action that, even taking into account the specifics of the Cold War, was characterized by unequivocal identification with a specific political model. As the Birkelbach Report put it, "The guaranteed existence of a democratic form of state, in the sense of a free political order, is a condition of membership. states whose governments lack democratic legitimacy and whose peoples are not to participate in the decisions of their government, either directly or indirectly through freely chosen representatives, cannot expect to be admitted to the circle of men constituting the European Communities."[47] As L. Whitehead notes, the EC's attitude towards Greece did not contribute to the overthrow of the dictatorship, but encouraged the opposition and created new problems for the junta in Greece.[48] With the fall of the dictatorships, membership of the European Communities began to be seen in terms of external guarantees for the consolidation of democracy.[49]

As S. Royo rightly points out, democracy was an unwritten requirement for candidate countries and, in the case of Spain and Portugal, this requirement

43 *Ibid*.

44 JANSE, Ronald, "The evolution of the political criteria for accession to the European Community, 1957-1973", *European Law Journal*, 2018, 24, 57-76, s.72.

45 WHITEHEAD, Laurence, "International Aspects of Democratization", w red. O'DONNELL, Guillermo, SCHMITTER, Phillippe C., WHITEHEAD, Laurence. *Transitions from Authoritarian Rule: Comparative Perspectives*, The John Hopkins University Press, Baltimore and London, 1991, s. 3-46, p. 21, also JANSE at p.62.

46 As JANSE notes, the colonels' regime continued to benefit from the application of "specific legal obligations", which, among other things, continued the process of reducing customs duties and, in the context of the advancing Common Agricultural Policy, required harmonisation, or in the context of the 1973 enlargement. See. JANSE p. 72.

47 JANSE, p. 66.

48 WHITEHEAD, *op. cit.*, p. 22.

49 *Ibid*.

could not be met before the fall of those countries' authoritarian regimes.[50] When Greece, Spain and Portugal rejected authoritarian regimes in the 1970s they wanted to join the integration process, thus striving to consolidate a democratic political system.[51] Importantly, however, the most significant step for the Iberian states in that direction was membership of the Council of Europe in 1976 (Portugal) and 1977 (Spain). A period of increasing political conditionality and the promotion of democracy in international relations followed.[52]

4. CONCLUSIONS.

In order to understand the role of the rule of law in the process of European integration, it is necessary to examine the historical and political context. Since the end of the 1940s, the integration process has developed exclusively among states sharing the same political values: democratic pluralism, free market economy, the rule of law and respect for human rights. Even the states that remained on the Western side of the Iron Curtain but were unable to meet these basic criteria were outside the mainstream of integration. Of course, this did not mean that all states that met the above criteria were part of this mainstream (such as the Scandinavian states or Switzerland), but in these cases, internal factors played a much greater role than resistance from the European Communities. As O. Anastasakis notes, the European Communities promoted the universality of their democratic, pluralistic and liberal values and principles from the very beginning, and since the 1950s this was open to all European democratic states. For the first time, the European Parliament's Birkelbach Report emphasized that only those states that guarantee genuine democratic practices and respect human rights and fundamental freedoms may be admitted to the Community. The principles of democracy, the rule of law, social justice and respect for human rights were detailed in the Copenhagen Declaration of European Identity.[53]

This attempt at tracing the presence and appearance of political values, and the rule of law in particular, in the process of European integration during the Cold War brings up several observations. Political values were not considered a necessary element in the context of integration efforts. The establishment

50 ROYO, Sebastian, "The experience of Spain and Portugal in the European Union: Lessons for Latin America", *Working Paper Series*, vol. 2, no. 2, p. 4, http://aei.pitt.edu/8079/1/royoworkingpaper.pdf

51 BACHE, Ian and STEPHEN, George, *Politics in the European Union*, Oxford University Press, 2006, p. 540-542.

52 ANASTASAKIS, Othon, "The EU's political conditionality in the Western Balkans: towards a more pragmatic approach", *Southeast European and Black Sea Studies*, vol. 8, no. 4, December 2008, p. 367.

53 *Ibid.*

of the Council of Europe settled the needed axiological framework, providing the necessary background for integration efforts. Once the initial federalist enthusiasm for a fast political integration failed, together with the failure of the EPC and the EDC, the accent went on the much more narrow, technical and practical integration of the EEC and Euratom. This justifies the virtual non-existence of references to political values and to the rule of law in the early documents of European integration.

This, however, did not meant that there was discussion or reflection on the formula of political integration. On the contrary, two parallel processes need to be underlined. Firstly, the growing demand for the Communities' political identity vis-à-vis external partners, particularly non-democratic ones, seeking closer relations. Secondly, as a result of the consistent pursuit for closer political integration within the federalist circles. It was within the ranks of the EPA and the European Commission that demand for a sound political reference for democracy, political pluralism and human rights were made.

However, the political articulation of values in the integration process had to wait for two decades. Although the Birkelbach report or the Fouchet plan referred to them, it was only with the first enlargement and the emerging conviction that, along with the advancement of the practical achievements, the time for a political and values–based integration was approaching. Nevertheless, the member states were much more reluctant to support such claims than the authors of the documents. The integration developed de facto where it was possible, as in the case of the European Political Community, in the form of efforts for consultation and coordinated positions on international matters. Together with the shared push, expressed in the Declaration on European Identity and the subsequent decade-long efforts for consensus around the next steps of the integration process, political values and the rule of law circulated in the debate.

The second dimension, relations with third countries, delivered the necessary justification for the shared definition of political values in relations with Spain, Portugal and Greece. Although the Spanish aspiration to start membership talks was supported by France and Germany, the other countries were clearly against rapprochement with General Franco. In turn, the association agreement, which was extremely beneficial for Greece, was practically suspended during the military rule between 1967 and 1974. Importantly, however, their accession treaties contain no reference to political values, thus showing a careful and pragmatic approach towards integration, leaving political values outside the integration framework within the Communities.

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THE CJEU'S DEFENCE OF EU VALUES TO PRESERVE THE EUROPEAN CONSTITUTIONAL ORDER[1]

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SUMMARY: 1. INTRODUCTION. 2. THE LEGAL NATURE AND BINDING CHARACTER OF EU VALUES. 3. THE JUDICIAL REVIVAL OF EU VALUES. 3.1. The case that started the rediscovery: *Associação Sindical dos Juízes Portugueses*. 3.2. The main developments in the case law: *Repubblika* and financial conditionality judgments. 4. PRESENT AND FUTURE DEBATES ON THE EU VALUES. 5. CONCLUSIONS. 6. BIBLIOGRAPHY.

1. INTRODUCTION.

For more than a decade, the illiberal challenge led by populist governments in Hungary and Poland, along with clear signs of their expanding popularity in other member states,[2] has marked the political and judicial agenda in the

1 This article was written within the framework of the Spanish Ministerio de Ciencia e Innovación research project 'La configuración europea del Estado de Derecho: implicaciones en el ámbito nacional' (PID2022-137789NB-I00), the Spanish Ministerio de Ciencia e Innovación research project 'Populismo y poder judicial: los retos para el Estado constitucional de Derecho' (PID2022-136707NB-I00), and 'La Nueva Seguridad Pública, Derecho Administrativo Sancionador y Estado de Derecho en Europa' (Proyecto de Excelencia de la Junta de Andalucía PROYEXCEL 00903).

2 Apart from the well-known cases of Hungary and Poland, it is also worth mentioning the case of the rule of law crisis in Romania, which has even been referred to as the 'Romanian saga'. MENÉNDEZ, Agustín J., "¿Rebelión a bordo? A vueltas (de nuevo) con las relaciones entre ordenamientos en el espacio jurídico europeo", *Revista Española de Derecho Constitucional*, 129 (2023), p. 64. Additionally, more and more voices are warning about the illiberal degradation in Slovakia under the leadership of Robert Fico. MINDER, Raphael, "The new face of illiberalism",

European Union.[3] One of the main targets in this political drift has been a classic guarantee of constitutionalism: judicial independence. Hectic legislative activity to curtail judicial independence has been undertaken to modify structural aspects of national judicial organisation, including, among others, changes to the rules for the composition of courts, the appointment of their members, length of service, the disciplinary regime and the involuntary transfer of judges.[4] In response to this threat of democratic erosion, a main legal instrument employed in recent years by the Court of Justice has been the invocation of the values of the Union (Article 2 TEU).[5]

Faced with the proven inability of national democracies to prevent populist governments from implementing their illiberal roadmap, the response has largely involved 'Europeanising' the rule of law crisis by elevating it to the supranational level and, more specifically, by bringing the crisis before the Court of Justice. However, the mechanisms that were available in the European legal toolbox in principle quickly proved substantially ineffective in responding to this phenomenon of democratic involution.

From very early on in this crisis, the European institutions were helplessly aware of the difficulty of overcoming the so-called 'Copenhagen dilemma', i.e. how to ensure continued compliance with accession criteria once candidate countries attain member state status.[6] The European Council held in Copenhagen in 1993 included the 'stability of institutions guaranteeing democracy, rule of law, human rights and respect of and protection for minorities' among the accession criteria. These criteria were subsequently reinforced in the European Council of Madrid in 1995 and incorporated in the Treaties via Article 49 TEU, which refers to Article 2 TEU enshrining the values on which the Union is founded as a prerequisite for accession. As a complement to mere *ex ante* control, post-accession monitoring

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Financial Times, 31 October 2024, https://www.ft.com/content/78f49467-1e2c-4c4f-9908-897ce8d5319d

3 See VON BOGDANDY, Armin & SONNEVEND, Pál (eds.), *Constitutional Crisis in the European constitutional area: theory, law and politics in Hungary and Romania*, Hart Publishing, Oxford, 2015; SADURSKI, Wojciech, *Poland's Constitutional Breakdown*, Oxford University Press, Oxford, 2019.

4 See MARTÍN y PÉREZ DE NANCLARES, José, "Valores y Tribunal de Justicia de la Unión Europea: jurisprudencia reciente en materia de Estado de Derecho", *Un mundo en continua mutación: desafíos desde el Derecho internacional y el Derecho de la UE: Liber Amicorum Lucía Millán Moro*, Aranzadi, Cizur Menor, 2022.

5 Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

6 TUORI, Kaarlo, *"From Copenhagen to Venice", Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge, 2015, pp. 225-226.

of the Copenhagen criteria has been institutionalised with the establishment of the Cooperation and Verification Mechanism (CVM), the application of which has been limited to the cases of Bulgaria and Romania.[7]

Similarly, the stringent requirements for the activation of Article 7 TEU – once described as the "nuclear option"[8] –, conceived as an extraordinary political mechanism to ensure respect for the Union values, are widely known. It is worth noting that the European authorities sought the application of this rule against Hungary and Poland at the request of the European Parliament and the Commission, respectively.[9] However, only the first of the three steps stipulated in Article 7 TEU was taken, and the procedure has since been paralysed *sine die.*[10] *No motion has therefore been submitted to the European Council for a vote, and, even if one were, unanimity is required for a finding of a serious and persistent breach of the Union's values, thus preventing the imposition of the heavy sanctions provided for in Article 7 TEU. As a result, a widely shared assessment of the operability of this political control mechanism is overwhelmingly negative,*[11] *to the point that it has been described in academic circles as a "dead provision".*[12]

In contrast with the high bar for Article 7 TEU, and the serious repercussions of invoking it, the first phase of the European response was marked by the adoption of soft law acts which were clearly conciliatory in nature but by no means proved

7 Sixteen years after the implementation of this exceptional mechanism, the Commission closed the CVM in both countries in 2023. Press release, 'Rule of Law: Commission formally closes the Cooperation and Verification Mechanism for Bulgaria and Romania', https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4456

8 state of the Union address of 12 September 2013, delivered by the President of the European Commission, J. M. Durão Barroso, http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

9 Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM/2017/0835 final, 20.12.2017; European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

10 The new Polish government that emerged from the 15 October 2023 election, led by former European Council president Donald Tusk, has opened up a new political landscape. Under the promise of reversing the democratic regression of the last decade, it is embarking on a programme of counter-reforms to restore the weakened checks and balances in Polish democracy. This change has prompted the European Commission to declare its intention to close the Article 7 TEU procedure against Poland. See HALMAI, Gábor, "Can the Rule of Law Be Restored by Violating Its principles?: The Current Polish Debate", *VerfBlog*, 2025, https://verfassungsblog.de/can-the-rule-of-law-be-restored-by-violating-its-principles/ DOI:10.59704/838fa671ded0d323.

11 For a recent account defending the application of Article 7(2) TEU against Hungary in the light of recent political developments, see SPIEKER, Luke D., "Tackling the Union's ''Orbán Problem'' Now: Seizing Momentum, Reviving Article 7 TEU, Sharpening Conditionality", *VerfBlog*, 2025, https://verfassungsblog.de/tackling-orban-problem/, DOI: 10.59704/9b1855f0d7899719.

12 KOCHENOV, Dimitry, "Article 7: A Commentary on a Much Talked-About 'Dead' Provision'", *Defending Checks and Balances in EU member states*, Springer, Berlin, 2021.

adequate to halt the democratic regression that was beginning to show increasingly worrying signs in terms of its systemic nature and seriousness. Two of the most significant EU soft law acts were the Commission's Communication on "A New EU Framework for Strengthening the Rule of Law"[13] and the annual Rule of Law reports.[14] The timidity of this initial riposte led to harsh criticism of the European institutions, especially of the Commission. It was not until much more recently, through Regulation 2020/2092 on financial conditionality, that the European authorities have opted for more decisive legislative intervention.[15] Despite the undeniable merits of this regulatory instrument, its effectiveness was initially compromised by the need for political agreements to provide support for Ukraine. The meagre results of efforts on the political front have led, in turn, to much more intensive reliance on the Court of Justice, which, by elaborating an ambitious and innovative jurisprudence, is "mobilising"[16] the Union's values as an 'existential' resource to ensure the very survival of the common European project.[17]

This is the backdrop against which this article examines the judicial construction of the EU values by the Luxembourg Court in order to counter the constitutional erosion caused by the executives in certain member states. It is my intention to present an overview of the supranational jurisprudence involving EU values, paying particular attention to both present and imminent debates around it. In particular, I will address three potential risks associated with the European case law developed in the context of the crisis of values. The first is an imbalance in the relations between the Court of Justice and the Constitutional Courts as a result of the extension of European jurisdiction; the second, a potential uniformising effect of Union values that limits the constitutional diversity of the member states; and third, the justiciability and autonomous invocation of Art. 2 TEU before the CJEU.

13 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.

14 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, 2024 Rule of Law Report, COM(2024) 800 final.

15 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. For a political and legal approach concerning the debates surrounding the emerging of this legal instrument, see GREGORIO MERINO, Alberto de, "El nuevo régimen general de condicionalidad para la protección del presupuesto de la Unión", *Revista de Derecho Comunitario Europeo*, 71, 2022; For a substantive constitutional angle, see TORRES PÉREZ, Aida, "The constitutional impact of rule-of-law spending conditionality", *International Journal of Constitutional Law*, 22(3), 2024.

16 VON BOGDANDY, Armin & SPIKER, Lukas D., "Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions", *Columbia Journal of European Law*, 29(2), 2022, p. 66.

17 Arguing that the case law developed by the CJEU is based on an existential interpretation in defence of the EU legal order, GUTIÉRREZ-FONS, José A., "El Tribunal de Justicia y la Unión Europea como una 'unión de valores'", *Revista de Derecho Comunitario Europeo*, 76, 2023.

2. THE LEGAL NATURE AND BINDING CHARACTER OF EU VALUES.

The centrality of EU values in current supranational jurisprudence contrasts sharply with their absence in European debates for most of the Union's history. Although the Union's values were codified in EU primary law with the adoption of the Treaty of Amsterdam in 1997, they went virtually unnoticed for years after in both academic and judicial circles. Despite the silence, however, there are reasons to believe that the incorporation of EU values into the *acquis communautaire* actually predates the 1990s, and it has even been argued that they constitute founding values that have defined the European project since its beginnings.[18]

Their current formulation in the text of the Treaties as *values*, which differs from their characterisation as *principles* in previous iterations of the Treaties,[19] has prompted a discussion on their legal nature and, along with it, on their binding nature. In defence of their binding legal nature, in line with the position held by the majority doctrine, three main arguments can be adduced which derive from historical, textual and systematic interpretations of the Treaties.

In order to understand the intention of the authors of the Treaties at the time the current Article 2 TEU was drafted, it is useful to go back to the European Convention responsible for the European Constitution that failed ratification, which is at the origin of the transformation in the term's *nomen iuris*. Regardless of the different positions advanced during the preparatory work related to the specific denomination – whether as principles or as values – there is no room for doubt that the resulting wording was not driven by a desire to downgrade their legal nature.[20] Secondly, textually speaking, the Treaties use the terms 'values' and 'principles' interchangeably and indistinctly, which can be verified by comparing the language used in the preamble and in Article 2 TEU, together with the CJEU case law.[21]

Thirdly, and most decisively, the legal normative force of the Union values can be derived from a double systematic reading of the Treaties. The importance of the EU values clearly exceeds a general, aspirational declaration, since

18 According to Rossi, a textual reading of Article 2 TEU ("[t]he Union is founded on the values of…") supports the idea that EU values are connected to the origins of the European project. ROSSI, Lucia S., "La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes jurisdictionnels", *Revue trimestrielle de droit européen*, 56(3), 2020, p. 640.

19 Originally, Article 6.1 TEU (Amsterdam version) read as follows: "The Union is founded on the *principles* of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states" (emphasis added).

20 SPIEKER, Lukas D., *EU values before the Court of Justice: foundations, potentials, risks*, Oxford University Press, Oxford, 2023, p. 36.

21 *Ibid*., pp. 40-41.

respect for them is an unavoidable requirement that every state wishing to join the European Union must meet (Article 49 TEU). In addition to that, however arduous the activation of Article 7 TEU may be, the serious and persistent violation of EU values remains the legal parameter for the imposition of sanctions that the article explicitly establishes. Whatever the merits of these arguments, the debate has been resolved by the Court of Justice, which, in its capacity as the highest interpreter of EU law, has declared that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which (...) are given concrete expression in principles containing legally binding obligations for the member states".[22]

3. THE JUDICIAL REVIVAL OF EU VALUES.

3.1. The case that started the rediscovery: *Associação Sindical dos Juízes Portugueses*.

The starting point of the judicial rediscovery of EU values is found in the *Associação Sindical dos Juízes Portugueses* case (hereinafter ASJP).[23] This groundbreaking decision set out a series of interpretative guidelines on which judicial action has been developed in recent years. ASJP makes the principle of the rule of law applicable in the context of a judicial conflict, which is enshrined as one of the values proclaimed in Article 2 TEU. Given the importance of the case, the main jurisprudential milestones that have contributed to the legal shaping of the Union's values by the Luxembourg court are worth revisiting.

The ASJP arose from a dispute over measures adopted by the Portuguese authorities to reduce the remuneration of public sector workers to comply with austerity measures adopted during the 2008 financial crisis. The trade union representing the interests of the *Tribunal de Contas* contested the salary cuts on the grounds that they incurred a breach of the principle of judicial independence recognised in Article 47 CFEU and unexpectedly also based its claim on the second paragraph of Article 19(1) TEU.

The Court of Justice reformulated the questions referred for a preliminary ruling to base the dispute on the second paragraph of Article 19(1) TEU, without even considering CFEU applicability. Unlike the literal limitation of Article 51 of

22 CJEU 16 February 2022, *Hungary v Parliament and Council*, C- 156/ 21, EU:C:2022:97, para. 232; CJEU 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 264.

23 CJEU 27 February 2018, *Associaçao Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16, EU:C:2018:117.

the Charter to acts of the member states "when they are implementing Union law", the second paragraph of Article 19(1) TEU limits the scope of application more loosely, referring to "the fields covered by Union law". Thus, the Court of Justice interprets the potential jurisdiction of a national court or tribunal over the interpretation or application of EU law as sufficient for the dispute to fall within the scope of application of the second paragraph of Article 19(1) TEU, which, makes it practically impossible to preclude a national court from hearing a case.[24]

A second major innovation of this ruling is its affirmation that Article 19 TEU, which gives substance to the value of the rule of law proclaimed in Article 2 TEU, entrusts the task of guaranteeing judicial control of the supranational order not only to the Court of Justice but also to the national courts. Because national judges are an integral part of the European judiciary, the reasoning goes, they must ensure effective judicial protection of individuals, and to this end it is essential that they ensure the independence of national courts.

This twist in the interpretative framework opened the door for the Court of Justice to become a protagonist in the European response to the rule of law crisis.[25] Until then, the Court of Justice had limited its strategy to basing infringement actions on rules of EU secondary law, which prevented it from adopting a broader, holistic assessment of the impact of the Polish and Hungarian legislative reforms. From the ASJP onwards, however, the imposition of sanctions on the argument that the infringement of EU law based on Article 19 TEU in conjunction with other provisions of primary law, in particular Articles 2 TEU and 47 Charter, would become recurrent.

3.2. The main developments in the case law: *Repubblika* and financial conditionality.

Another seminal judgment in the progressive refinement of the legal status of EU values was handed down in *Repubblika.*[26] *In this case, a Maltese association brought a collective action before the national courts challenging the conformity with EU law of several constitutional provisions regulating the system of appointment of judges, which had been the object of constitutional reform in 2016. The judgment held that the second paragraph of Article 19(1) TEU did not conflict with the constitutional reform, even though the reform gave the prime*

24 ROSAS, Allan, "The Rule of Law and Judicial Independence: Recent EU Developments and Case Law of the European Court of Justice", *Der Schutz des Individuums durch das Recht*, Springer, Berlin, 2023, p. 924.

25 BONELLI, Matteo & CLAES, Monica, "Judicial Serendipity: How Portuguese judges Came to the Rescue of the Polish judiciary", *European Constitutional Law Review*, 18(1), 2018.

26 CJEU 20 April 2021, *Repubblika v. Il-Prim Ministru*. C-896/19, EU:C:2021:311.

minister decisive powers in the process of appointing judges, because the reform also provided for the involvement of other constitutional bodies and contained procedural guarantees.

More relevant for the purposes of the jurisprudential study of Article 2 TEU is the emergence of the principle of non-regression of EU values. According to the CJEU, the criteria for accession to the common European project are not only a parameter of control that can only be imposed on the candidate states for admittance to the Union but are subject to review at all times. Were this not so, member states would not be able to enjoy the rights deriving from the Treaties. In this sense, a member state may not adopt a reform of its national or constitutional legislation that could lead to reduced protection of Union values. This new principle of non-regression is based on the joint interpretation of Article 2 TEU with Article 49 TEU, which, in the opinion of the doctrine, makes it possible to project the values far beyond the dispute on judicial independence and, possibly, may even cover all the values enshrined in Article 2 TEU.[27] In any case, this judgment represents a qualitative reinforcement of the legal nature of Article 2 TEU. The claim has even been made that it opens the door to resolving the Copenhagen dilemma mentioned early on in this article by bolstering the CJEU's protection of EU values.[28]

Following this same line of jurisprudence in the context of the crisis of the rule of law, a pair of judgments handed down by the Court of Justice in February 2022 are also worth mentioning. In these cases, the CJEU ruled on the challenge to Regulation 2020/2092 on financial conditionality. Three main lessons can be drawn from these two rulings: first, they clearly affirm the legal nature of the Union values, rejecting the position of the Hungarian and Polish governments, which argued that the values were no more than guidelines or intentions of a political nature; secondly, they held that alternative mechanisms to Article 7 TEU for the defence of the principle of rule of law are fully in line with Union law as they pursue different objectives and entail different legal consequences; and, thirdly, they made reference in an unprecedented manner to European identity, made up of the values enumerated in Article 2 TEU.[29] By attributing

27 POLLAK. Polly R., 'The Evolving Narrative of the Court on the Rule of Law in the EU and Potential Future Directions', *Revista de Derecho Comunitario Europeo*, 77, 2024, pp. 186-187.

28 LELOUP, Mathieu, KOCHENOV, Dimitry & DIMITROVS, Aleksejs, 'Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Repubblika v Il-Prim Ministru', *European Law Review*, 5, 2021.

29 CJEU 16 February 2022, *Hungary v Parliament and Council*, C- 156/21, EU:C:2022:97, para. 127; CJEU 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 145: 'The values contained in Article 2 TEU have been identified and are shared by the member states. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.'

a distinguishable identity to the Union in addition to those already recognised for the member states, the Court of Justice set an absolute backstop for repeated abusive invocation of the national identity clause.[30]

4. PRESENT AND FUTURE DEBATES ON EU VALUES.

In addition to analysing each case individually, this judicial output should also be examined from a broader perspective. Without doubt, the intervention of the Court of Justice has led to the development of an elaborate and incisive jurisprudence that has extended the jurisdiction of the Court of Luxembourg, created new standards of protection and, in short, provided the European authorities with new tools to counteract the illiberal drift in the Union. However, the transformative nature of this innovative case law in terms of its territorial, temporal and material scope cannot be overlooked. Firstly, its impact will affect all member states, not only those afflicted by the latest strain of viral populism. Secondly, the new doctrine will have lasting effects that transcend the current moment of crisis. Last but not least, this line of jurisprudence may come into conflict with the fundamental structures of national systems. At least three major debates have already arisen as a result of the jurisprudential response to the rule of law crisis: the extension of the Court of Justice's jurisdiction, greater potential for standardisation in the development of the Union's values, and the autonomous invocation of Article 2 TEU.

4.1. Extending the jurisdiction of the Luxembourg court: finding the right balance between national and supranational jurisdictions.

The elevation of the crisis of the rule of law to the supranational court was made possible, to a certain extent, by a previous broadening of the jurisdiction of the Court of Justice. Indeed, it is difficult to imagine how questions over judicial independence could be subjected to judicial review by the Luxembourg court without the judicial reinterpretation of the second paragraph of Article 19(1) TEU. As has been pointed out, the criterion that makes it possible to activate European judicial supervision is the mandate that national courts should interpret or apply Union law, which goes beyond the more restrictive criterion of the scope of the Charter under Article 51.

30 CRUZ MANTILLA DE LOS RÍOS, Pablo, 'La identidad constitucional de la Unión Europea: una categoría jurídica en construcción', *Estudios de Deusto: revista de Derecho Público*, 70(2), 2022.

The aim of the reinterpretation was the articulation of a European defence of the rule of law that would not rely primarily on the control exercised by political actors but also include the judiciary. This change of course is easily explained by the high degree of integration achieved in Europe, such that national and European legal systems are so closely interconnected that the effects of illiberal drift immediately spread throughout the entire European legal system. One of the consequences of this jurisprudence is the strengthening of what might be called a 'European judiciary', for it should not be forgotten that national judges may be organically national but are functionally European. They are, essentially, in the front line in terms of guaranteeing the effectiveness, primacy and uniformity of Union law.

This widening of European jurisdiction is straining the relationship between constitutional courts and the Court of Justice. The result of this tension has been a progressive displacement of the constitutional courts,[31] one that started with the privileged role granted to the national courts in *Simmenthal*, which instituted decentralized control of EU law[32]. It was then further exacerbated by the configuration of the principle of primacy as supranational jurisprudence in virtually absolute and unconditional terms[33]. While greater intervention by the Court of Justice may be welcome in a scenario of political capture of the national constitutional courts, the long-term repercussions of this jurisprudence should not be neglected.

In this respect, a rich doctrinal debate has delved into the possibility of limiting the scope of action of the Court of Justice. Worthy of attention are the reflections expressed by Advocates General Tanchev and Bobek in several opinions, proposing to limit the scope of the jurisdiction of the Court of Justice in cases of infringement of the Union's values to those in which a high degree of seriousness can be appreciated.[34] All in all, these approaches have not yet been taken up by the Luxembourg court, although they are increasingly repeated in academia. It is possible to glimpse a possible avenue for self-limitation in this apparently unrestricted jurisdiction through the initiative of the Court of Justice

31 KOMÁREK, Jan, "The Place of Constitutional Courts in the EU", *European Constitutional Law Review*, 3, 2013.

32 CJEU 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal*, C-106/77, EU:C:1978:49.

33 For a recent account on the European case law concerning the principle of primacy, KOUTRAKOS, Panos, "Primacy, the Rule of Law and the Autonomy of the EU Legal Order: Three Common Threads", *European Law Review*, 3, 2022.

34 Opinion AG E. Tanchev, 28 June 2018, *Minister of Justice and Equality*, C-216/18, EU:C:2018:517; Opinion AG E. Tanchev, 11 April 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:325 Opinion AG M. Bobek, *Asocia ia "Forumul Judecătorilor din România"*, joined cases C-83/19, C-127/19 y C-195/19 [2020] EU:C:2020:746, para. 207-208. Reaffirming this position, Opinion AG M. Bobek, *Euro Box Promotion*, joined cases C-357/19 y C-547/19, EU:C:2021:170, paras. 71-72.

itself. After all, since *Miasto Lowicz*,[35] the examination of the admissibility of preliminary rulings has become increasingly demanding, which can be seen as a filter that limits the scope of action of European jurisdiction when it is considered excessive.

4.2. The homogenising effect of EU values.

One argument repeatedly put forward by the Polish authorities is the lack of jurisdiction of the Court of Justice to adjudicate disputes in areas of law where the European Union has no competence. In particular, they have rejected the application of Article 2 TEU by the Court of Justice in cases in which it was called on to assess whether certain legislative reforms that affected judicial independence were in accordance with the parameters of EU law. In general, this position against European judicial review has been based on due respect for the national identity of the member states (Article 4(2) TEU). In other words, it is up to the states to determine the basic constitutional structures, without imposition from the supranational level of a sole European model of justice.

In contrast with this reasoning, the Court of Justice has consistently held that, although the organisation of the judiciary is an exclusive competence of the member states, this does not exempt them from compliance with the obligations of Union law in the exercise of their competences.[36] There exists an obligation of result whereby the member states have the autonomy to establish their own national model of justice within the limits of respect for the values of the Union.[37]

Hence, the risk of an increasingly expansive EU case law, both in terms of the expansion of its jurisdiction and the creation of more demanding standards, is inherent, which may prevent sufficient constitutional autonomy and diversity in the national sphere. To defuse this danger, the EU must be understood as much more than a mere 'Union of law', but also as a 'Union of values', which is not compatible with illiberal models of democracy because those models are contrary to its founding values. That said, the aspiration to build a shared constitutional space in which the minimum guarantees of the rule of law are respected cannot under any circumstances entail the creation of a European judicial standard that blocks the accommodation of heterogeneous constitutional models. In this sense, citing von Bogdandy, a "minimalist reading" of Article 2 TEU has been proposed in

35 CJEU 26 March 2020, *Miasto Łowicz*, joined Cases C-558/18 and C-563/18, EU:C:2020:234.

36 CJEU 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, para. 52; CJEU 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para. 216.

37 TIMMERMANS, Christiaan, "Mediating conflicts between national identities and EU law: The potential of Article 4(2) TEU", *Common Market Law Review*, 59 (special issue), 2022.

the search for a middle ground that allows reconciling a substantive conception of EU values with respect for the constitutional diversity of the member states.[38]

On a final note on this debate, another jurisprudential novelty is worth pointing out. It consists of a *motu proprio* invocation of the national identity argument by the Court of Justice as an exercise of self-awareness of the limitations inherent in Article 2 TEU.[39] This is a significant change in the previous case law on Article 4(2) TEU, which had been characterised by very exceptional acceptance of this type of reasoning on the part of national authorities. On its own initiative and without prompting by the litigant Member state, the Court of Justice itself has now held up this argument to show its willingness to use the legal category with restraint. Admittedly, this assessment of the case law, which is still very much in its infancy, is somewhat optimistic. We will have to monitor future developments very attentively in order to confirm this presentiment.

4.3. The justiciability and autonomous invocation of EU values.

The discussion on the justiciability of values is one of the great unresolved debates on this fundamental provision of the Treaties. Nevertheless, there have been major jurisprudential developments in recent years that have been moving the conversation forward. More specifically, academic and judicial reflections currently revolve around the possibility of autonomously invoking Article 2 TEU.

Until now, the reasoning followed by the Court of Justice has always been based on a joint interpretation of Article 2 TEU with other rules of EU primary law, preferably the second paragraph of Article 19(1) TEU, Article 267 TFEU and Article 47 Charter. In this regard, scholars are very divided between detractors and supporters of the validity of invoking Article 2 TEU as a 'free-standing' clause. Among the arguments against this thesis,[40] emphasis has been placed on the generality and imprecise expression of the values enumerated in Article 2 TEU. Counterarguments have also pointed out that opting for this view would introduce a significant degree of judicial creativity whose conformity with EU law raises doubts. Furthermore, some of the supporters of this approach have suggested that this judicial approach offers important added value because – among other benefits – it would make the seriousness of the violation of EU values clearer, would influence the financial penalty that could be imposed in the framework of infringement proceedings, and would be useful for other related

38 VON BOGDANDY, Armin & SPIKER, Lukas D., "Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions", *op. cit.*, p. 77.

39 CJEU 22 February 2022, *RS*, C-430/21, EU:C:2022:99.

40 BONELLI, Matteo & CLAES, Monica, "Crossing the Rubicon? The Commission's use of Article 2 TEU in the infringement action against LGBTIQ+ rights in Hungary", *Maastricht Journal of European and Comparative Law*, 30(1), 2023.

proceedings such as the activation of Article 7 TEU or the suspension of the enforcement of the European arrest warrant (EAW).[41]

The Court of Justice will shortly hand down a ruling pertaining to this debate in an infringement action brought by the Commission against Hungary in which Article 2 TEU was invoked autonomously for the first time.[42] More than two years have passed since the infringement action was published; the oral hearing took place on 19 November 2024. The excitement that this litigation is causing in academic and judicial circles is notable, as can be seen from the unprecedented participation of representatives of the governments of sixteen member states, the Commission and the European Parliament.

5. CONCLUSIONS.

It is clear that the Court of Justice has once again proven to be the driving force behind European integration. Through its rulings, it has elaborated an innovative doctrine on EU values against the backdrop of the rule of law crisis. Discussions over their normativity, binding nature or even their justiciability before European jurisdiction have been largely eclipsed. The focal points of the debate have moved on to the optimal judicial operationalisation of Article 2 TEU and, more specifically, whether it is possible to invoke the argument autonomously. While it is true that the aspect of judicial independence has attracted particular attention, being comfortably placed within the more general principle of the rule of law expressly referred to in Article 2 TEU, possible jurisprudential developments around other values are still available. To mention a clear example, invoking the judicial applicability of the democratic principle through the joint interpretation of Article 2 TEU and Article 10 TEU is gaining ground in academic and judicial reflections.[43]

From a more general perspective, the constitutional transformations that this jurisprudence entails for European Union law, as well as for the EU's relationship with national systems, cannot be ignored. The permeability of values in the European legal order means that the renewed and strengthened legal configuration will have a structural impact that transcends the current

41 SPIEKER, Lukas D., "Berlaymont is back: The Commission invokes Article 2 TEU as self-standing plea in infringement proceedings over Hungarian LGBTIQ rights violations", *EU Law Live*, 2023, https://eulawlive.com/op-ed-berlaymont-is-back-the-commission-invokes-article-2-teu-as-self-standing-plea-in-infringement-proceedings-over-hungarian-lgbtiq-rights-violations-by-luke-dimitrios-spieker/

42 CJEU, *Commission v Hungary*, C-769/22, pending.

43 IGLESIAS SÁNCHEZ, Sara, *La independencia judicial ante el Tribunal de Justicia de la UE: Vías procesales, estándar de control y perspectivas de futuro*, Aranzadi, Cizur Menor, 2023, pp. 192-194.

scenario. There is a growing trend among academics to describe the current landscape in the wake of new jurisprudential developments as a "constitutional moment" for Europe.[44] In fact, the progressive elevation of the values of the European Union has reached the point where they are recognised as the integral basis of the European identity, such that they would constitute something akin to the intangible core of its Treaties. This is why I argue that it is the latest manifestation of a phenomenon of constitutionalisation of European integration that incorporates a category hitherto reserved for domestic constitutional systems.

It is paradoxical, then, that, rather than paralysing European integration, the rule of law crisis has given impetus to the increasingly federal and constitutional dimension of the Union. These developments, however, must necessarily be accompanied by the complex task of coordination with national systems in order to achieve a balance in which the autonomy and pluralism that have characterised this composite constitutional order from the beginning can be accommodated.

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44 VON BOGDANDY, Armin, BOGDANOWICZ, Piotr, CANOR, Iris, TABOROWSKI, Maciej & SCHMIDT, Matthias, "Guest Editorial: A potential constitutional moment for the European rule of law - The importance of red lines", *Common Market Law Review*, 55, 2018.

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NO RULE OF LAW IN UNDEMOCRATIC SOCIETIES: THE EU LEGAL FRAMEWORK TO TACKLE THREATS TO DEMOCRACY

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SUMMARY: 1. INTRODUCTION. 2. DEMOCRACY, RULE OF LAW AND FOREIGN THREATS. 3. DEMOCRACY IN THE EU LEGAL FRAMEWORK AND CHALLENGES FOR ITS PROTECTION VIS-À-VIS FOREIGN INTERFERENCE. 4. THE EU INTERNAL MARKET COMPETENCES: LIMITS AND OPPORTUNITIES. 5. THE CONTENT OF SPECIFIC RULES TO TACKLE FOREIGN INTERFERENCE BY MEANS OF DISINFORMATION. 6. CONCLUDING REMARKS.

1. INTRODUCTION.

In the last decade, much attention has been dedicated in legal scholarship to the so-called "rule of law crisis" that is affecting various member states (MSs) in the European Union (EU). However, this phenomenon is closely linked to democracy backsliding, defined as the process that gradually leads to a decrease in the quality of democratic governance.[1] Moreover, democracy is threatened not only from the inside, but also by the interference of foreign actors attempting to disrupt democratic processes. Such risks might stem, among others, from disinformation campaigns conducted by foreign subjects taking advantage of

1 On the concept of democratic backsliding see WALDNER, David and LUST, Ellen, "Unwelcome Change: Coming to Terms with Democratic Backsliding, *Annual Review of Political Science*, 21, 2018, pp. 93-113 and BERMEO, Nancy, "On Democratic Backsliding", *Journal of Democracy*, 27, 2016, pp. 5-19.

the opportunities opened by the increased diffusion of online media outlets, including social media.

The EU ought to be concerned by these threats for two main reasons. First, manipulation techniques represent a risk not only for the MSs but might also be used to manipulate the results of elections for the European Parliament. Second, such threats might undermine one of the core values upon which the EU is built, namely democracy. However, when analysing these issues from the perspective of EU law, one cannot help but notice that the EU faces important legal limitations when attempting to counter such threats. In fact, it acts pursuant to the principle of conferral enshrined in Art. 5(2) TEU, which entails that the EU can only act in those areas where the MSs have renounced their sovereign powers, and in order to pursue the aims established in the treaties. In this respect, the main problem is that the EU has not been attributed explicit competences to safeguard its common values in the treaties. As a result, the EU has had to rely on the legal bases conferred on it in other areas to intervene to protect democracy. Among the composite set of strategies the EU has adopted to tackle the phenomenon of foreign interference, the EU legislator has taken some measures to regulate online platforms, including social media, with a view to combating disinformation. Such rules are currently enshrined in the Digital Services Act (DSA), [2] adopted pursuant to Art. 114(1) TFEU, conferring the competence to harmonise MSs' legislations on the EU to develop the internal market.

In light of this framework, this paper aims to explore the legal implications stemming from the use of internal market competences to adopt measures that might contribute to the fight against foreign interference. This analysis is relevant for different purposes. First, it identifies the most recent attempts made at the EU level to include considerations on the capacity of digital platforms to influence democracy. The study also contributes to demonstrating the inherent flexibility of EU internal market powers to pursue various aims that are not only economic ones.

The main contention of this paper is that despite the EU lacking explicit competences to foster democracy, its flexible internal market legal basis might enable the regulation of media outlets in ways that should prevent foreign interference in the electoral process, at least, through disinformation. In turn, the analysis demonstrates that by relying on Art. 114(1) TFEU to adopt measures aimed at safeguarding democracy, economic and political integration become increasingly intertwined in the EU legal framework.

The scope of the analysis is restricted in some respects. First, the research does not deny the important role played by EU interventions, for instance,

2 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services.

in the role of the Common Foreign and Security Policy (CFSP) in tackling foreign interference. However, measures adopted in this area are only briefly mentioned when relevant, but they are not extensively analysed. Indeed, the use of Art. 114(1) TFEU raises specific sets of considerations that differ from those that could be implemented with regard to EU actions pursuant to its CFSP competence. Second, it is not claimed here that the DSA is the sole instrument adopted, relying on the EU internal market competence that contains provisions supporting the EU in dealing with foreign interference. For instance, the European Media Freedom Act and the Artificial Intelligence Act might also be relevant in this regard. Nonetheless, the DSA has been selected as it is the one that most specifically deals with the obligations of social media platforms. As already mentioned, these platforms are the media outlets that have brought about the most significant changes in how political information is conveyed nowadays.

The next section provides an overview of the connections between democracy, the rule of law and foreign threats, to justify the need to focus on these issues. Section 3 discusses democracy in the EU legal framework and presents the most notable attempts made to protect it against foreign interference. The subsequent section discusses the possibilities and limitations of the use of Art. 114(1) TFEU in this respect. Section 5 analyses the most pertinent provisions contained in the DSA that are applicable to social media that might play a role in contrasting disinformation campaigns conducted by foreign actors to destabilise democracy in the EU.

2. DEMOCRACY, RULE OF LAW AND FOREIGN INTERFERENCE.

A two-fold relationship connects the values of democracy and the rule of law. On the one hand, safeguarding the rule of law is crucial to protect democracies since the principles giving it concrete expression are necessary to ensure justice in democratic societies. As the Commission stated in 2024, "[d]emocracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process".[3] On the other hand, the emergence of the rule of law crisis is closely connected to the rise of political parties that do not fully adhere to democratic ideals. The situation has deteriorated to the point that, for instance, the European Parliament adopted a resolution in 2022 considering Hungary a "hybrid regime of electoral autocracy".[4] In this vein,

3 See Communication of 11 March 2014 from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final, p. 4.

4 Press Release of 15 September 2022 of the European Parliament, *MEPs: Hungary can no longer be considered a full democracy*, available at www.europarl.europa.eu.

problems concerning the lack of independence of judges in certain MSs that the Court of Justice of the European Union (CJEU) have considered to be in breach of EU law in its judgments can be perceived as just the tip of the iceberg of a broader phenomenon. In fact, they should be understood as attempts made by illiberal leaders to gain control over the political life of a country.[5] In other words, the different measures such ruling parties might put in place to disrupt democracy include removing effective judicial oversight over the activities of the government and the legislature.

These considerations on the two-fold nexus between the values of the rule of law and democracy highlight the need to safeguard the former to ensure the latter and vice versa. Apart from situations where the rule of law crisis and democratic backsliding go hand in hand, EU democracies are not immune to other threats. While different factors might lead to democratic backsliding, risks also come from state and non-state foreign actors meddling in national democratic processes, intending to support specific candidates with particular ideologies.[6] The recent annulment of the Romanian election due to foreign interference is a clear example of such threats.[7] In that respect, a connection with the rule of law is once again present, since such interference might benefit illiberal political parties less inclined to safeguard the EU values of democracy and the rule of law. This is confirmed by the fact that the European External Action Service considers that major threats are coming from China and Russia – two countries whose conceptualisation of the functioning of the political system differs from the EU's understanding of democracy.[8]

Before going into greater detail, it is useful to define 'foreign interference'. At the EU level, such a phenomenon is called Foreign Information Manipulation and Interference and is considered to encompass "[a] mostly non-illegal pattern of behaviour that threatens or has the potential to negatively impact values, procedures and political processes. Such activity is manipulative in character and is conducted in an intentional and coordinated manner, by state or non-state actors, including their proxies inside and outside of their own territory".[9] This

5 JAKAB, Andras, *What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law*, MPIL Research Paper no. 2019-15, p. 7.

6 TENOVE, Chris (lead author), *Digital Threats to Democratic Elections: Howe Foreign Actors Use Digital Techniques to Undermine Democracy*, Centre for the Study of Democratic Institutions UBC, Vancouver, 2018. p. 2.

7 BORTOLETTO, Francesco, "Romania must start over; Constitutional Court annuls outcome of first round of presidential election", *Euronews*, 6 December 2024, available at www.eunews.it

8 European External Action Service, *3rd Report on Foreign Information Manipulation and Interference Threats*, March 2025, available at www.eeas.europa.eu, p. 9.

9 Id., p. 4.

definition highlights the fact that foreign interference might take different forms, and manipulation of information is one of them. In this respect, social media increasingly play a crucial role in determining the formation of individuals' opinions and political stances and, at the same time, their services can be hijacked to convey misleading information.[10] Indeed, foreign actors wanting to disrupt free democratic debates might benefit from the diffusion of disinformation over media outlets – including social media – through fake profiles, and from using bots to steer algorithms to give more or less visibility to certain information. As noted in the literature, digitalisation has increased the risks of so-called "computational propaganda", defined as the "assemblage of social media platforms, autonomous agents, and big data tasked with the manipulation of public opinion".[11]

While disinformation is not only steered by foreign actors, when performed by these campaigns attempting to manipulate information have been classified by the EU as hybrid threats, causing instabilities by aiming at disrupting fundamental democratic values and liberties.[12] Hence, disinformation always puts democracy at risk, but when performed by foreign actors it is considered a threat to the security of the EU and the MSs.[13] We will present some examples to show that this, arguably, has important legal implications.

3. DEMOCRACY IN THE EU LEGAL FRAMEWORK AND CHALLENGES FOR ITS PROTECTION VIS-À-VIS FOREIGN INTERFERENCE.

In EU primary law, democracy is, first of all, considered one of the common values of the EU mentioned in Art. 2 TEU and is therefore one of the criteria that candidate countries must fulfil to join the EU pursuant to Art. 49 TUE. Title III of the TEU further elaborates on the democratic principles applicable at the EU level. In particular, Art. 10 TEU is considered by the CJEU to "give concrete form to the value of democracy referred to in Art. 2 TEU".[14] This provision confers an active role on EU citizens in determining the functioning of the EU, establishing

10 TENOVE, Chris (lead author), *Digital Threats to Democratic Elections*, *op. cit.*, p. 12.

11 WOOLLEY, Samuel and HOWARD, Philip, "Political Communication, Computational Propaganda, and Autonomous Agents", *International Journal of Communication* 10(2016), p. 4886.

12 See Joint Communication of 6 April 2016 of the Commission to the European Parliament and the Council, *Joint Framework on countering hybrid threats a European Union response*, JOIN(2016) 18 final.

13 European External Action Service, *A Strategic Compass for Security and Defence*, 24 March 2022, available at www.eeas.europa.eu, p. 34.

14 CJEU, judgment of 19 December 2019, Case C-502/19, *Junqueras Vies*, para. 63. In general, on Art. 10 TEU, see KELLERBAUER, Manuel, KLAMERT, Marcus and TOMKIN, Jonathan (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary*, 2nd Edition, Oxford University Press, Oxford, 2024, pp. 138-143.

that the Union is based on a representative democracy where citizens are represented in the European Parliament and the right to participate in the democratic life of the EU is recognised. This right is further corroborated by the right to vote and to stand as candidate in elections to the European Parliament and to municipal elections in the MS where they reside, as defined in Art. 20(2)(b) TFEU. In addition, Art. 10(2) TEU refers to democracy at the MS level, requiring that national representatives sitting in the Council and in the European Council are democratically accountable at the domestic level.[15]

The inclusion of Art. 10 TEU in the treaties is part of the attempts made by the EU to tackle its democratic deficit. Hence, its main role is to back the legitimacy of the EU.[16] Such conceptualisation is crucial to understanding the existential threat that foreign interference in democratic societies poses to the EU. In a multi-level system such as the EU, where representatives of citizens and MSs are in most cases co-legislators, ensuring the correct functioning of democracy must be guaranteed both at the national and EU level.[17] If that were not the case, the legitimacy of EU institutions would be jeopardised. In other words, Art. 10 TEU underlines the central role of EU citizens in the correct functioning of democracy at the EU level. While this provision does not confer any competence or obligation on the EU, it emphasises the need to ensure that people's political opinions are not manipulated by foreign interference.

Art. 2 TEU is relevant here for another reason, as it specifies that the values contained therein shall be guaranteed in a society with some specific characteristics, such as pluralism. In particular, pluralism of the media plays a crucial role in ensuring the correct development of political life at the national and EU levels.[18] In this respect, Art. 11(1) of the EU Charter of Fundamental Rights is particularly pertinent, as it specifically states that "[t]he freedom and pluralism of the medial shall be respected". Furthermore, Art. 11(1) of the Charter ensures freedom of expression, encompassing the freedom "to receive and impart information and ideas without interference by public authority". As the CJEU noted, freedom of expression stands as the basis for the development of

15 On the possibility of relying on this provision to exclude national representatives from EU institutions, see COTTER, John, 'To Everything there is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member state Representatives from the European Council and the Council", *European Law Review*, 47, 2022, pp. 69-84.

16 In general, on Art. 10 TEU, see KELLERBAUER, Manuel, KLAMERT, Marcus and TOMKIN, Jonathan (eds), *The EU Treaties and Charter of Fundamental Rights*, *op. cit.*, p. 139.

17 *Id*., p. 140.

18 A broader discussion on the role of the freedom of expression in democratic societies, see ASHUTOSH, Bhagwat and WEINSTEIN, James, "Freedom of Expression and Democracy", in STONE, Adrienne and SCHAUER, Frederick (eds), *The Oxford Handbook of Freedom of Speech*, Oxford University Press, Oxford, 2021, p. 82.

a democratic and pluralistic society.[19] In other words, such a right constitutes the premise for democracy to function. At the same time, one should also consider its scope of application and the possibilities of restricting it. Indeed, regulating media outlets, including social media, would require striking a delicate balance between two opposing needs: ensuring pluralism of the media while avoiding threats to democracy.

Although a thorough analysis of this right is outside the scope of this paper, suffice it here to mention that the CJEU considered that information labelled as "vehicle of propaganda" enjoyed protection under Art. 11 of the Charter, but that it could be restricted if the conditions established in Art. 52 of the Charter were met.[20] In that case, the restriction was a temporary suspension of broadcasting activities of some media outlets supporting the illegal aggression of Russia against Ukraine. This limitation was considered to pursue an objective of general interest, namely safeguarding EU values.[21] This conclusion is crucial for our purposes, as it confirms that certain types of conduct of media outlets that have negative repercussions on democratic societies cannot be tolerated within the EU.

Before further discussing interventions through the regulation of media platforms, one should also briefly consider other possibilities offered in EU law to safeguard democracy as an EU value when threatened by foreign powers.[22] Specific instruments used so far in the context of the rule of law crisis include the procedure provided for in Art. 7 TEU, the infringement procedure under Art. 258 TFUE, and the adoption of the so-called Conditionality Regulation.[23] The procedure under Art. 7 can be used with regard to any violation of one of the values included in Art. 2 TEU, so nothing prevents it from being used to deal with violations of the principle of democracy. Art. 258 TFEU has already been activated against Poland in the case of the so-called "lex Tusk", claiming that a law adopted with the clear intention of preventing a specific candidate to run for elections breached Arts. 2 and 10 TEU.[24] Lastly, the conditionality regulation

19 CJEU, judgment of 23 April 2020, case C-507/18, *Associazione Avvocatura per i diritti LGBTI*, point 48.

20 See CJEU, judgment of 27 July 2022, case T-125/22, *RT v Council*. See also SZÉP, Viktor and WESSEL, Ramses, "Balancing restrictive measures and media freedom: *RT v Council*", *Common Market Law Review*, 60, 2023, pp. 1384-1396.

21 *RT v Council*, cit., para. 161.

22 In general, in support of the argument that the EU should intervene to safeguard democracy even in its MSs see MÜLLER, Jan-Werner, "Should the EU Protect Democracy and the Rule of Law inside member states?", *European Law Journal*, 21, 2015, pp. 141-160.

23 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

24 European Commission, Press release of 8 June 2023, *Rule of Law: Commission launches infringement procedure against POLAND for violating EU law with the new law establishing a special committee*, available at www.ec.europa.eu. In this respect, the discussion concerning whether it is

thus far only connects the EU budget and respect for the rule of law, but the EU legal framework would allow the extension of its scope of application to limit the concession of funds to those MSs that breach the value of democracy. Discussing the results that have been achieved in the framework of the rule of law crisis with these instruments, as well as their capacity to prevent violation of EU values more generally is not our remit here. Instead, what should be underlined is that these instruments are not fit to tackle threats to democracy from foreign actors. They aim at sanctioning MSs for their behaviour, but they are not able to safeguard EU values when they are at risk because of actions committed by actors that are not national governments and legislators. In addition, they would not be capable of preventing disruptions to democracy that not only concern the MSs but also EU institutions.

The most visible interventions made by the European Commission to specifically safeguard democracy started in 2020, as that objective was included among the policy priorities promoted by the von der Leyen Commission. This commitment became a reality, especially with the adoption of the European Democracy Action Plan (EDAP).[25] Although it does not have any binding value, the Plan captured ongoing trends and proposed interventions to tackle risks affecting democracy. In particular, it emphasised the challenges that digitalisation has brought to democracy.[26] The Communication has also referred to risks posed by foreign interference, especially in the third area of intervention envisaged in the Plan, namely efforts aimed at countering disinformation.[27] The Communication distinguished four different phenomena: unintentional misinformation, disinformation, information to influence operations and foreign interference in the information space. While it is not possible to define each of these notions here, the Commission recognised that disinformation efforts are often part of interference campaigns carried out by foreign actors to manipulate the will of populations.[28] The Plan proposed three different lines of intervention to counteract disinformation, addressed to the MSs, online platforms and citizens. For the purposes of this paper, it is relevant to notice that the Plan suggested increasing inspection, transparency, and oversight obligations of

possible to sanction a self-standing violation of Art. 2 is relevant. Such an issue will be dealt with by the Court of Justice when ruling on the action brought on 19 December 2022, case C-769/22, *European Commission v Hungary*.

25 Communication of 3 December 2020 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *On the European democracy action plan*, COM(2020) 790 final.

26 *Id*., p. 2.

27 The other means considered necessary to strengthen democracy were the protection of free and fair elections and improved democratic participation and the promotion of free and independent media.

28 *European democracy action plan*, *op. cit.* p. 18.

online platforms.[29] In this respect, the Communication envisaged the adoption of the DSA and a revision of the 2018 Code of practice on disinformation.

All in all, the Plan is relevant in the context of this paper for three main reasons. First, it recognised the role played by online platforms in current democracies and proposed specific measures to tackle risks caused by increased digitalisation. Second, it set the ground for further actions, which will be examined in the next section. Third, it connected the adoption of an instrument based on Art. 114(1) TFEU – i.e. the DSA – with a broader spectrum of measures intended to safeguard democracy at the EU level.

4. THE EU INTERNAL MARKET COMPETENCES: LIMITS AND OPPORTUNITIES

Before analysing the main measures adopted in the field of the internal market to counteract foreign interference in democratic processes, it is worth reflecting more generally on the possibilities stemming from EU law to do so. Since the legal basis of the DSA is Art. 114(1) TFEU, conferring competences to harmonise national legislations to ensure the functioning of the internal market, it is appropriate to briefly discuss the possibilities that emerge from relying on this provision.

It is well known that the primary objective that led to the creation of the European Economic Community through the Treaty of Rome was the creation of a common market, now renamed the internal or single market. Pursuant to Art. 26(2) TFEU, the internal market shall encompass "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties". Developments in this field have been achieved through negative and positive integration. In the former instance, the case law of the CJEU identified a series of obstacles that MSs had to remove to guarantee the four fundamental freedoms mentioned above. Positive integration refers to the EU's competence to adopt harmonising measures to guarantee the development of the internal market. As already mentioned, the adoption of the Lisbon Treaty Art. 114(1) TFEU enshrines this possibility and it can be used as a legal basis to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in member states which have as their object the establishment and functioning of the internal market".[30]

29 *Id*., pp. 21-22.

30 In general, on the internal market competence attributed to the EU, see WEATHERILL, Stephen, *The Internal Market as a Legal Concept*, Oxford University Press, Oxford, 2017, pp. 151-186.

The most notable limitations to the use of this legal basis have been identified in the so-called *Tobacco Advertising* case, where the CJEU rejected a directive on the advertising of tobacco products, arguing that the EU did not have the competences to enact such a piece of legislation.[31] Although it is not possible to discuss all the details of the case here, suffice it to say that the Court claimed that such a legal basis cannot be interpreted as conferring a "general power to regulate the internal market". On the contrary, said provision should be relied upon only to adopt measures "intended to improve the conditions for the establishment and functioning of the internal market".[32] While this restricted the EU's ability to rely on Art. 114(1) TFEU, it is currently accepted that legislation can be adopted pursuant to this legal basis, not only to remove obstacles to liberalising exchanges among the MSs but also to define common regulatory standards.[33]

With regard to the harmonisation of provisions applicable to online platforms, the idea of introducing measures to guarantee the four fundamental freedoms in the digital space can be traced back to 2015, when the Juncker Commission did the groundwork for the creation of a digital single market. In particular, the objective was to remove obstacles that could prevent businesses and individuals from accessing and exercising online activities.[34] In the preamble of the DSA, one of the main obstacles to the development of the digital single market identified by the Commission was the adoption of different regulations applicable at the national level to intermediary services. Such differences in national legislations were considered as negatively affecting the internal market, whereas the definition of harmonised measures would have increased the possibilities of benefiting from the fundamental freedoms ensured within the EU.[35] Hence, harmonising the regulation of intermediary services in this context clearly appeared as favouring the functioning of the internal market. As a consequence, this allowed the EU to rely on Art. 114(1) TFEU.[36]

These limitations on the discretion of the EU legislator constitute the "restrictive" elements of EU internal market competence. Nevertheless, *Tobacco*

31 CJEU, judgment of 5 October 2000, case C-376/98, *Germany v Parliament and Council (Tobacco Advertising)*.

32 *Id.,* para 83.

33 WYATT, Derrick, *Community Competence to Regulate the Internal Market*, University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper no. 9/2007, p. 46.

34 Communication of 6 May 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM(2015) 192 final, p. 3.

35 Recital 2 DSA.

36 In general on the legal implications stemming from the use of Art. 114(1) TFEU in the digital single market, see DE WRIES, "Recent Trends in EU Internal Market Legislation", in VAN DEN BRINK, Tom and PASSALACQUA, Virginia (eds), *Balancing Unity and Diversity in EU Legislation*, Edward Elgar Publishing, Cheltenham, 2024, pp. 30-33.

Advertising also contains some "expansive" elements.[37] In that judgment, the Court claimed that, once the EU can legitimately resort to Art. 114(1) TFEU because the criteria mentioned above are fulfilled, nothing precludes it from taking into account other considerations (such as health protection) when deciding on the content of the measures to be adopted.[38] This latter part of the reasoning of the Court was justified in the case at stake by the fact that health protection was – and still is – mentioned in the text of the Treaties both as a cross-cutting objective and as an element to be considered when adopting internal market legislation.[39] However, subsequent practice has demonstrated that health protection or the other elements that, according to Art. 114(3) TFEU, should inform the exercise of EU competence in the internal market – i.e. environmental and consumer protection – are not the sole factors to be considered. For instance, the CJEU ruled that social objectives listed in Art. 9 TFEU, such as workers' protection, might also play a role in determining the content of the measures the EU should adopt in the internal market.[40]

The question raised in this regard is whether the EU should also consider the value of democracy in this process. The answer is straightforward, as it can be argued that, since the promotion of EU values is one of the objectives that should be pursued by the EU according to Art. 3 TEU, democracy is also an interest that should be taken into account when the legislator relies on Art. 114(1) TFEU. The two CJEU rulings on the validity of the Conditionality Regulation confirmed that "the European Union must be able to defend [Art. 2 TEU] values, within the limits of its powers as laid down by the Treaties".[41] Such a statement confirms that the EU has a duty to adopt measures safeguarding its values, even if this does not extend its powers.[42] Considerations related to democracy as an EU value have been taken into account in the adoption of the DSA, which states that the harmonisation of rules applicable to intermediary services aims *inter alia* at

37 WYATT, Derrick, *Community Competence to Regulate the Internal Market*, *op. cit.*, pp. 22-23.

38 *Tobacco Advertising*, *op. cit.* para 88. On this issue, see DE WITTE, Bruno, "A Competence to Protect. The Pursuit of Non-market Aims through Internal Market Legislation", in SYPRIS, Philip (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge University Press, Cambridge, 2012, pp. 25-46.

39 See, *inter alia*, art. 168(1) TFEU and 114(3) TFEU.

40 CJEU, judgments of 8 December 2020, case C-620/18, *Hungary v European Parliament and Council*, para. 46 and case C-626/18, *Poland v European Parliament and Council*, para. 51.

41 CJEU, judgments of 16 February 2022, case C-156/21, *Hungary v European Parliament and Council*, para 127 and case C-157/21, *Poland v European Parliament and Council*, para. 268.

42 FISICARO, Marco, "Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation - ECJ Judgments of 16 February 2022, Cases C-156/21, Hungary v Parliament and Council and C-157/21, Poland v Parliament and Council", *European Constitutional Law Review*, 18, 2022, p. 347.

"addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate".[43]

The fact that the proposed measures ensure the development of the internal market only constitutes the trigger that activates EU competences in this field and the possibility for it to adopt harmonising measures. The specific content of such measures is usually determined by other types of considerations, which might include the need to safeguard the EU value of democracy. From the perspective of EU competences, this qualifies EU interventions, as the use of Art. 114(1) TFEU can no longer be considered "value-neutral".[44] In addition, from the point of view of the capacity of the EU to counter foreign interference, the EU legal framework – and more specifically the interpretation of Art. 114(1) TFEU – offers broad possibilities to the EU legislator to regulate the conduct of private actors in a way that promotes the correct functioning of democracy.

5. THE CONTENT OF SPECIFIC RULES TO TACKLE FOREIGN INTERFERENCE THROUGH DISINFORMATION.

In line with the European Democracy Action Plan, the EU undertook a series of actions to reinforce democracy vis-à-vis foreign threats. Among these efforts, the EU strengthened its role in preventing and tackling disinformation. In that respect, in 2022 the European Commission supported the revision of the Code of Practice on Disinformation. This document was signed by different stakeholders, including some of the most used social media platforms, that voluntarily accepted certain commitments to avoid disinformation. In addition to such a non-binding document, pursuant to the competences conferred on the EU based on Art. 114(1) TFEU, it adopted the DSA. The purpose of this section is not to discuss whether the adoption of the DSA will improve EU efforts in tackling disinformation or – to put it differently – its effectiveness.[45] Rather, it aims to analyse the main provisions of the DSA that could be relevant in counteracting the manipulation of information by foreign actors. Furthermore, the regulatory framework applicable to online platforms established by the DSA is only considered in this paper as an example of the possible provisions that might help to counteract foreign manipulation and might be adopted under this competence.

43 Recital 9 DSA.

44 TRIDIMAS, Takis, "Competence after Lisbon. The Elusive Search for Bright Lines", in ASHIAGBOR, Diamong, COUNTOURIS, Nicola and LIANOS, Ioannis (eds), *The European Union after the Treaty of Lisbon*, Cambridge University Press, Cambridge, 2012, p. 73.

45 See, for instance, NANNINI, Luca, BONEL, Eleonora, BASSI, Davide and MAGGINI, Michele Joshua, "Beyond phase-in: assessing impacts on disinformation of the EU Digital Services Act", *AI and Ethics*, 5, 2025, pp. 1241-1269.

The DSA defined obligations on transparency, measures to tackle illegal content, and systems to help individuals to lodge their claims, applicable to a broader range of platforms. In addition, other major provisions contained in the DSA to counteract disinformation are those imposing obligations on very large platforms and very large online search engines to manage systemic risks.[46] The main obligation imposed on them is to "diligently identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services".[47] Systemic risks are not defined in the DSA, but Art. 34(1)(c) DSA clarifies that such an assessment should encompass "actual or foreseeable negative effects on democratic processes, civil discourse and electoral processes". In this respect, threats posed by foreign actors that might manipulate political opinions within the EU using social media should be considered systemic risks. Moreover, Art. 34(2) DSA specifies that the assessment shall cover the design of the algorithm-based recommender systems and content moderation rules, as well as the extent to which systemic risks are affected by intentional manipulation of the service – encompassing inauthentic use[48] or automated manipulation – and the diffusion of illegal content.[49] While it would be more difficult to classify content shared by foreign actors as illegal, their manipulation techniques often include relying on bots and fake profiles. Hence, these possibilities should be carefully considered when determining the systemic risks that social media might imply.

Once such risks have been identified, the platforms shall adopt mitigation measures to tackle them.[50] These obligations entail that the most used social media should not only analyse the risks posed by actual or potential attempts of foreign actors to manipulate information by exploiting their services, but also adopt appropriate measures to prevent or counteract them. Art. 35(1) DSA leaves broad discretion to platforms to decide which mitigation technique is the most appropriate to tackle the risk at stake.[51] Nonetheless, such measures must be "reasonable, proportionate and effective", as well as tailored to the risk identified.

In the event of a crisis, Art. 36(1) DSA confers on the Commission the power to issue a decision obliging very large online platforms or very large online search

46 Very large online platforms and very large online search engines are considered those that "have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million" (art. 33(1) DSA).

47 Art. 34(1) DSA.

48 This notion shall be interpreted as encompassing use of bots and fake accounts (see recital 55 DSA).

49 This expression refers to content that breaches provisions of EU or domestic law (see Art. 3(h) DSA).

50 Art. 35(1) DSA.

51 This article provides for a non-exhaustive list of measures that might be taken.

engines to assess the contribution of their system to such a situation and/or to prevent or eliminate it. A crisis is considered a situation in which "extraordinary circumstances lead to a serious threat to public security or public health in the Union or in significant parts of it".[52] The concept of public security is not defined in the Regulation. Nonetheless, this paper contends that there is room to argue that such a notion should encompass threats to physical security and other types of threats. Foreign interference campaigns might fall within this category, as they often constitute part of hybrid operations threatening EU values and, most notably, democracy. This would confer vast power to the Commission in determining the content of platforms' obligations in case of a threat to democracy caused by foreign interference.

6. CONCLUDING REMARKS.

This paper has provided a preliminary assessment of the use of the EU's internal market competence to contrast foreign interference in democratic processes using information manipulation. Risks to democracy constitute an existential threat to the EU because they would take away the legitimacy of its institutions. Regardless of the limited scope of the analysis, some broader considerations can be elaborated, focusing on the implications using EU internal market powers to deal with foreign interference.

To begin with, the possibility of relying on Art. 114(1) TFEU opens up various chances for the EU to adopt measures that might play a role in tackling foreign interference, by establishing common rules applicable to online operators. The main limitation on EU intervention is that such measures should also improve the functioning of the internal market. As the current DSA rules demonstrate, enacted measures could both prevent risks stemming from foreign actors and mandate intervention when major incidents occur. Therefore, Art. 114(1) TFEU should be considered part of the legal toolbox that allows the EU to adopt measures to safeguard its values. However, due to the various strategies used by foreign actors to interfere with democratic processes, other types of intervention should also be considered.

Furthermore, the use of Art. 114(1) TFEU as an instrument to safeguard democracy – or any other EU value – should be carefully considered given the sensitive nature of the issues at stake. This also raises questions concerning the current state of the division of competences between the EU and the MSs, as the former is indirectly intervening in one area – democracy – where the latter

52 Art. 36(2) DSA.

have not renounced their sovereign powers.[53] That should not be perceived as a novelty in the EU legal framework, as the legislator has often relied on this legal basis to introduce measures informed by sensitive considerations in areas that formally pertained to the MSs.[54] This is the logical consequence of the need to consider non-economic interests when regulating the internal market. Nevertheless, such a functional use of Art. 114(1) TFEU further contributes to strengthening the role of this provision as a means of advancing integration in the EU.

In conclusion, this also changes the relation between economic and political integration in the EU. Indeed, the creation of the internal market was the first form of integration among different European countries, and political integration has gradually followed and is now a reality. The definition of common values in Art. 2 TEU is a prominent example in this regard. The analysis conducted so far demonstrates that economic integration has not lost its relevance over time; on the contrary, relying on Art. 114(1) TFEU to adopt measures to safeguard the EU against foreign interference, the EU internal market competence becomes more central as it becomes an instrument to favour political integration.

53 See GARBEN, Sasha, "Competence Creep Revisited", *Journal of Common Market Studies*, 57, 2019, pp. 205-222.

54 One example in this regard could be Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, which entailed sensitive considerations relating to national healthcare systems.

THE RULE OF LAW IN EU MULTICONSTITUTIONAL DIALOGUE: TOWARDS ITS CONSTITUTIONAL ANCHORING IN EU CITIZENSHIP.[1]

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SUMMARY: 1. INTRODUCTION. 2. RULE OF LAW. AN INMANENT CONCEPTION WITHIN THE EU. 2.1. The Rule of Law: A Bulwark Against Arbitrary Exercise of Power. 2.2. The Dialogic Nature of the Rule of Law in the EU. 2.3. The legal nature and binding character of EU values. 3. RULE OF LAW AS AN INFRASTRUCTURE FOR EU INTEGRATION AND CONTROL. PITFALLS AND LIMITATIONS. 3.1. European Governance through the Rule of Law: Towards a Constitutional Articulation; 3.2. Between principle and Practice: Pitfalls and Shortcomings in the EU's Upholding of the Rule of Law. 4. STRENGTHENING EU CITIZENSHIP THROUGH THE RULE OF LAW: EXPLORING NEW PATHWAYS. 4.1. Citizens as Active Agents in the Defence of a Dialogic, Bottom–up Rule of Law. 4.2. The Rule of Law as a Structuring Component of European Citizenship. 5. FINAL REMARKS.

1. INTRODUCTION.

The rise of populism and the emergence of authoritarian tendencies encroaching on established liberal democracies have propelled the rule of law to the forefront of contemporary constitutional and political discourse. Although a

1 This article forms part of the research conducted within the framework of the Basque system's project 'Multilevel Governance and EU Law' (IT1733-22) and the Spanish Ministerio de Ciencia e Innovación research project 'Gobernanza Multinivel: Retos y oportunidades tras la crisis pandémica' (PID2021-128599NB-100).

comprehensive examination of these global dynamics goes beyond the scope of this paper, centred on the European Union (EU), it is important to acknowledge that the phenomenon is by no means confined to the European context. Examples of national and social populism vividly illustrate the contemporary erosion of the rule of law. On the one hand, the weakening of constitutional checks and balances in the United States following the Trump presidency, Erdoğan's Turkey, Russia under Putin, or the patterns of semi authoritarianism under Bolsonaro in Brazil represent instances of right-leaning populist challenges to the liberal democratic order. On the other hand, the systematic adulteration of the rule of law by authoritarian-leaning regimes in Venezuela and Nicaragua[2] exemplifies similar dynamics emerging from left-leaning populist governments. Taken together, these cases reflect a broader, transnational pattern of global democratic regression,[3] wherein the classical concept of the rule of law has re-emerged as a pivotal source of contestation and defence.

Under the term *democratic backsliding*, scholars and policymakers in Europe describe a gradual and systematic erosion of fundamental pillars of liberal democracy, particularly the rule of law and the independence of the judiciary.[4] While Poland and Hungary stand as the most emblematic cases of sustained assaults on foundational liberal democratic principles within the European Union, serious concerns regarding the rule of law have begun to surface in other member states as well. Recently, the victory of the populist George Simion in the first round of Romania's presidential election – held after the Constitutional Court annulled the previous vote due to Russian interference in favour of another far-right candidate – has raised serious concerns within the European Union.[5] Simion's nationalist, anti-EU rhetoric, his scepticism regarding military aid to Ukraine and his confrontational political style have sparked fears of renewed democratic and rule of law backsliding and the emergence of an illiberal coalition within the EU. These events in Romania have once again cast a spotlight on the

2 KORNBLITH, Miriam, "Latin America's Authoritarian Drift: Chavismo After Chávez?" *Journal of Democracy*, vol. 24, no. 3, 2013. FARRIS, Emma, "Fragility in Venezuela and Nicaragua: Returning to the Sanctions Question" in *Global Approaches on state Fragility & Organized Crime* (VIEIRA, Maurício, Editor), UPEACE Press, San José, Costa Rica, 2023, p. 100.

3 *See* e.g. DIAMOND, Larry, "Democratic Regression in Comparative Perspective: Scope, Methods, and Causes", *Democratization,* 28.1, 2021, pp. 22-42; GERSCHEWSKI, Johannes, "Erosion or decay? Conceptualizing causes and mechanisms of democratic regression", *Democratization*, 28.1, 2021, pp. 43-62.

4 LAURENT, Pech and SCHEPPELE, Kim Lane, "Illiberalism within: rule of law backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, 19, 2017, vol. 19, pp. 3-47. ADAMSKI, Dariusz, "The social contract of democratic backsliding in the "new EU" countries", *Common Market Law Review*, 56.3, 2019, pp. 623-666.

5 BOGDAN, Iancu, "Romanian Militant Democracy and the Time Machine", *VerfBlog,* https://verfassungsblog.de/romanian-militant-democracy-and-the-time-machine/

pressing question of how the Union should respond to democratic backsliding and strengthen the protection of the rule of law.

This progressive deterioration of the liberal democratic model within the very heart of the EU contradicts the fundamental values of the Union as enshrined in Article 2 of the Treaty on European Union (TEU). For years, this normative assertion was often regarded as a symbolic affirmation of liberal-democratic ideals, whose legal implications were perceived as largely symbolic or, at most, indirectly operative. Violations of these values were meant to be addressed through Article 7 TEU, a complex and politically sensitive procedure over which the Court of Justice of the EU (CJEU) was granted either no jurisdiction or only narrowly adjudicative competence, pursuant to Article 269 of the Treaty on the Functioning of the European Union (TFEU). However, given the limited success of infringement actions initiated by the European Commission against specific measures adopted by certain 'illiberal' governments, such as those in Hungary and Poland, the EU – particularly the European Commission and the CJEU – has embarked on what has come to be known as a "values protection" strategy.[6] Conceptualizing the Union as a "Community based on the Rule of Law",[7] this approach specifically targets the rule of law, in particular through more direct infringement actions based on Article 19 of the TEU, which safeguards judicial independence.

The legal operationalization of Article 2 TEU – and in particular its articulation of the rule of law – has not only broadened the jurisdictional reach of the CJEU, it has also endowed the European Commission with a more versatile and dynamic normative toolkit at the institutional and political levels. Indeed, under the umbrella of the *Rule of Law Toolbox*, the European Commission has equipped itself with enhanced capacities to monitor and enforce compliance with the Union's rule of law in the member states.[8] Therefore the "rule of law strategy" has enabled the Commission and the CJEU to develop new powers in

6 BONELLI, Matteo, "Infringement Actions 2.0: How to Protect EU Values before the Court of Justice", *European Constitutional Law Review*, 18.1, 2022, p. 31.

7 ECJ 23 April 1986, Case C-294/83 *Parti écologiste "Les Verts"* v *European Parliament,* ECLI:EU:C:1986:166 para. 23.

8 Although the EU Rule of Law Framework, established in 2014 (*A New EU Framework to Strengthen the Rule of Law* (COM(2014) 158 final), is narrowly structured as a dialogue-based early warning mechanism, the EU's broader strategy to protect the rule of law relies on a diverse set of instruments. In 2019, the Commission assessed existing tools and proposed enhancements in "*Further Strengthening the Rule of Law within the Union*" (COM(2019) 163 final), followed by the more comprehensive *Blueprint for Action* (COM(2019) 343 final), which structured the EU's approach around promotion, prevention, and response. The annual Rule of Law Report launched in 2020 (COM(2020) 580 final) further strengthened systematic monitoring. Complementing these soft law tools, the Rule of Law Conditionality Regulation (Regulation (EU, Euratom) 2020/2092) introduced financial sanctions where breaches affect the EU budget. This rule of law toolbox combines soft law measures, judicial remedies, financial conditionality, and diplomatic engagement.

order to address fundamental constitutional issues, rather than focusing solely on technical breaches of EU legislation.

Against this backdrop, my reflection pursues two main objectives. First, it seeks to question and critically assess the European Union's conceptualization of the rule of law and its emerging role as a bulwark, safeguard, or *jurisdictio*, i.e. its capacity to impose constraints on member states and to transform the rule of law into a technology of control and European integration. This analysis requires starting from an understanding of the rule of law within the EU as ontologically dialogical and inherently complex. Second, the aim is to envision and explore new ways of conceiving and articulating a European rule of law, an approach that necessarily entails linking it to a broader notion of European citizenship, whose reinforcement emerges as essential to fostering a rule of law that is both effective and genuinely democratic.

2. RULE OF LAW. AN IMMANENT CONCEPTION WITHIN THE EU.

2.1. The Rule of Law: A Bulwark Against the Arbitrary Exercise of Power.

As Jeremy Waldron reminds us, the rule of law remains a deeply contested concept.[9] Persistent disagreements over its core principles and applications may have rendered the notion "meaningless thanks to ideological abuse and general overuse," turning it into a decorative and rhetorical object in innumerable political discourses.[10] Furthermore, it is characterized by its ambivalent nature. As Michel Rosenfeld aptly notes, it is an "essentially contested concept." Its ambivalence lies in its dual character: while it requires individuals to submit to the law as an expression of majority will, it simultaneously empowers them to invoke legal norms to challenge arbitrary exercises of authority.[11]

Brian Tamanaha's historical analysis distinguishes between *formal* (thin) and *substantive* (thick) theories of the rule of law.[12] While the former would be

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Taken together, these instruments reflect a multifaceted approach that combines monitoring, dialogue, legal enforcement, and financial conditionality to uphold the Union's rule of law.

9 WALDRON, Jeremy, "Is the Rule of Law an essentially contested Concept (In Florida)?", *Law and Philosophy*, 21, 2002, pp. 137-164.

10 SHKLAR, Judith N, "Political Theory of the Rule of Law", in *The Rule of Law: Ideal or Ideology (*HUTCHINSON, Allan C., MONAHAN, Patrick, eds.), Carswell, Toronto, 1987, p. 1.

11 ROSENFELD, Michel, "The Rule of Law and the Legitimacy of Constitutional Democracy", *Southern California Law Review*, 74.5, 2001, p. 1309.

12 TAMANAHA, Brian Z, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 92.

focused on legality's form and procedure, the latter would be centred on justice-oriented values. Building on this foundation, scholars such as Paul Craig have proposed integrated frameworks. Within the EU context, Craig identifies three core elements: 1) legislative and executive powers must operate on the basis of lawful authority (the principle of legality); 2) laws must offer sufficient clarity and predictability to enable individuals to organize their lives accordingly (legal certainty); and 3) individual rights must be safeguarded through judicial adjudication, informed by the most compelling theory of justice available at a given historical moment.[13]

Having acknowledged the multiplicity of meanings attached to the rule of law, this analysis does not aim to offer an exhaustive account of all emerging approaches. Rather, it seeks to identify the essential elements necessary to conceptualize and evaluate the EU's evolving engagement with this foundational principle. To begin with, the rule of law is best approached as a regulative ideal, a normative standard that transcends mere formal legality. As such, rule *of* law must not be conflated with the rule *by* law or the "exercise of power through law," where legality serves as a vehicle for authority rather than a constraint upon it. In this sense, the rule of law is not satisfied by the mere existence of legal norms, even when they have been enacted in accordance with prescribed procedures,[14] a conception often encapsulated by the notion of "rule through law." Instead, it resists identification with a self-referential legality characteristic of the pre-constitutional *Rechtsstaat*, in which law functioned predominantly as the expression of the state's will rather than as a limit on it.[15] A genuine commitment to the rule of law presupposes an autonomous normative force that extends beyond the positive content of legal provisions, thereby ensuring that law operates as a check on arbitrary power rather than as its instrument.

In his quest to identify the feature that distinguishes a mere legal system from one governed by the rule of law, Krygier offers a pivotal insight: rather than cataloguing institutional features, formal rules, or procedural mechanisms, attention should be directed toward the *telos* – the ultimate purpose – of the rule of law. The question is not simply what the rule of law *is*, but what it *does* and which ends it serves. From this perspective, the defining feature of the rule of law is that it constrains and directs the exercise of power, whether public or private, in ways that preclude arbitrariness.[16] Building on Krygier's

13 CRAIG, Paul, "Definition and Conceptualization of the Rule of Law and the Role of Judicial Independence Therein: Perspective from Practitioners and Academics", in *Rule of Law in Europe. Perspective from Practitioners and Academics* (CRAIG, Paul et al. eds.) European Judicial Training Network, 2019, p. 1.

14 ROSENFELD, *supra* no. 313, p. 1325.

15 *Ibid.* p. 1319.

16 KRYGIER, Martin, "Why the Rule of Law is too important to be Left to Lawyers", *Law of Ukraine: Legal Journa*l, 2013, p. 23.

functional approach, some scholars have identified a structural duality within the legal order: a distinction between *gubernaculum* – the exercise of sovereign will – and *jurisdictio*, the authority to interpret and articulate what the law is. This "duality of law"[17] encapsulates a fundamental and necessary tension at the heart of any legal system committed to the rule of law. It entails, first, a protective function: shielding individuals from arbitrary domination by those who wield power. Second, it presupposes the existence of a normative space in which the exercise of power can be contested, questioned, and subjected to legal standards. While such a condition may not be imperative across all democratic systems, it is fundamental to the normative fabric of constitutional democracies.

Hence, the autonomy of the *jurisdictio* facet of the law, i.e. the authority to interpret and articulate law in accordance with fundamental rights and shared constitutional values, is now extensively codified in national constitutions and international legal charters and conventions.[18] Additionally, the establishment of a space for dialogue – a discursive arena in which the legitimacy and appropriateness of the exercise of power through law can be questioned, contested, and justified – requires that those entrusted with the creation and application of norms adhere to the principles of transparency, accountability, and responsiveness.[19] It is through such dialogic engagement with the mentioned conditions of transparency, accountability and responsiveness that the rule of law acquires its democratic legitimacy and safeguards against arbitrariness.

Ultimately, the rule of law – understood as a counterbalance to sovereign will and arbitrary power – does not originate merely from an act of state self-restraint, but rather from a deeper sense of *justice*: a form of social normativity that transcends the sovereign's exclusive authority and preserves the capacity to contest illegitimate exercises of power. Framed in this way, the rule of law demands a more expansive conceptual lens, one that fully integrates its social and democratic dimensions as constitutive elements rather than ancillary features. Furthermore, the institutional expressions through which the rule of law is realized are not fixed, but evolve in accordance with specific historical and sociopolitical contexts, enabling different societies to instantiate this ideal through different legal and constitutional arrangements

17 PALOMBELLA, Gianluigi, "The Rule of Law as Institutional Ideal" in *Rule of Law and Democracy: Inquiries into Internal and External Issues* (MORLINO, Leonardo and PALOMBELLA, Gianluigi eds.), vol. 115. Brill, Leiden, 2010, p. 31.

18 *Ibid*. p. 22.

19 MORLINO, Leonardo, "The Two ''Rules Of Law'' Between Transition to And Quality Of Democracy", in L. Morlino and G. Palombella (eds.), *supra* no. 16, p. 61.

2.2. The Dialogic Nature of the Rule of Law in the EU.

An immanent conception of the rule of law within the European Union underscores its inherently dialogic character. We use the term 'immanent' to refer to a conception that arises from within the Union's own legal and institutional framework, grounded in the internal nature as a multi-level, composite constitutional order rather than derived from external or abstract ideals. Indeed, as noted by Ingolf Pernice, there is an evolving constitutional architecture in the post-Amsterdam era, a multi-level constitution, wherein national constitutions are linked through a complementary constitutional framework established by the European Treaties – a *Verfassungsverbund* – that reflects a division of powers and accommodates the multiple, overlapping political identities of EU citizens (regional, national, and supranational).[20] This concept denotes the coexistence of diverse interrelated constitutional orders: the national and the European. Rather than constituting separate or hierarchically arranged spheres, these orders are mutually embedded and function within a pluralistic structure. In this sense, national and European constitutional norms are not only intertwined but also interdependent in constituting a coherent and integrated legal system.[21]

This perspective recognizes that the EU rule of law is not a static or externally imposed norm but a normative construct that evolves through the interplay of national and supranational actors, principles, and legal cultures. As the CJEU notes, "whilst they have separate national identities, inherent in their fundamental structures, political and constitutional", member states are expected to "adhere to a concept of the rule of law which they share, as a value common to their own constitutional traditions".[22] Therefore, the rule of law would form part of the "common heritage"[23] of European constitutional traditions and it can only be meaningfully developed through a shared and inclusive deliberation among all constitutional actors within the EU's multi-level ecosystem. In this context, dialogue becomes more than a mere procedural formality but a structural

20 PERNICE, Ingolf, "Multi-level Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", *CML Rev,* 36, 1999, p. 707. When employing the widely used term "multi-level constitutionalism", I refer to the more analytically precise notion of a composite constitution. This latter concept more accurately reflects the European constitutional architecture, wherein national constitutions and the EU legal order are integrated on an ostensibly equal footing, sustaining a relationship marked by relative heteronomy. *See* BESSELINK, Leonard F.M, *A Composite European Constitution,* Europa Law Publishing, Groningen, 2007.

21 PERNICE, Ingolf, "Multi-level Constitutionalism and the Crisis of Democracy in Europe", *European Constitutional Law Review* 11.3, 2015, p. 545.

22 ECJ 16 February 2022, Case C-156/21 *Hungary* v *Parliament and Council*, ECLI:EU:C:2022:97 para. 234.

23 KUMM, Mattias, "Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called", *American Journal of Comparative Law,* 54 Supplement Issue, 2006, p. 517.

necessity, an essential mechanism for mediating tensions between divergent legal orders, articulating shared values and legitimizing the exercise of public power.

The dialogic nature of the European Union's rule of law unfolds along three distinct yet interrelated dimensions: functional-ontological, organic-constitutional, and legitimacy-based. If one accepts that the rule of law presupposes a space for contrast, objection, and scrutiny of sovereign arbitrariness – a *jurisdictio* distinct from the *gubernaculum* – it follows that the rule of law is, in its very ontology, dialogical. Dialogue – understood etymologically as the process of "speaking" or "reasoning" (*logos*) "through" or "across" (*dia*), i.e. an exchange between multiple actors – performs the crucial function of constituting and sustaining the duality of law. It maintains the tension necessary to prevent the consolidation of arbitrary power (functional-ontological dimension). Secondly, the presence of multiple constitutional levels and overlapping competences within the EU legal order demands continuous dialogical engagement among constitutional actors, even where principles have been harmonized or are normatively equivalent (organic-constitutional dimension). Finally, the dialogic character of the rule of law enhances the legitimacy of legal authority and enforcement, a cornerstone of constitutional democracies and an especially salient concern within the EU context (legitimacy-based dimension).

This dialogic conception is closely aligned with the notion of the "rule of law from below,"[24] an approach that calls for a paradigmatic shift in how the rule of law is understood, emphasizing a bottom-up perspective. Within this perspective, particular attention is given to societal dynamics and the interests of individuals and civil society groups, thereby facilitating a deeper engagement with the structural causes underlying rule of law backsliding and a more effective response to them. This perspective arguably resonates more coherently with the normative foundations of the rule of law in constitutional democracies, as well as with conceptions of 'justice' rooted in forms of social normativity that transcend the state. Notably, recent developments ("updates") to the 2014 Rule of Law Framework appear to reflect this orientation, highlighting both the need to move beyond an institution-centric approach and the importance of involving civil society actors at regional and local levels.[25]

24 BUYSE, Antoine, et al, "The rule of law from below-a concept under development", *Utrecht Law Review*, 17.2, 2021.

25 European Commission Communication, *Further strengthening the Rule of Law within the Union state of play and possible next steps*, COM (2019) 163 final, p. 11 and European Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, COM(2019) 343 final.

3. RULE OF LAW AS AN INFRASTRUCTURE FOR EU INTEGRATION AND CONTROL. PITFALLS AND LIMITATIONS.

3.1. European Governance through the Rule of Law: Towards a Constitutional Articulation.

In a landmark judgment, the CJEU famously characterized the European Community as a "community based on the rule of law".[26] In a further twist, the Court has gone a step further by elevating the values enshrined in Article 2 TEU – including, prominently, the rule of law – as constitutive elements of the "very identity of the EU",[27] which is by no means a trivial matter.[28] We can observe two principal operational implications arising from the CJEU's elevation of the rule of law to the status of a constitutional principle and a constitutive element of the European Union's identity. It will affect, on the one hand, the interpretative-legal component of the European multi-level constitutional system, and on the other, its legal-institutional component.

Firstly, within the framework of plural constitutionalism, which acknowledges the coexistence of two potentially applicable constitutional orders, multi-level constitutionalism provides a distinctive approach to resolving legal issues and specific cases. Rather than merely determining the ultimate authority for rule application based on overarching constitutional principles, multi-level constitutionalism requires the formulation of hetero-integrative legal responses that recognize the composite nature of the relevant legislative and constitutional frameworks, thereby ensuring the coherent operation of the system as a whole.[29] This process of normative integration transcends the simple application of predetermined criteria and extends beyond the interpretative role of judges in

26 ECJ 23 April 1986, Case C-294/83 *Parti écologiste "Les Verts"* v *European Parliament,* ECLI:EU:C:1986:166 para. 23. For an analysis of the consideration of the rule of law as a constitutional principle of Union law, *see* PECH, Laurent, "'A union founded on the rule of law': meaning and reality of the rule of law as a constitutional principle of EU law." *European Constitutional Law Review*, 6.3, 2010.

27 ECJ 22 February 2022, Case C-156/21 *Hungary v European Parliament and Council of the European Union,* ECLI:EU:C:2022:97 para. 127.

28 *See,* e.g. CRUZ MANTILLA DE LOS RÍOS, Pablo, "La identidad constitucional de la Unión Europea: Una categoría jurídica en construcción", *Estudios de Deusto: Revista de Derecho Público,* 70.2, 2022. ROCA FERNÁNDEZ, María José, "La identidad constitucional de la unión europea en la jurisprudencia del TJUE: pasado, presente y futuro". *Revista de Derecho Constitucional Europeo*, 41, 2024.

29 CALLIESS, Christian and SCHNETTGER, Anita, "The Protection of Constitutional Identity in a Europe of Multi-level Constitutionalism", in *Constitutional Identity in a Europe of Multi-level Constitutionalism* (CALLIESS, Christian and VAN DER SCHYFF, Gerard, eds.), Cambridge University Press, Cambridge, 2020, p. 350.

adjudication. It promotes substantive and procedural connectivity among legal orders through shared normativity, permeability, and procedural solidarity. Importantly, this quest for unity does not imply uniformity but embodies a dynamic and ongoing dialogue, adapted to the specificities of individual cases and contexts.

In this context, the rule of law, alongside the national identity clause of Article 4(2) TEU, emerges as a key element in the dialogical interplay among the diverse actors of the European multi-level constitutional system. In particular, the rule of law functions as a substantive constraint on the invocation of national identity. While this provision was originally intended to safeguard the diversity of member states within the EU's constitutional framework, it has, in certain instances, been instrumentalised strategically by illiberal governments as a rhetorical shield. These regimes have sought to justify, in an abusive manner, measures aimed at dismantling liberal democratic checks and balances, measures fundamentally at odds with the political ethos and normative architecture of the Union. By affirming the rule of law as integral to the Union's identity, the CJEU places clear limits on such abusive appeals to national constitutional particularism.[30]

Second, and regarding its legal-institutional component, the rule of law has not remained a purely abstract value but has been progressively translated into concrete legal and policy mechanisms. The Union assumes the role of a constitutional counter-power or *jurisdictio*, – drawing on Palombella's distinction between *gubernaculum* (the exercise of political power) and *jurisdictio* (the authority of law) –[31] capable of restraining the excesses, abuses, and authoritarian tendencies of illiberal national governments within the multi-level constitutional order. This process of "operationalization" has been spearheaded by the European Commission through the development of an array of instruments, such as the Rule of Law Framework, annual Rule of Law Reports, and Regulation 2020/2092 on a General Regime of Conditionality for the Protection of the Union Budget (Rule of Law Conditionality Regulation) linked to budgetary allocations. These tools reflect a growing consensus that the rule of law must serve as both the normative foundation and the functional rationale for safeguarding democratic governance within the EU's multi-level constitutional order.

This process has been often described as "competence creep,"[32] whereby EU institutions have expanded their influence into areas traditionally considered

30 See, e.g. SCHOLTES, Julian. "Abusing constitutional identity." *German Law Journal,* 22.4 (2021); CRUZ MANTILLA DE LOS RÍOS, Pablo. "Identidad nacional y valores de la Unión Europea: límites a una interpretación extensiva del artículo 4.2 TUE." *Revista de Derecho Político,* 114, 2022.

31 PALOMBELLA, Gianluigi, "The Rule of Law as Institutional Ideal", *supra* no. 319, p. 61.

32 GARBEN, Sacha, "Competence creep revisited", *Journal of Common Market Studies*, 57.2 2019, p. 205. For an analysis of competence creep in the context of the Rule of Law Conditionality

within the exclusive domain of member states. Beginning with the landmark *Portuguese judges case*[33] *and against the backdrop of judicial capture and court-packing strategies in Hungary and Poland, the CJEU has progressively expanded the Union's capacity to oversee the organization of national judicial systems. This supervisory authority is invoked in instances where domestic measures – such as lowering the mandatory retirement age for judges or instrumentalising disciplinary regimes against members of the judiciary – are deemed to pose a systemic threat to the rule of law. While Article 2 TEU and its catalogue of Union values, including the rule of law, are not in themselves directly justiciable for the time being, the Court held that Article 19 TEU gives "concrete expression"*[34] *to the value of the rule of law within the EU legal order.*

Relying on a dynamic and, at times, contested interpretation of Union primary law, the CJEU asserted that the second subparagraph of Article 19(1) TEU imposes a binding obligation upon the member states to guarantee judicial independence. Crucially, this obligation applies even in circumstances falling outside the direct scope of the fundamental right to a fair trial before an independent tribunal under Article 47 of the Charter of Fundamental Rights of the European Union, the applicability of which is confined by Article 51(1) of the Charter to situations where member states are implementing Union law. Through this reasoning, the Court effectively constitutionalized the principle of judicial independence within EU primary law, recognizing national courts as integral components of the "European judiciary" to the extent that they are, or may be, called upon to interpret and apply provisions of Union law.[35]

As previously mentioned, at the level of the European Commission this evolution has taken shape through the deployment of a comprehensive "rule of law toolbox," comprising legal enforcement, soft law instruments, economic governance mechanisms, and diplomatic engagement. These tools enable the Union to act both directly and indirectly in defence of rule of law standards across its multi-level constitutional space. This proactive agenda encompasses various levels of engagement.[36] On a promotional level, the EU supports civil society

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Regulation see, FISICARO, Marco. "Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation: ECJ Judgments of 16 February 2022, Cases C-156/21, Hungary v Parliament and Council and C-157/21, Poland v Parliament and Council", *European Constitutional Law Review*, 18.2, 2022.

33 ECJ 27 February 2018, Case C-64/16 *Associaçao Sindical dos Juizes Portugueses,* ECLI:EU:C:2018:117.

34 ECJ Case C-64/16 *Associaçao Sindical* (no. 33) para. 32.

35 BONELLI, Matteo, and CLAES, Monica, "Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses", *European Constitutional Law Review*, 14.3, 2018.

36 European Commission, Communication "Strengthening the Rule of Law within the Union: A Blueprint for Action", COM(2019) 343 final.

initiatives, judicial networks and institutional dialogues while also investing in transparency and access to information, all actions directed to foster a rule of law culture. At the preventive stage, mechanisms such as the Annual Rule of Law Cycle, the European Semester, and country-specific dialogues allow for early detection of systemic risks and facilitate structured responses through political debate and mutual learning. These instruments not only monitor developments but also encourage reforms in justice systems, anti-corruption efforts, media pluralism, and checks and balances.

When more serious breaches arise, the Union resorts to targeted legal and financial measures. These include infringement proceedings, the Rule of Law Framework, and Article 7 TEU, which allows for sanctions in response to persistent violations. Moreover, financial conditionality mechanisms, such as Regulation 2020/2092[37] and the Recovery and Resilience Facility[38] link respect for the rule of law to access to EU funds, making the rule of law a functional component of economic governance. Taken together, these tools reflect a shift from passive norm-setting to active constitutional engagement, underscoring the European Commission's transformation into a vigilant guardian of the rule of law. This dynamic not only reaffirms the normative foundations of the Union but also positions the rule of law as an infrastructure of European integration itself.

The European Commission has developed a sophisticated (and sometimes controversial) technological apparatus to exercise its expanded powers and responsibilities in safeguarding compliance with the EU's rule of law standards. This apparatus consists of a series of tools and indicators that form part of what some scholars have termed an emerging European "quantitative constitutionalism".[39] Among the central instruments are the Annual Rule of Law Reports, launched in 2020, which provide country-specific assessments based on four key pillars: judicial independence, anti-corruption frameworks, media pluralism, and institutional checks and balances. These reports aim to prevent breaches by offering early warnings and fostering dialogue. Complementing them is the EU Justice Scoreboard, a comparative analytical tool measuring the efficiency, quality, and independence of national justice systems. It provides crucial data that feeds into both the Rule of Law Reports and the European Semester, the EU's broader economic governance framework. Additionally,

37 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

38 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

39 The considerations regarding European numerical constitutionalism and its impact on the rule of law have been drawn from the workshop held in Bologna this past May, which focused on the analysis of this issue. See, https://site.unibo.it/governonumeri/en/events/numeric-constitutionalism-how-quantitative-indicators-shape-rights-and-powers-within-the-european-member-state

the Eurobarometer on the Rule of Law surveys public perceptions of rule of law principles, justice systems, media pluralism, and institutional checks and balances across all member states.[40]

At the legal-normative level, although the indicators themselves lack binding force they contribute to the definition of compliance with EU values and guide potential enforcement actions, such as infringement proceedings under Article 258 TFEU, the application of the Rule of Law Conditionality Mechanism, or even the activation of Article 7 TEU. Recital 16 of the Rule of Law Conditionality Regulation makes explicit reference to several of these instruments – such as the Rule of Law Reports, the Justice Scoreboard, and reports from bodies like the Venice Commission or OLAF – as relevant sources in assessing breaches of the rule of law. The Commission's Guidelines on the application of the Conditionality Regulation[41] further underscore the importance of a comprehensive, qualitative assessment informed by these data sources. This interpretive approach has also been affirmed by the CJEU, which recognized the legitimacy of the indicators, characterizing them as rebuttable evidence (iuris tantum), and emphasized the Commission's duty to carry out a thorough and diligent assessment on the relevancy and reliability of data.[42]

According to some scholars,[43] these measurement technologies perform a crucial normative and integrative function in the EU's multi-level constitutional framework. First, by translating abstract legal values into measurable indicators, rule of law metrics contribute to normative clarity and substantive coherence, thus reinforcing a shared understanding of the constitutional essence of the rule of law and helping to harmonize expectations across diverse national contexts. Moreover, this fact-based approach is said to embody a realist sensibility by prioritizing "law in action" over merely formal compliance. These measurement practices also foster a transnational community of practice – uniting national and EU actors, civil society, and academia – around a common evaluative grammar. In doing so, they enhance mutual learning, institutional dialogue, and normatively

40 European Commission, *European Rule of Law Mechanism: Methodology for the Preparation of the Annual Rule of Law Report*, Brussels, 2020. https://ec.europa.eu/info/sites/default/files/rule_of_law_mechanism_methodology_en.pdf

41 European Commission, *Guidelines on the Application of Regulation (EU, Euratom) 2020/2092 on a General Regime of Conditionality for the Protection of the Union Budget*, C(2022) 1382 final, 2 March 2022, section 5.2.1. General sources of information (63).

42 ECJ Judgment of 16 February 2022, Case C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97 para. 353-359.

43 See, URUEÑA, René, "Indicators and the law: A case study of the rule of law index", in *The quiet power of indicators: Measuring governance, corruption, and rule of law* (MERRY, Sally Engle, DAVIS, Kevin E, and KINGSBURY Benedict, eds.), Cambridge University Press, 2015, p. 75-102. Although the author analyses the World Justice Project's Rule of Law Index in the context of development policy agendas, many of the virtues he highlights are transferable to other rule of law indicator systems, such as the one employed by the European Commission.

grounded convergence without imposing legal uniformity, in line with the EU's commitment to pluralism and respect for constitutional diversity on the basis of the European multi-level constitutionalism. Finally, their empirical and technocratic nature seeks to compensate for the EU's democratic legitimacy deficit by relying on an apparently neutral, empirical, and ultimately technical form of legitimacy.[44]

3.2. Between principle and Practice: Pitfalls and Shortcomings in the EU's Upholding of the Rule of Law.

Much of the doctrinal and jurisprudential reflection and debate on the EU's Rule of Law has centred on its legal status within the Union's complex multi-level governance system, its implementation in legal practice, and the evolving attribution of competences and new EU powers associated with it. However, comparatively less attention has been devoted to the substantive and material dimensions of the type of Rule of Law that is emerging from the EU's new strategic agenda, in other words, the concrete embodiment or 'corporisation' of the rule of law that the EU has undertaken over the past decade. From a critical yet constructive perspective, three main lines of critique can be identified in relation to the EU's conceptualization and use of the rule of law. These pertain to concerns about its coherence, the potential for conceptual and practical reductionism, and the superficiality or ineffectiveness of its diagnostic capacity in addressing the deeper structural drivers behind democratic backsliding in Europe.

Regarding the first set of objections, concerns have been raised about the coherence of the European Union's role as both a guardian of the rule of law and a subject bound by it. The EU positions itself as an objective and independent referee that can exercise an increasingly preventive role of prima facie *jurisdictio* before threats to the rule of law that are of a systemic nature in the member states. This aligns with the ethos of the above analysed EU *Rule of Law Framework*. However, although this framework appears consistent with a dialogic vision of the rule of law, the credibility of the EU in this role depends on its coherence in adapting its internal functioning to the rule of law standards it preaches.

Indeed, there is a well-founded criticism that warns of a conception of the EU rule of law that adopts only one of the two senses the rule of law envisages: ensuring compliance by subjects (first implication of its ambivalent nature) while suppressing the possibility of contrasting that the law is not the result of an arbitrary exercise of power (second implication). In this regard, the EU rule of law language is challenged for its tendency to prevent "substantive arguments

44 For a critical analysis of the phenomenon, see SÁNCHEZ-CUENCA, Ignacio, "From a deficit of democracy to a technocratic order: The postcrisis debate on Europe", *Annual Review of Political Science*, 20.1, 2017, pp. 351-369.

of principle being made".[45] In the EU, the rule of law would be invoked to claim the supremacy, autonomy, and direct effect of European law,[46] and to expand its powers without much concern for what that implies in substantive terms. This proclamation is made by adhering to procedural principles, without paradoxically allowing for analysis of the substantive content of the values it entails (in this case, the rule of law). This approach effectively revives the pre-constitutional *Rechtsstaat*, the self-referentiality of a legal order.

Turning to the second category of critiques, concerns may be raised regarding the scope and significance attributed by the European Union to the concept of the rule of law in the current context of democratic backsliding within Europe. The EU does not adhere to a singular, canonical definition of the rule of law. However, we can say that the European Commission has embraced a broad and substantive approach.[47] This framework, largely inherited from the Venice Commission's 2016 Rule of Law Checklist,[48] identifies six key principles: legality, legal certainty, prohibition of arbitrariness by executive powers, independent and impartial courts, effective judicial review – including respect for fundamental rights – and equality before the law. Similarly, Article 2 of the Rule of Law Conditionality Regulation outlines the Rule of Law to encompass these principles, while also emphasizing the separation of powers and non-discrimination.

However, the EU's Rule of Law Mechanism does not fully encompass all the complex aspects inherent in the rule of law as a normative ideal. Instead, it often reduces this complexity to a limited set of proxies, focusing primarily on judicial independence, anti-corruption efforts, media pluralism, and institutional checks and balances. Critics argue that this approach is excessively legalistic and disproportionately centred on judicial independence,[49] neglecting broader democratic principles such as media freedom, electoral integrity, and civil liberties. Furthermore, this narrow focus often sidelines the experiences and vulnerabilities of marginalized groups, such as Roma communities, migrants,

45 KOCHENOV, Dimitry V, "Restoring Dialogical Rule of Law in the European Union: Janus in the Mirror", *Cambridge Yearbook of European Legal Studies*, 2024, p.1. The author offers several examples of this alleged denaturalization of the rule of law by suppressing its dialogic character: the presumption of guilt as a requirement of mutual trust in European Arrest Warrant cases; the margin of appreciation afforded to FRONTEX by the Court; mistreatment of migrants on the EU's Eastern border etc.

46 *Ibid.* p. 3.

47 VON BOGDANDY, Armin, ANTPÖHLER, Carlino, and IOANNIDIS, Michael, "Protecting EU Values-Reverse Solange and the Rule of Law Framework", *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* 2016-04, p. 11.

48 BEQIRAJ, Julinda, and MOXHAM, Lucy, "Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law", *Hague Journal on the Rule of Law*, 14.2, 2022.

49 VAN MALLEGHEM, Pieter-Augustijn, "Legalism and the European Union's rule of law crisis", *European Law Open*, 3.1, 2024.

or LGBTQ+ individuals, resulting in a portrayal of the rule of law that obscures structural inequalities and societal exclusions. At the production level, although the EU's rule of law monitoring framework prepares its annual reports based on consultations with member states, civil society organizations, and professional associations – which nonetheless represents an important step forward to be acknowledged –, the overall process remains predominantly top-bottom. The European Commission controls the structure of these consultations, frames the questionnaires, and ultimately decides which findings are incorporated into the final reports. While participation formally exists, it is often managed and constrained, limiting the capacity of local actors to meaningfully influence the conceptual categories, benchmarks, and normative standards applied.

Moreover, within the current EU strategy, the rule of law is increasingly framed through an 'economized' lens, as instruments like the European Semester, Recovery and Resilience Facility or the Rule of Law Conditionality Regulation link its enforcement to the protection of the EU budget. This shift redefines the rule of law less as a constitutional cornerstone of democracy and more as a financial safeguard against inefficiency and as an instrument to restore growth and competitiveness.[50] As a result, enforcement mechanisms are primarily triggered by breaches with tangible budgetary implications, while broader democratic erosion may go unaddressed. Tools such as the EU Justice Scoreboard, though aimed at improving judicial efficiency, largely focus on indicators aligned with market rationality, offering limited insight into the actual independence or fairness of judicial systems.[51]

Finally, the emphasis on just some measurable aspects produces a recursive effect, where these aspects define the understanding of the rule of law while more complex, less quantifiable dimensions are consequently overlooked. Over time, this discursive narrowing threatens to flatten the normative richness of the rule of law into a mere checklist of formal institutions and procedures. This issue is particularly concerning given that the rule of law has become the principal instrument employed by the European Union to confront complex phenomena such as democratic backsliding and the rise of authoritarian tendencies within its own member states.

The third, and perhaps most complex, category of objections or critiques concerns the effectiveness of a strategy centred on a reduced conception of the rule of law – namely, judicial independence – in addressing the broader phenomenon of democratic deterioration within the European Union,

50 FROMONT, Louise, "What EU Conditionality Says about the Rule of Law", *European Journal of Risk Regulation*, 2024, p. 8.

51 JAKAB, András, and KIRCHMAIR, Lando, "How to develop the EU justice scoreboard into a rule of law index: using an existing tool in the EU rule of law crisis in a more efficient way", *German Law Journal*, 22.6, 2021, p. 936.

particularly in several Eastern European member states.[52] In this respect, some scholars have drawn attention to the limitations of addressing democratic backsliding by concentrating on a single aspect of what is, by its nature, a multifaceted and complex phenomenon. Consequently, the EU's strategy, with its predominant focus on judicial independence as the principal indicator of adherence to the rule of law, may fail to confront the broader and deeper challenges undermining democratic systems in some member states. Against this backdrop, it is increasingly argued that, in addition to the traditional juridical-liberal approach, two further dimensions merit attention: the discursive-cultural and the participatory.[53]

The discursive-cultural dimension relates to the strength and vitality of a society's civic culture, i.e. the existence of a dynamic public sphere open to rational, reasoned debate over publicly justified arguments, and a political culture characterized by mutual respect between competing political proposals and adversaries, mutually viewed as legitimate opponents rather than enemies to be destroyed.[54] At its core, this dimension concerns the existence of a shared ethical and political foundation broadly recognized and respected by the different political forces within a democratic society. The participatory dimension, in contrast, refers to what some have described as the current curtailment of democracy's popular components. This is reflected in a growing disaffection with political institutions, particularly among younger generations, as well as a decline in political activism and participation in political parties, civic organizations, and other forms of collective and social engagement.

The complexity of addressing a multidimensional democratic backslide lies in the fact that, while procedural safeguards may address certain manifestations of it, some other challenges such as the quality of deliberation of a democratic system cannot be sufficiently resolved through institutional or legal mechanisms alone. Rather, they are deeply rooted in the civic and political culture of societies and their political elites, on which the impact of institutional and legal reforms remains limited. Nevertheless, a richer, dialogic conception of the rule of law might be better equipped to engage with the problems posed by what some have termed 'post-democracy'. Such an approach requires, among other things, an appreciation of the deeply contextual character of the rule of law. In this sense, it would be detrimental to apply identical forms or 'templates' of the rule of law

52 See, SCHEPPELE, Kim Lane, VLADIMIROVICH KOCHENOV, Dimitry and GRABOWSKA-MOROZ, Barbara, "EU values are law, after all: Enforcing EU values through systemic infringement actions by the European Commission and the member states of the European Union." *Yearbook of European law* 39 (2020); DEINHAMMER, Robert. "The Rule of Law: Its Virtues and Limits." *Obnovljeni Život: časopis za filozofiju i religijske znanosti* 74.1. (2019).

53 GORA, Anna, and DE WILDE, Pieter, "The essence of democratic backsliding in the European Union: deliberation and rule of law." *Journal of European Public Policy* 29.3 (2022), p. 348.

54 *Ibid.* p. 346.

across all member states and societies. Rather, what is required is a thorough analysis of the structural causes underpinning the dysfunctions observed within different national legal and political systems, in order to adequately address the challenges they pose to the effective operation of the constitutional order in accordance with the regulative ideal of the rule of law.

In this context, it is also essential to move beyond absolute legal conceptions. Judicial independence provides a pertinent example. While it is undeniably important as an instrumental safeguard for ensuring that a legal and political system functions in accordance with the rule of law, the specific meaning of 'judicial independence' inevitably varies across societies and historical contexts. Few would advocate for a judiciary entirely detached from democratic sensibilities, drawn exclusively from a single social class or background, or one that might foster a "juristocracy"[55] disconnected from public accountability and democratic values.

Once again, the dialogic character of the rule of law proves fundamental within the EU context for two reasons. First, it must be sufficiently responsive to the specific political and cultural circumstances of each Member state. Second, at the EU level, what the rule of law means cannot be understood in isolation but must be conceived as the product of a convergent synthesis of the diverse constitutional and legal traditions of the Union's member states. Only through this dialogic, pluralist, and context-sensitive approach can the EU hope to uphold a meaningful and resilient understanding of the rule of law as an effective instrument against democratic backsliding.

4. STRENGTHENING EU CITIZENSHIP THROUGH THE RULE OF LAW: EXPLORING NEW PATHWAYS.

4.1. Citizens as Active Agents in the Defence of a Dialogic, Bottom–up Rule of Law.

As previously analysed, the Union has appropriated the longstanding institution of the rule of law as one of the central legal infrastructures for articulating, on the one hand, its multi-level constitutional framework, and on the other, as a legal-political instrument to confront populism, illiberal governments, and the broader phenomenon of democratic backsliding in the Western world. However, little attention has been devoted to the connection between the still-

55 GINSBURG, Tom, "Pitfalls of measuring the rule of law", *Hague Journal on the Rule of Law*, 3.2, 2011, p. 273.

evolving configuration of the rule of law as a foundational value of the European project under Article 2 TEU, and the equally evolving reality of Union citizenship as an autonomous legal status with substantive meaning, capable of providing a deeper political identity to the EU as a political community of shared values.

In the preceding paragraphs I have argued for a conception of the rule of law as a regulative ideal, one that entails the control and restraint of arbitrary power. Consequently, this rule of law is ontologically dialogic and must be dynamic and sensitive to national and social contexts. Furthermore, in the EU context, the rule of law should be the result of catalysing the plurality of diverse constitutional and legal systems and traditions. Moreover, the rule of law embodies a dual dimension: on the one hand, it demands a system where the law is respected as an expression of the democratic will and is capable of structuring social and political relations; on the other, it empowers citizens to challenge the arbitrary exercise of power. This second dimension – the capacity of citizens to challenge the arbitrary exercise of power – is closely linked to the justiciability of the rule of law, as emphasized by the CJEU in the previously mentioned *Portuguese judges*' case. At the heart of this principle lies one of its key expressions: judicial independence under Article 19(1) TEU, which is essential for ensuring the effective protection of rights. Although the Court missed the opportunity to firmly anchor the justiciability of judicial independence within the framework of European citizenship, this judicial interpretation nonetheless directly impacts the configuration of EU citizenship by contributing to its shaping and evolution as a substantive and autonomous legal status, whose defining feature lies in its normative commitment to the rule of law. In doing so, it converts the citizen into an active agent in the defence of the rule of law, thereby fostering a democratic, dialogic, bottom-up, and context-sensitive conception of this principle.

In this light, the rule of law ceases to be merely an institutional framework regulating relations between the various branches of government or levels of governance. It becomes a civic concern, with citizens no longer regarded as passive beneficiaries of rights guaranteed by institutions, but as active subjects[56] who, in collaboration with EU institutions, can confront systemic threats to the rule of law and the rights it enshrines. This vision aligns with the EU's traditional reliance on strong 'private' or decentralized enforcement mechanisms, a governance model that has, however, increasingly centralized under the Union's

56 In a similar vein, the so-called reverse *Solange* doctrine, proposed by several scholars, seeks to empower individuals with the capacity to challenge exercises of public authority that deprive them of their fundamental rights. See, VON BOGDANDY, Armin, *et al.*, "A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine", in *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (VON BOGDANDY, Armin and SONNEVEND, Pál eds.), C.H. Beck-Hart-Nomos, Munich, 2015.

new Rule of Law mechanisms,[57] with their system of incentives, sanctions, and integrationist oversight.

4.2. The Rule of Law as a Structuring Component of European Citizenship.

Citizenship or, as Hannah Arendt aptly put it, "the right to have rights",[58] emerges as a cornerstone in the construction of a political community (citizenship as polity-building), transcending the confines of a mere economic project or internal market.[59] Accordingly, any serious European integration project claiming coherence and ambition must necessarily establish the foundations for what it politically means to be a citizen of the Union. The CJEU has similarly acknowledged this in its assertion that Union citizenship is "destined to be the fundamental status of the nationals of the member states".[60] Yet, as in other aspects of European integration, the concept of Union citizenship must be appropriately situated within the EU's compound constitutional system, where national citizenship remains primary and Union citizenship functions as an additional layer. It neither seeks to compete with nor supplant national citizenship, but rather exists in a relationship of interconnection, interdependence, and continuous dialogue. Union citizenship is additional to national citizenship; it adds rights without detracting from national citizenship, enhancing the legal position of nationals of member states within a supranational polity.[61] In essence, the inquiry focuses on examining the concept of a "supranational citizenship", characterized by the coexistence and overlap of two political communities, the national and the European, and the implications this dual belonging holds for legal status, rights, and political identity

In the absence of a formal constitutional amendment, the CJEU has become the principal driver of European integration and the principal architect of the EU's constitutional form. EU citizenship was formally introduced by the Treaty of Maastricht in 1993 (former Article 8, now Article 20 TFEU). Initially, it was conceived as a status complementary to national citizenship,

57 MAIANI, Francesco, and BIEBER, Roland, "Enhancing centralized enforcement of EU law: Pandora's Toolbox?", *Common Market Law Review*, 51.4, 2014, pp. 1060-1062.

58 ARENDT, Hannah, *The origins of totalitarianism*, Harvest/HBJ Book, 1973, pp. 296-297.

59 ELEFTHERIADIS, Pavlos, "The content of European citizenship", *German Law Journal*, 15.5, 2014, p. 777.

60 Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458, para. 31.

61 On the difference between "complementarity" and "additionality", see. SHAW, Jo. "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism" in *The Evolution of EU Law* (CRAIG, Paul and DE BURCA GRÁINNE eds.), Oxford University Press, third edition, 2021, p. 642.

not as an autonomous source of rights but largely anchored in the exercise of fundamental market freedoms. In this early phase, it functioned as an accessory status conferring additional benefits on those already exercising their rights as economically active persons within the internal market, primarily in transnational, cross-border situations. However, from the late 1990s onwards, the CJEU progressively and incrementally expanded both the scope and constitutional significance of Union citizenship.[62] Through a series of landmark rulings, it began to interpret citizenship as a fundamental status for nationals of member states, capable in certain circumstances of generating rights independent of market participation or economic activity. This interpretive shift marked a significant evolution in EU law, moving beyond the purely economic rationale underpinning earlier free movement provisions toward a more individual-centred, rights-based understanding of Union membership. The Court increasingly framed EU citizenship as a constitutional principle within the EU legal order, positioning it as a normative foundation for rights of residence, equality, and protection against discrimination on grounds of nationality, even in contexts with no cross-border or transnational element.

Two doctrinal milestones merit particular mention. First, while member states retain the master key to define the criteria for the acquisition and loss of nationality and to determine European identity in its most entrenched cultural and ethnic meaning,[63] the CJEU held in *Rottmann* that such powers are not absolute. In this case the CJEU stated that "the member states must, when exercising their powers in the sphere of nationality, have due regard to European Union law".[64] Second, in *Grzelczyk*,[65] the Court broadened the scope of EU citizenship and its implicit guarantee of non-discrimination to include economically inactive individuals, thus extending EU citizenship beyond the traditional context of market freedoms. It held that a Union citizen lawfully residing in a host Member state could access certain social benefits as long as they did not place an unreasonable burden on that state's social assistance system. Yet, the most significant doctrinal leap came with *Ruiz Zambrano*, where the Court recognized autonomous rights derived from EU citizenship status, even in the absence of cross-border movement, blurring the traditional distinction between internal and cross-border situations. Most importantly, it introduced the concept of "the genuine enjoyment of the substance of the rights attaching to

62 LENAERTS, Koen, "EU citizenship and the European Court of Justice s 'stone-by-stone'approach", *International Comparative Jurisprudence*, 1.1, 2015.

63 IGLESIAS SÁNCHEZ, Sara, "Constitutional Identity and Integration: EU Citizenship and the Emergence of a Supranational Alienage Law", *German Law Journal*, 18.7, 2017, p. 1799.

64 Case C-135/08, *Janko Rottmann v Freistaat Bayern*, ECLI:EU:C:2010:104, para. 45.

65 Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458.

the status of European Union citizen"[66] as a doctrinal test used to assess whether national measures would effectively nullify the practical benefits attached to Union citizenship.[67]

It is within this constitutional framework that one might envision the development of a bottom-up, dialogic rule of law as a lived experience rather than a purely structural ideal. In this sense, the justiciability of judicial independence becomes integral to the "substance of rights" test, reinforcing the catalogue of rights derived from EU citizenship. A rich and expansive conception of the rule of law provides sufficient flexibility to be normatively creative, equipping citizens with the full range of rights necessary to exercise meaningful oversight over the legitimate exercise of political authority and to contest its potential abuses. This citizen agency extends beyond judicial independence and effective judicial protection to encompass a broader array of accountability mechanisms within administrative procedures, as well as the structural and procedural conditions essential for their proper functioning, including transparency, accountability, and other safeguards indispensable for the establishment of a public sphere in which democratic deliberation can meaningfully unfold.

If, as claimed, the values enumerated in Article 2 TEU constitute the identity of the European Union, and if the Union aspires to be the guardian of these values, then integrating them into the status of Union citizenship is both a legally coherent interpretation and a politically significant operation. There are numerous reasons, grounded in both legal coherence and public and political utility, that support the further development of the EU's rule of law through its anchoring within the legal status of Union citizenship. In this sense, such an approach would help consolidate EU citizenship as a constitutional status with a clearer and more substantive identity, one that goes beyond national citizenship. At the same time, it would strengthen citizens' perception of the Union as the key guarantor of their rights to live in societies grounded in the rule of law, human dignity, freedom, democracy, equality, and respect for human rights, including the rights of minorities. What was once considered the speculative domain of academic debate may soon acquire tangible legal form if the CJEU upholds the

66 Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, ECLI:EU:C:2011:124, para 45.

67 The case law on EU citizenship, however, has not evolved in a linear or consistently expansive direction. In some other decisions like *Dano* (Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358) and *Alimanovic* (Case C-67/14, *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, ECLI:EU:C:2015:597), the CJEU adopted a more restrictive position regarding economically inactive EU citizens claiming social assistance, holding that member states could legitimately deny such benefits to those failing to meet the residence conditions established in secondary law.

European Commission's infringement actions against Hungary[68] by considering Article 2 TEU values as directly justiciable and actionable within the EU legal order.[69]

5. FINAL REMARKS.

We are living in times of profound uncertainty, marked by a pervasive sense of the end of an era, yet without a clear vision of the new world that seems to be emerging, governed by increasingly opaque and elusive codes. At the political level, one of the defining features of this historical moment is the systemic crisis of liberal democracy, one which, among other consequences, entails the erosion and distortion of the rule of law, one of the fundamental pillars that has sustained the political and social order of our modern democracies for a long time. From both national and social populist movements, and even from openly authoritarian projects, the regulative ideal at the heart of the rule of law – namely, the limitation of arbitrary power and the subjection of authority to democratically legitimate law – is being fundamentally questioned.

The EU is by no means immune to this reality. Conscious of the fact that one of its defining traits is its self-conception as a community of law, the EU has gradually developed a sophisticated legal and institutional architecture around the rule of law, conceived as a legal and political instrument to confront democratic backsliding and the rise of illiberal regimes. The renewed prominence and evolving configuration of the rule of law within the Union has transformed it into a organizing infrastructure governing dialogues and legal interactions in Europe's complex multi-level constitutional system. In this respect, the ontologically dialogic character of the rule of law is particularly manifest within the EU, where the Union's democratic deficit and its composite, multi-level nature demand the establishment of clear, legitimate, and participatory spaces of legal and political dialogue.

While it is important to recognize the valuable contributions of the EU's new rule of law strategy to the Union's governance, it is equally vital to address its limitations, blind spots and shortcomings, issues that demand urgent attention

68 Case C-769/22, *European Commission v Hungary*, action brought on 19 December 2022 (pending). This case is significant as it marks the first time the European Commission has brought an infringement action based directly on the values enshrined in Article 2 TEU, challenging Hungary's 2021 law that restricts access to content depicting LGBTQ+ identities for minors. The Commission argues that this legislation violates fundamental EU values.

69 On this issue, see further BONELLI, Matteo, and CLAES, Monica, "Crossing the Rubicon? The Commission's use of Article 2 TEU in the infringement action on LGBTIQ+ rights in Hungary", *Maastricht Journal of European and Comparative Law*, 30.1, 2023.

to secure a coherent and effective application of the rule of law as a foundational component of Europe's constitutional identity. Among these shortcomings are the simplification of the rule of law's rich, multidimensional meaning, its tendency to privilege market-based and budgetary logics over its inherently political and democratic nature, and its frequent conceptualization and enforcement in a top-bottom schema.

In this context, and given the new role assumed by the EU as guardian of the rule of law in Europe in the face of illiberal national governments, we argue for the urgent need to reimagine a new social and constitutional compact around the rule of law between the Union and its European citizens. The rule of law must be removed from the abstract and distant terrain of European institutional architecture and returned to the lived realities of individuals, whose rights and freedoms are the very *raison d'être* of both the rule of law and the European project itself.

By embedding the protection and promotion of the rule of law within the substantive content of European citizenship and the rights it entails, the European Union can advance a more coherent, effective, and participatory enforcement of this foundational principle. In doing so, it would transform citizens from passive beneficiaries of legal safeguards into active agents empowered to detect, contest, and resist systemic threats to democratic governance and fundamental rights. At the same time, such a strategy would cultivate a deeper complicity between European citizens and the very idea of Europe and its normative and civic identity that the Union aspires to incarnate. This complicity would resonate not only in legal and institutional terms, but also in the symbolic, affective, and collective imagination of what it means to be, and to feel, European.

EUROPE FACING THE CHALLENGE OF TAXING MULTINATIONALS: STATE AID – THE APPLE CASE

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SUMMARY: 1. INTRODUCTION. 2. BASIC CONCEPTS OF INTERNATIONAL TAXATION: TAX RESIDENCE; SOURCE–BASED TAXATION; ATTRIBUTION OF PROFITS TO PERMANENT ESTABLISHMENTS. 3. THE APPLE CASE. 4. LEGAL ASSESSMENT. 5. FINAL CONSIDERATIONS. 6. BIBLIOGRAPHY.

1. INTRODUCTION.

One of the main challenges currently facing the European Union and the world as a whole is the effective taxation of the profits obtained by multinational companies. As highlighted in another chapter of this book,[1] this problem stems from two distinct phenomena.

On the one hand, from the behaviour of the multinational companies themselves. In recent decades, we have witnessed the phenomenon of base erosion, through which multinationals shift or allocate profits and expenses derived from their activities to specific jurisdictions in an attempt to obtain tax savings. Hence, what characterizes the operation of entities that form part of a multinational enterprise is that the transactions they carry out with one another are not necessarily subject to market forces and the spontaneous price formation

1 CASTRO BOSQUE, M., "Europe facing the challenge of taxing multinationals: the global minimum tax", in this handbook.

that preside over those carried out by stand-alone entities. This peculiarity leads to especially acute distortions from a tax perspective, as the corporate income taxes of the European Union (EU) member states principally follow the separate entity approach principle, for which every single entity is regarded as a separate taxpayer – including those that form part of a group. To determine their taxable base, the transactions undertaken by stand-alone entities reflect market conditions, as each party bargains to achieve the best possible outcome according to their self-interest. In opposition to it, entities operating within a group may enter into agreements that do not reflect market outcomes, as the parties do not respond to their interest but to the group's interest. Although EU countries – and almost all countries worldwide – have adopted what are known as transfer pricing rules to mitigate the phenomenon, multinational companies still have the possibility of shifting profits from high-tax to low-tax jurisdictions.

The problem also stems from the behaviour of states. In their effort to attract investment, they approve preferential tax regimes or enter into agreements on the application of tax rules to certain taxpayers that may also be considered highly favourable.

In the author's view, the second phenomenon is the main reason why multinationals today do not pay what is referred to as their 'fair share' of taxes in relation to the profits they generate globally. For that reason, it is not surprising that the efforts of the Organization for Economic and Cooperation Development (OECD) [2] and its influence in Europe, aimed at addressing this issue, mainly focus on limiting and coordinating national tax systems and, in particular, targeting the tax advantages granted by certain countries.

At the European level, the lack of coordination between states, intense tax competition to attract investments through fiscal measures, and the slowness in designing and implementing appropriate global measures have, in the author's view, led to regulations such as the prohibition of state aid – originally not designed to combat aggressive tax planning – being used to try to correct such situations.

Indeed, the use of state aid rules to address harmful tax regimes or the abusive application of tax law is not new. The 1998 Commission Communication on the application of state aid rules to measures relating to direct business taxation,[3] and the 1999 Primarolo Report,[4] which identified harmful tax regimes in EU member states and their dependent territories, addressed issues of the

2 Perfectly described in CASTRO BOSQUE, M., "Europe facing the challenge of taxing multinationals: the global minimum tax", in this handbook.

3 98/C 384/03, "Commission Notice on the application of the state aid rules to measures relating to direct business taxation".

4 SN 4901/99, Code of Conduct (Business Taxation) Report, 23 Nov. 1999.

compatibility of transfer pricing regulations with the state aid regime, especially regarding special regimes, administrative decisions, or tax rulings.[5]

After the economic downturn of 2008, however, the political turmoil derived from a series of public media scandals derived from leaks of information on tax avoidance and the launch of the initiative by the OECD to counter base erosion and profit shifting (BEPS) prompted the European Commission to act.[6] Since 2014, DG Competition has reviewed more than 1,000 rulings,[7] and these issues have been magnified due to the opening of state aid proceedings by the European Commission in cases dealing with the application of transfer pricing regulations through secret tax rulings,[8] benefiting multinational companies in Belgium[9] and others such as Apple in Ireland,[10] Fiat[11] and Amazon[12] in Luxembourg, and Starbucks[13] and Nike[14] in the Netherlands. The last-named are particularly relevant to this paper, as they refer to individual decisions by tax authorities clarifying how specific tax regulations apply to particular transactions on arrangements. They are meant to provide legal certainty to taxpayers, but if their content deviates from the applicable regulations they may entail the granting of selective advantages favouring individual undertakings over other competitors.

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5 The CJEU addressed the matter in Joined Cases C-182/03 & C-217/03, *Forum 187*, EU:C:2006:416.

6 See an overview of the use of the prohibition of state aid as means to fight harmful tax competition in the described context in KYRIAZIS, D. "Fiscal state aid law as a tool against harmful tax competition in the EU: déjà vu?", *Yearbook of European Law*, 2022, vol. 41, pp. 279-313.

7 DG Competition, *Working Paper on state Aid and Tax Rulings*, 2016, para. 6, available at https://competition-policy.ec.europa.eu/document/download/cc11b513-0d4b-4617-bbb2-9c8a7cdb59c5_en?filename=specific_aid_instruments_working_paper_tax_rulings.pdf

8 See a description of the facts of these cases in LYAL, R., "Transfer pricing rules and state aid", *Fordham Int´l L.J.*, 2015, pp. 1017-1043.

9 These cases refer to the so-called excess profits scheme, benefited by several MNEs. See C(2015) 9837 final, "Commission decision of 11.1.2016 on the excess profit exemption state aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium". Case T-131/16 RENV, *Excess Profits Scheme*, EU:T:2023:561.

10 C (2016) 5605 final, "Commission decision of 30.8.2016 on state aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple". Opinion of AG Pitruzzella on case C-465/20 P, *Apple*, EU:C:2023:840.

11 C (2015) 7152 final, "Commission decision of 21.10.2015 on state aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat". Joined cases C-885/19 P and C-898/19 P, *Fiat*, EU:C:2022:859.

12 C (2017) 6740 final, "Commission decision of 4.10.2017 on state aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon". Case C-457/21 P, *Amazon*, EU:C:2023:985.

13 C (2015) 7143 final, "Commission decision of 21.10.2015 on state aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks". Joined cases T-760/15 and T-636/16, *Starbucks*, T:2019:669.

14 Decision C (2019) 6 final on state aid SA.51284 (2018/NN). Case T-648/19, *Nike*, T:2021:428.

The application of the state aid prohibition regime in these cases is not unproblematic. As we will have the opportunity to analyse in this article, it is possible that, with the commendable aim of tackling such harmful practices, the state aid prohibition regime is being misapplied. The Apple case will allow us to fully explore the concerns raised in this introduction.

Given the context of our study, in order to properly understand the Apple case and the origin of the issue we aim to analyse here, it is necessary to first explain some basic concepts of international taxation. Specifically, it is essential to understand the notion of tax residence and the distinction between worldwide income taxation and territorial taxation, on the one hand, and the attribution of income to permanent establishments in the case of business profits, on the other (section 2). This will then allow us to understand the particularities of the Apple case (section 3). From there, we will be in a position to carry out a critical analysis (section 4) and to conclude with a summary and final remarks (section 5).

2. BASIC CONCEPTS OF INTERNATIONAL TAXATION TO UNDERSTAND THE APPLE CASE: TAX RESIDENCE; SOURCE-BASED TAXATION; ATTRIBUTION OF PROFITS TO PERMANENT ESTABLISHMENTS.

One does not need to be a tax law expert to know that the fiscal systems of the vast majority of countries provide different rules for taxing income obtained by taxpayers considered tax residents, and for taxing income earned in a given country by taxpayers who are not considered tax residents in that country.

The tax standard for resident taxpayers is characterized by taxing their worldwide income. In principle, the taxpayer is taxed in their country of residence on all income received, regardless of whether it was obtained in that country or abroad. In contrast, the tax standard for non-resident taxpayers is characterized by being territorial (not worldwide). That is, a non-resident taxpayer may be taxed in a given country to the extent that it earns income within that country.

These basic rules of taxation in an international context help to explain the phenomenon of double taxation. Double taxation may occur, among other scenarios, when worldwide income taxation in the country of residence coincides with territorial taxation in the source country. For example, imagine a taxpayer is resident in country X and earns income in country Y. Country X will seek to tax that income under its worldwide income rules, while country Y will also seek to tax the same income because it considers the income was earned or obtained in its territory as a non-resident.

This leads to a typical scenario of double taxation in which both the country of residence and the source country seek to tax the same income earned by a

single taxpayer. The excess taxation that results from this double taxation is addressed through domestic rules in the country of residence and through bilateral treaties or Double Tax Treaties designed to eliminate double taxation. In this way, taxing rights are allocated by determining which income is taxable in the country of residence and which in the source country, and by designing legal mechanisms to avoid double taxation.

In the specific case of business profits, the rule or standard that allows for the allocation of taxing rights to the source country is defined by the concept of a "permanent establishment" (PE). In general terms, a permanent establishment is a fixed place of business through which a given company carries out its activities in a country other than its country of residence. In this way, the source country is allowed to tax the income attributable to the permanent establishment maintained by the non-resident taxpayer in that country.

Thus, in the example mentioned earlier, if a company that is tax resident in country X operates or obtains income in country Y through a permanent establishment, country Y may tax the income attributable to that establishment. The income subject to taxation in Y will depend on the "substance" of the permanent establishment. Specifically, it will depend on the assets, risks, and functions assigned to that establishment. The more assets it holds, the more risks it assumes, and the more functions it performs, the more profits will be attributable to it, and the larger the share of profits that may be taxed in the source country. Conversely, the fewer assets it has, the fewer risks it assumes, and the fewer functions it performs, the less profit will be attributable to it in the source country. The country of residence – in our example, country X – must eliminate the double taxation, usually by exempting the profit attributed to the permanent establishment from taxation. In this way, the business profit attributed to the establishment ends up being taxed exclusively in the source country.

The above is key to a correct understanding of the Apple case, which we will use as an example to highlight some of the main challenges faced by the European Union when trying to effectively tax the profits obtained by multinationals, and whether the state aid prohibition regime is suitable to address those challenges.

This is because, as will be explained below, Apple's tax structure or planning – analysed under the state aid prohibition regime – unfolds in two steps. First, Apple's subsidiary is structured in such a way that it is not a tax resident in any of the countries where it operates, and therefore it is not subject to worldwide income taxation anywhere. As a result, its income can only be taxed under territorial rules. Second, to determine the territorial tax, i.e. the income to be attributed to Apple's permanent establishment (in Ireland) an agreement is reached with the tax administration that is highly favourable to the American multinational.

3. APPLE CASE.

Simplifying the case,[15] in 1980 Apple Inc. based in the United States, set up the following wholly-owned subsidiaries in Ireland: Apple Operations Europe (AOE) and Apple Sales International (ASI). Both companies were incorporated under Irish law, but neither was resident in Ireland for tax purposes at the time relevant to the case. This was because, under the law as it then stood (it has since been amended) a company was resident in Ireland only if it was managed and controlled in Ireland. Since both AOE and ASI were managed and controlled in the United States, they were not resident in Ireland. Since they were not incorporated in the United States, they were not resident in the United States for tax purposes either, so they were not a tax resident anywhere.

Since both companies were not tax residents in Ireland, they could only be taxed on the income obtained in that country (territorial taxation) through the branches or permanent establishments located there.

In addition to their Irish trading activities, both AOE and ASI were parties to a cost sharing agreement with Apple Inc. Under that agreement, AOE and ASI were granted a royalty-free licence to manufacture and sell Apple products outside North and South America in return for sharing costs and risks related to the Apple Group's research and development intangibles. Both companies generated significant profits from Apple Intellectual Property (IP) under the cost sharing agreement, and the case before the Court of Justice of the European Union (CJEU) essentially focused on whether those profits should have been attributed to the Irish branches or permanent establishments and taxed in Ireland.

In order to address the amount of income that should be attributed to the Irish branches and provide legal certainty on that very complex issue, in 1991 and 2007 AOE and ASI agreed on a methodology for computing their Irish taxable profits with the Irish Tax Administration. The methodology consisted basically of a margin or percentage of certain expenses incurred by the branches with certain limits, the result being quite beneficial for the Irish companies.

The chronology of the Case was as follows:

On 12 June 2013, the European Commission (hereinafter, the "Commission") issued a request for information concerning tax rulings granted by the Republic of Ireland to Apple. Subsequently, on 11 June 2014, the Commission initiated a formal state aid investigation under Article 108(2) Treaty of Functioning of the European Union (TFEU).

15 For a more detailed presentation of the Apple structure and tax planning scheme, see TING, A. "iTax-Apple´s International Tax Structure and the Double Non-Taxation Issue", *British Tax Review*, 2014, no. 1. The facts are also outlined in detail in Commission Decision (EU) 2017/1283 of 30 August 2016 on state aid implemented by Ireland to Apple, paras. 39-151, OJ L187/1 (2017).

Following its investigation, the Commission adopted a final decision on 30 August 2016 (comprising 110 pages), concluding that the profit attribution to Apple's Irish branches, as determined under two tax rulings issued in 1991 and 2007, departed from the applicable reference framework under national law. The Commission found that this conferred a selective economic advantage on Apple, thereby constituting unlawful state aid in breach of Article 107(1) TFEU.

Consequently, the Commission ordered the Republic of Ireland to recover the unlawful aid, amounting to approximately €13 billion, together with accrued interest, from Apple.

An appeal was brought before the General Court of the European Union, which, in a judgment dated 15 July 2020 (68 pages), annulled the Commission's finding, holding that the requisite criteria for identifying state aid had not been sufficiently established.

The Commission subsequently lodged an appeal before the CJEU. In a judgment, the CJEU set aside the General Court's ruling and reinstated the Commission's 2016 Decision in full (judgment length: 52 pages). The CJEU definitively held that Ireland's tax treatment of Apple amounted to illegal state aid and reaffirmed the obligation to recover unpaid taxes for the period between 2003 and 2014.

The CJEU found that the 1991 and 2007 tax rulings enabled Apple to benefit from an artificially reduced effective tax rate, in some years as low as 0.005%, thus providing an undue economic advantage incompatible with the internal market. The Court upheld the Commission's recovery order for €13 billion, exclusive of interest. This final judgment concludes the legal proceedings initiated over a decade ago and confirms the Commission's powers of enforcement in the area of state aid and corporate taxation.

In the following section of our paper, we will provide a general legal assessment of this case and its implication for the subject under discussion.

4. LEGAL ASSESSMENT.

The context of this paper does not allow for an in-depth technical analysis of the legal and tax aspects underlying the final decision of the CJEU. However, it is worth noting from the outset that the decision adopted by the Court surprised the academic community at large, and even those who had considered it appropriate to qualify the two tax rulings as state aid.[16]

16 Among others, GARAVAN, Ch. The *Apple Case*: The Right Decision for the Wrong Reasons?, European Taxation, 2024, vol. 64, no. 12.

In the author's opinion, the Irish tax legislation in force at the time regarding the attribution of profits to permanent establishments[17] allowed such a broad margin of discretion that it could, in itself, be considered a (potential) form of state aid. It is evident that this wide-ranging discretion in determining the profits attributable to permanent establishments located in Ireland did not allow for a fair comparison between the tax treatment received by companies operating independently in the market and that received by related companies.[18]

As a result of the above, the Irish rule and its subsequent application through the two tax rulings clearly granted aid in the form of a significant reduction in the taxes that should have been paid in Ireland. Therefore, the measure was clearly selective *de facto*, benefiting a very specific company with significant investment potential, which the country evidently sought to attract. Consequently, it was evident that this created a distortion of competition in the European market by placing Apple in a favourable position vis-à-vis other competitors.

However, the reasoning followed by the CJEU was very different from that just outlined. In fact, the way the CJEU had previously addressed situations similar to the Apple case is quite different from how it ruled in the present judgment. The CJEU was not consistent with the jurisprudence it had previously maintained in cases such as *Engie* and especially *Fiat.*[19] Indeed, the differences between the arguments presented by the CJEU in the Apple case and the settled case law in *Fiat* are notable, not only in formal terms (the Apple judgment is more than three times longer) but more importantly in terms of substantive legal reasoning.

In the *Fiat* case, the CJEU simply stated that the European Commission had made a legal error in determining the general reference framework in its analysis of whether there was state aid in that specific case. Essentially, the Commission's main argument was that the legal reference framework to assess whether the Luxembourg legislation on intra-group transactions constituted state aid

17 According to section 25 TCA 1997 "a company not resident in the state shall not be within the charge to corporation tax unless it carries on a trade in the state through a branch or agency, but if it does so it shall, subject to any exceptions provided for by the Corporation Tax Acts, be chargeable to corporation tax on all its chargeable profits wherever arising.

For the purposes of corporation tax, the chargeable profits of a company not resident in the state but carrying on a trade in the state through a branch or agency shall be […] any trading income arising directly or indirectly through or from the branch or agency, and any income from property or rights used by, or held by or for, the branch or agency […]" (emphases added).

18 For a more detailed analysis of this controversial issue, see LÓPEZ, H.; NAVARRO, A. "EU state aid and the tax allocation of multinationals´ profits", *Common Market Law Review*, 2024, vol. 61, no. 5, pp. 1255-1288.

19 For a more detailed analysis of the differences between the approach adopted by the CJEU in the *Engie* and *Fiat* cases and the one taken in the *Apple* case, see: CFE Opinion statemen, *Apple Case*: state Aid Concerning the (Mis)allocation of Profits to Irish PEs (Opinion statement CJEU) TF 2/2024 on the Decision of the CJEU of 10 September 2024 in *Commission v. Ireland and Others* (Joined Cases C-465/20 P), European Taxation, 2024 (vol 64), no. 12.

should be derived directly from Article 107(1) TFEU. In the Commission's view, that article implicitly required the application of the so-called "arm's length" principle or standard. The CJEU held that this argument was incorrect and that the existence of state aid could not be considered proven. In fact, the Commission had also based its decision on other subsidiary arguments, which the CJEU chose not to evaluate.[20]

If the CJEU had followed the same line of reasoning as in the *Fiat* case, it would have had to uphold the General Court's ruling and consider the Commission's Decision null and void on the grounds that there was no state aid.

However, due to a purely procedural matter, in the Apple case the CJEU avoided addressing this aspect of the Commission's Decision. Specifically, in the appeal filed by the Commission against the judgment of the General Court of the European Union, neither Apple nor Ireland argued that the Commission's Decision was flawed due to a legal error regarding the benchmark used to determine whether state aid existed (i.e., the "arm's length" standard derived from Article 107 TFEU). For that exclusively formal reason, the CJEU concluded it should not examine the matter, considering it *res iudicata*, since the issue had not been formally contested by the parties that benefited from the General Court's judgment.

By considering part of the Commission's reasoning *res iudicata*, the CJEU limited itself to examining the Irish tax measures without addressing the prior question of the reference framework. However, this formal argument had not been applied in other previous cases related to the Apple case. Indeed, this doctrine disregards the Court's recent jurisprudence in the *Amazon* case, where very similar issues were decided and where legal arguments that had not been challenged in the appeal were nevertheless central to the final decision. This suggests, once again, that the CJEU ignored its own case law to resolve the Apple case.[21]

Beyond this, some authors[22] argue that, in this particular case, it is not appropriate to speak of state aid being granted through reduced taxation in Ireland. Essentially, these authors claim that the CJEU conducted a biased analysis when determining the profits attributable to Apple's Irish permanent

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20 For a short comment see author´s post LÓPEZ LÓPEZ, H. The CJEU´s Ruling in the FIAT Case: One Light but Still Many Shadows, Kluwer International Tax Blog, December 5, 2022. (Available at: https://kluwertaxblog.com/2022/12/05/the-cjeus-ruling-in-the-fiat-case-one-light-but-still-many-shadows/).

21 This is stated by GARAVAN, Ch. The *Apple Case*: The Right Decision for the Wrong Reasons?, European Taxation, 2024, vol. 64, no. 12.

22 Among others, see DALY, S.; MASON, R. "state Aid: The General Court Decision in Apple", *99 Tax Notes Int´l 1317*, 2020 (also published as 168 Tax Notes Federal 1791 (2020), Virginia Public Law and Legal Theory Research Paper N. 2020-71, Virginia Law and Economics Research Paper no. 2020-17, King´s College London Law School Research Paper no. 2j020-46.

establishments. They believe there is a certain bias on the part of the Court, driven by the fact that Apple earned very large profits and yet paid little global tax, among other reasons because US regulations allowed those profits to go untaxed.

These authors argue that if the CJEU had limited its examination strictly to the assets, risks, and functions of the Irish permanent establishments, it would have had to conclude that most of Apple's profits should not have been attributed to Apple Ireland. According to them, this is because Apple had little substance in Ireland. They maintain that the know-how resided in the US, where the executives were located and where the company as a whole – including its economic and technological strategy – was managed.

In short, they contend that most of Apple's profits should not have been attributed to Ireland under Irish law. If the CJEU concluded otherwise, it was due to the unusual circumstance that the United States ultimately did not tax those profits, not because they genuinely should have been attributed to the Irish permanent establishments. According to GARAVAN[23], "it is difficult to argue that Apple Inc.'s considerable profits from its IP should have gone untaxed, though one could argue that the proper place for the taxation of that IP was the United States, where it was developed and exploited. It is also hard to resist the conclusion that the reason that the CJEU reached its decision is precisely because it felt those profits required to be taxed". The authors are bolstered in this view by the comments of the CJEU in paragraph 201 of its decision, where it stated that if Ireland's interpretation of its own law were correct and one could not allocate the IP profits to the Irish branches, those profits would "as a matter of principle avoid any taxation in that Member". This is not a ground on which to interpret sovereign national law, but it goes a long way to explaining why the CJEU took a careful path around its own jurisprudence to reach its decision.

Be that as it may, the fact remains that there are many uncertainties surrounding the Apple case. On the one hand, the change in approach by the Court of Justice of the European Union compared to its previous case law is surprising. On the other, there are significant doubts regarding the calculation of the profits that should actually have been attributed to the Irish permanent establishments. Furthermore, as mentioned, in the author's opinion the resolution of the Apple case was much more straightforward, considering the literal wording of the Irish legislation and the broad margin of discretion it granted to the Irish tax authorities.

All of this leads us to question the extent to which the Court of Justice of the European Union is stretching or broadening the application of the state aid

23 GARAVAN, Ch. "The *Apple Case*: The Right Decision for the Wrong Reasons?", *European Taxation*, 2024, vol. 64, no. 12.

regime in order to achieve a result that falls outside its intended purpose. It seems evident that the CJEU either ignored or bypassed Irish law, the findings of the General Court, and its own most recent jurisprudence.[24]

The reason why the CJEU decided the Apple case in this way is difficult to understand. According to some authors, the Court sought to reach the 'right' decision and was willing to engage in a bit of legal sleight of hand to get there.

One might think that the Apple case marks a shift in the jurisprudence of the Court of Justice of the European Union with future implications. However, that does not appear to be the case. Indeed, one week after its decision on Apple, the CJEU reiterated its stance on Fiat. In UK Controlled Foreign Company rules (CFC) (Case C–555/22 P), the CJEU stated that "the Commission is in principle required to accept the interpretation of the relevant provisions of national law given by the Member state concerned"[25] and "may depart from that interpretation only if it is able to establish, on the basis of reliable and consistent evidence … that another interpretation prevails in the state case".[26]

In *Apple*, however, the CJEU did not require any threshold to find a relevant misapplication of national (Irish) law. Instead, it seems to have upheld the Commission's view that "any error in the interpretation and application of national law constitutes an error in the interpretation and application of Article 107(1) TFEU".[27] According to certain authors,[28] neither did it address the appropriate level of discretion that can be afforded to a national tax administration in the application of the law, especially where the legal provisions have a broad scope and leave the details of their application up to that administration. The CJEU did not explain these apparent incongruities with its latest previous case law, despite the fact that Fiat, Engie, Apple and UK CFC had the same judge rapporteur.

5. FINAL CONSIDERATIONS.

The Apple case has allowed us to highlight some of the fundamental challenges currently faced by the European Union in relation to the taxation of profits earned by multinational companies.

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24 GARAVAN, Ch. "The *Apple Case*: The Right Decision for the Wrong Reasons?", *European Taxation*, 2024, vol. 64, no. 12.

25 Par. 97.

26 Par. 98.

27 Par. 171.

28 CFE Opinion statement, *Apple Case*: state Aid Concerning the (Mis)allocation of Profits to Irish PEs - Opinion statement CJEU-TF 2/2024 on the Decision of the CJEU of 10 September 2024 in *Commission v. Ireland and Others* (Joined Cases C-465/20 P), European Taxation, 2024 (vol 64), no. 12.

It shows that the current problem of taxing multinational corporations is not only a problem *of* the states, but a problem *caused* by the states themselves.

It also reveals the problems and difficulties faced by European Union law, particularly those inherent in using the state aid regime to address aggressive tax planning situations, as though it were some kind of general EU anti-abuse clause.[29] The distortion of legal categories to address crisis situations can lead us to find ourselves in a crisis of the law instead of having a legal response to a crisis.

In addition to the strictly legal and technical problems, it should be considered that an excessively rigid application of the state aid prohibition could place the European Union at a competitive disadvantage.[30]

For all these reasons, as a final reflection one must ask whether this is truly a problem that there is a genuine will to solve, or whether the intention is merely to *appear* to address it while clearly ineffective measures are being adopted.

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29 On this idea, see ENGLISH, J., "state Aid Prohibition - the new GAAR in town", *EC Tax Review*, 2021, vol. 4.

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EUROPE FACING THE CHALLENGE OF TAXING MULTINATIONALS: GLOBAL MINIMUM TAX[1]

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SUMMARY: 1. INTRODUCTION. 2. THE PROBLEM DRIVERS: PROFIT SHIFTING AND TAX COMPETITION. 2.1. The main challenges in the field of international taxation in the 21st century. 2.2. The role of the OECD. *2.2.1. The pre–BEPS era. 2.2.2. The BEPS 1.0 era. 2.2.3. The post–BEPS or the BEPS 2.0 era.* 3. THE EU DIRECTIVE ON PILLAR TWO: A GLOBAL MINIMUM TAX FOR MNEs. 4. CRITICAL REMARKS: THE END TO PROFIT SHIFTING AND TAX COMPETITION? 4.1. The lack of consensus on the policy objective behind Pillar Two. 4.2. The (potential) lack of efficiency of Pillar Two. 5. CONCLUSIONS. 6. BIBLIOGRAPHY.

1. INTRODUCTION.

In recent decades, international taxation has been shaped by efforts to implement effective measures addressing two key challenges.[2] Firstly, the persistent erosion of national tax revenues caused by the artificial shifting of corporate profits to jurisdictions with little or no taxation. In particular,

1 This contribution is part of the Project: "La tributación justa de las multinacionales y los superricos" (FAIRTAX), CIGE/2024/51".

2 RUIBAL PEREIRA, L., *Las medidas del Pilar II de la OECD y la propuesta de directiva de la Unión Europea sobre una tributación mínima global.* Documentos de Trabajo del Instituto de Estudios Fiscales 8/2022.

Available at: https://investigacion.usc.es/documentos/6397d677b0ebee6c879a32d0?lang=es

corporate taxation emerged as a focal point of both public and policy discourse in the aftermath of the global financial crisis of 2008.[3] Multinational Enterprises (MNEs) came under significant scrutiny, with criticisms often framed in moral terms, despite their adherence to existing legal frameworks. Empirical analyses of their global effective tax rates revealed a pattern of relatively low contributions to Corporate Income Tax (CIT), leading to the perception that these entities were not contributing their 'fair share' to public finances.[4] This notion of tax fairness has since become a central theme in the ongoing reform of corporate tax regimes, shaping the agenda for CIT reform efforts over the past decade.[5] Secondly, the intensifying tax competition among certain states, aimed at attracting investment, has resulted in a 'race to the bottom', often leading to unfair tax practices. Furthermore, there is an increasing need to establish common standards in international taxation to adapt to a new economic landscape characterized by globalization and digitalization, both of which exacerbate these challenges.[6]

Since 1996, combating tax evasion and fraud has been a key objective of the Organisation for Economic Cooperation and Development (OECD),[7] the G7, and later the G20, leading to the adoption of measures aimed at eliminating these issues. However, the role of the OECD has also evolved over the years, the latest milestone being the so-called 'global minimum tax'. This tax, established under Pillar Two of the OECD/G20 Inclusive Framework (IF) on Base Erosion and Profit Shifting (BEPS), is an international initiative designed to ensure that large MNEs with turnovers of at least EUR 750 million pay a minimum level of corporate income tax (set at 15%) regardless of where they operate. Pillar Two, characterized as one of the most significant developments in international tax policy in recent decades,[8] introduces a set of coordinated rules, known as the Global Anti-Base Erosion (GloBE) Rules, which allow countries to impose a top-up tax on the profits of MNEs that are taxed below that minimum rate in any jurisdiction. This framework, as discussed here, aims to reduce tax competition

3 In fact, social concern was raised as a result of scandals such as Liechtenstein LGT Bank (2008); HSBC Bank Falciani List (2010); Offshore Leaks (2013); Luxleaks (2014); Panama Papers (2016); Bahamasleaks (2016); Futbolleaks (2016); or Paradise Papers (2017).

4 On this topic see, among others, PANAYI, C. HJI., "Is Aggressive Tax Planning Socially Irresponsible?". *Intertax*, vol. 43, no. 10, 2015, pp. 544-558; or HAPPE, R. "Multinationals, Enforcement Covenants, and Fair Share", in *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management.* Oxford University Centre for Business Taxation, 2008.

5 GALENDI, R.A., *The Justification and Structure of the Globe Model Rules.* 2023, p. 1. Available at: https://kups.ub.uni-koeln.de/71906/

6 RUIBAL PEREIRA, L., *op. cit.*

7 In this regard, it shall be noted that Spain joined the European Organization for Economic Cooperation (OEEC), nowadays the OECD, as a full member in 1959. It is also worth highlighting Spain's participation in the Inclusive Framework (IF) since the signing of the agreement in 2017.

8 ARNOLD, B.J., "The Ordering of Residence and Source Country Taxes and the OECD Pillar Two Global Minimum Tax", *Bulletin for International Taxation*, vol. 76, no. 5, 2022.

among states by limiting the incentive for MNEs to shift profits to low- or no-tax jurisdictions, while maintaining a degree of tax sovereignty and allowing carve-outs for certain economic activities with real substance. The framework is being implemented through national legislation, including an EU Directive requiring adoption by member states.

This contribution examines the implementation and implications of the global minimum tax for MNEs, with particular focus on the European Union's Pillar Two Directive.[9] It begins by contextualizing the persistent challenges of profit shifting and tax competition in international taxation, which have been central concerns in the 21st century. The analysis highlights the OECD's pivotal role in addressing these issues through the BEPS project and the subsequent implementation of the two-pillar solution (Section 2). The paper then provides an overview of the global minimum tax rules, particularly as articulated in the European Union (EU) Directive implementing the OECD's initiative (Section 3). Finally, the contribution critically assesses whether Pillar Two can meaningfully curb tax competition and prevent profit shifting, drawing attention to conceptual ambiguities, practical inefficiencies, and the divergent policy motivations underlying its adoption (Section 4). It is important to note that this paper does not address the numerous technical challenges associated with Pillar Two in detail. Instead, it focuses on more fundamental issues, including the inherently unclear objective of the measure and its lack of full efficiency.

Methodologically, the article employs a doctrinal legal analysis, focusing on the interpretation of legislative instruments, policy documents and authoritative guidance from the OECD and EU. It combines a normative evaluation of legal texts with comparative elements to assess the effectiveness and limitations of the implementation of the Directive. The analysis is further enriched by a critical reflection on the broader implications for fiscal sovereignty and the rule of law.

2. THE PROBLEM DRIVERS: PROFIT SHIFTING AND TAX COMPETITION.

As advanced above, the emergence of global profit shifting and intensifying tax competition among states has significantly undermined the integrity and fairness of the international corporate tax system. MNEs increasingly exploit mismatches between national tax regimes to minimize their tax liabilities, often by relocating profits to low- or no-tax jurisdictions irrespective of where the underlying economic activity occurs. At the same time, states engage in strategic

9 Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, ST/8778/2022/INIT, OJ L 328.

tax competition to attract investment and mobile capital, frequently eroding tax bases in the process. This section examines how these two interconnected dynamics have served as key drivers to prompt international tax reform initiatives by the OECD, including the development of the GloBE Model Rules under Pillar Two.

2.1. The main challenges in the field of international taxation in the 21st century.

Digitalization and globalization have significantly influenced economies and individuals' lives globally, with their effects accelerating in the 21st century. These transformations have posed considerable challenges to the taxation rules governing international business income, which have remained largely unchanged for over a century. As a result, MNEs have often avoided paying the taxes they owe, despite generating substantial profits in an increasingly interconnected world.[10] The OECD estimates that corporate tax avoidance results in a loss of between US$100 billion and US$240 billion annually, representing 4-10% of global corporate tax revenue. Developing countries are particularly affected by this issue, as they rely more heavily on corporate tax revenue than advanced economies. The inability of countries to effectively tax MNE profits has led many to adopt unilateral measures, such as digital services taxes (DSTs), and to consider retaliatory tariffs.[11]

The reality is that the current rules still allow MNEs to generate significant income in a jurisdiction without being subject to CIT there. Globalization has exacerbated detrimental tax competition. New business models, which rely heavily on intellectual property, have made it easier for MNEs to shift their profits to low-tax jurisdictions. In fact, the existing international tax rules are based on agreements made in the 1920s and are now governed by a network of bilateral tax treaties (DTCs).[12] According to the OECD,[13] this creates two primary issues: a first, and fundamental, issue lies in the continued reliance on outdated international tax principles, which assert that a foreign enterprise's

10 OECD, *Tax Challenges Arising from the Digitalisation of the Economy - Global Anti-Base Erosion Model Rules (Pillar Two)* (2021) [hereinafter the GloBE Model Rules]. Available at: https://www.oecd.org/en/publications/tax-challenges-arising-from-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two_782bac33-en.html

11 According to the OECD, these actions could potentially cost the global economy up to 1% of global GDP and hinder recovery efforts from the COVID-19 crisis, with developing countries being disproportionately impacted. See *Ibid.*

12 Spain currently has 103 DTCs signed to avoid double taxation. The list can be found at: https://www.hacienda.gob.es/eu-ES/Normativa%20y%20doctrina/Normativa/CDI/Paginas/cdi.aspx

13 OECD, 2021, *op. cit.* p. 13.

profits may be taxed in a given jurisdiction only if the enterprise maintains a physical presence there. While this framework was appropriate in the early 20th century – when economic activity was predominantly tied to physical assets such as factories and warehouses – it is increasingly ill-suited to the digital economy. In the contemporary globalized market, many MNEs are capable of generating substantial revenue within a country without any significant physical footprint, thereby exposing critical gaps in the existing tax regime. The second issue is that most countries only tax the domestic business income of their MNEs, excluding profits earned abroad, based on the assumption that business profits earned in foreign jurisdictions are taxed where they are generated. The rise of intangible assets such as trademarks, copyrights, and patents, combined with the ability of companies to shift profits to jurisdictions with little or no tax, means that MNE profits often go untaxed.

As a result, following Pistone, the rise of aggressive tax planning structures [14] can be attributed to two key factors.[15] On the one hand, for nearly a century tax systems were designed within national boundaries and focused on closed economies. However, with the increasing globalization of the world economy, taxpayers began to engage in international activities. To mitigate the impact of international double taxation, various provisions were gradually introduced, although no measures were implemented to address the issue of non-taxation, which taxpayers, and particularly MNEs, took advantage of. On the other hand, aggressive tax planning was facilitated by the absence of effective international tax control mechanisms. The lack of transparency in international tax matters and the absence of communication between tax administrations played a significant role in this regard.[16] The result of this combination of factors was a general reduction in tax revenue and the erosion of national economies.[17] The negative consequences of this situation are evident: the erosion of taxable income reduces a state's tax collection, forcing it to increase the tax burden on other taxpayers with sufficient "ability-to-pay".

14 Aggressive tax planning refers to tax minimization strategies that, while often remaining within the bounds of legality, exploit loopholes, mismatches, and gaps in domestic and international tax rules – particularly in cross-border contexts – to shift profits and reduce tax liabilities in ways that undermine the integrity, fairness, and neutrality of tax systems. Such practices erode public confidence in the tax system, distort market competition – especially to the detriment of small and medium-sized enterprises – and lead to an inequitable redistribution of the tax burden by favouring entities better positioned to exploit these mechanisms. See on the issue, e.g. PIANTAVIGNA, P. "Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies", *World Tax Journal*, no. 9(1), 2017, pp. 47-98.

15 PISTONE, P., "La planificación fiscal agresiva y las categorías conceptuales del Derecho tributario global", *Quincena Fiscal*, no. 170, 2016, p. 4 et seq.

16 *Ibid*, at. p. 5.

17 *Ibid*, at. p. 21.

This problem is further compounded by the fact that many jurisdictions engage in tax competition to attract foreign direct investment.[18] The term "tax competition" refers to the practice whereby countries adopt strategic tax policies to attract investment by adjusting their tax systems.[19] States engage in competition for productive resources, intangible assets, and tax revenues, employing various policy instruments, most notably their tax systems.[20] Thus, recognizing the loss of international tax competitiveness, many countries reduced tax rates or introduced special tax regimes, which, in turn, led to a reduction in tax revenues for other countries. In other words, MNEs thrived in this competitive environment where jurisdictions sought to implement attractive tax regimes that facilitated the relocation of wealth to their territories. This fostered a form of tax competition that led to a "race to the bottom" in tax policies,[21] ultimately affecting the fair competition of economic actors in the global market.

As sovereign entities, states have the right to determine their own tax policies and may implement competitive tax measures such as reduced tax rates, tax exemptions or tax deductions to encourage the inflow of productive resources or prevent capital flight. Tax competition is not inherently detrimental:[22] in some cases, it can counteract a political bias toward excessive public expenditure or prevent governments from imposing excessively high taxes, thereby ensuring that tax rates remain at optimal levels. However, tax competition becomes harmful when it leads to this "race to the bottom", in which countries continuously lower tax rates in an attempt to outcompete one another. This

18 OECD, *Tax Challenges Arising from the Digitalisation of the Economy - Global Anti-Base Erosion Model Rules (Pillar Two)*, 2021.

19 RIXEN, T., "Tax Competition and Inequality: The Case for Global Tax Governance", *Global Governance,* vol. 17, p. 449, 2011.

Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1488066

20 TODER, E., "International Competitiveness: Who Competes Against Whom and for What?", *Tax Law Review*, vol. 65, 2012, p. 509.

21 In this sense, PIANTAVIGNA describes tax competition as "the phenomenon where governments throughout the world adopt tax-favourable regimes and related policy environments purposively designed to attract growth within their borders as inbound investments or to avoid departure of capital and domestic business activities". See PIANTAVIGNA, P. ,"Tax competition and tax coordination in aggressive tax planning: A False Dichotomy", *World Tax Journal*, vol. 9, no. 4, 2017, p. 480.

22 Until the mid-1990s, international tax competition was largely perceived as a mechanism that encouraged national tax systems to calibrate their rates effectively to support public spending. Cross-border tax savings – provided that they did not involve illegal practices or constitute tax avoidance – were regarded as a lawful expression of a taxpayer's right to minimize their fiscal liabilities. In this context, the European Court of Justice (ECJ) affirmed that an EU taxpayer is entitled to exercise fundamental freedoms to structure their affairs in a manner that enables them to benefit from a more advantageous tax regime. See Judgments of the ECJ of 21 February 2006, *Halifax* (C-255/02); 12 September 2006, *Cadbury Schweppes* (C-196/04). Also, MORRISS A.P. & MOBERG, L., "Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition", *Columba J. Tax L.*, vol. 4, no. 1, 2012, p. 9.

process ultimately undermines national tax sovereignty. Although each country has the right to shape its tax policy, including using taxation as a tool to influence capital allocation, the 2015 International Monetary Fund (IMF) Working Paper[23] highlights that such policies can create negative spillover effects, eroding the tax bases of other nations. The race to the bottom exacerbates these spillover effects, jeopardizing the integrity of corporate income tax systems and causing long-term economic harm to all countries involved.[24] In fact, the consequences of the race to the bottom are evident in the steady decline of global CIT over recent decades. Among OECD member countries, the average corporate tax rate fell from 32.3% in 2000 to 22.9% in 2021. Latin American countries experienced a decline from 26.8% to 19.1% over the same period. In 2021, the average corporate tax rate stood at 26.8% in Africa and 19.2% in Asia.[25] This downward trend poses a significant threat to CIT, which constitutes a major portion of the tax base in many developing economies.[26] Developing nations, which typically have smaller markets, are particularly vulnerable in this competitive environment. They often rely on tax incentives to attract foreign investment, yet the overall effect of this competition leaves none of them better off in the long run,[27] as it poses serious challenges to the coherence and equity of national income tax systems.

To preserve the integrity of tax regimes and address the erosion caused by profit shifting, international cooperation is essential. This necessitates a coordinated approach to the taxation of multinational profits through binding international agreements. However, such cooperation inherently requires states to relinquish a degree of fiscal autonomy, presenting a sovereignty dilemma: in order to defend the foundational values of their tax systems, states must accept limitations on their unilateral tax-setting powers.[28] For all these reasons, in recent years at both the OECD and the EU level, awareness has been raised about the need to fight against these practices. This will be addressed in the following section.

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23 CRIVELLI, E., DE MOOIJ R., & KEEN, M., *Base Erosion, Profit Shifting and Developing Countries*, IMF Working Paper WP/15/118, May 2015, p. 4.

24 WANYANA OGUTTU, A. "Preventing International Tax Competition and the Race to the Bottom: A Critique of the OECD Pillar Two Model Rules for Taxing the Digital Economy - A Developing Country Perspective". *Bulletin for International Taxation,* vol. 76, no. 11, 2022, p. 547.

25 OECD, *Corporate Tax Statistics* (2024). Available at: https://www.oecd.org/en/publications/corporate-tax-statistics-2024_9c27d6e8-en.html

26 WANYANA OGUTTU, 2022, *op. cit.* p. 547.

27 WANYANA OGUTTU, A., "International Tax Competition, Harmful Tax Practices and the Race to the Bottom: A Special Focus on Un-strategic Tax Incentives in Africa", *Comp. & Intl. L. J. S. Afr.*, vol. 51, no. 3, 2018, pp. 293-219.

28 SCHREIBER, U., "Remarks on the Future Prospects of the OECD/ G20 Programme of Work - Profit Allocation (Pillar One) and Minimum Taxation (Pillar Two)", *Bulletin for International Taxation*, vol. 74, no. 6, 2020, p. 5.

2.2. The role of the OECD.

The OECD's efforts to address base erosion and tax competition can be categorized into three phases. The first phase, before the Base Erosion and Profit Shifting (BEPS) initiative, began with the 1998 *Report on Harmful Tax Competition*, which highlighted concerns about unfair tax practices and, in particular, the rise of tax havens. The second phase, BEPS 1.0, started with the release of 15 Final Reports in 2015. The third and current phase, BEPS 2.0, focuses on the challenges derived from the digitalization of the economy and the implementation of a global minimum tax. The OECD's evolving approach reflects the complexity of the tax scenario, with each phase introducing new strategies and different regulatory frameworks to address the issue.

2.2.1. The pre-BEPS era.

As advanced in the introduction, the fight against tax evasion and fraud has constituted a central objective of the OECD since 1996, prompting the adoption of a range of measures designed to eliminate these practices. Notably, significant progress was made between 2000 and 2007 in enhancing transparency and information exchange, which emerged as some of the most effective tools in this effort. Similarly, in this era, known as the pre-BEPS era, progress was made in addressing harmful tax competition. In 1998, the OECD published the landmark report *Harmful Tax Competition: An Emerging Global Issue,*[29] which aimed to eliminate harmful tax practices and secure the commitment of both OECD and non-OECD countries to the principles of transparency and effective information exchange. In this Report, the OECD identified both "tax haven jurisdictions" and "preferential tax regimes" as harmful tax practices. The report asserted that such practices could erode the tax bases of other countries and distort financial and investment flows across jurisdictions. Among its key recommendations, the OECD advocated enhanced international cooperation to address these challenges. The OECD also established criteria for identifying tax havens and harmful preferential tax regimes.[30] Although the 1998 OECD Report recommended

29 OECD, *Harmful Tax Competition: An Emerging Global Issue*, 1998. Available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/1998/04/harmful-tax-competition_g1ghgc60/9789264162945-en.pdf

30 *Ibid.* at para. 75. The OECD defines tax havens as jurisdictions that intentionally facilitate the reduction of tax payments that would normally be due in countries with higher tax rates. These jurisdictions are typically characterized by strong confidentiality in their banking and commercial practices, limited transparency, insufficient cooperation in sharing information with foreign tax authorities, and a lack of genuine economic activity conducted by the taxpayers who benefit from these environments. Tax havens were characterized by four key factors: (i) the absence of or only nominal taxation; (ii) a lack of effective exchange of information; (iii) a lack of transparency; and (iv) the absence of substantial economic activities. Similarly, harmful preferential tax regimes were

countermeasures at unilateral, bilateral, and multilateral levels,[31] the primary approach at the time focused on utilizing a list of uncooperative tax havens to promote tax transparency.[32]

During the 2000s the OECD successfully encouraged compliance with tax transparency and information exchange standards by maintaining and monitoring this list. Subsequent progress reports on the OECD's initiatives were released in 2000, 2001, 2004, and 2006, among other years. A major turning point occurred following the 2008 financial crisis, prompting the G20 to make a renewed commitment to ending banking secrecy and establishing the Global Forum on Transparency and Exchange of Information for Tax Purposes, which significantly influenced states' tax policies.[33] In May 2009 the OECD removed the last three jurisdictions (Andorra, Liechtenstein, and Monaco) from its list after they pledged to comply with the established standards. Since then, no additional tax jurisdictions have been included in the OECD's list.[34]

2.2.2. The BEPS 1.0 era.

Despite the progress made toward establishing a supposedly 'fairer' global economic and fiscal framework, tax evasion and avoidance remained a priority on the G20 agenda in 2013. Consequently, the OECD launched the BEPS project, whose results materialized in 2015 with the approval of the so-called BEPS 1.0 Plan. This plan introduced a package of fifteen measures aimed at tackling – in a coordinated manner – the causes and circumstances creating BEPS practices. It had three lines: (i) improving the coherence of tax rules across borders; (ii) reinforcing substance requirements; and (iii) enhancing transparency and certainty, structured as follows:

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identified based on: (i) low or negligible effective tax rates (ETRs); (ii) ring-fencing of tax regimes; (iii) a lack of transparency; and (iv) ineffective exchange of information.

31 The OECD faced criticism for utilizing this initiative as a precursor to positioning itself as a "world tax organization" aiming to compel all countries to eliminate harmful tax competition in order to secure allocations of global tax revenues through collective agreement. See AVI-YONAH, R.S. "Globalisation, Tax Competition, and The Fiscal Crisis of the Welfare state", *Harvard L. Rev.*, vol. 113, 2000, p. 1662.

Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=208748

32 Following this approach, many jurisdictions adopted their own lists. The list of non-cooperative jurisdictions in Spain can be found at: Order HFP/115/2023, of February 9, determining the countries and territories, as well as the harmful tax regimes, that are considered non-cooperative jurisdictions.

33 RUIBAL PEREIRA, *op. cit.*

34 This has raised strong critics. As an example, the Tax Justice Network condemned the empty tax haven blacklist. See

https://taxjustice.net/2017/06/28/empty-oecd-tax-haven-blacklist-undermines-progress/

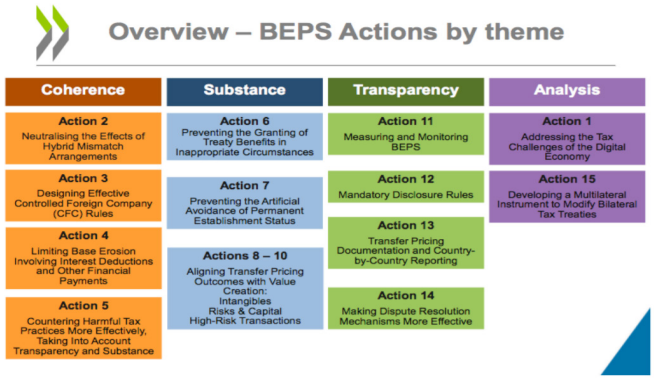

Figure 1 – BEPS Actions by theme.

During this phase, the work of the OECD was aimed at addressing preferential harmful tax regimes that facilitated artificial profit shifting. The objective was not to eliminate all instances of non-taxation but rather to target abusive or harmful tax practices, without implying that low or zero taxation was inherently problematic. At this stage, the OECD did not seek to standardize tax structures or harmonize tax rates across jurisdictions but rather aimed to mitigate the effects of harmful tax competition. The implementation of the BEPS package by various states has yielded varying degrees of success, depending on the specific measures adopted.[35]

As an example, in Action 5, which addresses the countering of harmful tax practices, the OECD highlighted that, over time, the focus had been on preventing harmful tax practices primarily in tax havens, rather than addressing preferential tax regimes. It acknowledged the issue of the "lack of economic substance" in such regimes, which could create legal or commercial environments designed to attract investments based solely on tax benefits, without any mechanisms to prevent tax avoidance.[36] In response, many jurisdictions implemented preferential tax regimes designed to attract investment by offering reduced rates across various regimes (i.e. intellectual property, financing and leasing, fund management, banking and insurance, shipping, or holding companies, among

35 As observed by RUIBAL PEREIRA, *op. cit.* The BEPS Actions Implementation Matrices can be found at: https://www.deloitte.com/an/en/services/tax/analysis/beps-action-implementation-matrices.html The site sets out a summary of the local country implementation prepared by Deloitte related to the BEPS Actions.

36 OECD, *Action 5 Final Report 2015 - Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance*, 2015, p. 23.

others).[37] The proliferation of these regimes was significantly accelerated by the expansion of the digital economy, as digital enterprises exploited their operational flexibility to relocate intangible assets to low-tax jurisdictions, thereby minimizing their tax obligations in their countries of residence. This dynamic intensified international tax competition, prompting governments to grant preferential tax deductions or exemptions to digital companies, which contributed to a progressive erosion of the global tax base through a race to the bottom in tax incentives.[38] To address these challenges, Action 5 advocated for aligning the taxation of multinational enterprises' profits with the location of the "substantial activities" that produce them, thereby discouraging artificial profit shifting driven solely by tax considerations. Countries were also urged to improve transparency by exchanging information on rulings related to those tax regimes.[39]

However, the OECD's 2018 *Interim Report on the Tax Challenges of the Digital Economy*[40] noted that harmful tax practices persisted, as MNEs could still send a minimal number of personnel to ostensibly run a company in a low-tax jurisdiction, thus manipulating the "substantial activity" test. These risks remained because Action 5 focused on countering harmful tax practices without eliminating low (or zero) tax regimes entirely. In fact, the reliance on the "value creation" paradigm[41] within the BEPS framework introduced a model of profit allocation grounded in mobile economic components such as corporate functions, intangible assets, and risk. This mobility granted MNEs considerable flexibility to relocate these elements to jurisdictions with more favourable tax regimes.[42] As a result, tax considerations often became the dominant factor shaping corporate investment strategies, potentially at the expense of genuine economic rationale.[43]

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37 EVERS, L., MILLER H. & SPENGEL, C., "Intellectual Property Box Regimes: Effective Tax Rates and Tax Policy Considerations", Intl. Tax & Pub. Fin vol. 22, no. 3, 2015, p. 503. Available at: https://link.springer.com/article/10.1007/s10797-014-9328-x

38 WANYANA OGUTTU, 2022, *op. cit.*

39 As part of the BEPS Plan, a peer review mechanism was implemented to assess the preferential tax regimes of all OECD members. Through this process, a total of 319 regimes have been reviewed. As of 2023, over 120 preferential tax regimes with harmful characteristics were abolished or reformed. See CHEN, J. & CHOW, W., "Global Minimum Tax Reform and the Future of Tax Competition", *Bulletin for International Taxation*, vol. 77, no. 8, 2023, pp. 308-319.

40 OECD, *Interim Report on the Tax Challenges of the Digital Economy* (2018). Available at: https://www.oecd.org/en/publications/tax-challenges-arising-from-digitalisation-interim-report_9789264293083-en.html

41 On the principle of "value creation", see SCHÖN, W. "Is There Finally an International Tax System?", *World Tax Journal*, Vol. 13, no. 3 (2021), pp. 357-384.

42 GALENDI, *op. cit.,* p. 50.

43 DEVEREUX, M. et al., *Taxing Profit in a Global Economy,* Oxford University Press, 2021, p. 18; and GALENDI, *op. cit.,* p. 50.

2.2.3. The post-BEPS or the BEPS 2.0[44] era

As mentioned, the implementation of the measures outlined in the BEPS Plan proved insufficient to ensure the proper functioning of the international taxation system. Action 1 of the BEPS Plan, which addressed the challenges posed by the digitalization of the economy, served as a starting point for further OECD initiatives. These efforts quickly underscored the necessity of securing a multilateral agreement supported by a broad coalition of countries to achieve meaningful results. In response, the OECD and the G20 established the Inclusive Framework (IF) on BEPS in 2016, which currently comprises 141 countries.[45] However, from this point forward, it also became evident that the ongoing efforts were increasingly directed toward curbing tax competition among states, particularly concerning tax rates. Thus, the IF called for "global action" in order to "stop a harmful race to the bottom, which otherwise risks shifting taxes to fund public goods onto less mobile bases including labour and consumption, effectively undermining the tax sovereignty of nations and their elected legislators".[46]

Between 2017 and 2020, extensive efforts were undertaken to develop a unified approach based on two pillars (Pillar I and Pillar II) intended to address the shortcomings of the BEPS Plan and serve as transformative elements for 21st-century taxation. Pillar I focused on the partial reallocation of profits to market jurisdictions for highly digitalized businesses[47], while Pillar II, the focus of this article, aimed to establish a global minimum tax applicable to multinational

44 Note that referring to the Pillar Two solution as BEPS 2.0 has been contested by scholars. This will be further addressed in Section 4.1.

45 This initiative was designed to extend participation beyond OECD and G20 members, allowing other nations, including developing countries, to contribute to the formulation of common standards on base erosion issues and to monitor the implementation of the BEPS Plan. However, it has been criticized for not being, in reality, that inclusive. See BRAUNER, Y. "Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument", *Florida Tax Review*, Vol. 25, No. 2 (2023), Article 1. Available at: https://scholarship.law.ufl.edu/ftr/vol25/iss2/1

46 OECD, Base Erosion and Profit Shifting Project "Addressing the tax challenges of the digitalisation of the economy", Public Consultation Document, 2019, p. 24.

47 The OECD's Pillar One seeks to address the tax challenges arising from the digitalization and globalization of the economy, particularly the misalignment between the location of profits and the location of economic activity. The key features of this Action consist of the Reallocation of Taxing Rights (Amount A) and a simplified and streamlined approach to allocate a fixed return for baseline marketing and distribution activities taking place in market jurisdictions (Amount B). However, as of 2025 Pillar One remains in a state of uncertainty. While substantial technical progress has been made and a Multilateral Convention (MLC) was released in draft form in 2023, political consensus for its ratification and implementation has not yet been achieved. The proposal requires a critical mass of countries to ratify and implement the MLC for it to be effective. However, the US participation is uncertain, due to concerns about ceding taxing rights to foreign jurisdictions. In addition, countries such as Spain, France, India, or the UK have adopted digital services taxes (DSTs), which Pillar One aims to replace.

enterprises with revenues exceeding EUR 750 million. In 2019, work commenced on various aspects, including the design of the GloBE rules. By 2020, these efforts culminated in the publication of the *Blueprints* for both Pillars, outlining the key components of the proposed tax measures. With the technical work advancing significantly, political negotiations regained prominence in 2021, leading to the Multilateral Agreement of July 2021 in which 130 jurisdictions committed to implementing the measures under Pillars I and II. This agreement was subsequently renewed and signed by 136 countries in October 2021. At present, 137 states and jurisdictions have pledged to adopt these measures, supported by a comprehensive Implementation Plan developed by the OECD.

Against this background, on 20 December 2021 the OECD published the Pillar Two GloBE Model Rules,[48] offering countries a framework for implementing domestic legislation to establish a minimum threshold for tax competition regarding CIT. The Commentary to the Model Rules, released on 14 March 2022, offers guidance to tax administrations and taxpayers on how to interpret and apply the rules.[49] This was updated on 25 April 2024 to include the OECD Administrative Guidance issued in 2023. Additionally, the OECD published a document containing illustrative examples of the application of the GloBE rules.[50] Under the BEPS 2.0 framework, Pillar Two promotes the global harmonization of corporate income tax rates by establishing a minimum tax rate. These rules provide countries with the right to impose a "top-up tax" on profits generated in jurisdictions where the effective tax rate (ETR) falls below the minimum rate of 15%. The Pillar Two GloBE rules were initially planned to generally apply from January 2023; however, this was pushed back to January 2024.

As further discussed in section 4.1, the stated policy objective of the GloBE rules is to create a coordinated tax system ensuring that large MNE groups pay a global minimum tax rate of 15% on income earned in each jurisdiction in which they operate. Although jurisdictions maintain sovereignty over their own tax regimes, the GloBE rules recognize the legitimate interest of other states in safeguarding their tax base when income is subject to low taxation elsewhere. Under this framework, countries are empowered to apply a top-up tax on profits derived from low-tax jurisdictions, thereby enabling them to recover the difference between the actual ETR and the agreed minimum threshold. According to OECD projections,[51] the implementation of the global minimum tax is expected

48 Art. 1.1 GloBE Model Rules.

49 Para. 3 GloBE Model Rules.

50 OECD, Tax Challenges Arising from the Digitalisation of the Economy - Global Anti-Base Erosion Model Rules (Pillar Two) Examples (2022), Primary Sources IBFD.

51 OECD, Tax Challenges Arising from Digitalisation: Economic Impact Assessment (2020), p. 61.

to increase worldwide tax revenues by approximately USD 150 billion each year. The OECD's impact analysis indicates that the GloBE rules will primarily benefit countries such as China, the United States, and several European nations, which are the primary home countries for MNEs. In contrast to earlier phases that mainly targeted harmful tax competition, Pillar Two is widely viewed by scholars as encompassing a wider mandate. Its objective is to curtail CIT competition not only in abusive scenarios such as artificial profit shifting but also in legitimate contexts, including the relocation of genuine investments.[52] However, as will be outlined in Section 4, the global minimum tax has the potential to give rise to new types of competition, suggesting that both tax competition strategies and the measures designed to counteract them will continue to evolve. Before analysing this, the following section focuses on the implementation of the global minimum tax in the EU.

3. THE EU DIRECTIVE ON PILLAR TWO: A GLOBAL MINIMUM TAX FOR MNES

The OECD's Pillar Two rules are considered a "common approach",[53] meaning that countries are not obligated to adopt them. However, after intense discussions, at the end of December 2022, the member states of the EU agreed to implement the OECD's Pillar Two initiative, that now embodies Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (hereinafter "the EU Directive").

The EU Directive, which closely follows the content and structure of the "OECD GloBE Model Rules" on Pillar Two,[54] was to be transposed by all member states by 2024[55] and establishes a top-up tax by means of two interconnected

52 LIOTTI, B.F. et al. "The Treatment of Tax Incentives under Pillar Two", *Transnational Corporations Journal*, Vol. 2, no. 2 (2022).

53 OECD, *Commentary to the GloBE Model Rules (Pillar Two)* (2023), at para. 1. Available at: https://www.oecd.org/en/publications/tax-challenges-arising-from-the-digitalisation-of-the-economy-consolidated-commentary-to-the-global-anti-base-erosion-model-rules-2023_b849f926-en.html

54 On the differences see DOURADO, A.P. "The EC Proposal of Directive on a Minimum Level of Taxation in Light of Pillar Two: Some Preliminary Comments", *INTERTAX*, vol. 50, no. 3, 2022, pp. 200-204.

55 Considering the above, on 21 December 2024, Law 7/2024 was published in the Official state Gazette (BOE), which adapts Spanish legislation to the Directive (EU) 2022/2523, establishing a "Supplementary Tax" (*Impuesto Complementario Adicional*, i.e. Top-Up-Tax) to guarantee an overall minimum level of taxation for MNEs. See ES: Ley 7/2024, de 20 de diciembre, por la que se establecen un Impuesto Complementario para garantizar un nivel mínimo global de imposición para los grupos multinacionales y los grupos nacionales de gran magnitud [Law 7/2024,

rules: the Income Inclusion Rule (IIR) and the Under-Taxed Profits rule (UTPR), which supports the former. In addition, the Qualified Domestic Top-up Tax (QDMTT) will enable jurisdictions to collect any applicable top-up tax from domestic entities prior to the application of the IIR or UTPR.[56] These rules ensure that income earned by large domestic groups located in the EU or by MNEs operating in an EU Member state are effectively taxed at an overall minimum rate of 15% on a jurisdictional basis.[57]

Within this framework, the several key components that define the scope and operation of the rules will be briefly addressed below. These include identifying which entities fall within the scope of the legislation as well as the three core mechanisms for enforcing the minimum tax: the IIR, the UTPR and the QDMTT.[58]

What entities are within the scope of the legislation?

The rules apply to MNEs groups or large-scale domestic groups. In particular, they are applicable when the group's revenue exceeds EUR 750 million in two of the preceding four fiscal years. Certain entities, referred to as excluded entities, are not subject to these rules. An understanding of the scope of the rules requires reference to the following key terms:

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of December 20, establishing a supplementary tax to guarantee an overall minimum level of taxation for multinational groups and large domestic groups] [hereinafter the Law]. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2024-26694 Broadly speaking, the structure of the Spanish regulations closely mirrors those of the EU Directive. As a result, a new and distinct tax has been introduced into the Spanish legal framework, operating in parallel with the existing CIT: the Top-Up Tax. This is a direct and personal tax imposed on the income of group entities. In particular, the Top-Up Tax consists of three interrelated components: (i) a domestic Top-Up Tax, equivalent to the QDMTT; (ii) a primary Top-Up Tax, corresponding to the IIR; and (iii) a secondary Top-Up Tax, aligned with the UTPR. For further information on the Spanish implementation see, CASTRO BOSQUE, M. & MARTÍNEZ LAGUNA, F.D. "Spain", in: *The Implementation of the Global Minimum Corporate Tax*, IBFD [forthcoming].

56 There is also a fourth component, namely, the Subject to Tax Rule (STTR). The STTR is a treaty-based rule. It allows source jurisdictions (typically where income-generating activities occur) to impose a limited withholding tax on certain types of payments (e.g., interest, royalties, and other intra-group service payments) made to related parties in low-tax jurisdictions, where the income is taxed below a minimum rate (usually 9%). However, the STTR will not be analysed for the purposes of this contribution. See on the topic LIOTTI, B.F., "The Subject-to-Tax Rule Under Pillar Two", *World Tax Journal*, vol. 16, no. 1, 2024, pp. 103-128, Available at: https://ssrn.com/abstract=5233516 or http://dx.doi.org/10.59403/qqp03f

57 In particular, the Preamble to Directive 2022/2523 highlights the need "to reinforce the fight against aggressive tax planning within the internal market" [...] "to ensure that MNEs pay a fair share of tax wherever they operate. That major reform aims to put a floor on competition over corporate income tax rates through the establishment of a global minimum level of taxation".

58 For further information on the Directive see MARTÍNEZ LAGUNA, F.D., "La Directiva 2022/2523 en materia de imposición mínima societaria", *Carta Tributaria*, no. 94, 2023.

I. Article 3(3) of the EU Directive – in line with article 1(2) of the GloBE rules – defines a "group" as a collection of entities linked through ownership or control, in accordance with the applicable financial accounting standards for preparing consolidated financial statements of the ultimate parent entity. This definition includes entities excluded from consolidation solely due to their limited size, materiality thresholds, or classification as held for sale. Alternatively, a group may also refer to an individual entity that operates one or more permanent establishments (PEs)[59], provided it is not already part of another group as defined above. An "MNE group" refers to any such group that includes at least one entity or PE located outside the jurisdiction of the ultimate parent entity.

II. Article 3(2) – in line with article 1(3) of the GloBE rules – defines a "constituent entity" (CE) as any entity that is part of an MNE group or of a large-scale domestic group; and any permanent establishment of a main entity that is part of an MNE group.

III. Article 3(14) –in line with article 1(4) of the GloBE rules– defines the "Ultimate Parent Entity" (UPE) as the entity that directly or indirectly holds a controlling interest in any other entity and is not itself controlled, directly or indirectly, by another entity. It is also the main entity of a group.

IV. Article 2 excludes certain entities from the scope, to preserve their status as tax-neutral investment vehicles, including governmental entities, international organizations, non-profit organizations, pension funds, investment funds that are UPEs, and real estate investment vehicles that are UPEs. In addition, it should be noted that the Directive establishes industry specific carve-outs for ship operators.[60]

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59 According to the Spanish Tax Administration: "It is understood that a natural person or legal entity that carries out economic activities operates through a PE (parent entity) in Spanish territory, when by any title it has in the same, continuously or habitually, facilities or workplaces of any kind, in which it carries out all or part of its activity, or acts in it through an agent authorized to contract, in the name and on behalf of the non-resident, who habitually exercises said powers. More specifically, the premises that constitute a PE are: executive headquarters, branch offices, offices, factories, workshops, warehouses, shops or other establishments, mines, petroleum or gas wells, quarries, farm, forest, livestock or other holdings or any other place used for the survey or extraction of natural resources, as well as construction, installation or assembly work with a duration of more than 6 months. The PE has no legal personality of its own." See: https://sede.agenciatributaria.gob.es/Sede/en_gb/no-residentes/irnr-establecimiento-permanente/definicion-establecimiento-permanente.html#:~:text=More%20specifically%2C%20the%20premises%20that,used%20for%20the%20survey%20or

60 Art. 16 of the EU Directive includes an exemption for eligible shipping income. Para. 157 of the Preamble to the EU Directive explains that the primary rationale behind the exclusion of

What is the IIR top-up tax?

The IIR top-up tax rule is the primary taxing mechanism. It mandates that the UPE of a group determines whether the entities within its group have an ETR of 15%. This calculation[61] is performed on a jurisdictional basis for each country in which the entities are located (the so-called 'jurisdictional blending'). If the ETR falls below the minimum threshold, the parent entity is required to pay an additional amount of tax. In other words, to determine the amount of the top-up tax, it is necessary to calculate the ETR for all CEs within a given jurisdiction (jurisdictional blending) and compare it to the minimum tax rate of 15%.[62] In addition, the Special Business Income Exclusion (SBIE) recognizes that a portion of a MNE's profits is linked to real economic activity and should not be subject to top-up taxation, even if the effective tax rate in a jurisdiction falls below the 15% minimum. To reflect this, the SBIE allows an exclusion from GloBE income based on a formula tied to payroll and tangible assets in a jurisdiction.

As a result, evaluating whether CEs within a given jurisdiction are susceptible to taxation below the 15% minimum threshold requires more than merely examining the statutory corporate tax rate. A comprehensive assessment must focus chiefly on the permanent differences that emerge between the applicable domestic tax regulations and the corresponding financial accounting standards. The rules are intended to apply specifically to activities conducted in jurisdictions characterized by the absence of corporate income taxes, the provision of substantial exemptions, or the imposition of notably low tax rates.[63] However, their scope is not limited to such jurisdictions. The provision of tax-free research incentives or credits, government subsidies (such as those granted

international shipping income is to accommodate existing shipping tax frameworks, like tonnage tax regimes.

61 The calculation of the top-up tax begins with determining the GloBE income or loss for each constituent entity. Generally, GloBE income or loss corresponds to the net income or loss of a constituent entity as reported in the consolidated financial statements of the UPE, typically based on International Financial Reporting Standards (IFRS), before applying consolidation adjustments that eliminate intra-group transactions. The net income or loss is subsequently adjusted for the purpose of calculating the top-up tax. These adjustments are based on the IFRS employed in the preparation of the consolidated financial statements of the UPE, and must reflect the position before consolidation eliminations.

62 Following the determination of the tax base, the next step involves identifying and quantifying the relevant covered taxes. According to art. 20 EU Directive, covered taxes are defined as income taxes, ensuring consistent and flexible recognition across various tax systems. Non-income-based taxes, such as indirect taxes, payroll taxes, and property taxes, are excluded from this definition. The jurisdictional ETR for a given tax period is then computed as the ratio of adjusted covered taxes to net GloBE income for all CEs located in that jurisdiction. If the resulting ETR falls below the 15% global minimum threshold, the group will be liable for a Top-Up Tax.

63 DZIURDŹ, K. & MARCHGRABER, C., "GloBE: Why a Nominal Tax Rate of More Than 15% Might Not Be Enough". *Bulletin for International Taxation*, vol. 76, no. 11, 2022.

in response to high energy costs), investment allowances, deductions, and other tax benefits may result in the imposition of a top-up tax, even in jurisdictions with high tax rates. This also applies to incentives designed to achieve legitimate objectives, such as stimulating economic growth, creating employment opportunities, promoting environmentally sustainable investments, and encouraging innovation, as well as research and development (R&D).[64] In addition, it is important to recognize that a CE exhibiting an ETR below the 15% threshold does not automatically trigger the imposition of a top-up tax. The GloBE framework requires the aggregation of income or losses and adjusted covered taxes across all constituent entities within a given jurisdiction, a process known as jurisdictional blending. Consequently, a lower ETR for one constituent entity may be balanced out by a higher ETR for another entity operating within the same jurisdiction.[65]

What is the UTPR top-up tax?

The UTPR serves as a backstop to the IIR by applying when low-taxed income of a group entity is not sufficiently taxed under the IIR (e.g., because the parent entity is located in a jurisdiction that does not apply the IIR). Under the UTPR, if an entity within an MNE group is subject to an effective tax rate below the minimum threshold, and the IIR has not applied to that income, other jurisdictions where the MNE operates may require additional taxes to collect the residual top-up tax. The UTPR thereby ensures that low-taxed income does not escape taxation entirely, reinforcing the global minimum tax regime. The UTPR applies when a MNE has a taxable nexus in the source state, such as a subsidiary or a PE. As a result, this tax may be applicable if a group lacks a parent company in a jurisdiction that has adopted Pillar Two.

What is the QDMTT top-up tax?

Finally, the QDMTT enables jurisdictions to collect any applicable top-up tax from domestic entities prior to the application of the IIR or UTPR top-up tax. This tax is creditable against any liability arising from the IIR or UTPR top-up tax. Although jurisdictions are not obligated to adopt a QDMTT, there exists a strong incentive to do so. Implementing a QDMTT enables a jurisdiction to retain the revenue generated from the application of the Pillar Two minimum tax framework on economic activity within its territory. In practical terms, affected MNEs would generally be liable for the same amount of tax on their profits regardless of whether a QDMTT is in place. However, the absence of such a mechanism would result in the top-up tax being collected by another jurisdiction under the GloBE rules. By enacting a QDMTT, the domestic jurisdiction ensures

64 *Ibid.*
65 *Ibid.*

that it, rather than a foreign government, captures the additional tax revenue arising from undertaxed profits. This way, the QDMTT might be considered as a defensive measure.

The GloBE rules in a nutshell

Finally, for the sake of clarity, the following is an example provided by the OECD of how GloBE rules work in practice.

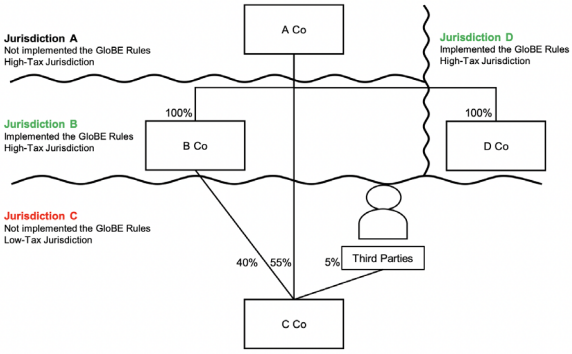

Figure 2 – Example of the functioning of the Pillar 2 Rules. Source: OECD, Tax challenges arising from the digitalisation of the economy – global anti-base erosion model rules (Pillar Two) examples (2024).

Following the example, assume A Co is the UPE of the ABC Group. A Co is located in Jurisdiction A. A Co directly owns 100% of B Co, 55% of C Co and 100% of D Co, respectively located in Jurisdictions B, C and D. Assume B Co has a 40% Ownership interest in C Co, and that the remaining 5% ownership interests of C Co are held by minority shareholders. The application of the rules will be as follows:

- A Co is not required to apply an IIR as the jurisdiction has not implemented the rules.
- B Co is required to apply an IIR with respect to the Top-up Tax of C Co.
- D Co does not have Ownership Interests in C Co and therefore no CE is required to apply an IIR with respect to the Top-up Tax of C Co.

4. CRITICAL REMARKS: THE END TO PROFIT SHIFTING AND TAX COMPETITION?

The implementation of the OECD's Pillar Two framework, particularly through the GloBE Model Rules, has been hailed as a significant milestone in the fight against profit shifting and harmful tax competition. By establishing a global minimum tax, the initiative aims to curtail the ability of MNEs to erode national tax bases. However, despite its ambitions, critical questions remain as to whether these measures truly mark the end of tax-driven distortions. This section examines the limitations, unintended consequences, and broader policy implications of the current approach, questioning whether it effectively addresses the structural dynamics of international tax competition and profit allocation.

4.1. The lack of consensus on the policy objective behind Pillar Two.

The starting point to determine whether the Global Minimum Tax is adequate to fight base erosion and tax competition is to analyse its objectives. The reality is that member countries of the IF held differing views on Pillar Two. Even among those that supported its implementation, there was no unified agreement on its policy objectives. Broadly speaking, some countries favoured a measure primarily targeting profit shifting (the profit-shifting objective), while others advocated a more comprehensive approach aimed at addressing tax competition arising from real economic activity (the tax competition objective).[66]

According to the academic doctrine,[67] pursuing the profit-shifting objective would position Pillar Two as a continuation of the BEPS Project. It would adopt BEPS's core principle that "profits are taxed where economic activities generating the profits are performed and where value is created". If the profit-shifting objective were the sole focus, Pillar Two would address "undertaxed" profits only when they have been shifted away from the jurisdictions where the economic activities generating them take place. This approach would align with the longstanding policy stance that "no or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it".[68] The tax competition objective, however, extends beyond the profit-shifting objective. Under this broader approach, no or low taxation is inherently problematic, even

66 DEVEREUX, M. & VELLA, J., "The Impact of the Global Minimum Tax on Tax Competition", *World Tax Journal*, vol. 15, no. 3, 2023, p. 323-378.

67 *Ibid.*

68 *Ibid.*

in the absence of artificial income segregation. This represents a significant departure from the established policy framework, which has historically permitted tax competition over real economic activity (as opposed to competition over artificially shifted profits). If Pillar Two were to fully embrace this objective, it would target "undertaxed" profits even when they arise in jurisdictions where the underlying economic activities occur.[69]

In fact, ensuring that MNEs pay a minimum level of tax aligns more closely with the policy priorities of some countries than others.[70] The challenge arises because, over time, smaller nations are compelled to forego increasing amounts of revenue to remain competitive in attracting investment and profits. While tax harmonization may enable certain states to preserve existing levels of social welfare provision, it simultaneously constrains the fiscal autonomy of other – particularly developing – countries, limiting their ability to calibrate tax policies in accordance with the developmental stage and capacity of their public sectors.[71] This ensures that, even as tax competition limits their ability to use corporate taxes as an incentive, countries can still collect some level of revenue from MNEs.[72] Ensuring that MNEs pay a minimum level of total tax aligns more closely with the interests of large, developed economies that maintain higher average tax rates and serve as home jurisdictions for major multinational corporations. Conversely, establishing a floor on tax competition at the source is more aligned with the interests of countries seeking to attract investment and real economic activity, yet facing competitive pressure to reduce tax rates below an optimal level.

An examination of the key stages of discussion within the IF that led to the 2021 political agreement on the GloBE indicates that the anti-BEPS objective of the minimum tax was the only aspect universally accepted by member countries. In contrast, the relevant documents remain ambiguous regarding the extent to which member countries also sought to address international tax competition.[73] When the two-pillar approach was first introduced in the January 2019 Policy Note, Pillar Two was described as a measure aimed at "addressing

69 *Ibid.*

70 Following DEVEREUX and VELLA, countries can be broadly categorized into three types, though this classification is not exhaustive. Type 1 countries are large, developed economies with high tax rates that serve as home jurisdictions for major multinational parent companies. Their primary concern is preventing the shifting of profits and economic activities to lower-tax jurisdictions, making a minimum tax rate highly aligned with their policy interests. Type 2 and Type 3 countries are smaller, capital-importing nations. Type 2 countries focus on attracting real economic activity, while Type 3 countries prioritize profit shifting. See *Ibid.*

71 GALENDI, *op. cit.,* p. 54; and TANZI H. & ZEE, H.H., "Tax Policy for Emerging Markets: Developing Countries", IMF Working Paper WP/00/35, 2000, p. 11.

72 GALENDI, *op. cit.,* p. 54.

73 As analysed by ENGLISCH, J., "GloBE Rules and Tax Competition", *INTERTAX,* vol. 50, no. 12, 2022, pp. 859-873.

remaining BEPS issues". At the same time, the OECD describes the GloBE rules as a "landmark reform to the international tax system"[74] and asserts that they will mitigate harmful tax competition in developing countries by reducing pressure to offer inefficient incentives, thereby enabling more effective mobilization of domestic resources.[75] According to Englisch, the general conclusion on the policy objectives that can be drawn from the IF documentation is that no definitive choice was made between focusing on profit shifting or tax competition within Pillar Two. If it had concentrated solely on profit shifting, it would have excluded BEPS Action 5-compliant regimes and not targeted undertaxed profits generated where economic activities occur. Conversely, fully embracing tax competition would have omitted the SBIE. Instead, Pillar Two represents a compromise, addressing undertaxed profits both when shifted across borders and when they arise locally but exceed a fixed return.[76] Against this background, as observed by Devereux and Vella, the ambiguity surrounding the policy objectives articulated in the IF's various publications during the negotiation process is not unexpected. The absence of a clearly defined and coherent set of goals for Pillar Two may have been a strategic necessity to facilitate political consensus among participating jurisdictions.[77]

In the author's opinion, the GloBE Model Rules primarily serve as a mechanism to curb tax competition among states, aiming to prevent jurisdictions from engaging in a "race to the bottom" in corporate tax rates. By setting a floor for tax competition, the rules seek to ensure a more stable and equitable international tax framework. However, following Galendi, it is important to recognize that the GLOBE Model Rules extend beyond merely addressing harmful tax competition, which is often associated with "free–riding" by governments and residents benefiting from public goods funded by other jurisdictions. Furthermore, they are not specifically designed to target so-called "tax havens" in the conventional sense, i.e. jurisdictions that not only impose low tax rates and also have restrictions on information exchange. Instead, the scope of the GLOBE Model Rules is broader, addressing tax competition in a more comprehensive manner.[78] In a similar context, Navarro Ibarrola highlights the regulatory role

74 OECD, *OECD Releases Pillar Two model rules for domestic implementation of 15% global minimum tax* (2021). Available at www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm

75 OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy - Inclusive Framework on BEPS* (2019), para. 54. Available at: https://www.oecd.org/en/publications/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy_87061b68-en.html

76 DEVEREUX, M. & VELLA, J., *op. cit.*

77 *Ibid.*

78 GALENDI, *op. cit.,* p. 50. Same opinion is held by PISTONE et al., "The OECD Public Consultation Document 'Global Anti-Base Erosion (GloBE) Proposal - Pillar Two': An Assessment",

of the proposal, which aims to influence the determination of the effective taxation of cross-border income to set limits on tax competition between states and prevent the "beggar-thy-neighbour approach" of attracting investment at the expense of tax revenues.[79] According to this author, "[o]verall, the GloBE measures are not intended to alter the distribution of taxing power (jurisdiction to tax) if it has been effectively exercised above the agreed minimum tax rate, but rather the power not to tax (jurisdiction not to tax), or to tax at reduced rates"[80] [author's translation]. This goal has been previously characterized as the *illusion*[81] of international recognition of an acceptable level of tax competition between states, a reality that influences both state behaviour and taxpayer actions.

Indeed, one of the criticisms is that the purpose of the GloBE extends beyond the scope of the OECD BEPS Project. As a result, once the GloBE measures are implemented, part of the BEPS framework will become obsolete and outdated,[82] since "the GloBE is not limited to curbing harmful tax competition, but tax competition in general, whether harmful or not" [author's translation].[83] This creates a misalignment between the objectives of Pillar Two and the BEPS Project, as the measures proposed in GloBE are designed to tax income at a given location, regardless of where it is generated.[84] Thus, Pillar Two marks a significant shift from a long-standing principle upheld by the OECD, namely that the determination of tax rates falls exclusively within the sovereign domain of individual states and is beyond the scope of OECD intervention. This development also signals a departure from the policy consensus articulated during the BEPS Project, which maintained that low or no taxation, in and of itself, was not problematic unless accompanied by practices that artificially disconnect taxable income from the underlying economic activity. The very emergence of Pillar Two reflects a broader policy orientation toward addressing tax competition in

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Bulletin for International Taxation, vol. 74, no. 2, 2020, p. 62. See also OECD, Public Consultation Document, *op. cit.*, p. 6.

79 NAVARRO IBARROLA, A., "Jurisdiction Not to Tax, Tax Sparing Clauses, and the OECD Minimum Taxation (GloBE) Proposal", *Nordic Tax Journal*, no. 1, 2021, pp. 6-19.

80 NAVARRO IBARROLA, A. "Consideraciones De Política Fiscal Sobre La Propuesta GLOBE De Tributación Mínima (Pilar 2) Y Su Implementación", *Crónica Tributaria* no. 179, 2021, pp. 63-91.

81 MARTÍNEZ LAGUNA, F.D., "GloBE ¿Hacia un mínimo de tributación global?", in *Retos del derecho financiero y tributario ante los desafíos de la economía digital y la inteligencia artificial*, Tirant lo Blanch 2021, pp. 50-68.

82 On a critical view on this see ENGLISCH, J. & BECKER, J., "International Effective Minimum Taxation - The GLOBE Proposal", *World tax journal*, vol. 11, no. 4, 2019, pp. 483-529.

83 NAVARRO IBARROLA, A., "Consideraciones De Política Fiscal Sobre La Propuesta GLOBE de Tributación Mínima (Pilar 2) Y Su Implementación", *op. cit.*

84 MARTÍNEZ LAGUNA, F.D. "El Pilar 2 de la OCDE: régimen, inconsistencias y potenciales incompatibilidades", in *Desafíos fiscales en un mundo post-COVID. Valoración y retos pendientes a nivel interno e internacional*, Tirant Lo Blanch 2021, pp. 69-98.

a comprehensive manner. It suggests that the jurisdictions advocating for this reform now view low or no taxation as inherently problematic, even in cases where genuine economic activity is conducted within the low-tax jurisdiction.[85] For these reasons, it is argued that the OECD Pillars cannot be regarded as a form of BEPS 2.0.

As a result, it is essential to clarify that the GLOBE Model Rules do not constitute anti-abuse provisions in the conventional legal sense. Their primary objective is not to target or deter abusive tax practices.[86] Instead, they serve as a mechanism to establish a minimum standard for tax competition, being applied without regard to taxpayer intent, the nature of transactions, or indicators of aggressive tax planning. They are triggered solely by a jurisdictionally blended ETR falling below the minimum threshold, regardless of the commercial substance, legitimacy, or alignment with BEPS Action 5 standards. Their primary objective is not to influence corporate behaviour directly, but to reshape state-level incentives by encouraging jurisdictions to increase their ETRs and thus curb tax competition. In this way, the rules act as a multilateral safeguard designed to prevent a downward spiral in global tax rates and to enable states to protect their tax bases from one another. While earlier BEPS measures focused on profit shifting, current concerns center on the relocation of real economic activity, a practice that, although tax-motivated, is not inherently abusive. Such movements remain lawful exercises of economic choice within the bounds of national legal systems.[87]

4.2. The (potential) lack of efficiency of Pillar Two.

Beyond theoretical discussions, the aim of this section is to briefly analyse whether the Global Minimum Tax has the potential to constrain international tax competition in practice (i.e. To what extent will the GloBE Rules be effective in curbing tax competition?). Although Pillar Two is designed to mitigate traditional forms of CIT competition through the introduction of a global minimum tax, it does not entirely eliminate the structural conditions that enable such competition. The framework's various design elements generate asymmetrical impacts across jurisdictions. While some tax incentives may be curtailed under Pillar

85 DEVEREUX, M. et al., *The OECD Global Anti-Base Erosion ("GloBE") Proposal*, Report from the Oxford University Centre for Business Taxation 2020, p. 4. Available at: https://oxfordtax.sbs.ox.ac.uk/files/oecdglobeproposalreportpdf; and GALENDI, *op. cit.,* p. 54.

86 CHAND V., TURINA A., & ROMANOVSKA K., "Tax Treaty Obstacles in Implementing the Pillar Two Global Minimum Tax Rules and a Possible Solution for Eliminating the Various Challenges", *World Tax Journal,* vol. 14, no. 1, 2022, p. 3; and PINTO NOGUEIRA, J.F. & TURINA, A. "Pillar Two and EU Law," in *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative*, IBFD Tax Research Series 4, 2021, sec. 10.3.3.2.

87 GALENDI, *op. cit.,* p. 66.

Two, others may remain unaffected or only partially constrained. Consequently, jurisdictions are likely to adapt by leveraging the regulatory flexibility and new strategic opportunities that the framework inadvertently provides. This section illustrates some major (but not exhaustive) circumstances in which Pillar Two may prove to be ineffective.

As a starting point, it is important to highlight that the OECD endorses the internationally agreed minimum tax, emphasizing that a state-specific minimum tax regime "would result in a more complex and opaquer international framework".[88] The GloBE Model Rules thus establish a detailed and stringent framework aimed at ensuring consistent implementation across jurisdictions, with limited scope for national discretion. This uniformity is essential to achieving the intended global minimum tax outcome. However, due to the need for harmonization, the rules rely on autonomous legal concepts rather than domestic legal definitions. This conceptual autonomy raises concerns about interpretative authority, particularly in the absence of a multilateral convention or binding dispute resolution mechanism.[89] The layered structure is expected to lead to interpretative ambiguities, compliance challenges, and an increased risk of cross-border tax disputes. Since implementation occurs through domestic legislation, divergent judicial interpretations are likely.[90] While the Commentary and Administrative Guidance are central to promoting a coherent and harmonized application of the GloBE Rules,[91] their lack of binding legal force remains a key limitation. These documents are intended to serve as primary interpretative tools to aid jurisdictions and stakeholders in consistently applying the rules and resolving ambiguities. However, they do not have the status of international law or treaty obligations. As such, while they provide authoritative insight into the intent and application of the rules, their interpretations are not enforceable per se, and jurisdictions retain discretion in how they interpret and implement the GloBE Rules domestically.

In addition, the technical intricacies of the GloBE Model Rules present considerable challenges, even for experts in international taxation.[92] The

88 OECD, "Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising From the Digitalisation of the Economy," op. cit., para. 63.

89 For further information on this topic see, CASTRO BOSQUE, M., & MARTÍNEZ LAGUNA, F.D, *op. cit.*

90 For some examples on these differences see DOURADO, A.P. "Pillar Two Model Rules: Inequalities Raised by the GloBE Rules, the Scope, and Carve-Outs", *INTERTAX*, vol. 50, no. 4, 2022, pp. 282-285.

91 GALENDI, *op. cit.,* p. 6.

92 CARRERO, J.M., "La transformación del marco fiscal internacional resultante de la Reforma Fiscal Global", *Civitas - Revista española de Derecho Financiero*, no. 193, 2022, pp. 13-66. On the complexity of the rules see, for example, DE PIETRO, C., "The GloBE Income Inclusion Rule and Its Global Character: Complexities Underlying Its Fully Effective Application", *EC Tax Review*, nos. 5&6, 2021, pp. 220-235.

Business and Industry Advisory Committee (BIAC) to the OECD, composed of tax professionals from MNEs, has raised concerns that the cumulative complexity of these rules could render them practically unmanageable.[93] These concerns are shared by the African Union[94] and the UK government, both of which acknowledge that despite the detailed OECD Commentary, significant time and effort will be needed for businesses and tax administrations to interpret and apply the framework correctly. Furthermore, the implementation of the GloBE Rules is complicated by their integration with pre-existing domestic tax systems, posing substantial administrative burdens, especially for under-resourced developing countries.[95] Overall, while the rules aim to improve tax fairness, their complexity may undermine effective implementation and generate unintended economic consequences.

On the other hand, the structure[96] of the GloBE Rules, combined with the relatively modest global minimum ETR of 15% and the specific tax base upon which it is calculated, continues to allow space for substantial tax competition among jurisdictions. Despite the aim of curbing harmful tax practices, governments may still offer generous tax incentives such as allowances and deductions without breaching the minimum tax threshold. Similarly, it has been argued that the minimum tax might be easily circumvented by granting direct aid or subsidies.[97] The ETR has also raised concerns among scholars and policymakers, as it is argued that 15% is too low to meaningfully deter tax competition or protect the tax bases of countries. Thus, various international bodies, including the United Nations High Level Panel on International Financial Accountability, Transparency and Integrity (FACTI) Panel and the African Tax Administration Forum (ATAF), have advocated for a higher global minimum rate, ranging from 20% to 30%.[98] A rate set too low risks enabling continued profit

93 See: https://www.businessatoecd.org/blog/business-at-oecd-biac-responds-to-the-oecd/g20-outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalization-of-the-economy

94 WANYANA OGUTTU, 2022 , *op. cit.,* p. 13.

95 On the risk of no implementation see PARADA, L., "The OECD Global Tax Deal and Developing Countries: Where Do We Stand?", *Caribbean Tax Law Journal*, 2023. Available at SSRN: https://ssrn.com/abstract=4525708

96 On the issues related to the complexity of the structure see PITAMBAR D., & RIZZO, A., "The OECD Global Minimum Tax Proposal Under Pillar Two: Will it Achieve the Desired Policy Objective?", *Bulletin for International Taxation*, vol. 76, no. 1, 2022, pp. 44-52.

97 See, e.g. CHAND, V. & ROMANOVSKA, K., "The Impact of Pillar Two on Corporate Tax Incentives and Incentives Post Pillar Two: The Potential Rise of Tax Credits and Subsidies". *International Tax Studies (ITAXS)*, vol. 6, no. 9, 2023. Available at SSRN: https://ssrn.com/abstract=4719319; CALDERÓN CARRERO, J.M. "La transformación del marco fiscal internacional resultante de la Reforma Fiscal Global", *Civitas - Revista española de Derecho Financiero*, *op. cit.*, pp. 13-66; or ENGLISCH, J. & BECKER, J., *op. cit.,* p. 495.

98 WANYANA OGUTTU, 2022, *op. cit.*, p. 14. For instance, the United States' "Made in America Tax Plan" proposed a 21% minimum rate, reflecting broader international support for a more robust

shifting from countries with higher statutory rates, particularly those in the Global South, and undermines the objectives of equitable tax competition and sustainable development. In fact, this has been viewed as advantageous to OECD-EU countries to the detriment of developing and emerging states.[99] In any case, it is important to consider, as observed by Hey, that the ETR, "is not a technical question of design but a political one, and one that is highly controversial".[100] Thus, it has been argued that the 15% rate should be considered a floor, subject to upward revision in future policy evaluations.[101]

In summary, the long-term efficiency of the emerging international tax landscape shaped by the implementation of Pillar Two remains subject to considerable uncertainty. While the global minimum tax framework has the potential to improve allocative efficiency by mitigating the adverse effects of harmful CIT competition, it may concurrently give rise to new forms of inefficiency. These include increased administrative and compliance burdens for both taxpayers and tax authorities, greater complexity in the design and application of tax rules, and the potential for strategic behavioural responses by jurisdictions seeking to maintain their fiscal attractiveness within the constraints of the new regime. As such, the net efficiency outcomes of this reform depend not only on its effectiveness in curbing tax competition but also on how well it balances simplification, enforceability, and neutrality across diverse tax systems.

5. CONCLUSIONS.

The adoption of a global minimum tax under the OECD's Pillar Two framework constitutes a pivotal development in the landscape of international

threshold. See The White House. *The American Jobs Plan, factsheet* [Press release]. (March 2021). Available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/

99 As CALDERÓN CARRERO observes, the measures preserve the right of taxation in the state of residence, while also limiting the tax competition that other source jurisdictions (typically developing countries) may engage in to attract investment and business activity. See CALDERÓN CARRERO, J.M., "Acuerdo Multilateral de 130 jurisdicciones sobre los principios de la Reforma Fiscal Global BEPS 2.0", *Revista de Contabilidad y Tributación*, no. 35, 2021, pp. 461-462. Also on this topic, CORDONIZ LEITE PEREIRA, R. "Pillar Two and Developing Countries: The Perils of Jurisdictional Blending". *World Tax Journal*, vol. 15, no. 4, 2023, pp. 545-573; and SCHOUERI, L.E. & FETTERMANN NOGUEIRA S.B.C., "Effective Tax Rate Criteria and Source Taxation Under the OECD's Pillar Two Proposals", *Bulletin for International Taxation*, vol. 77, no. 9, 2023, pp. 386-393.

100 HEY, J., "The 2020 Pillar Two Blueprint: What Can the GloBE Income Inclusion Rule Do That CFC Legislation Can't Do?", *INTERTAX*, vol. 49, no. 1, 2021, p. 9; similarly, ENGLISCH, J. & BECKER, J., *op. cit.*, p. 497.

101 WANYANA OGUTTU, A., "Preventing International Tax Competition and the Race to the Bottom: A Critique of the OECD Pillar Two Model Rules for Taxing the Digital Economy - A Developing Country Perspective", *Bulletin for International Taxation*, no. 547, 2022, p. 5.

tax governance. By introducing a minimum effective corporate tax rate of 15%, the initiative aims to counteract base erosion and profit shifting, thereby redefining the contours of permissible tax competition in an increasingly interconnected global economy. In doing so, it signals a shift towards greater collective oversight over corporate taxation, invoking principles of fairness, and cooperation.

However, the framework is not without significant conceptual and operational limitations. The absence of a unified policy rationale – specifically, the unresolved tension between targeting artificial profit shifting and addressing tax competition more broadly – has resulted in a compromise that weakens its normative coherence and enforcement prospects. These issues are compounded by procedural and institutional shortcomings. The framework imposes disproportionate administrative burdens on developing countries, many of which lack the fiscal and technical capacity to implement its intricate rules. Moreover, despite its stated objective of curbing tax competition, Pillar Two leaves considerable room for continued tax planning and regulatory arbitrage, owing to its relatively low rate and structural complexity.

In this context, the global minimum tax also poses challenges to the rule of law. Without a binding multilateral legal instrument, its legitimacy and long-term sustainability rest heavily on voluntary compliance and soft law mechanisms, which may erode the predictability traditionally associated with the rule of law in tax matters. Although the GloBE Rules represent a meaningful attempt to recalibrate tax sovereignty in the interest of global equity, they fall short of offering a definitive resolution to the structural deficiencies of the current international tax regime. Rather than fully curtailing tax competition, Pillar Two may simply reconfigure it, encouraging new forms of strategic behaviour by both states and MNEs. As such, the global minimum tax should be seen not as a conclusive solution, but as a foundational step toward constructing a more coherent and equitable, grounded international tax order – one in which the rule of law is not merely aspirational, but fully embedded in the design of the tax systems.

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PART III.
CURRENT CHALLENGES FOR THE RULE OF LAW IN WESTERN EUROPE

THE CONCEPTION OF THE RULE OF LAW IN FRENCH LAW

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SUMMARY: 1. INTRODUCTION. 2. A FRENCH CONCEPT BORN OF REPUBLICAN HISTORY AND THE CENTRALITY OF THE LAW. 2.1. Legicentrism inherited from 1789: the law as the expression of the general will. 2.2. The separation of jurisdictional orders: a French originality. 3. THE GRADUAL EMERGENCE OF THE RULE OF LAW IN POSITIVE LAW. 3.1. Constitutionalizing of fundamental rights. 3.2. Reinforcement of judicial control by the administrative judge. 4. AN EVOLVING MODEL INFLUENCED BY EUROPE AND CONTEMPORARY CRISES. 4.1. The Europeanization of French law. 4.2. The resilience of the Rule of Law in the face of exceptional logics. 5. CONCLUSION.

1. INTRODUCTION.

The concept of the rule of law, understood as the submission of all public authorities to the law, has long remained a legal concept formed by jurists since its appearance at the end of the 18th century. Since the end of the 20th century it has taken on a political meaning and is now considered a fundamental requirement in democratic regimes.

Generally speaking, this concept is characterized by four components: the separation of powers, respect for the hierarchy of norms, equality of citizens before the law, and the independence of judges.[1]

1 On the concept, Cf. CHEVALLIER, J., *L'État de droit*, Montchrestien, 2003. See the list of criteria drawn up by the Council of Europe's Venice Commission at its 106th full session on 11 & 12 March 2016.

It is in this sense that Carré de Malberg stated in the first half of the 20th century that: "*The spirit of the Rule of Law is that the Constitution should determine above all else and guarantee to citizens those individual rights that must remain above the reach of the legislature. The Rule of Law is a system of limitations, not only on the administrative authorities, but also on the Legislature*".[2]

More recently, the former Vice-President of the French Council of State stated that "*the separation of powers and the independence of the judiciary have been one of the essential foundations and even the matrix of the guarantee of the Rule of Law, without which there is no democracy*".[3]

This concept of the rule of law, which originated in Europe but is now considered to be universal, leads us to question our subject: what logic would there be in considering a French concept of this notion or a specific variation of this concept in French law? Would France not be lacking in modesty, exceptionally no doubt, in claiming to have its own conception, defined by its law, of a universally recognized concept? Could such a quest for origins only be exercised at Western level?[4]

It should be said that the concept of the rule of law has been forged at the crossroads of philosophical, historical and political influences and has taken on different meanings in different countries and legal traditions.[5] There is indeed a French concept of the rule of law that permeates French law. This concept was developed during the French Revolution, in opposition to monarchical absolutism, and was formalized at the end of the 19th century in opposition to the highly specific German concept of the *Rechtsstaat.*[6]

Long dominated by a legicentrist vision stemming from the French Revolution, the French conception of the rule of law has evolved profoundly with the rise in power of the constitutional judge, the Europeanisation of the law, and contemporary challenges linked to security, health emergencies and lack of faith in democracy.

Understanding the rule of law in French law therefore involves tracing this historical and doctrinal construction, analysing its concrete legal forms, and questioning its limits in the light of current changes.

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2 CARRE DE MALBERG, Raymond, *Contribution à la théorie générale de l'État*, Paris, CNRS Éditions, 1920.

3 J-M. SAUVE, *L'État de droit aujourd'hui*, RDLF, 2024, no. 62.

4 V. J.-L. HALPERIN, *L'État de droit, un concept occidental ?*, in Pouvoirs, n°193, *Qui en veut à l'État de droit ?*, Seuil, 2025, p. 21s.

5 *Ibid*.

6 According to LORENZ VON STEIN, "It must first be assumed that both the word and the concept of *Reichtsstaat* are specific to Germany. Neither can be found in foreign literature, and neither can be correctly translated into any language other than German, in *Die Verwaltungslehre*, 2nd ed, Stuttgart, Cotta, 1869, p. 296, cited in M. KORDEVA, *L'État de droit: crise de définitions*, Pouvoirs, no. 193, *op. cit.*, p. 7.

2. A FRENCH CONCEPT BORN OF REPUBLICAN HISTORY AND THE CENTRALITY OF THE LAW.

The French concept of the rule of law is reflected in the place accorded to the law in the hierarchy of norms and in an administrative justice system that reflects an original concept of the separation of powers.

2.1. Legicentrism inherited from 1789: the law as the expression of the general will.

The expression *État de Droit* (Rule of Law) did not become widespread in France until the early 20th century.[7] It was taken up by the great authors of French public law at the beginning of the century, such as Léon Duguit, Maurice Haurriou and Raymond Carré de Malberg.[8]

Rebutting the principles of the *Rechsstaadt* (in particular self-limitation) and its compatibility with the principles of French law in the Germanophobic context of the time, these authors grafted the notion of the rule of law onto a political and legal tradition stemming from the French Revolution.

Some of the foundations of the *Rechsstaadt* had in fact been formulated by French revolutionary thought.

The 1789 Declaration of the Rights of Man and of the Citizen laid the foundations of the French concept of national sovereignty, proclaiming that "*the law is the expression of the general will*" (article 6).

In the republican tradition, this formula established the pre-eminent role of the law, and therefore of Parliament, as the legitimate source of law, which underpinned the omnipotence of legislative power in France for almost a century and gave rise to criticism of unbridled power.

The revolutionary concept of sovereignty, taken up by the republican tradition of sovereignty, made suffrage the sole democratic source of power, breaking with monarchical absolutism and the legitimacy of divine right.

Consequently, since the democratic legitimacy of the assemblies is the most direct, the executive, which has only a second sovereignty, derived from Parliament, cannot contest their supremacy within the institutions. Nor can it set itself up as an equal according to a logic of balance of powers. On the contrary, French Republicans saw the submission of the executive to the power of the

7 HEUSCHLING, L., *État de Droit, Rechsstaadt, Rule of Law*, Dalloz, 2002.

8 DUGUIT, L., *Manuel de Droit constitutionnel*, éd de Boccard, Paris, 1923. M. Haurriou, *Principes de droit public*, Sirey, 1916. CARRE DE MALBERG, Raymond, *Contribution à la théorie générale de l'État*, *op. cit.*

assemblies as an essential condition for democracy throughout the Third and Fourth republics.[9]

This refusal to grant even a limited form of autonomous legitimacy to the executive led the republicans to seek a form of institutional functioning similar to that of the assembly system, in which the executive was responsible. As the constitutional laws of the Third Republic in 1875 laid the foundations for a parliamentary system, the executive always retained a form of autonomy that varied from period to period. However, the Third Republic was to operate in a manner similar to that of a de facto assembly system, otherwise known as a system of parliamentary sovereignty or absolute parliamentarism.

Parliamentary sovereignty, supposedly the most moderate expression of popular sovereignty, the direct expression of which could prove dangerous (according to Montesquieu), was coupled with the affirmation of the sovereignty of the law.[10]

This republican worship of the law is based first and foremost on the mythical origin of the law as the "*expression of the general will*", as set out in article 6 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789, a formulation taken from Jean-Jacques Rousseau's Social Contract (chapter VI of book XI). The corollary of Rousseau's conception of the law is that it can only formulate a rational imperative.

The cult of the law is therefore also in line with the revolutionary cult of reason. For the *Encyclopédie*, the law is "*human reason insofar as it governs all the peoples of the earth*". Similarly, Montesquieu states that "*Laws are the necessary relationships that derive from the nature of things*". As a conjunction of the general will and the imperatives of reason, the law takes up the idea of the infallibility of the law formerly vested in royal authority for its own benefit.

It follows that no one can evade the law. The Constitution of the Third Year thus stipulates that "No man is a good man unless he is frankly and religiously law-abiding". Furthermore, the infallibility of the law excludes, in principle, any form of constitutional review.

This rejection of constitutional review was asserted very early on, as early as the revolutionary period. Emmanuel Siéyès' plan for a constitutional jury was rejected.

However, this does not mean imposing the idea that the law has no limits and that there is no rule that is superior to it. The Declaration of the Rights of Man and of the Citizen of 26 August 1789 is very explicit in this sense.

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9 From 1875 to1940 for the Third Republic and from 1946 to 1958 for the Fourth.

10 For links between parliamentary sovereignty and the sovereignty of the law, see R. CARRÉ DE MALBERG, *La loi, expression de la volonté générale*, *op. cit.*

The principle of the superiority of the Declaration over the law is affirmed in the Preamble, which states that "*The representatives of the French people constituted as a National Assembly have resolved to set out in a solemn declaration the inalienable and sacred rights of man so that the acts of the legislative power and those of the executive power, which can be compared at any time with the purpose of any political institution, may be more fully respected". The content of the Declaration also sets very clear limits on the action of the legislator, specifying that "The law only has the right to defend actions that are harmful to society" (art. 5) or that "The law must only establish strictly and obviously necessary penalties" (art. 8). The revolutionary Constitutions, in line with these precepts, assert that "The legislative power may not make any law that does not infringe or impede the exercise of the natural and civil rights (...) guaranteed by the Constitution*" (Constitution of 1791) or that "The Declaration of the Rights of Man and of the Citizen contains the obligations of the legislator" (Constitution of Year III – 1795).

This is the affirmation of the French concept of limitation, which has been based on a hierarchical legal order since 1789. Natural law constitutes the fundamental standard to which positive law must conform, in accordance with the precepts of the Declaration which, by its very name, does not claim to create anything but simply to recall natural principles existing throughout eternity.

Moreover, the Republicans, like most of the revolutionaries of 1789, refused to allow any authority other than the legislature itself to review the conformity of the law with the principles that are superior to it. No form of constitutionality review by way of action could therefore be introduced. The same applies to review by way of exception. Thus, in the name of the separation of powers, the court cannot refuse to apply the law on pain of denial of justice, prohibited by article 4 of the Civil Code, or substitute its own case law for the law. Article 5 of the Civil Code prohibits "*arrêt de règlement*", in reaction to the abuses of the parliaments of the *Ancien Régime* and in accordance with the principle of the separation of powers laid down by article 16 of the DDHC and by the laws of 16 and 24 August 1790.

Judges were confined to enforcing the law and excluded from political interpretation.[11] In addition to implementing the separation of powers explicitly mentioned in article 16 of the Declaration of the Rights of Man, this was the expression of a mistrust of judges that can be explained by the revolutionary desire to abolish the judicial arbitrariness of the *Ancien Régime*.

11 The revolutionary legislator even introduced a procedure known as référé législatif (Law of August 16 and 24, 1790, art. 12) to require the judge to consult the legislator in the event of uncertainty in the interpretation of the law. This procedure was abolished by the Law of 1 April 1837.

From the early 20th century, voices were raised in both academic circles[12] and among parliamentarians[13] to denounce the risks of majority dictatorship generated by such a conception of parliamentary sovereignty, a political consequence of the sovereignty of the law.

2.2. The separation of jurisdictional orders: a French originality.

One of the specific features of French law is the duality of the jurisdictional orders resulting from the laws of 16 and 24 August 1790 and the decree of Fructidor year III (1795).

Thus, out of a desire to separate the executive and judicial powers, but also to prevent the re-emergence of pressure from the judiciary on the royal power, the revolutionary legislator explicitly provided that the ordinary law judge had no jurisdiction to judge the administration. After a decade of judicial vacuum characterized by a mechanism of "minister-judge" by which the administration judged itself, this competence was attributed, from the very end of the 18th century,[14] to the Council of state which belongs to the Administration.[15] Despite developments in jurisdictional procedure throughout the 19th century, the Council of State only had the power of restraint and did not acquire full powers of delegated justice until the Act of 24 May 1872. This put a definitive end to the logic of the minister-judge, which was confirmed by case law almost twenty years later.[16] The Act of 24 May 1872 also created the *Tribunal des Conflicts*, which was responsible for ruling on jurisdictional disputes between the two levels of court.

In France, the establishment of the rule of law did not mean that the administration was subject to ordinary law, but rather that a specific judicial system was set up within the state administration itself.

The emergence of a genuine regulatory power was the first change in the hierarchy of norms established by the revolutionaries. From the revolutionary period onwards, regulations were considered to be instruments of law enforcement, although the executive was to go beyond this concept. New regulatory provisions appeared first and foremost in the context of increasing legislative delegations due to Parliament's inability to respond to the state's need to act in times of crisis. Administrative case law, while maintaining

12 See L. DUGUIT et M. HAURRIOU, in JJ. Chevallier, *Histoire des institutions et des régimes politiques de la France*, 9e éd., Dalloz, 2009.

13 See, for example, A. TARDIEU "Everything happens by virtue of the law, which is, for the majorities, the means of sanctifying their arbitrariness", in *La Révolution à refaire,* Flammarion, t. 1, 1936, p. 223 et seq.

14 Constitution of Year VIII, art. 52

15 "To judge the administration is still to administer" was the late French expression of the *Conseiller d'Etat* Henrion de Pansay, in *De l'autorité judiciaire en France,* Barrois, Paris, 1818.

16 CE 13 Dec 1889, *Cadot*, Rec. 1148

the subordination of regulations to the law, was also led to recognize an autonomous regulatory power both for the organization of public services (CE Babin, 4 May1906) and the protection of public order in the context of general administrative policing (CE Labonne, 8 August 1919).

This organisation contributes to making administrative legality an autonomous issue, but also to distancing the administration from the ordinary judge. However, through the general principles of law, administrative case law has developed a real framework for administrative action, reinforced by the effective independence of administrative justice from the active Administration.

This revolutionary conception of the rule of law thus reflects the originality of the French sources of the rule of law. This French originality is reflected in the gradual emergence of the rule of law in French positive law through the progressive submission of statutes and regulations to a coherent hierarchy of norms.

3. THE GRADUAL EMERGENCE OF THE RULE OF LAW IN POSITIVE LAW.

Beyond its natural foundations inherent in the French conception of the rule of law, the rule of law gradually developed within positive law through the constitutionalising of fundamental rights and progress in judicial control of the Executive.

3.1. Constitutionalizing fundamental rights.

It was only belatedly that France introduced a genuine review of the constitutionality of laws.

The review of the constitutionality of laws had been rejected as a matter of principle by republicans since the revolutionary period, in the name of the refusal to review the expression of the general will. Indeed, while the review of legality practiced by the administrative courts was unanimously welcomed as a means of subjecting regulations – a secondary, conditional act – to the law, an act of sovereignty, the idea, however consistent within the framework of the hierarchy of norms, of subjecting the text adopted by the representatives of the nation to any authority whatsoever appeared to be incongruous.

Even if the principle of such control had been accepted in the name of the supremacy of the Constitution in the internal normative order, a second difficulty, and not the least important, concerned the designation of the body responsible for fulfilling such a mission.

The drafters of the Constitution of 4 October 1958 resolved these two difficulties by presenting the Constitutional Council, at the outset, simply as a body responsible for ensuring compliance with the law. The Constitutional Council was therefore initially regarded by the most critical as "a cannon pointed at Parliament", i.e. a censor on the lookout for any attempt by the legislature to step outside its domain and encroach on that reserved for autonomous regulation. However, in terms of principles, control of the constitutionality of laws is defined by the Constitution, i.e. by the highest expression of sovereignty expressed by the original constituent people. This supreme will can therefore legitimately take precedence over the secondary will of the representatives responsible for passing the law. Finally, insofar as the review instituted is a review by way of action and not by way of exception, the text reviewed is an act adopted by Parliament, but, as promulgation has not yet taken place, it is not formally a law.

The Constitution of 4 October 1958 also settles the institutional question, since the nine members of the Constitutional Council are appointed in equal parts by authorities of unquestionable legitimacy (the President of the Republic, the guardian of the institutions, who appoints the President of the Constitutional Council, and the Presidents of the National Assembly and the Senate, embodying legislative power).

While this control may initially have been perceived as a threat to the law, the case law of the Constitutional Council has, on the contrary, come to Parliament's rescue. The nine wise men of the rue de Montpensier authorised the 'overflow' of the law into the regulatory domain, provided that the Government did not prevent it.[17] Furthermore, the Constitutional Council obliged Parliament to exercise its prerogatives to the full through its jurisprudence on negative incompetence,[18] in particular by prohibiting it from referring the power to the regulatory authority to establish provisions that fall within the scope of the law.

In view of the relative symbolic depreciation of the law, which has become a simple tool for political decision-making that can change at any time,[19] it may even be considered that the review exercised by the Constitutional Council reinforces the authority of the law by giving it a form of patent of constitutionality. In accordance with the case law of the Constitutional Council, the law is henceforth the expression of the general will "only in compliance with the Constitution".[20]

17 *Cf.* notamment Cons. Const., décis. no. 82-143 DC, 30 July 1982.

18 *Cf.* Cons. Const., décis. No. 83-168 DC, 20 Jan 1984; *adde,* sur cette notion G. Schmitter, " L'incompétence négative du législateur ", *AIJC* 1989, vol. V, p. 137 et s.

19 Cf. in particular the repeated upheavals in the law over the last 40 years in the areas of tax law and criminal law, to cite just two examples.

20 *Cf.* Cons. Const. Décis. no. 85-197 DC, 23 August 1985

There can be no question here of undertaking an overall analysis of the constitutional provisions clarified by the case law,[21] but only of identifying the main trends. The Constitutional Council has adopted an extensive conception of its role, while case law has deepened constitutional guarantees. This twofold trend has been reinforced by the introduction in 2008 of an *a posteriori* constitutionality review through a Priority Constitutionality Question (QPC).

Firstly, it should be remembered that the concept of a Constitutional Council limited to the role of guardian of the division of powers operated by articles C34 and C37 was defended at the origins of the Fifth Republic and confirmed by the first decisions of this institution. Thus, the refusal to rule on the constitutionality of the procedure used to revise the Constitution on 6 November 1962 appeared to be a sign of timidity, if not subservience to the government.

However, and at the risk of sometimes being accused of a "government of judges",[22] the Constitutional Council very quickly asserted its authority by including (in a famous decision of 16 July 1971) not only the articles of the Constitution, but also its preamble in its review, which gave it grounds for a much more in-depth examination of the texts submitted to it, or by analysing its own jurisdiction extensively.[23]

According to the same logic, the Constitutional Council would then develop its methods of examination by considering itself, for example, seized of the whole of a text as soon as one of its articles has been submitted to it, authorising it to raise grounds of the unconstitutionality of its own motion, by practicing a method of conformity subject to reservation which enables it to indicate the legitimate interpretation of a text of law.

Without attaining the degree of freedom enjoyed by the Court of Karlsruhe in the exercise of constitutionality review relating to the German Basic Law, this evolution in the methods of the Constitutional Council contributes to the development of case law in the scope of constitutional provisions.

Secondly, it is clear that the Constitutional Council has led to a deepening of constitutional guarantees.

The recognition of an extensive conception of the field of the law to the detriment of the material conception laid down by Article C34 appeared to be

21 Cf. DE VILLIERS, M. and RENOUX, T. S., *Code Constitutionnel*, *op. cit.* FAVOUREU, L. and PHILIP, L., *Les grandes décisions du Conseil constitutionnel,* Dalloz, 16e éd, 2011. DRAGO, Guillaume, *Contentieux Constitutionnel français,* PUF, Thémis, 5e éd., 2020.

22 *Cf.*, TROPER, M., "Le bon usage des spectres. Du gouvernement des juges au gouvernement par les juges", in *Mélanges en l'honneur de G. Conac*, Economica, 2001.

23 By intervening, for example, in the declaration of a vacancy in the office of President of the Republic due to the resignation (1969) or death (1974) of the incumbent, whereas article C7 only refers to a vacancy.

a further indication of the Constitutional Council's concern to set itself up as the protector of fundamental freedoms.[24]

The decision of 16 July 1971 is the founding element of this development, insofar as constitutional guarantees now appeared to be a real bulwark against the abuses still possible under majority parliamentarianism.

The extension of the right of referral to sixty deputies or sixty senators in 1974 also opened up the possibility of constitutionality review to the opposition, and completed an edifice limited by the absence of self-referral or individual exception of unconstitutionality.

Today, however, these constitutional guarantees of freedoms are relativised by competition from international standards. Thus, although the Constitutional Council has refused to assess the conformity of laws with a treaty,[25] the Court of Cassation[26] and the Council of State,[27] since its Nicolo judgment of 20 October 1989, are now willing to give precedence to a treaty over a subsequent law deemed to be in conformity with the Constitution.

The increasing scrutiny exercised by the European Court of Human Rights over our domestic normative order[28] also contributes to this modification of the hierarchy of norms, in which the Constitution remains formally the supreme norm[29] but is materially subject to the entry of international norms into the domestic order, as evidenced by the revisions designed to adapt the Constitution to treaties.

The guarantees afforded to fundamental freedoms by the Constitution are thus extended by other standards, international texts, making up for the shortcomings of the French system of rights protection and thus completing the construction of the principles proclaimed by domestic law.

Thirdly and lastly, this evolution has been reinforced by the introduction of the QPC (*question prioritaire de constitutionnalité* [priority question of constitutionality]).

The introduction of constitutionality control *a posteriori* was rejected in 1958, in the name of the sovereignty of promulgated law, i.e. the expression of the general will (art. 6 DDHC). The erosion of this symbolic authority of the law (upheaval of the hierarchy of norms with regard to international law and derived Community law, erasure of the screen law, degradation of the law to the rank

24 Cf. ROUSSEAU, D., "Les grandes avancées de la jurisprudence du Conseil constitutionnel", in *Mélanges J. Robert*, Libertés, Monchrestien, 1998, p. 297.

25 See the *Conseil constitutionnel*'s "IVG" decision of 15 January 1975, in FAVOUREU, L. and PHILIP, L., *Les grandes décisions du Conseil constitutionnel*, Sirey.

26 Since the Société Jacques Vabre, decision of 24 May 1975.

27 Since its Nicolo decision, of 20 October 1989.

28 Cf. ECHR *Kreiss c/ France*, of 30 June 2001.

29 CE Ass, 30 October 1998, Sarran, Levacher et al.

of a contingent and perishable political instrument, alteration of the quality of the law, etc.), as well as the observation of the inadequacies of the law, have all contributed to the development of the French legal system and the inadequacy of *a priori* control alone (see G. Drago, "Réformer le Conseil constitutionnel", in *Pouvoirs*, no. 105, 2003, p. 80–82) and have led to the idea of a necessary renewal of constitutionality control.

After failed attempts in 1990 and 1993 (Bills no. 1203 tabled in the National Assembly on 30 March 1990 and no. 231 tabled in the Senate on 10 March 1993, both of which had no effect), the Constitutional Act of 23 July 2008 introduced the QPC. A preliminary question of constitutionality, the QPC enables any litigant to challenge the constitutionality of the law applicable to them before a court of first instance.

If the plea is serious, not manifestly unfounded and conditions the outcome of the dispute, the judge refers the question to the supreme jurisdiction (Court of Cassation or Council of State, depending on the level of jurisdiction concerned), which decides whether to refer it to the Constitutional Council. This filter is designed to prevent the Constitutional Court from becoming overloaded. It has proved effective in its first few years of operation, guaranteeing a reasonable and credible flow of QPCs.

The QPC can only concern the protection of fundamental rights (excluding rules of legislative procedure or those governing regulatory competence), provided that the law in question has not already been subject to a constitutionality review.

The QPC has enabled the Constitutional Council to assert a new form of jurisprudence and, through a number of landmark decisions (on police custody, for example), has reinforced its role as guardian of freedoms.

The introduction of the QPC, conceived as a new legal avenue open to citizens, was one of the major innovations of the 2008 revision.

3.2. Reinforcement of judicial control by the administrative judge.

Through its jurisprudence, the Council of State has progressively strengthened the rule of law by requiring the administration to comply with the law. It thus proved to be an effective complement to the judicial judge in the protection of freedoms.[30]

The administrative justice system asserted itself as the guardian of the legality of administrative acts within the framework of the *contentieux de l'excès*

30 Cf. V J-M SAUVE, Vice-Président du Conseil d'État, in Actes du Colloque *Dialogue entre les deux ordres de juridiction*, Ecole Nationale de la Magistrature, 21 July 2017.

de pouvoir (excess of power litigation), which is the *contentieux de l'annulation* (to use Laferrière's expression) of administrative decisions that are contrary to the law. Over the years, the administrative judge's jurisprudence has extended the scope of his control to virtually all administrative acts, since only acts of government (acts necessary for the conduct of France's diplomatic action and relations between constitutional public authorities) still escape the control of legality,[31] while measures of internal order[32] and circulars containing imperative provisions of a general nature are now subject to it.[33]

The administrative courts were also empowered to rule on the liability of public bodies for damage caused to private individuals by their employees, a principle established by the famous Blanco decision of the *Tribunal des Conflits* of February 1873.

From the second half of the 19th century onwards, the Council of State developed a body of jurisprudence that protected fundamental rights, notably through the discovery of general principles of law (rights of defence,[34] equality of users of public services,[35] equal access to public employment,[36] freedom of trade and industry[37] and the right to lead a normal family life).[38]

Administrative justice was also to innovate through jurisprudential theories that handed back the task of protecting individual freedoms to ordinary law. The "*voie de fait*"[39] theory establishes the jurisdiction of the judicial judge when the administration has committed a serious and grave violation of a public freedom or private property by means of an act that is manifestly insusceptible of being connected to the exercise of one of its powers. The same applies to the theory of real estate holding[40] in cases of serious irregular infringement of property rights.

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31 This category has itself become even smaller CE Ass. 28 May 1937, *Decerf;* CE Ass. 15 Oct 1993, *Royaume-Uni de Grande-Bretagne et Gouverneur de la colonie royale de Hong-Kong*, no. 142578.

32 The internal rules of a school (CE November 2, 1992, Kherouaa, Rec. 389), the sanctions of military personnel (CE Ass., February 17, 1995, M. Hardouin, Rec. 82) and prisoners (CE Ass. Febr 17, 1995, M. Marie, Rec. 85) are no longer considered beyond the judge's control.

33 CE Sect. December 18, 2002, Mme Duvignères, Rec. 463, which generalizes the right to appeal and thus reverses the distinction between interpretative circulars (not subject to appeal for misuse of power) and regulatory circulars (subject to appeal), established by the CE January 29, 1954, Institution Notre-Dame du Kreisker decision.

34 CE Sect. 5 May 1944, Dame Veuve Trompier Gravier, Leb. p. 133; CE Ass. 26 October 1945, *Aramu*, Leb. p. 213.

35 CE Ass. 25 June 1948, Société du Journal l'Aurore, Leb. p. 289.

36 CE Ass 28 May 1954, Barel et autres, Rec. p. 308 concl. Letourneur.

37 CE Ass. 22 June 1951, Daudignac.

38 CE Ass. 8 December 1978, Gisti et autres, Leb. p. 493.

39 TC 8 April 1935, Action française, Gaja.

40 TC 17 March 1949, Société "Hôtel du vieux Beffroi" et société "Rivoli-Sébastopol", Gaja.

The principle of non-retroactivity of administrative acts,[41] or the right to challenge the legality of an administrative act by means of a *recours pour excès de pouvoir*, has been confirmed by this category of jurisprudence.[42]

The creation of the "*référé liberté*"[43] procedure by the law of 30 June 2000, an emergency procedure enabling the termination of an administrative measure likely to seriously affect the exercise of a fundamental freedom, offers an effective mechanism for the rapid protection of fundamental freedoms against administrative infringement. The rule of law is thus embodied in increasingly active judicial practice.

4. AN EVOLVING MODEL INFLUENCED BY EUROPE AND CONTEMPORARY CRISES.

The most recent developments in the rule of law in France are the result of European influence and contemporary crises.

4.1. The Europeanisation of French law.

The growing influence of European Union law and the European Convention on Human Rights has profoundly transformed and enriched the French conception of the rule of law.

The Court of Cassation and the Council of State now recognize the primacy of international and European commitments over national laws, in line with the case law of the Court of Justice of the European Union (CJEU), which has given full effect to EU law by enshrining the principles of primacy, unity and effectiveness (CJCE, July 15 1964, Costa c/ ENEL, aff. 6/64 and CJCE, 9 March 1978, Simmenthal, aff. 106/77).

The requirements of the ECHR, particularly in terms of the right to a fair trial, the independence of the judiciary, and non-discrimination have altered the internal balance of the French system.[44]

Since the *Jacques Vabre* decision by the Court of Cassation[45] (1975), and the *Nicolo* decision by the Council of State[46] (1989), the French courts have agreed to set aside a law that is contrary to an international treaty, logically drawing the consequences from the Constitutional Council's refusal to rule on

41 CE Ass. 25 June 1948, Société du Journal l'Aurore, Leb. p. 289.
42 CE Ass. 17 February 1950, Dame Lamotte, Leb. p. 110.
43 CJA art. L. 521-2 et R. 522-1 et s.
44 ECHR Kreiss c/ France, du 30 juin 2001.
45 C. Cass Ch. mixte, 24 mai 1975, Société des cafés Jacques Vabre, D. 1975.497.
46 CE Ass. Nicolo, 20 oct. 1989, Leb. 190.

the conformity of a domestic law to an international treaty.[47] The Council of State has progressively extended this jurisprudence to all acts of European Union law, recognizing them as superior to domestic laws (CE 24 Sept 1990, Boisdet, no. 58 657 for regulations and CE Ass. 28 February 1992, S.A. Rothmans International France et S.A. Philip Morris France pour les directives, n° 56 776). This superiority of EU law now also applies to the general principles laid down by the European Court of Justice (EC, July 7, 2006, *Société Poweo*, no. 289 012).

Occasional discrepancies between European case law and certain domestic decisions may exist, for example in the context of the use of the *acte clair* theory. Both the Conseil d'État and the Court of Cassation have enshrined the theory of the clear act, which allows a domestic judge to interpret a European standard when this interpretation poses no real difficulty (CE 19 June 1964, *Société des pétroles Shell–Berre*, no. 47 007; Cass. 1ère civ. 19 December 1995, *Banque africaine de développement*, no. 93–20424).

However, the dialogue among judges has resulted in a high degree of convergence between French domestic case law and European case law. By way of illustration, we might mention the Council of State's general recognition of the principle of legal certainty (CE 24 March 2006, *Société KPMG et alii*, no. 288460), a principle that the ECJ had recognized in 1962 (ECJ 6 April 1962, *Bosch*, aff. 13/61).

Independently of this structural evolution in the sources of the rule of law in France since the mid-2010s, circumstances have shed new light on our conception of the rule of law, notably through exceptional legal regimes.

4.2. The resilience of the Rule of Law in the face of exceptional logics.

The crises that hit Western democracies in the early 21st century (economic crises, terrorist attacks, pandemics, social crises) led to the implementation of exceptional legal regimes, testing the capacity of the rule of law to protect freedoms while maintaining public order.[48]

The legal regime of the state of emergency, created in France in the context of the Algerian insurrection in the 1950s (Law no. 55-385 of 3 April 1955 relating to the state of emergency) illustrates the nature of this situation, in which exceptional measures are put in place to deal with a disorder that cannot be resolved by ordinary law. This is by no means a digression from the rule of

47 Décision IVG, Cons. const., décis. n° 74-54 DC, du 15 janvier 1975.

48 For an evocation of the economic law of exception which will not be dealt with here, Cf. M. GOUPY, *Le droit (d'exception) économique contre l'État de droit*, in Pouvoirs, *Qui en veut à l'État de droit*, *op. cit.*, p. 87s.

law, since these provisions are established by law in a regular manner, and the restrictions they impose on freedoms are, under the supervision of the courts, considered proportionate to the measures required by the circumstances. This system has been used on a number of occasions in times of great threat to public order (such as in January 1985 in New Caledonia during clashes sparked by independence movements, or in November 2005 to control riots in the suburbs of many French cities).

However, more recent uses of the state of emergency have been in response to specific threats, resulting in a substantial change in the applicable legal regime and, above all, a change in the rationale for its use. Previously reserved for one-off situations, the state of emergency is now used to deal with long-term threats.

Thus, following the 3 November 2015 attacks in France, the state of emergency was once again decreed, and the law of 20 November 2015[49] was, within this framework, designed to substantially increase the powers of the executive to carry out house arrests, searches at any time or block websites, independently of new guarantees of information to parliament. The repeated extension of the state of emergency until 31 October 2017 shows that the long-term use of this legal regime raises many questions in that it devalues the normal functioning of institutions, distorts the balance of power and undermines national cohesion by restricting freedoms without any real visible need. This was evidenced by the lively debates that challenged the French conception of the rule of law.

This question of the proportionality of restrictions on freedoms to the risk and their social acceptability also arose in 2020 and 2021 in the context of the Covid 19 pandemic. The law of 23 March 2020[50] created a state of health emergency to provide a legal basis for the measures taken to combat the effects of the pandemic. This state of health emergency was applied nationally on two occasions, between 24 March 2020 and 10 July 2020, and between 17 October 2020 and 1 June 2021. "Exit" regimes are applied between these two periods, and between 2 June 2021 and 31 July 2022.

The restrictions on individual freedoms imposed by this temporary regime (restrictions on freedom of movement, assembly, worship, etc. through confinement measures) have also highlighted the impact of such measures on social cohesion.

Lastly, these episodes have shown how difficult it is to emerge from a state of emergency when a threat has not disappeared, since the necessity of the restrictions imposed on the population is then questioned *a posteriori*. The

49 Loi n° 2015-1501 du 20 novembre 2015 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et renforçant l'efficacité de ses dispositions.

50 Law 2020-290 of 23 March on emergency response to the COVID 19 pandemic.

system of procedural guarantees and safeguards, particularly jurisdictional ones, then appears to be the best way to protect national cohesion.

5. CONCLUSION.

Far from being a simple adaptation of a universal model, the French conception of the rule of law is distinguished by its historical genesis, its particular jurisdictional structure and its ambivalent relationship with supranational norms. The evolution of the role of the judge, the constitutionalising of fundamental rights and the impact of European law have profoundly renewed this conception. However, the rule of law in France remains vulnerable to the logics of power, security temptations and democratic mistrust. It therefore requires constant vigilance, political maturity and renewed pedagogy to bring the principles on which it is founded to life on a daily basis.

ADMINISTRATIVE INERTIA AS A VIOLATION OF THE PRINCIPLE OF THE RULE OF LAW IN PORTUGAL

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SUMMARY: 1. DEMOCRATIC AND SOCIAL STATE UNDER THE LAW AND DIGNITY OF THE HUMAN PERSON. 1.1. The enshrinement of the principle of the Democratic Rule of Law in the Portuguese Constitution of 1976. 1.2. Human Dignity as a founding value of Portuguese Basic Law. 1.3. The "Anthropological Axiom" and the triple constitutional characterization of the Portuguese state: Rule of Law, Democratic and Social. 1.4. The Democratic and Social state (of Law) as a specific "constitutional formula" of a state of Substantive Law. 2. REGULATORY ADMINISTRATION AND IMPLEMENTATION OF THE PRINCIPLE OF THE SOCIAL RULE OF LAW. 2.1. Material privatization of "Public Services" and Regulatory state. 2.2. The paradigm of the "new social state": regulation and regulatory bodies. 2.3. Powers of Regulation/Supervision and Pursuit of Public Interests as the scope/task of the Administration of the "New" Social state of Law. 3. INERTIA OF THE REGULATORY ADMINISTRATION AND VIOLATION OF THE DEMOCRATIC AND SOCIAL STATE OF LAW – "REMEDIES TO COMBAT". 3.1. Failure to exercise the functional powers legally assigned to the Regulatory Administrative state for the fulfilment of its duties. 3.2. Generic proposals for the implementation or legal formulation of appropriate remedies to combat administrative "inertia". 3.3. The Subjective Right of Citizens to the "Public Action" of the Regulatory state. 4. A FUNCTIONALLY ACTIVE REGULATORY ADMINISTRATION AND POSTPONING INERTIA TO SAFEGUARD THE DEMOCRATIC AND SOCIAL STATE OF LAW. 5. CONCLUSION.

1. DEMOCRATIC AND SOCIAL STATE UNDER THE LAW AND DIGNITY OF THE HUMAN PERSON.

Since we passed through the "Iron Gate" of the ancient University of Coimbra – in traditional Coimbra parlance, "*Porta Férrea*" – some forty-two years ago to begin our Law Degree course, we have heard and internalized, from the very beginning, through the learned words of our beloved Master and distinguished Constitutionalist, Professor Gomes Canotilho – who, in addition to the obligation that falls upon us, we will always be proud to praise – that Portugal is a "democratic state under the Law".[1] This is, in fact, a "key concept" of the Portuguese Constitution, albeit a "complex" one, given, at the very least, the requirement for coordination/compatibility of its two components: the rule of law and the democratic state.[2] In this regard, Jorge Miranda recalls, following the thinking of Jürgen Habermas, that "the democratic principle and the principle of the rule of law are co-originary principles. One is not possible without the other, without, therefore, imposing restrictions on the other".[3]

1.1. The enshrinement of the principle of the Democratic Rule of Law in the Portuguese Constitution of 1976.

Although in its original text, the expression "rule of law" "only" appeared in the Constitution's Preamble,[4] it would be fair to say that, in fundamental legal and normative terms, Portugal effectively came under it with the entry into force of the Portuguese Constitution of 1976, which will celebrate its 50th anniversary next year. This, despite the seven revisions to which it has been subjected since, which, in our view, are highly commendable, precisely because they aimed, in one way or another, at improving and establishing the democratic statehood of law and its corollaries in concrete terms, such as the enforcement

1 This "dimension of the rule of law" is revealed in the Basic Law of 1976 through a "complex of principles and rules dispersed throughout the constitutional text" that concretize its "core idea", i.e. "the subjection of power to legal principles and rules - guaranteeing individuals and citizens freedom, equality before the law and security". See GOMES CANOTILHO, J. J., *Direito Constitucional e Teoria da Constituição*, *op. cit.*, pp. 230 and 231.

2 See GOMES CANOTILHO, J.J. e MOREIRA, Vital, *Constituição da República Portuguesa Anotada*, Coimbra Editora, vol. I, 4th Edition, 2006, p. 204.

3 Cf. MIRANDA, Jorge, *Direitos Fundamentais*, Almedina, Coimbra, 3rd Edition, October 2020, pp. 266-269.

4 *Ibidem*, p. 204. According to Jorge Miranda, although this reference is "merely" a preamble, the Constitutional Commission did not fail to recognize "legal value" in some judgments. It should be noted that the Constitutional Commission functioned as an auxiliary body of the Revolutionary Council, which, in the original version of the 1976 Constitution, i.e. before the creation of the STF, also through the constitutional revision of 1982, exercised the function of controlling the constitutionality of norms. See MIRANDA, Jorge, *Direitos Fundamentais*, *op. cit.*, p. 261, note 625.

of Fundamental Rights, respect for the Separation of Powers and, in a particular way, compliance with the Principles of Legality of Administration and the Pursuit of Public Interest.[5]

Proof of this was clearly seen during the first constitutional review, carried out in 1982, through which the expression "Rule of Law" was finally introduced in article 2 of the constitutional corpus, but "always associated with the concept of democratic state".[6] To this extent, it is currently stipulated that "The Portuguese Republic is a democratic state of law, based on popular sovereignty, on the pluralism of democratic expression and political organization, on respect for and guarantee of the enforcement of fundamental rights and freedoms and on the separation and interdependence of powers, aiming at the achievement of economic, social and cultural democracy and the deepening of participatory democracy".

This fundamental precept means that "the rule of law is democratic and only by being so is it a state of Law; the democratic state is based on the rule of law and only if it is so is it democratic".[7] Therefore, "there is a democracy of the rule of law and a rule of law of democracy". In other words, "just as the aspect of the rule of law cannot be seen except in the light of the democratic principle, so too can the aspect of the democratic state be understood only from the perspective of the rule of law. Just as there is only one democratic state of law, there is also only one democratic state of law, and this is subject to legal rules".

Now, the concept of "constitutional democratic state" results from the combination of these two "components" or from the "confluence of the rule of law and democracy",[8]. Since "the Constitution is, directly, the law that governs the organization and exercise of political power", then "Democratic state of Law" means that "power is formed and exercised in accordance with the Constitution" or that "democracy is based on constitutional legality".[9]

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5 Among the formal and material dimensions of the principle of the Rule of Law are the System of Fundamental Rights and the Division/Separation of Powers. In the calculation of the respective "concretizing subprinciples", special emphasis is given to the principle of Legality of Administration, in all its aspects: prevalence or preeminence of the law, in a negative and positive sense, reservation of the law and precedence of the law. *Ibidem*, pp. 248-253 and 256.

6 See GOMES CANOTILHO, J.J. and MOREIRA, Vital, *Constituição da República Portuguesa Anotada*, Coimbra Editora, vol. I, *op. cit.*, p. 204.

7 See GOMES CANOTILHO, J.J., *Direito Constitucional e Teoria da Constituição*, *op. cit.*, p. 230.

8 See MIRANDA, Jorge, *Direitos Fundamentais*, *op. cit.*, pp. 266 and 267.

9 See GOMES CANOTILHO, J. J., *Direito Constitucional e Teoria da Constituição*, *op. cit.*, p. 231; GOMES CANOTILHO, J.J. e MOREIRA, Vital, *Constituição da República Portuguesa Anotada*, Coimbra Editora, vol. I, *op. cit.*, pp. 206 and 207.

1.2. Human Dignity as a founding value of Portuguese Basic Law.

It is also true that the 1976 Constituent Legislator should be proud of having peremptorily enshrined Human Dignity as the deepest "foundation" of Portugal as a political, national Community in Article 1 (of the original version) of the Portuguese Basic Law or, quite simply, *res publica*, established in the "form" or "political regime" of a "sovereign republic". Even today, one can still read in that constitutional precept that "Portugal is a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, fair and supportive society".

This postulate suggests, firstly, an idea of "limit". In fact, by asserting itself as a "limit-principle", the Dignity of the Human Person determines, on the one hand, that the person comes first and after that the political organization, and, on the other hand, that "the person is the subject and not the object, the end and not the means of legal-social relations". Hence the elevation of the Dignity of the Human Person as "the mainstay of support and legitimacy" of the *res publica* and the understanding of the organization of political power, functioning as a "borderline" against totalitarianism and the "existential annihilation of the human being". Secondly, it asserts itself as having a "value of its own" and a "specific normative dimension" that presupposes the existence of "a material principle underlying the idea of human dignity", conceived as an "anthropic" or "person–centred principle" that "embraces the pre–modern and modern idea of *dignitas-hominis* (…), i.e. of the individual shaping himself and his life according to his own spiritual project (*plastes et fictor*)".[10]

Therefore, it is legitimate to argue that the Portuguese Constitution "leaves no doubt about the indispensability of a constitutionally structuring anthropological basis for the rule of law", deduced, condensed and made effective by the enshrinement of a broad set of fundamental rights, in particular, rights, freedoms and guarantees, allowing us to deduce that the "anthropological root can be traced back to man as a person, as a citizen, as a worker and as an administered person".[11] As a result of this "materiality", emerging from a modern understanding of the "purposes of the state and the law it creates", it is not surprising that the value of "Human Dignity and Person" is considered as

10 See GOMES CANOTILHO, J.J., and MOREIRA, Vital, *Constituição da República Portuguesa Anotada* Coimbra Editora, vol. I, 4th Edition, 2006, pp. 198 and 199. GOMES CANOTILHO, J.J., *op. cit.*, p. 225.

11 See GOMES CANOTILHO, J.J., *Direito Constitucional e Teoria da Constituição*, *op. cit.*, p. 248.

For the author, in democratic thought, "the eminent dignity of the human person appears developed, in a first explication, through the principles of liberty, equality and fraternity – the democratic trilogy", i.e.the "three modalities, faces or dimensions of a single and unique value that encompasses and transcends them". *Ibidem,* pp. 17 and 18.

"the first element that makes up the contemporary or material conception of the principle of the rule of law".[12]

This is to say that the "Dignity of the Human Person" was elevated to a founding value of the Constitution and, necessarily, of the rule of law, conceived as one of its transversal principles worthy of the highest importance,[13] especially when (and because) it is inextricably linked to the Democratic principle and the principle of Sociality, since, in our understanding, they constitute a triptych of emerging structuring constitutional principles supported by the same "anthropological axiom" , to invoke *hic et nunc*, an expression loaded with theoretical-legal substance, so aptly used by our late Master and Great Humanist, António Barbosa de Melo.[14]

1.3. The "Anthropological Axiom" and the triple constitutional characterization of the Portuguese state: Rule of Law, Democratic and Social.

According to Barbosa de Melo's thinking, the existence of Man in Society obeys a "humanist idea", whose "essential core" means that "in social relations each individual and concrete person is an end in itself, has dignity, is priceless; he/she must always be valuable to others as a subject and never as an object, "*Homo homini frater*": "man is brother to man". This is the "first principle or anthropological axiom of the democratic ideal"! Whatever the social relations in question, it is thus dictated that "no one should use anyone as an instrument". Now, this is the "fundamental norm" (*Grundnorm*) of the legal and social order of democracy"[15] which, in our view, was adopted and consolidated as the core of the state by the Constitution of the Portuguese Republic of 1976. From it, the principle of the Rule of Law, the Democratic principle and the principle of Sociality naturally emerged as structuring and shaping principles.

In this regard, considering that sufficient observations have already been made regarding the constitutional interconnections between the rule of law and the Democratic state, it is necessary to make some observations about the combination of these first two 'dimensions' of the constitutionally shaped state envisaged in the Portuguese Constitution, with a third aspect that interests us

12 See AMARAL, Maria Lúcia. *A Forma da República - Uma Introdução ao Estudo do Direito Constitucional*, Coimbra Editora, Coimbra, 2005, pp. 164 and 165.

13 Cf. SIMÕES LOUREIRO, João Carlos, *Direito Constitucional II (Sumários Desenvolvidos)*, Copied, Coimbra, 2019, pp. 39 and 40.

14 See BARBOSA DE MELO, A., *Democracia e Utopia*, Porto, 1980, p. 17.

15 For the Author, in democratic thought, "the eminent dignity of the human person appears developed, in a first explication, through the principles of liberty, equality and fraternity - the democratic trilogy", that is, the "three modalities, faces or dimensions of a single and unique value that encompasses and transcends them". *Ibidem*, pp. 17 and 18.

greatly, i.e. "sociality" or the Social State – because, as João Loureiro reminds us, "man also lives by bread"![16]

Now, for us, from everything that has been defended above it follows – and will continue to follow – that the Democratic Rule of Law, expressly contemplated in the Portuguese Constitution because it is also based on the "will" or "popular sovereignty" (articles 1, 3 and 108 of the Portuguese Constitution),[17] in addition to postulating a Public Power subordinate to the Law and respectful of Fundamental Rights, came to be designed and formulated with more intense content and a broader scope that extends to the dimension of "sociality". It is, therefore, a Democratic and Social Rule of Law. In our opinion, this was the position explicitly and successively assumed by the constituent legislator in the various revisions that have been in operation up to the present day.

It is true that the Portuguese Constitution of 1976 does not include, in any rule, a "Principles of Sociality" section, as was the case, from the outset, with the German Constitution. However, the social burden and "responsibility" that emerge from various precepts of the Basic Law, justifying its characterisation as a "programmatic" constitution, allow us to conclude without a doubt that the Basic Law of 1976 enshrines or embraces the "principle of Economic, Social and Cultural Democracy", as a "political and logical-material consequence of the democratic principle", and that, as is the case with most European states, it integrates it "into the firm core of the Democratic Constitutional state".[18]

In that normative-constitutional body, in addition to Article 2, with regard to the fundamental duty of achieving "economic, social and cultural democracy (...)", Article 9 stands out, dealing with the "Fundamental Tasks of the state", in particular that of "Promoting the well–being and quality of life of the people and real equality among the Portuguese, as well as the realization of economic, social, cultural and environmental rights, through the transformation and modernization of economic and social structures" (paragraph d)).

In turn, in this area of "sociality", the importance of Article 81 should also not be forgotten, in terms of "Priority Responsibilities of the state" in the economic and social sphere, and here the "responsibility" of "Promoting the increase in social and economic well–being and the quality of life of the Portuguese people" should be highlighted. people's lives, within the framework of a sustainable

16 See SIMÕES LOUREIRO, João Carlos, *Direito Constitucional I...*, *op. cit.*, pp. 57 and 58.

17 According to the provisions of Article 3, paragraph 3, of the Portuguese Basic Law, "Sovereignty, one and indivisible, resides in the people, who exercise it in accordance with the forms provided for in the Constitution", and, in addition, according to the provisions of Article 108, "Political power belongs to the people and is exercised in accordance with the terms of the Constitution".

18 See GOMES CANOTILHO, J.J., *Direito Constitucional e Teoria da Constituição*, *op. cit.*, pp. 335 *et seq*.

development strategy" (paragraph a), "Ensure the efficient functioning of markets, in order to guarantee balanced competition between companies, to counter monopolistic forms of organization and to repress abuses of dominant positions and other practices that are harmful to the general interest" (paragraph f)) and, finally, "Ensure the defence of the interests and rights of consumers" (paragraph i)).

1.4. The Democratic and Social state (of Law) as a specific "constitutional formula" of a state of Substantive Law.

It is not at all insignificant to bear in mind that the "legal force" of the principle of Economic, Social and Cultural Democracy contemplates or includes a "mandatory imposition addressed to political leadership bodies (legislative and executive) to develop economic and social activity that shapes socioeconomic structures, in order to evolve towards a democratic society". In this vein, we also understand that the "principle of Sociality" is "a legally binding constitutional mandate that limits legislative discretion as to the "if" of action, while leaving a considerable margin of freedom of conformity as to the "how" of its implementation".[19]

As Vieira de Andrade rightly points out, this requirement for implementing regulations is crucial with regard to the precepts enshrining Economic, Social and Cultural Rights, since these are constitutional norms that contemplate rights to benefits, which, precisely for this reason, "contain directives for the legislator or, perhaps better, are mandatory norms of legislation". Therefore, they cannot be understood as mere "programmatic" norms, in the sense of being merely "proclamatory", since they are endowed with "legal force and effectively bind the public authorities, imposing genuine legislative duties on them". Therefore, as the illustrious Constitutionalist of our School of Coimbra states, the Legislator –as the first recipient of these mandatory rules – "cannot decide whether to act or not: *non facere* is prohibited"–[20] under penalty of unconstitutionality by omission, as we say, as can be seen from article 283 of the Constitution.[21]

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19 See GOMES CANOTILHO, J.J., *Direito Constitucional e Teoria da Constituição*, *op. cit.*, p. 338.

20 See VIEIRA DE ANDRADE, José Carlos, *Fundamental Rights in the Portuguese Constitution of 1976*, Almedina, Coimbra, 5th edition, 2012, pp. 358 and 359. The Author also emphasizes that "in relation to the definition of the content of rights, even if he can largely choose what he wants", the Legislator "is not free to choose whatever he wants".

21 Article 283 of the Constitution of the Portuguese Republic states that "1. At the request of the President of the Republic, the Ombudsman or, on the grounds of violation of the rights of the autonomous regions, the presidents of the Legislative Assemblies of the autonomous regions, the Constitutional Court assesses and verifies the non-compliance with the Constitution due to the omission of the legislative measures necessary to make the constitutional norms enforceable. 2.

However, the equation of the state's legality/democraticity/sociality, as enshrined in the Constitution, requires one more observation, which we consider to be quite pertinent. Furthermore, for us, the true essence of the Welfare State derives, first and foremost, from the principle of the rule of law itself. True, we are not aiming at a "pure" "formal" rule of law, understood as a state "that accepts that its concrete actions are limited by the law", but rather a "Material" rule of law, whose substance is identified – and has come to be identified – per se, throughout the 20th century, with a specific idea of Law that was identified from the outset with the aims of Sociality or Social Justice, and which came to be embraced by Western Constitutions.[22]

Therefore, in this area too, due to the legal "materiality" in question, the interconnection between the rule of law or the Democratic Rule of Law and the Welfare State has reached this level of solidity and depth. Following Jorge Miranda, we are of the opinion that the Democratic State of Law "seems to mean a little more. It can mean a social state of law".

Even more! We are certain that, without a doubt, this is the constituent legislative *mens* and the constitutional *mens legis* that underlie the literal formulation of the provisions of the aforementioned article 2 of the Portuguese Basic Law, when enshrining and specifying the content of the precept referred to – restrictively – as "Democratic State of Law". It is enough to bear in mind that this "is also specifically linked to economic, social and cultural democracy, the achievement of which is the objective of political democracy (article 2, part 2), and refers to the importance assumed by economic, social and cultural rights and the conditions for their implementation [article 9, paragraph d) and arts. 58 *et seq*.]", as well as intending to represent a "more demanding (not necessarily more original) model of the rule of law – in comparison with Western European countries – both in terms of social rights and in terms of the rights to freedom themselves".[23]

When the Constitutional Court verifies the existence of unconstitutionality due to omission, it will inform the competent legislative body".

22 See EHRHARDT SOARES, Rogério, *Direito Administrativo I*, Catholic University - Porto Regional Center, p. 23. According to our late Master, the "painful experiences of the 1930s", "ripe fruits" of a conception of a formal state of Law "indifferent to the content" that public institutions receive, made "the need for a material state of Law built on the basis of man and his determinations felt, with anguish. Not just a state of Law that claims any legitimacy - but that".

The truth is that, in the author's words, "The modern state is incomprehensible without the community of men, as something that is above or beyond this community, with its own values, different or even antagonistic to those of the community". (...) "It is the community that presents itself with the task of achieving peace and justice". *Idem*, *Direito Constitucional: Introdução, o Ser e a Ordenação Jurídica do Estado, in Instituições de Direito*, Volume II, Law Library, Organization: FERREIRA DA CUNHA, Paulo, Almedina, Coimbra, May, 2000, pp. 50, 68 and 69.

23 See MIRANDA, Jorge, *Direitos Fundamentais*, *op. cit.*, pp. 268 and 269.

In our understanding, this is the deepest root of the "sociality" that confers the status of a Substantive Rule of Law on the "Democratic Rule of Law" assumed and configured in the Constitution of the Portuguese Republic of 1976 – as opposed to the "old" liberal-nineteenth-century Formal Rule of Law which, for political reasons specific to that historical period, is satisfied with a subordination of the state to the Law, fulfilled by the Constitution in the modern sense, but without taking care to know what its legitimate content should be to be implemented by its Powers.

It is, therefore, this Substantive Rule of Law that takes on the guise of the 20th century "Social State", centred on a Constitutive or Conforming Administration (Rogério Ehrhardt Soares), because it is seen as an "instrument for transforming society to achieve an idea of social justice, but also referred to as a Service – an Administration Service – since it is aimed at providing means of directly satisfying collective needs in the most varied economic and social domains.[24]

To this extent, the Law itself "no longer has as its exclusive purpose the defence of citizens' rights and freedoms before the government" and now regulates, "first and foremost, the achievement of the multiple public interests entrusted to the Administration", becoming a "norm and an objective standard for controlling administrative activity".[25]

It goes without saying that, subsequently, it will be up to the Administration to give due effect to the impositions dictated by the principle of Sociality, formally defined as secondary public interests[26] in compliance with the principle of Legality, namely its aspect of prevalence or primacy of the Law in its positive sense. In fact, it is important not to forget that by assigning a public entity a certain range of duties or public interests to pursue, and its bodies a certain set of powers to exercise, the legislator is determining the need or obligation of their pursuit and exercise.

This means, from the outset, that preventing, postponing or sanctioning administrative inertia or inactivity, in terms of duties and competences, the

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24 See EHRHARDT SOARES, Rogério, *Direito Administrativo I*, Catholic University - Porto Regional Center, p. 24.

In his opinion, with regard to "public interests (...) it is essential that the law individualize them, that is, affirm their value as instruments of the common good". Hence, special situations of claims arise in relation to goods that, due to their instrumental position in the face of the primary public interest, are called "secondary public interests".

25 See VIEIRA DE ANDRADE, José Carlos, *Lições de Direito Administrativo*, 7th Edition, Coimbra Jurídica, Coimbra University Press, 2025, pp. 27 and 28.

26 See EHRHARDT SOARES, Rogério, *Direito Administrativo I, op. cit.*, pp. 3-5, 45 and 46. In his Teaching, the Illustrious Master was concerned with clarifying the relationship between the "primary public interest", meaning "common good" or "*salus publica*", expressed in the Constitution, and the so-called "secondary public interests", heteronomously defined by the legislator, with a view to their necessary implementation by the Administration.

implementation of which is imposed by the principle of Legality, in particular, by the dimension of the Prevalence of the Law, in its positive sense, prevents the violation of the Social Rule of Law. These are, therefore, public interests to whose pursuit the Administration is necessarily bound under the terms of the Law, so that, in our view, the inertia or inactivity regarding their pursuit, attributed to public subjects, bodies, holders and agents that comprise it, determines the illegitimacy and unlawfulness of this omission behaviour.

2. REGULATORY ADMINISTRATION AND IMPLEMENTATION OF THE PRINCIPLE OF THE SOCIAL RULE OF LAW.

2.1. Material privatization of "Public Services" and Regulatory state.

As is well known, until the end of the 1980s this Social Rule of Law assumed and implemented a public logic of "welfare state", constitutionally founded, through which, alongside the traditional Authority Administration or "Public Power Administration", we witnessed the growth and consolidation of an Administration "providing social benefits", i.e. the Public Service Administration, as well as an Administration with a "significant and prominent public sector in vast economic areas", i.e. the "Public Producer Administration".

However, from that term onwards, or rather, for us, in a "second moment" of implementation of the principle of Sociality, also in Portugal – *hic et nunc* supported by successive constitutional revisions that opened the door to the legitimization of the European integration process – the Social State of a Conforming and Providing Administration underwent profound changes in content and scope, first caused by a movement of "privatization" (or reprivatization, especially in Portugal), firstly, in a material sense, but also in a formal and instrumental sense, including the expansion of "functional privatization" (concessions).

Even so, it is imperative to emphasize that the "liberalization and privatization of economic services of general interest" did not mean "the farewell of the state and the non-existence of public rules".[27] Instead, we have entered into a "new" model of state–Administrator that some, in our view, wrongly call the "Post-Social state" or "post-modern" one. The paradigm shift was unquestionable since this "new" Social State ceased to be the Welfare State (the Public Service Social State). However, without returning to the liberal state of the 19th century,

27 See GOMES CANOTILHO, J.J., *Direito Constitucional e Teoria da Constituição*, *op. cit.*, p. 352.

it became a state of Guarantee or a Regulatory state in the economic and social areas which regulates, guides and encourages private activities, particularly those that pursue general or collective interests.[28]

2.2. The paradigm of the "new social state": regulation and regulatory bodies.

In this regard, in our opinion, it is theoretically unfounded to say that Portugal has transformed itself into a "post-social state" or, constitutionally speaking, into a "post–social" democratic state under the rule of law – as is often stated. It does indeed appear today, at most, as a "new social state", in line with the European legal-teleological framework, in which the Portuguese legal-constitutional system is integrated, now taking on the guise of a "guarantee state", a "responsibility state" or a "regulatory state" of materially privatized (or reprivatized) economic and social activities, but always a true and proper democratic and social state under the rule of law.

For us, it follows – and will continue to follow – from the provisions of Article 2 of the Portuguese Constitution that the principle of the Democratic Rule of Law contemplated therein, in addition to postulating a Public Power subordinate to the Law and respectful of Fundamental Rights, as well as legitimized by the "will" or "popular sovereignty", remains constitutionally configured with the most comprehensive and intense materiality of a Social Rule of Law.

Therefore, despite the transformations undergone by the "Provider State" or "Public Service", the "Social State" has not "retreated", nor has the Regulatory State (...) replaced the Social and Public Service State that grew throughout the 20th century, nor, in our view, has not (yet) completely supplanted it,[29] nor has the principle of Sociality been postponed from the Basic Law, as is often insinuated.[30]

As we have argued, it is, rather, a "New Social State" that assumes a "regulatory responsibility for public services of general interest", especially in the economic and social domains, i.e. it takes the "modern form" of a Regulatory State for essential public services. With the exception of some public services whose provision, even by constitutional imposition, remains directly the responsibility of the state, the currently designated economic services of general interest – post-privatization – are now provided by the market, although the state

28 See VIEIRA DE ANDRADE, José Carlos, *Lições de Direito Administrativo*, *op. cit.*, pp. 27-29.

29 See COSTA GONÇALVES, Pedro, "Reflexões sobre o Estado Regulador e o Estado Contratante, in *Direito Público e Regulação*, 8, CEDIPRE, Coimbra Editora, Coimbra, 2013, p. 30.

30 Idem, "Estado de Garantia e Mercado", in *Journal of the Faculty of Law of the University of Porto*, Faculty of Law of the University of Porto, Year VII (SPECIAL), Porto, 2000, p. 115.

sociality underlying their provision remains public, "insofar as the regulation of such provision is based on legal rules defined by directly or indirectly legitimized public entities".[31]

These powers of regulation in the broadest sense (regulatory, executive and control) involving the regulatory power in the strictest sense and the power of supervision, have been legally committed and concretely exercised – or, at least, it is assumed that they should be effectively exercised – by the so-called "Regulatory Entities" as independent administrative authorities not subordinate to the political-administrative power of direction and supervision of the Government and which form part of the Independent Indirect State Administration.[32]

Therefore, under the terms of clause no. 1 of article 3 of the Framework Law on Regulatory Entities, approved in the Annex to Law no. 67/2013, of 28 August[33] (Framework Law on independent administrative entities with functions of regulating the economic activity of the private, public and cooperative sectors), "Regulatory entities are legal entities under public law, with the nature of independent administrative entities, with powers in matters of regulating economic activity, defending services of general interest, protecting the rights and interests of consumers and promoting and defending competition in the private, public, cooperative and social sectors".

In addition to a "general regulatory authority for economic competition" (AdC – Competition Authority), the following stand out among the many sectoral regulatory bodies or "sectoral agencies", in the Anglo-Saxon style: the Market Securities Commission (CMVM), the Insurance and Pension Fund Supervisory Authority (ASF), the Energy Services Regulatory Authority (ERSE), the Health Regulatory Authority (ERS), the Water and Waste Services Regulatory Authority (ERSAR) and the Institute of Public Markets, Real Estate and Construction, I.P. (IMPIC, I.P).[34]

In this regard, it is essential to emphasize, by way of partial summary, that private companies providing "economic services of general interest" are subject to public regulation of the "rules of the game," not only to defend competition but

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31 See GOMES CANOTILHO, J.J., *Direito Constitucional e Teoria da Constituição*, *op. cit.*, pp. 352-354.

32 According to the provisions of paragraph 3 of article 267 of the Constitution of the Portuguese Republic, "The law may create independent administrative authorities".

33 Article 1, no. 1 , states that "This framework law establishes the principles and rules governing independent administrative entities responsible for regulating and promoting and defending competition in the economic activities of the private, public, cooperative and social sectors, hereinafter referred to as regulatory entities".

34 See VIEIRA DE ANDRADE, José Carlos, *Lições de Direito Administrativo*, *op. cit.*, pp. 121-123.

also to guarantee social rights whose implementation reports to these services".[35] To this end, it is essential that these regulatory and supervisory powers – especially when exercised *ex officio* – are effectively exercised and that the fight against inertia or inactivity in the specific area of the duties and competences of the Regulatory Entities is assumed as an urgent need to safeguard the principle of Sociality and the Social Rule of Law, as well as to implement the fundamental, economic, social and cultural rights enshrined in the Constitution.[36]

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35 See GOMES CANOTILHO, J.J., *Direito Constitucional e Teoria da Constituição*, *op. cit.*, p. 353.

36 According to the provisions of Article 40.1 of Law no. 67/2013 of 28 August, "Under the terms and limits of their respective statutes, the regulatory bodies shall be responsible, in the exercise of their powers of regulation, supervision, inspection and sanctioning of infringements relating to the economic activities of the private, public, cooperative and social sectors, in particular, for: a) Enforcement of applicable laws, regulations and acts of European Union law; b) Setting or collaborating in the setting of fees, tariffs and prices to be charged in the respective regulated sector; c) Setting the rules for access to the regulated economic activity, in the cases and under the terms provided for by law; d) Ensuring, in network-based activities, equitable and non-discriminatory access to them by the various operators, under the terms provided for by law; e) Ensure, in activities that provide "services of general interest", the relevant "public service obligations" or "universal service obligations (...)".

According to the provisions of clause 2, "Within the terms and limits of their respective statutes, it is also the responsibility of the regulatory entities in the exercise of their regulatory powers, in particular: a) To prepare and approve regulations and other standards of a general nature, instructions or other standards of a specific nature referring to the interests, obligations or rights of the regulated entities or activities or their users; b) To issue generic recommendations and directives; c) To propose and approve codes of conduct and manuals of good practices for the recipients of the respective activity (...)".

Clause no. 3 of the same article also states that "Under the terms and limits of their respective statutes or applicable sanctions regime, it is the responsibility of the regulatory entities, in the exercise of their inspection and auditing, monitoring and sanctioning powers, namely: a) To monitor and audit the application of laws and regulations, and other applicable standards, as well as the obligations undertaken by concessionaires or service providers in their respective contracts for the provision of public service or universal service, when they concern activities subject to their regulation; b) To monitor and audit the application of laws and regulations, and other standards applicable to activities subject to their jurisdiction and carry out the necessary inspections, inquiries and audits; c) To initiate sanctioning procedures in the event of breaches of duties and obligations arising from legal or regulatory standards, as well as obligations undertaken by concessionaires or service providers in their respective contracts for the provision of public service or universal service, when they concern activities subject to their regulation; d) Adopt the necessary precautionary measures and apply the appropriate sanctions; e) Report to the competent authorities any infringements whose punishment does not fall within the scope of their powers and cooperate with them; f) Collect fines".

Article 42 determines that, with regard to Powers in terms of inspection and auditing: "1 - Regulatory entities must carry out inspections and audits on a timely basis, in execution of previously approved inspection plans and whenever circumstances arise that indicate disruptions in their respective sector of activity. (...).

Finally, in the field of "sanctioning powers" Article 43 prescribes that "Regulatory entities shall, under the terms of their respective sanctioning regimes, carry out all acts necessary to process

2.3. Powers of Regulation/Supervision and Pursuit of Public Interests as the scope/task of the Administration of the "New" Social state of Law.

As explained above, the State Administration, i.e. the administrative Power/Function of the state, is intended solely and exclusively to serve and implement secondary public interests, selected and defined by the legislator (internal or external), including the *modus operandi* of fundamental rights, as autonomous dimensions of the constitutionally enshrined "primary public interest" and nothing more!...In fact, this is the imperative and exclusive meaning that should be inferred from paragraph 1 of article 266 of the Portuguese Basic Law, when it determines that "The Public Administration aims to pursue the public interest (...)".

Due to the constitutional imposition of the principle of Democratic statehood of Law – and the principle of legality that implements it – the Administration is not entitled to pursue interests that are not public or "collective". It only serves one "master": the public interest, as defined by the legislator, regardless of the greater or lesser degree of normative densification. We therefore believe that Administrative Power, even when innovatively elevated to a power of public regulation, of an economic and social nature, will always continue, in compliance with that categorical imperative, to pursue concrete public interests and only these.[37]

We believe that it will never be superfluous to reinforce the idea, whose practical subversion seems undeniably dangerous for the achievement of the common good, which postulates that even this "refraction" of the presence of the State-Administration in Society, the Economy and the Market, always reports to options previously taken at the legislative level, in accordance with an "actualist"

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and punish infringements of the laws and regulations whose implementation or supervision is their responsibility, as well as failure to comply with their own determinations".

37 This imperative is highlighted by Pedro Gonçalves when he states that the "position of referring the (administrative) regulatory function to the traditional frameworks of administrative activity is based on the understanding that regulation, as a mission of regulatory entities, constitutes, on the one hand, an activity of pursuit of public interests (balanced functioning of markets, protection and realization of citizens' rights) and, on the other hand, a heterodetermined task (in the political-legislative sphere). Furthermore, according to the author's thinking, which we undoubtedly support, "in Europe, where it emerged in a context of reconfiguration of the state, regulation represents a clear public responsibility: a responsibility of the Guarantee State, which remains committed to the well-being and to the realization of citizens' rights to enjoy certain services and goods under accessible conditions. Regulatory intervention, whether in the field of social regulation or in that of economic regulation, aims precisely to serve the pursuit of these interests, which are public interests". See GONÇALVES, Pedro, "Direito Administrativo da Regulação", in *Estudos em Homenagem ao Prof. Doutor Marcelo Caetano, no Centenário de seu Nascimento*, vol. II, Faculdade de Direito de Lisboa, 2006, pp. 546, 547, 572 and 573.

interpretation of the basic constitutional principles, both of political and economic organization, and of the fundamental rights regime.

Indeed, as we have been saying, it is in the context of this "new" Democratic and Social state of Law that the Administrative Power/Function (the same should be said about this "new" "Regulatory" Administration), has come to carry out, in a manner "apparently" different from the traditional ones – as regards its content, although not as regards its instruments – a range of regulatory and supervisory powers and responsibilities, especially regarding "markets" of goods and services of "general economic interest", in order to "guarantee" their provision to citizens ("users") under "accessible" conditions, i.e. those of so many other secondary public interests, as always heteronomously defined by the legislator. The pursuit of these goals is necessarily and directly projected onto the implementation of the Fundamental Rights constitutionally contemplated (rights, freedoms and guarantees, of a classical nature) and, above all, the economic, social and cultural rights postulated by the principle of Sociality.[38]

Now, in the face of a continental European legal-administrative system that is still essentially "executive", although not exclusively, and despite the gradually noticeable influences of "good governance" or "New Public Management" of an Anglo-Saxon nature, the preference for the implementation of a State-Administration of Guarantee or a State-Regulatory Administration whose intervention is 'softer' than the constitutive presence developed by the State-Administration of Provision or Public Service that preceded it throughout the 20th century, can only be based on the successive positions taken in terms of legislative policy, based on (and subordinate to) constitutional precepts.[39]

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38 If we think about it, it is in this sense that Pedro Gonçalves' words should be understood, when he says that "public regulation, by the state, has been converted into a legal-political (constitutional) requirement". In this line of thought, according to the author, "regulation and the right to regulation therefore emerge as schemes to compensate for the state's retreat, following the privatization process and the abandonment of the direct provision of public services". See COSTA GONÇALVES, Pedro, *Estado de Garantia e Mercado*, *op. cit.*, p. 119.

39 This new way of managing, built on the domain of social and political sciences, means that, "alongside a classical administration (…), the government tends to assert itself, with special emphasis on the areas of economic and social policies, as a power that coordinates and unifies multiple centres of power, both institutional and social". This "polycentrality", spread across the internal, supranational (European) and international levels, thus constructs the "figure of governance ("good governance")". See VIEIRA DE ANDRADE, José Carlos, *Lições de Direito Administrativo*, *op. cit.*, p. 31.

It is worth noting, however, that not everything is rosy in the new world of "governance". First of all, as João Nuno Calvão da Silva points out, "the currently so popular governance cannot constitute the magic formula for legitimizing political power". See CALVÃO DA SILVA, João Nuno, *Agências de Regulação da União Europeia*, Colecção Teses, GESTLEGAL, Coimbra, 2017, p. 81.

Furthermore, it is important not to neglect that "the exercise of flexible and comprehensive governance does not supersede or replace the muscular and tough exercise of government, whenever the law and rights are not complied with. The government's action of ordering and commanding

3. INERTIA OF THE REGULATORY ADMINISTRATION AND VIOLATION OF THE DEMOCRATIC AND SOCIAL STATE OF LAW – "REMEDIES TO COMBAT".

3.1. Failure to exercise the functional powers legally assigned to the Regulatory Administrative state for the fulfilment of its duties.

However, it seems imperative to warn that the Administration has the "power-duty" or functional power to act, comply with and put into practice these legal impositions of "regulation" or "supervision", using the traditional instruments of its Public Law action for this purpose such as administrative acts, regulations and, more recently, the administrative contract. After all, it is important to remember that, even upstream, the legislator itself must comply with the areas to which, in Portugal, the Constituent Power bound it under the terms of articles 9 and 81, respectively in terms of "Fundamental Tasks of the state" and "Priority Responsibilities of the state" in the "economic and social sphere", under penalty of unconstitutionality by omission (article 283).

In our view, the so-called "Regulatory" Administration is imperatively obliged to "act", mainly because it is subject to the Principles of Separation of Powers or Functions of the state (*lato sensu*), Legality and Pursuit of the Public Interest, understood as constitutionally and legally enshrined principles, therefore, as "basic" elements of the *ratio essendi* of the principle of the Rule of Law *tout court*, but also of the broader content, meaning and scope that derive from the interconnection or ontic-genetic relationship with the principle of Sociality, given the relevance assumed by the "materiality" that the Constitution confers and recognizes upon it.

Otherwise, the principle of the Democratic and Social state of Law ends up being violated – as it has been – due to the "inertia" or "inactivity" of the Regulatory Administration. An omission that, in our view and as we have argued, leads to a tacit and abdicative renunciation not only of the exercise of the function, but of the administrative function itself, configuring an absurd and paradoxical situation of illegality and, ultimately, of unconstitutionality.

The "Regulatory" Administration cannot "renounce" the "functional power" to regulate or supervise the provision of economic goods of general interest, because if it does it ceases to be an Administration: it cannot refrain from exercising the regulatory powers legally conferred upon it, nor fail to initiate

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coexists with the action of coordinating, arranging, guiding, inciting, and guiding governance". See GARCIA, Maria da Glória, *Direito das Políticas Públicas*, Almedina, Coimbra, 2009, p. 161.

official procedures for monitoring and supervising the "market" of services of general interest, a duty that is legally assigned to it in binding terms. It has no legitimacy to "renounce" the litigation to which it is bound in order to defend the public interest, to renounce a "right of recourse" against a third party – for us more of a "duty of recourse" than a "right of recourse" in the strict sense –, or even to enter into contracts on the exercise of public powers that, going beyond the legal grounds, involve only apparent "transactions" that constitute genuine tacit "translative waivers" of powers.

It turns out that the Regulatory Administrative Entities are, or at least should be, the Guarantee Administration in action, not only in their organizational aspect, but mainly, in our view, in their material or functional dimension. In other words, these "authorities" are the "guarantee" of the Guarantee Administration itself, since their absence or paralysis, in terms of attributions and competences, cause the public law concept to weaken, or even collapse like a fragile house of cards. At the turn of the 20th century in Europe, this served as the theoretical foundation for the "new" model of Administrative Power, synonymous with the "emergence of a new paradigm of the state that today tends to be called the Paradigm of the Regulatory State" and which seeks to assert itself as a successor or, at times, as an "embarrassed" continuator of the Social Rule of Law, despite still and always being conceived, in its essence and teleology, as a servant and shaper of heteronomously defined public interests.[40]

The weakness we see in the Guarantee or Regulatory Administration, when we are concerned with administrative inertia or inactivity – assumed, in our view, as a "modality" of abdicative renunciation of powers or competences, attributed to the bodies and respective holders of the Independent Authorities that give it substance, invoked daily and inevitably proven by the facts – appears to be "aggravated", since the duty to supervise, monitor and sanction the due provision of services of general interest by private entities is part of its *ratio essendi*, but because and to the extent that the Legislator (external and internal) removed from this direct provision of goods and services the materially administrative character to which it had been raised by determinations of public interest, disqualifying it, now, in private activities but always because and to the

40 This is what happens, according to Gomes Canotilho, when "we insist on replacing the bureaucratic paradigm of administration with the administrative-business paradigm". Now, this "change in the state's paradigm has, as we have just seen, a fundamental component: the change from the positive or interventionist state to the regulatory state", which "involves a functional dimension translated into the fact that the state ceases to be a producer of goods and services and becomes a regulator of the market process". See GOMES CANOTILHO, José Joaquim, "O Direto Constitucional Passa; O Direito Administrativo Passa Também", in *Estudos em Homenagem ao Prof. Doutor Rogério Soares*, STVDIA IVRIDICA, 61, Ad Honorem, - I - Boletim da Faculdade de Direito, Universidade de Coimbra, Coimbra Editora, 2002, pp. 708 and 718.

extent that it would be subject to an "indispensable" regulation by the Public Administration.

3.2. Generic proposals for the implementation or legal formulation of appropriate remedies to combat administrative "inertia".

Consequently, in our opinion, such "omissions" by the current Administration, especially the "Regulatory" Administration – whether express or tacit – can and should be subject to investigation by the Courts, which have full jurisdiction to legitimize the condemnation of the Administration for the practice of legally due or legally binding acts, in favour of the pursuit of public interests or the defence of the community – in fact, as happens to the benefit of an individual – with public action, that is to say, in Portugal, the active procedural legitimacy of the Public Prosecutor's Office, as well as the holders of the right to "popular action" – both when and because appropriate – being of decisive importance in combating "administrative inertia".

However, it is necessary to rethink and reformulate the current organizational/functional scheme of regulation, which, for us, cannot be satisfied with an intensification of parliamentary political control, as it is predicted to be insufficient and ineffective, but rather requires, on the one hand, the reinforcement of the *auctoritas* of the administrative system as a whole, which, on the other hand, must indeed pass, *ex ante*, through a greater commitment of the legitimate Political Power, i.e. a prior intervention of the Legislative Power through the institutionalization of control mechanisms, perhaps specific and punctual, whether of a hierarchical nature or of a tutelary nature, in traditional forms, as a means of combating the inertia or inactivity of Regulatory Entities – after all, one of the vocations highlighted by Administrative Law –, which, inevitably, will also require a review of the "myth of their independence" in the face of the Administrative Power of the Government, valuing, in return, their independence in relation to the "regulated", thus combating their desires and attempts to "capture" the Regulator.[41]

41 According to Ana Raquel Moniz, "relations between regulators and those regulated must be developed in the light of ethical criteria, in the sense that regulatory action itself must foster the introduction of mechanisms typical of restorative justice", guided by the "search for a balance between persuasion and sanction". Secondly, "and most importantly, the reference to regulatory ethics is associated with the introduction of mechanisms designed to prevent the capture of the regulator by those regulated", that is, to eliminate the risk of "corruption phenomena". See GONÇALVES MONIZ, Ana Raquel, "A Crise e a Regulação: O Futuro da Regulação Administrativa", in *A Crise e o Direito Público, VI Encontro de Professores de Direito Público, Instituto de Ciências Jurídico-Politicas*, Faculdade de Direito da Universidade de Lisboa, Coordenação de GONÇALVES, Pedro, AMADO GOMES, Carla, MELO, Helena e CALVÃO, Filip, Lisbon, October 2013, pp. 115-120 and 121.

This, in line with what we advocated above, without forgetting the need to implement the effective jurisdictional protection of the legally protected rights and interests of citizens in this legal-administrative sphere and, *a fortiori*, of their fundamental rights, as well as the jurisdictional control of respect for the block of administrative legality, especially in the area of discretion. It would then be a question of successfully fulfilling this material/functional purpose of the 21st-century Administration, embodied in a guarantee of pursuing the public interest of the "correct functioning of the market" and, simultaneously, of realizing the fundamental rights of citizens, in their role as private individuals ("users") of goods and services of general economic interest, under the constitutionally required terms.

3.3. The Subjective Right of Citizens to the "Public Action" of the Regulatory state.

Furthermore, there are those who argue – coherently, in our opinion – that in a State of Law, citizens themselves, especially as consumers, have a fundamental right to protection from the regulatory state against such omissions by the Administration, as they are detrimental to their rights. This is a "subjective right to public action" (Pedro Costa Gonçalves), subject to judicial protection, with active procedural legitimacy falling to the citizen "harmed" by administrative inactivity.

This is a subjective right whose holders are not only the "regulated companies", legally designated as the object of public regulation, burdened with its sustainability and potentially harmed by its deficiencies or failures, but also private individuals, as beneficiaries/users of the guarantee assumed by the "New Social State", especially with regard to the availability and accessibility of goods and services of general interest. Thes people will ultimately suffer the harm resulting from administrative omission or passivity.

In truth, on the one hand, it can be "affirmed that the transition to the Regulatory and Guarantee State has the effect of increasing the demands for state protection of the rights of individuals", since, "in a context in which the fulfilment of individuals' essential needs is entrusted to the market, the state assumes this special duty of protection" of citizens, with regard to their "accessibility (...) to certain services" of general interest. However, the most recent profile of the "responsibilities" of the regulatory state does not stop there. Furthermore, it seems "clear" that the "guarantee and protection of users" rights are not simple powers of the state that it may or may not exercise. On the contrary, it must be understood that, in a balanced and credible system of state protection of citizens' fundamental rights, they appear as holders of a right to state protection".

Following Pedro Gonçalves, we also consider that this "subjective right to public action emerges as a natural corollary of the meaning of the regulatory activity itself", which consists of "inducing confidence in the correct functioning of the regulated systems", leading to the "systematic incorrect functioning" of the same, by an absolutely intolerable action or omission, without such behaviour implying the legal liability of those who are legally invested in carrying out this materially administrative task.[42]

4. A FUNCTIONALLY ACTIVE REGULATORY ADMINISTRATION AND POSTPONING INERTIA TO SAFEGUARD THE DEMOCRATIC AND SOCIAL STATE OF LAW.

It is precisely a "duty of guarantee", a "responsibility", a regulatory function that the Administrative State must effectively assume, now with a more conscious and reinforced urgency. It is not "possible" for it to renounce this "task" that, in essence, is entrusted to it, as well as the powers that are conferred on it for its implementation, regardless of the manner, by action or omission, or the forms, express or tacit, by which it objectively denies or postpones it, turning a "blind eye" and "deaf ear" to it, under penalty of illegitimacy and/or illegality.[43]

In our view, to live up to the name it was given it is essential that the State-Administration of Guarantees remains functionally active in order to guarantee citizens the enjoyment of fundamental, social and economic goods and services of "general interest". It currently does not exercise, produce or provide these directly, but whose effective implementation was constitutionally and legally entrusted to it and for which it was "responsible".

This will be the case not only when it is contingently forced to put on its uniform again as a direct intervener *ex post*, because it is faced with possible failures that, to a greater or lesser extent, occur or may occur in the market, as often happened with the outbreak of the economic and financial crisis on a global scale at the end of the first decade of the 21st century, but primarily when it tries to avoid or prevent them *ex ante*, complying, in an attentive, timely and rigorous manner, with the priority regulatory responsibilities that the Law imposes on it, as well as putting into action the corresponding and necessary powers that are assigned to it for this purpose.

42 See COSTA GONÇALVES, Pedro, *Reflexões sobre o Estado Regulador… op. cit.*, pp. 66 and 67.

43 On administrative inertia or inactivity, especially on the "legal duty to act", see GÓMEZ PUENTE, Marcos, *La Inatividad de la Administración*, *op. cit*, pp. 60, *et seq*.

In this way, the pursuit of the public interest is safeguarded, fundamental rights are protected and the concrete danger of violation of the principle of the Democratic and Social Rule of Law due to the inertia, inactivity or resignation of the Regulatory Administration is combated. In our opinion, nowadays, the true and proper renunciation of powers, rights and, in short, the administrative function itself has a name: administrative inertia. Consequently, the legislator has a decisive role to play in "arranging" the best solutions to combat it, thus safeguarding the principle of the Democratic and Social State of Law, as a structuring principle of the Constitution of the Portuguese Republic of 1976, supported by the "cornerstone" of all Law, which is undoubtedly the "anthropological axiom", i.e. the "Dignity of the Human Person".

5. CONCLUSION.

And now, by way of conclusion, we end with a reflection by Marcos Gómez Poente:

> "The formulation of a concept of administrative inactivity must be done, therefore, within the framework of the notion of maladministration... But the deduction of a legal concept of inactivity must be based on legal assumptions, that is, on the rules and principles of the legal system that define the institutional position of the Administration and regulate its activity as a manifestation of public power subject to Law".[44]

44 See GÓMEZ PUENTES, Marcos, *La Inactividad de la Administración*, ARANZADI, Editorial, Pamplona, 1997, p 58.

PART IV.
CURRENT CHALLENGES FOR THE RULE OF LAW IN EASTERN EUROPE

LIMITS OF DISCRETIONARY POWER AND DIFFICULTIES IN APPLYING THE LAW IN ROMANIA

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SUMMARY: 1. SHORT CONSIDERATIONS ABOUT THE CONSTITUTIONAL REGIME IN ROMANIA. 2. COMMENTS ON CONSTITUTIONAL AND LEGAL REGULATIONS AND JURISPRUDENTIAL APPROACHES RELEVANT TO DISCRETIONARY POWER. DISCRETIONARY POWER OR RIGHT OF APPRECIATION? 3. COMMENTS ON THE DISCRETIONARY POWER IN ADOPTION OF EMERGENCY ORDINANCES BY THE GOVERNMENT OF ROMANIA. 4. COMMENTS ON DISCRETIONARY POWER IN ADOPTION OF MINISTERIAL ORDERS. 5. SHORT CONCLUSIONS.

1. SHORT CONSIDERATIONS ABOUT THE CONSTITUTIONAL REGIME IN ROMANIA.

After the Events of December 1989, through the provisions of the Constitution of 1991 a democratic political regime was established in Romania, considered to be a semi-presidential one, but in an attenuated form, not having assumed the specific regime of the French Republic.

Following the constitutional revision of 2003, this political regime was maintained, but the attenuation was strengthened out of the desire to further facilitate the balancing of the three powers in the state in order to further remove the risk of reinstating a new autocratic, dictatorial regime.

Thus, in accordance with the provisions of art. 1 para. (3) and (4) of the Constitution of Romania, republished,[1] Romania is currently a "democratic state governed by the rule of law.... which is organized according to the principle of separation and balance of powers – legislative, executive and judicial – within the framework of constitutional democracy". Art. 2 paragraph (1) of the Constitution, republished, specified that "[n]ational sovereignty belongs to the Romanian people, who exercise it through their representative bodies, constituted through free, periodic and fair elections, as well as through referendum". Therefore, in order to respond to the requirements imposed by the aforementioned constitutional provisions, the constituent legislator identified the public authorities at the constitutional level through art. 61 - 134 of Title III of the Constitution, titled "Public Authorities". These are regulated respecting the natural, classical order of the three powers, namely: the Parliament of Romania (the exponent of the legislative power), the President of Romania, the Government, the central and local public administration authorities (exponents of the executive power, the courts, the prosecutor's offices attached to these courts) and the Superior Council of Magistracy (exponents of the judicial authority). The constituent legislator configured their constitutional profile by identifying, usually in principle, the way they are organized and function, their powers, the legal liability that can be incurred in the event of non-compliance with specific constitutional and legal provisions, but also identified instruments and mechanisms through which these authorities collaborate and monitor each other. Moreover, the same legislator also constitutionally configured authorities that are not part of any of the three powers in the state, and, through their specific powers, contribute to maintaining the balance between them, such as the Constitutional Court of Romania[2] or the People's Advocate (Ombudsman).[3]

1 The Constitution of Romania was republished, with the names updated and the texts renumbered, in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003. Law no. 429/2003 revising the Constitution of Romania (published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003) was approved by the national referendum of 18-19 October 2003 and entered into force on 29 October 2003, the date on which it was published in the Official Gazette of Romania, Part I, no. 758, Decision of the Constitutional Court of Romania no. 3 of 22 October 2003 confirming the result of the national referendum of 18-19 October 2003 on the Law revising the Constitution of Romania.

2 The Constitutional Court of Romania [hereinafter referred to as the CCR] has dedicated a number of 6 articles in the Romanian Constitution, namely artt. 142 - 147, these being found in a different title, Title V, specifically dedicated to this political-jurisdictional authority precisely to reinforce, on the one hand, the fact that it is not part of any of the three classical powers, and, on the other hand, the fact that, by exercising its powers, it will fulfil its role provided, *expressis verbis,* by art. 142 of the Constitution, as guarantor of the supremacy of the fundamental law. Thus, it will contribute, implicitly, to guaranteeing the principle of separation and balance of powers in the state.

3 The People's Advocate is, according to art. 2 par. (1) in conjunction with art. 1 par. (1) of Law no. 35/1997 on the organization and functioning of the People's Advocate institution, republished, with subsequent amendments and completions, an "autonomous public authority and independent of any other public authority" which has "as its purpose the protection of the rights and

The constitutional outline of the authorities that exercise the three powers in the state, as well as the interactions between them, as we have briefly shown above, has determined the expression of various opinions regarding the legal nature of the constitutional political regime in Romania. When the draft of the constitution was written, however, the specially established commission was consistently inspired by French constitutional provisions, considering that such a regime would be the most suitable for the Romanian state since the early 1990s, with the President of Romania "to be directly elected by universal suffrage",[4] directly by citizens with the right to vote. It was still not desired that he or she should be a very powerful[5] head of state through his or her powers, preferring a figure "with more limited powers compared to a president of a semi-presidential republic".[6] The dictatorship that Romania and the Romanian people had lived through, characterized by the "concentration of power (...) and its personalization"[7] by the then President, determined the configuration of this institution in such a way that its powers were limited, exercised with prior consent, or subsequently subject to the approval of other authorities such as the Parliament or the Government, with an emphasis on its neutrality,[8] but also on the function of mediation between the powers of the state, between the state and society, as provided for in art. 80 para. (2) of the Constitution.

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freedoms of individuals in their relations with public authorities", being the national expression of the ombudsman institution. Like the Constitutional Court of Romania, the constitutional provisions, in principle, regarding this institution are not found in Title III dedicated to public authorities, but at the end of Title II, in artt. 58 - 60 dedicated to the fundamental rights, freedoms and duties of Romanian citizens. This confirms its relevant role in the protection of these rights and freedoms, but also its role in ensuring the balance between the three powers, especially between the legislative and executive.

4 IORGOVAN, Antonie, *Treaty* of *Administrative law*, vol. I, 4th edition, All Beck Publishing House, Bucharest, 2005, p. 294.

5 For example, according to art. 85 par. (1) of the Romanian Constitution, the President of Romania "designates a candidate for the position of Prime Minister and appoints the Government based on the vote of confidence granted by Parliament". Following consultations with the parliamentary parties, under the conditions provided for by art. 85 in conjunction with art. 103 of the Constitution, the President will therefore designate only one candidate for the position of Prime Minister, not as provided for in art. 8 par. (1) of the Constitution of the French Republic, according to which "The President of the Republic appoints the Prime Minister". As far as we are concerned, therefore, there is no relationship of subordination between the President of Romania and the Prime Minister, the former not having been granted any right of appreciation regarding the appointment of the Government once it has received the vote of confidence from Parliament.

6 *Ibidem*.

7 APOSTOL TOFAN, Dana, *Administrative Law*, vol, I, 5th edition, C. H. Beck Publishing House, Bucharest, 2020, p. 113.

8 The neutrality of the President of Romania is enshrined in the constitutional provisions of art. 84 para. (1), which specifies that during his/her term of office, he/she "may not be a member of a party and may not perform any other public or private function".

Therefore, the political regime in Romania was assessed as being "closer to the parliamentary republic regime, with the only essential difference being his [the President's] election by the people, through universal, direct, secret and freely expressed vote",[9] or that it is "semi-presidential, but with much diminished powers for the head of state",[10] or that it is "a mixed regime, with parliamentary tendencies and not (...) a purely semi-presidential regime".[11]

In our opinion, Romania is a republic with a semi-presidential political regime in an attenuated, parliamentarized form in which Parliament is the authority that exercises – or should exercise – genuine and constant specific control over the public administration and, first of all, over the Government. The President of Romania must be constantly vigilant in detecting various conflicts in society, including those between Parliament and the Government, which he/she can mediate by virtue of and within the limits permitted by his/her constitutional powers.

2. COMMENTS ON CONSTITUTIONAL AND LEGAL REGULATIONS AND JURISPRUDENTIAL APPROACHES RELEVANT TO DISCRETIONARY POWER. DISCRETIONARY POWER OR RIGHT OF APPRECIATION?

By consecrating such a political regime, the Romanian state is one in which the rule of law is one of its essential features, as mentioned above, which "[regards] the major goals of state activity, prefigured in what is generally called the rule of law, a phrase that implies the subordination of the state to the law, the provision of those means that allow the law to censor political options and, within this framework, to weigh up any abusive tendencies of state structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of public powers, which must act within the limits of the law, namely within the limits of a law that expresses the general will".[12] The Constitutional Court also emphasized that "a first component of the rule of law is the implementation of the explicit and formal provisions of the law and the Constitution. In other words, in terms of loyal collaboration between state institutions and authorities, a first meaning of

9 APOSTOL TOFAN, Dana, *op. cit.*, p. 112.

10 MURARU, Ioan, & TĂNĂSESCU, Elena Simina, coordinators, *The Constitution of Romania. Commentary on articles*, comment by DEACONU, tefan, C. H. Beck Publishing House, Bucharest, 2022, p. 723.

11 APOSTOL TOFAN, Dana, *op. cit.*, p. 114.

12 Decision of the Constitutional Court of Romania no. 70/2000 regarding the exception of unconstitutionality of the provisions of art. IV point 7 of Government Ordinance no. 18/1994 on measures to strengthen the financial discipline of economic agents, approved, with amendments, by Law no. 12/1995, published in the Official Gazette of Romania, Part I, no. 334 of 19.07.2000.

the concept is the observance of positive law norms, in force in a certain period of time, which expressly or implicitly regulate the competences, prerogatives, attributions, obligations or duties of state institutions and authorities",[13] but "implies, on the part of public authorities, constitutional behaviours and practices which have their origin in the constitutional normative order, viewed as a set of principles that underpin the social, political, and legal relations of a society".[14]

The rule of law "presupposes a state that must effectively limit itself by law",[15] which does not translate into a restrictive interpretation by virtue of which public authorities and institutions must strictly submit to the principle of legality, without recognizing the possibility for them, within the limits permitted by the legislation in force, to assess the appropriateness of adopting measures, to act in one direction or another to satisfy the legitimate public or private interest, as the case may be. Although the constitutional provisions do not expressly speak of such a right of appreciation or the discretionary power with which public authorities or institutions could act, nevertheless art. 53 of the Constitution – enumerating the "conditions of validity"[16] that must be respected for a restriction of the exercise of certain rights or freedoms – mentions proportionality to the cause, thus constitutionally enshrining the principle of proportionality. This principle "expresses the necessary adequacy of legal measures to the factual situations to which they are addressed, establishing a relationship (...) as just and legitimate between the legal measure adopted and social reality".[17] The Constitutional Court of Romania emphasized, in turn, that "[in] compliance with the principle of proportionality, any measure taken must be adequate – objectively capable of achieving the purpose, necessary – and indispensable for achieving the purpose and proportionality – for a fair balance between concrete interests in order to be appropriate to the purpose pursued".[18]

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13 Decision of the CCR no. 611/2017 on the requests for the resolution of legal conflicts of a constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry-Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, requests formulated by the Presidents of the Senate and the Chamber of Deputies, point 106, published in the Official Gazette of Romania, Part I, no. 877 of 07.11.2017.

14 *Idem*, punctul 107.

15 MURARU, Ioan, & TĂNĂSESCU, Elena Simina, coordinators, *op. cit.*, comments by MURARU, Ioan, & TĂNĂSESCU, Elena Simina, p. 10.

16 MURARU, Ioan, & TĂNĂSESCU, Elena Simina, coordinators, *op. cit.*, comments by TĂNĂSESCU, Elena Simina, p. 461 et seq.

17 MURARU, Ioan, & TĂNĂSESCU, Elena Simina, coordinators, *op. cit.*, comments by TĂNĂSESCU, Elena Simina, p. 468.

18 Decision of the CCR no. 833/2015 [R] regarding the exception of unconstitutionality of the provisions of art. 35 paragraph (1) of Law no. 165/2013 on measures for completing the process of restitution, in kind or by equivalent, of real estate abusively taken over during the communist regime in Romania, point 10, published in the Official Gazette of Romania, Part I, no. 192 of 15.03.2016

The Constitutional Court of Romania has even referred to the failure to respect the constitutional framework when an authority acts in a discretionary manner, specifically expressing itself in this sense and sanctioning such behaviour by declaring those legal acts unconstitutional. Thus, for example, in a decision[19] from 2022, it recalled that "accepting the idea that Parliament can exercise its legislative authority in a discretionary manner, at any time and under any conditions, adopting laws in areas that belong exclusively to acts of a sublegal, administrative nature [as is the case with the law that was the subject of the prior constitutional review that determined the making of this decision], is equivalent to a deviation from the constitutional prerogatives of this authority, enshrined in art. 61 para. (1) of the Constitution, and its transformation into an executive public authority", the provisions of art. 1 para. (4) of the Constitution,[20] which enshrines the principle of separation and balance of powers in the state, being also violated. Examining another objection of unconstitutionality regarding the failure to comply with the constitutional and legal provisions of legislative technique, the Constitutional Court reiterated that Parliament "is obliged, in its activity of adopting laws, to respect the constitutional and legal limits of the exercise of this prerogative",[21] otherwise "the competence provided for in art. 61 para. (1) of the Constitution ["the sole legislative authority of the country"] cannot be exercised by Parliament in a discretionary manner".

Therefore, at the constitutional level, we do not find express provisions in Romanian legislation regarding the discretionary power or the right of appreciation that public authorities and institutions should and could enjoy when exercising their specific competence within the legal framework drawn up by the legislator. However, provisions such as those mentioned above, as well as the jurisprudence of the Constitutional Court, allow us to appreciate that in exercising their own competence, while respecting the rule of law, public authorities and institutions enjoy a right of appreciation to achieve the purpose for which they were established and to respond to the public interest, assessing their adequacy and the limits of proportionality.

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19 Decision of the CCR no. 406/2022 [A] regarding the objection of unconstitutionality of the Law on the transfer of a part of a land located in the city of Teiuș, from the public property of the city of Teiuș and under the administration of the Local Council of the City of Teiuș, Alba County, into the private property of the city of Teiuș and for the amendment of Law no. 54/2018 regarding the transfer of a land from the public domain of the state and under the administration of the Ministry of Transport, under the concession of the National Railway Company (C.F.R.- S.A.) into the public domain of the city of Teiuș and under the administration of the Local Council of the City of Teiuș, Alba County, point 63, published in the Official Gazette of Romania, Part I, no. 172 of 28.02.2023.

20 *Idem*, point 33.

21 Decision of the CCR no. 728/2023 [A] on the objection of unconstitutionality of the Law amending and supplementing Law no. 364/2004 on the organization and functioning of the judicial police, point 38, published in the Official Gazette of Romania, Part I, no. 156 of 26.02.2024.

Neither was the Romanian legislator more generous with regulations regarding discretionary power and its limits, preferring either to enshrine principles that outline a specific legal framework, or to refer indirectly to the right of appreciation.

Thus, we could exemplify the first category with several principles enshrined in the Administrative Code,[22] such as:

— the principle of proportionality by virtue of which "[t]he forms of activity of public administration authorities must be appropriate to the satisfaction of a public interest, as well as balanced from the point of view of the effects on individuals",[23] and "the regulations or measures of public administration authorities and institutions [will be] initiated, adopted, issued, as the case may be, only following the assessment of public interest needs or problems, as the case may be, of the risks and the impact of the proposed solutions";[24]

— the principle of satisfying the public interest, by virtue of which "public administration authorities and institutions, as well as their personnel, [are obliged to pursue] the satisfaction of the public interest before the individual or group interest";[25]

— the principle of impartiality which requires "[public administration personnel] to exercise their legal duties without subjectivity, regardless of their own beliefs or interests";[26]

— the principle of adaptability, by virtue of which "public administration authorities and institutions have the obligation to meet the needs of society".[27]

From the second category, we will provide examples with provisions from Law no. 554/2004[28] on administrative litigation, with subsequent amendments and additions. Thus, according to art. 2 para. (1) letter n), by the excess of power, with which public authorities and institutions can act in the development and issuance or adoption, as the case may be, of normative or individual administrative acts, the legislator understood "the exercise of the right of appreciation of public authorities by violating the limits of competence provided by law or by violating the rights and freedoms of citizens".

22 The Administrative Code was adopted by Government Emergency Ordinance no. 57/2019, published in the Official Gazette of Romania, Part I, no. 555 of 05.07.2019.

23 Art. 9 of the Administrative Code.

24 *Ibidem.*

25 Art. 10 of the Administrative Code.

26 Art. 11 of the Administrative Code.

27 Art. 13 of the Administrative Code.

28 This law was published in the Official Gazette of Romania, Part I, no. 1154 of 07.12.2004.

The last-mentioned provision also indicates the answer to the question of this section. Thus, in exercising their powers provided for by specific legislation, public authorities and institutions enjoy the possibility of exercising a right of appreciation, enjoying a "margin of freedom left to [their] free appreciation (...) so that in order to achieve the purpose indicated by the legislator they can resort to any means of action".[29] In support of such an assessment, we could also recall the statement according to which "the law may sometimes allow public authorities a wider or narrower margin of appreciation with regard to a concrete situation",[30] and then these authorities make an assessment with regard to that situation and the regulations affecting it, either acting "in the presence of discretion",[31] or "of discretion (...) to the extent permitted by law to public authorities".[32]

The difference in the two forms of expression may seem insignificant, but it is one of nuance, relevant to the formulation of our answer. Thus, in common language, by 'discretionary' we mean "left to one's own pleasure".[33] As for the legal meaning of the same term, the same dictionary indicates the following meaning: "who has freedom of action by law".[34] Indeed, for the legal meaning of the term 'discretionary', it is specified that freedom of action and margin of appreciation must be permitted by law. However, as there is a tendency to confuse the two meanings, taking into account the expressions used by the legislator, as mentioned above, we believe that we can speak of a right of appreciation enjoyed by public authorities and institutions, within the limits provided by the legislation (in other words, in compliance with the principle of legality), in choosing a course of action to achieve a certain goal specific to their own competence. We will talk about discretionary power when the freedom of action is total or is bound, when there is no freedom in choosing the course of action.[35]

Moreover, since public authorities and institutions sometimes tend to act by forcing legal limits or even violating them, their conduct being barely legal (or apparently legal, or even illegal, as the case may be), in a context in which the common meaning of the term discretionary would best describe their mode of action, it would be all the more desirable that, in order to highlight a positive

29 APOSTOL TOFAN, Dana, *The discretionary power and excess power of public authorities*, All Beck Publishing House, Bucharest, 1999, p. 22.

30 SĂRARU, Cătălin Silviu, "Competence determined strictly by the law and the discretionary power of public administration", *Juridical Tribune*, no. 12/2016, p. 247.

31 *Ibidem.*

32 *Ibidem.*

33 See *the Explanatory Dictionary of the Romanian Language*, Online version, available at the following link: https://dexonline.ro/definitie/discre%C8%9Bionar

34 *Ibidem.*

35 See, PODARU, Ovidiu, *Administrative law. A conception. A vision*, Hamangiu Publishing House, Bucharest, 2017, pp. 102-103.

mode of action, in the letter and spirit of the law the phrase "right of appreciation" or "margin of appreciation" should be used.

3. COMMENTS ON DISCRETIONARY POWER IN THE ADOPTION OF EMERGENCY ORDINANCES BY THE GOVERNMENT OF ROMANIA.

Among the acts that the Government of Romania can adopt are, according to the provisions of art. 108 in conjunction with those of art. 115 of the Constitution, Emergency Ordinances. These are, along with simple ordinances, an expression of legislative delegation. However, unlike simple ordinances that can be adopted under much stricter parliamentary control[36] and only with the prior approval of Parliament, emergency ordinances can be adopted by the Government whenever it identifies an extraordinary situation whose regulation cannot be postponed, provided that the urgency of these measures is justified within the emergency ordinance itself, as provided for in art. 115 para. (4) of the Constitution. Constitutional provisions from the same art. 115 paras. (5) - (6) also set other conditions that the Government must comply with in order to be able to adopt such emergency ordinances within constitutional limits, namely: they must not be adopted in the field of constitutional laws, they must not affect the regime of the fundamental institutions of the state or the rights, freedoms and duties provided for by the Constitution, electoral rights, and they must not concern measures for the forced transfer of some assets into public ownership, respectively. In order to be able to enter into force, they must be submitted to debate under the emergency procedure at the competent Chamber to be notified, and they must be published in the Official Gazette of Romania.

Therefore, emergency ordinances can be adopted by the Government even when the Romanian Parliament is in session,[37] both in the field of ordinary and organic law, respecting only the limits imposed by the Constitution, as we briefly mentioned above.

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36 Thus, according to art. 108 paragraph (3) in conjunction with art. 115 paragraph (1) - (3) of the Constitution, simple ordinances may be adopted only on the basis of an enabling law adopted by the Romanian Parliament, which establishes: the period for which the enabling is granted (this is always established during parliamentary holidays), the areas for which this enabling is granted (these are always within the scope of ordinary law), as well as the need to submit them, before the end of the enabling term, to Parliament in order to be subject to its debate and approval.

37 In accordance with the provisions of art. 110 paragraph (4) of the Constitution in conjunction with the provisions of art. 37 paragraph (3) of the Administrative Code, during the period in which the Government's mandate has ended and until the members of the new Government take the oath, the former may no longer adopt either simple ordinances or emergency ordinances.

The constituent legislator, by granting this "constitutional legislative delegation directly permitted by the Constitution",[38] acted, in our opinion, in good faith in leaving the identification of situations that fall within the concept of extraordinary situation to the Government's discretion, choosing not to provide a definition of this type of situation in the constitutional text itself. However, the legislator also established control mechanisms to avoid and even correct the slippages of a government tempted to understand 'extraordinary situation' as almost any situation that it wants to regulate, circumventing the parliamentary legislative procedure. These control mechanisms are: the Romanian Parliament, which, as we have emphasized above, will (or should) submit all emergency ordinances for debate and approval in its two Chambers, but also the Constitutional Court, which is able to exercise *a posteriori* constitutional control over them by virtue of the provisions of art. 146 letter d) of the Constitution.

Unfortunately, the Romanian Government has taken – and continues to take – full advantage[39] of the aforementioned constitutional provisions and adopts emergency ordinances as if on a conveyor belt with unstoppable passion[40]. This is one of the most relevant examples of the exercise of discretionary power by one of the central authorities of our executive, which undermines the exercise of the legislative function by Parliament, knowingly exceeding its constitutional powers and transforming any situation that requires legislation through ordinary or organic laws in compliance with specific parliamentary procedures into an extraordinary one.

In the foregoing, we mentioned one of the best-known emergency ordinances, namely the one through which the Administrative Code was adopted in 2019 when, unfortunately, not even the Constitutional Court considered that it was a violation of constitutional provisions. Thus, it was appreciated, through the definition that it itself offered on the extraordinary situation,[41] that "the

38 SĂRARU, Cătălin Silviu, *Administrative Law*, vol. I, Universul Juridic Publishing House, Bucharest, 2023, p. 97.

39 Our statement is less valid at the time of writing this article, given that during this period governance is ensured by an interim government following the resignation of the Prime Minister on 5 May 2025.

40 This passion can also be demonstrated through numbers. We have chosen to exemplify only the 2022-2025 period. Thus, in 2022 the Romanian Government adopted 192 emergency ordinances, and the Romanian Parliament adopted 385 laws; in 2023 the Romanian Government adopted 131 emergency ordinances, and the Romanian Parliament adopted 431 laws; in 2024 the Romanian Government adopted 157 emergency ordinances, and the Romanian Parliament adopted 332 laws; in 2025, until 15.05.2025 the Romanian Government adopted 30 emergency ordinances, and the Romanian Parliament adopted 70 laws. The source of these statistical data is the Chamber of Deputies website, Legislative Repertory section, available at the following link: https://www.cdep.ro/pls/legis/legis_pck.frame

41 This extraordinary situation was defined by the Constitutional Court as a situation which "expresses a high degree of deviation from the usual or common and must have an objective

elements presented by the Government in the sense of invoking the extraordinary situation correspond to the constitutional framework thus established",[42] and "the urgency of the regulation by emergency ordinance was real, in the absence of the criticized normative act the sanction of suspension of interim payments by the Commission for failure to fulfil *ex ante* conditionality no. 11 of the Partnership Agreement concluded by Romania with the European Commission for the 2014-2020 period being directly applicable. This hypothesis would have led to major negative consequences on the development of the administrative public service throughout the country".[43]

However, we must emphasize that this decision was adopted only with the vote of the majority of the Court's judges, two judges also formulating a separate opinion in which, in essence, they emphasized that "the transfer of legislative powers to the executive authority is achieved through an act of will of the Parliament or directly by virtue of the constitutional text, but only in extraordinary situations and under parliamentary control (...), otherwise the legislative monopoly of the Parliament is enshrined by the Constitution in Article 61 paragraph (1). However, in the present case, the Government has achieved an inversion of the constitutional relations of control over the executive by the legislature, imposing its own will on all public authorities and all citizens, in defiance of the Parliament and the Constitutional Court and in contempt of the constitutional provisions",[44] an opinion that we share.

Another example in the field of emergency ordinances is represented by Emergency Ordinance no. 9/2025,[45] whereby neither by its title, nor by the exposition of the extraordinary situation and the urgency that determined the adoption of this normative act, the Government did not foresee the fact that it also modifies provisions from other normative acts that have no connection with the regulatory object of this ordinance. Thus, art. IV provides for the implementation

character, in the sense that its existence does not depend on the will of the Government, which, in such circumstances, is forced to react promptly to defend a public interest by means of an emergency ordinance". See, for example: Decision of the CCR no. 60/2020 [R] on the exception of unconstitutionality of the provisions of the Government Emergency Ordinance no. 57/2019 on the Administrative Code, point 50, published in the Official Gazette of Romania, Part I, no. 369 of 08.05.2020.

42 *Idem*, point 55.

43 *Idem*, point 66.

44 *Idem*, Separate opinion, point 3.3.

45 Government Emergency Ordinance 9/2025 for regulating measures relating to some projects for the expansion and change of destination, conversion or modernization of natural gas transmission and distribution networks, for amending and supplementing some normative acts, and for repealing Government Decision no. 1.261/2024 on the approval of financing from the Environmental Fund of projects for the expansion and change of destination, conversion or modernization of gas transmission and distribution networks, published in the Official Gazette of Romania, Part I, no. 203 of 07.03.2025.

of the provisions of art. 38 of Framework Law no. 153/2017 on the remuneration of personnel paid from public funds, published in the Official Gazette of Romania, Part I, no. 492 of June 28, 2017, with subsequent amendments and completions, by introducing a new paragraph. This essentially provides that "the employment relationship of contractual personnel paid from public funds (...), who meet the retirement conditions and for whom the retirement decision has been issued, terminates by law, under the conditions of art. 56 para. (1) letter c) of Law no. 53/2003 - Labour Code, republished, with subsequent amendments and supplements, even if the employee has requested the suspension of pension payments". In our opinion, such an emergency ordinance is adopted without correctly identifying, in accordance with the constitutional provisions, the extraordinary situation that determined the urgency of its adoption, being an eloquent example of a situation in which the Government acts in a discretionary manner, the seriousness of the situation being given by the very violation of the constitutional provisions.

Moreover, because the application of the provisions mentioned above has created deep dissatisfaction among those affected who carry out their activities in education or the health system. This is also due to the fact that we were in a pre-election period determined by the reorganization of the presidential elections in May 2025. Art. VI of Emergency Ordinance no. 12/2025[46] decreed "the suspension of the application of the provisions of art. 38 paragraph (10) of Framework Law no. 153/2017 regarding the remuneration of personnel paid from public funds, with subsequent amendments and completions, until December 31, 2025" from the date of entry into force of this emergency ordinance. In the case of this emergency ordinance, the Government also "omitted" a due explanation, according to constitutional norms, of the extraordinary situation, exercising the same discretionary power.

From the discretionary conduct manifested by the Government by adopting the last two emergency ordinances mentioned, some consequences arise. By virtue of the provisions of Emergency Ordinance no. 9/2025 in conjunction with those of art. 56 paragraph (2) of the Labour Code, according to which "the determination of the case of legal termination of the individual employment contract is made within 5 working days from its intervention, in writing, by decision of the employer, and is communicated to the persons in the respective situations within 5 working days", some persons in the situation identified by the provisions of art. IV of Emergency Ordinance no. 9/2025, had their employment contract terminated by law. The employers thus acted in accordance with the legal provisions in force until the entry into force of the provisions of Emergency

46 Government Emergency Ordinance no. 12/2025 on the granting of financial support for some categories of pensioners in 2025, as well as for the completion of some normative acts, published in the Official Gazette of Romania, Part I, no. 225 of 13.03.2025.

Ordinance no. 12/2025, which, although it suspended the provisions of the first emergency ordinance, did not come up with legislative solutions to resolve such situations.

Thus, by exercising the constitutional prerogative that allows it to adopt emergency ordinances in an absolutely discretionary manner, the Government determined the emergence of undesirable individual legal situations that affected the fundamental rights of some individuals.

Finally, we would also highlight the silence of Parliament, which has not yet adopted a law regarding Emergency Ordinance no. 57/2019, as provided for in the provisions of art. 115 paragraph (5) of the Constitution, a possible situation that we will also encounter in the case of the last two emergency ordinances mentioned. Thus, we are forced to note an example of discretionary manifestation even by the legislature, which does not fulfil its own constitutional competence, does not sanction the Government's slippage and does not actively and truly exercise its function of parliamentary control, thus allowing it to consider itself entitled to exercise the original, main competence of Parliament, namely that of legislation.

4. COMMENTS ON DISCRETIONARY POWER IN THE ADOPTION OF MINISTERIAL ORDERS.

In accordance with the provisions of art. 116 paragraph (1) of the Constitution of Romania, in conjunction with those in art. 51 paragraph (2) of the Administrative Code, ministries are only subordinate to the Government, and, in the exercise of their duties, ministers issue orders and instructions of a normative and individual nature, according to art. 57 paragraph (1) of the same Code.

Law no. 199/2023 on higher education,[47] subsequently amended and supplemented, provides, through art. 36 paragraph (1) letter b) and paragraph (2), that "the final examination of higher education studies [consists of] a bachelor's degree examination, for the bachelor's degree cycle or a diploma examination for education in the field of engineering sciences", these being to "[be] organized and conducted only by accredited higher education institutions, for accredited study programs, based on their own regulations, approved by the university senate and which comply with the framework methodology approved by order of the Minister of Education".

In the last 10 years, the bachelor's or diploma exam, as the case may be, consisted of "1 or 2 tests, established by the university senate, as follows: a) a test

47 Published in the Official Gazette of Romania, Part I, no. 614 of 07.05.2023.

for evaluating fundamental and specialized knowledge; b) a test for presenting and defending the bachelor's thesis/diploma project", as provided for in art. 13 para. (1) of the 2022 Framework Methodology for organizing and conducting bachelor's/diploma and dissertation exams, approved by Order of the Minister of Education no. 3.106/2022.[48]

Consequently, each university, through its own specific methodology adopted by the university senate, decided how many tests had to be taken for the bachelor's/diploma exam and what they consisted of.

However, at the beginning of December 2024 a ministerial order was published on the website of the Ministry of Education for public consultation, which provided for a series of changes to the Framework Methodology for organizing and conducting graduation, bachelor's/diploma and dissertation exams, including the one according to which, according to art. 24 para. (1): "The bachelor's/diploma exam consists of two tests, as follows: a) a test for evaluating fundamental and specialized knowledge; b) a test for presenting and publicly defending the bachelor's thesis/diploma project". The same normative act provided that these provisions would enter into force immediately, being also applicable to students completing their bachelor's and dissertation studies in the 2024-2025 academic year, without taking into account the fact that we were at the end of the first semester of this academic year and that most faculties and universities had already communicated the content of the final exam to their students.

At the time of this post on the ministry's website, the specific instrument for motivating the draft normative act[49] had not been uploaded, as provided for in art. 7 paragraph (2) of Law no. 52/2003, subsequently amended and supplemented, according to which "The announcement regarding the development of a draft normative act will be made public, under the conditions of paragraph (1), at least 30 working days before submission for approval by the public authorities. The announcement will include: the date of posting, a report on the necessity, a statement of reasons, an approval report on the need to adopt the proposed regulatory act, an impact and/or feasibility study, as appropriate, the full text of the draft of the respective act, as well as the deadline, place and manner in which those interested can send in by writing proposals, suggestions and opinions of a recommendatory nature regarding the draft regulatory act".

Following the situation created, universities, academic staff, students, and the People's Advocate have made specific approaches to the Ministry of

48 Published in the Official Gazette of Romania, Part I, no. 169 of 21.02.2022.

49 Thus, as provided for in art. 20 paragraph (3) of Law no. 24/2000 on the legislative technical norms for the elaboration of normative acts, republished, with subsequent amendments and supplements, published in the Official Gazette of Romania, Part I, no. 260 of 21.04.2010.

Education, emphasizing that university autonomy was violated by the Ministry acting in this way. This is a fundamental principle, guaranteed by art. 32 paragraph (6) of the Constitution, by virtue of which the university community has the right "to establish its own mission, institutional strategy, structure, activities, organization and functioning, as well as the management of financial, material and human resources, in compliance with the legislation in force", as provided for in art. 11 paragraph (2) of Law no. 199/2023, with subsequent amendments and supplements. It was also emphasized that the initial regulation offered universities the possibility to choose between examination tests in accordance with their own principles and logistical possibilities, adapted to the specifics of each study program or the imposition, through a normative administrative act of lower rank, such as a ministerial order, which is also intended to be adopted in the middle of the academic year, and for which no substantiation is presented, according to the legislation in force mentioned above, affecting university autonomy and its fair application.

Through a response communicated to the People's Advocate, the General Directorate of University Education within the Ministry of Education supported the ministry's position transposed in this order, essentially showing, among other things, that the changes made to the content of the bachelor's/diploma exam represent an expression of university autonomy that can only be exercised on condition that each higher education institution assumes public responsibility by complying with the legislation in force, not only with its own charter and national and European policies in the field of higher education. Furthermore, such an interpretation would contravene, in the opinion of the ministry, the very fundamental duty to respect the Constitution and the laws, provided for by article 1, paragraph (5) of the Constitution.

Indeed, in our opinion, university autonomy cannot allow universities to not comply with legal provisions, but, nevertheless, this being guaranteed by constitutional norms, it cannot be affected by provisions established in a discretionary manner without any kind of argumentation or substantiation by an administrative act with a legal force inferior to a law. We certainly cannot equate autonomy and independence, as the Constitutional Court of Romania has emphasized,[50] but we cannot agree that a central public administration

50 See in this regard the Decision of the CCR no. 2/2011 regarding the objection of unconstitutionality regarding the National Education Law, as a whole, as well as, in particular, art. 45 para. (5) (6) (7) and (9), art. 46 para. (2), art. 121, art. 125 para. (1) let. a), b) and c), art. 125 para. (2), art. 128 para. (5), art. 132 para. (5), art. 212 para. (3), art. 215 para. (1) (3) and (4), as well as art. 361 para. (2) of the law, published in the Official Gazette of Romania, Part I, no. 136 of 23.02.2011, or Decision of CCR no. 80/2014 [R] on the legislative proposal regarding the revision of the Romanian Constitution, point 126, published in the Official Gazette of Romania, Part I, no. 246 of 07.04.2014, through which the Court emphasized that "university autonomy is not confused with independence" or that "it is not equivalent to it".

authority such as the Ministry of Education should exercise its competence with excessive power, and in a discretionary manner, by circumventing legal provisions regarding the procedure that must be followed by such an authority to adopt a ministerial order. By doing so, the Ministry of Education itself violated, in bad faith and with a clear excess of power, the "minimum procedural rules applicable to ensuring decision-making transparency", thus violating the very object of regulation of Law no. 52/2003 on decision-making transparency in public administration. Also, through this conduct the ministry in question also violated the purpose of the aforementioned law, according to art. 1 paragraph (2), because it did not contribute, actively and in good faith, to increasing the degree of accountability of the public administration towards the citizen (in this case towards the student taking the final exam), as the beneficiary of the administrative decision, nor did it contribute to increasing the degree of transparency of the public administration of which it is part. As for the third dimension of this purpose, the "active participation of citizens in the administrative decision-making process and in the process of drafting normative acts" was used only formally, by putting the draft legal act in question into public consultation without having the slightest intention of considering the opinions expressed as a result of this procedure.

However, given the numerous, consistent and well-documented reactions from the academic sector, the People's Advocate, although without making its report public on the necessity of the proposal including the justification of its actions, the Ministry of Education adopted another ministerial order[51] whose art. II established that the provisions regarding the content of the bachelor's/diploma exam established by the Order of the Minister of Education no. 3,691/2024, with subsequent amendments and additions, would apply starting in the 2025-2026 academic year. We appreciate that this latest order is also evidence of a discretionary approach, in clear contradiction with the legal provisions regarding decision-making transparency.

5. SHORT CONCLUSIONS.

The rule of law is one of the essential values on which any democratic state or any democratic construction such as the European Union is based, and "[t]he heart of the theory of the rule of law lies (...) the principle according to which

51 Order no. 7843/2024 on the amendment and completion of the Framework Methodology for the organization and conduct of graduation, bachelor's/diploma and dissertation exams, approved by Order of the Minister of Education no. 3.691/2024, published in the Official Gazette of Romania, Part I, no. 1331 of 31.12.2024.

the various organs of the state can only act by virtue of a legal authorization",[52] which is why the exercise of any right of appreciation regarding the action to be taken must only be carried out by a public authority or institution within the limits established by legislation.

The discretionary power that a public authority or institution can enjoy can be understood, completely erroneously, as a freedom that, "by its essence, excludes control, supervision or coercion",[53] thus being able to act with excess power in the exercise of its own competence. This is why we considered that it would be more appropriate to express ourselves in terms of "right of appreciation" in order to avoid the pejorative meaning of the phrase "discretionary power".

Through the examples mentioned above we have shown how some of the most important authorities in the sphere of public administration, i.e. the government and the ministries, forget that the exercise of their own powers is done within the limits outlined by the principle of legality, and the appropriateness of their actions is determined by the exercise of the right of appreciation within the limits established by the legislation and by applying the filter offered by the principle of proportionality.

Compared to the discretionary behaviour of the authorities in our examples, the most accessible solutions are those found in the Constitution and other laws, but they must also be applied.

Thus, for example, our Government's particular passion for emergency ordinances could be curbed if Parliament were to exercise its legislative function constantly and actively, if it were not to remain passive, as is often the case when it submits emergency ordinances for debate and approval. Parliament approves them, with amendments and/or additions, or rejects them, or if it were the case, even to truly use the specific instruments of parliamentary control such as simple motions or even the motion of censure. Also, amending the constitutional provisions of art. 146 letter d) regarding the subjects of law that may refer to the Constitutional Court of Romania an exception of unconstitutionality regarding the possible unconstitutionality of an emergency ordinance or of provisions of such a normative act, by also granting this capacity to the President of Romania, the High Court of Cassation and Justice or even interested social bodies, could contribute to limiting the situations in which such emergency ordinances would be adopted. Last but not least, restricting the areas in which such ordinances can be adopted, by supplementing the provisions of Article 115 of the Constitution, would be another solution.

52 CHEVALLIER, Jacques, *The rule of law*, DĂNI OR, Diana, translation from French, Universul Juridic Publishing House, Bucharest, 2012, p. 12.

53 PODARU, Ovidiu, *op. cit.* p. 102.

As for situations of discretionary exercise of specific powers by ministries, we believe that their limitation can also be done by using the specific instruments of parliamentary control mentioned above, but also by exercising specific judicial control by the administrative courts, and much more often.

In today's world, the rule of law tends to become a beautiful story, but one that, if we are not careful, we will talk about in the past, if we will talk about it at all. The experience of the last six months in our country, when we amazed the world with the presidential elections, supports our allegation that the rule of law can very easily become a real beautiful story. However, the theme of today's paper is not about the presidential elections in Romania but about the limits of discretionary power and the difficulties in applying the law in Romania and, especially, how our rulers did not pick up even the slightest tinkle of the alarm signal activated in the first round of the presidential elections in December 2024.

It seems that power is so beautiful, perhaps like a mermaid that constantly attracts rulers, but at the same time it distances them from us, those we elected to represent our interests and to exercise our power for us and with us, but by no means only in their own interest.

Legal instruments and procedures to limit the discretionary exercise of power by public authorities and institutions are provided for by the legislation in force, but they must be used, not just improved.

HISTORICAL ROOTS OF THE CONTEMPORARY MISUNDERSTANDING OF THE "RULE OF LAW" CONCEPT ON THE BALKANS – THE CASE OF BULGARIA AND OTHERS.

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SUMMARY: 1. INTRODUCTION. 2. THEORETICAL FRAMEWORK: CLASSICAL AND CONTEMPORARY APPROACHES OF THE RULE OF LAW. 2.1. Conventional Ideas. 2.2. Modern Understanding. 3. HISTORICAL DEVELOPMENT AND DIFFICULTIES IN THE BULGARIAN SITUATION. 3.1. Ottoman Legacy (1396–1878). 3.2. Legal modernization and nation-state formation (1878–1944). 3.3. Communist Era (1944–1989). 3.4. Post-Communist Transition and European Union Accession (1989–Present). 4. CONTEMPORARY MISUNDERSTANDINGS OF RULE OF LAW IN BULGARIAN SOCIETY. 4.1. Legitimacy against the Rule of Law. 4.2. Trust Deficit and Discriminatory Application. 4.3. Legislative Instrumentalism. 4.4. Procedural Formalism. 4.5. Between Populism and Technocracy. 4.6. Individualized Justice and Cultural Particularism. 4.7. Passive Legality and Active Circumvention. 4.8. The state of Chaos and Institutional. Uncertainty. 5. CONCLUSION. 6. REFERENCES.

1. INTRODUCTION.

Although a basic tenet of modern democratic government, the Rule of Law is interpreted and applied quite differently depending on the sociopolitical setting. As defined by many national constitutions and international conventions

from the 19th and 20th centuries – specifically, the rights to life, personal security, freedom, private property, contractual autonomy, and political rights –, this concept is acknowledged as a political and legal theory that makes the safeguarding of human rights a top priority (Zolo, 2007).

Particularly, Bulgaria and post-communist Southeast Europe have trodden different historical paths that deviate from Western European influence and understanding of the application of this concept. This paper looks at the historical roots of modern misunderstandings about the Rule of Law in Bulgaria, examining how historical legacies have shaped present institutional and social viewpoints on this fundamental democratic concept.

Belov (2023) aptly characterizes Bulgaria's Rule of Law as in a "semi-permanent transitory" state caught between constitutional ideals, pragmatic imperatives, and normative expectations as a basic obstacle for Bulgaria's democratic growth, and he offers interesting new perspectives on the larger dynamics of legal transplantation and democratic consolidation in post-communist countries: the conflict between official adoption and substantive implementation. Bulgaria's "state of chaos", according to Kavalski (2009), gets worse by stressing the systematic corruption in the nation's government since the fall of communism. This chaotic state has hampered the application of real rule of law values and has created an atmosphere whereby legal uncertainty is accepted as something common.

2. THEORETICAL FRAMEWORK: CLASSICAL AND CONTEMPORARY APPROACHES OF THE RULE OF LAW.

2.1. Conventional Ideas.

Western political philosophy has great historical roots for the normative ideal of the Rule of Law. Aristotle famously argued in his *Politics* that "law should govern" rather than people, thereby laying an early basis for the idea that government by set laws guards against arbitrary rule. This conventional wisdom has evolved over millennia of political and legal development.

In the 19th century Dicey (1915) defined three fundamental ideas using the traditional Anglo-Saxon formulation:

1. No punishment can be inflicted except for a breach of established law, adjudicated through ordinary legal procedures
2. No one is above the law, with all citizens equally subject to ordinary law and the jurisdiction of ordinary courts

3. Constitutional law emerges as the result of ordinary law as determined by judicial decisions protecting individual rights

Friedrich Hayek (1944) then developed on these ideas, claiming that the Rule of Law shows that "government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances" (Hayek, 1944).

2.2. Modern Understanding.

Advancing the idea of the Rule of Law, modern legal theorist Joseph Raz (1979) defined a number of ideas that make up the Rule of Law: laws must be prospective rather than retroactive, maintain relative stability, show clarity, and be enforced by an independent judiciary. Raz argued that proper direction of human behaviour reports to these formal aspects of law. Using the term "the inner morality of law", Lon Fuller (1964) said that a legal system must comply with eight principles to operate effectively: laws must be general, publicly published, prospective, coherent, clear, stable, and congruent with official actions. Fuller argued that a system cannot fairly be labelled as "law" without these components. The World Justice Project (2023) recently defined the Rule of Law as a system upholding four universal values:

1. The government and private actors are accountable under the law
2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient
4. Justice is delivered timely by competent, ethical, and independent representatives who reflect the makeup of the communities they serve

Contending that this requires "a conception of legality focused not just on process but also on substance: on what kinds of laws support rather than compromise dignity and self-governance", Ronald Dworkin (1985) said that the Rule of Law must embrace substantive justice values rather than only procedural adherence.

3. HISTORICAL DEVELOPMENT AND DIFFICULTIES IN THE BULGARIAN SITUATION.

Different historical eras that have shaped institutional development and society views of law and legal institutions have made Bulgaria's connection with the idea of the Rule of Law a convoluted one.

3.1. Ottoman Legacy (1396–1878).

Bulgaria's legal development was largely shaped by the five centuries of Ottoman control. The country did not participate in the fundamental European legal developments of the Enlightenment and the emergence of constitutional government during this period (Daskalov, 2004). Although the Ottoman legal system combined elements of Islamic law (*sharia*) with customary law (*kanun*), it essentially differed from the evolving rule of law traditions in Western Europe.

Todorova (2009) notes that this extended period created a paradigm in which law was seen mostly as a tool of external authority rather than a defence against capricious power, a view that would persist through later governments. Along with building legal pluralism and community-based dispute resolution that ran alongside state power, the Ottoman *millet* (independent court of law) system gave religious communities great autonomy in running their internal affairs.

3.2. Legal modernization and nation-state formation (1878–1944).

Bulgaria started an ambitious legal modernization campaign just after its independence in 1878. Its first modern constitution, the Tarnovo Constitution of 1879, combined liberal democratic ideas including the separation of powers and the protection of civil rights (Crampton, 2007). However, this quick legal transplantation happened without the necessary social evolution that had produced Western European systems. Western European legal codes brought about a far-reaching change in the Bulgarian legal system. Whereas the Civil Procedure Code of 1891 was greatly influenced by Italian law, the Criminal Code of 1896 was essentially based on Hungarian law (Tokushev, 2008). The Commercial Law of 1897 borrowed heavily from German commercial legislation. Bulgarian jurists, educated mostly in Germany, France, and Russia, imported foreign legal ideas without sufficient adaptation to local conditions and legal traditions, thus creating a kind of 'legal transplantation' (Manolova, 2001).

One clear example of this disjunction was the founding of the Supreme Court of Cassation in 1880. Emphasizing legal principles over factual conclusions, it struggled to create consistent jurisprudence due to political unrest even though it was formally organized as a court of final appeal based on the French model. Metodiev (2010) claims that Bulgaria experienced more than 35 political changes, several constitutional crises and intervals of suspended constitutional order between 1879 and 1944, which made consistent judicial development practically unattainable.

During this time the court faced significant challenges to its independence. Following the 1923 coup against Alexander Stamboliyski's agricultural

government, many judges were ousted for alleged political ties despite constitutional guarantees of judicial autonomy (Metodiev, 2010). During the interwar years, this trend of political intervention in the court continued, undermining public confidence in legal institutions as objective arbiters.

The fragility of constitutional government is best shown by the coup of 19 May 1934 carried out by the political group "Zveno". The coup leaders quickly revoked the Tarnovo Constitution, split political parties, and ruled by decree; these actions that were legally dubious but faced little significant resistance from legal institutions that were meant to preserve constitutional order (Daskalov, 2005). The royal authoritarian government established by King Boris III (1935–1943) demonstrated the flexibility of official legal systems even more. Although the government claimed to uphold constitutional governance, its technically legal but essentially anti-democratic policies such the Law on the Defence of the State (1936) sharply limited civil liberties and political dissent and thus concentrated power. Daskalov (2004) argues that this resulted in a continuous discrepancy between formal legal frameworks and social practices; laws were passed but implemented inconsistently, leading scholars to describe the phenomena as "façade constitutionalism". The experiences of this era established a lasting pattern whereby constitutional principles and legal assurances could be technically upheld while being substantively compromised, sending the message to citizens that formal legal provisions provided minimal practical protection.

This period of political unrest was marked by frequent changes of government, autocratic royal episodes, and later involvement in both World Wars, which undermined the consistent development of rule of law traditions. Bulgaria modernised itself in legal terms mostly through the formal adoption of Western legal systems by 1944, when communist forces took over; however, it neglected to foster the necessary institutional culture and social practices for efficient rule of law governance.

3.3. Communist Era (1944–1989).

Bulgaria's legal system was drastically changed in 1944 with the advent of communist rule. While maintaining a formal legal system, the communist government prioritised party ideology and political expediency over law. Ganev (2013) claims that this era established a "telephone justice" system whereby party officials could control court decisions, which undermined judicial independence and the principle of law as a constraint on political power. With judges and prosecutors obliged to carry out party instructions rather than impartially apply legal principles, the legal profession evolved into a tool of state policy rather than a separate entity. This fundamentally changed public opinion

on law and legal institutions, strengthening the idea of law as a tool of power rather than a protection against its abuse.

Dimitrov's study (2020) on the cognitive difficulties Bulgarian society faces provides important new perspectives on the long-lasting consequences of that era. He notes that the communist experience fundamentally changed people's view of law from a protective mechanism to an instrument of power, so creating a "double standard of legality" in which official rules coexisted with unofficial circumventions. This cognitive model persisted into the post-communist era, thereby complicating the consolidation of democracy.

3.4. Post-Communist Transition and European Union Accession (1989–Present).

Bulgaria's post-communist transition presented fresh difficulties for the development of ideas around the rule of law. The legal system evolved quickly and underwent major legislative changes, including the acceptance of a new democratic Constitution in 1991 and thorough legal changes meant to fit European norms. Nevertheless, execution has presented challenges. Belov (2023) writes of Bulgaria's development in terms of rule of law as being in a "semi-permanent transitory" state in which official structures coexist with persistent unofficial practices and attitudes. He sees a basic conflict among three dimensions: "normative expectations" set by EU standards and requirements, "pragmatic imperatives" resulting from challenges of political and economic transition, and "constitutional imaginaries" that reflect deeper cultural views of law and authority, and resist official transformation. Although Bulgarian cultural life may seem overly politicized over the past three decades, Dimitrov (2020) noted that mass media rather than the rule of law mostly shape politics. Moreover, the content of the media is shaped by the value preferences of a mostly underprivileged population, of which only roughly one-fifth have degrees in higher education.

Especially perceptive is Kavalski's (2009) portrayal of Bulgaria as in a "state of chaos" during this period. He argues that the post-communist transition created a milieu of "institutionalized uncertainty", whereby legal uncertainty became both expected and accepted. Kavalski claims that since people have learned to negotiate governance, not via dependable legal structures but rather through informal power and influence networks, this disorder has regularly undermined efforts to apply real rule of law principles. Especially noticeable during Bulgaria's EU accession process was the phenomena of a formal adoption lacking significant implementation. Belov (2023) notes that "Bulgaria successfully adhered to EU accession criteria while maintaining internal dynamics that significantly diverged from EU standards". This resulted in what

he describes as "mimetic constitutionalism", whereby constitutional and legal provisions apparently adhere to European standards yet function differently in practice. Effective operation of the rule of law reports to it, existing inside a social system that rejects contractual social relations but requires equal value, equal rights, and reciprocal obligations among the contracting parties (Dimitrov, 2020).

Important new perspectives on the development of this process come from Domaradzki and Milosavljevič (2021). Bulgarian national officials deliberately control EU rule of law conditionality by means of technical compliance, thus undermining substantive reform at the same time. Their studies show how Bulgarian officials perfected "apparent compliance" by carrying out performative reforms satisfying official EU directives while preserving existing power systems and practices. This created a "two-level game" whereby officials could present approved reforms to EU monitors while delivering an alternative message to home audiences, thereby reducing external pressure for real improvements in the rule of law.

Bulgaria's admission into the European Union in 2007 required the official acceptance of rule of law norms; nevertheless, the European Commission has repeatedly underlined flaws in judicial independence, corruption prevention, and efficient law enforcement (European Commission, 2019) through its Cooperation and Verification Mechanism. These difficulties point to underlying historical patterns rather than mere technical flaws. Dimitrov (2020) claims that during this transitional phase Bulgarian society developed a "cognitive dissonance". Western legal systems were adopted quickly without corresponding changes in cognitive models and value systems, producing a situation whereby "new norms were interpreted through old cognitive frames" (Dimitrov, 2020). This cognitive dissonance clarifies the continuous discrepancy between official legal systems and social policies defining Bulgaria's post-communist development.

4. CONTEMPORARY MISUNDERSTANDINGS OF THE RULE OF LAW IN BULGARIAN SOCIETY.

Dimitrov (2015) emphasizes the inherent difficulty of offering a universal definition of the rule of law, especially outside the particular settings of national social relations. He considers that the delayed and insufficient modernization of national civilizations in Southeastern Europe and Bulgaria is a particular cause of the ongoing crisis of the rule of law in these countries. Only at a rather late phase in the process of European integration and EU enlargement were the importance of the rule of law and the need of advancing and solidifying it acknowledged. Many of the major misunderstandings that still exist in the present Bulgarian

understanding and application of rule of law ideas are firmly ingrained in a national perspective and cultural paradigms shaped by past events.

4.1. Legitimacy against the Rule of Law

According to Ganev (2008), a common mistake in Bulgarian legal and political debate is equating simple legal compliance with the more complete definition of the rule of law. Emphasizing the existence of laws and technical adherence over substantive justice or meaningful restrictions on power, the hallmark of this formalistic approach is an emphasis on passing laws without enough thought given to their execution or outcomes. Belov (2023) defines this as a basic component of Bulgaria's "mimetic constitutionalism", in which formal legal systems are created mostly to satisfy external needs (notably EU accession criteria) without concurrent changes in practice. He notes that "formal constitutionality coexists with extra-constitutional practices that may significantly contradict constitutional norms" (Belov, 2023), producing what he calls "constitutional theatre" in which the values of the rule of law are formally acknowledged but substantively avoided. This legalistic approach best captures what anthropologist Creed (2011) notes as a cultural pattern of "performing compliance" while preserving other systems of meaning and practice. Bulgarians developed complex plans for formal compliance through imposed systems while preserving parallel systems of authority and significance throughout centuries of foreign dominance – a cultural adaptation that persists in modern legal frameworks. Dimitrov (2020) clarifies this phenomenon by means of the "cognitive inertia" theory, which holds that Bulgarian society continues to use mental models developed during the communist era despite an official democratic transition. He notes a constant "legal nihilism" whereby "law is viewed not as a structure for safeguarding rights but as a hindrance to be surmounted" (Dimitrov, 2020). This cognitive model creates a situation whereby, despite decades of official reform, the achievement of a meaningful rule of law remains elusive.

4.2. Trust Deficit and Discriminatory Application.

Past events have bred great mistrust of legal institutions among Bulgarian people. With just 18% of Bulgarian respondents expressing confidence in their courts, surveys repeatedly show declining trust in the judiciary (European Commission, 2020). Bulgaria's continuous problems with high-level corruption and impunity support a common belief that legal standards are applied unequally to powerful elites compared to common citizens. Giordano and Kostova (2002) characterize this mistrust of formal institutions as "social capital of distrust"

– a logical reaction to historical events of repeated betrayal of trust in official institutions – that is deeply ingrained in the country's culture. Proverbs abound in Bulgarian folklore that show this point of view sound like "The law is like a door in an open field – only fools pass through it" and "The law is a spider's web – it catches the small flies but lets the big ones break through". These cultural expressions capture centuries of experience with legal systems perceived as tools of external oppression rather than a mechanism for safeguarding rights.

According to Kavalski (2009), this mistrust has become methodically embedded in Bulgaria's political system, leading to what he calls "institutionalized uncertainty." As a result, people expect legal institutions to be erratic, which encourages adaptive behaviour that compromises the values of the rule of law. This creates what Kavalski describes as a "vicious circle of mistrust," whereby citizens' rational attitudes to inadequate institutions further compromise their capacity for operation. One cannot describe the difference between codified law and its application in both pre-socialist and socialist periods as a state run under the rule of law. The general low confidence in laws and jurisprudence led many to seek refuge in patronage networks, thereby weakening the already precarious legal system.

4.3. Legislative Instrumentalism.

The historical view of law as a tool of state authority rather than a constraint on it continues to shape institutional behaviour and public attitude. Usually, the law is seen as an instrument for achieving political goals rather than as an autonomous normative framework. The regular legislative changes, in line with political priorities and the view of courts as enforcers of political will rather than as autonomous interpreters of the law, clearly show this instrumentalist viewpoint. It fits the idea of the Bulgarian "statist mentality", developed by cultural historian Elenkov (1998), which sees the state as the main agent of social change and the final source of power. This orientation first surfaced during Bulgaria's fast modernization post-1878, when the country engaged in nation-building, and this was strengthened during the communist era. Both elite and public opinions on legal systems are still shaped by the general cultural presumption that the law serves the interests of the state rather than restricting its authority.

Examining how Bulgarian executives use EU rule of law conditionality, Domaradzki and Milosavljevič (2021) offer a contemporary example of this instrumentalist viewpoint. They document how political leaders have deftly engaged in what they refer to as "strategic adaptation", seeing rule of law mandates not as normative obligations but rather as technical obstacles to be negotiated through performative compliance. This point of view is quite

instrumental, seeing law mostly as a strategic tool used for political advantage rather than as a fundamental framework for government.

4.4. Procedural Formalism.

The Bulgarian legal system shows notable procedural formalism, giving top priority to technical adherence to procedures over pragmatic outcomes. This encourages a tendency to use formal adherence to procedural guidelines as a defence against significant review. This approach helps one to follow the legal text while maybe going against its intended use. This procedural formalism is related to the "bureaucratic" ethos found by the anthropologist Verdery (1996), which developed under socialism and underlined formal correctness over significant outcomes. This is best shown in Bulgarian terms by what Avramov (2007) describes as a "dual normative consciousness", the simultaneous adherence to formal rules and unofficial behaviour that might greatly deviate from those rules.

4.5. Between Populism and Technocracy.

Essential new perspectives on present challenges to the rule of law come from the analysis by Domaradzki and Milosavljevič (2021) on the alternation of Bulgarian leaders between populist and technocratic approaches. They see a deliberate swing between technocratic government that creates a false sense of reform and populist rhetoric that undermines legal systems. This dual approach helps political leaders to present a reformist image to international entities, particularly EU institutions, while simultaneously attracting Bulgarian citizens with nationalist, anti-elite rhetoric. This complex approach has effectively reduced outside pressure for real reform of the rule of law while preserving internal power structures that undermine it.

4.6. Individualized Justice and Cultural Particularism.

As the sociologist Chavdarova (2013) notes, Bulgarian legal philosophy is distinguished by "particularism", i.e. the expectation that rules should be carried out differently depending on personal relationships and circumstances instead of consistently. The common behaviours of seeking customized exemption from rules and using personal ties to negotiate bureaucratic and legal systems clearly show this cultural orientation. Kaneff (2002) points out that this orientation has deep historical roots in the difference between "official" and "unofficial" knowledge, which developed during the Ottoman period and was strengthened under socialism. From this vantage point, formal rules represent only one layer of social reality, under which more important networks of personal relationships

and responsibilities operate. Informal behaviours like *vruzki* (connections) within legal environments show this cultural inclination toward particularism (favouritism); that is their general nature. Rice (2002) pointed out that many Bulgarians continued to handle legal matters through personal intermediaries rather than official channels, suggesting a perspective that sees the law as negotiable rather than universally applicable following post-democratic transitions. Dimitrov (2020) argues that this particularism marks a cognitive adaptation to historical events in which one-off approaches to legal problems emerged as logical responses to unreliable official institutions. He acknowledges a constant "solidarity deficit" in Bulgarian society, a lack of trust in official rules and institutions that drives people to look for one-off solutions for problems that should be resolved collectively. This cognitive orientation creates what Dimitrov calls a "social trap", in which individual rational adaptations added together undermine the possibility for an efficient rule of law.

4.7. Passive Legality and Active Circumvention.

One prominent feature of Bulgarian legal philosophy is what Dimitrov (2015) calls "passive legality", a formal adherence to legal rules combined with proactive attempts to avoid them when they conflict with personal interests or the expectations of society. This kind of thinking evolved as a logical reaction to past events, where imposed legal systems regularly collided with local customs and interests. This orientation is clear in the general acceptance of what Avramov (2007) refers to as "soft illegality" – actions that, although technically breaking official rules, are socially acceptable and generally carried out. Examples include a variety of forms of tax avoidance, illegal building, and the use of personal networks to expedite administrative procedures – activities that many Bulgarian citizens would not consider as essentially unethical despite their legal transgressions. Dimitrov (2020) explores this idea, claiming that Bulgaria suffers a "values deficit", marked by official adherence to democratic values against general acceptance of practices that essentially challenge those values. This lack of values sets the stage whereby "citizens concurrently demand the rule of law while anticipating and engaging in its circumvention" (Dimitrov, 2020). This cognitive dissonance clarifies the ongoing discrepancy between Bulgaria's official democratic structures and its real problems of governance.

4.8. The state of chaos and institutional uncertainty.

The way Kavalski (2009) presents Bulgaria as in a "state of chaos" provides a useful perspective for understanding the systematic obstacles to the rule of law. According to him, post-communist Bulgaria has developed a governance model

based on "institutionalized uncertainty" in which uncertainty is expected and accepted. Kavalski contends that by creating an environment in which people rely on personal relationships and informal agreements rather than official legal systems to control their daily life, this disorderly state satisfies major functions for political elites. What Kavalski describes as "cyclical destabilization" – repeated cycles of reform and regression that impede real institutional consolidation – defines this chaotic condition. This cyclical pattern produces a situation whereby reforms are regularly promised, partially carried out, and finally abandoned, thereby generating a continuous state of institutional instability that undermines confidence in official legal systems and processes. Under these conditions, the rule of law becomes almost impossible since people cannot rely on consistent legal systems.

5. CONCLUSION.

The present challenges Bulgaria faces in putting an efficient rule of law system into effect reflect not only technical or institutional flaws but also great historical trends. Modern misunderstandings of the concept of the rule of law have resulted from the disturbed evolution of indigenous legal traditions, the experience of imposed legal systems, and continuous use of the law as a tool for political control. Belov's (2023) description of Bulgaria's rule of law as ensnared in a "semi-permanent transitory" condition captures the basic conflict in Bulgaria's legal development rather faithfully. Formal legal systems and persistent informal practices coexist to produce what he calls "constitutional schizophrenia", a disjunction between accepted legal norms and real-world experience that erodes public confidence in legal institutions and processes. Dimitrov's (2020) study of post-communist cognitive difficulties offers important new perspectives on the causes of the ongoing disconnect three decades after Bulgaria's change to democracy. His identification of "cognitive inertia" in Bulgarian society clarifies why formal institutional change has not resulted in corresponding behavioural change. Citizens persist in interacting with legal institutions based on mental frameworks influenced by historical experience, producing what he describes as a "values implementation gap" between formal democratic commitments and social practice. The study on the manipulation of EU rule of law conditionality by Domaradzki and Milosavljevič (2021) reveals complex strategies used by Bulgarian political elites to maintain this disjunction. Their awareness of a strategic oscillation between populist and technocratic approaches exposes how formal adherence to EU directives has been used to safeguard informal practices from thorough inspection, thereby neutralizing external demand for real reform. Kavalski's 2009 "institutionalized uncertainty" model clarifies the processes

by which this condition has endured over time. His analysis of Bulgaria's "state of chaos" shows how the erratic nature of administrative and legal procedures has become accepted and how this encourages logical incentives for people to pursue security via unofficial networks rather than through official institutions. Kavalski argues that by preserving opportunities for free will outside official constraints, this systematic uncertainty serves the political elites very well. The study shows that addressing the problems of Bulgarian rule of law calls for more than just institutional changes or technical legal reforms. Belov (2023) argues that it is imperative to face the "constitutional imaginaries" influencing citizens' and officials' perspectives and interaction with legal values. Changing these significant cultural patterns calls for constant interaction with the social, educational, and cultural elements of legal life rather than mere legislative change. Dimitrov (2020) emphasizes the need for "cognitive synchronizing", in which official institutional structures line up with citizens' mental models and value orientations. According to him, this process requires both institutional change, continuous educational and cultural projects to change people's impressions of their interaction with legal systems.

Dealing with these difficulties calls for institutional changes as well as a change of legal culture and public opinions of law and legal institutions. Bulgaria has made significant progress in the formal acceptance of rule of law values, particularly in response to EU accession requirements; nevertheless, balancing official structures with social practices remains a difficult task. Future reforms need to address institutional aspects as well as the significant historical legacies that still affect Bulgaria's attitude to the rule of law. Bulgaria's experiences offer important new angles on the more general difficulties associated with democratic consolidation. Domaradzki and Milosavljevič (2021) argue that advanced tactics of mimetic compliance make the external conditionality mechanisms used by the EU vulnerable, and hence call for more complex strategies addressing the basic social and cultural aspects of reform. Kavalski's (2009) analysis of institutionalized uncertainty emphasizes the fundamental need to face up to systematic unpredictability in order to establish real rules of law. Bulgaria's rule of law indicates a lack of coordinated change across institutional, social, and cognitive dimensions, reflecting what Dimitrov (2020) describes as a "holistic transformation deficit". Correcting this shortfall requires seeing the rule of law as a multifarious social ecosystem requiring the concurrent transformation of formal structures, social practices and cognitive paradigms rather than as a set of institutional frameworks. Bulgaria can only overcome the historical legacies that affect its relationship with the concept of the rule of law through a holistic approach.

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RULE OF LAW IN SERBIA AND ITS EU INTEGRATION PATH[1]

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SUMMARY: 1. INTRODUCTION. 2. THEORETICAL FRAMEWORK – THE EUROPEANISATION MODEL. 3. ANALYSIS. 3.1. The rule of law in Serbia. 3.2. EU conditionality and its impact: between rational adaptation and norm internalization. *3.2.1. The Rationalist Lens: Conditionality Without Traction. 3.2.2. The Reflectionist Lens: The Limits of Norm Internalisation.* 4. CONCLUSIONS. 5. REFERENCES.

1. INTRODUCTION.

Serbia's European Union (EU) integration path began in the early 2000s, after the change of an undemocratic regime, when the Stabilisation and Association Process encompassed the Federal Republic of Yugoslavia. The process was designed by the EU to help the reconstruction, stabilisation and transformation of the Western Balkan region after years of conflict and instabilities, and offer the countries an associated status that allowed for a free

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trade regime and political cooperation with the EU. The first decade of this path was marked by a commitment to political and economic reforms aimed at further democratisation, stabilisation of the political system, and making the country's market economy stable and more resilient. Nevertheless, the path was burdened by the political and economic challenges, like reconstitution and further dissolution of the state.[2] In 2006, Montenegro became independent, while Serbia's southern province, Kosovo, declared independence in 2008, which is still contested today. The EU has been closely involved in all these developments, either by mediating in the process or by shaping the specific conditions for Serbia, involving sovereignty and state integrity issues. Finally, the Stabilisation and Association Agreement (SAA) was signed in 2008, signalling a formal step toward EU membership, although not with a guaranteed outcome. In 2012, Serbia was granted EU candidate status, while in 2013 the EU decided to start accession negotiations with the country in early 2014, after progress was made in the EU-facilitated Belgrade-Pristina dialogue.[3]

In the following years, the accession negotiations process continued at a slow pace, reaching the point where Serbia has opened only 22 negotiating chapters out of 35 to date, and provisionally closed only two. The EU has made the issues of the rule of law and democratic institutions some of the fundamentals of the accession process, and they nominally remain crucial for measuring the country's progress towards membership in all policy areas. However, the pace and depth of the fundamental reforms have raised questions about Serbia's genuine commitment to the EU norms and values and its membership aspirations. The Europeanization process in sectors such as the judiciary, public administration, and fundamental rights, while driving reforms in terms of adopting new laws, has often faced implementation and enforcement challenges and resistance from entrenched interests. Persistent issues such as political influence over the judiciary and endemic corruption continue to undermine Serbia's compliance with EU standards.

The Europeanisation process in (potential) candidate countries, which primarily develops through the EU's conditionality mechanism, often referred to as the "sticks and carrots" approach, has played a crucial role in guiding the

2 PETROVIĆ, Miloš, KOVAČEVIĆ, Maja and RADIĆ MILOSAVLJEVIĆ, Ivana, *Srbija i Evropska unija dve decenije nakon Solunskog samita*, Institut za međunarodnu politiku i privredu, Belgrade, 2023. https://www.diplomacy.bg.ac.rs/2023/09/23/srbija-i-evropska-unija-dve-decenije-nakon-solunskog-samita/.

3 About the agreements concluded between Serbia and Kosovo in the process of normalisation of relations, see: SIMENTIĆ POPOVIĆ, Janja, and HRNJAZ, Miloš, "The Legal Nature of Agreements Concluded During Belgrade-Priština Negotiations: Pursuing National Interests Through International Law Mechanisms" in *National Interest(s) in World Politics*, edited by Dragan Đukanović, Saša Mišić, and Nikola Jović, University of Belgrade - Faculty of Political Sciences, Belgrade, Serbia, 2024, pp. 275-306.

Western Balkans' reforms, as well as the transformation of the Central and Eastern European countries that acceded in 2002 and 2007, and Croatia, which joined in 2013. However, in Serbia (as well as in other Western Balkan countries) the effectiveness of this mechanism can be questioned, given the slow pace of genuine change. In contrast to other Western Balkan candidates, according to available opinion polls, Serbia is also the most Euro-pessimistic country, which impacts its reform dynamics.[4]

In this paper, we explore the dynamics of the Europeanisation process in Serbia in the domain of the rule of law. We chose the rule of law as the norm and political ideal was supposed to be at the heart of the accession process, and after the 2012 and 2020 enlargement policy reforms, the measure of progress in all policy areas.[5] Nevertheless, we observed some serious obstacles even after more than a decade of accession negotiations. We therefore wanted to explore whether the EU accession process influences the state of the rule of law in Serbia. We hypothesise that the EU accession process has little or no influence, and that the effects were only superficial rather than thorough and comprehensive. The governments in Serbia acted pragmatically by not openly opposing the EU's rule of law conditionality, even including it in official reform programs. However, the implementation of the reforms, as well as the enforcement of adopted legislation, has often been relativised, manipulated and sometimes simply non-existent. The relevant norms and principles have not been internalised either, despite the long duration of the process. The EU, on its side, has been reluctant to exert pressure and substantively support the capacities of civil society.

To understand the dynamics of the Europeanisation process in Serbia, we use two approaches to conceptualising this model: the rationalist (logic of consequences) and reflectionist (logic of appropriateness). Within the rationalist approach to Europeanisation in Serbia, we employed the External Incentives Model developed by Frank Schimmelfennig and Ulrich Sedelmeier. Specifically, we evaluated the four factors that, according to this model, influence domestic change as a consequence of the EU integration process: "the size of the EU's

4 Regional Cooperation Council, "Balkan Public Barometer: Attitudes Towards Regional Cooperation and EU Integration," n.d., https://www.rcc.int/balkanbarometer/results/2/public. In particular, see the results on the questions of EU membership and EU accession.

5 RADIĆ-MILOSAVLJEVIĆ, Ivana, and DOMARADZKI, Spasimir, "The EU's *raison d'état* in the Western Balkans: Can the new enlargement methodology help?" *medjunarodni problemi* 74, no. 3, 2022, p. 403, doi: 10.2298/medjp2203391r; European Commission, "Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enhancing the Accession Process - A Credible EU Perspective for the Western Balkans," Pub. L. n. COM(2020) 57 final (2020), https://neighbourhood-enlargement.ec.europa.eu/system/files/2020-02/enlargement-methodology_en.pdf.

rewards, the determinacy of the conditions, the credibility of conditionality, and the size of the adjustment costs of compliance for target governments".[6]

To grasp the social and political dimensions of norm diffusion, we applied Thomas Risse and Kathryn Sikkink's theory on the diffusion of international human rights norms, adapting it to the European context and the rule of law principle.[7] We follow the key mechanisms identified that drive the internalisation of EU rule of law norms in Serbia and examine the role of domestic and transnational advocacy networks.

To explore Europeanisation in the rule of law domain in Serbia as a consequence of rationalist, cost-benefit calculations and the internalisation of EU rule of law norms, we conducted an in-depth case study and a comprehensive document analysis. This analysis traced the formal adoption of EU-inspired legal reforms and their contents. It was complemented by a qualitative assessment of policy documents, official reports and statements, media sources, and public opinion surveys providing insights into the practical implementation and challenges faced, as well as into the main actors' understandings and framing of the issue.

The paper is organised in a way that it first establishes the theoretical framework, presenting the main propositions from both rationalist and reflectionist explanations of the Europeanization process. In the following sections, we analyse the case of Serbia's rule of law reforms and recent political and social developments, and test the possible domestic changes influenced by the EU integration process against the selected theoretical approaches. In the conclusion, we discuss and summarise our findings, revealing that, despite some bottom-up initiatives, current conditions in Serbia do not favour a genuine transformation. So far, the reforms in the rule of law domain have been adopted superficially, driven by performative compliance rather than substantive change. The impact of social actions, such as student-led protests, remains limited due to organisational and institutional weaknesses, deep societal divisions, political repression and manipulation.

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6 SCHIMMELFENNIG, Frank, and SEDELMEIER, Ulrich, "The Europeanization of Eastern Europe: The External Incentives Model Revisited," *Journal of European Public Policy* 27, no. 6, 2 June 2020, p. 815, doi: 10.1080/13501763.2019.1617333; SCHIMMELFENNIG, Frank, and SEDELMEIER, Ulrich, "Introduction: Conceptualizing the Europeanization of Central and Eastern Europe" in *The Europeanization of Central and Eastern Europe*, edited by Frank Schimmelfennig and Ulrich Sedelmeier, Cornell Studies in Political Economy, Cornell University Press, Ithaca, NY, 2005, pp. 1-28.; SCHIMMELFENNIG, Frank, and SEDELMEIER, Ulrich, "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe," *Journal of European Public Policy*, 11, no. 4, January 2004, pp. 661-79. doi: 10.1080/1350176042000248089.

7 RISSE, Thomas and SIKKINK, Kathryn, "The socialization of international human rights norms into domestic practices" in *Domestic Politics and Norm Diffusion in International Relations: Ideas Do Not Float Freely* edited by RISSE, Thomas, Routledge UACES Contemporary European Studies Series 34, Routledge, London, New York, 2017.

2. THEORETICAL FRAMEWORK – THE EUROPEANISATION MODEL.

The concept of Europeanization seems to have several meanings in academic literature. In this paper, we define it as a process that influences domestic change as a consequence of European integration rather than the process of building up supranational institutions.[8] In other words, Europeanization is concerned with "how European Union (EU) policy and politics affect the domestic level".[9] One of the frequently cited definitions by Claudio M. Radaelli states that Europeanization is a "Process of a) construction, b) diffusion and c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated into the logic of domestic discourse, identities, political structures and public policies".[10]

The concept was first used to understand internal EU interactions and processes on different levels: EU, member states, and local ones. However, the Europeanization model also provides a framework for understanding how EU formal and informal rules and norms influence domestic policies, structures, but also domestic discourse and identities in candidate countries like Serbia. This process has been termed 'external Europeanization' or 'external governance', denoting the influence of the EU integration process in non-member states.[11] External Europeanization refers to the process through which non-EU countries adopt European/EU norms, policies, and practices, particularly those seeking membership. This process manifests in various forms, including legal adaptations, institutional and procedural reforms, and changes in political

8 GRAZIANO, Paolo and VINK, Maarten Peter, "Challenges of a New Research Agenda", in *Europeanization: New Research Agendas* edited by GRAZIANO, Paolo and VINK, Maarten Peter, Palgrave Macmillan, Basingstoke, 2008, p. 7; RISSE, Thomas, GREEN COWLES, Maria, and CAPORASO, James, "Europeanization and Domestic Change: Introduction" in *Transforming Europe*, edited by Maria Green Cowles, James Caporaso, and Thomas Risse, Cornell University Press, 2001, p. 3, doi: 10.7591/9781501723575-002.

9 EXADAKTYLOS, Theofanis, and RADAELLI, Claudio M., "Looking for Causality in the Literature on Europeanization" in *Research Design in European Studies: Establishing Causality in Europeanization*, edited by Exadaktylos, Theofanis and Radaelli, Claudio M., Palgrave Studies in European Union Politics, Palgrave Macmillan, Basingstoke, 2012, p. 17.

10 RADAELLI, Claudio M., "The Europeanization of Public Policy" in *The Politics of Europeanization*, edited by Kevin Featherstone and Claudio M. Radaelli, 1st ed., Oxford University Press, 2003, p. 30, doi: 10.1093/0199252092.003.0002; BACHE, Ian, BULMER, Simon and GUNAY, Dafne, "Europeanization: A Critical Realist Perspective" in *Research Design in European Studies: Establishing Causality in Europeanization*, edited by Exadaktylos, Theofanis and Radaelli, Claudio M., Palgrave Studies in European Union Politics, Palgrave Macmillan, Basingstoke, 2012, p. 68.

11 LAVENEX, Sandra, "The External Face of Europeanization: Third Countries and International Organizations" in The Europeanization of National Policies and Politics of Immigration, edited by Thomas Faist and Andreas Ette, Palgrave Macmillan, London, UK, 2007, pp. 246-64, doi: 10.1057/9780230800717_12.

culture. When it comes to (potential) candidate countries, conditionality is the most obvious and most important mechanism (often referred to as the 'sticks and carrots' mechanism) through which the Europeanization process develops.

In order to assess EU conditionality in the rule of law sphere, the Europeanization framework can be critically examined through both rationalist (logic of consequences) and reflectionist (logic of appropriateness) lenses.

Rationalist theories emphasise strategic behaviour based on cost-benefit analyses. In the process of Europeanization, the EU sets conditions for membership along with a set of sanctions and rewards for their (non) fulfilment. Candidates adopt laws and institutional changes as calculated moves to satisfy the EU's expectations and avoid sanctions. Rewards mostly come in the form of further progress in the accession process (e.g. opening or closing negotiating clusters/chapters), financial and technical assistance to the country or political support for its leaders for doing a good job. Sanctions may come as stagnating or reversing the accession process or cutting the funds available to the candidate country if the country does not fulfil the conditions set by the EU. In this process, the EU and the candidates act rationally, aiming to collect certain gains and avoid costs or losses. Within this rationalist framework, Serbia would be expected to adapt its legal reforms to satisfy EU conditionality to access the benefits of EU membership, such as economic aid and market access, provided that these are seen as more beneficial than costly.

Frequently cited External Incentives Model (EIM), developed by Schimmelfennig and Sedelmeier to account for the Europeanization process in the Central and Eastern European countries before their EU accession, specifies four conditions for the success of the conditionality mechanism: "the size of the EU's rewards, the determinacy of the conditions, the credibility of conditionality, and the size of the adjustment costs of compliance for target governments".[12] We will apply this model to the case of Serbia's accession negotiations in the area of the rule of law and analyse whether these conditions are present and whether they can account for the rule of law reform.

Applied to the candidate country like Serbia, which is deeply into accession negotiations, the size and tangibility of the reward (approaching membership, which comes with access to the EU internal market and more funding) should be fairly attractive and thus incentivise quicker reform, especially in the fundamentals of the accession process. Nevertheless, we will question whether the reward still remains attractive enough for Serbia's political leaders. The accession reward can incentivize domestic reforms only if the membership goal

12 SCHIMMELFENNIG and SEDELMEIER, "The Europeanization of Eastern Europe," p. 815; SCHIMMELFENNIG and SEDELMEIER, "Introduction: Conceptualizing the Europeanization of Central and Eastern Europe"; SCHIMMELFENNIG and SEDELMEIER, "Governance by Conditionality."

is genuinely pursued. If this is not the case, fractional rewards, such as partial integration into certain EU policies and programs, might satisfy the political leaders who do not practice what they preach.

When it comes to the second condition, the determinacy of the conditions, the expectation is that it will be easier for the candidates to fulfil them if they are clearly specified and communicated. Schimmelfennig and Sedelmeier find that, compared to the CEECs' pre-accession process, membership conditions for the Western Balkans have been further specified but have become more demanding, thus raising the costs of adoption.[13] In the case of Serbia's accession process, we also find more demanding political conditionality, not only due to the changed enlargement strategy, which concerns all the candidates, but also due to the country-specific situation. We argue that the EU's attempts to specify the conditions for membership for the Western Balkans resulted in piling demands on these countries. Also, within the so-called political criteria group, where the rule of law conditionality belongs, it is often hard to determine the exact EU demands, and the fulfilment of the criteria is often subject to interpretation rather than objective measurement.

The third condition, credibility of conditionality, reports to the internal EU consensus on enlargement and the consistency of applying both rewards and sanctions (threats).[14] Schimmelfennig and Sedelmeier find that this aspect of conditionality policy towards Southeastern Europe (SEE) is most problematic. The consensus on enlargement has become much harder to reach after the EU grew to 27 (previously 28) member states. Bilateral conditioning reached the point where it is almost impossible to reach a unanimous decision on any issue, no matter how modest the progress it would bring for a candidate country. While the EU representatives constantly repeat that the EU needs to get stronger before it gets bigger, public opinion in the EU is not favourable to enlargement, except when it concerns Ukraine and possibly Moldova and Montenegro (see below). In the case of Serbia, we will argue that the conditionality credibility declined due to the long-held perception of the EU's unfair and illegitimate political criteria, inconsistent application of rewards and restrictive measures, disbelief in the EU's willingness to ever accept Serbia as a member state, and finally, due to the perception of the EU's prioritisation of stability and its own interests rather than democracy and the rule of law.

Finally, as for the condition of the size of the adjustment costs for the governments, in contrast to the previous three conditions, this reports to domestic factors rather than the EU. The costs may be in the form of financial and administrative capacity, but also political costs, such as loss of power and votes, and they can negatively affect veto

13 SCHIMMELFENNIG and SEDELMEIER, "The Europeanization of Eastern Europe".
14 SCHIMMELFENNIG and SEDELMEIER.

players. The external incentives model presupposes a democratic political system as a background favourable condition in which governments are constrained and conform to the public demands with a view to being re-elected.[15] In this paper, we claim that the electorate in Serbia is generally favourable to the EU's conditions in the rule of law and democratization domains, while the government only superficially adopts the relevant legislation while avoiding and manipulating its implementation and enforcement and thus, avoiding political accountability.

In contrast to rationalist accounts of Europeanization, reflectionists, and more specifically sociological institutionalists, understand Europeanization as the internalisation of norms, meaning that European/EU norms and values are integrated into a country's political culture. In our case, this would mean a more or less clear change in political identity and an understanding that compliance with the rule of law is necessary, not only for EU membership but also as a key principle governing the Serbian state and society.

Europeanization in this sense includes not only society but political elites who learn from the process of socialisation with EU political representatives and interactions in EU institutions and processes about the desirability of EU norms and values.[16] They can slowly change their own political beliefs and identity and start to promote them among citizens through their public actions and discourses. The consequence of this internalisation of norms can be policy change and more than simple, superficial compliance with EU norms. When it comes to the rule of law principle, the question is whether this political ideal influences the actions and behaviour of Serbian political actors, officials, and society at large.

To explore the norm internalisation processes, we will use Thomas Risse and Kathryn Sikkink's theory on the diffusion of human rights international norms and the role of advocacy networks, making an analogy to apply it to the case of the diffusion of "European" rule of law norms in Serbia. According to these two authors, the diffusion of international norms "crucially reports to the establishment and the sustainability of networks among domestic and transnational actors who manage to link up with international regimes … [T]hese advocacy networks serve three purposes, which constitute necessary conditions for sustainable domestic change …

1 They put norm-violating states on the international agenda in terms of moral consciousness-raising. In doing so, they also remind liberal states of their own identity as promoters of human rights.

15 SCHIMMELFENNIG and SEDELMEIER, 819.

16 BORZEL, Tanja A., and RISSE, Thomas, "When Europe Hits Home: Europeanization and Domestic Change," *European Integration Online Papers (EIoP)* 4, no. 15, 2000. http://eiop.or.at/eiop/texte/2000-015a.htm; CHECKEL, Jeffrey T., "International Institutions and Socialization in Europe: Introduction and Framework." *International Organization* 59, no. 04, October 2005, doi:10.1017/S0020818305050289.

2 They empower and legitimate the claims of domestic opposition groups against norm-violating governments, and they partially protect the physical integrity of such groups from government repression. Thus, they are crucial in mobilizing domestic opposition, social movements, and non-governmental organizations (NGOs) in target countries.

3 They challenge norm-violating governments by creating a transnational structure pressuring such regimes simultaneously "from above" and "from below" (Brysk 1993). The more these pressures can be sustained, the fewer options are available to political rulers to continue repression".[17]

The diffusion of norms happens through the socialisation process, which helps the "actors to internalize norms, so that external pressure is no longer needed to ensure compliance".[18] The authors identify three causal mechanisms typical of different stages of the process. At first, "processes of instrumental adaptation and strategic bargaining occurs", which is followed by "processes of moral consciousness-raising, argumentation, dialogue, and persuasion", leading finally to "processes of institutionalization and habitualization".[19] In short, what is first adopted for instrumental or pragmatic reasons is later sustained with identity and beliefs.

Applied to our Serbian case of Europeanization domain of ideas and norms related to the rule of law, we should expect that after the relatively successful legal adaptation, which occurred as a result of the pragmatic acceptance of EU membership conditionality, Serbia entered the phase of awareness raising, dialogue about the rule of law, persuasion, etc. Given the longevity of its socialization process, which started around the early 2000s when Serbia entered the Stabilisation and Association Process, the process of habitualization and institutionalisation of the rule of law principles should have occurred as well. We will analyse and try to track this process in the following sections.

3. ANALYSIS.

3.1. The rule of law in Serbia.

Despite repeated claims of commitment to European Union integration and the formal adoption of relevant reforms, the rule of law in Serbia remains fraught

17 RISSE and SIKKINK, *Domestic Politics and Norm Diffusion in International Relations*, pp. 119-20.

18 RISSE and SIKKINK, p. 125.

19 RISSE and SIKKINK, pp. 120, 123-24.

with structural weaknesses, institutional fragility, and political interference. Although the legal framework is largely in place and progress has been made in aligning national legislation with EU *acquis*, practical implementation remains inconsistent and selective, undermining the transformative potential of the reforms.

The EU's assessment of the rule of law in Serbia encompasses a broad set of indicators, including justice system reforms, anti-corruption efforts, media freedom, and institutional checks and balances. The Commission monitors the relevant criteria in its annual reports (Communication on EU enlargement policy to the EP, Council, EESC and Committee of the Regions).[20] From 2024, the EU decided to include Serbia, along with other Western Balkan candidates, in the Annual Rule of Law Reports previously done for member states.[21] While the indicators in the two reports remain largely the same, some differences can be observed, reviving the debate on the mismatch between the EU's internal and external rule of law standards.[22] The difference lies in the scope of issues covered in the two documents and the source of the relevant standards. The Annual Rule of Law report includes the analysis of justice system reforms, anti-corruption efforts, media freedom, and institutional checks and balances; the Annual Candidate Country Report includes justice system reforms, anti-corruption efforts, media freedom under the rule of law criteria while institutional checks and balances are analysed under the separate "functioning of democratic institutions" heading. However, both segments are part of Cluster 1 – The Fundamentals, and the progress in the field "will determine the overall pace of negotiations".[23] On the other hand, negotiations on the fundamentals are based on the roadmaps for the rule of law, functioning of democratic institutions and economic reform programme, reflecting the original Copenhagen criteria.[24] To conclude, the fundamentals are dependent on the rule of law, understood both

20 E.g., the last published at the time of writing, European Commission, Commission Staff Working Document: Serbia 2024 Report (SWD(2024) 695 final, 31 October 2024), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024SC0695 (EC Report Serbia 2024)

21 European Commission, Commission Staff Working Document: 2024 Rule of Law Report, Country Chapter on the rule of law situation in Serbia (SWD(2024) 831 final, 24 July 2024), https://op.europa.eu/en/publication-detail/-/publication/f99edefa-4ab1-11ef-acbc-01aa75ed71a1/language-en.

22 KNEŽEVIĆ BOJOVIĆ, Ana, ĆORIĆ, Vesna, "Challenges of Rule of Law Conditionality in EU Accession", *Bratislava Law Review*, 7:1 (2023), pp. 41-62. https://doi.org/10.46282/blr.2023.7.1.32

23 European Commission, 'Enhancing the accession process - A credible EU perspective for the Western Balkans' COM(2020) 57 final, 5 February 2020, pp. 2-3.

24 PETROVIĆ, Miloš, KOVAČEVIĆ, Maja and RADIĆ MILOSAVLJEVIĆ, Ivana, *Srbija i Evropska unija dve decenije nakon Solunskog samita*, Institut za međunarodnu politiku i privredu, Beograd, 2023. https://www.diplomacy.bg.ac.rs/2023/09/23/srbija-i-evropska-unija-dve-decenije-nakon-solunskog-samita/.

in narrow sense, focusing on judiciary, anti-corruption and media, and in larger sense including also the functioning of the democratic institutions.

Both reports for Serbia continue to point to persistent challenges, particularly in ensuring judicial independence and combating high-level corruption. Political pressure on the judiciary and the prosecution service remains a key concern. While constitutional and legislative amendments have been adopted to formally reduce political influence, the practical effects of these changes are yet to be observed.[25] Appointments and promotions within the judiciary remain vulnerable to undue influence, and there is limited follow-up in cases of alleged interference.[26] Similarly, although most forms of corruption are criminalised, the establishment of a consistent and credible track record of investigations, indictments, and final convictions in high-level corruption cases remains elusive. The Prosecutor's Office for Organised Crime continues to face capacity shortages, while the risk of politically motivated interference persists.[27]

The erosion of institutional checks and balances is also evident in the functioning of the Serbian Parliament. Legislative procedures are often accelerated without meaningful deliberation, and the oversight function of the Parliament is weakened by a lack of transparency and political autonomy.[28] Independent regulatory and oversight bodies, such as the Regulatory Authority for Electronic Media (REM), the Ombudsman, and the Commissioners for Information and Equality, struggle to assert their mandates due to lack of independence and limited follow-up on their recommendations.[29] Media pluralism is formally protected, yet in practice, state-aligned actors dominate the public discourse, further curtailing democratic accountability.[30]

These structural and political challenges suggest that Serbia's rule of law deficit is not rooted in an absence of formal norms, but in the instrumentalization of the legal and institutional structure to serve political interests. At the same time, there is evidence of societal awareness and resistance to this trend since late 2024. Student-led protests and the pertaining mobilisation of the wider public and watchdog organisations demonstrate a degree of public engagement with the rule of law principles, which may signal the early stages of a bottom-up push for norm internalisation. This dynamic will be further analysed in the next section through the lens of rationalist and reflectionist theories of Europeanization.

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25 European Commission, Commission Staff Working Document: 2024 Rule of Law Report, Country Chapter on the rule of law situation in Serbia, pp. 2-5. (2024 Rule of Law Report - Serbia).

26 2024 Rule of Law Report - Serbia.

27 2024 Rule of Law Report - Serbia, pp. 7-11.

28 2024 Rule of Law Report - Serbia, pp. 19-21.

29 2024 Rule of Law Report – Serbia, pp. 15-16, p. 23.

30 2024 Rule of Law Report – Serbia, pp. 16-18.

3.2. EU conditionality and its impact: between rational adaptation and norm internalization.

In assessing the influence of EU conditionality on rule of law reform in Serbia, it is crucial to revisit the theoretical expectations of rationalist and reflectionist Europeanization approaches. The rationalist model, operationalized through the External Incentives Model (EIM), posits that candidate states will comply with EU demands when the benefits are tangible, conditions are clear, credibility is strong, and adjustment costs are manageable. In contrast, the reflectionist model anticipates a gradual internalisation of EU norms and values through socialisation, identity transformation, and norm diffusion. Applied to the Serbian case, both approaches reveal significant limitations in the EU's capacity to effect meaningful rule of law reform.

3.2.1. The Rationalist Lens: Conditionality Without Traction.

The first condition – the size of the EU's rewards – is formally intact, as full membership remains the ultimate goal. However, in practice, these rewards have lost their appeal among Serbia's political elites and parts of the public, which is strongly tied to the third condition of credibility. The credibility of the full membership is disturbed both by the credibility of conditionality (on the EU side) and the lack of genuine membership aspirations (on the Serbian side).

In such a situation, fractional rewards, such as partial integration into certain EU policies and programs, might satisfy political leaders. In this manner, the EU awards become smaller, less ambitious, but more tangible and easily achievable. The relevant awards in Serbia's case would be the concrete financial assistance for progress encapsulated in the Reform Agenda, which should trigger the activation of the Growth Plan and the opening of the new clusters. In addition, Serbia participates in a few instances of differentiated or partial integration, like the Transport Community or the Energy Community and several EU programs allowing it to benefit from integration before accession.

In November 2023 the EC adopted the Growth Plan for the Western Balkans.[31] The main goal of the programme is to enable the economic reforms that are currently lagging behind. The Growth Plan has the character of a reward, separate but complementary to the accession and the already available Instrument for Pre-accession Assistance (IPA): "it provides for more incentives and for the benefits of integration ahead of EU accession" and "adds further

31 Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, New growth plan for the Western Balkans, COM(2023) 691 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2023:691:FIN

opportunities for the Western Balkans to those available under the existing Stabilisation and Association Agreements (SAAs)".[32]

One of the pillars of the Growth Plan is to accelerate fundamental reforms, including the rule of law reforms from the Fundamentals cluster.[33] The EC posits that "fundamental reforms, including to strengthen the rule of law and fundamental rights, are indispensable to unleash the benefits of integration and to create a favourable environment to attract private investments and generate sustainable economic growth while reducing emissions".[34] The rule of law reforms are moreover directly tied to the release of funds for each country. Namely, each Western Balkan country, including Serbia, needs to adopt a Reform Agenda whereby it will set the priority reforms, the relevant benchmarks (quantitative and qualitative) upon the completion of which, the EU will release the allocated funds. These payment conditions are linked to inter alia "specific reforms related to fundamentals of the enlargement process, including the rule of law, democracy, the respect of human rights and fundamental freedoms".[35] Therefore, the rule of law is part of the pre-conditions and payment conditions.[36]

In October 2024, Serbia adopted the Reform and Growth Facility for the Western Balkans (the Reform Agenda).[37] Serbia enlisted four reform areas (Business environment and private sector development; Green and Digital Transition; Human Capital; Fundamentals) with 98 payment conditions to be completed. The policy area of Fundamentals covers the following subareas: democracy, fundamental rights, fight against organised crime, security and migration, fight against corruption and judiciary. It contains 21 payment conditions to be achieved in the 2024–2027 period, including the adoption and implementation of important changes in legislative frameworks pertaining to electoral system (especially thorough revision of the voter registry), media system (especially the election of new members to the Regulatory Authority for Electronic Media (REM) Council) and protection of right of vulnerable persons (especially the adoption of new laws). While the Serbian Ministry of European Integration announced in March 2024 that the first pre-financing payment

32 New growth plan for the Western Balkans, p. 2.

33 New growth plan for the Western Balkans, p. 2.

34 New growth plan for the Western Balkans, p. 2.

35 New growth plan for the Western Balkans, p. 8.

36 European Commission (2024, October 23) Commission approves Reform Agendas of Albania, Kosovo, Montenegro, North Macedonia and Serbia, paving way for payments under the Reform and Growth Facility https://enlargement.ec.europa.eu/news/commission-approves-reform-agendas-albania-kosovo-montenegro-north-macedonia-and-serbia-paving-way-2024-10-23_en

37 Ministry of European Integration, Adopted Reform Agenda Narrative https://www.mei.gov.rs/upload/documents/nacionalna_dokumenta/adopted_reform_agenda_narrative_-_republic_of_serbia.pdf

is expected soon,[38] the sources from the EU confirm that the first instalment is delayed until the reforms promised in the November 2024 non-paper are delivered. These reforms consider the main facets of the rule of law reforms: the adoption of a set of new media laws; the election of new members to the Regulatory Authority for Electronic Media (REM) Council, and the revision of the voter registry.[39]

The second type of the fractional award is the opening of new negotiating clusters. The last cluster that Serbia opened in December 2021 was Cluster 4 (Green Agenda and Sustainable Connectivity). From then on, work has been completed to open Cluster 3 (Competitiveness and Inclusive Growth) but the process has been lagging for some time. There were several announcements that the cluster would be opened, but it has not happened until Spring 2025. In her last visit to Serbia, Enlargement Commissioner Marta Kos explained that there is an urgent need to conduct reforms that Serbia has undertaken by the December 2024 non-paper for the opening of Cluster 3.[40] Namely, in the 2024 report, the EC noted that Serbia is technically ready to open Cluster 3.[41] However, the underlying fact is that member states and the EU are not satisfied with the pace of reform in the fundamentals clusters, without which no progress in the negotiation could be made.[42] It is important to note that Cluster 3 includes policies that are at the core of Serbia's student-led protest claims: media regulation and education standards.[43] Nevertheless, with the new changes in the Serbian legislative framework governing scientific research at the universities, the substantial fulfilment of this part of the cluster also becomes questionable.

Finally, Serbia has been allowed to participate in numerous EU programs and integration initiatives before membership. The country is a member of the Energy Community, established in 2006, which aims to create an integrated European

38 Ministry of European Integration (26 March 2025). First pre-financing payments to Serbia under the Growth Plan are expected soon https://www.mei.gov.rs/eng/news/2220/more/w/0/first-pre-financing-payments-to-serbia-under-the-growth-plan-are-expected-soon/

39 GAJIĆ, Dušan (2025, May 5) Srbija i EU - zašto nas nema u projekcijama za prijem do 2029. https://www.rts.rs/vesti/politika/5704148/srbija-i-eu--zasto-nas-nema-u-projekcijama-za-prijem-do-2029.html

40 European Western Balkans (2025, April 30) Kos: Srbija hitno da sprovede reforme potrebne za otvaranje Klastera 3 https://europeanwesternbalkans.rs/kos-srbija-da-hitno-sprovede-reforme-potrebne-za-otvaranje-klastera-3/

41 EC Report Serbia 2024, p. 3.

42 European Parliament, Resolution of 7 May 2025 on the 2023 and 2024 Commission reports on Serbia (2025/2022(INI)), para. 3; STOJANOVIĆ, Marija (12 March 2025=). Ništa od otvaranja klastera 3 i SEPA. European Western Balkans https://europeanwesternbalkans.rs/nista-od-otvaranja-klastera-3-i-clanstva-u-sepa-zasto-evropske-integracije-srbije-tapkaju-u-mestu/

43 N1 (2024 December 26) Student demands https://n1info.rs/english/news/students-clear-up-demands/; N1 (2025, April 15) Students: Protest at RTS until new call for REM Council members https://n1info.rs/english/news/students-to-culture-committee-protest-at-rts-until-new-call-for-rem-council-members/

energy market and disseminate the relevant EU acquis beyond its borders. Similarly, Serbia is integrated into the European transport market through the Transport Community established in 2017. It also has access to EU programs such as Horizon, Erasmus+, Creative Europe, and Employment and Social Innovation. The so-called phasing-in, which allows the country to participate in EU programs and the internal market, has become an officially pursued goal since the change in enlargement methodology in 2020 and is supported more openly with the mentioned Growth Plan for the Western Balkans. This partial integration of non-members allows for the fulfilment of particular interests of both the EU and a candidate without the need to fulfil the complex membership criteria. Serbian governing elites might have found this reward satisfying enough not to pursue the potentially more costly goals, such as "full" membership.[44]

The conclusion is that the fractional rewards are in place, but the activation of some of them is tied to the achievement of the deep and structural reforms in the rule of law area, thereby making some of the rewards hard to reach (such as the opening of new clusters). From the perspective of Serbian politicians, the continued blockade of negotiating clusters due to a lack of advancement in the rule of law underscores the perception that the EU reward is increasingly abstract and politically unattainable. Furthermore, the rewards that are achievable (such as participation in EU programmes and integration initiatives) are not directly tied to the deep rule of law reforms. The question is whether they are significant enough to enable the spill-over effect in other policy areas and make an indirect push in the direction of deeper structural reforms. However, there is the other possibility that the Serbian government does not truly seek membership by preference and that it is satisfied with what has already been achieved.[45]

Coming to the second factor in the EIM, the determinacy of the EU's conditions is questionable. Over time, the EU has determined its demands more clearly and made them more demanding.[46] The membership conditions have often been described as a moving target for candidate countries, not only because

44 RADIĆ MILOSAVLJEVIĆ, Ivana, and PETROVIĆ, Miloš, "EU Enlargement Policy between the Chronological Precedence of the Western Balkans and the Geopolitical Urgency in the Eastern Neighborhood: A Realist Perspective," *Political Perspectives* 14, no. 1, 2024, pp. 33-63, doi: 10.20901/pp.

45 See the position of Radić Milosavljević and Domaradzki that "the goal of EU integration and membership is instrumentalised as it is not being pursued because it is perceived as good in itself. Instead, it has been pragmatically used to achieve other goals (economic benefits and political support for the ruling elites) and sidelined when in conflict with some of them (e.g., territorial integrity issues and relations with Russia)." RADIĆ MILOSAVLJEVIĆ, Ivana, DOMARADZKI, Spasimir, "Assessing the Legitimacy of Serbia's EU Membership Goal", in *National Interest(s) in World Politics*, edited by Dragan Đukanović, Saša Mišić, and Nikola Jović, University of Belgrade - Faculty of Political Sciences, Belgrade, Serbia, 2024, p. 50.

46 F. SCHIMMELFENNIG AND U. SEDELMEIER, "The Europeanization of Eastern Europe", p. 826.

of the EU "policy" acquis objectively developed in parallel to the association and accession process, but also due to the constant evolving and specification of the so-called political conditions. In the case of the Western Balkans, making the fundamentals the guiding frame for the whole negotiation process has burdened the conditions. In case of Serbia, the condition of engaging constructively in the normalisation of relations with Kosovo "with a view to fully implementing all their respective obligations stemming from the Agreement on the Path to Normalisation and its Implementation Annex and all past Dialogue Agreements and engage in negotiations on the Comprehensive Agreement on normalisation of relations"[47] is another ladder in the raised conditions. These conditions often remain politically sensitive and subject to ambiguous interpretation. The absence of clear benchmarks for completion and the conflation of political and legal criteria blurs the lines of accountability and reduces the incentive to comply. In addition, in contrast to previous enlargements, the WB countries are not only obliged to adopt the relevant legislation but also to show a track record of actual implementation, which is not only harder to achieve but often subject to vague and inconsistent evaluation by the relevant accession process actors.

The EU is "able to elicit compliance with its demands, even if they involve high political costs, as long as it offers important and imminent intermediate rewards in return".[48] As noted previously, the rewards offered are reduced to the opening of new clusters and financial compensation, with membership fading as a reward. Moreover, the rewards are not imminent as they are tied to the rule of law reforms, which are structural and time-consuming.

The third factor – the credibility of conditionality – is the key condition and perhaps the most problematic in the case of Serbia. For both the political elites and the general public, the EU's application of conditionality appears inconsistent and, at times, politically motivated. Long-standing perceptions of double standards, shifting goalposts, and the prioritisation of regional stability over democratic principles have eroded the EU's normative appeal. The EU's failure to decisively respond to democratic backsliding in Serbia, despite repeated warnings, has only reinforced this perception. The credibility is lowered by shifting rewards from membership to frictional rewards (as explained before). Moreover, even these frictional rewards are not given when Serbia is technically ready (see the cluster 3 saga described before) but are tied to the rule of law reforms at times when the internal rule of law in several member states is under scrutiny. The general public in Serbia is weary of the length of the negotiation process, and support for EU membership is declining. In a 2022 public poll, the highest number of respondents (28%) stated that the "politics of conditionality

47 New growth plan for the Western Balkans, p. 8.

48 F. SCHIMMELFENNIG AND U. SEDELMEIER, "The Europeanization of Eastern Europe", p. 831.

and the blackmail that the EU applies towards our country" are the reason for the slow pace of the accession negotiation.[49] However, the overwhelming majority of interviewees (65%) claim that the reforms should be carried out "even if they were not requested from the EU, for our own sake".[50] When asked for the importance of the concrete reforms, most of the respondents think that the rule of law reforms should be at the forefront (17% fight against corruption; 12% better protection of human rights; 11% reform of the judicial system). These data show that while there is awareness in the general public of the need for reforms, especially in the area of the rule of law, the role of the EU in attaining the reforms is not looked upon as positive, casting a shadow on the credibility of EU conditionality.

Since the 2004–2007 "Big Bang" enlargement, the EU has been suffering from 'enlargement fatigue'; it is still visible nowadays and negatively impacts the credibility of EU conditionality. Despite continuing the process formally, high tolerance for bilateral conditioning and undue slowing down of the candidates' progress show that enlargement is far from prioritised. Numerous statements by the EU and member states' officials, which can best be described as mixed, and the determination to make the EU stronger or reformed before it gets bigger,[51] send a gloomy message to the candidate countries. This reluctance on the part of the political elite is compatible with European public opinion towards enlargement, which is split on the issue. Specifically, a 2024 poll found that, when asked whether the EU should allow additional countries to join, 53% were in favour while 40% were against. The answer varied across EU member states, with Spaniards mostly in favour, Austrians mostly against, and majorities in France and Germany against further enlargement.[52] Another poll conducted in six member states confirms the fluctuation among member states when it comes to the question of enlargement, with Austria, Germany, France and Denmark opting for non-enlargement in the near future and Poland and Romania being in favour of receiving new members. The same poll discovers that not all candidates are equally desirable as EU members. While Ukraine, Moldova and Montenegro seem to have support, Serbia and the other candidates do not, with less than

49 Ministry of European Integration (2022 December) European orientation of citizens of Serbia - Public Poll https://www.mei.gov.rs/upload/documents/nacionalna_dokumenta/istrazivanja_javnog_mnjenja/javno_mnjenje_dec_22.pdf

50 *Ibid.*

51 European Commission, "COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL on Pre-Enlargement Reforms and Policy Reviews," 20 March 2024, https://commission.europa.eu/document/download/926b3cb2-f027-40b6-ac7b-2c198a164c94_en?filename=COM_2024_146_1_EN.pdf.

52 European Commission, "Standard Eurobarometer 102 Autumn 2024: Annex Fieldwork: October - November 2024," 2024, 125, https://europa.eu/eurobarometer/api/deliverable/download/file?deliverableId=95656.

30% of respondents expressing support for any of these countries becoming EU members.[53]

Finally, the adjustment costs of compliance remain prohibitively high for Serbia's ruling elites. The full implementation of the rule of law reforms would require relinquishing political control over key institutions, including the judiciary and regulatory bodies, a cost that the current leadership is unwilling to bear. In this context, reforms are simulated rather than internalised, and legal compliance is selectively pursued to maintain access to EU funds while avoiding genuine institutional transformation.

One interesting hypothesis within the EIM is that "if EU conditions and rewards are more popular among the electorate, interest groups, opposition parties, and state institutions than in the government, the government will be more likely to comply".[54] In Serbia, the public acceptance of conditionality varies across policy domains. As previously noted, when it comes to democratic reforms and the rule of law, public opinion surveys frequently find that these reforms are seen as desirable and necessary even if there were no EU to demand them. However, this public stance is burdened by the lack of credibility of the conditionality and the stakes that are high in terms of Serbia's relations with Kosovo. Moreover, in order for this hypothesis to take place in practice, the country needs to have strong democratic potential and functioning institutions through which the electorate could exert pressure on the government. Currently, there is no such potential in Serbia. The pressure from organised civil society (mostly Belgrade-based NGOs) has been mild due to their vested interests, and a desire, and the EU's expectation, to play a constructive role in the accession process and not to disturb the slow progress so far too much. Instead of demanding clear shifts in the government's behaviour and alarming the EU, these actors have focused more on providing policy advice and supporting the accession process, thus giving it a layer of legitimacy. At the same time, the EU kept its eyes shut, expecting Serbian authorities to provide stability and deliver on the EU's interests. An illustrative example of this is visible in the case of adopting the Reform Agenda to enable the flow of funds from the Growth Plan for the Western Balkans, when the government failed to secure an inclusive and transparent process and wider public consultations despite this being one of the conditions in the Growth Plan and the Government's regulation concerning the adoption of

53 European Council on Foreign Relations (ECFR), "New Poll: Europeans Open to Ukraine Joining the EU despite Security Risks, but Cool on Further Enlargement of the Bloc Ahead of Crucial European Council Summit," November 2023, https://eSeeeu/publication/europeans-open-to-ukraine-joining-the-eu-despite-security-risks/.

54 SCHIMMELFENNIG AND SEDELMEIER, "The Europeanization of Eastern Europe", p. 819.

this document.[55] The European Commission accepted the government's claims about the inclusion of civil society, while the National Convent, an umbrella for a group of NGOs, provided the alibi for this, probably due to the short deadlines set by the EU. Serbia's opposition parties have been too weak and have been deprived of the theme of EU integration and membership by the government, which has declaratively pursued this goal.

Taken together, these findings indicate that the core assumptions of the rationalist model are not met in the Serbian case. Conditionality may still shape formal reform trajectories, but it lacks the power to catalyse genuine change in the absence of credible incentives and enforceable consequences.

3.2.2. The Reflectionist Lens: The Limits of Norm Internalisation.

From a reflectionist perspective, Europeanization implies the internalisation of EU norms as part of a broader normative and identity transformation. While this process often builds on earlier phases of rational adaptation, it requires sustained interaction, persuasion, and the elite's socialisation with EU values. In Serbia, however, this deeper form of Europeanisation has encountered significant obstacles.

Legal reforms have indeed been adopted, and EU-compatible language permeates official discourse, but the substance of these norms has not been embedded in the political culture. Rather than viewing the rule of law as a foundational value, Serbian political elites continue to see it as an external obligation to be managed strategically, with the Serbian political elite nominally supporting rule of law reforms. In April 2025, President Vučić stated that Serbia is "ready to speed up the reforms, not because of bureaucratic requests but because we believe that they bring a better life to our citizens … we will strengthen our institutions and bring our country closer to the EU, not just politically but substantially, through concrete advantages and standards that citizens can grasp".[56] Such a statement bears the potential to achieve not only legislative reforms but also norm internalisation. However, it needs to be contrasted with the practical deeds of the Serbian government and the previously described failure to conduct the required reforms in full. Moreover, the statement is an example of the populist-technocratic style that the Serbian executive has been using for more than a decade in the rule of law area.[57] This strategy consists

55 BURSAC, Dejan, "Reformska Agenda Srbije: Brže u Susret Evropskoj Uniji? - Progovori o Pregovorima," May 12, 2024. https://eupregovori.bos.rs/progovori-o-pregovorima/analize/1463/4566/reformska-agenda-srbije_-brze-u-susret-evropskoj-uniji.html.

56 N1 (2025, April 29) Vučić o sastanku sa Martom Kos https://n1info.rs/vesti/vucic-o-sastanku-sa-martom-kos-naglasio-sam-nasu-punu-spremnost-da-ubrzamo-reforme/

57 DOMARADZKI, Spasimir, and RADIĆ MILOSAVLJEVIĆ, Ivana, "Between Populism and Technocracy: How National Executives in Bulgaria and Serbia Manipulate EU Rule of Law

of both defending Serbian national interests and prompting the emotions of national pride (a populist tactic) and presenting it in a technocratic form in order to depoliticise it. This tactic narrows the scope of rule of law reforms, which primarily focus on the fight against corruption, and captures and trivialises the narrative on the rule of law, thereby disabling substantial change and excluding the possibility of internalising the relevant norms and principles underpinning the rule of law. This relationship of the political elites in Serbia vis-à-vis EU norms and standards is instrumental, limiting the potential for their internalisation and undermining the transformative effect of the European integration process.

Nevertheless, there are some indicators of bottom-up normative change. Students, civic actors, and segments of the media have embraced rule of law principles in their advocacy and protest movements.[58] These actors may function – albeit in a constrained space – as domestic advocacy networks that challenge the behaviour of the state and mobilise public support around democratic norms, as theorised by Risse and Sikkink. Their actions, such as cycling and running from Serbia to the EU and the Council of Europe headquarters in Brussels and Strasbourg, may be seen as an attempt to raise awareness and (re) build transnational advocacy networks involving MEPs, commissioners and city mayors in Western European countries along their way, as well as the Serbian and former Yugoslav diaspora. The activities of a nascent social movement consisting of students, student-supporters from the general public and NGOs are also in line with the purpose of engaging transnational advocacy networks for the domestic change in the field of the rule of law: by engaging EU and Council of Europe institutions, as well as MEPs, Commissioners and city mayors in several countries, they "remind liberal states of their own identity as promoters of human rights"; through a public call to end the detention of five activists from the opposition Movement of Free Citizens (PSG) and a student from the STAV organisation "they empower and legitimate the claims of domestic opposition groups against norm-violating governments, and they partially protect the physical integrity of such groups from government repression" and finally, by pleading both to the general public and European institutions they strive to pressure "such regimes simultaneously 'from above' and 'from below'".[59]

However, their capacity to sustain pressure on the government is still limited by institutional weakness, restricted media access, and political

Conditionality", *Journal of Contemporary European Research*, 17 (2), 2021, pp. 281-303.

58 Note the position of EP that "the students' demands align with reforms that Serbia is expected to implement on its European path" (European Parliament resolution of 7 May 2025 on the 2023 and 2024 Commission reports on Serbia (2025/2022(INI)), para. 25) and the pertinent position of EU Enlargement Commissioner Marta Kos (European Wester Balkans (30 April 2025) Marta Kos visits Serbia https://europeanwesternbalkans.com/2025/04/30/marta-kos-visits-serbia-what-we-are-asking-is-very-close-to-the-demands-of-the-protesters/).

59 RISSE, pp. 119-120.

repression. Moreover, large parts of society still do not consider democracy the best political system and prefer a system with a strong leader.[60] At the same time, while students' protests managed to push corruption to the top of the perceived problems in the country for the first time in 25 years[61] in 2024, Serbia dropped further down on the Corruption Perception Index list, reaching its lowest ranking since 2012.[62]

In sum, while reflectionist Europeanization presupposes a learning process whereby external norms become internal values, the Serbian case reflects a more superficial engagement. Without a commitment by the elites and institutional reinforcement, norm internalisation remains incomplete and fragile.

4. CONCLUSIONS.

This paper has analysed the Europeanization of Serbia through the lens of rule of law reforms – arguably the cornerstone of both the EU accession process and democratic consolidation. By employing rationalist and reflectionist theoretical frameworks, we have examined whether Serbia's (non)compliance with EU demands is a matter of instrumental cost-benefit calculations or a deeper process of norm internalisation. The findings from both perspectives raise serious doubts about the inevitability – and even the likelihood – of genuine rule of law transformation under current conditions.

From a rationalist standpoint, the key conditions required for successful conditionality under the External Incentives Model (attractive rewards, determinacy of conditions, credible enforcement, and low adjustment costs) are only partially met at best. While the EU continues to offer material and political rewards – ranging from financial assistance under the Growth Plan to gradual inclusion in EU programs – these incentives have lost much of their traction. Full membership, once the primary transformative driver, has become both distant and politically ambiguous. Moreover, rule of law reforms, particularly

60 CRTA, "Stavovi Građana Srbije o Učešću u Demokratskim Procesima 2022.," February 2023, 22-25, https://crta.rs/wp-content/uploads/2023/02/Istrazivanje-Ucesce-gradjana-u-demokratskim-procesima-u-Srbiji-2022.pdf.

61 CRTA, "Stavovi Građana Srbije: Istraživanje Javnog Mnjenja," April 2025, https://crta.rs/wp-content/uploads/2025/04/Javnomnjensko-istrazivanje-Crta-april-2025-1.pdf; Transparentnost Srbija, "Korupcija posle 25 godina prvi put isplivala na prvo mesto problema društva u Srbiji," 4 June 2025. https://www.transparentnost.org.rs/sr/aktivnosti-2/podlupom/12858-korupcija-posle-25-godina-prvi-put-isplivala-na-prvo-mesto-problema-drustva-u-srbiji.

62 Transparentnost Srbija, "Saopštenje za Javnost: Novi pad Srbije na svetskoj listi Indeksa percepcije korupcije Transparency International," November 2, 2025, https://www.transparentnost.org.rs/images/Saopštenje_CPI_2024.pdf.

those targeting judicial independence, media pluralism, and anti-corruption, carry high political costs for Serbia's ruling elites and directly threaten their entrenched power structures. As such, the cost-benefit calculation does not favour deep reform. Reforms are adopted if they are low-cost or externally visible, but resisted when they risk redistributing power or challenging elite control. The expectations of the External Incentives Model that the government will be more likely to comply with the EU conditions and rewards if these are more popular in the society and relevant political actors than in the government did not materialise in Serbia due to the ruling party's ability to dominate the political arena and manipulate the topic of EU conditionality in the public space.

The reflectionist perspective does not offer much more optimism. While over two decades of interaction with EU institutions have led to the adoption of EU-inspired legal norms and reform vocabulary, the internalisation of rule of law values remains superficial and selective. The rule of law is not yet embedded as a foundational political norm, but rather treated as a negotiable condition – instrumentalised in public discourse, and often subordinated to short-term political calculations. The Serbian government's technocratic-populist strategy reframes rule of law reforms as administrative exercises rather than normative commitments, narrowing their transformative potential.

At the same time, bottom-up dynamics – student protests and civic mobilisation – indicate that parts of Serbian society do embrace the rule of law as a meaningful norm. However, without institutional channels to translate these societal demands into political accountability, their ability to drive structural change remains limited. The EU's focus on elite conditionality rather than broader societal engagement further limits the impact of these domestic advocacy efforts.

Taken together, these findings suggest that under present conditions, rule of law reforms in Serbia are not likely to happen any time soon, at least not as a result of either rational adaptation to EU conditionality or reflectionist norm internalisation. While formal progress may continue, structural transformation is unlikely in the absence of credible rewards, domestic political will, and empowered societal actors. The EU's current approach risks enabling performative compliance without substantive change, which not only delays Serbia's integration and corrodes the EU's normative influence in the region, but it also undermines Serbia's democratic potential and perspectives.

A recalibration is therefore necessary. Rule of law reforms must be supported through more than legal benchmarks – they require consistent and credible EU pressure, stronger support for civil society in terms of its ability to constrain and control political power, and not only to legitimise superficial compliance with EU norms through "constructive" participation in dialogue. There is an evident need for reframing Europeanization as a social contract with citizens, not just a bargain with political elites. Without this shift, Serbia may

remain in a prolonged limbo of partial adaptation, where the rule of law exists on paper but not in practice.

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SOME JURISPRUDENTIAL CLARIFICATIONS ON THE EUROPEAN UNION SANCTIONS AGAINST RUSSIA

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SUMMARY: 1. INTRODUCTION. 2. THE ONGOING RELEVANCE OF THE GROUNDS FOR SANCTIONING AN INDIVIDUAL. 3. CLARIFICATION OF THE CONCEPT OF "ASSOCIATION" WITH SANCTIONED PERSONS. 4. CLARIFICATION OF THE CONCEPT OF MATERIAL OR FINANCIAL SUPPORT TO RUSSIAN POLITICIANS RESPONSIBLE FOR THE ANNEXATION OF CRIMEA OR THE DESTABILIZATION OF UKRAINE. 5. DEFINITION OF THE CONCEPT OF LEADING BUSINESSPERSONS OPERATING IN RUSSIA. 6. CLARIFICATION OF THE CONCEPT OF BUSINESSPERSONS, LEGAL PERSONS, ENTITIES, OR BODIES INVOLVED IN ECONOMIC SECTORS PROVIDING A SUBSTANTIAL SOURCE OF REVENUE TO THE GOVERNMENT OF THE RUSSIAN FEDERATION. 7. CLARIFICATION OF THE CONCEPT OF ADVANTAGES OR BENEFITS REFERRED TO IN THE SECOND PART OF ARTICLE 3.1(G) OF REGULATION (EU) NO 269/2014. 8. CONCLUSIONS.

1. INTRODUCTION.

I would like to begin by thanking the organizers of this important international conference for the great honour they have shown me by inviting me to participate, as well as for including this modest contribution of mine in the resulting publication. My gratitude goes to all the organizers, but especially to my esteemed colleague Alejandro Torres, for whom I have the utmost admiration.

The European Union's sanctions against the Russian Federation are extensive and complex. They are articulated through a wide array of legal instruments, affect a multitude of natural and legal persons – including many who are not Russian nationals – and target a broad range of economic, financial, and industrial sectors. Moreover, these measures encompass a variety of restrictions, such as asset freezes, travel bans within the EU, bans on the export and import of specific goods, restrictions in credit and financial markets, and prohibitions on the provision of certain banking services, among others.

Unsurprisingly, this complex framework of sanctions has led to a large number of legal challenges before the General Court and the Court of Justice of the European Union. In addition, national courts in several member states have referred significant preliminary questions to the Court of Justice, whose rulings – once delivered – are expected to clarify many aspects of the current sanctions regime.[1]

Naturally, the case law relating to the EU's sanctions against Russia has reiterated a number of principles established in earlier judgments on related matters. These include, for example, the criteria for determining insufficient reasoning as grounds for annulment, standing to challenge restrictive measures, and the conditions under which rights enshrined in the Charter of Fundamental Rights of the European Union may be lawfully restricted. However, these general issues fall outside the scope of this paper. Here, without any claim to exhaustiveness, I will focus on the main jurisprudential developments that specifically concern the EU sanctions against Russia. With one exception: in the following section, I will briefly refer to recent case law clarifying the requirement that the grounds for sanctioning an individual must remain current. This is a

1 For example, the rulings that will eventually be issued regarding the issue of trusts and the potential control of trust assets by sanctioned persons will be of great interest. In this regard, the judgments that resolve the preliminary questions raised in cases C-483/23, *A and others v. Ministero dell'Economia e delle Finanze* and others will be particularly relevant, https://curia.europa.eu/juris/document/document.jsf?text=&docid=279370&pageIndex=0&doclang=es&mode=lst&dir=&occ=first&part=1&cid=14052732; C-428/24, FZ AR Spa/Ministero dell´Economia e delle Finanze and others, https://curia.europa.eu/juris/document/document.jsf?text=&docid=289705&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=14051034 y C-476/24, SX Ltd/Ministero dell´Economia e delle Finanze and others, https://curia.europa.eu/juris/document/document.jsf?text=&docid=290517&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=14055932

Apart from the issues raised by trusts, other interesting preliminary questions have also been brought forward, whose future rulings should provide significant clarification. For example, the question concerning the scope and meaning of Article 3 paragraph (1) of Council Regulation (EU) 833/2014 on restrictive measures motivated by Russia's actions destabilizing the situation in Ukraine, when it prohibits the import of products listed in Annex XXI of the said Regulation, in case C-619/24, *J C v. Hauptzollamt Düsseldorf*, https://curia.europa.eu/juris/document/document.jsf?text=&docid=294145&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=14059146

legal question that has already been addressed in prior case law, but it has gained renewed prominence in many of the recent rulings concerning the sanctions imposed in connection with the situation in Russia.

2. THE ONGOING RELEVANCE OF THE GROUNDS FOR SANCTIONING AN INDIVIDUAL.

European case law has consistently held that the grounds for sanctioning a natural or legal person must remain valid at the time the sanctions are maintained or renewed. Accordingly, a change in the personal circumstances of the sanctioned individual, or a shift in the broader context, should lead to the lifting of the sanctions or the annulment of the relevant restrictive measures. For instance, in its judgment of 26 October 2022 in the case *Ovsyannikov v. Council,*[2] *the General Court held that, in order to justify the continued inclusion of a person's name on the sanctions list, the Council is not prohibited from relying on the same evidence that justified the initial listing, the re-listing, or the previous renewal of the listing – provided that, on the one hand, the grounds for inclusion have not changed, and, on the other hand, the context has not evolved in such a way as to render that evidence outdated. The General Court further emphasized that the term "context" includes not only the situation of the country in respect of which the restrictive measures were adopted, but also the individual circumstances of the person concerned. Therefore, even if the general context remains unchanged, a change in the personal situation of the sanctioned individual should lead to the lifting of the sanctions. As a result, a current assessment of the grounds for the sanction is required, and the Council may not rely on evidence that has become obsolete.*

Nevertheless, the General Court itself has introduced some important qualifications in this regard. For example, in its judgment of 7 February 2024 in the case Shuvalov v. Council,[3] the Court stated that *"… il est possible de prendre en compte des faits intervenus dans un temps relativement éloigné de la date d'édiction d'une mesure restrictive, pour autant que, d'une part, ces faits étayent l'un des critères justifiant l'inscription du nom de l'intéressé sur la liste des mesures restrictives et, que, d'autre part, il soit établi que, au moment de l'édiction des mesures restrictives, cette personne n'avait pas définitivement mis un terme à toute activité de nature à justifier une telle édiction".*[4] *While it is true that this jurisprudential position grants a very wide margin of discretion to the courts of*

2 Case T-714/20; ECLI:EU:T:2022:674, mainly paragraphs 67 and 94-99.

3 Case T-289/22; ECLI:EU:T:2024:57, paragraph 65.

4 In those cases where there is no English version of the European judgments cited in this work, the French-language version is reproduced.

the European Union, it somewhat contradicts – or at least does not align well with – what the General Court itself held, for example, in its judgment of 27 April 2022 in the case Ilunga Luyoyo v. Council.[5] In that case, the Court ruled that the applicant, who had been sanctioned under the EU restrictive measures relating to the Democratic Republic of the Congo, should be removed from the sanctions list. This was despite the fact that the individual had committed extremely serious acts in the past involving brutal human rights violations and had not severed ties with the regime in question, even continuing to hold positions of some significance.

3. CLARIFICATION OF THE CONCEPT OF "ASSOCIATION" WITH SANCTIONED PERSONS.

Article 3(1), last paragraph, of Council Regulation (EU) No. 269/2014, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine, lists the circumstances under which natural and legal persons will be sanctioned, concluding that sanctions also apply to "natural or legal persons, entities or bodies associated with them". Consequently, it is essential to determine when such an association exists, especially in cases where the alleged association is based on family ties.

The case law on this matter was summarized in the recent judgment of the General Court of 30 April 2025, in the case *SBK Art OOO v. Council and Others,*[6] in which it is stated that: "165 In that regard, while the concept of 'association' is often used in Council acts relating to restrictive measures, it is not, as such, defined and its meaning reports to the context and circumstances at issue. That being so, such a concept may be regarded as covering natural or legal persons who are, generally speaking, linked by common interests without, however, requiring a link by means of an economic activity, but which nonetheless cannot be based exclusively on a family relationship (judgment of 25 October 2023, QF v Council, T-386/22, not published, EU:T:2023:670, paragraph 54; see also, to that effect, judgment of 8 March 2023, Prigozhina v Council, T-212/22, not published, EU:T:2023:104, paragraphs 93, 103 and 104 and the case-law cited). […] 166 The association criterion may therefore be interpreted as referring to any natural or legal person, or any entity, having a link, as defined in paragraph 165 above, with a person who is subject to restrictive measures under one of the listing criteria laid down in Decision 2014/145, as amended by Decision 2022/329, and Regulation No 269/2014, as amended by Regulation 2022/330. […] 167 Furthermore,

5 Case T-108/21; ECLI:EU:T:2022:253.

6 Case T-102/23; ECLI:EU:T:2025:416, paragraphs 165-167.

where an entity belongs to, or is controlled by, an entity subject to restrictive measures under one of the listing criteria laid down in Decision 2014/145, as amended by Decision 2022/329, and Regulation No 269/2014, as amended by Regulation 2022/330, the shareholding link or relationship of control between those two entities clearly constitutes a link as referred to in paragraph 165 above, since there is a not insignificant danger of the parent entity in question exerting pressure on the entity belonging to or controlled by it in order to circumvent the effect of the measures applying to it (see, by analogy, judgment of 4 September 2015, NIOC and Others v Council, T-577/12, not published, EU:T:2015:596, paragraph 114)".

Several important conclusions can be drawn from these judicial statements. First, the concept of "association" is not legally defined; in other words, it constitutes an indeterminate legal concept whose meaning must be assessed on a case-by-case basis, depending on the specific context (political, legal, economic, etc.) and the particular circumstances of the case and of the sanctioned natural or legal person. This interpretation grants a considerable degree of discretion and latitude to the Council when imposing restrictions, as well as to the General Court and the Court of Justice when adjudicating appeals brought by sanctioned individuals or entities. This reality raises serious concerns from the perspective of legal certainty – a principle enshrined in the constitutions of the member states of the European Union, the Charter of Fundamental Rights of the European Union, and generally in international human rights treaties.

Secondly, "association" cannot be based solely on a family relationship; in other words, family ties alone, when they operate exclusively, do not imply the existence of an "association". This principle has been repeatedly upheld by European case law in numerous judgments, such as those referenced earlier, but also in other cases, for example, in the General Court's rulings of 6 September 2023 in the *Pumpyanskaya v. Council*[7] and *Elena Petrovna Timchenko v. Council and Commission* cases.[8] In these cases, the women were sanctioned for being associated with their husbands, who were also prominent businessmen subject to sanctions. However, European case law also holds that a family relationship combined with other circumstances – such as a wife owning half the shares of a foundation that controls all her husband's businesses, or a wife holding significant positions in her husband's companies – can justify the existence of an "association" for the purposes of the sanctions regime. In such situations, the courts' assessment will play a decisive role.

Thirdly, the existence of an "association" is determined by the presence of "common interests", which do not necessarily have to be economic – although

7 Case T-272/22; ECLI:EU:T:2023:491.
8 Case T-361/22; ECLI:EU:T:2023:502.

economic interests often play a very important and almost decisive role – but may also be of other natures, such as political interests. Indeed, the aforementioned judgment states that, for these purposes, any natural or legal person who has a connection with a sanctioned subject may be considered associated. Most often, there will be a combination of common interests: economic, familial, political, business-related, etc. However, we should conclude that, once again, we are dealing with an indeterminate legal concept that grants the Council and the courts of the European Union a very wide margin of discretion.

Finally, the ownership or control of a legal person by a sanctioned natural or legal person implies the existence of a link between them in the sense relevant here. A legal person is considered owned by a sanctioned individual when more than 50% of its capital is directly or indirectly owned by that individual. Control can also be attributed to the sanctioned person even if they do not hold a majority of the capital, provided that they control the entity by other means, such as having the power to appoint the majority of the members of the board of directors, the power to appoint most of the members of the governing and management bodies, control over its operations and its means of production, and so forth.

4. CLARIFICATION OF THE CONCEPT OF MATERIAL OR FINANCIAL SUPPORT TO RUSSIAN POLITICIANS RESPONSIBLE FOR THE ANNEXATION OF CRIMEA OR THE DESTABILIZATION OF UKRAINE.

Article 3(1)(d) of Regulation (EU) No 269/2014 provides that, among others, the following shall be subject to sanctions "natural or legal persons, entities or bodies supporting, materially or financially, or benefiting from Russian decision-makers responsible for the annexation of Crimea or the destabilisation of Ukraine". In this way, it is necessary to clarify through case law what is meant by providing material or financial support to these Russian politicians.

Very recently, reaffirming previous case law, the General Court held in its judgment of 5 March 2025, in the case *Ponomarenko v. Council,*[9] that *S'agissant du critère d), il convient d'observer que celui-ci n'exige pas que les personnes ou entités concernées apportent un soutien directement ou indirectement lié à l'annexion de la Crimée ou à la déstabilisation de l'Ukraine. Il suffit qu'elles apportent un soutien matériel ou financier quantitativement ou qualitativement important aux décideurs russes responsables de ces actions (voir, en ce sens, arrêt du 20 septembre 2023, Mordashov/Conseil, T-248/22, non publié, EU:T:2023:573, point 91; voir*

9 T-249/22; ECLI:EU:T:2025:202, paragraph 118.

également, par analogie, arrêt du 7 avril 2016, Central Bank of Iran/Conseil, C-266/15 P, EU:C:2016:208, point 44)".

Several points should be highlighted from these judicial statements. The first is that, for the sanctioning criterion under Article 3(1)(d) of Regulation (EU) No 269/2014 to apply, it is not necessary for the affected natural or legal persons to provide support directly or indirectly related to the annexation of Crimea or the destabilization of Ukraine. What matters is that they provide material or financial support to the Russian decision-makers responsible for those actions. In other words, once significant material or financial support is provided to these individuals – for example, financing a holiday complex personally used by President Putin, as was the case with Mr. Ponomarenko – the sanctioning provision is engaged, even if the support is not directly or indirectly related to the annexation or destabilization of Ukraine. In this regard, it is also important to bear in mind that, in the judgment in the *Mordashov v. Council* case mentioned above, it is expressly stated that *"l'expression " décideurs russes ", placée dans le contexte des mesures restrictives en cause, fait référence aux hauts fonctionnaires de la Fédération de Russie, y compris le président de la Fédération de Russie et les membres du gouvernement russe"*.[10]

Regarding the nature and extent of material or financial support, case law has indicated that *"De plus, et dans la mesure où le critère d) fait état d'un soutien matériel ou financier sans apporter d'autre précision sur la nature de ce soutien, le critère litigieux doit être compris en ce sens qu'il vise tout appui qui, bien que n'ayant aucun lien direct ou indirect avec l'invasion de l'Ukraine, permet aux décideurs russes, du fait de son importance quantitative et qualitative de poursuivre cette politique (voir, en ce sens et par analogie, arrêt du 16 juillet 2014, National Iranian Oil Company/Conseil, T-578/12, non publié, EU:T:2014:678, point 140)"*.[11] In other words, the material or financial support must be of such magnitude that it enables the Russian decision-makers to continue pursuing their policies regarding Ukraine. Naturally, determining this aspect grants a wide margin of discretion to both the Council and the Courts.

5. DEFINITION OF THE CONCEPT OF LEADING BUSINESSPERSONS OPERATING IN RUSSIA.

Article 3.1(g) of Regulation (EU) 269/2014 states in its first part that "leading businesspersons operating in Russia and their immediate family members, or other natural persons benefiting from them" shall be included in the

10 Paragraph 92.

11 Judgment of the General Court of 12 June 2024; Case T-288/22; state Development Corporation VEB.RF v. Council and Commission; ECLI:EU:T:2024:372, paragraph 123.

list of sanctioned individuals. Naturally, case law has been compelled to clarify the concept of leading businesspersons operating in the Russian Federation or to provide criteria for assessing this notion.

In this regard, the judgment of the General Court of 22 January 2025, in *Andrey Melnichenko v. Council and Commission*[12] is highly illustrative, where it states the following:"61. As a preliminary point, it should be noted that criterion (g) uses the notion of 'leading businesspersons' in conjunction with involvement 'in economic sectors providing a substantial source of revenue to the [Russian] Government', without any other condition relating to a link, whether direct or indirect, with that government. The aim pursued by that criterion is to exert maximum pressure on the Russian authorities so that they bring an end to their actions and policies destabilising Ukraine and to the military aggression against Ukraine (judgment of 15 November 2023, OT v Council, T-193/22, EU:T:2023:716, paragraph 138). […] 62 In that regard, there is a rational connection between the targeting of leading businesspersons involved in economic sectors providing a substantial source of revenue to the Russian Government and the objective of the restrictive measures in the present case, which is to increase pressure on the Russian Federation and the costs of its actions to undermine Ukraine's territorial integrity, sovereignty and independence (see judgment of 15 November 2023, OT v Council, T-193/22, EU:T:2023:716, paragraph 139 and the case-law cited). […] 63 However, there is nothing in the recitals or the provisions of Decision 2014/145 and Regulation No 269/2014, as amended, to indicate that it is for the Council to demonstrate the existence of a close link or interdependence between, on the one hand, the person whose name is included on the lists at issue and, on the other, the Russian Government or its actions undermining the territorial integrity, sovereignty and independence of Ukraine (judgment of 15 November 2023, OT v Council, T-193/22, EU:T:2023:716, paragraph 140). […] 64 Thus, in the light of the wording of criterion (g), the persons referred to must be considered to be influential due to their importance in the sector in which they are involved and the importance of that sector for the Russian economy. In that regard, the notion of 'leading businessperson' must therefore be understood as referring to their importance in the light of their professional status, the importance of their economic activities, the extent of their capital holdings or their functions within one or more undertakings in which they pursue those activities (see judgment of 15 November 2023, OT v Council, T-193/22, EU:T:2023:716, paragraph 143 and the case-law cited). […] 65 The objective of the restrictive measures at issue is not to penalise certain persons or entities because of their links with the situation in Ukraine or their links with the Russian Government, but to impose economic sanctions on the Russian Federation in order to increase pressure on it and the costs of its actions to undermine Ukraine's territorial integrity,

12 T-271/22; ECLI:EU:T:2025:47, paragraphs 61-65 and 75.

sovereignty and independence and to put an end, as quickly as possible, to the aggression suffered by Ukraine (see judgment of 15 November 2023, OT v Council, T-193/22, EU:T:2023:716, paragraph 144 and the case-law cited). [...] 75. In any event, in view of criterion (g), the notion of 'leading businesspersons' refers to factual matters occurring both in the past and over time. Therefore, even assuming that the grounds for including the applicant's name on the lists at issue refer to a factual situation which existed before the adoption of the initial acts and which was modified shortly before that date, that fact would not necessarily mean that the restrictive measures adopted against him by those acts are obsolete (see, to that effect, judgment of 15 November 2023, OT v Council, T-193/22, EU:T:2023:716, paragraph 154)".

That is, the individuals concerned must be considered influential due to their importance within the sector in which they operate and the significance of that sector for the Russian economy. In this regard, the concept of "leading businessperson" should be understood as referring to the individual's importance in relation to their professional position, the significance of their economic activities, the extent of their shareholdings in major companies, or their roles within one or more companies where they conduct such activities. In other words, to determine whether someone qualifies as a leading businessperson, two factors must be weighed: the person's prominence within their sector and the importance of that sector to the Russian economy – without requiring a direct or indirect link to the Government of the Russian Federation or the situation in Ukraine.

Furthermore, it is important to note that European case law holds that, under criterion (g), the notion of "leading businessperson" pertains to factual elements that are both historical and long-term. Therefore, even if the reasons for including an individual's name on the sanctions list relate to circumstances that existed prior to the adoption of the initial sanctions and that had changed shortly before that date, this does not necessarily render the restrictive measures imposed against them obsolete.

6. CLARIFICATION OF THE CONCEPT OF BUSINESSPERSONS, LEGAL PERSONS, ENTITIES, OR BODIES INVOLVED IN ECONOMIC SECTORS PROVIDING A SUBSTANTIAL SOURCE OF REVENUE TO THE GOVERNMENT OF THE RUSSIAN FEDERATION.

Article 3.1(g) of Regulation (EU) 269/2014 states in its second part that the sanctions list shall also include "businesspersons, legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation

of Crimea and the destabilisation of Ukraine". Therefore, it is necessary to clarify the scope and meaning of this provision.

For example, in the General Court's judgment of 20 November 2024 in the case *Uss v. Council,*[13] it is stated that: *"109 Il y a lieu de constater que, selon son libellé même, le troisième volet du critère g) modifié emploie la notion de "femme et homme d'affaires" en corrélation avec l'exercice d'une "activité dans des secteurs économiques qui fournissent une source substantielle de revenus au gouvernement russe", sans autre condition concernant un lien, direct ou indirect, avec ledit gouvernement. La finalité poursuivie par ce critère est en effet d'exercer une pression maximale sur les autorités russes, afin que celles-ci mettent fin à leurs actions et politiques déstabilisant l'Ukraine ainsi qu'à l'agression militaire de ce pays (voir, par analogie, arrêt du 15 novembre 2023, OT/Conseil, T-193/22, EU:T:2023:716, point 46 et jurisprudence citée). […] 111 Quant à la notion de " secteurs économiques qui fournissent une source substantielle de revenus au gouvernement de la Fédération de Russie", il convient de relever que, certes, ni la décision 2014/145 modifiée ni le règlement nº 269/2014 modifié ne définit la notion de "source substantielle de revenus". Toutefois, l'emploi de l'adjectif qualificatif " substantielle", qui se rapporte au groupe nominal "source de revenus", implique que cette source de revenus doit être significative et donc non négligeable (arrêt du 6 septembre 2023, Pumpyanskiy/Conseil, T-291/22, non publié, EU:T:2023:499, point 63). […] 116 Deuxièmement, s'agissant du secteur dans lequel Sibugol exerce son activité, le requérant avance que le Conseil n'a pas produit de données chiffrées relatives à la contribution du secteur du charbon au budget de la Russie et que les données fournies par le Conseil relatives à la part de ce secteur dans les exportations de la Russie et à l'augmentation des exportations de charbon ne sont pas pertinentes. Il ajoute que ce dernier élément est sans influence sur l'importance des revenus générés par le secteur du charbon au gouvernement et, à tout le moins, qu'une telle influence n'a pas été démontrée par le Conseil. En outre, le fait que le Tribunal ait pu considérer que le secteur minier fournissait une source de revenus substantielle au gouvernement russe ne serait pas non plus pertinent, dans la mesure où le secteur du charbon serait un secteur plus étroit que le secteur minier, lequel engloberait notamment le secteur des pierres et métaux précieux et le secteur du schiste bitumineux".*

Several important conclusions can be drawn from these statements. First, it is not necessary that the individuals be linked to the Russian government or the events in Ukraine; rather, the person is sanctioned due to their participation in a specific economic sector. Second, the sector in question must be the source of a substantial revenue stream for the Russian government; therefore, if such revenues are not significant, the provision would not apply. Most importantly,

13 T-571/23; ECLI:EU:T:2024:839, paragraphs 109, 111 and 116.

and this point is made very clear in the judgment of the aforementioned *Melnichenko* case, the case law emphasizes that it is the economic sector or sectors – not the specific individual whose name appears on the sanctions list – that must constitute a substantial source of revenue for the Government of the Russian Federation. In other words, the person is sanctioned because they operate in sectors that represent a significant source of revenue for the Russian government, but it is not required that the sanctioned individual in particular provides substantial revenue to the Government of the Russian Federation.

Furthermore, the statements made in the judgment in the *Uss v. Council* case regarding the potential violation of the principles of legal certainty and protection of legitimate expectations are of interest. Indeed, the appellant argued that the provision in question violated these principles because the scope of affected persons is unpredictable and does not allow those concerned to adjust their behaviour to the Council's regulations. Furthermore, the sectors referred to are not clearly defined. In other words, the appellant raised an issue that has been repeatedly mentioned throughout this work: the existence of rules that foster legal uncertainty and, consequently, give rise to case law solutions that also fail to guarantee legal certainty.

However, in the judgment,[14] these arguments put forward by the appellant are rejected, holding that *"87 S'agissant des principes de sécurité juridique et de protection de la confiance légitime, il convient de rappeler que le droit de se prévaloir de ce dernier principe s'étend à tout justiciable à l'égard duquel une institution de l'Union a fait naître des espérances fondées du fait d'assurances précises qu'elle lui aurait fournies. Toutefois, lorsqu'un opérateur économique prudent et avisé est en mesure de prévoir l'adoption d'une mesure de l'Union de nature à affecter ses intérêts, il ne saurait invoquer le bénéfice de ce principe lorsque cette mesure est adoptée (voir arrêt du 17 février 2017, Islamic Republic of Iran Shipping Lines e.a./Conseil, T-14/14 et T-87/14, EU:T:2017:102, point 191 et jurisprudence citée). […] 88 Par ailleurs, le principe de sécurité juridique implique que la législation de l'Union soit claire et précise et que son application soit prévisible pour les justiciables (voir arrêts du 5 mars 2015, Europäisch-Iranische Handelsbank/Conseil, C-585/13 P, EU:C:2015:145, point 93 et jurisprudence citée, et du 17 février 2017, Islamic Republic of Iran Shipping Lines e.a./Conseil, T-14/14 et T-87/14, EU:T:2017:102, point 192 et jurisprudence citée). […] 89 S'agissant de l'argument du requérant tiré de l'absence d'identification des secteurs d'activités qui fournissent une source substantielle de revenus au gouvernement russe, il convient de relever que, certes, ni la décision 2014/145 modifiée ni le règlement nº 269/2014 modifié, ne définit la notion de "source substantielle de revenus ". Toutefois, l'emploi de l'adjectif qualificatif " substantielle ", qui se rapporte au*

14 Paragraphs 87-90.

groupe nominal " source de revenus ", implique que cette source de revenus doit être significative et donc non négligeable (arrêt du 6 septembre 2023, Pumpyanskiy/ Conseil, T-291/22, non publié, EU:T:2023:499, point 63). [...] 90 Eu égard au lien logique, rappelé au point 81[15] *ci-dessus, entre le fait de cibler les personnes visées par le troisième volet du critère g) modifié et l'objectif des mesures restrictives en l'espèce, il convient de considérer que le libellé du troisième volet du critère g) modifié est clair et précis et que son application est prévisible pour les justiciables, lesquels sont en mesure de prévoir l'adoption d'une mesure de l'Union de nature à affecter leurs intérêts, conformément à la jurisprudence rappelée aux points 87 et 88 ci-dessus".*

That is, the judgment acknowledges that the sanctions legislation does not define the concept of a "substantial source of revenue", but holds that "substantial" implies that it must be significant and not negligible. Furthermore, the legislation does not violate the principles of legal certainty and protection of legitimate expectations, since, taking into account the logical link between the persons sanctioned and the objective pursued by the restrictive measures, the wording of the provision is clear and foreseeable to a prudent and discerning individual who can anticipate the adoption of a restrictive measure that may affect their interests.

7. CLARIFICATION OF THE CONCEPT OF ADVANTAGES OR BENEFITS REFERRED TO IN THE SECOND PART OF ARTICLE 3.1(G) OF REGULATION (EU) NO 269/2014.

Article 3.1(g), in its first part, establishes that other persons who benefit from prominent businesspersons operating in the Russian Federation shall also be included in the list of sanctioned individuals. This requires us to clarify the concept of advantages or benefits for these purposes. The General Court, in its judgment of 26 February 2025 in the *Tokareva v. Council* case[16] stated the following in this regard: *"Ainsi, la notion d'"avantage", au sens du deuxième volet du critère g) modifié, doit être interprétée en tenant compte des objectifs visés par ce critère, énoncés au point 50 ci-dessus, lesquels impliquent un accroissement du coût*

15 In this section of the judgment, it states: *"Par conséquent, il existe toujours un lien logique entre, d'une part, le fait de cibler les femmes et les hommes d'affaires exerçant leurs activités dans des secteurs économiques fournissant une source substantielle de revenus au gouvernement, au vu de l'importance que revêtent ces secteurs pour l'économie russe, et, d'autre part, l'objectif des mesures restrictives en l'espèce, qui est d'accroître la pression sur la Fédération de Russie ainsi que le coût de ses actions visant à compromettre l'intégrité territoriale, la souveraineté et l'indépendance de l'Ukraine (voir, par analogie, arrêt du 15 novembre 2023, OT/Conseil, T-193/22, EU:T:2023:716, point 49 et jurisprudence citée)"*.

16 T-269/24; ECLI:EU:T:2025:179, paragraph 51.

des actions de la Fédération de Russie visant à compromettre l'intégrité territoriale, la souveraineté et l'indépendance de l'Ukraine. Dès lors, l'avantage au sens de cette disposition vise tout avantage de quelque nature que ce soit, qui n'est pas nécessairement indu, mais qui doit être quantitativement ou qualitativement non négligeable. Il peut donc s'agir d'un avantage financier ou non financier, tel qu'un don, un transfert de fonds ou de ressources économiques, une intervention en vue de favouriser l'attribution de contrats publics, une nomination ou une promotion. Par ailleurs, eu égard à l'objectif d'éviter les pratiques de contournement des mesures restrictives, expressément visé au considérant 5 de la décision 2023/1094, peuvent également relever du deuxième volet du critère g) modifié les avantages octroyés par les femmes ou les hommes d'affaires influents exerçant une activité en Russie dans une situation susceptible de conduire à un contournement des mesures restrictives qui les visent (arrêt du 11 septembre 2024, Tokareva/Conseil, T-744/22, EU:T:2024:608, point 142)".

Consequently, the concept of "advantage" within the meaning of the second part of the amended criterion (g) should be interpreted in the light of the objectives pursued by that criterion, which involve increasing the cost of the actions undertaken by the Russian Federation aimed at undermining the territorial integrity, sovereignty, and independence of Ukraine. Therefore, "advantage" under this provision refers to any benefit of any nature, which is not necessarily undue, but which is neither quantitatively nor qualitatively negligible. Such advantage may be financial or non-financial, such as a donation, a transfer of funds or economic resources, an intervention to promote the awarding of public contracts, an appointment, or a promotion. Furthermore, considering the objective of preventing circumvention practices of restrictive measures, advantages granted by influential businesspersons operating in Russia, in situations that may lead to circumventing restrictive measures targeted against them, may also fall within the scope of the second part of the amended criterion (g).[17]

17 Furthermore, regarding the temporal scope for the realization of advantages or benefits, the judgment specifies the following (paragraphs 53-55): *"53 En outre, contrairement à ce que soutient la requérante, les avantages visés par le deuxième volet du critère g) modifié ne sauraient se limiter aux avantages accordés, à une date concomitante à leur désignation sur les listes litigieuses, par des femmes ou des hommes d'affaires influents exerçant des activités en Russie à un membre de leur famille proche ou à d'autres personnes. En effet, une telle limitation temporelle des avantages susceptibles d'être pris en considération afin de permettre l'application dudit critère ne ressort pas du libellé de la disposition qui prévoit ce critère. En outre, une telle interprétation limitative proposée par la requérante serait incompatible avec les objectifs poursuivis par l'introduction dudit critère, lesquels visent à accroître la pression exercée sur le gouvernement de la Fédération de Russie et à éviter le risque de contournement des mesures restrictives, notamment par des avantages accordés par des femmes et des hommes d'affaires influents avant l'inscription de leur nom sur les listes litigieuses (arrêt du 11 septembre 2024, Tokareva/Conseil, T-744/22, EU:T:2024:608, point 144). […] 54 Il n'en demeure pas moins que les circonstances de l'octroi de l'avantage et l'écoulement du temps entre l'octroi d'un*

8. CONCLUSIONS.

This study provides a limited overview of the case law of the General Court and the Court of Justice concerning the European Union's sanctions on the Russian Federation. It primarily focuses on the main issues raised by the application of Council Regulation (EU) 269/2014, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine. This regulation is the source of the most significant and recent judicial pronouncements, which is why this paper concentrates on the fundamental case law responses to it. It is from this perspective that these conclusions should be understood.

We do not intend to address the specific conclusions of each section here and prefer to refer to what has been said in each of them. However, we wish to highlight a basic conclusion: several very important concepts in the aforementioned Regulation (EU) No 269/2014 – such as association with sanctioned persons, material or financial support to Russian politicians responsible for the events in Ukraine, and others – are not legally defined.

This situation leads to a case-by-case interpretation, largely depending on the specific context (political, legal, economic, etc.) and the particular circumstances of the case and the sanctioned natural or legal person. Consequently, a considerable degree of discretion and latitude is granted to the Council when imposing restrictions, as well as to the General Court and the Court of Justice when adjudicating appeals brought by sanctioned parties, which results in a significant undervaluation of the principle of legal certainty.

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avantage par une femme ou un homme d'affaires ayant des activités en Russie et la date d'inscription du nom de ces derniers sur les listes litigieuses sont des éléments à prendre en compte pour apprécier le bien-fondé de l'inscription, sur lesdites listes, du nom de la personne qui a reçu cet avantage. En tout état de cause, l'avantage reçu par la personne dont le nom est inscrit sur les listes litigieuses au titre du deuxième volet du critère g) modifié, ou à tout le moins ses conséquences, doit demeurer au moment de l'adoption des mesures restrictives à l'encontre de ladite personne (arrêt du 11 septembre 2024, Tokareva/Conseil, T-744/22, EU:T:2024:608, point 145). […] 55 De plus, l'interprétation du deuxième volet du critère g) modifié doit être conforme au principe de sécurité juridique. Il y a lieu de rappeler que le régime des mesures restrictives eu égard à la situation en Ukraine a été mis en œuvre, d'abord, par l'adoption de la décision 2014/145, en réaction à l'annexion de la Crimée et à la déstabilisation de l'est de l'Ukraine survenues à la fin du mois de février 2014, puis par une consolidation progressive dudit régime afin de l'adapter en fonction de la gravité des atteintes, par la Fédération de Russie, à l'intégrité territoriale, à la souveraineté et à l'indépendance de l'Ukraine. Il en résulte que, étant donné que les mesures restrictives en cause s'inscrivent dans la continuité de la réaction de l'Union aux politiques et aux activités des autorités russes concernant spécifiquement l'Ukraine, amorcées par l'annexion de la Crimée, le Conseil ne saurait, au titre du second volet du critère g) modifié, se prévaloir d'avantages dont l'octroi, par des femmes ou des hommes d'affaires influents aux membres de leur famille proche ou à d'autres personnes, est antérieur la fin du mois de février 2014 (arrêt du 11 septembre 2024, Tokareva/Conseil, T-744/22, EU:T:2024:608, point 146)".

EUROPEAN UNION TOWARD THE SUPPORT OF RULE OF LAW INITIATIVES IN UKRAINE

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SUMMARY: 1. INTRODUCTION. 2. EU-UKRAINE RELATIONS IN TIMES OF WAR: TOWARD THE TRANSFORMATIONAL SHIFT OF THE STATUS QUO. 3. THE VERKHOVNA RADA AND CABINET OF MINISTERS AS FACILITATORS OF DEMOCRATISATION IN UKRAINE. 4. RUSSIAN INVASION AS A CATALYST OF EU-UKRAINE COOPERATION ON RULE OF LAW REFORMS. 5. CONCLUSIVE REMARKS.

1. INTRODUCTION.

The European Union (EU)–Ukraine relations have undergone a significant shift from cooperation without prospects of membership to a new model of bilateral relations in response to the full-scale Russian military invasion. The EU has announced an unprecedented transformation of its foreign policy priorities and has introduced the enlargement agenda as a pragmatic investment into securing peace and promoting democracy in member states and potential new members. Significantly, it was Ukraine's membership application that became a trigger for the discussion on making the EU bigger once again. Unlike the Association Trio appeal in 2019, this application led to a serious discussion on future membership of not only Ukraine but new candidate states, e.g. Moldova or Georgia, and other countries that started the accession process years before.

In this regard, the major purpose of the article is to explain the newly adopted framework of EU support for the legal reforms in Ukraine aimed at adjusting Ukraine's rule of law system to the EU's *acquis communautaire*. The main research assumption is that the political will of EU institutions to maintain a consensus on Ukraine's accession as a pragmatic interest of the EU has become a defining factor for facilitating the efficient democratization reforms in Ukraine in times of war. In order to test this assumption, the article studies the state of EU intergovernmental and supranational agreement on Ukraine's membership prospects in the 2022–2024 period. By doing so, the author makes an attempt to study the impact of a new situational context, caused by Russia's war on Ukraine, and on institutional cooperation between the EU and its Ukrainian counterparts.

2. EU-UKRAINE RELATIONS IN TIMES OF WAR: TOWARD THE TRANSFORMATIONAL SHIFT OF THE STATUS QUO.

Russia's full-scale war of aggression against Ukraine became a turning point in EU foreign policy agenda-setting and in its approach to support for Ukraine in particular. Ukrainian president Volodymyr Zelenskyy used political discourse as a convincing tool to address both domestic and foreign audiences. By using different types of rhetorical addresses, i.e. short daily video recordings, addresses at international institutions and forums, press conferences or interviews with Ukrainian and international journalists, Zelenskyy successfully promoted a narrative on Ukraine's fight for freedom and democratic values. Interestingly enough, the rhetoric employed by the Ukrainian president comprised political appeals with reference to the EU and its responsibility to support Ukraine in its struggle against Russia.[1] In other words, the emphasis was placed on the need to support Ukraine as a moral obligation of the EU due to the fact that Ukraine is fighting for democratic values that are fundamental elements of the EU as a whole.

Such a proactive position in communication with the EU and Western allies, coupled with Ukraine's application to the EU four days after Russia launched its full-scale invasion, signalled the start for an official debate on the reform of EU enlargement. This then became a priority task of EU institutional actors, who announced a transformation of EU foreign policy that should be based on a values-driven approach. In a newly adopted Strategic Agenda 2024–2029, European Council leaders expressed a commitment to EU values as the strength

1 KHUDOLIY, Anatoliy, ZHELTOVSKYY, Vadym, "Rhetorical argumentation as a public action: the case of Volodymyr Zelenskyy's presidential rhetoric", *Online Journal Modelling the New Europe,* vol. 42/2023, pp. 4-21. DOI: 10.24193/OJMNE.2023.42.01

of the Union and emphasised the preparation of a stronger and bigger Union as one of the key priorities.[2]

Overall, the transformational shift in the status quo of EU-Ukraine relations could be observed in a number of ways. First, there has been unprecedented macro-financial and budget support for Ukraine's military capability-building on the one hand, and reinvigorated cooperation on establishing foundations for Ukraine's EU membership on the other. Financial assistance in the form of loans and grant rose from 11.6 billion euros in 2022 to 19.5 billion euros in 2023 and 18 billion euros in 2024. The EU also established a specially designed financial instrument (The Ukraine Facility) that is to provide Ukraine with up to 50 billion euros in 2024–2027. Last but not least, Ukraine received around 6 billion euros from extraordinary revenues of Russian frozen assets.[3] In this regard, the EU has shifted its sanctions policy towards Russia from a transactional approach to a transformational one. Unlike sanctions adopted in response to Russia's annexation of Crimea in 2014, the sanction packages adopted in February 2022 following Russia's full-scale invasion of Ukraine were unprecedented in nature and scale. As of 24 February 2025, the European Council has adopted 16 packages of sanctions against Russian and Belarussian individual and collective actors.[4]

Second, the emphasis was placed on inter-institutional cooperation between the European Commission and the European Parliament and their Ukrainian counterparts. Based on the analysis of the political discourse employed by leaders of EU institutions in response to Russia's military aggression against Ukraine, one could have observed a joint message on the necessity for the EU to continue supporting Ukraine "as long as it takes". In fact, solidarity with Ukraine was presented simultaneously as a moral obligation and a pragmatic necessity of the EU member states. Leaders of the European Council, European Commission and European Parliament repeated the argument that EU support for Ukraine's struggle against Russian illegal aggression was of vital importance for the EU, as its member states could be invaded by Russia if it is not stopped in Ukraine.

Significantly, Ukraine's accession to the EU was presented as a logical and rational step in the existing geopolitical context. There has been a clear message saying that "Ukraine is the EU and the EU is Ukraine".[5] As stated in the introduction, the issue of Ukraine's accession to the EU dominated the enlargement agenda very quickly. Despite the opposition from the Hungarian

2 https://www.consilium.europa.eu/media/yxrc05pz/sn02167en24_web.pdf

3 https://commission.europa.eu/topics/eu-solidarity-ukraine/eu-assistance-ukraine/eu-financial-support-ukraine_en

4 https://www.consilium.europa.eu/en/policies/sanctions-against-russia/timeline-sanctions-against-russia/

5 www.consilium.europa.eu/en/press/press-releases/2023/11/21/statement-by-president-charles-michel-on-the-10th-anniversary-of-the-maidan-revolution

government and some conservative and ultra-conservative parties across the EU, its relations with Ukraine have evolved from an association agreement – which did mention the possible membership perspective[6] – to opening negotiations with Ukraine and positive evaluations of Ukrainian progress in adopting the acquis in times of war.

3. THE VERKHOVNA RADA AND CABINET OF MINISTERS AS FACILITATORS OF DEMOCRATISATION IN UKRAINE.

In their turn, the Ukrainian government and parliament became actively engaged in the implementation of European integration initiatives in line with the association agreement with the EU. In fact, Decree No. 744/2023 issued by President Zelenskyy "On Certain Measures to Prepare for Negotiations o Ukraine's Accession to the European Union"[7] obliged the Cabinet of Ministers of Ukraine to submit the draft law to the Verkhovna Rada[8] to approve a new National Programme for the Adaptation of Ukrainian Legislation to the EU acquis. The document considered the recommendations of the European Commission formulated in its assessment reports. Furthermore, the study of parliamentary legislative activity in times of war illustrates the intensification of parliamentary proceedings in terms of the accession process. This process received a positive assessment by the European Commission that has served as a facilitator of EU-Ukraine relations in terms of the accession process.[9]

As regards the political system of Ukraine, it has a single-chamber parliament that consists of 450 MPs elected on the basis of general, equal, and direct election by secret ballot for a 5-year term. According to the Constitution of Ukraine, the Verkhovna Rada has the powers to introduce amendments to Ukraine's Constitution; call an All-Ukrainian referendum; adopt laws; approve Ukraine's state budget and amend it, supervise the execution of the state budget and make decisions on reporting concerning its execution; establish principles of domestic and foreign policy; approve national programs for economic, scientific, technical, social, national, and cultural development and the protection of the environment; call elections for the President of Ukraine; hear the annual and extraordinary address "On the internal and external situation of Ukraine";

6 ZHELTOVSKYY, Vadym, "European integration processes in post-Euromaidan Ukraine: in search of scenarios", *Online Journal Modelling the New Europe,* vol. 32/2020, pp. 72-92. DOI: 10.24193/OJMNE.2020.32.05

7 Decree no. 744/2023 "On Certain Measures to Prepare for Negotiations o Ukraine's Accession to the European Union", president.gov.ua/documents/7442023-48833

8 Name of the Ukrainian Parliament.

9 Commission adopts 2023 Enlargement package. November 8, 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5633

declare war upon a recommendation made by Ukraine's President and make peace; approve the President's decision regarding the use of Ukraine's Armed Forces and other military formations in the event of armed aggression against Ukraine; remove the President of Ukraine from office in accordance with a special procedure (impeachment); review and approve the Action Program of the Government.

What is of particular importance in context of our research is that the Ukrainian Constitution provides the Verkhovna Rada with the power to implement the strategic course towards the acquisition of full membership of Ukraine in the EU and NATO.[10] As a reminder, the Ukrainian Parliament had approved amendments to the country's Constitution before the 2019 parliamentary elections, stating that the acquisition of full membership of the EU and NATO represents a "strategic course" for Ukraine.[11] The amendments were supported by 334 deputies, showing the significant political will of Parliament members to continue the pro-EU course.[12]

Article 75 of the Constitution of Ukraine states that the sole body of legislative power in Ukraine is the Parliament (the Verkhovna Rada). Under article 82, the Verkhovna Rada works in sessions, and it is competent on the condition that no less than two-thirds of its members has been elected. The Verkhovna Rada meets for its first session no later than on the thirtieth day after the official announcement of the election results. According to article 83 of the Constitution (1996), the procedure of the Verkhovna Rada is established by the Constitution of Ukraine and the Rules of Procedure of the Verkhovna Rada. A coalition of parliamentary factions can be formed in the Verkhovna Rada based on the results of the elections and on the coordination of political positions, which shall include the majority of the people's deputies of Ukraine from the constitutional composition of the Verkhovna Rada. A coalition of parliamentary factions in the Verkhovna Rada shall be formed within one month from the date of opening of its first session, held after regular or early elections of the Verkhovna Rada, or within one month from the date of termination of the coalition of parliamentary factions in the Verkhovna Rada.[13]

As far as the Verkhovna Rada of the current 9th call is concerned, it began its work on 29 August 2019. Due to the law "On ensuring the rights and freedoms of citizens and legal regime on the temporarily occupied territory of Ukraine", elections did not take place in 12 Crimean constituencies, 9 constituencies in Donetsk oblasts, and 6 constituencies in Luhansk oblasts. That is why only 424 MPs have been elected (Internews 2024). As a matter of fact, five political

10 Constitution of Ukraine, https://zakon.rada.gov.ua/laws/show/254 /96- #Text
11 *Ibidem.*
12 https://www.bbc.com/ukrainian/features-47155927
13 https://zakon.rada.gov.ua/laws/show/254 /96- #Text

parties overcame the 5% electoral threshold and won seats in the Verkhovna Rada. Volodymyr Zelenskyy's party (Servant of the People) received 43% of the proportional representation vote, resulting in 124 of 225 seats, and 130 seats in the 225 single-member districts. That gave Servant of the People an unprecedented number of 254 seats, exceeding the minimum number needed for a simple majority. As for the other four parties, the European Solidarity party of former president of Ukraine Petro Poroshenko received only 8.1 % of the votes in proportional representation (23 seats) and only 2 seats in the 225 single-member districts. The other three parties' results were as follows: the Opposition Platform – For Life (13.1%), the party which consisted of former supporters of pro-Russian President Victor Yanukovych who refused to sign the Association Agreement in 2013; All-Ukrainian Union "Fatherland" (*Batkivschyna*) (8.2%), the party under the leadership of the former prime minister Yulia Tymoshenko; and "Voice" (*Holos*), a political party established by the famous Ukrainian singer Sviatoslav Vakarchuk, who obtained 5.8% of the vote. Three of the five elected parties – Servant of the People, European Solidarity and Voice – included liberal postulates in their political programs.

The activity of the Ukrainian Parliament post-February 2022 illustrated efforts by political parties to adopt legislation in line with the recommendations of the European Commission, set out in its Opinion on Ukraine's application for EU membership in 2022. These acts aimed to improve the procedure for selecting candidates for the Constitutional Court of Ukraine, the independence of the media, the protection of national minorities, and the prevention and countering of money laundering.[14] The adoption of these acts demonstrated a significant shift in the ability of the Verkhovna Rada to act in a unified manner in response to Russia's ongoing invasion of the country.[15] As a result, on 3 February 2023 the President of the European Council recognised Ukraine's accomplishments in judicial reform and fighting corruption.[16]

Regarding the engagement of the Cabinet of Ministers of Ukraine in the realisation of the Association Agreement, it has developed an interactive webpage presenting an online progress monitoring report on summarising the legislature work undertaken by parliament and the respective ministries. The report highlights constant progress in all 24 sectors of the Association Agreement. The webpage may be seen as a promotion tool designed by the Ukrainian government to inform the public on the state of progress in the implementation of the

14 rada.gov.ua/news/Top-novyna/231357.html

15 ZHELTOVSKYY, Vadym, "Verkhovna Rada towards the European Integration of Ukraine", *Nuovi Autoritarismi e Democrazie: Diritto, Istituzioni, Società (NAD-DIS)*, 6(1), pp. 254-261. DOI 10.54103/2612-6672/23982.

16 consilium.europa.eu/en/press/press-releases/2023/02/03/remarks-by-president-charles-michelat-the-press-conference-of-the-eu-ukraine-summit-in-kyiv/

Association Agreement. Interestingly, the report shows the percentage of tasks accomplished by the Cabinet of Ministers and the Verkhovna Rada respectively. To give an example, 95% of tasks from the justice, freedom, security and human rights sector have been accomplished by the Cabinet of Ministers, while the Ukrainian Parliament has accomplished 85 % of its tasks in this sector.[17]

4. THE RUSSIAN INVASION AS A CATALYST OF EU-UKRAINE COOPERATION ON RULE OF LAW REFORMS.

Despite Russia's ongoing and full-scale war on Ukraine, the issue of European integration has been at the top of the political agenda in EU-Ukraine relations. As far as the Ukrainian parliament is concerned, it turned out to be a central forum for legislation on preparing Ukraine's political system for accession to the EU. Moreover, Ukrainian members of parliament launched a discussion on framework development in 2024 that would enable them to consider European integration initiatives under a shortened procedure. This would considerably speed up the process of building the legal foundation for Ukraine's accession to the EU.[18] Furthermore, the Ukrainian parliament has become an essential platform for European leaders to express their support for reforms in Ukraine and its prospects of accession to the EU. Such visits in wartime had a strong symbolic meaning, underlining the role of the Verkhovna Rada in the democratisation process and illustrating EU continuous support for Ukraine to a broad public internationally. Supporting Ukraine's accession to the EU as a geopolitical necessity[19] demonstrates the political will to change the EU's transactional approach to its relations with Ukraine that blocked its membership prospects prior to 2022[20] and to strengthen the EU's geopolitical credibility.[21]

At the same time, the planned fast-track legislation did not significantly impact the tempo of the negotiation stage of the accession process. The

17 https://pulse.kmu.gov.ua/ua/streams/human-rights-justice-and-anticorupption

18 https://fact-news.com.ua/verhovna-rada-hotuetsya-rozhlyanuty-zakonoproekt-pro-sproschenyy-rozhlyad-zakoniv-pro-evrointehratsiyu

19 RAIK, Kristi, BLOCKMANS, Steven, OSYPCHUK, Anna, SUSLOV, Anton, "EU Policy towards Ukraine: Entering Geopolitical Competition over European Order," *The International Spectator* 59, issue 1, 2024, pp. 39-58, https://doi.org/10.1080/03932729.2023.2296576

20 ZHELTOVSKYY, Vadym, "European integration processes in post-Euromaidan Ukraine: in search of scenarios", *Online Journal Modelling the New Europe,* vol. 32/2020, pp. 72-92. DOI: 10.24193/OJMNE.2020.32.05.

21 DIONYSIOU, Evita, "Building a Geopolitical European Union After Russia's Attack on Ukraine: The Valuable Tool of Enlargement". *Studia Europejskie - Studies in European Affairs* 2-2023, pp. 7-26. DOI: https://doi.org/10.33067/SE.2.2023.1

Ukrainian authorities expressed their readiness[22] – supported by the European Commission[23]– to open three clusters till the end of the Polish presidency in the Council (June 2025). More precisely, they referred to clusters such as Cluster 1 (Fundamentals), Cluster 2 (Internal Market) and Cluster 6 (External Relations). Furthermore, both sides agreed to undertake attempts to open six clusters by the end of 2025.[24] However, the government of Ukraine only announced the finalisation of the domestic procedures that enabled the opening the first cluster on 14 May 2025, which illustrates the complexity of the process.[25]

That said, it is also true that the dynamics of EU-Ukraine relations in the 2022–2024 period led to building a sustainable basis for the ongoing negotiation process. On opening the negotiation stage in November 2023, the European Commission pointed to granting Ukraine candidate status as a motivation for speeding up the process of democratisation in the country. Additionally, the President of the European Commission stressed the geopolitical and economic rationale behind the planned enlargement reform.[26] The most recent 2024 Enlargement Package Assessment report emphasised the "smooth" character of the screening process,[27] aimed at creating grounds for opening the clusters mentioned above.

An examination of the institutional stance of the EU on providing political and economic support for Ukraine, an analysis of resolutions on EU foreign policy adopted by the European Parliament in the 2022–2024 period makes it possible to formulate the following observations. First and foremost, the MEPs defined the enlargement reform as the most effective foreign policy instrument, coinciding with the narrative employed by the leaders of the European Council or European Commission. The has been a consensus reached on enlargement reform as an investment in "long-term peace, democracy, stability, security, climate protection and prosperity across the continent".[28] Meanwhile, there was repeated emphasis on the need to employ a merit-based approach to each candidate country in the enlargement process. Simultaneously, the resolutions included an appeal to both parties to avoid the risk of excessive delays in the realisation of the accession process. This, in fact, may result in the reversibility of the democratisation

22 https://www.president.gov.ua/en/news/u-nas-ye-ambitna-meta-vidkriti-5-6-peregovornih-klasteriv-z-95457

23 https://www.pravda.com.ua/eng/news/2025/02/24/7499906/

24 *Ibidem*.

25 https://eu-ua.kmu.gov.ua/en/news/ukrayina-zavershyla-vnutrishnoderzhavni-protsedury-dlya-vidkryttya-peremovyn-z-yes-za-pershym-klasterom/

26 https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5633

27 https://enlargement.ec.europa.eu/news/commission-adopts-2024-enlargement-package-2024-10-30_en

28 https://www.europarl.europa.eu/doceo/document/TA-10-2025-0057_EN.html

processes in candidate states and negatively impact the credibility of the adopted enlargement agenda overall.

Second, the accent was put on the need to use the existing situational context as a window of opportunity for introducing changes that would enable the EU institutional system to be efficient in the post-enlargement stage. This primarily referred to the ongoing debate on increased competences for the European Parliament and broadening the supranational dimension of European integration overall. In this regard, the European Parliament argued for the need to increase EU actorness globally, based on the EU values-driven approach described in the 2024–2029 Strategic Agenda. In fact, the Strategic Agenda adopted by the European Council members included a similar message on enlargement and support for Ukraine, was promoted by the European Parliament not only since February 2022 but also prior to the full-scale Russian invasion of Ukraine.[29]

Even though the initial EU response to Russia's illegal invasion of Ukraine was seen as a domination of the intergovernmental dimension in the decision-making process,[30] the further stages of building a reaction strategy illustrated the political will of supranational and intergovernmental institutional actors to speak with one voice on the matter. This underlines the consolidating impact of the new geopolitical context on the EU's diplomatic capacity to build consensus among its member states and supranational institutions, i.e. European Commission and European Parliament. Indeed, this ability to avoid domestic divisions remains crucial for strengthening the EU's diplomatic potential on the global stage.[31]

5. CONCLUSIVE REMARKS.

This study presents arguments in favour of the positive verification of the research assumption stating that the political will of EU institutions to maintain the consensus on Ukraine's accession as a pragmatic interest of the EU has become a defining factor for facilitating efficient democratization reforms in Ukraine in times of war. The analysis of the state of EU intergovernmental and supranational agreement on Ukraine's membership prospects in the 2022–2024 period shows

29 ZHELTOVSKYY, Vadym, "The European Parliament as Transformational Actor toward the Reconsideration of the EU Eastern Policy", *Politics in Central Europe,* vol. 18, no. 4, pp. 661-679. DOI: 10.2478/pce-2022-0027.

30 GENSCHEL, Philipp, LEEK, Lauren, WEYNS Jordy, "War and integration. The Russian attack on Ukraine and the institutional development of the EU," *Journal of European Integration* 45, issue 3, 2023, pp. 343-360, https://doi.org/10.1080/07036337.2023.2183397

31 PISKORSKA, Beata, "The European Union as a Diplomatic Actor in Turbulent Times". *Studia Europejskie - Studies in European Affairs*, 1/2025, pp. 209-230. DOI: 10.33067/SE.1.2025.11.

the vivid consolidating impact of the issue on inter-institutional cooperation among the three main institutions, i.e. European Council, European Commission and European Parliament. This consensus has had direct implications for the accession process of Ukraine leading to opening the negotiation stage and political declarations on readiness to open six negotiating chapters in 2025.

Furthermore, the new situational context caused by Russia's war on Ukraine led to unprecedented implications for institutional cooperation between the EU and its Ukrainian counterparts. Despite the ongoing Russian military aggression against the country, key Ukrainian institutions, i.e. parliament and the cabinet of ministers approached the Ukraine's accession to the EU as a priority on the foreign policy agenda. This resulted in a rapid change of the status quo in EU-Ukraine bilateral relations, from a lack of membership prospects at the beginning of 2022 to the declared plans for the ongoing negotiations stage. The tempo and scale of European integration of Ukraine going forward will be largely defined by the political component. On one hand, the stability of political consensus on Ukraine's EU membership among EU institutions while, on the other, the bilateral EU-Ukraine political will to efficiently work on cluster negotiation in the accession process.

RULE OF LAW AND THE TEMPTATION OF ILLIBERALISM: THE CASE OF EASTERN EUROPE

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SUMMARY: 1. RULE OF LAW. DEFINITION AND CHARACTERISTICS. 2. ILLIBERALISM, CONCEPT AND PARADIGM. 3. TENSIONS BETWEEN THE RULE OF LAW AND ILLIBERALISM. 4. ILLIBERAL TRENDS IN EASTERN EUROPE. 5. ILLIBERAL TRENDS IN ROMANIA. 6. CONCLUSIONS.

1. RULE OF LAW. DEFINITION AND CHARACTERISTICS.

The rule of law is one of the most important values of political modernity. The functioning of democracy in the European Union is inconceivable without the rule of law, which guarantees the uniform application of the law in the member states and respect for human rights. It is only within the rule of law that citizens' rights can be respected and institutions can operate impartially, respecting only the law and not depending on arbitrary will. The European Commission sees the rule of law as the common thread that binds together the states of the European Union, states with different identities and traditions. According to the

European Commission, "the essence of the rule of law is the same in all member states and can be defined on the basis of six principles: legality – which implies a transparent, accountable, democratic and pluralistic law-making process; legal certainty; the prohibition of arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, with effective judicial review, including respect for fundamental rights; separation of powers; and equality before the law".[1]

Traditionally, the concept of the rule of law is linked to classical liberalism, which considers that political power should be limited by the individual rights of citizens. The values of the rule of law are the values of liberalism, "such as the effective protection and realisation of human rights and governing in a way that promotes a social coexistence in which the state acts for the individual and not vice versa".[2]

According to a minimalist definition, the rule of law refers to a state in which the law reigns supreme and no one is above it. In English, 'rule of law' designates the very name of the form of the state, which is signified in the same way by the expressions in French, *état de droit*, and in German, *Rechtsstaadt*. The rule of law is opposed to the rule of blind force or the whim of the person in power. In a state governed by the rule of law, the law must be public, define precisely what is prohibited, be impartial in its content and application, and must not be applied retroactively. Respect for citizens' rights is also a prerequisite for the rule of law, but for laws to be effective, people are needed to enforce them. Laws do not govern by themselves, political power governs through them. If people were not driven by certain passions they would obey the laws by themselves, and then we could say that the laws are the element that rules. Since this is not the case, however, a sovereign power must be used to ensure – by force, if necessary – that the laws are obeyed. Civil law intervenes as "a complex legal system which must guarantee the binding nature of its own rules; it plays the role of disciplining human actions".[3] Civil law enshrines "the fulfilment of agreements and the giving to each his due".[4] Civil law is therefore a useful law because it regulates relations between people. It is based on the concrete power of sovereignty, which functions as the impersonal source of the legislative act.

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1 European Commission, What is the Rule of Law, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/what-rule-law_ro

2 DRINÓCZI, Timea, BIEŃ-KACAŁA, Agnieszka, "Illiberal constitutionalism and the European Rule of Law" in DRINÓCZI, T., BIEŃ-KACAŁA, A. eds., *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union*, Routledge, NY, 2021, p. 5.

3 FOISNEAU, Luc, *Politique, Droit et Théologie chez Bodin, Grotius et Hobbes*, Kimé, Paris, 1997, p. 23.

4 HOBBES, Thomas, *Leviathan*, chap. XXI, Cambridge University Press, 1904, p. 140.

Laws are necessary so that people know what is allowed and what is forbidden. Only through them can we distinguish between what is just and unjust. A law is binding only in so far as it is known. For this, two conditions must be met: the laws must be clear, and they must be public, i.e. all citizens must be able to know them. Given that "laws are the rules of justice and injustice, nothing can be considered unjust unless it is contrary to a law",[5] it follows that everything that is not prohibited by law is authorised.

The rule of law is a liberal concept, and it is hard to imagine that it can exist outside liberal democracy and what it entails: fundamental rights and freedoms, separation of powers, independence of the judiciary, constitutionalism.

2. ILLIBERALISM, CONCEPT AND PARADIGM.

Illiberalism, a concept that has expanded conceptually and politically in the 21st century, is a form of government that undermines the essential principles of liberal democracy, such as the rule of law, equality and individual freedoms. Illiberalism does not reject the rule of law altogether, but uses it to justify abuses, in a process called "legal despotism".[6] According to Kauth and King, "Illiberalism represents either an opposition to procedural democratic norms – as disruptive illiberalism – or an ideological struggle termed ideological illiberalism".[7] This is not only a democratic regression, but also an ideological form of rejection of pluralism and intermediary institutions that mediate popular will.

To define illiberalism as a deviation from liberal ideology is more than simplistic. We know that liberal ideology can only exist in a democratic political regime, which links the two (liberalism and democracy) inextricably. We cannot conclude from this that illiberalism means the absence of democracy; quite the contrary. The problem lies in the way democracy is understood in liberalism and illiberalism. If, in the first situation, democracy cannot exist if the rights of individuals are not respected, irrespective of any ethnic, gender, racial, etc. differences; in the second situation democracy is understood in its classic sense of the power of the many, an excess of democracy, which is tantamount to popular tyranny.

Liberal democracy is based on the existence of fundamental individual rights and freedoms, but it is also inconceivable without legal rules and procedures; in illiberal democracies, by contrast, procedures are not properly

5 *Ibid*, chap. XXVI, p. 173.

6 SAJO, Andras, "The Rule of Law as Legal Despotism: Concerned Remarks on the Use of Rule of Law in Illiberal Democracies", *Hague Journal on the Rule of Law*, 11, 371-376, 2019, p. 371.

7 KAUTH, Jasper Theodor, KING, Desmond, "Illiberalism", *European Journal of Sociology*, 61(3), 365-405, 2021, p. 367.

respected. An important characteristic of the rule of law is the separation of powers in the state, and their independence, with particular attention being paid to the independence of the judiciary. In a liberal democracy where the rule of law reigns, justice can only be independent, because this is the only way that ensures that laws and legal procedures are implemented and respected by everyone. If we refer to illiberalism, an important characteristic of it is precisely the attempt to limit the independence of justice and to subdue it to the will of the majority. Illiberalism is a form of capturing democracy by democratic means. Although elections continue to take place, independent institutions are undermined and "formal constitutional review survives on paper, but its power is limited".[8] A hybrid regime emerges, in which democratic norms are perverted to entrench the rule of a majority loyal to the ruling elite. As Halmai states "democratic backsliding is not a proof of the failure of liberal democracy altogether, as illiberal leaders and their court ideologues want people to believe".[9] On the contrary, these regimes manipulate democratic discourse to legitimise themselves but they exclude the liberal essence of democracy: respect for minorities, fundamental rights and separation of powers. Illiberal trends should not be understood as mere deviations but as articulated ideological alternatives that offer a coherent vision of power, order and sovereignty. As Smilova shows, these political projects capitalise on disillusionment with the performance of liberal democracy and they reconstruct legitimacy around a radicalised version of popular sovereignty. Illiberalism thus presents itself not as a rejection of democracy, but as a "democratic illiberalism" that preserves elections but undermines the rule of law and minority rights.[10] Illiberalism also manifests itself in the emergence of "defective" forms of democracy, as Khoma and Vdovychyn point out: "defective democracies formally reproduce the institutional design of western democracies, while giving a different substance to it".[11] These regimes mimic pluralism and use institutions to suppress civil liberties, limit the independence of the judiciary, and control public discourse.

At the institutional level, illiberalism does not mean the abolition of democracy, but a reconfiguration of it: elections remain, but the institutions of control (constitutional courts, the press, civil society) are stripped of their power.

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8 SAJÓ, Andras, TUOVINEN, Juha, "The Rule of Law and Legitimacy in Emerging Illiberal Democracies", *OER*, 4, pp. 506-516, 2018, p. 511.

9 HALMAI, Gabor, "Illiberalism in East-Central Europe", in SAJÓ, Andras, UITZ, Renata, & HOLMES, Stephen (Eds.), *Routledge Handbook of Illiberalism*, Routledge, 2019, p. 3.

10 SMILOVA, Ruzha, "The Ideational Core of Democratic Illiberalism", in SAJÓ, Andras, UITZ, Renata, & HOLMES, Stephen (Eds.), *Routledge Handbook of Illiberalism*, Routledge, 2021, pp. 177-202.

11 KHOMA, Nataliya, VDOVYCHYN, Ihor, "Illiberal democracy as a result of liberal democratic regression in Central and Eastern European countries", *European Journal of Transformation Studies*, 9(1), 58-71, 2021, p. 60.

We are thus witnessing a form of "constitutional majoritarianism" that mimics popular legitimacy and neutralises real pluralism.[12]

Constitutionalism is another important feature of the rule of law. In fact, any constitution provides for individual rights and freedoms, the functioning of the state and the legal procedures that are fundamental components of the rule of law. The most important defining characteristic of the rule of law is derived from constitutionalism, namely the existence of a set of procedures and decisions laid down by the constitution, on the basis of which the state is governed. The importance of this characteristic is reflected in the very name of 'rule of law'. These procedures are characterised by the fact that they are stable, durable over time and do not change whenever the parliamentary majority changes. Decision-making procedures concern the relationship between the powers of the state and the way they function. Illiberal constitutionalism is not a mere procedural deviation but a coherent ideological project that rejects liberalism as a democratic foundation. Halmai believes that "there is no such a thing as an 'illiberal or anti-liberal democracy",[13] and that so-called "illiberal constitutionalism" is essentially a form of authoritarianism that instrumentalises democratic institutions to eliminate the separation of powers, the independence of the judiciary, and fundamental rights.

3. TENSIONS BETWEEN THE RULE OF LAW AND ILLIBERALISM.

In the case of illiberalism, the political power, particularly the executive authority, tries to impose exceptional procedures that violate the proper functioning of the constitution and constitutional procedures. In this sense, one of the characteristics of today's illiberalism is the tendency to govern by means of emergency ordinances (decrees). In Romania, according to the Constitution, these can only be adopted in "extraordinary situations, the regulation of which cannot be postponed, and which must state the reasons for the urgency in their content".[14] However, between 1 September 2023 and 1 October 2024 the Romanian Government issued almost 178 emergency ordinances, despite having a parliamentary majority. If we make a simple calculation, we see that during the aforementioned period a legislative act that could not be postponed was issued,[15] approximately every two days, Government ordinances are often

12 HALMAI, Gabor, "Illiberalism in East-Central Europe", *EUI Working Paper LAW*, 2021, pp. 1-39.

13 HALMAI, Gabor, "Illiberalism in East-Central Europe", in SAJÓ, Andras, UITZ, Renata, & HOLMES, Stephen (Eds.), *Routledge Handbook of Illiberalism*, Routledge, 2019, p. 2.

14 Romanian Constitution, art. 115, https://www.cdep.ro/pls/dic/site.page?id=339

15 CORNEA Ovidiu, "How the government bypasses the legislature, even though it has a majority", *Europa Liberă România*, 1.XI.2024, https://romania.europalibera.org/a/o-ordonanta-de-

obvious acts of abuse of power. For example, in February 2020, Romania's government at that time adopted 25 emergency ordinances in a single day, thus substituting the parliament. Moreover, some of the laws adopted were already under parliamentary debate.[16] But perhaps the best-known example of this is GEO 13/2017, also known to the Romanian public as "the night-like thieves" because it was adopted in the late evening of 31 January, presented at a press conference at 10 p.m. and published in the Official Gazette almost immediately. The ordinance was aimed at amending and supplementing the Criminal Code and the Code of Criminal Procedure in order to adopt measures that would leave certain acts of corruption unpunished. Invoking a 2016 European Parliament directive on strengthening certain aspects of the presumption of innocence, as well as the need to include several Constitutional Court decisions in the penal codes, and taking into account the overcrowding in prisons, the ordinance was basically redefining corruption. It abolished penalties for minor acts of corruption, decriminalised negligence at work or abuse of office if the damage caused was less than 200,000 *lei* (about 45,000 euros), while prison sentences for damages of more than 200,000 *lei* could be offset by a fine. In the situation of restriction of the rights of persons belonging to minorities or vulnerable groups, the penalty was reduced from two to seven years to one month to one year. But the most important change introduced by Ordinance 13 was that abuse of office no longer applied in the case of the enactment of normative acts (laws, county council decisions, mayoral provisions). This meant, in practice, that legislators would be above the law, which further translates into the idea that they could adopt abusive laws without being held accountable, which obviously raises questions about the existence of the rule of law in Romania.[17] Of course, the measures provided for by the ordinance were intended to favour political figures accused – and even convicted – of corruption, as was the case with the president of the Social Democratic Party, the ruling party at the time. The citizens' reaction, however, was not long in coming, despite the cold weather and the late hour at which the adoption of the ordinance was announced. People mobilised and protests took place all over the country, starting on the night of 31 January 2017, and they continued across the country in the following days, eventually leading to the repeal of the GEO 13 on 5 February 2017.

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urgenta-la-doua-zile-cum-ocoleste-guvernul-forul-legislativ-desi-are-majoritate/33181937.html

16 What the People's Advocate says about the 25 GEOs of the Orban Government: a serious offence, *Ziarul financiar,* 5.02.2020, https://www.zf.ro/politica/ce-spune-avocatul-poporului-despre-cele-25-de-oug-uri-ale-guvernului-orban-o-grava-abatere-vom-sesiza-la-ccr-18795393

17 Government of Romania, Emergency Ordinance No 13/2017 amending and supplementing Law No 286/2009 on the Criminal Code and Law No 135/2010 on the Code of Criminal Procedure https://lege5.ro/Gratuit/ge2dqmrrgyya/ordonanta-de-urgenta-nr-13-2017-pentru-modificarea-si-completarea-legii-nr-286-2009-privind-codul-penal-si-a-legii-nr-135-2010-privind-codul-de-procedura-penala

Illiberal regimes maintain the appearance of legality but manipulate the legal system to protect the interests of the ruling elite and eliminate opposition. Thus, "cheating by the state makes the subjects of the illiberal realm complicit in this cheating".[18] In this context, the law is no longer a guarantor of freedom, but a vehicle for arbitrary domination.

Sajó and Tuovinen note that "the rule of law is regularly reduced to legalism", allowing the protection of partisan interests within an apparent procedural conformity.[19] Although formal standards are maintained, the substance of the rule of law is eroded, especially by limiting judicial review and subordinating the courts.[20]

The tension between illiberalism and the rule of law becomes even clearer in Krygier's approach, which shows that the rule of law is not just a set of institutions or rules but implies a legal culture designed to temper the arbitrary exercise of power.[21] Illiberalism defies this ideal by promoting a style of government that is arbitrary, unpredictable and disrespectful of citizens. The rule of law, in its deepest sense, is a cultural and institutional solution to the age-old problem of abuse of power; therefore, where this goal is abandoned, we refer to a structural, not just a procedural, degradation.

In illiberal democracies the lack of respect for the law and legal procedures can be identified in the frequent modification of the law and the changing of the rules, often even during the 'match'. For example, during the first suspension of President Traian Basescu in 2007, when the Romanian population was called to a referendum, the Parliament changed the rule on considering the majority needed to dismiss the president ad hoc during the time the president was suspended, and after the date of the referendum was set. Thus, on 19 April the president was suspended by the parliament and the date for the referendum set at a maximum deadline of 30 days, i.e. 19 May, which fell on a Saturday in 2007, a day of the week on which no elections had ever been held before. The rule in Romania is to call the population to the polls on Sundays to allow for a larger turnout, given that a large part of the working population works on Saturdays. This is corroborated by the fact that, at the beginning of May, Article 10 of Law 3/2000 on the organisation and conduct of referendums was amended, stipulating that the President shall be dismissed if the proposal for dismissal receives half plus one of the votes cast in the referendum. The initial version of the law stipulated that "the dismissal

18 SAJÓ, Andras, "The Rule of Law as Legal Despotism: Concerned Remarks on the Use of Rule of Law in Illiberal Democracies", *Hague Journal on the Rule of Law*, 11, 371-376, 2019, p. 373.

19 SAJÓ, Andras, TUOVINEN, Juha, "The Rule of Law and Legitimacy in Emerging Illiberal Democracies", *OER*, 4, 506-516, 2018, p. 507.

20 *Ibid*, p. 511.

21 KRYGIER, Martin, "Illiberalism and the Rule of Law", in SAJÓ, Andras, UITZ, Renata, & HOLMES, Stephen (Eds.), *Routledge Handbook of Illiberalism*, Routledge, 2021.

of the President of Romania shall be approved if the majority of the votes of the citizens registered in the electoral rolls are in favour".[22] Although adopted only two weeks before, the new provision was applied in the 19 May elections.

The rule of law presupposes a few rules, announced in advance, which everyone knows: "nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[23]

Illiberalism is defined as a critical reaction to liberalism[24] directed against both liberal theories and liberal societies. This critique often implies an erroneous generalisation: illiberals treat liberalism as a unitary and coherent phenomenon, ignoring the diversity of liberal traditions (social, classical, neoliberal, etc.) and targeting the fundamental values of political liberalism: human rights, justice, equality, the rule of law, multiculturalism, and tolerance.[25] This vision is rejected in favour of a model based on identity, ethnic or religious cohesion, and concentrated authority. Illiberalism challenges the idea that liberal democracy must limit the power of the majority and protect minorities. Instead, it promotes the idea of unlimited popular sovereignty, often mediated by a charismatic leader who claims to be the authentic voice of the people. "The illiberals are all antidemocrats – who delegitimise representative democracy's normative foundation; nativists, who protect the interests of the native- born against those of immigrants; and populists, referring to the "pure people" against the "corrupt elite".[26]

4. ILLIBERAL TRENDS IN EASTERN EUROPE.

When we talk about illiberalism in Eastern Europe, we think primarily of Hungary and Poland, but a clear slide towards illiberalism is also evident in Romania, and not only recently. In Hungary, a parliamentary republic,

22 Law No 3 of 22 February 2000, *Journal of Laws* No 84 of 24 February 2000, https://legislatie.just.ro/Public/DetaliiDocumentAfis/21139

23 Hayek, Friedrich A., *The Road to Serfdom*, Routledge, N.Y., 2006, p. 75.

24 SMILOVA, Ruzha, "The Ideational Core of Democratic Illiberalism", in SAJÓ, Andras, UITZ, Renata, HOLMES, Stephen (Eds.), *Routledge Handbook of Illiberalism*, Routledge, 2021.

25 HALMAI, Gabor, "Illiberalism in East-Central Europe", *EUI Working Paper LAW*, 2021, pp. 1-39.

26 *Ibid*, p. 814.

Prime Minister Viktor Orbán declared in 2014 that "the new state that we are constructing in Hungary is an illiberal state, a non-liberal state".[27] This "illiberal state" does not explicitly deny freedom but refuses to place it at the centre of state organisation, replacing it with a nationalist vision of the political order. As Halmai shows, this illiberal orientation is legitimised by a reinterpretation of popular sovereignty and national identity which replaces the universal principles of the rule of law with a 'Christian liberty' defined in opposition to liberal individual liberty.[28] The Prime Minister's decisions are justified by the popular support he enjoys. Clearly, it is the proliferation of populism that illiberals use to outmanoeuvre their political opponents, i.e. all those who rely on rule of law procedures. Populism plays a central role in the process of illiberalisation. Bugaric defines populism as an ideology that "considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite'".[29] This vision leads to the rejection of intermediate liberal institutions such as constitutional courts or independent media, perceived as obstacles to the direct expression of the popular will.

Illiberalism is conservative, relying on nationalist/religious ideas to win the adherence of the masses, advocating the violation of the rights of people considered deviant in the traditionalist vision (LGBTQ+ community, ethnic/religious minorities, etc). For example, the ban on abortion in Poland in 2020 is a violation of a fundamental human right in the liberal sense, namely the right of the individual to make their own decision about what happens to their body. Likewise, the referendum in Romania, organised in October 2018 to define the family restrictively through the Constitution, is an example of an illiberal attempt; it was blocked by civic non-participation. Initiated by the Coalition for the Family, with the support of the Romanian Orthodox Church and the Romanian government, the endeavour sought to amend Article 48 of the Constitution to restrict the definition of marriage to the union between a man and a woman. Although the mechanism used – referendum – is a democratic one, the underlying intention was to legally enshrine the exclusion of sexual minorities, defined in specialised literature as 'ideological illiberalism', the promotion of traditional norms and hierarchies through majoritarian means.[30] Although it was not explicitly proposed to ban other forms of cohabitation, the symbolic and legal effect would have been restrictive. The campaign was accompanied

27 PECH, Laurent, SCHEPPELE, Kim Lane, "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, 1-45, 2017, p. 1.

28 HALMAI, Gabor, "Illiberalism in East-Central Europe", in SAJÓ, Andras, UITZ, Renata, & HOLMES, Stephen (Eds.), *Routledge Handbook of Illiberalism*, Routledge, 2019, p. 4.

29 BUGARIC, Bojan, "Populism, liberal democracy and the rule of law in Central and Eastern Europe", *Communist and Post-Communist Studies*, 41(2), 191-203, 2008, p. 192.

30 LARUELLE, Marlene, "Introduction: Illiberalism studies as a field", *The Oxford handbook of illiberalism*, 2023, p. 2.

by conservative and manipulative messages, promoting the fear of "gender ideology" and moral decline, central to illiberalism's cultural strategies.[31] The failure of the referendum, due to a turnout of only 21.1% (below the 30% validation threshold), marked a significant moment of civic resistance against an attempt to normalise an illiberal framework in Romania. Analyses in the national and international press interpreted the result as a failure of the government and a symbolic defeat of the alliance between the state and the Church in promoting a conservative agenda.[32] From the conceptual perspective offered by Laruelle,[33] such initiatives reflect illiberal tendencies to instrumentalise majoritarianism to exclude minorities, appealing to traditional identities and moralising discourses. However, in this case Romania avoided slipping into a consolidated illiberal framework, precisely thanks to the strategic passivity of the citizens who refused to legitimise an exclusionary initiative by not voting.

The evolution towards illiberalism follows a repetitive pattern, well documented in the specialised literature. Pech and Scheppele provide a reconstruction of the steps by which rule of law backsliding takes place: the intentional degradation of the rule of law by capturing independent institutions, manipulating the constitutional order, and rewriting electoral rules to preserve power.[34] This development is fuelled by a combination of factors: economic or representational crises, disillusionment with liberal systems and the emergence of charismatic leaders who promise to "restore" the popular will.

Illiberal and authoritarian tendencies are on the rise nowadays both in states with younger and more fragile democracies and in those with a solid democratic tradition. In the United States, the assault on the Capitol in January 2021 can only be interpreted in an illiberal vein. President Donald Trump's repeated claims of electoral fraud in the 2020 elections culminated in the rally organised in his support in Washington on the morning of 6 January, when the

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31 SHEPHERD, Robert, *Beyond illiberalism: Rights, rhetoric, and reality in a pluralistic world*, Routledge, 2025.

32 Digi24, 2018a, October, Why did the referendum fail? C.T. Popescu's point-by-point analysis. https://www.digi24.ro/fara-categorie/de-ce-a-esuat-referendumul-analiza-pe-puncte-a-lui-c-t-popescu-1009817

Digi24, 2018b, October 7, International press on the referendum in Romania: "A blow for the government", https://www.digi24.ro/fara-categorie/presa-internationala-despre-referendumul-din-romania-romania-intoarce-spatele-referendumului-o-lovitura-pentru-guvern-1009818

HotNews, 2016, October 20, Coalition for the Family announces the collection of more than 3 million signatures to amend the Constitution,https://www.hotnews.ro/stiri-esential-21384420-coalitia-pentru-familie-anunta-strangerea-peste-13-milioane-semnaturi-vederea-modificarii-constitutiei.htm

33 LARUELLE, Marlene, "Introduction: Illiberalism studies as a field", *The Oxford handbook of illiberalism,* 2023.

34 PECH, Laurent, SCHEPPELE, Kim Lane, "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, 1–45, 2017, p. 7

US president incited the masses to riot and urged participants to go to the Capitol to "win the country back", ultimately leading to the assault on Congress, one of the most representative institutions of American democracy. The protesters disrupted the joint session of Congress, convened to count Electoral College votes and validate the victory of Democratic Party candidate Joe Biden in the 2020 elections, and occupied the building for several hours, engaging in vandalism and assaults against congressmen and officials of the institution. As Crothers and Burgener argue "the attack as having been motivated by populism" and "The January 6 insurrection was an extraordinary attack on American democracy".[35] We can therefore argue that the trend towards illiberalism is not only regional or transitory. Referring to consolidated democracies, Kauth and King point out that "practices such as the casual abrogation of citizenship... all reek of illiberalism".[36] The phenomenon cuts across classic ideological divides, being used by both right-wing and left-wing actors to discredit opposition or justify exceptional measures.

As for Eastern Europe, the current historical contexts make it difficult to approach the concept of the rule of law in countries where the slide towards illiberalism is obvious, such as Hungary and Poland, but also Romania. Moreover, the experience of communism in these countries already made the rule of law impossible for 45 years. It is common knowledge that in countries characterised by a lack of solid democratic traditions, authoritarianism is much easier to establish.

Krzywosz-Rynkiewicz and Kennedy point out that the process of "de-Europeanisation" reflects a retreat of democratic values in Central and Eastern Europe, a phenomenon that particularly affects the younger generations, who acutely feel the dissonance between the initial promises of democratic transition and the economic and political reality.[37] Young people in the CEE show political apathy, distrust of institutions and low civic engagement, a symptom of the fragility of education in citizenship and the erosion of democratic culture. Illiberalism leads to the consolidation of a 'pseudo civil society' that legitimises authority, attacks minorities and promotes radical narratives.[38] Moreover, as Kennedy notes, the future of democracy in the region reports to building

35 CROTHERS, Lane, BURGENER, Grace, "Insurrectionary Populism? Assessing the January 6 Attack on the US Capitol", *Populism,* 4(2), Oct 2021, p. 129

36 KAUTH, Jasper Theodor, KING, Desmond, "Illiberalism", *European Journal of Sociology*, 61(3), 365-405, 2021, p. 366.

37 KRZYWOSZ-RYNKIEWICZ, Beata, KENNEDY, Kerry J., "De-Europeanisation, populism and illiberalism: Young people and democracy in Central and Eastern Europe", in KRZYWOSZ-RYNKIEWICZ, Beata, KENNEDY, Kerry J. (Eds*.) Reconstructing Democracy and Citizenship Education*, Routledge, 2022, pp. 1-11.

38 KHOMA, Nataliya, VDOVYCHYN, Ihor, "Illiberal democracy as a result of liberal democratic regression in Central and Eastern European countries", *European Journal of Transformation Studies*, 9(1), 58-71, 2021, p. 62.

new social coalitions and activating citizens' capacity for agency, especially through deep and participatory civic education.[39] Such an approach can counter authoritarian tendencies and rebuild trust in democratic processes. At the same time, the data collected by the authors in various CEE countries confirm the existence of marked differences in young people's understanding and valorisation of democracy, with their civic engagement manifesting itself in social forms (volunteering, environmental activism) rather than in political participation per se. The European Union, although it has reacted through formal mechanisms (such as Article 7), is perceived as ineffective, and illiberal regimes have managed to adapt to external demands while maintaining a democratic façade. As Sajó and Tuovinen note, "formal constitutional review survives on paper, but its power is limited".[40]

The transition from liberalism to illiberalism is not always abrupt or visible. Glasius proposes an understanding of illiberalism as a set of practices that affect the dignity and autonomy of the individual, rather than a mere ideology.[41] These practices include systematic violations of equality before the law, intimidation of civil society and the marginalisation of minorities. In Eastern Europe these practices often manifest themselves in digital surveillance, restrictive legislation for NGOs, and sustained campaigns against independent media.

The Balkan region's past and present, as Sotiropoulos (2021) observes, confirm that regimes labelled 'illiberal' sometimes maintain democratic institutions as a façade, but the circumvention of the rule of law is systematic. In these cases, what persists is not liberal democracy but an authoritarian-competitive hybrid that undermines pluralism, captures institutions, and marginalises opposition. Also, the incomplete influence of the European Union, accompanied by clientelism and endemic corruption, has allowed the consolidation of these regimes, even in countries that are already members, such as Romania or Bulgaria.[42]

The illiberal regimes in the Western Balkans are often categorised as 'competitive authoritarianism', where pluralism is suppressed, justice is politically influenced, the media is captured, and opposition is reduced to a symbolic role. These regimes keep democratic institutions in the shadows but use subtle instruments of control to block any real alternative to power. The transition

39 KENNEDY, Kerry J., "Democracy's future in Central and Eastern Europe: Building coalitions, enhancing agency", in KRZYWOSZ-RYNKIEWICZ, Beata, KENNEDY, Kerry J. (Eds.), *Reconstructing Democracy and Citizenship Education*, Routledge, 2022, pp. 194-205.

40 SAJÓ, Andras, TUOVINEN, Juha, "The Rule of Law and Legitimacy in Emerging Illiberal Democracies", *OER*, 4, 506-516, 2018, p. 511.

41 GLASIUS, Marlies, "Illiberal Practices", in SAJÓ, Andras, Uitz, RENATA, & HOLMES, Stephen (Eds.), *Routledge Handbook of Illiberalism*, Routledge, 2021, pp. 339-350.

42 SOTIROPOULOS, Dimitri A., "The Balkans", in SAJÓ, Andras, UITZ, Renata, & HOLMES, Stephen (Eds.), *Routledge Handbook of Illiberalism*, Routledge, 2021, pp. 796-812.

to this type of regime is not externally imposed but is the result of deliberate strategies by local elites, fuelled by nationalism, populism and patronage networks. Justice is instrumentalised and the independent press is often silenced or marginalised. These forms of governance reflect a contextualised adaptation of illiberalism, with local political culture and historical trajectory shaping its practical application.[43]

The post-communist democratic transformation in Central and Eastern Europe has been characterised by a focus on economic efficiency at the expense of civic participation and the strengthening of a constitutional culture.[44] In the absence of a solid entrenchment of democratic and liberal values, a space was left open for the emergence of illiberal regimes, which exploited historical dissensions and contemporary crises. Bugaric emphasises that although progress has been made in electoral democracy, "constitutional liberalism and the rule of law still remain weak".[45]

In Poland and Hungary, attacks on constitutional courts have been accompanied by rhetoric legitimising executive interventions by invoking national sovereignty and restorative justice. In these cases, "popular legitimation often prevails against fundamental cultural conventions of the rule of law."[46] This "illiberal legality" is sufficient to maintain the appearance of international compliance, especially with the EU, but it does not fulfil the requirements of a genuine rule of law. Moreover, in these two countries illiberalism has established itself not only as a set of practices but also as a hegemonic discourse. It is reinforced through cultural and religious mobilisation – the use of traditional religion, culture war themes (gender, migration), and a narrative of collective historical victimisation that justifies authoritarian policies.[47]

Although Balkan constitutions do not formally deny human or minority rights, and protests and elections continue to take place, liberal institutions "are not central to exercising (or limiting) political power" and are not inspired by a genuine liberal culture.[48]

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43 *Ibid*.

44 HALMAI, Gabor, "Illiberalism in East-Central Europe", *EUI Working Paper LAW*, 2021, pp. 1-39.

45 BUGARIC, Bojan, "Populism, liberal democracy and the rule of law in Central and Eastern Europe", *Communist and Post-Communist Studies*, 41(2), 191-203, 2008, p. 191.

46 SAJÓ, Andras, TUOVINEN, Juha, "The Rule of Law and Legitimacy in Emerging Illiberal Democracies", *OER*, 4, 506-516, 2018, p. 508.

47 HALMAI, Gabor, "Illiberalism in East-Central Europe", *EUI Working Paper LAW*, 2021, pp. 1-39.

48 SOTIROPOULOS, Dimitri A., *The Balkans*, in SAJÓ, Andras, UITZ, Renata, & HOLMES, Stephen (Eds.), *Routledge Handbook of Illiberalism*, Routledge, 2021, p. 796

5. ILLIBERAL TRENDS IN ROMANIA.

The establishment of communist regimes and popular democracies in the countries of Central and Eastern Europe meant the disappearance of the rule of law in those territories. Although the Constitutions of the Romanian People's Republic of 1948 and 1952 and of the Socialist Republic of Romania of 1965 affirmed the existence of the rule of law, this, like popular democracy, was merely a pretence. In a totalitarian state in which the single communist party had absolute control over all the institutions, in turn controlled by the single ruler, the rule of law could only be a form without substance. The will of the supreme leader and the party were elevated to the rank of law. The party decided not only on economic, political and cultural matters, but also on people's personal lives: who they could marry, how many children they could have, where they could live, and even how many calories they should eat a day. The totalitarian regime in Romania was overthrown in December 1989, but unfortunately its consequences are still being felt. In societies in which people have acquired the experience of obedience, the values of liberalism are easily violated and considered to be insignificant.

The first article of the Romanian Constitution, adopted in 1991, proclaims Romania as a state governed by the rule of law in which the fundamental rights of citizens are respected and the powers of the state are separated. "Romania is a democratic and social state based on the rule of law, in which human dignity, citizens' rights and freedoms, the free development of the human personality, justice and political pluralism are supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and are guaranteed".[49] However, over the past 35 years the rule of law has been questioned very often. The development of populism, corruption, poor political socialisation and the poverty among the population have been – and remain – its greatest enemies.

Populism is a phenomenon that emerged in Romania immediately after the fall of communism. Dragoman and Ungureanu point out that "The direct appeal to 'the People' as the ultimate repository of truth was current during Nicolae Ceau escu's *Nationalkommunismus* and took new ideological shape in the post-communist period".[50]

The Great Romania Party was founded in 1991, defining itself as "a centre party, of patriotic orientation, advocating pluralism in political life and aiming to

49 Romanian Constitution, art. 1, https://www.cdep.ro/pls/dic/site.page?id=339

50 DRAGOMAN, Drago and UNGUREANU, Camil, "The Faces Of Populism In Post-Communist Romania", *CIDOB Report*, 01-2017, p. 65, https://www.cidob.org/en/publications/faces-populism-post-communist-romania.

reposition relations in society on the principles of the rule of law, constitutional democracy and social justice".[51] It is interesting how illiberal and nationalist policies use the concept of the rule of law to legitimise themselves.

The party was founded by two writers devoted to the communist regime, Corneliu Vadim Tudor, a poet, and Eugen Barbu, a prose writer. The party's ideology combined chauvinist and xenophobic nationalism with nostalgia for the communist regime and the 'superiority' of the Romanian nation. Taking advantage of the unstable economic and social situation in Romania, and of the increasing levels of poverty among the population (the poverty rate in 2000 was 44%),[52] the difficult living conditions of Romanians and high unemployment (11.8% in 1999, 10.5% in 2000),[53] the PRM managed to gain more and more followers from one year to the next, and in 2000 it sent its candidate to the presidential elections in the second round, which was a serious threat to the country's democracy. With a political programme that aimed to make food and drink cheaper, wipe out house maintenance debts, give free medicine and transport to the poor under the electoral message of "food, heat, medicine", millions of Romanians fell for his populist message and chose to vote for him and take him to the second round of the 2000 presidential elections. Twenty-four years later, the scenario has repeated itself; another presidential candidate, this time an independent, reached the second round of the elections with a similar message: "water, food, energy."

The events of the past six months in Romania only confirm the spread of illiberalism in Eastern Europe. The first round of the presidential elections in November 2024 was won by a surprise candidate with a big impact on social networks, an anti-system candidate with a strong illiberal discourse. The specific difference of the illiberalism promoted in the political discourse of this candidate and his supporters is the presence of neo-fascist tendencies through the revival of 'legionnaireism' (the form that fascism has known in Romania), without this necessarily meaning that all his followers are of a neo-fascist orientation. In fact, most of his voters have amended the political class. In an interview given in 2020, Călin Georgescu spoke of the "new nationalism" as "a global patriotism, which is needed at this time. And also the legionary movement, when the true history will be written, because the true history has not yet been written, but it will be written, will show that it was the most powerful essence and expression of health and self-will coming from the Romanian people".[54]

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51 Greater Romania Party, https://partidulromaniamare.ro/.

52 ZAMFIR, Cătălin, "Poverty situation in Romania - dimensions, sources, risk groups", in *România socială - Revistă de cultură i analiza socială*, 2001/2.

53 *Statistical Yearbook of Romania - 2000*, National Statistical Institute, p. 96.

54 Live with Dr Călin Georgescu: A supravie ui identitar, Facebook, "Association" Gogu Puiu and the Haiducii Dobrogei.

The second round of the presidential elections was scheduled for 8 December 2024, but on 6 December Romania's Constitutional Court annulled the results of the first round of elections and decided to reorganise the entire electoral process, following the consideration of the documents of the Supreme Council for the Defence of the Country, declassified by President Iohannis, which showed that the elections were flawed. Election advertising signs were not used on the candidate's promotional materials and, much worse, the financing of the election campaign was made from undeclared sources, claiming that there were no campaign costs. In May 2025, elections were rerun in Romania, with Călin Georgescu's candidacy invalidated by the Central Electoral Bureau, which considered that the cancellation of the December 2024 presidential elections due to his conduct meant that he could not run again for the Romanian presidency this time. Significantly, it took into account the candidate's attitude, which was described as "in manifest contradiction with the core values of the rule of law."[55]

Unfortunately, this has not stopped the rise of illiberalism. After the first round of the presidential elections on 4 May 2025, Romania faces a new danger of having a president with a nationalist and implicitly illiberal orientation, this time the president of the *Alian a pentru Unirea Românilor* party (the Alliance for the Romanians Unification; the Romanian acronym stands for 'gold'). In the 2024 parliamentary elections the party won 14.94% of Romanians' votes and it is the second largest party in the Romanian Parliament. According to its Statutes, the party's objectives "are exclusively political, with the aim of developing Romanian society and social cohesion, restoring national consciousness, developing the market economy, strengthening the rule of law, achieving a Greater Romania in a strong, united and fair Europe by reuniting Bessarabia with Romania and assuming a leading position on the European level, promoting the interests of Romanians everywhere, regardless of ethnicity or citizenship, by implementing the party's political programme".[56] However, there is a glaring discrepancy between its declarations and deeds. The party's president, the current presidential candidate, has been declared *persona non grata* in the Republic of Moldova and Ukraine. A totally bizarre situation is the way of dealing with Hungary, and particularly its President Viktor Orban. In the presidential debate on 8 May, George Simion declared that "there are people who do not want the good of the Hungarian communities in Romania and want to go in the same direction

55 Decision no. 18D/ 9.03.2025 on the rejection of the registration of the independent candidacy of Mr Georgescu Călin Georgescu for the elections for President of Romania in 2025, Central Electoral Bureau, for the Election of the President of Romania 4 May 2005, https://prezidentiale2025.bec.ro/decizii-privind-candidaturile-2/

56 Statute of the Political Party Alian a Pentru Unirea Românilor, https://partidulaur.ro/statut/

as Emmanuel Macron and all the globalists in Brussels, instead of going in the conservative, healthy direction, which a majority of the Hungarian people adhere to", and he also said that "many of Viktor Orban's positions will be state policy in Romania as well".[57] In reply, the next day, the Hungarian Prime Minister made statements in support of George Simion (which were later withdrawn), which only confirms the political similarity between the two in promoting illiberalism. All of this, against the background of the existence of a large Hungarian minority in Romania towards which George Simion has shown chauvinist attitudes on several occasions. If the road to illiberalism has been decided for Hungary, there remains a faint hope for Romania of a return to the true European values of democracy and the rule of law.

6. CONCLUSIONS.

Illiberalism is not just a deviation from democracy or a transient crisis of the rule of law, it is a systemic reconfiguration of the relationship between the individual, political power and the law. In the face of this transformation, institutional responses remain, for the time being, timid and ineffective, in a context in which "the proliferation inside the EU of governments that no longer share basic European values undermines the reason for existence of the EU in the first place".[58]

Illiberalism is not a mere institutional regression, but a systemic transformation that redefines the very nature of democracy and the rule of law. Although these regimes ostensibly operate within the legal framework, they undermine the values of liberal constitutionalism, reconfiguring the relationship between law, sovereignty and freedom. In this context, the defence of democracy can no longer be limited to formal mechanisms but must also include a revalorisation of the norms and political culture underpinning the rule of law.

The success of illiberal regimes is explained not only by power strategies but also by a legitimate social grievance: the failure of liberalism to deliver economic equity, genuine participation, and protection from post-transitional insecurities.

57 Live Update Video - Presidential elections 2025/ George Simion and Nicușor Dan in the first TV debate before the second round of elections, https://agerpres.ro/2025/05/08/live-update-video-prezidentiale2025-george-simion-si-nicusor-dan---la-prima-dezbatere-tv-inainte-de---1447291

58 PECH, Laurent, SCHEPPELE, Kim Lane, "Illiberalism Within: Rule of Law Backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, 1-45, 2017, p. 5.

Illiberalism takes advantage of these deficits to present a 'new social contract' centred on order, identity and belonging.[59]

59 HALMAI, Gabor, "Illiberalism in East-Central Europe", *EUI Working Paper LAW*, 2021, pp. 1-39.

PART V.
THE JUDICIARY AND THE RULE OF LAW

CONSTITUTIONAL COURTS AND THE RULE OF LAW: NAVIGATING DEMOCRATIC INTEGRITY

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SUMMARY: 1. INTRODUCTION. 2. BACKGROUND. 3. PROTECTING THE RULE OF LAW – 2024 SAGA – 1ST ATTEMPT. 4. PROTECTING THE RULE OF LAW – 2024 SAGA – 2ND ATTEMPT. 5. AFTERMATH. 6. THE VENICE COMMISSION'S TAKE ON ELECTION ANNULMENTS. 7. CONCLUSION.

1. INTRODUCTION.

It is enough that the people know there was an election. Free elections, although indispensable, are insufficient alone to sustain a constitutional democracy. History repeatedly demonstrates that democratic procedures can be manipulated to undermine democracy from within. The collapse of the Weimer Republic serves as a stark warning that democratic legitimacy does not by itself prevent the erosion of constitutional safeguards against unconstrained political manipulation and passive judicial responses. Therefore, constitutional democracy must necessarily be underpinned by robust institutions capable of sustaining the rule of law despite intense political pressures.[1] The necessity for courts – particularly constitutional courts – to act decisively in democracy's defence, while necessary, is hugely challenging in terms of legitimacy, proportionality, and the public's trust.

1 STOICA, Valeriu, "Intoleran a nu trebuie să fie tolerată", in *Dilema*, January 16, 2025, available at www.dilema.ro/tilc-show/intoleranta-nu-trebuie-sa-fie-tolerata

Romania's democratic institutions were tested towards the end of 2024. A wave of coordinated pressure – both domestic and international – was intended to capitalize on popular outrage against the political elite. Initial discontent soon gave way to profound distrust and anger. A magazine report[2] broke down the mechanics of this phenomenon: a strategic campaign of disinformation, coordinated mainly on social media, had taken hold. Through incessant repetition and expert messaging, these campaigns planted seeds of doubt in voters' minds. Familiar falsehoods, repeated often enough, came to sound like truths – truths that were eventually accepted by large segments of the electorate. This artificially created certainty opened the door to what became widely accepted as the fraudulent conduct of the presidential election's first round on 24 November 2024.

Against this tense background, the annulment of the presidential ballot by the Constitutional Court of Romania (CCR) ignited a firestorm of controversy. For some, the ruling was not only justified but necessary. In their view, a constitutional democracy owes it to itself to stand against electoral manipulation and cannot risk legitimizing transgressions against the democratic order. Under these circumstances, the CCR fulfilled its constitutional role by being a defender of democratic integrity. Others attacked the legal basis of the ruling, saying that the Court, confronted by a runaway political crisis, could have acted more from necessity than from principle of law – concluding first, and then creating its rationale. This argument embodies a fundamental dilemma facing constitutional courts: how to balance the imperative of protecting democracy in moments of crisis with the equally important need to remain rooted in legal thinking and institutional restraint.

The Court's decision is undoubtedly a clear act of militant democracy, a theory developed under the shadow of Europe's interwar instability, emphasizing pre-emptive constitutional measures to prevent democratic self-destruction. Loewenstein, the architect of the theory, envisioned a democracy that was capable of legally and constitutionally defending itself against extremism and authoritarian ambitions, with the emphasis on the notion that tolerance need only cease when confronted by active intolerance aimed at undermining

2 NICOLESCU, Răzvan, *Operațiunea "Gospodin Georgescu" de întoarcere a românilor la întuneric*, in *Financial Intelligence*, December 27, 2024, available at financialintelligence.ro/operatiunea-gospodin-georgescu-de-intoarcere-a-romanilor-la-intuneric-opinie-razvan-nicolescu/ In short: For nearly 15 years, Romanian society has been bombarded with messages portraying the country as a Western colony, its leaders as corrupt and compromised, and its resources as plundered. Narratives warn of cultural and territorial threats - multinational exploitation, foreign religious dominance, an impending war, and the loss of Transylvania or Moldova. Patriotism is framed as incompatible with European identity, while Romanians are cast as powerless and deceived.

democracy itself.[3] While tolerance is needed to facilitate mutual respect and peaceful coexistence for a multiplicity of opinions it does have boundaries, particularly when confronted by behaviour or ideologies that undermine constitutional democracy and the rule of law. Tolerance cannot be extended to those who actively endanger or reject the democratic order. Genuine toleration relies on reciprocity; it presumes a two-way commitment to democratic norms.[4] Therefore, institutions charged by the constitution with the protection of these principles not only possess the authority but also the duty to defend and preserve them against anti-democratic forces.

This "militant democracy" principle has reappeared recently at the forefront of the Constitutional Court of Romania's controversial decision nullifying the 2024 presidential elections. The record-breaking nature of this nullification was both commended and criticized, highlighting essential paradoxes embedded in the militant democracy model *per se*. One cannot overlook the irony of employing authoritarian means – such as election forfeitures or candidate prohibitions – to protect democratic ideals, an approach that paradoxically risks damaging the very democratic integrity it seeks to uphold.

Meanwhile, constitutional adjudication,[5] though necessarily political in outcome, must be substantively based on legal reasoning if it is to preserve legitimacy. The decision-making of constitutional courts has to closely track legal arguments and use an open methodology, resisting extrajudicial or political pressures even in defending democracy.

In assessing Romania's recent electoral crisis, one is compelled to review the CCR's methodology on the grounds of adherence to such standards of legality, transparency, and proportionality. The Romanian electoral annulment, based on system-wide irregularities such as digital falsification, foreign interference, and opaque funding, has raised basic questions about whether the CCR's intervention represented a legitimate example of militant democracy or an example of judicial overreach.

The Court's reactive and, on occasion, conflicting positions on several fronts indicate strengths alongside weaknesses in its approach to the defence

3 LOEWENSTEIN, Karl, "Militant democracy and fundamental rights", in *I. Am Polit Sci Rev,* no. 31, June 3, 1937, pp. 417-432.

4 FROST, Rainer, "The Limits of Toleration", in CREPPELL, Ingrid, MACEDO, Stephen (Eds.), *Toleration on Trial*, Lanham, 2008, p. 18. See also, FLETCHER, George, "The Case for Tolerance", in *Social Philosophy and Policy,* vol. 13(1), 1996, p. 230, who argues that: "not tolerating the intolerance of neo-Nazi skinheads is not itself intolerance but, rather, a matter of expressing tolerance". The discussion is obviously larger, with the paradox that toleration ends as soon as it begins: "as soon as an arbitrary limit is set by defining the intolerable and intolerant". However, this theoretical dilemma exceeds the scope of the present study.

5 GRIMM, Dieter, "Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics", in *4 NUJS L. Rev.* 15, 2011, p. 21.

of democratic integrity in the face of internal and external pressure. Previous Romanian constitutional crises, such as those concerning judicial independence and rule of law backsliding between 2017 and 2019 involve a context in which constitutional resilience was under extreme tension.[6] Moreover, the recent experience of Romanian constitutional law with supranational institutions' case law, such as the Venice Commission and the ECtHR, confirms the need for proportionality and transparency of electoral judging. Both bodies underscore that the intervention of constitutional authorities has to be rigorously last-resort (*ultima ratio*), fully justified, publicly transparent, and closely tailored to ensure the protection of the electoral process without demolishing public trust.

The Romanian case provides a necessary comparative forum for the testing of these standards in practice, especially as it intersects with broader European legal doctrines. This paper examines the annulment of Romania's 2024 presidential elections, with particular attention to the interaction between democratic legitimacy and the rule of law.

Through a synthesis of academic arguments favouring and refuting the Court's decision, the paper examines concerns regarding judicial legitimacy, proportionality, and the necessity of judicial activism in the face of systemic democratic decay. In the light of the recent recommendations from the Venice Commission, the study finally addresses the question of whether the CCR's disputed annulment served to defend or undermine Romania's constitutional order. In the process, it adds to a broader comprehension of the complex and sometimes fraught dynamic between constitutional courts and democratic government in times of political crisis.

2. BACKGROUND.

Romania has long held a strategic role in the landscape of post-communist Eastern Europe, second only to Poland in terms of regional weight and demographic influence. After the fall of Nicolae Ceau escu's brutal regime in 1989, the country's trajectory toward democracy and market reform has been anything but straightforward.[7] What followed Ceau escu's demise was a murky period where former communist elites reinvented themselves and clung to power, supported by deeply entrenched intelligence networks that had evolved from the notorious *Securitate*. Romania's transition lagged behind that of countries like

6 BERCEA, Raluca, "EU values through constitutional lenses: assessing the resilience of the Romanian Constitutional Court", in *Global Jurist*, special issue "Resilience of Constitutional Courts" (ed. by HALMAY, Gabor, KOVACS, Ágnes and STEUER, Max), volume 25, 2025 (forthcoming).

7 For a comprehensive analysis of the Romanian anti-communist revolution of December 1989, see SIANI-DAVIES, Peter, *The Romanian Revolution of December 1989*, Ithaca, N.Y., 2005.

Poland or the Czech Republic, even as its population remained firmly supportive of Euro-Atlantic integration.

Throughout the 1990s, Romania's governments only superficially embraced reforms. This changed after 1996, with the first peaceful transfer of power to a centre-right coalition. Meaningful economic and political reforms accelerated during the late 1990s, eventually leading to Romania's inclusion in NATO and the start of EU accession negotiations. This transformation came at a social cost, however, cushioned in part by large-scale emigration. Today, with around 5 million Romanians living abroad, the diaspora has grown into a political force, particularly visible in presidential elections.[8]

EU membership in 2007 marked a major milestone, but Romania's internal governance challenges persisted. Alongside Bulgaria, it was placed under the EU's Cooperation and Verification Mechanism (CVM), designed to monitor reforms in areas such as judicial independence and anti-corruption. Over time, however, as other EU members began experiencing their own rule-of-law crises, scrutiny of Romania lessened. This shift in focus allowed long-standing issues – including political interference in the judiciary and secret service overreach – to remain unresolved.

Romania's political scene has remained remarkably fragmented, even as other Central European states veered into entrenched illiberalism. Unlike Hungary's *Fidesz* or Poland's *PiS*, no Romanian party has achieved dominant power. Instead, short-lived coalitions have governed in cycles of fragile alliances. Most notably, the 2021–2024 coalition between the Social Democrats (PSD) and the Liberals (PNL) marked an uneasy marriage of former adversaries, with power-sharing at its core. While it presented an image of unity, political manoeuvring was rife behind the scenes.

A key and controversial element in Romanian politics has been the alleged influence of intelligence agencies in democratic processes. Accusations of behind-the-scenes interference, candidate grooming, and media manipulation have become common, particularly during the 2024 election cycle. These concerns are not new – they date back to Romania's post-revolutionary years – but they resurfaced with force amid mounting reports of covert involvement in the selection of presidential candidates and the strategic fragmentation of the vote.

The 2024 election year was unprecedented, not only because of the sheer number of elections packed into it (local, European, presidential, and

8 Between 2014 and 2022 alone, a period of relative prosperity and sustained economic growth compared to both the previous decade and the tumultuous 1990s, 1.88 million Romanian citizens officially left the country, according to www.statista.com/statistics/1096002/ number-of-emigrants-romania/

parliamentary) but also because of how they were managed. By merging the local and European Parliament elections in June and sandwiching the legislative elections between the two rounds of the presidential vote in November and December, the ruling coalition was widely seen as attempting to choreograph the political outcome to its advantage.

This strategy backfired dramatically, however. Voter frustration over rising inequality, lack of reform and opaque governance was compounded by widespread disinformation campaigns on social media. These campaigns, often powered by AI-generated content and aggressive messaging on platforms like TikTok, played a central role in shaping public opinion, especially among younger voters. Romania, with an estimated nine million TikTok accounts, saw its electoral debate migrate almost entirely online, a domain where traditional parties struggled to keep up.

Adding fuel to the fire, it later emerged that the major parties themselves had played a role in promoting fringe candidates. Investigations suggested that PSD had covertly aided an extremist opponent in hopes of securing an easy win in the runoff, while the PNL was accused of boosting the visibility of the radical candidate Călin Georgescu. These tactical blunders ultimately fragmented the vote in unpredictable ways and deepened the electorate's cynicism about democratic integrity.

The Constitutional Court found itself thrust into this volatile mix. Initial complaints following the first round of the presidential election on 24 November 2024 prompted the CCR to order a nationwide recount. The process was chaotic, however, and transparency was sorely lacking. While the Court initially validated the results on December 2nd, further allegations of manipulation, illegal financing, and foreign influence – including suspected cyber-interference linked to Russia – led to mounting public anxiety.

Then came the bombshell: just two days before the planned runoff, and as voting had already begun for the diaspora, the CCR announced it was annulling the entire election process. In Decision no. 32 of December 6, 2024, the Court cited serious and systemic breaches of democratic principles – ranging from lack of transparency to the unequal treatment of candidates and the spread of digital disinformation – as reasons for this unprecedented move.

The annulment shocked the nation. Critics accused the CCR of overstepping its constitutional mandate, acting *ex officio* and without granting the affected parties a proper hearing. Others defended the decision as a necessary, if dramatic, step to safeguard democracy. Legal scholars were divided: some viewed the Court's actions as aligned with the doctrine of militant democracy, while others warned of the risks of judicial overreach, especially when acting without explicit legislative backing.

Compounding the turmoil was the population's growing sense of confusion and mistrust. The overlap between the annulled presidential vote and the upcoming parliamentary elections created a surreal and unstable political environment. While pro-Western parties retained a majority, far-right forces surged and captured over 30% of the vote.[9] All the while, the state's failure to communicate clearly or credibly only deepened the sense of institutional crisis.

In this broader context, the annulment of the 2024 presidential elections cannot be understood as a standalone decision. It was the culmination of decades of unfinished reform, persistent institutional fragilities, political opportunism, and external interference. What remains to be seen is whether this moment marks the beginning of a more resilient democratic reset or the entrenchment of deeper constitutional disillusionment.

Ultimately, these events underscored the complex and perilous interplay between constitutional court interventions aimed at safeguarding democratic integrity and their unintended consequences for political stability and public trust. The CCR's proactive stance initially appeared as a commendable attempt to uphold constitutional and democratic values; however, the subsequent inconsistent application of these principles and the controversial judicial methods employed exposed significant risks inherent in expansive judicial activism. These interventions, while aimed at protecting the rule of law, paradoxically undermined the very democratic foundations they intended to preserve, highlighting the need for constitutional courts to carefully balance activism with restraint, proportionality, and procedural transparency. The Romanian crisis of 2024 serves as a potent reminder of how constitutional guardianship, when not exercised cautiously and consistently, can itself inadvertently erode public confidence, destabilize political order, and threaten the very constitutional democracy it seeks to defend.

3. PROTECTING THE RULE OF LAW – 2024 SAGA – FIRST ATTEMPT.

In its landmark ruling no. 2 of 5 October 2024, the Romanian Constitutional Court invalidated the presidential candidacy of Diana Șoșoacă, a controversial

9 Allegedly anti-system parties with an extremist discourse have existed in the past, but they have ultimately faded from the political scene. The most successful among them, the Great Romania Party, collapsed shortly before the death of its charismatic leader, while another, the People's Party, disbanded after its founder was convicted of extortion and sentenced to prison. Currently, the parties considered extremist and the primary supporters of Călin Georgescu's candidacy include the Alliance for the Unity of Romanians (A.U.R.), the S.O.S. Romania Party, and the Young People's Party (P.O.T.). The latter's unexpected success in surpassing the 5% electoral threshold is particularly striking, given that it was only recently founded and lacks a significant logistical or organizational infrastructure.

far-right figure known for her extremist rhetoric. The decision, adopted by a majority of 6 to 1 (with two judges absent), was based on an innovative interpretation of the constitutional eligibility criteria for presidential candidates. Beyond explicit constitutional requirements such as Romanian citizenship, residence, and absence of criminal convictions, the Court articulated a new set of implicit substantive conditions rooted deeply in Romania's constitutional identity, liberal democratic values, and commitment to European integration.

This decision marked a significant milestone: the Court's first explicit attempt to actively safeguard the rule of law by scrutinizing candidates' constitutional loyalty. The CCR argued that assessing candidates' adherence to foundational constitutional principles fell within its remit, specifically derived from Article 146 (f) of the Constitution, which tasks the Court with overseeing presidential election procedures. Thus, the CCR justified extending its competence to ensure candidates exhibited consistent respect for the constitutional order. According to the majority opinion, while freedom of speech allows candidates to criticise constitutional provisions, any calls or campaigns explicitly undermining fundamental democratic principles or proposing changes incompatible with the rule of law and basic human rights standards were deemed constitutionally unacceptable.

A significant aspect of the Court's reasoning was the reinforcement of Romania's irreversible commitment to EU and NATO membership. The CCR underscored that any proposed constitutional amendments aimed at reversing this strategic choice, such as a hypothetical "ROexit", would be automatically unconstitutional. Therefore, systematically employing anti-European or anti-democratic rhetoric constituted sufficient grounds for disqualification. This interpretation drew from constitutional symbolism, notably the explicit text of the presidential oath, which only mandates allegiance to constitutional order, thus providing textual legitimacy for the Court's substantial interpretative expansion.[10]

The practical application of this reasoning led directly to the invalidation of Diana Șoșoacă's candidacy. Her documented hostility towards the EU, liberal democracy, and constitutional norms rendered her, in the Court's view, fundamentally incompatible with the presidency's constitutional obligations. Only one dissenting opinion arose, highlighting the potential constitutional and procedural overreach. This judge argued that the Court had effectively granted itself powers not explicitly provided by law or the constitution, depriving Șoșoacă

10 MERCESCU, Alexandra, "The Romanian Constitutional Court doing "militant democracy" (twice and more to come)", in *Journal of Contemporary Central and Eastern Europe*, 25 March 2025, available at https://doi.org/10.1080/25739638.2025.2482401

of her electoral rights without explicit legal grounds or adequate procedural safeguards, notably the absence of an adversarial hearing.

From a broader constitutional perspective, the CCR's initiative reflected a courageous judicial stance aimed at reinforcing the rule of law, especially given Romania's troubled experience with dictatorship in the 20th century. Requiring explicit allegiance to democratic values as a prerequisite for the presidency seems intuitively justified, particularly in a country where constitutional democracy has faced periodic threats. Through this decision, the Court clearly communicated to future political candidates that fundamental rights and democratic principles are non-negotiable electoral conditions.

Nevertheless, the ruling introduced significant interpretative uncertainties despite its principled stand. The decision raised pragmatic questions about its operationalization; specifically, what precisely constitutes sufficient anti-democratic behaviour or rhetoric for the Court to intervene, and over what period? Could controversial statements from many years ago disqualify candidates, or should recent declarations only matter? Additionally, what if a candidate strategically recanted prior extremist views shortly before the electoral filing deadline? Such ambiguities highlighted the need for the legislature, or the Court itself, to establish clearer criteria and procedural standards to ensure fairness and predictability.

Moreover, the ruling's legitimacy hinged critically on consistent application. Excluding one extremist candidate while inadvertently permitting another candidate with similarly problematic rhetoric undermined public confidence. Indeed, while the Court barred Șoșoacă, it overlooked similar attitudes from candidate Călin Georgescu, whose subtler, more polished presentation masked equally troubling extremist views. This oversight was not intentional; the Court was not alerted to Georgescu's candidacy via a formal complaint, but it underscored the risks associated with selective judicial intervention. Later, it was cynically suggested that the CCR's decision inadvertently aided a third extremist candidate, George Simion, potentially reshaping electoral dynamics in unforeseen ways.

Importantly, the CCR implicitly recognized the limitations of merely procedural democracy, emphasizing instead the necessity of substantive democratic principles. By disqualifying candidates openly advocating anti-democratic positions, the Court attempted to shift political competition toward genuinely substantive issues, economic policy, governance reforms and practical democratic engagement, away from inflammatory identity politics and divisive nationalist rhetoric.

Finally, the Court's decision implicitly recognized that while emotional appeals are inherent to democratic discourse, unchecked populism and

authoritarian tendencies posed existential threats. Requiring at least declarative commitments to constitutional liberalism from presidential candidates might not guarantee democratic behaviour in office, but it set an essential baseline expectation. Mechanisms such as impeachment exist precisely to address later deviations, but preventing openly anti-democratic candidates from achieving political legitimacy in the first place is a valuable democratic safeguard.

In conclusion, this ruling represented a landmark moment in Romanian constitutional jurisprudence: the CCR's initial explicit attempt to proactively defend liberal constitutional democracy and the rule of law through candidate vetting. While questions of consistency, clarity, and potential politicization remain unresolved, the decision underscored the judiciary's vital role in preserving democratic norms. It established a significant precedent, signalling to Romanian society, and indeed, broader European constitutional practice, that certain foundational democratic commitments must remain beyond the reach of transient political agendas.

4. PROTECTING THE RULE OF LAW – 2024 SAGA – SECOND ATTEMPT.

In its second significant move to protect the rule of law, the Constitutional Court of Romania grappled with validating the contentious results of the first round of the 2024 presidential election, where Călin Georgescu, an extremist, pro-Russian candidate, unexpectedly emerged as frontrunner. Initially, despite evident apprehensions about Georgescu's unforeseen success, the Court seemed poised to uphold the democratic principle of respecting electoral outcomes. However, due to the narrow margin separating Georgescu from the pro-European candidate in second place and the third-place candidate, the incumbent Prime Minister and leader of the Social Democratic Party (PSD), the Court ordered a recount. This decision aimed explicitly at confirming the electoral rankings, knowing that any shift in placement could provide a legitimate, clear-cut reason to annul the results.

However, this procedural decision quickly spiralled into a legal quandary. The electoral authority declared it logistically impossible to complete the recount within the timeline stipulated by the CCR, forcing the Court to postpone its ruling. Eventually, a partial recount covering domestic votes satisfied the Court sufficiently to validate the first round of the election. Nevertheless, questions persisted regarding the implication of this decision on Georgescu's controversial candidacy, especially given the precedent established earlier with Diana o oacă's disqualification for similar anti-constitutional rhetoric. Observers wondered whether Georgescu's candidacy, implicitly validated through the Court's decision, could still face challenges, potentially even after the second round or in the eventuality of his victory.

The situation shifted dramatically soon after. Following revelations from intelligence documents declassified by Romania's president, in the form of documents presented to the Supreme Council for Defence of the Country (CSAT), the Court was alerted to substantial evidence of foreign interference, online manipulation via artificial intelligence, and illegal campaign financing. Even though civil society actors swiftly filed requests challenging the election based on these revelations, procedural rules rendered their submissions inadmissible. Consequently, the Court exercised a contentious *ex officio* competence, taking it upon itself to reassess the entire electoral campaign process rather than merely the legality of the vote-counting phase, as it had initially done.

This unprecedented step, although seemingly necessary, led to substantial legal debate. Critics argued that the Court failed to adequately justify its authority to intervene without an explicit legal basis.[11] By law, only candidates reaching the runoff have explicit standing to contest electoral results. Nevertheless, the Court invoked its constitutional mandate, under Article 146 (f), to oversee the presidential electoral process, broadly interpreting this provision to encompass comprehensive oversight powers. The urgency of the circumstances led to a concise, unanimously adopted ruling that was issued quickly, as voting for the second round had already commenced abroad.

In its brief yet decisive ruling (decision no. 32, December 6, 2024), the Court declared the entire electoral process fundamentally compromised due to extensive manipulation, violations of electoral law, and infringements on transparency and fairness principles. It specifically identified issues like disinformation campaigns, bot-driven propaganda, undisclosed financing, and unchecked social media manipulations. Collectively, these irregularities significantly undermined the democratic integrity of the electoral process. Despite criticisms highlighting evidentiary gaps, specifically, the absence of formal criminal convictions or fully conclusive proof, the ruling remained within plausible interpretative boundaries from a legal standpoint.

Indeed, legal reasoning in such politically charged cases rarely resembles pure logic or objective syllogism. Rather, as critical legal scholars recognize, law often involves pragmatic judgments grounded in context-specific interpretations. The CCR's decision thus exemplifies a situation where immediate and robust action was prioritized over procedural rigidity and evidential completeness. In a national security context and amidst ongoing threats to democratic integrity, demanding perfect evidential standards or procedural formalism could arguably have endangered the democratic order itself.

11 CARROZZINI, Alina, "Shooting Democracy in the Foot?: The Romanian Constitutional Court's Annulment of Presidential Elections" in *VerfBlog*. 13 December 2025, available at https://verfassungsblog.de/shoot ing-democracy-in-the-foot

Moreover, the CCR's action highlights broader systemic vulnerabilities. The Court's decision has been described by critics as a 'belated response' rather than a proactive safeguard, emphasizing inherent judicial limitations. As one commentator noted, while the ruling courageously defended democratic principles, addressing structural weaknesses such as inadequate regulation of digital campaigning and foreign interference lies primarily with legislative and regulatory bodies rather than courts.[12]

Further complicating matters, the external perception of Georgescu as merely another populist candidate obscured his genuinely destabilizing influence. Unlike other populist figures like Hungary's Orbán or Poland's Kaczyński, Georgescu's candidacy was entwined with overt Russian influence and neo-fascist domestic networks, posing a severe threat to Romania's democratic foundations. This existential dimension validated the Court's extraordinary judicial action, underscoring that constitutions in liberal democracies must not serve as 'suicide pacts' but should instead empower institutions to act decisively in defence of foundational democratic principles.[13]

Nonetheless, the Court's decision exposed considerable limitations inherent in judicial oversight mechanisms. Without consistent legislative frameworks to address emerging electoral threats proactively, constitutional courts are inevitably pushed into reactive, crisis-driven roles. Such reactive interventions risk accusations of judicial activism or political bias, weakening public trust. Moreover, selective judicial scrutiny, evident in disqualifying o oacă but initially overlooking Georgescu, highlighted potential inconsistencies and further complicated perceptions of impartiality.

The main critique was the Court's failure to provide a detailed constitutional methodology. The ruling made broad references to 'democratic values', 'national security', and 'public order', but it did not identify a test or threshold for when such values may override electoral outcomes. By elevating abstract principles above concrete legal norms, the Court risked substituting judicial discretion for legal reasoning.

A more balanced approach would have involved a comprehensive evidentiary hearing, a public rationale based on defined legal standards, and a demonstrable nexus between the alleged irregularities and the electoral outcome. If these safeguards are absent, the decision appears vulnerable to

12 MAFTEAN, Michael, "A Troubling Triumph in Romania: What the Annulled Election Reveals About Democracy's Defence" in *VerfBlog*, December 10 2024, available at https://verfassungsblog.de/triumph-in-romania/

13 TYULKINA, Svetlana, *Militant Democracy: Undemocratic Political Parties and Beyond,* London: Routledge, 2015 in MERCESCU, Alexandra, "The Romanian Constitutional Court doing "militant democracy" (twice and more to come)", in *Journal of Contemporary Central and Eastern Europe*, 25 March 2025, p. 9, available at https://doi.org/10.1080/25739638.2025.2482401

charges of arbitrariness and politicization. Constitutional legitimacy must rest not only on substantive ends but also on procedural integrity.[14]

"We are not final because we are infallible, but we are infallible only because we are final".[15] The same logic applies to constitutional courts everywhere. Their authority rests not on infallibility but on fidelity to process, reason, and the public good. When courts abandon these pillars in pursuit of lofty aims, they risk becoming self-justifying institutions untethered from the constitutional order they are meant to uphold.

The Romanian Court's ruling thus prompted broader reflections on the delicate balance constitutional courts must maintain. On one hand, proactive judicial enforcement against constitutional illiberalism is crucial. On the other, judicial activism, especially when extending beyond established competences, can foster perceptions of political bias or manipulation.

Nevertheless, from a normative standpoint, the Court's decision was defensible. It sought not only to uphold formal constitutional criteria but also to embed a substantive, value-based understanding of democracy and the rule of law into electoral processes. Although controversial, the decision created a robust precedent asserting constitutional democracy's foundational principles over electoral expediency and populist rhetoric.

In conclusion, the CCR's second significant intervention in the 2024 presidential election process underscores the complexity of judicial roles in safeguarding democracy under severe threat. Although marked by procedural shortcomings, evidentiary controversies, and interpretative expansiveness, the Court's ruling ultimately represented a defensible assertion of judicial responsibility in extraordinary times.

5. AFTERMATH.

Following the unprecedented annulment of Romania's 2024 presidential elections, a fresh electoral cycle commenced in March 2025 under circumstances that deeply tested the country's commitment to constitutional democracy and

14 For a more detailed analysis, see PERJU, Vlad, "Analiza constitu ională a Hotărârii CCR nr. 32/2024 de anulare a alegerilor preziden iale", in *Contributors.ro*, 7 December 2024, available at www.contributors.ro/analiza-constitutionala-a-hotararii-ccr-32-2024-de-anulare-a-aleger-ilor-prezidentiale/

15 As Justice Robert Jackson, former US Supreme Court Justice and Nuremberg prosecutor, famously remarked. In constitutional interpretation, no authority stands above the Court. While certain challenges may arise – such as complaints before the European Court of Human Rights within its jurisdiction – these do not alter the Court's rulings but, at most, may impact its institutional credibility, as seen in cases like *Kövesi v. Romania*, 2020. See IANCU, Bogdan, "Judecătorii CCR nu sunt principalii responsabili", an interview in *Adevărul*, 9 December 2024, available at: adevarul.ro/alegeri-prezidentiale-2024/judecatorii-ccr-nu-sunt-prin- cipalii-2407288.html

the rule of law. This new electoral phase was immediately marked by controversy when the Central Electoral Bureau rejected the candidacy of Călin Georgescu, the previously leading far-right, pro-Russian candidate, explicitly citing prior decisions of the CCR, notably decision no. 2 (5 October 2024) and decision no. 32 (6 December 2024). In its analysis, the Bureau examined not only formal criteria, but also the broader context of Georgescu's political conduct and campaign activities, echoing the constitutional standards established in the earlier o oacă ruling. This approach was swiftly endorsed by the CCR through decision no. 7 (11 March 2025), reinforcing the principle that eligibility criteria for presidential candidates extend beyond procedural formalities to include a commitment to fundamental constitutional values, democratic principles, and the rule of law.

The immediate aftermath of these decisions, however, highlighted the fragility and ongoing challenges faced by Romania's constitutional institutions. Approximately 130 lawsuits were filed across various ordinary courts nationwide, demanding annulment or suspension of the CCR's December 2024 ruling, erroneously classifying it as an administrative act subject to regular judicial review.[16] This significant judicial misunderstanding culminated dramatically when one of these claims was shockingly upheld by a lower court on 24 April 2025.[17] Although the Public Ministry quickly intervened to contest this aberrant ruling, and the Supreme Council of the Magistracy initiated disciplinary investigations against the judge responsible, the damage to public confidence was substantial.[18] The revelation that the lawsuit campaign had been orchestrated through social media by a former judge closely associated with Georgescu further deepened perceptions of institutional vulnerability and judicial confusion.

This troubling incident underscored the inherent dangers involved when constitutional courts venture deeply into militant democracy practices. Critics argued that by actively policing the boundaries of political discourse and candidacies, the CCR might inadvertently have set a precedent of judicial activism susceptible to exploitation, polarization, and misinterpretation. This judicial overreach, even if well-intentioned to preserve democratic integrity, risked undermining the legitimacy of the Court itself, exposing it to accusations of political partisanship and contributing to societal fragmentation.

Furthermore, the Romanian experience sparked an academic debate about whether the concept of 'resilience', often invoked in analyses of democratic and judicial institutions, appropriately describes the complex dynamics surrounding

16 IANCU, Bogdan, "Militant Democracy and Rule of Law in Three Paradoxes: The Annulment of the Romanian Presidential Elections", in *Hague J Rule Law,* 2025, available at https://doi.org/10.1007/s40803-025-00245-8

17 Decision 301/42/2025 Ploie ti Court of Appeal.

18 For more on this decision, see https://www.juridice.ro/780057/csm-sesizeaza-ij-dupa-decizia-curtii-de-apel-ploiesti.html

constitutional courts' roles in crisis management. The CCR's rapid evolution from judicial restraint toward assertive engagement in protecting democratic principles and the rule of law, especially in electoral contexts, prompts critical reflection. Historically, the Constitutional Court of Romania had maintained a cautious stance, safeguarding national constitutional sovereignty against external legal influences, evident in earlier rulings. However, the recent jurisprudential developments signal a significant ideological shift toward proactive constitutional guardianship. Rather than simple resilience, implying adaptation to pressures without fundamental structural change, this evolution might better reflect a transformative redefinition of judicial roles and constitutional interpretation.[19]

The adaptability of constitutional courts to political pressures is inherently limited by the politically influenced nature of judicial appointments. Consequently, the capacity for genuine institutional resilience or proactive judicial adaptation appears restricted. When systemic resilience strategies are discussed, experience suggests that these strategies typically originate from political rather than judicial initiatives. A pertinent example is Germany's July 2024 bipartisan strategy announcement to shield its Federal Constitutional Court from illiberal influences.[20] Romania's scenario starkly contrasts this approach, with the CCR acting largely autonomously and unpredictably in the politically charged climate of late 2024 and early 2025.

Moreover, applying the concept of 'social resilience' to constitutional courts implies recognizing ongoing uncertainty, political volatility, and frequent crises as standard rather than exceptional.[21] Yet, despite recent suggestions of a profound, enduring crisis in Romanian constitutionalism, it remains difficult to generalize such chronic instability as normative across the European Union or even within Romania specifically. Rather, the effort to cultivate resilience within constitutional courts must be understood as inherently political, not merely technical or jurisprudential. The CCR's recent activism, therefore, constitutes not only an adaptation to immediate threats but also a political assertion of constitutional priorities, reinforcing fundamental democratic principles in times of significant internal and external challenge.

In sum, the aftermath of Romania's annulled 2024 presidential elections highlights both the possibilities and pitfalls inherent in a constitutional court's

19 BERCEA, Raluca, "EU values through constitutional lenses: assessing the resilience of the Romanian Constitutional Court", in *Global Jurist*, special issue "Resilience of Constitutional Courts" (ed. by HALMAY, Gabor, KOVACS, Ágnes and STEUER, Max), vol. 25, 2025 (forthcoming).

20 BÖCKENFÖRDE, Markus, "Resilience lite: Strengthening the constitutional protection of the German Federal Constitutional Court", available at https://constitutionnet.org/news/voices/resilience-lite-german-federal-constitutional-court, in BERCEA, Raluca, note 19.

21 KECK, Markus, SAKDAPOLRAK, Patrick, "What is social resilience? Lessons learned and ways forward" in *Erdkunde*, vol. 67(1), 2013, pp. 5-19, available at http://www.jstor.org/stable/23595352

assertive defence of democracy and the rule of law. While the CCR's decisions have undoubtedly strengthened certain democratic safeguards by clearly articulating and enforcing core constitutional principles, they simultaneously exposed the judiciary to criticisms of overreach and politicization. This delicate balance between necessary judicial intervention and institutional legitimacy underscores the critical need for legislative clarity and political commitment to proactively support the constitutional order. Ultimately, the Romanian experience reaffirms that the preservation of democracy and the rule of law cannot rest solely on judicial activism but requires comprehensive engagement across all branches of government and society.

Political update: On May 18, 2025, in a surprising turn of events after a fiercely contested election that initially favoured another far-right populist leader in Europe, Romania chose a centrist candidate as its next president. Bucharest's moderate mayor, Nicușor Dan, who was significantly behind in the initial round two weeks earlier, managed an impressive comeback, ultimately defeating his extremist opponent George Simion by a comfortable margin of eight percentage points.[22]

6. THE VENICE COMMISSION'S TAKE ON ELECTION ANNULMENTS.

The spirit of liberty is the spirit which is not too sure that it is right. The controversy surrounding Romania's 2024 presidential election prompted an exceptional response from the Venice Commission. On 27 January 2025 the Commission issued an Urgent Opinion addressing the broader principles governing the annulment of elections by constitutional courts.[23] The document was drafted at the request of the President of the Parliamentary Assembly of the Council of Europe, yet it carefully refrained from passing judgment on the merits of the CCR's decision.[24] Instead, it sought to articulate a set of comparative legal

22 https://www.politico.eu/article/romanian-presidential-election-results-nicusor-dan-george-simion/

23 In a letter dated 13 December 2024, Mr Theodoros Rousopoulos, President of the Parliamentary Assembly of the Council of Europe, requested an urgent report of the Venice Commission on the following question: *Under which conditions and under which legal standards can a constitutional court invalidate elections, drawing from the recent Romanian case?*, Venice Commission, CDL-PI(2025)001, Urgent report on the cancellation of election results by Constitutional Courts, I1.

24 "It is not for the Venice Commission to go into the facts of the case, or into the examination of the decision by the Romanian Constitutional Court. The question put to the Venice Commission by the Parliamentary Assembly is of a general nature, and it refers to an analysis of general comparative constitutional law and European and international standards", Venice Commission, CDL-PI(2025)001, Urgent report on the cancellation of election results by Constitutional Courts, II6.

principles to be applied across European democracies, focusing on the conditions and safeguards that should frame any annulment of electoral results.

The Commission's recommendations revolve around the need for clarity, predictability, and procedural rigor in any judicial decision that overturns an electoral result. It underscored that decisions of such magnitude should typically rest with the primary electoral authority, while remaining subject to review by a constitutional court or a specialized electoral body. Moreover, the Commission emphasized that constitutional courts should not be empowered to act *ex officio* on their own initiative except in extraordinary circumstances. Even then, such powers must be clearly articulated in national legislation. It also reaffirmed that annulments should be reserved for situations in which there is compelling evidence that irregularities have significantly influenced the outcome. Any such ruling must be transparent, legally reasoned, and procedurally fair, granting affected parties a genuine opportunity to be heard.

In light of the modern electoral environment, the Commission also acknowledged the growing challenge posed by digital disinformation, foreign interference, and opaque political financing. It called for more robust legal frameworks addressing online political messaging, including mechanisms for identifying and labelling sponsored content and ensuring that social media platforms adhere to disclosure requirements. These regulations should also extend to campaign financing in the digital realm, placing online propaganda under the same transparency and accountability rules as traditional electoral communications.

Although the Commission refrained from explicit criticism of the CCR's decision, its carefully worded analysis raised several red flags. By noting that the Romanian ruling was "special in several respects," the report subtly indicated unease with the process and legal reasoning. Concerns focused on the reversal of an earlier validation ruling by the CCR, the fact that the annulment was initiated *ex officio*, and the absence of clear procedural safeguards, particularly the right of affected candidates to be heard before the decision was rendered.[25]

The use of vague reasoning and the reliance on intelligence sources further complicated perceptions of legitimacy. The Commission stressed that while electoral integrity must be protected, campaign messaging, however misleading, typically falls within the bounds of free expression. Proving the scale and influence of disinformation, especially when AI technologies are involved, remains a daunting task. Moreover, basing electoral annulment on classified

25 CĂRĂMIDARIU, Dan-Adrian and VERTEȘ-OLTEANU, Andreea, "Safeguarding democracy: constitutional insights from Romania's election annulment", in *Diritto pubblico comparato ed europeo, Rivista trimestrale*, 1/2025, pp. 139-165, available at https://www.rivisteweb.it/doi/10.17394/116461

materials risks undermining transparency, as voters must be able to understand and verify the legal grounds on which their vote was invalidated.

Despite these misgivings, a closer analysis of the Commission's findings suggests that it did not reject the CCR's action outright. Instead, it outlined a set of expectations for legal certainty, procedural regularity, and democratic accountability. Critics on both sides of Romania's political spectrum interpreted the report selectively, some accusing the CCR of judicial overreach while others portrayed the decision as a necessary correction. Yet neither side fully captured the Commission's nuanced stance, which neither condemned nor endorsed but called for clearer legislative guidance and more transparent judicial practices.

Supporters of the CCR have pointed out that the Court acted under exceptional conditions, as envisioned in para. 27 of the Commission's report. While ideal legislation would expressly define these exceptional cases, the absence of such provisions does not inherently strip the Court of its authority. Rather, it highlights a legislative vacuum that the Romanian Parliament must address going forward. In fact, Romania's constitutional framework grants the CCR supervisory powers over the entire electoral process in presidential elections, and its 2019 precedent affirms this oversight from start to finish.[26]

Criticism that the CCR contradicted its earlier decisions fails to account for the evolving context. The annulment came after new evidence surfaced suggesting that the integrity of the election had been compromised. The timing of the ruling, while contested, remained within the bounds of the Court's electoral supervision mandate. The Commission's recommendation that irregularities should ideally be addressed before confirmation of the results does not preclude judicial action if material issues come to light afterwards.

Some observers also questioned the CCR's role as the final arbiter, arguing that the absence of an appellate mechanism contravenes international standards. However, this concern appears to misread the Commission's position. Paras. 21 and 78 letter A) clarify that the right to appeal is mandatory when annulment decisions originate from administrative bodies, not when they stem from constitutional courts. Hence, the CCR acted within its legal bounds, consistent with its constitutional role.

Substantively, the CCR's ruling addressed many of the core issues identified by the Venice Commission: digital manipulation, opaque financing, and violations of transparency norms in political advertising. Paras. 41 and 42 of the report acknowledge that an annulment can be justified. not only by conclusive evidence of electoral distortion but also by the reasonable possibility that such irregularities may have altered the result. The CCR's findings, grounded in

26 Decision no. 66/2019 expanded the Court's role, affirming its authority over all electoral operations, from initiation to conclusion.

declassified evidence, raised serious concerns about the legitimacy of the process and met this threshold.

On campaign financing, the Court aligned with the Commission's insistence on transparency in digital campaigning, including the disclosure of financial sources and identification of foreign influence. The Court's attention to these dimensions reflects a broader concern that electoral fairness must adapt to the realities of 21st century technology and information warfare.

Contrary to speculation, the CCR did not rely solely on classified intelligence. Instead, it used materials that had been officially declassified and made part of the judicial file. Para. 59 of the Commission's report rightly warns against rulings based exclusively on secret information, but it does not preclude the use of national security evidence that has undergone appropriate procedural scrutiny.

Finally, the CCR's decision to extend the incumbent president's mandate in the absence of clear constitutional guidance falls within the scope of acceptable judicial interpretation. Para. 61 of the Commission's report stresses the importance of ensuring continuity of governance in annulment scenarios. In the absence of a statutory rule, the Court's interim solution may not be ideal, but it was legally defensible and avoided a power vacuum.

That said, the report does identify a significant procedural flaw: the lack of opportunity for candidates and other interested parties to respond to the CCR's concerns *prior* to the annulment. While this does not negate the substance of the ruling, it does raise valid concerns about procedural justice. The Commission's message is clear: electoral legitimacy is not only about outcomes but also about the integrity and openness of the process leading to those outcomes. The Romanian experience, in this light, is less a cautionary tale of judicial overreach than a reminder of the critical need for legal clarity, democratic resilience, and institutional trust.

7. CONCLUSION.

Free and fair elections are undeniably central to the functioning of democratic regimes. However, they are not sufficient to safeguard democracy in themselves. A healthy democracy is not merely an exercise in majoritarianism, it must also rest on a substantive foundation that includes the protection of fundamental rights, respect for the separation of powers, and robust constitutional adjudication. Without these structural pillars, democratic processes risk being exploited to subvert democratic principles themselves. As Aharon Barak reminds us, such vulnerabilities necessitate a model of 'defensive

democracy', i.e. one in which the legal system is empowered to actively resist authoritarian tendencies cloaked in democratic legitimacy.[27]

Ronald Dworkin's conception of adjudication, articulated through the figure of judge Hercules in *Law's Empire*, envisions a judge committed to moral coherence and constitutional integrity.[28] Hercules is neither a formalist nor an activist. He is an interpreter who strives to harmonize precedent, principle, and political morality. His method of legal reasoning seeks not only consistency with historical legal practice but also fidelity to democracy's core normative commitments.

In 2024, Romania's Constitutional Court found itself confronting a decision of Herculean proportions. The Court had to choose between *a)* validating an electoral process that complied with formal rules but was marred by substantive irregularities or *b)* intervening in an extraordinary fashion to protect the integrity of democratic governance. Whether the Romanian judges measured up to Dworkin's philosophical ideal may be debated, but the gravity of the dilemma they faced was unquestionable. Their ruling to invalidate the elections echoed the ethos of Hercules' mission: to act when democratic fairness is compromised, even if the doctrinal elegance or transparency of their reasoning may fall short of Dworkin's standards.

In delivering its December rulings, the Court engaged with a 'hard case' in the fullest sense, one that sat at the intersection of law, politics, and constitutional morality. The annulment of the presidential vote cannot be evaluated in a legal vacuum. It must be seen within the broader framework of national and European standards on electoral fairness and legitimacy. Nevertheless, the absence of a thoroughly articulated and publicly accessible rationale casts a shadow over the Court's procedural legitimacy. Constitutional courts are more than 'legal gatekeepers', they are also civic educators. Their duty includes explaining decisions in a way that fosters public understanding and confidence in the democratic process. While the substance of the annulment may be justified in principle, it ultimately raises a critical question: can democratic legitimacy and the rule of law truly be upheld through a judicial intervention that risks undermining public trust in the constitutional order it aims to defend?

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27 See BARAK, Aharon, "Foreword: A judge on Judging: The Role of a Supreme Court in a Democracy", in *116 Harvard Law Review*, 16, 2022, p. 20.

28 "Hercules escapes the standard academic classifications of justices. [...] Hercules is no usurping tyrant trying to cheat the public of its democratic power. [...] When he intervenes in the process of government to declare some statute or other act of government unconstitutional, he does this in service of his most conscientious judgment about what democracy really is and what the Constitution, parent and guardian of democracy, really means. But if Hercules had renounced [his] responsibilities, which includes the responsibility to decide when he must rely on his own convictions about his nation's character, he would have been a traitor, not a hero of judicial restraint", DWORKIN, Ronald, *Law's Empire*, Cambridge, Mass., 1986, pp. 397-399.

PREVENTING LAWFARE: IS THE INDEPENDENCE OF THE JUDICIAL BRANCH UNDER SUSPICION?

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SUMMARY: 1. LAWFARE AND JUDICIAL ACTIVISM: AN ALLEGATION AGAINST THE INDEPENDENCE OF THE JUDICIAL BRANCH? 1.1. The polysemic of the term "lawfare". 1.2. "Judicial lawfare": the two perspectives. 2. THE AUTONOMY OF THE JUDICIAL BRANCH IN EUROPE AND ITS ADVERSARIES: 2.1. The judiciary in the genesis and development of constitutionalism in Europe. *2.1.1. Judicial independence as an imported constitutional principle. 2.1.2. The remaining suspicions towards judicial independence in European constitutionalism.* 2.2. Independence of the judiciary within the legal framework of the European Union. *2.2.1. Judicial independence as a foundational element of the European Union institutional system. 2.2.2. The inception of judicial independence as an enforceable legal principle. 2.2.3. The forging of a European doctrine of judicial independence.* 3. THE COMPLEXITIES OF "JUDICIAL LAWFARE": JUDICIAL ACTIVISM VS. JUDICIAL MISCONDUCT: 3.1. A premise: judicial activism can obviously be the inception point of lawfare actions, but it should be labelled as judicial misconduct. 3.2. An objection: the independence of the judiciary should not be the focus of lawfare allegations. 4. PREVENTING LAWFARE IN THE EUROPEAN UNION. 4.1. A first legal instrument: the prevention of abusive lawsuits and the Anti-SLAPP EU Directive. 4.2. A framework to prevent judicial misconduct: upholding judicial independence in opposition to member states. *4.2.1. Soft law mechanisms within the rule of law framework. 4.2.2. Hard law mechanisms through funding conditionality.* 4.3. Preventing judicial misconduct through general harmonization of procedural guarantees. 5. CONCLUSIONS.

1. LAWFARE AND JUDICIAL ACTIVISM: AN ARGUMENT AGAINST THE INDEPENDENCE OF THE JUDICIAL BRANCH?

1.1. The polysemy of the term "lawfare".

Recently, the term "lawfare" has been integrated into the political discourse of Member States of the European Union. In this context, the use of the term points to deviations or collateral drift of so-called 'strategic litigation', a practice which initially emerged as a way for civil society actors to promote political and legislative changes.[1]

Subsequently, a different political use of the term originated within the international context. This second use was initially associated with campaigns aimed at discrediting political leaders in Latin America.[2] After that, the emergence of populist and illiberal tendencies within Europe is the reason why the term 'lawfare' has been introduced into our public discourse. It is also the reason why this study deals with the word.

Therefore, in the context of this paper the term is used to denote any deviations in the initiation or application of judicial procedures. Such deviations would be intended to advance political objectives or manipulate public prosecution to promote or reverse individual political agendas. Notwithstanding the term's broader and somewhat ambiguous connotations,[3] this definition of 'lawfare' is focused on the instrumentalization of judicial procedures. These controversial methods may also encompass legal and media strategies, which have gained considerable influence owing to the capabilities of digital communication mechanisms.[4] In this context, an action of lawfare

1 The meanings of lawfare are linked to abusive lawsuits, commonly described as "the growing strategy of powerful private actors, businesses and wealthy individuals (oligarchs) but also autocratic governments, trying to intimidate and stop stakeholders in civil society". HESS, Burkhard, "Strategic Litigation: A New Phenomenon in Dispute Resolution", Max Planch Institute Luxembourg for Procedural Law Research Paper Series, 2022 (3), p. 23. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4107384

2 BIGLINO CAMPOS, Paloma, "Los retos a la independencia judicial", *Derecho constitucional del siglo XXI: desafíos y oportunidades,* ARAGÓN REYES, M., VALADÉS RÍOS, D., TUDELA ARANDA, J. (coords.), Fundación Giménez Abad, Zaragoza, 2023, pp. 377-396, p. 386.

3 This meaning of lawfare could match with the with the "lawfare by actors in political society" category, which is referred to by Gloppen, along with two other categories: "state lawfare", by government and state actors, and "lawfare from below", by civil actors. GLOPPEN, Siri, "Conceptualizing Lawfare: A Typology & Theoretical Framework", *Center of Law and Social Transformation Paper*, Bergen, 2018, pp. 1-31, p. 7.

https://www.academia.edu/35608212/Conceptualizing_Lawfare_A_Typology_and_Theoretical_Framwork

4 Although we only refer to the legal aspects of lawfare, these abusive methods usually include communication and media strategies. TIEFENBRUN, Susan W., "Semiotic Definition of

is distinguished from what is referred to as legal mobilization. The former is regarded as an illegitimate manifestation of legal instrumentalism, whereas the latter is perceived as a legitimate form of counterpower.[5]

It is imperative to emphasize the specific connotation of the term 'lawfare' as it is examined within this discourse. Instances where the legal system is strategically manipulated reveal that 'lawfare' often entails the initiation of legal proceedings against politicians, activists or organizations to diminish their influence or leadership capabilities. Therefore, the denunciation of that kind of strategy implies that the legal framework is employed not in the pursuit of justice but as a mechanism to target individuals or entities through lawsuits, investigations or criminal charges. Consequently, whenever there is a denunciation of 'lawfare' in this sense, it refers to an attempt to suppress dissent, eliminate political adversaries, or undermine opposition forces by depleting their resources or tarnishing their reputations. In this context, measures must be taken to prevent and eradicate undesirable manipulations and deviations of the pursuit of justice. This is essential to protect political pluralism, which is a foundational element of democratic systems.

Evidently, all these practices are associated with judicial activity and procedures. This obviously places lawfare accusations in line with separation of powers in democratic societies.[6] For that reason, it is usually referred to as 'judicial lawfare' and can be examined from two perspectives.

1.2. "Judicial lawfare": the two perspectives.

The first perspective for examining 'judicial lawfare' is the initiation of judicial processes by individuals or by political associations against political adversaries or rivals. Critics of this form of lawfare contend that it compromises the integrity of legal systems by exploiting them as instruments of political manipulation, whereas advocates might regard it as a legitimate means of holding powerful individuals or political associations responsible. Fundamentally, from both viewpoints lawfare signifies a transition from traditional modes of conflict in democratic competition to more nuanced and frequently insidious approaches of confrontation within the legal domain.

Lawfare, Case Western Reserve Journal of International Law", 43, 2010, pp. 29-60, p. 31. https://scholarlycommons.law.case.edu/jil/vol43/iss1/3 31

5 Regarding these differentiations, see BORG-BARTHET, Justine, FARRINGTON, Francesca, "The EU's Anti-SLAPP Directive: A Partial Victory for Rule of Law Advocacy in Europe", *German Law Journal*, 2024, 25(6), pp. 840-855, p. 843. https://doi.org/10.1017/glj.2024.51.

6 HESS, Burkhard, "Strategic Litigation: A New Phenomenon in Dispute Resolution", *Max Planch Institute Luxembourg for Procedural Law Research Paper Series*, 2022 (3), p. 32. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4107384

The second perspective of this kind of lawfare considers the role of judicial activism. It is focused on how courts can promote or trigger the prosecution of politicians, leaders of opinion, or any other individual or association engaged in public participation. Here a dangerous contradiction is found. In a constitutional democracy, the judiciary should be perceived as the sole entity capable of halting political corruption and abuses of authority. In contrast, this 'judicial lawfare' would mean that judges may be abusing their authority by instigating or advocating baseless actions against political or social leaders.

In such instances, accusations of lawfare directed at courts and judges may be valid. Alternatively, they may serve as an instrument of populist strategies, acting as a smokescreen or a covert method to undermine the rule of law within a constitutional framework. This phenomenon is especially prevalent when lawfare accusations emanate from democratically elected officials. Such accusations erode public trust in the legal system of a democratic state. Under these circumstances, judicial activism is criticized as a deviation from due process, with representatives portrayed as victims of unfair trials and sentences. Ultimately, this situation culminates in a confrontation between two essential components of democratic constitutionalism that should function cooperatively: the democratic legitimization of political authority and the subordination of that authority to the rule of law.

This is the issue to be explored. Allegations of lawfare against members of the judiciary in EU member states elicit a profound uncertainty: are independent judges currently perceived as a threat to democracy? From this initial viewpoint, judicial activism is portrayed as an emerging issue necessitating intervention. Alleged and potentially unfounded lawfare claims have engendered concern regarding the stability of the separation of powers in the European context. Conversely, a critical doubt emerges from the opposite perspective: is the independence of the judiciary sufficiently safeguarded? Evidently, these uncertainties converge on judicial power, its functional limitations, and its capacity to subordinate power to law. Ultimately, a subsequent inquiry is raised: is judicial independence under scrutiny?

This paper will address the concerns raised, providing an analysis of the perceived dilemma highlighted by opponents of judicial activism. The foundational premise is that the notion of judicial lawfare constitutes a disruptive concept. It has the potential to undermine the rule of law when deployed against the judicial system. Thus, it is posited that, within a democratic framework, the judiciary must operate independently and actively, albeit within constitutional boundaries. The perils of a judiciary that is neither independent nor active outweigh the possible risks of 'judicial lawfare'. Accordingly, the prevention of lawfare should be addressed through the mechanisms inherent to the rule of law,

thereby reinforcing both the independence of the judiciary and the multifaceted nature of their accountability.

2. THE AUTONOMY OF THE JUDICIAL BRANCH IN EUROPE AND ITS ADVERSARIES.

2.1. The judiciary in the genesis and development of constitutionalism in Europe.

2.1.1. Judicial independence as an imported constitutional principle.

The concept of judicial independence is regarded as a cornerstone of democratic constitutional frameworks. This notion has been upheld since the era when *The Federalist Papers* (1788) were composed. Alexander Hamilton initially articulated the crucial function that judges were to fulfil in the emerging governmental structure: he stated that "the complete independence of the courts is essential in a limited constitution".[7] In accordance with the author's proposition, judicial independence must be manifested through the establishment of a cadre of irremovable judges and magistrates, whose positions are not contingent upon compliance with mandates from political authorities. These autonomous judges would ensure the enforcement of a legal system based on the constitution. They ought to be capable of counterbalancing even the acts of democratically elected bodies such as the federal Congress and the legislatures of federated states.

However, the principle of judicial independence was not embraced in the same way by the liberal constitutionalism of the nineteenth century in continental Europe. This underscores the ongoing concerns regarding the presence of "excessively autonomous judges" within the constitutional frameworks of several European states.[8] Furthermore, the presumption that the principle of judicial independence is inherently secured without the implementation of legal mechanisms should be avoided. Democratic systems necessitate the establishment of mechanisms to ensure that political powers – particularly the legislative, as well as the executive and administrative branches – will refrain from influencing judicial proceedings in any manner. It is imperative that these

7 HAMILTON, Alexander, MADISON, James, and JAY, John, *El Federalista,* Akal, Madrid, 2015, 547.

8 This is the argument in GUARNIERI, Carlo (2013), "Judicial independence in Europe: Threat or resource for democracy?", *Representation*, *49*(3), 2013, pp. 347-359. https://doi.org/10.1080/00344893.2013.830486

mechanisms possess normative authority and are upheld through constitutional oversight.

Thus, when examining the origins of constitutionalism and the development of the separation of powers in continental Europe, it becomes evident that the initial status of the judicial branch was far from autonomous. Indeed, the judiciary in modern European states had emerged as an extension of the powers of the monarchies. Consequently, the judiciary has historically been viewed with scepticism, both prior to and after the era of the French Revolution.[9] In Montesquieu's pivotal work, *The Spirit of the Laws* (1748), he characterized the judicial branch as "invisible and null" during periods of peace, signifying that its activation should be reserved for essential instances, and it ought not to intrude upon the other branches of government. Subsequent to Montesquieu, while independent judges were acknowledged as crucial for averting despotism and safeguarding the liberties of citizens, they were concurrently viewed with suspicion.[10]

In continental Europe, constitutionalism advanced towards democracy during the 19th century without a transformation of the judiciary into a genuinely independent institution. Notably, courts of justice were predominantly organized in a hierarchical and bureaucratic manner. Judges often assumed the role of civil servants with the exclusive duty of implementing laws. As Lousada Arochena says, judges in Europe were subjected to a series of incompatibilities governed by stringent disciplinary regulations, and remained under the ultimate authority of the Ministries of Grace and Justice. These mechanisms of control were designed to fulfil two principal objectives, with the primary objective of separating judges from political power. The secondary objective was to prevent judges from engaging in discourse concerning what had been resolved by the legislature.

The attainment of the first objective was hindered due to the intrusion of the executive branch in the process of selecting members of the higher courts.[11] This was a logical consequence of the organic dependency of the courts under the authority of the ministries of justice. As for the second objective, it was accomplished to the extent that constitutional review was initially excluded from the purview of any judge or court. Even with the subsequent establishment of constitutional courts in the early 20th century, constitutional adjudication continued to remain outside the ambit of ordinary courts.

9 LOUSADA AROCHENA, José Fernando, "Politización de la justicia, judicialización de la política: estado de la cuestión en España", *Revista de Derecho Político*, 121, 2024, pp. 87-109, p. 90.

10 MONTESQUIEU, *El espíritu de las leyes,* TIERNO GALVÁN, Enrique (Introduction), Tecnos, Madrid, 1972, p. 166.

11 LOUSADA AROCHENA, José Fernando, "Politización de la justicia, judicialización de la política: estado de la cuestión en España", study cited, p. 92.

However, true constitutional interpretation requires constitutional norms to permeate the entire legal system, resulting in the subordination of the principle of legality to that of constitutionality. Consequently, the role of European judges progressively expanded from merely executing the law to becoming integrators of normative plurality. These democratic judges began to assume a proactive role,[12] found themselves engaged in a communicative function[13] and, when required, had to be creative in the interpretation and execution of legal statutes.[14] Additionally, the evolution of constitutional rights into fundamental rights, characterized by their direct applicability, enhanced the judicial function's role as a counterweight to political authority.[15] Finally, in EU member states the extension of the authority of national judges to their European Union counterparts increased their powers to evaluate the applicability of state legal provisions.

2.1.2. The remaining suspicions towards judicial independence in European constitutionalism.

At this point of evolution, the position of the judiciary within European continental democracies became comparable, although not equal to that described by Hamilton in *The Federalist Papers*. The differences are a logical result of a different starting position. On the one hand, the constitutional role of the courts as enforcers of the rule of law was theoretically acknowledged in the same terms. The prevailing European constitutional doctrine maintained that the independence of judges was more closely associated with their adherence to legal statutes rather than aligned with the constitution.[16] On the other hand, even though judicial independence emerged as a constitutional imperative, it did so within a constitutional framework where the judiciary was not initially envisaged as an autonomous entity.[17] Behind these mismatches lies an ambiguity that is partially responsible for the weaknesses that judicial independence shows in some European states.

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12 FIORAVANTI, Maurizio, *El Estado moderno en Europa. Instituciones y Derecho*, Trotta, Madrid, 2004, p. 29.

13 ATIENZA, Manuel, "Virtudes judiciales. Selección y formación de los jueces en el Estado de Derecho", *Claves de razón práctica,* 86, 1988, pp. 32-42, p. 36.

14 LÓPEZ GUERRA, Luis, "El papel del juez en una sociedad democrática", *Revista de Estudios Jurídicos*, 18 (Segunda Época), Universidad de Jaén (Spain), 2018, pp. 1-16, p. 5. https://dx.doi.org/10.17651/rej.n18.a5

15 To such an extent that concentrated constitutional control by specialized constitutional courts has come to be criticized as an "unnatural mechanism". See CLAVERO, Bartolomé, *Los derechos y los jueces,* Civitas, Madrid, 1988. p. 89.

16 LÓPEZ BOFILL, Héctor, "Reflexiones sobre los orígenes de la independencia judicial", *Independencia judicial y estado constitucional. El estatuto de los jueces,* GONZÁLEZ PASCUAL, María Isabel and SOLANES MULLOR (coordination), Tirant lo Blanch, Valencia, 2016, pp. 21–37, p. 31.

17 This can be deduced from Íñiguez Hernández's reflections in ÍÑIGUEZ HERNÁNDEZ, Diego, *El fracaso del autogobierno judicial*, Aranzadi, 2008, p. 51.

Simultaneously, the enhancing of judicial competences raised new concerns among political authorities. The executive branch, along with the administrative apparatus, experienced an intensification in the oversight exerted by the judiciary over their functions, while the legislative branch encountered frequent constitutional court reviews of its authority. On the one hand, judicial independence has been dignified, but on the other it has become an inconvenience for political entities. Herein lies another partial cause of the weakness that judicial independence manifests in some European states.

Indeed, the tensions between political power and judicial power in Europe have continued to branch out. The previous situation, inherited from 19th-century constitutionalism, became more complicated with the arrival of the new century. The previous situation aligned with the emergence of populism and the regression of the rule of law in Europe from the late 2000s to the early 2010s. Collectively, these elements raise critical questions regarding the autonomy of the judiciary. Furthermore, as will be discussed subsequently, this period denotes the involvement of the European Union in protecting it.

2.2. Independence of the judiciary within the legal framework of the European Union.

2.2.1. Judicial independence as a foundational element of the European Union institutional system.

Judicial independence is of paramount importance, not only for democratic European states in their own right but also as a fundamental prerequisite for the continued existence of the European Union. The reasoning behind this is multifaceted and its components are interrelated.

An initial component is related to the absence of a decentralised judicial system within the institutional design of the European Union. Indeed, the Court of Justice of the European Union was created as a singular and centralized entity. Notwithstanding its current internal division into multiple bodies, the CJEU is a single institution without any territorial decentralization. The subsequent component concerns the normative efficacy of Union Law, which operates on an executive federalist model. In this framework, the implementation and enforcement of most supranational regulations fall under the purview of member states. Consequently, based on the connection between the first and the second component, judges within the member states are the institutional bodies which possess the authority to adjudicate issues concerning the application of Union Law within the member states' jurisdictions and by the member states' administrations. To ensure the federal functioning of the system, uniformity in the interpretation

and application of Union law is based on a referral procedure to the Court of Justice – the preliminary ruling – and this mechanism requires optimization through the independence of national judges.[18] Therefore, the effectiveness of Union law would decline without independent judges in member states.

Another aspect pertains to the European Union's competences in the realm of judicial cooperation within the Area of Freedom, Security, and Justice. The operational framework of judicial cooperation is founded upon mutual recognition mechanisms emanating from Articles 67, 81, and 82 of the Treaty on the Functioning of the European Union. These mechanisms incorporate an implicit principle of mutual trust, associated with the principle of sincere cooperation, as delineated in Article 4(3) of the TEU.[19] The efficacy of the rules of mutual recognition and the principle of mutual trust is contingent upon the proper functioning of national judicial systems.[20] However, outside the specificities of the Area of Freedom, Security and Justice, mutual trust emerges as an essential foundation for supranational integration.[21] As the CJEU has stated, the premise is that each member state shares the common values contained in Article 2 TEU with all the other member states. These values, on which the European Union is founded, are recognised by the member states as shared. This sharing of values implies and justifies the existence of mutual trust between the member states. It ensures that those values will be recognised and, therefore, that the EU law that implements them will be respected.[22]

2.2.2. The inception of judicial independence as an enforceable legal principle.

Consequently, while judicial independence was originally a constitutional matter of state-level concern, it has since evolved into a fundamental principle of the Union's constitutional framework. However, coinciding with the period

18 This was explained by Eric Stein in the 1980s. See his celebrated work STEIN, Eric, "Lawyers, judges, and the Making of a Transnational Constitution", T*he American Journal of International Law*, 75-1, 1981, pp. 1–27. https://doi.org/10.2307/2201413

19 CLOSA, Carlos, KOCHENOV, Dimitri and WEILER, Joseph H. H. (eds.), *Reinforcing rule of law oversight in the European Union*, Cambridge University Press, Cambridge, 2016, p. 2. https://doi.org/10.1017/CBO9781316258774

20 This is explained, among other things, in the following paper: SCHUTTER, Olivier de, "La contribution du contrôle juridictionnel à la confiance mutuelle", *CRIDH Working Paper* 2005/06, pp. 17-22.

https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO.WP.2005.06.pdf

21 BÁRD, Petra, "In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law", *European Law Journal,* 27 (1-3), 2021, pp. 185–210, p. 187. https://doi.org/10.1111/eulj.12425

22 Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, § 125; Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, §143.

of regression of the rule of law in the first decade of the 21st century, judicial independence also became a standard applicable to conflict situations between national judges and state authorities.

The Court of Justice of the European Union initially advanced this proposition in the *Associação Sindical dos Juízes Portugueses* ruling.[23] The facts of the case are well known and may sound anecdotal. Most doctrinal analyses concur that the CJEU possessed discernible political objectives in formulating its judgment. One objective was to clarify that member states were under an obligation to ensure that their courts and judges were independent in the fields covered by EU law. Another related objective was to establish a rationale for evaluating certain judicial reforms in Poland and Hungary, which were raising concerns regarding the independence of these judicial systems.[24]

The case originated when the Portuguese Association of Judges challenged salary reductions imposed on judges. They contended that these reductions violated judicial independence, a principle enshrined in Article 19(1) of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights of the European Union. The principal argument posited by the Court of Justice of the European Union in support of the independence of national courts was as follows: since national courts also function as European Union courts in the context of applying EU law, any undermining of judicial independence within a member state would constitute not only a national constitutional concern but also a direct threat to the integrity of the European legal framework. The Court outlined that judicial independence entails that national courts must operate autonomously, free from external pressures or directives. Member states should also protect courts with essential guarantees, such as protection against removal from office and remuneration commensurate with the importance of judicial functions.[25]

The importance of the ruling was enhanced as it established that the CJEU has the authority to assess national measures affecting the judiciary's independence when they have potential implications for the application of EU law. Article 2 of the Treaty on the European Union articulates the rule of law as a fundamental value of the Union, whereas Article 19(1) of the same treaty

23 Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117.

24 BONELLI, Matteo and CLAES, Monica, "Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses", *European Constitutional Law Review*. 2018, 4(3), pp. 622–643, p. 623. https://doi.org/10.1017/S1574019618000330.

25 SILVEIRA, Alessandra; ABREU, Joana; FROUFE, Pedro; and PEREZ; Sophie, "União de direito para além do direito da União - as garantias de independência judicial no acórdão Associação Sindical dos Juízes Portugueses", *Julgar On line*, May 2018. Available at http://julgar.pt/uniao-de-direito-para-alem-do-direito-da-uniao-as-garantias-de-independencia-judicial-no-acordao-associacao-sindical-dos-juizes-portugueses/

stipulates that member states are obligated to furnish judicial remedies to guarantee the efficacy of Union law. The synergistic interpretation of these articles has empowered the Court of Justice of the European Union to address breaches of judicial independence, which have been predominantly observed in Poland,[26] although also in Hungary and Malta.

Those rulings of the Court of Justice of the European Union are not isolated occurrences; rather, they constitute a result and a consequence of the rule of law protection framework established by the European Union in 2014.[27] This framework aimed to address emerging systemic threats to the rule of law in a structured, preventive manner. It was necessary given the difficulty of activating the sanctioning mechanisms contained in Article 7 of the TEU against states where constitutional principles or institutions were threatened.[28]

It is evident that the rule of law within the member states, as well as the enforcement guarantees of EU law, must be ensured through effective judicial protection provided by independent and impartial courts alongside effective judicial review. In 2019, the evaluation of this framework provided the European Commission with the opportunity to underscore potential threats to national judicial systems within the context of lawfare. According to the European Commission evaluation, intrinsic vulnerabilities within judicial systems, illustrated by insufficient assurances of judicial independence, would inevitably increase the probability of exerting undue pressure on the judiciary.[29]

2.2.3. The forging of a European doctrine of judicial independence.

However, the emphasis on judicial independence within European democracies has not been solely the purview of the European Union. This issue was previously subjected to thorough examination by the Council of Europe, as

26 Poland is the member state that has been involved in most CJEU rulings referred to judicial independence. See Case C-619/18, *Commission v Poland* (Independence of the Supreme Court), ECLI:EU:C:2019:531; Case C-192/18, *Commission v Poland* (Independence of common law courts), ECLI:EU:C:2019:924; Case C-216/18 PPU - *LM Minister for Justice and Equality* (Deficiencies in the system of justice), ECLI:EU:C:2018:586; Joined Cases C585, 624 & 625/18 *A. K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court), EU:C:2019:551; Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, ECLI:EU:C:2020:234.

27 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, Brussels, 11.3.2014 COM(2014) 158 final.

28 As Carlos Closa explains, the lack of sanctions to member states in which the rule of law is threatened results from the institutional patterns of behaviour and interactions that Article 7 determines. CLOSA, Carlos, "Institutional logics and the EU's limited sanctioning capacity under Article 7 TEU", *International Political Science Review*, *42*(4), 2020, pp. 501-515, p. 502. https://doi.org/10.1177/0192512120908323

29 Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union. state of play and possible next steps, Brussels, 3.4.2019 COM(2019) 163 final.

evidenced by the collection of non-binding documents that started to appear in the mid-1990s. The first of them was Recommendation (94)12 of the Committee of Ministers on the independence, efficiency and role of judges, followed by the European Charter on the Statute for Judges (1998). The creation of the Consultative Council of European Judges (CCJE) by the European Council in 2000 is also noteworthy. The primary function of this entity is to formulate opinions on matters pertaining to judicial independence and to the judicial role in European constitutional democracies. These reports shall be produced upon the request of its members or after a petition from the Council of Europe's entities.[30]

More recently, a series of reports produced by the Venice Commission specify the most pressing issues regarding the independence of judges in Europe. The initial document was the Report on Judicial Appointments in 2007, followed by the Report on the Independence of the Judicial System, Parts I and II in 2010.[31] Although these reports were produced within the framework of the establishment of new democracies in Eastern Europe, they have significantly impacted current understanding of the judiciary's function within constitutional systems. These reports highlighted the importance of independent judicial councils in processes concerning the appointment and the discipline of judges. The necessity for the incorporation of explicit constitutional frameworks was also underscored by the Venice Commission. This was considered particularly important in emerging democracies to mitigate potential political interference in the judicial appointment process. Furthermore, these reports underscored the necessity for safeguarding judges against undue influences, including the potential pressures emanating from the foundational structure of judicial authority.

The imperative for both the European Union and the Venice Commission to act as guardians of judicial independence has arisen in the face of internal attempts to compromise it. This situation may signify the insufficiency of national safeguard mechanisms, further underscoring the vulnerability of the judiciary at the state level to a variety of influences and assaults. The directives of the Venice Commission and the European Commission are aimed at national authorities, urging them to implement necessary measures. Furthermore, the European Union has specific mechanisms to address irregularities concerning

30 BUSTOS GISBERT, Rafael, "La influencia de los textos no vinculantes del Consejo de Europa sobre la independencia judicial en el TEDH y en la UE", *Teoría y Realidad Constitucional*, 47, 2021, pp. 161-198, p. 163 and p. 168.

31 CDL-AD (2007)028, Report on Judicial Appointments, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007); CDL-AD (2010)004-e, Report on the Independence of the Judicial System Part I: The Independence of judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010). CDL-AD (2010)040-e: Report on the Independence of the Judicial System, Part II – The Prosecution Service adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

judicial independence, either through infringement proceedings or by applying conditionality.

Nonetheless, the increasing number of claims regarding lawfare represent a subtle yet equally pivotal indication of the systemic inadequacy and vulnerability of the judicial systems of democratic European states. The issue lies in the fact that addressing these concerns falls beyond the remit of preventive and sanctioning measures of both the European Union and the Council of Europe.

The situation is exacerbated when these claims attributing 'lawfare' are linked to dysfunctions in democratic processes arising from instances of judicial activism. Another issue emerges, necessitating a thorough examination within its conceptual framework.

3. THE COMPLEXITIES OF JUDICIAL LAWFARE: JUDICIAL ACTIVISM VS. JUDICIAL MISCONDUCT.

In this context, it is imperative to consider several inquiries regarding judicial activism. Does judicial activism constitute a real threat to democracies in Europe? Alternatively, are the real adversaries of democracy those seeking to abolish judicial activism, as it serves as a safeguard for both the separation of powers and the rule of law? Has the independence of the judiciary truly extended beyond necessary limits, or is it insufficiently safeguarded? Are present constitutional safeguards adequate to avert the internal disintegration of democratic systems? What measures can be implemented to prevent breakdowns arising from the misuse of legally established democratic processes and institutions?

3.1. A premise: judicial activism can obviously be the starting point of lawfare actions, but it should be labelled as judicial misconduct.

There may be an excessive number of questions about the negative effect of judicial activism, and the answers remain unclear. Prominent European democracies have increasingly expressed concerns regarding the potential for the misuse and abuse of legal procedures over an extended period. This concern is particularly heightened due to the increasing prevalence of legal proceedings intended to criminalize and undermine political actors, although it is acknowledged that legal action has been imperative to combat corruption in certain instances. Consequently, it is essential to conduct a comprehensive analysis of the concept of judicial activism to ascertain whether the dangers of judicial lawfare are fundamentally an issue inherent to judicial activism itself.

Prior to ascertaining whether judicial activism can be directly accountable for the phenomenon of judicial lawfare, it is imperative to consider two salient aspects of the term. Firstly, judicial activism does not constitute a legal concept. While it is associated with the constitutional interpretation within the legal framework, thereby transforming the judicial role, judicial activism has never been integrated into constitutional theory as such. It is judicial independence, not judicial activism, that has normative status as a constitutional principle. Secondly, judicial activism is not a concept with a singular meaning. It is applied indiscriminately to describe a series of practices related to the judicial function, it only carries negative implications in certain applications.[32]

However, in any context, judicial activism is an outcome of the principle of judicial independence. This may involve positive ramifications for democratic constitutionalism, provided it operates within the constraints imposed on judicial authority by the rule of law. Conversely, when judicial activism exceeds these boundaries, it yields adverse consequences. In these circumstances, it is feasible to refer to jurisdictional activism as the inability of a court to conform to the jurisdictional boundaries of its authority.[33]

3.2. An objection: the independence of the judiciary should not be the focus of lawfare allegations.

Therefore, judicial activism may sometimes serve as the catalyst or starting point for actions characterized as lawfare. Nevertheless, as we will propose, this detrimental manifestation of judicial activism may be distinguished by designating it as judicial misconduct. The mitigation of such detrimental judicial activism, from now on identified as 'judicial misconduct', should be addressed through the judiciary's internal disciplinary mechanisms and the appellate review system conducted by higher-level courts. The solution cannot be to erode confidence in the judicial system or to interfere with it to undermine its independence.

Claims against actions of alleged lawfare spread, damaging public trust in the political systems. These claims, however, also make the vulnerability of the judicial systems as constitutional guarantees visible. What happens when courts and judges, which are responsible for upholding the rule of law, are suspected of using the legal framework not for justice but to target individuals to weaken

32 As explained by Marshall, a judicial decision which is non-activist in one sense may be activist in another. See MARSHALL, William P., "Conservatives and the Seven Sins of Judicial Activism", University of Colorado Law Review, 73, 2002, pp. 1217-1255, p. 1220. https://scholar.law.colorado.edu/lawreview/vol73/iss4/3

33 This is one of the categories of judicial activism in MARSHALL, William P., "Conservatives and the Seven Sins of Judicial Activism", *study cited,* p. 1220.

their reputation and political influence? Do European democracies need a reinforcement of judicial independence mechanisms? Has the judicial branch been disregarded as a key element in the separation of powers? Or could it be true that judicial independence has been so enhanced by constitutional theorists that judges have felt encouraged to surpass some of their own constitutional limits? Is judicial activism a benefit or a hindrance to democracy?

4. PREVENTING LAWFARE IN THE EUROPEAN UNION.

Our analysis underscores the significance of judicial activism in upholding constitutional democracy. Persistent allegations of lawfare against the judiciary can severely undermine this principal safeguard of the rule of law and the fundamental rights framework, so it is imperative to adopt a perspective on lawfare that extends beyond a narrow focus on judicial activism.

In this respect, on one hand, we consider that the effort of EU legislation to inhibit abuses of judicial proceedings against persons who engage in public participation is an interesting reaction. First, it addresses lawfare concerns as an issue of transnational significance. Second, it enhances the function of the judiciary in the defence of political pluralism. Third, it demonstrates that the European Union is concerned about the abusive use of judicial procedures.

On the other hand, some initiatives prove that the European Union is determined to make judicial independence a reality in member states. This is confirmed in the annual audit carried out by the Commission, with reports on the rule of law in each of the member states. To elucidate the efficacy of these supervisory measures, it is essential to underscore the implementation of regulations that condition the allocation of European funds on adherence to rule of law criteria by the member states.

4.1. A first legal instrument: the prevention of abusive lawsuits and the Anti-SLAPP EU Directive.

The first legal instrument of the European Union that aims to prevent misuses of judicial processes, linked to the prevention of lawfare, has been a directive sanctioned against the exploitation of judicial mechanisms. Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 is about the protection of persons who engage in public participation from manifestly unfounded claims or abusive court proceedings. Its rationale is explained by the increase of strategic lawsuits against public persons in some EU countries, having a 'chilling effect' beyond the individual case and, consequently, undermining the construction of a pluralistic civic space in which citizens can

participate actively. This increase, moreover, would be occasionally enhanced by the possibilities of opting for different judicial forums within the area of freedom, security, and justice.

This directive is one of a wide array of European Union initiatives intended to enhance media freedom and pluralism. These initiatives include the Media Freedom Act, as well as recommendations to member states aimed at enhancing the safety of journalists and human rights defenders.[34] The main critics of these European Union legislative acts and recommendations contend that the singular emphasis on the media and human rights defenders could potentially undermine the safeguarding of other public entities.[35] These critics often overlook that the directive inclusively addresses academics, researchers, and artists, thereby indicating that its subjective scope of application is not as limited as it may appear initially. Certain other critics argue that the tangible impact of this regulation is contingent upon the political will and climate within each member state, attributing this to the restricted scope within which the Directive's binding authority is operational.[36] Nonetheless, upon careful consideration, the provisions of the Anti-SLAPP directive are of significant importance when evaluating the judiciary's capacity to mitigate instances of lawfare.

This recent European Union regulation has been adopted in accordance with Article 81 of the Treaty on the Functioning of the European Union (TFEU), concerning judicial cooperation in civil matters with cross-border implications. The directive is intended to mitigate lawfare activities targeting politically engaged individuals with a transnational scope. Referred to as the Anti-SLAPP Directive, with SLAPP denoting 'Strategic Lawsuits Against Public Participation', its provisions delegate the primary mechanisms for anti-SLAPP interventions to the jurisdiction of the national courts. In this context, the directive does not seek to combat forms of judicial activism or judicial misconduct; instead, it aims to address the improper use of judicial processes. Consequently, national judges

34 See Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU. And, singularly, Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation'), C/2022/2428, OJ L 138, 17 May 2022. An additional EU law instrument to protect public discourse is Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

35 BODNAR, Adam and GLISZCZYŃSKA-GRABIAS, Aleksandra, "Strategic Lawsuits against Public Participation (SLAPPs), the Governance of Historical Memory in the Rule of Law Crisis, and the EU Anti-SLAPP Directive", *European Constitutional Law Review,* 19 (4), 2023, pp. 642-663, p. 659. https://doi.org/10.1017/S1574019624000063

36 HERNÁNDEZ PERIBÁÑEZ, María Eugenia, "La libertad de expresión frente a los litigios estratégicos: análisis crítico de la Directiva Anti-SLAPP", *Teoría y Realidad Constitucional*, 55, 2025, pp. 289-317, p. 298. https://doi.org/10.5944/trc.55.2025.45036

are not perceived as the problem, as the originators of abusive proceedings, but rather are presented as those who are tasked with addressing the democratic disfunctions of lawfare.

The protection afforded by the directive is formulated to safeguard individuals and organizations from vexatious litigation, currently limited to civil matters with transnational dimensions that seek to suppress, intimidate, or impose financial strain upon them. The directive is intended to shield participants in public discourse from clearly unwarranted or malicious legal actions, encompassing journalists, activists, non-governmental organizations, and others engaged in voicing concerns on issues of public significance. The limitation to matters with a transnational dimension ensures the proportionality of the measure, encouraging member states to adopt similar measures for matters with a purely internal dimension.[37]

Article 4.3 of the directive provides a series of guidelines on what type of demand can be considered abusive by a national court. Indications of such a purpose include, for example, the disproportionate, excessive or unreasonable nature of a claim (including the dispute value), the existence of multiple proceedings against the same person or for similar matters, by the same claimant or by related ones, the existence of intimidation, harassment or threats before or during the proceedings, intentional delays or abusive forum shopping.

The directive adopts a series of measures that fall under the jurisdiction of national courts. The first are related to the admission and processing of allegedly abusive lawsuits, including rules such as early dismissal by the courts of manifestly unfounded claims (art. 11), accelerated treatment of applications for procedural safeguards by the defendant (art. 7), or allocation of the burden of proof to the claimant (art. 12). In Articles 11 to 13 the directive states that member states must introduce or adapt their legislation so that, through an expedited procedure, courts can examine the defendant's allegations regarding the manifestly unfounded nature of the claim. Additionally, external support could be allowed in court proceedings (art. 9). Consequently, associations, organisations, trade unions and other entities which could have a legitimate interest in safeguarding or promoting the rights of persons engaging in public participation could be allowed to intervene in the suit to support the defendant. Those entities could also be allowed to provide information in those proceedings

A second group of measures is related to the evaluation and repercussion of economic costs and damages. One of them is cost shifting (art. 14), meaning that if a court determines that proceedings against a defendant are abusive,

37 CUARTERO RUBIO, Mª Victoria, "Demandas estratégicas contra la participación pública en la Unión Europea: La Directiva anti-SLAPP", *Cuadernos de Derecho Transnacional*, 16(2), 2024, pp. 430-443, p. 432. https://doi.org/10.20318/cdt.2024.8920

it can require the claimant to bear the full legal costs. This acts as a deterrent against initiating frivolous lawsuits. Another measure consists of empowering judges to impose penalties on those who initiate frivolous actions (art. 15), further discouraging them. Final measures require member states to refuse to recognize or enforce judgements from third countries against a natural or legal person domiciled in a member state, when those judgements are deemed to be manifestly unfounded or abusive (art. 16). This measure includes a right to seek compensation for economic damages; member states must also provide information about the resources available to people targeted by SLAPPs.

EU member states must incorporate the directive into their national law systems by 7 May 2026. The directive articulates the establishment of minimum standards for member states, facilitating their adoption or maintenance of provisions designed to establish effective safeguards against abusive litigation. Given that the anti-SLAPP measures outlined in the directive exclusively pertain to cases with cross-border implications, member states will encounter the challenge of enacting legislation applicable to cases that are entirely domestic in nature.

To date, Malta is the only country that has transposed the directive.[38] In Malta, in particular, the expediency in implementing the directive has been significantly associated with the assassination of Daphne Caruana in 2017. At the time of her assassination in October 2017, Daphne Caruana Galizia was facing 43 civil libel suits and 5 criminal libel suits in different countries. The critique of the national legislation ensuing from the transposition contends that it is deficient in essential protections against domestic SLAPP cases.[39] Although it is too early to evaluate the impact of its measures, it is evident that its implementation will require a proactive attitude typical of judges in a constitutional democracy.[40]

4.2. A framework to prevent judicial misconduct: upholding judicial independence in opposition to member states.

The anti-SLAPP Directive is an example of the commitment of the European Union to enhance the capacity of national judges and courts to uphold democratic structures and principles. This commitment elucidates why the

38 Although according to the information published on the matter in Eurlex and consulted on May 15, 2025, Romania would already be processing the transposition law through a civil procedure law reform project.

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32024L1069.

39 See The Daphne Caruana Galizia Foundation letter to the President and the Prime Minister of Romania, available in https://www.daphne.foundation/documents/letters/letter-on-anti-SLAPP-Directive-transposition.pdf

40 CUARTERO RUBIO, Mª Victoria, "Demandas estratégicas contra la participación pública en la Unión Europea: La Directiva anti-SLAPP", *work cited*, p. 441.

examined directive endows courts with the authority to avert abusive lawsuits with a transnational scope. Concurrently, the Union has been unequivocally promoting the independence of the judiciary within the member states, based on an expansive interpretation of Article 19 of the Treaty on the European Union. As previously indicated, Article 19 has been pivotal to the Court of Justice of the European Union's initiatives against infringements on judicial independence in various member states.

4.2.1. Soft law mechanisms within the rule of law framework.

The European Union's support for the judiciary is predominantly concentrated on preserving judicial independence among member states within the Commission's rule of law defence initiative. Notably, the program encompasses the rule of law cycle, a significant mechanism comprising an annual dialogue overseen by the EU Commission regarding the rule of law conditions in each member state. The outcome of this dialogue is documented in the annual reports presented by the Commission, starting in 2020. The analysis of the conditions of judicial systems represents a fundamental component of these reports within the framework of the Rule of Law Mechanism.

A comprehensive analysis of the reports reveals the fundamental elements pertaining to the defence of judicial independence. For the Commission, even though efficient justice systems and robust institutional checks and balances are fundamental to the operation of democratic systems, legislation and strong institutions alone are insufficient. The rule of law necessitates a conducive ecosystem based on respect for judicial independence. Consequently, the initial focus of EU support to national judiciaries was directed towards three overarching objectives: the provision of effective judicial protection through independent and impartial courts, the implementation of effective judicial review that respects fundamental rights, and the maintenance of the separation of powers. Within this context, the Commission explicitly articulates its vested interest and supervisory role concerning constitutional or legal reforms that have the potential to influence national judicial systems.[41]

In the latest global report (corresponding to 2024)[42] it was highlighted that some member states had adopted measures to strengthen judicial independence, e.g. by reforming the disciplinary regime for magistrates and improving the

41 See the first 2020 reports, which are available through this link: https://commission.europa.eu/publications/2020-rule-law-report-communication-and-country-chapters_en

42 The analysis is especially focused on the latest global and country chapters reports published, which correspond to 2024. All of them are available in this link:

https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_es

efficiency of judicial systems, for instance through reforming the structure of courts. A prominent concern of the Commission relates to the processes involved in the appointment of judges in high courts. Accordingly, in the most recent report recommendations have been directed toward several member states in this context. There is also special attention to the way the Eurobarometer measures the levels of citizens' perception of judicial independence in each member state.

The Commission's attention to certain specific processes of reform or the renewal of state judicial structures is also significant. For instance, Spain's prolonged failure to renew the Council of the Judiciary was closely monitored; the situation persisted from 2020 to 2024 until it was finally renewed. Notwithstanding this renewal, the Commission's reports emphasize the necessity of altering the procedures whereby the members of this body, as well as those of high judicial offices, are appointed. The political influence within such appointment processes is subject to considerable criticism. Similarly, the dependency of the Attorney General on the executive branch is questioned, and the creation of an ethics commission within the context of the prosecutor's office has been encouraged.

In a more forceful example, Poland is the member state of the Union whose judicial system has been most intensively monitored. The legal reforms undertaken there since 2015 were criticized by both the Court of Justice and the Commission's reports. The political influences on the appointment of judges and the lack of guarantees in disciplinary procedures within the judiciary were critical aspects. They were also the target of conditionality measures, which conditioned the receipt of European funds on aligning the judicial structure with the rule of law parameters set by the European Union.

The judicial system in Hungary has also been closely monitored. In this case, the focus has not only been on political interference in judicial appointments, but also on combating internal corruption. Serious risks of clientelism, favouritism and nepotism, which affect the overall integrity of the judiciary, have been denounced in the Commission's reports. Hungary was also affected by financial conditionality measures, and a worrying phenomenon has occurred: a 'chilling effect' on Hungarian judges, caused by smear campaigns and political attacks, seems to have discouraged them from speaking out against measures undermining judicial independence.

4.2.2. Hard law mechanisms through funding conditionality.

A supplementary approach to strengthening the autonomy of national judiciaries is the utilization of a conditionality mechanism, which links the granting of European Union funds to adherence to the rule of law. This method is no longer expressed through soft law, but instead through formal legislative

enactment: Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

Conditionality can generally be described as the association of advantages with the satisfaction of specific conditions or compliance with a particular behaviour. Mechanisms of conditionality are frequently suggested in contexts where the application of conventional institutional or individual enforcement tools is either impracticable or insufficient to yield satisfactory outcomes. This encompasses adherence to macro-economic stipulations as well as the rule of law and the foundational values enshrined in Article 2 of the TEU. The European Union's authority is restricted within this scope of action, precluding it from making and authoritatively enforcing decisions upon member states. Consequently, conditionality serves as a legitimate alternative mechanism for the exercise of public power and authority.[43]

The Regulation on conditionality delineates a definitive connection between the optimal operation of national judicial systems, the independence of the courts, and the safeguarding of the European Union's budget. The legal document posits that violations of the principles underpinning the rule of law, particularly those compromising the efficient operation of public authorities and the integrity of judicial review, may substantially jeopardize the financial interests of the Union. Consequently, Article 3 of the Regulation states that endangering the independence of the judiciary may be indicative of a breach of the principle of the rule of law, while Article 5 outlines the financial consequences that states may face if breaches are detected.

Conclusively, any member state where judicial proceedings against individuals or entities causing detriment to the European Union's budget are obstructed shall be deemed non-compliant with the regulation and may be subject to financial sanctions. Organized efforts to undermine the credibility of the judiciary, exemplified by persistent allegations of lawfare, may ultimately yield such an outcome.

The array of critiques, alongside the preventive and sanctioning mechanisms directed at member states, collectively highlights the European Union's commitment to maintaining judicial systems' independence as far removed as possible from political interference. This initiative involves being vigilant about public comments made by political leaders and government officials that critique the judiciary. The Commission asserts that, based on European standards, although the judiciary can be critiqued and examined, maintaining public trust

43 BARAGGIA, Antonia, BONELLI, Matteo, "Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges", *German Law Journal, 2*3(2), 2022, pp. 131-156, pp. 141 and 144. https://doi.org/10.1017/glj.2022.17

in the judicial system is crucial due to its essential societal function. Undermining this trust is especially significant concerning statements from legislative and executive branch members, as it is imperative that all branches of government promote and uphold public confidence in constitutional institutions, including the judiciary.

4.3. Preventing judicial misconduct through the general harmonization of procedural guarantees.

To finalise this section concerning the European Union's defence of judicial independence, there remains an uncertainty to address. Does all this imply that the European Union disregards the potential for judicial misconduct? No, that is not the case. On the contrary, it suggests there is an awareness of the public's perception regarding the extent of judicial independence. Furthermore, it indicates that instances of judicial misconduct are regarded as negligible and that there is trust in the efficacy of internal disciplinary mechanisms to address such issues. Indeed, judicial misconduct can be effectively addressed through robust disciplinary systems, thereby enhancing public trust in the judiciary and its impartiality.

Nevertheless, this does not imply that the Union does not play a role in ensuring the implementation of adequate guarantees for the effective functioning of justice within the member states. The substantiation of the Union's concern for preserving confidence in national judicial systems is embodied in many standardized regulations governing judicial cooperation in civil and criminal domains. The implementation of these measures is based on the principle of generating trust through law, with the reinforcement of mutual recognition as a main objective.[44] It is obvious that the attainment of such an objective is fundamentally at odds with lax tolerance of judicial misconduct.

As an example, the EU's concern can be illustrated by the measures included in Directive EU 2016/343, aimed at reinforcing specific facets of the presumption of innocence and the right to attend one's trial in criminal cases. This initiative forms a component of a more comprehensive endeavour to enhance the rights to a fair trial throughout the European Union and to establish uniform standards across its member states. The undertaking is guided by the *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*[45] adopted in 2009. Among other directives linked to this

44 WISCHMEYER, Thomas, "Generating Trust Through Law? Judicial Cooperation in the European Union and the "principle of Mutual Trust", *German Law Journal*,17(3), 2016, pp. 339-382, p. 342. https://doi.org/10.1017/S2071832200019805

45 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01).

plan, we would mention Directive 2010/64/EU on the rights to interpretation and translation, Directive 2012/13/EU on the right to information in criminal proceedings, or Directive 2013/48/EU on the right of access to a lawyer and communication upon arrest. All these regulations aspire not only to harmonize and set out uniform minimum standards that facilitate mutual recognition but also to develop an independent standard concerning the rights of individuals under investigation and accused parties.

Notably, Article 4 of the directive on the presumption of innocence obligates member states to adopt essential measures ensuring that public statements made by authorities, including judicial rulings unrelated to guilt, do not label an individual as guilty until a suspect or accused person is lawfully convicted. This does not prevent authorities from providing information to the public, but it must not imply guilt. Fundamental entitlements within a criminal proceeding include the onus of proof resting with the prosecution and the accused's privilege against self-incrimination. These are enshrined in Articles 6 and 7, which add that these rights cannot be used to infer guilt and cannot be used against the accused. In accordance with Article 10, it is imperative that member states guarantee effective remedies for suspects and accused individuals if their rights, as delineated by the directive, are infringed. These remedies should be accessible through national judicial procedures, which may encompass the rights to appeal or retrial.

5. CONCLUSIONS.

It is imperative to ascertain whether the initial inquiry has been satisfactorily addressed. Is the independence of the judicial branch under suspicion? The conducted analysis allows us to assert both affirmatively and negatively. Ultimately, the formulation of a subsequent question may be warranted. Judicial independence has been elevated to a principal objective of the European Union's endeavours to safeguard the rule of law. However, in certain member states, the incorporation of the term 'lawfare' into the public discourse and the critical use of the notion of judicial activism raise questions regarding the legitimacy of judicial actions. Consequently, why is judicial conduct viewed with suspicion in member states yet is upheld within the Union? This would constitute the ensuing inquiry.

The resolution of this newly posed inquiry necessitates a comprehensive examination of the judiciary's role within the separation of powers and its development within the constitutional framework. As has been argued, judicial activism certainly emerges as an inherent outcome of constitutional interpretation within democratic systems. Nonetheless, within the European

constitutional framework it has been notably impeded by scepticism towards the judiciary's power, as articulated in the theory of separation of powers.

Irrespective of the outcome, it is evident that democratic constitutionalism has transformed the judiciary's function, endowing it with a critical responsibility in upholding the rule of law. This transformation includes the evolution experienced by member state judges in the European Union; their role is essential for ensuring both the effectiveness and consistency in the application of EU Law. However, this proactive role of judges and courts has not been assimilated into constitutional theory *per se*. The situation creates a conflict between the Union's advocacy for the autonomy of the judiciary and the apprehensions that judicial activism provokes among member states.

This paper has addressed the concerns articulated by adversaries of judicial activism and has provided an analysis of the perceived quandary highlighted by those opposing it. The attention has been focused on two prominent aspects of the concept "judicial activism," specifically, "judicial misconduct" and "lawfare". Moreover, it has been argued that lawfare could be construed as judicial misconduct, thus preserving judicial independence and judicial activism as essential instruments of democratic constitutionalism. This analysis has been undertaken from the vantage point of the European Union, emphasising the mechanisms by which both the legal framework and political initiatives of the Union function to safeguard judicial independence. Similarly, research indicates that within the European Union, the deterrence of lawfare – or the misuse of legal systems to undermine politicians and other key figures in democratic processes – depends largely on the actions of judicial entities and courts. Consequently, it can be assumed that these EU mechanisms aim to remove allegations of lawfare that inhibit the inherent judicial activism from public discourse.

The manifestation of judicial misconduct does not suggest that it should remain unaddressed. It is both feasible and imperative to address it through appropriate measures, exemplified by certain measures contained in Directive EU 2016/343 related to strengthening specific aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings. Specifically, attention must be directed to Article 4 of the directive, which mandates member states to implement necessary measures ensuring that, until a suspect or an accused individual is legally proven guilty, public declarations made by public authorities, including judicial decisions not pertaining to guilt, do not refer to the person as guilty. It is a direct and clear measure to restrict judicial misconduct, as well as to protect the extraprocedural dimension of the presumption of innocence.

While deviations in judicial conduct are generally minor within genuine constitutional democracies, the potential for their occurrence persists. Instances of judicial wrongdoing should be handled through formal disciplinary procedures

and corrected through the appellate system. Additionally, improving judicial independence requires stricter criteria in the selection of judges. It is crucial, however, not to overstate judicial misconduct, as doing so could diminish public confidence in the judiciary.

MAJORITY RULE AND ITS CHALLENGE TO THE RULE OF LAW: DEFENDING CONSTITUTIONAL PLURALISM IN EUROPE

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SUMMARY: 1. THE EVOLUTION OF THE RULE OF LAW: THE FUNCTION OF THE LEGISLATURE IN A FREE SOCIETY UNDER THE RULE OF LAW. 2. MAJORITY RULE AND THE TRANSFORMATION OF THE SOCIAL CONTRACT. 3. THE PERSISTENCE OF THE 'MAJORITY–BASED RULE OF LAW' IN CONTEMPORARY DEMOCRACIES DESPITE ITS NEGATIVE IMPACT ON CONSTITUTIONAL PLURALISM AND THE FUNDAMENTAL INTERESTS OF MINORITIES. 4. RETHINKING THE RULE OF LAW FROM A CONSENSUS DEMOCRACY PERSPECTIVE. 4.1. The Mutual Veto in the European Context. 4.2. Liberal Veto vs Corporate Veto. 5. CONCLUSION: THE NEED TO RESTRAIN THE "MAJORITY–BASED RULE OF LAW", ESPECIALLY IN THE EUROPEAN CONTEXT.

1. THE EVOLUTION OF THE RULE OF LAW: THE FUNCTION OF THE LEGISLATURE IN A FREE SOCIETY UNDER THE RULE OF LAW.

The concept of the Rule of Law is challenging to define, as its meaning has evolved over time. Rooted in Aristotle ("It is more proper that law should govern than any one of the citizens", Politics 3.16), it adapts to the ever-evolving notion of constitutionalism, keeping pace with a constantly changing world. As a result, the rule of law no longer holds the same significance as it did when A.V. Dicey described it as follows:

> "No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint [that means] the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[1]

The meaning of the rule of law has shifted as it has expanded beyond the English legal tradition into various legal and constitutional frameworks, including those of the European continent, as well as supranational European law (TEU, ECHR) and international law (UDHR).

The first significant document to acknowledge and indeed promote this transformation of the rule of law is the Delhi Declaration on "The Rule of Law in a Free Society", formulated by an international commission of jurists at the New Delhi Congress in 1959.[2] It is in this context that the weakness of Dicey's construction is brought to light, as he relates the meaning of the rule of law to a very specific core: judicial independence. The experience of scholars from Asia and Africa, particularly in South Africa, underscores the insufficiency of a purely judicial dimension of the rule of law. At the time, as J.T. Thorson pointed out, in the Union of South Africa "members of the judiciary and the legal profession, being sworn to administer the existing law, cannot remedy the evil inherent in the apartheid policy of that country with its shocking denial of fundamental rights to eleven million of its people simply because they are not white".[3]

Even though an independent judiciary is indispensable in shaping and maintaining a free society, it is powerless against the arbitrariness of discriminatory laws that independent judges are compelled to apply. Expanding the concept of the rule of law to the sphere of parliamentary legislation, the Delhi Congress marks a fundamental shift: in framing the rule of law within a free society, it is impossible to separate political considerations from purely juridical ones, because "there is a political content in the law that should rule in a free and orderly society in addition to the purely legal content which was the only one recognized by Dicey".[4] On this specific issue, the Congress ultimately adopted this key assumption:

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1 DICEY, Albert Venn, *Introduction to the Study of the Law of the Constitution*, 10th ed., Macmillan, London, 1959, p. 188 and p. 202.

2 *International Commission of jurists. The Rule of Law in a Free Society. A Report on the International Congress of Jurists*, New Delhi, India, January 5-10, 1959.

3 THORSON, Joseph Thorarinn, "A New Concept of the Rule of Law", *Canadian Bar Review*, vol. 38, 1960, p. 243.

4 *Ibidem*, p. 242.

> "The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality".[5]

This was undoubtedly the great achievement of the Delhi Declaration and a significant milestone in developing a new approach to the rule of law. By emphasizing the constructive role of the legislature in protecting and fostering individual personality, the rule of law has also evolved into a more inclusive concept, better suited to the protection of minorities. Not only does the separation of powers lead to the rule of just and fair law, the rule of law must also include, as a necessary precondition, the observance of adequate decision-making procedures aimed at protecting minorities from the "tyranny of the majority".[6] The law can, therefore, protect the fundamental interests of minorities only if minorities are able to influence the law-making process through the exercise of appropriate political rights, adequate parliamentary representation, and fair decision-making procedures, due to the importance of political constitutionalism.[7] It is no coincidence that Habermas maintains that human rights and democracy reciprocally presuppose each other: they are totally connected and "co-originary".[8]

2. MAJORITY RULE AND THE TRANSFORMATION OF THE SOCIAL CONTRACT.

The problem of the Rule of (unjust and unfair) Law may arise with respect to minorities excluded from the original social contract and/or the constituent power. The social contract underlying contemporary democracies stems from

5 *Ibidem*, p. 245.

6 As is well known, this concept was significantly shaped by Alexis de Tocqueville (*Democracy in America*, 1835-1840) and John Stuart Mill (*On Liberty*, 1859), the latter pointing out that the tyranny of the majority is even worse than the tyranny of government, because it infiltrates everyday life without leaving any escape route: the individual must protect themselves not only from the political power of the despot, but also from the tyranny of prevailing opinion and sentiment.

7 BELLAMY, Richard, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge University Press, Cambridge, 2007.

8 HABERMAS, Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge, 1996; HABERMAS, Jürgen, "Remarks on Legitimation Through Human Rights", *Philosophy & Social Criticism*, vol. 24, 1998, pp. 2-3 and pp. 157-71; SCHAFFER, Johan K., "The co-originality of human rights and democracy in an international order", *International Theory*, vol. 7, 2015, pp. 96-124.

a liberal vision. Locke, more accurately than others, focused on the consensual pact that still legitimizes the basic rules of democracy today, starting with the deliberative principle of the majority that all contracting parties have committed to respect, binding even future generations. Locke enriches his argumentative framework with an extraordinarily modern reflection on the concept of the social body as a vital political entity – a living organism that derives its greatest strength and energy precisely from the majority, which therefore has the right to make decisions for the whole.[9] For Locke, it is natural law that mandates the adoption of majority rule and the equation of the will of the majority with the will of the social body.

In the second half of the 18th century, revolutionary constitutionalist movements further strengthened the contractual foundation of the majority principle by anchoring it to the doctrines of national sovereignty and popular sovereignty. Within French constitutionalism, the solidity of the majority principle is rooted in Rousseau's idea of "*volonté générale*" and Sieyès' concept of "*volonté commune*". By virtue of the social contract, the citizen agrees to abide by the laws, even those they do not personally support, because the will of the majority reveals the right choice for the common good, thus revealing the general will. In support of the majority principle, in addition to the "mathematical" argument advanced by Borda and Condorcet (according to which the probability of a choice being closer to the truth increases as the number of votes exceeding half the total grows), there is also an ideological reason, grounded in a social judgment that overturns the Platonic perspective of ἄριστοι and instead asserts that it is precisely "the many" who represent the best part of the social body.[10]

The liberal justification for the majority principle remains substantially intact despite the gradual erosion of the premise that justified the binding nature of the contract, namely the relative homogeneity of the social body. This homogeneity has been affected by structural shifts in the social contract, more recently by the increasingly multicultural dimension of contemporary democracies and the proliferation of social groups and minorities that were entirely ignored in the original contract.[11]

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9 LOCKE, John, *Two Treatises of Government*, London, 1689, Cap. VIII, §§ 95-99, and Cap. X, § 132.

10 See FRAU, Matteo, *L'attenuazione del principio maggioritario*, Editoriale scientifica, Napoli, 2022.

11 See KYMLICKA, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford University Press, Oxford, 1995; ID., "Nationhood, Multiculturalism and the Ethics of Membership", *Majorities and Minorities and the Future of Nationhood*, Liav Orgad and Ruud Koopmans (Eds), Cambridge University Press, Cambridge, 2023; PALERMO, Francesco, and WOELK, Jens, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Cedam, Padova, 2021.

The first fundamental fractures in the liberal-derived social contract are indeed caused by the awareness of the social groups that had been excluded from it, such as the landless, the indigenous peoples of conquered lands, immigrant ethnic minorities brought in as labour or imported in a state of slavery, and, of course, women, victims of a cultural legacy that sought to exclude them from politics.

When applying Rawls' theory of the veil of ignorance, it becomes evident that certain social groups, although bound by the social contract, were not protected by its clauses to the same extent as others – despite the existence of the rule of law and other constitutional guarantees.[12] This is simply because these groups had been excluded from the negotiation of the contract. Rawls' thesis of the veil of ignorance offers a perfect interpretative key to this phenomenon. None of the framers of the American Constitution or the English uncodified Constitution (in its liberal stage) imagined themselves as landless, non-white, or non-male. For this reason, a long and still incomplete social transformation has been necessary to modify the constitutional pact to include the demands of those who had been unable to participate in the negotiations.

This leads to disruptive changes in the social contract, resulting in the end of the liberal state and the transition towards the democratic state, sometimes through peaceful constitutional transformations and more often through civil wars, constituent revolutions, totalitarian regimes, or other clear manifestations of the breakdown of the pre-existing social contract.

In the case of minorities (religious, ethnic, linguistic, or national), their participation as contracting parties in the social contract and the constitutional pact reports to historical and political variables present at the origin of the negotiation or that emerged subsequently to bring about a modification of the contract (i.e. a constitutional change).[13]

The connection between political rights and the protection of the fundamental interests of minorities is evident in the case of new minorities, particularly social groups composed of immigrants who are integrated into society but lack voting rights. In such cases, their exclusion from political rights leads to the perception that the new minorities that have emerged in Europe due to increasing migration are not properly political minorities, but rather "invisible minorities".

12 RAWLS, John, *A Theory of Justice*, Revised edition, Harvard University Press, Cambridge, 1999, pp. 118-123.

13 See ACKERMAN, Bruce, *We the People*, vol. 2, *Transformations*, Harvard University Press, Cambridge, 1998.

3. THE PERSISTENCE OF THE 'MAJORITY-BASED RULE OF LAW' IN CONTEMPORARY DEMOCRACIES DESPITE ITS NEGATIVE IMPACT ON CONSTITUTIONAL PLURALISM AND THE FUNDAMENTAL INTERESTS OF MINORITIES.

In the 20th century, Hans Kelsen sought to justify the majority principle by redefining it as the majority-minority principle. He emphasized that, within the democratic processes taking place in parliament, the position of the minority – which may in turn become the majority – is always taken into account and thus has the potential to influence legislation through compromise.[14] Kelsen identifies majority rule as a point of synthesis and balance between the two cardinal values of democracy: freedom and equality. He argues that it is a mechanism capable of optimally reconciling the need to safeguard the individual freedom of political self-determination with the necessity of limiting it to ensure the survival of the social community.

In reality, Kelsen's reconstruction of the majority-minority principle hides the affirmation of a straightforward majority principle and suffers from two major flaws: it is based on the erroneous assumption that the political majority must typically take the position and interests of the minority into account (something that, conversely, happens only exceptionally); it considers a binary opposition between the majority and minority based on belonging to the two social classes of the bourgeoisie and the proletariat, whereas today, we should speak of a universe of minorities, understood in a pluralistic sense. The pluralism alluded to in Kelsen's thesis is minimal and entirely inadequate to meet the needs of contemporary plural societies and to deal with the complexity of social multiculturalism.

While political minorities in opposition usually aim to become the majority, structural minorities, linked to the segmentation of society on an identity basis, often cannot realistically entertain such an ambition. In *Das Recht der Minoritäten*, Georg Jellinek highlights how erroneous it is to apply the majority principle in societies characterized by religious or ethnic-national divisions.[15] In these contexts, it is indeed inconceivable to apply the principle of majority, as this principle is suitable only for governing what is "absolutely equal", not what is "absolutely unequal". Jellinek identifies two main tools for implementing the protection of minorities: filibustering (obstruction tactics) and the veto, both conceived as "instruments of power" and pressure on the majority.[16]

14 KELSEN, Hans, *General Theory of Law and state*, Harvard University Press, Cambridge, 1945.

15 JELLINEK, Georg, *Das Recht der Minoritäten*, Hölder, Wien, 1898.

16 *Ibidem.*

Given that all minorities – however defined – can also be considered "political minorities" (particularly when they succeed in gaining parliamentary representation), the traditional binary opposition between majority and opposition should give way to a dialogue among a plurality of minorities. Such pluralism would contribute to the shaping of public policy and legislation through institutional mechanisms and decision-making procedures that need to be more inclusive than the deliberative majority principle. Therefore, the attenuation of the majority principle may find stronger justification when constitutionalism addresses the issue of ethnic, linguistic, religious, and cultural minorities.

Nonetheless, among contemporary constitutional scholars, Denis Baranger offers a radical defence of the majority principle. From his perspective, the nullification of the will of the minority within the "will of all" expressed by the majority is nothing more than the virtuous effect of an implicit constitutional principle of justice. In his view, the majority principle, as a decision-making mechanism, constitutes both "*un principe de justice politique*" and "*un principe constitutionnel de justice*".[17]

Like Baranger, most of constitutional doctrine continues to reject any plausible revision of the majority principle, which – subject to the necessary limitations imposed by the constitutional framework – is upheld as an indispensable component of the democratic principle.

In contemporary democracies, legislation is generally subject to the constraints imposed by the constitutional framework. The rule of law, constitutional rigidity, judicial review, the separation of powers, and the international law framework all function as checks on majority rule and serve to limit legislative arbitrariness.

However, these conditions are not sufficient to safeguard the fundamental interests of minorities.

The only interests that tend to be adequately protected by the legislature are those of constituencies that – at least occasionally – align with the parliamentary majority. In the case of structural minorities – identity groups that are systematically excluded from parliamentary representation or participation in government – this objective becomes extremely difficult to achieve through the application of majority rule in the legislative process.

In the mid-19th century, the controversial American constitutional theorist John Caldwell Calhoun was among the first to express concerns that a written and rigid Constitution, even though based on the principle of the separation

17 BARANGER, Denis, "Théorie et pratique du principe de majorité dans les droits constitutionnels européens", *Jus Politicum*, no. 15, 2016.

of powers, is insufficient to protect the essential interests of minorities from legislative abuses by the majority.[18]

Calhoun still offers highly relevant insights into how a party holding a stable majority can more easily impose a broad interpretation of the constitutional provisions defining governmental powers than a minority party can enforce a strict interpretation of the constitutional limits on majority power. His thesis was intended to protect the minority interests of the agricultural and slaveholding southern states in the USA, particularly in the light of the industrialized north's dominance over the federal government, as exemplified by the so-called 'Tariff of Abominations' passed by the US Congress in 1828. Calhoun highlights the inadequacy of both the courts and judicial reviews of legislation in protecting minorities from the tyranny of the political majority. Beyond the issue of court composition, courts cannot challenge the actions of a legislature that, while formally operating within constitutional powers and limits, systematically serves the interests of certain communities and groups, thereby severely disadvantaging others who are destined to remain a minority in Parliament.

Moreover, the violation of minorities' fundamental interests in contemporary democracies does not necessarily entail a breach of the 'ordinary' fundamental rights of individuals. Rather, it concerns the infringement of interests deemed vital and non-negotiable only by the minorities themselves. In some cases, these are interests that may appear irrelevant to those outside the minority – such as the right to hunt for certain Indigenous communities or the practice of Halal slaughtering for a Muslim religious minority. Even when such interests might be recognized as rights by both the legal system and society – such as the right of linguistic minorities to use their mother tongue – there are constitutions that do not protect special minority rights (e.g. the French constitution), while others provide specific protection only to recognized linguistic minorities (e.g. the Italian constitution). Furthermore, it is possible for a minority, even under a law fully compliant with the constitution, to be systematically oppressed in its vital economic interests. This occurred in 1828, when southern US farmers were harmed by the Tariff of Abominations, which protected northern manufacturing industries through exorbitant customs duties.

4. RETHINKING THE RULE OF LAW FROM A CONSENSUS DEMOCRACY PERSPECTIVE.

In abstract terms, the principle of consensus represents an ideal solution for giving voice to democracy from a pluralist perspective. Some natural law

18 CALHOUN, John C., *A Disquisition on Government* (1851), Liberal Arts Press, New York, 1953.

theorists view it as the law imposed by natural rights grounded in individualistic reasoning, while others emphasize the importance of human association and defend the principle of majority rule. Within the former perspective, Fichte even goes so far as to deny the legal validity of majority rule, allowing at most for a form of "relative consensus" in which an overwhelming majority may have the right to exclude a dissenter in certain cases.[19] In the realm of public law, these philosophical currents are reflected in the dichotomy – clearly delineated by Otto von Gierke – between the corporate institution (*Anstalt*), in which the legal fiction underlying majority rule ultimately prevails, and the cooperative association or society (*Genossenschaft*), where, by contrast, the individuality of the human person remains essential, along with the imperative of seeking consensus.[20]

The demographic and territorial expansion of organized communities ultimately facilitated the widespread adoption of the majority principle – originating from Roman law – which led to the abandonment of the deliberative principle of unanimity. Nevertheless, the progressive affirmation of majority rule has never fully prevailed; it has consistently encountered the doctrines of consociation and consensus in a dialectical tension that persists to this day and from which the current limitations of majority-based decision-making stem.

Thus, we now observe the inevitable hybridization of the majority principle with the principle of consensus – an interplay whose intensity varies according to the spatial-temporal context of each constitutional experience. This necessary blending of principles is integral to a proper understanding of the rule of law, particularly within the European context and other Western-style democracies.

From a procedural standpoint, the hybridization of the majority principle with the principle of consensus occurs through a skilful balancing of the right to veto.

There are several ways to configure a minority veto right. It may be granted either to a constitutionally recognized identity-based minority (the so-called 'corporate veto'), or to a numerically defined minority (the so-called 'liberal veto'). In the former case, the veto is assigned to a pre-established and institutionalized group, potentially resulting in differentiated treatment among various identity-based minorities within the social body. In the latter, the veto takes the form of a mutual or reciprocal power derived from qualified or supermajority decision-making rules, whereby each quantitatively significant faction (e.g., one-third,

19 "Fichte's overemphasis on the concept of people's unanimity", how ever hypothetical this supposition may be (GA I/3, 400-403, 437), leaves space open for the suspicion that minorities and opponents can be easily excluded from the state – which is typical of any "despotic and totalitarian government, even of authoritarian democracies" (ALESSIATO, Elena P. C., "Fichte on Democracy and Revolution. Sketches for a Normative Account", *Philosophy and Public Issues*, vol. 9, 2019, p. 191).

20 GIERKE, Otto von, "Sur le principe de majorité" (1913), *Raisons politiques*, vol. 53, 2014, pp. 176-185.

one-fourth, one-fifth, depending on the context) holds blocking power and thus competes on equal terms with other important groups in shaping the collective will. This model follows the theoretical framework developed by Calhoun, who equated the concept of mutual negative veto with that of concurrent majority.

To counter the risk that a right of veto might lead to a tyranny of minorities or a decision-making deadlock, it is argued that minorities do not hold full active decision-making power, but only a power of interdiction – akin to the *faculté d'empêcher* described by Montesquieu. However, it is necessary to clarify that the experience of democratic regimes and constitutional practice demonstrate that the veto power, regardless of its configuration (whether it be absolute veto, qualified suspensive, translative suspensive, suspensive *tout court*, or merely dilatory) always holds the potential to transform – more or less surreptitiously – into a *de facto* propositional power, even when its exercise is formally placed in a phase subsequent to the deliberation of the act. Thus, the veto mechanism should be designed to achieve a harmonious balance between the power to act and the power to prevent, thereby enabling the formation of a concurrent (or constitutional) majority and laying the foundation for genuine constitutional government.

Despite the numerous criticisms that Calhoun's theory has attracted over time from scholars of various backgrounds committed to defending the principle of majority rule, other studies – particularly those examining contemporary applications of the concurrent majority principle – suggest that the main objection to the doctrine – that its application exacerbates social division and fuels intergroup conflict – is largely unfounded.[21]

4.1. The Mutual Veto in the European Context.

In European scholarly literature, explicit and direct support for Calhoun's consensual model has come from the authoritative work of Arend Lijphart, who developed the model of consociational democracy[22] and contrasted it with the

21 DI PALMA, Giuseppe, *The Study of Conflict in Western Society: A Critique of the End of Ideology*, General Learning Press, Morristown, 1973; SALTER, Alexander W., "Calhoun's Concurrent Majority as a Generality Norm", *Constitutional Political Economy*, vol. 26, 2015, pp. 375-390.

22 See LIJPHART, Arend, "Consociational Democracy", *World Politics*, vol. 21, 1969, pp. 207-225; ID., *Democracy in Plural Societies: A Comparative Exploration*, Yale University Press, New Haven-London, 1977; ID., "Majority Rule versus Democracy in Deeply Divided Societies", *Politikon*, vol. 4, 1977, pp. 113-126; ID., "The Power-Sharing Approach", *Conflict and Peacemaking in Multiethnic Societies*, J. V. Montville (Ed.), Lexington Books, Lexington, 1990, pp. 491-509; ID., *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice*, Routledge, Abingdon-New York, 2008.

equally influential majoritarian (or Westminster) model.[23] Lijphart's theory has, more effectively than others, highlighted the close connection between the legal instrument of the right to veto and the implementation of consensus democracy and consociational government. The reason why the comparative jurist cannot overlook Lijphart's thought lies in the fact that his models – revolutionary even within political science – are deeply shaped by normative and institutional factors.

Unlike other political scientists, who oppose the establishment of shared government and the recognition of special political rights aimed at fostering interaction between segments,[24] Lijphart explicitly embraces this approach. He argues that applying the majority principle to divided societies inevitably leads to social conflict and the isolation of communal segments. Whereas other political science models, such as the integrative model, promote inter-ethnic cooperation from the bottom up and intra-ethnic competition, with the aim of gradually blurring and ultimately dissolving the boundaries between social groups, the consociational model seeks to manage conflict by emphasizing group autonomy and institutionalized power-sharing among political elites within a shared government.

Several objections have been raised against the consociational model. Critics argue that it risks fostering particularism, ethnic outbidding, and the radicalization of political positions. Moreover, by guaranteeing conflicting parties a share in the governance of common affairs, it may end up rewarding conflict.[25] Finally, some contend that consociationalism may lead to dynamics of escalation,

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23 See LIJPHART, Arend, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, 2nd ed., Yale University Press, New Haven-London, 2012.

24 The "incentivist" model, for example, differs from the consociational model in several key respects. While the consociational model advocates post-electoral elite coalitions, the incentivist model promotes pre-electoral coalitions. Moreover, whereas the consociational model primarily focuses on elite-level politics, the incentivist model emphasizes the importance of political engagement at both the leadership and mass levels. Finally, the consociational model supports a parliamentary system, as it allows for the formation of a consociational cabinet in which various segments can be represented at the ministerial level, whereas the incentivist model favours a presidential form of government, viewing it as more suitable for ensuring a balance of powers and preventing any one segment from permanently concentrating political authority. See HOROWITZ, Donald L., *A Democratic South Africa? Constitutional Engineering in a Divided Society*, University of California Press, Berkeley, 1991; ID., *Ethnic Groups in Conflict*, 2nd ed., University of California Press, Berkeley, 2001; ID., "Constitutional Design: Proposal versus Process", *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy*, A. Reynolds (Ed.), Oxford University Press, Oxford, 2002, pp. 15-36.

25 See JARSTAD, Anna K., "Power-Sharing: Former Enemies in Joint Government", *From War to Democracy: Dilemmas of Peacebuilding*, A. Jarstad and T. Sisk (Eds.), Cambridge University Press, Cambridge, 2008, pp. 105-133, p. 124; MITCHELL, Paul, EVANS, Geoffrey, and O'LEARY, Brendan, "Extremist Outbidding in Ethnic Party Systems is Not Inevitable: Tribune Parties in Northern Ireland", *Political Studies*, vol. 57, 2009, pp. 397-421.

as minorities sharing deliberative power seek to extract increasingly favourable concessions.[26]

In contrast, proponents of this approach argue that it offers the prospect of stable social and political pacification, linked to the broader inclusion of identity groups within key decision-making bodies.[27]

Simplifying Lijphart's complex and evolving thought over time, one can identify four "basic elements" of consociational democracy: (1) consociational government, or "executive power-sharing", which allows for co-decision-making among representatives of all major social segments on an equal footing; (2) a high degree of internal autonomy for groups that seek it; (3) proportionality, understood both as proportional representation and the proportional allocation of positions and resources; and (4) a veto right on vital interests. For Lijphart, the central structural element of consociational democracy is the "grand coalition government", with the other three elements – mutual veto, proportionality, and segmental autonomy – as secondary mechanisms.[28]

In his studies, Lijphart defines veto power both as a "secondary instrument" related to the primary tool of coalition government, and as "the ultimate weapon that minorities need to protect their vital interests".[29]

By examining the key characteristics of consociational democracy, Lijphart highlights that the greatest danger of the minority veto lies in the potential for decision-making paralysis and/or a "minority tyranny, which may strain cooperation in a grand coalition as much as the outvoting of minorities".[30] However, the distinguished political scientist notes that this risk is, in fact, quite low for at least three reasons, all of which are directly derived from Calhoun's reflections:

> "First, the veto is a *mutual* veto that all minority segments possess and can use; Calhoun uses the term "mutual negative" as an equivalent of concurrent majority. The too frequent use of the veto by a minority is not very likely because it can be turned against its own interests, too. Second, the very fact that the veto is available as a potential weapon gives a feeling of security which

26 ROEDER, Philip G., and ROTHCHILD, Donald, "Power Sharing as Impediment to Peace and Democracy", *Sustainable Peace: Power and Democracy After Civil Wars*, P.G. Roeder and D. Rothchild (Eds.), Cornell University Press, Ithaca, 2005, p. 29.

27 See, for example, besides Lijphart, HARTZELL, Caroline A., and HODDIE, Matthew, *Crafting Peace: Power-Sharing Institutions and the Negotiated Settlement of Civil Wars*, Pennsylvania state University Press, Philadelphia, 2007; MCCULLOCH, Allison, *Power-Sharing and Political Stability in Deeply Divided Societies*, Routledge, Abingdon-New York, 2014.

28 "The most important method of consociational government - the grand coalition in one form or another - is complemented by three secondary instruments: mutual veto, proportionality, and segmental autonomy" (LIJPHART, Arend, *Democracy in Plural Societies*, *op. cit.*, p. 36).

29 LIJPHART, Arend, "The Power-Sharing Approach", *op. cit.*, p. 495.

30 LIJPHART, Arend, *Democracy in Plural Societies*, *op. cit.*, p. 37.

> makes the actual use of it improbable: "[...] every feeling calculated to weaken the attachment to the whole is suppressed". [...] Finally, each segment will recognize the danger of deadlock and immobilism that is likely to result from an unrestrained use of the veto: 'Impelled by the imperious necessity of preventing the suspension of the action of government [...], each portion would regard the sacrifice it might have to make by yielding its peculiar interest to secure the common interest and safety of all, including its own [...]'".[31]

While some scholars have noted that the veto mechanism may hinder the regular functioning of representative bodies, a well-designed veto can empower groups in their pursuit of the common good, particularly in divided or multicultural societies.[32] This is evident in post-conflict situations, such as those that emerged in Northern Ireland, South Tyrol, Cyprus (although still rejected by the Turkish minority), as well as Belgium, and especially in the Balkans following the disintegration of socialist Yugoslavia, where the granting of veto rights encouraged ethnic groups to commit to peace agreements and to jointly draft a new constitutional compromise.[33]

The task of designing veto powers and other forms of consensual or semi-consensual deliberation so that their primary purpose – the protection of group interests does not undermine the stability of the system of government – falls squarely within the domain of legal-constitutional rationalization. This task is exemplified by mechanisms such as Belgium's *sonnette d'alarme* (alarm clock) or Northern Ireland's "petitions of concern" and "cross-community support" procedure.

From a constitutional perspective, the mutual veto, in addition to functioning as a negative closure clause aimed at protecting the fundamental interests of minorities, can also serve as a key mechanism for the active negotiation of those interests. In this sense, veto power is no longer merely an "emergency brake" but

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31 *Ibidem*, quoting CALHOUN, John C., *A Disquisition on Government*, *op. cit.*, p. 28, pp. 37-38, p. 52.

32 See KONESKA, Cvete, *After Ethnic Conflict: Policy-Making in Post-Conflict Bosnia and Herzegovina and Macedonia*, Routledge, Abingdon, 2014; BIEBER, Florian, "Power-Sharing After Yugoslavia: Functionality and Dysfunctionality of Power-Sharing Institutions in Post-War Bosnia, Macedonia, and Kosovo", *From Power-Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*, S. Noel (Ed.), McGill-Queen's University Press, Montreal, pp. 231-248; MCCULLOCH, Allison, "The Use and Abuse of Veto Rights in Power-Sharing Systems: Northern Ireland's Petition of Concern in Comparative Perspective", *Government and Opposition*, vol. 53, 2018, pp. 735-756.

33 In addition to the authors already cited in the previous note, see also MCEVOY, Joanne, "We Forbid! The Mutual Veto and Power-Sharing Democracy", *Power-Sharing in Deeply Divided Places*, J. McEvoy and B. O'Leary, (Eds.), University of Pennsylvania Press, Philadelphia, 2013, pp. 253-277, p. 255; O'FLYNN, Ian, "Deliberative Democracy, the Public Interest and the Consociational Model", *Political Studies*, vol. 58, 2010, pp. 572-589; SCHNECKENER, Ulrich, "Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation", *Journal of Peace Research*, vol. 39, 2002, pp. 203-228.

rather becomes the "unmoved mover" of the consociational constitutional model (see *supra*, sec. 4). Thus, in certain legal systems it has facilitated the transition from "agonistic pluralism" to the concrete realization of "deliberative democracy", in the sense articulated by Habermas.[34] Drawing inspiration from Bernard Manin, Habermas shifts the focus of the democratic concept from individuals' predetermined wills to the process of will-formation. From this reversal of perspective arises the notion of "discursive democracy" (*Diskursbegriff der Demokratie*), which Habermas grounds in a particular idea of "understanding" – one that is achieved through collectively reached conclusions, fostered by open and dialogical exchanges of differing viewpoints and by a careful weighing of pros and cons.[35] This leads all parties – even those initially dissenting – to accept the norm, not as an imposition from above but as the outcome of a choice rooted in discursive-deliberative democracy. From this perspective, the instrument of concurrent majority or mutual veto, if properly structured, appears as a legal and procedural embodiment of this philosophical conception insofar as it establishes a deliberative process in which the shared will underpinning the norm becomes indispensable.

In short, the mutual veto – when accompanied by the guarantee of adequate political representation of groups as a precondition for its effective functioning – emerges as a crucial element in constructing a democracy that is responsive to the interests of all relevant minorities.[36]

If the rule of law is to be re-established on the basis of respecting the fundamental interests of minorities, the provision of mutual veto should extend beyond multiethnic, multinational, and deeply divided societies. The mutual veto – and, by extension, the deliberative rule of the concurrent majority – ought to be regarded as a universally valid alternative to the prevailing rule of numerical majority, which is increasingly inadequate for governing contemporary societies marked by irreducible complexity and growing multiculturalism.

Thus, one might provocatively reverse the prevailing perspective on consociational democracy – no longer viewing it merely as a transitional phase intended to guide deeply divided societies toward social pacification and, eventually, to be replaced by competitive democracy. Instead, why not

34 It should be noted that this dichotomy is proposed by MOUFFE, Chantal, "Deliberative Democracy or Agonistic Pluralism?", *Social Research*, vol. 66, 1999, pp. 745-758, but here the two concepts are understood as complementary rather than competing patterns.

35 See HABERMAS, Jürgen, *Strukturwandel der Öffentlichkeit, Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, Suhrkamp, Frankfurt am Main, 1990.

36 RAM, Megha, and STRØM, Kaare Wallace, "Mutual veto and power-sharing", *International Area Studies Review*, vol. 17, 2014, pp. 343-358, suggest that mutual veto mechanisms are relatively rare and are more commonly found in highly developed societies than across the global average; conversely, it is argued that effective mutual veto models are almost entirely absent outside well-established political institutions.

envision the reverse path: a movement from competitive democracies toward a new, universal form of consociational democracy, one grounded in the transcendence of the principle of numerical majority? In short, why not promote the *de-competitivization* of majoritarian democracies rather than the *de-consociationalization* of consociational ones?[37]

4.2. Liberal Veto vs Corporate Veto.

The renegotiation of the social contract in the context of cultural pluralism must avoid both the homogenizing pressures of the assimilationist "melting pot" model and the isolationist tendencies of the multicultural "salad bowl" (or "mosaic") model. Instead, the goal is to adapt contemporary democracy to Mounk's vision of the "public park", which alludes to the model of intercultural democracy.[38] To promote intercultural democracy, veto power should not be designed as a corporate veto but rather as a liberal veto, i.e. a neutral mechanism exercised by a numerical minority (namely, a fraction of the assembly) aimed at countering the arbitrariness of majority rule. Its function is to prevent the transformation of the rule of law into merely the rule of the majority's law.

In the framework of the liberal veto and concurrent majority, decision-making power is not divided between a majority and a minority. Rather, principal segments of the representative body are endowed with veto power over legislation. This kind of veto is implicit in the rule of a qualified majority, or 'supermajority'. The principle of qualified majority has gradually entered the secular sphere since the Middle Ages, eventually becoming embedded in constitutional law.[39]

This approach ultimately converges with a conclusion reached by Rousseau himself: although he abstractly defends the principle of majority rule, he is, in fact, an advocate of the supermajority principle. Rousseau argues that the required majority should approach unanimity in proportion to the seriousness of the decision at hand, thereby undermining the theoretical foundation of simple majority rule. The use of a simple majority is deemed appropriate only for elections, everyday matters, and routine administration. In contrast, legislative decisions require a qualified majority of three-quarters, state-related matters

37 For a discussion on *de-consociationalization* see, for example, HELMS, Ludger, JENNY, Marcello, and WILLUMSEN, David M., "Alpine Troubles: Trajectories of De-Consociationalisation in Austria and Switzerland Compared", *Swiss Political Science Review*, vol. 25, 2019, pp. 381-407; BERENDS, Pelle, *De-Consociational Transition: A Comparison of Three Consociational Democracies*, University of Windsor, Major Papers, no. 142, 2020, https://scholar.uwindsor.ca/major-papers/142 Major.

38 See MOUNK, Yascha, *The Great Experiment. Why Diverse Democracies Fall Apart and How They Can Endure*, Penguin Press, New York, 2022.

39 GIERKE, Otto von, "Sur le principe de majorité", *op. cit.*, p. 178.

require a two-thirds majority, and unanimity remains necessary for truly fundamental laws (*Du contrat social*, IV, cap. III).

In this perspective, the deliberative rule of the qualified majority (or supermajority rule) achieves – or at least can achieve – a universally valid expression of the principle of concurrent majority and minority inclusion. This makes it applicable regardless of whether the social body is marked by the conflicting coexistence of multiple ethnic, linguistic, religious, or cultural components. In contemporary societies, where minority identities are in constant flux, the rule of deliberation by qualified majority functions like a revolving door, automatically adapting to the ongoing changes within a multicultural social body. In contrast, the corporate veto – as a special political right – may retain only a residual role in deeply divided societies, where it serves to protect a specific minority within a context marked by pronounced conflictual segmentation. The threshold beyond which the need to seek consensus through a 'contractual' method arises depends not only on the size of the qualified majority, but also on the degree of fragmentation and heterogeneity within the party system. It is therefore influenced by multiple variables of both political and legal nature, such as the electoral system. For instance, combining a moderately adjusted proportional system – rather than a strongly adjusted one – with qualified majority rules inevitably increases the risk of political instability and institutional deadlock.

The liberal-mutual veto linked to the supermajority rule provides a way to address the issue of identifying minorities who deserve special treatment. In contrast, granting veto power to a specific minority may lead constitutional law to draw distinctions that risk becoming discriminatory toward other minorities or social groups excluded from such protections. A case in point is the higher level of protection afforded to officially recognized linguistic minorities, which raises concerns about the differential treatment of indigenous linguistic minorities compared to settled foreign minorities lacking citizenship status.

As is well known, in international and supranational law, efforts to define minorities in a comprehensive and all-encompassing way often result in formulations that are overly descriptive and, consequently, excessively selective.[40] At the same time, the diversification of subjective legal statuses

40 From this perspective, the definition developed in 1979 by the working group led by Francesco Capotorti on behalf of the United Nations also appears overly restrictive. This is acknowledged in the preface itself, which highlights the limits of the definition: "[The definition] is drawn up solely with the application of article 27 of the Covenant in mind. In that precise context, the term 'minority' may be taken to refer to: A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members-being nationals of the state-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language". See CAPOTORTI, Francesco, *Study on Persons Belonging to Ethnic, Religious and Linguistic*

introduced by international law appears to further complicate these efforts at definition, creating a dichotomy between the rights of Indigenous Peoples and those of minorities,[41] or indirectly endorsing differentiated treatment of "national minorities" – as protected under the Framework Convention adopted by the Council of Europe in 1995 – compared to minorities more generally. These legally grounded distinctions ultimately result in an uneven application of the rule of law among the various categories of minorities in contemporary multicultural societies.[42]

In a nutshell, the fundamental difference between the concepts of corporate veto and liberal veto lies in the fact that the former identifies groups – and thus veto players – based on ascriptive criteria such as ethnicity or religion, whereas the latter allocates power-sharing rights according to the attainment of a purely quantitative threshold, ultimately determined by the level of electoral support received.

Accordingly, the criterion for attributing a corporate veto presupposes the identification of constitutionally recognized identity-based groups, whereas the liberal veto is based on a neutral criterion, allowing the temporary minority holding veto power to be replaced or transformed over time. Among the examples of the former is Article 64 of the Slovenian Constitution, which

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Minorities, UN Document E/CN.4/Sub.2/384/Rev.1, 1979, p. 96, par. 568. The Council of Europe also refers to Capotorti's definition. On the definitional issue, see also PACKER, John, "Problems in Defining Minorities", *Minority Group Rights in the Millennium*, B. Bowring and D. Fottrell (Eds.), Kluwer, The Hague-Boston, 1999, London-Boston 1999, pp. 223-274. On the topic of minorities in general, see, among others, PENTASSUGLIA, Gaetano, *Minorities in International Law*, European Center for Minority Issues (ECMI), Strasbourg-Flensburg, 2002.

41 See EIDE, Asbjørn, and DAES, Erica-Irene, *Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples*, UN Document E/CN.4/Sub.2/2000/10, 2000; CRAWFORD, James (Ed.), *The Rights of Peoples*, Clarendon Press, Oxford, 1988; the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The International Labour Organization (ILO) Convention no. 169 of 1989 on Indigenous and Tribal Peoples in Independent Countries affirms the right of Indigenous populations to participate in the political decision-making process (see Articles 6, 7, and 15). There are also protective instruments that apply to all minorities, such as, on the cultural level, the protection provided by Article 27 of the ICCPR (International Covenant on Civil and Political Rights), and, on the political level, the protection asserted by Article 2, paragraph 3, of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. In February 2019, the United Nations Human Rights Committee issued two decisions regarding the Sámediggi, the Parliament of the Sámi People located in Finnish territory, which aim to ensure a high level of political self-government for the Indigenous people, in relation to the legal constraints arising from the "host" state (Sanila-Aikio v. Finland, CCPR/C/124/D/2668/2015, and Näkkäläjärvi v. Finland, CCPR/C/124/D/2950/2017).

42 Indeed, the reasons that may lead to the recognition of a group as a minority are potentially infinite, and may well differ from those invoked by legislators in the exercise of their discretion, as highlighted by PALERMO, Francesco, and WOELK, Jens, *Diritto costituzionale comparato dei gruppi e delle minoranze*, *op. cit.*, p. 6.

establishes a special political right of legislative veto (or parallel consent) granted, *ratione materiae*, to the political representatives of the Italian and Hungarian national communities in Slovenia. This right, however, is not extended to the Roma community, even though it is recognized as a protected minority in Article 65 (implemented by the legislature in 2007). To give another example, the Constitution of the Federation of Bosnia and Herzegovina predetermines the ethnic groups entitled to exercise veto power over a parliamentary decision that may be declared detrimental to the vital interests of the Bosnian, Croat, or Serb Peoples by their respective delegates.

Corporate vetoes have the merit of encouraging opposing groups to actively participate in the institutional life of the system and, in the case of systems born out of interethnic conflict (as in the Balkan region), to engage with the new political and constitutional framework with greater confidence.[43] However, they also entail certain risks, such as the radicalization of differences, stemming from the fact that the potential social assimilation of a smaller group into a larger one would eliminate the advantage conferred by the veto right, an advantage that effectively 'imprisons' individuals within their identity groups.[44]

Another risk lies in the unequal treatment of minorities that are either excluded from constitutional recognition or, although recognized, do not enjoy the veto right, resulting in their marginalization within the political and institutional sphere. There is also the complex issue of the criteria used to determine group membership, not limited to residence, language, registration on specific lists, or self-identification, but in some cases even extending to notions of 'blood'. Equally important are the safeguards afforded to individuals who, belonging to unrecognized ethnic groups and refusing to affiliate with any of the constitutionally acknowledged ones, risk being denied access to certain political rights, as illustrated in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, decided by the European Court of Human Rights on 22 December 2009.

The liberal veto, on the other hand, is grounded in numerical-quantitative formulas and does not entail the establishment of special political rights. Structured as a prohibitive power held by a numerical fraction of the deliberative body, the pure liberal veto corresponds to the mutual veto theorized by Calhoun, which constitutes the first compelling theoretical archetype of this model, originally conceived to extend the rule of qualified majority decision-making, primarily associated with constitutional rigidity, to the realm of ordinary

43 See for example MCEVOY, Joanne, "We Forbid!", *op. cit.*

44 In Seyla Benhabib's view, a pluralist deliberative democracy must ensure that individuals have not only the voluntary freedom to join a minority group, but also the unrestricted right to exit and to join another group, free from coercion by either the state or the group itself. See BENHABIB, Seyla, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton University Press, Princeton, 2002, p. 131.

legislative functions (as also suggested by Rousseau). The liberal-mutual veto provides a mechanism for addressing what has been described as the "permanent and irreconcilable tension between the political representation of minorities and political representation as such".[45]

Any politically significant identity group can gain access to veto power (and thus to negotiation) through the ordinary system of political representation, potentially even via identity-based parties, where such formations are not prohibited by the legal order. Generally speaking, a liberal veto enables representatives of a group to self-identify and offers the advantage of flexibility: veto players are defined according to a percentage threshold, which also serves to balance the principle of consensus with that of majority rule. As a result, the liberal veto system allows the associated constitutional guarantees to adapt automatically to the ongoing demographic changes within a multicultural or multi-ethnic society, thereby fostering cooperation and integration.

Since the veto is granted to a numerical minority capable of blocking decisions, political forces that fail to achieve sufficient parliamentary representation to meet the threshold required to trigger the veto may be compelled to cooperate with representatives of other groups in order to exercise it.

The main challenge in designing the liberal veto model lies in ensuring that the threshold is high enough to prevent decision-making from being held hostage by small political groups acting out of purely opportunistic motives, yet not so high as to pre-emptively exclude identity groups that deserve the protection afforded by the veto right. Should this occur, the liberal veto should be supplemented by the targeted allocation of a corporate veto, understood as a special political right reserved for specific identity-based minorities. Moreover, in contemporary constitutional systems the liberal veto may blend with the corporate veto. In the constitutional orders of Macedonia, Kosovo, and Bosnia and Herzegovina, for example, certain veto power models involve the aggregation of constitutionally recognized minority groups through double-majority formulas applied to legislative deliberations on sensitive matters. In such contexts, the constitutional framework merges elements of both the liberal and corporate veto, with the aim of fostering intergroup cooperation in the protection of shared fundamental interests. As a result, smaller minorities are often unable to block legislation without the support of other groups, particularly those with greater parliamentary representation.[46]

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45 PALERMO, Francesco, and WOELK, Jens, *Diritto costituzionale comparato dei gruppi e delle minoranze*, *op. cit.*

46 See, for example, KONESKA, Cvete, *After Ethnic Conflict*, *op. cit.*; BIEBER, Florian, "Power-Sharing After Yugoslavia", *op. cit.*; KELLEHER, Shane, "Minority Veto Rights in Power Sharing

Once again, the most challenging task in constitutional design lies in avoiding the unreasonable marginalization of certain groups, while preserving the necessary "legal rationalization" of the principle of consensus.[47]

It is clear that the liberal veto model, functioning as a systemic check on the majority principle to safeguard the interests of all relevant groups, appears to better address an emerging need in contemporary pluralistic and multicultural democracies, which are increasingly characterized by social complexity and the proliferation of intermediate communities.

Finally, it should be emphasized that the effective functioning of the liberal veto, which, as such, does not require the precondition of reserved seats for individual group representatives, nonetheless necessitates an electoral system capable of ensuring adequate representation for minorities. This is usually achieved by adopting proportional electoral systems with exclusionary thresholds to secure representation of all relevant groups, for example, by establishing exceptions to the standard threshold in favour of any relevant identity minorities that may be present.[48]

5. CONCLUSION: THE NEED TO RESTRAIN THE "MAJORITY-BASED RULE OF LAW", ESPECIALLY IN THE EUROPEAN CONTEXT.

Justice, according to John Rawls' theory, implies the (political) right of every individual to be treated with equal respect and concern by those in power, so that fundamental rights, freedom, and equality harmoniously combine for the benefit of all members of society.[49] It follows that there is no justice when a minority, due to the absence of mutual veto power or other comparable constitutional instruments aimed at influencing the content of laws, is forced to passively endure the systematic violation of its fundamental interests by those in power, who are solely concerned with their own interests and those of the majority. Laws contrary to the essential interests of minorities may, in fact, formally comply with constitutional limits and thus remain untouchable.

Systems: Lessons from Macedonia, Northern Ireland and Belgium", *Adalah's Newsletter*, vol. 13, 2005, pp. 1-8.

47 By contrast, VERMEULE, Adrian, "Absolute Majority Rules", *British Journal of Political Science*, vol. 37, 2007, pp. 643-658, defends the criterion of the absolute majority as a good compromise against the risk of both majority and minority tyrannies.

48 However, a classic plurality system could also serve this purpose, at least where single-member electoral districts are designed in a way that promotes the representation of groups by taking their distribution across the national territory into account (a practice known as 'positive gerrymandering').

49 The reference is to the "principle of equal participation". See RAWLS, John, *A Theory of Justice*, *op. cit.*, p. 194.

Thus, the classic guarantees of the rule of law and judicial review of legislation may prove to be completely ineffective against the tyrannical laws of the majority.

At this point, contrary to Baranger's claim, the injustice of majority rule becomes evident, thereby legitimizing minorities to react by non-violent, although unlawful, means to defend their fundamental interests. This is because the essential interests of minorities, even if not recognized or adequately protected by positive law, must be considered fundamental rights under natural law.

In such cases, a minority is left with no choice but to defend its autonomy at all costs. This can occur through two possible exceptional remedies: secession and nullification.[50]

In 2016, Ran Hirschl published an essay titled *Secession and Nullification as a Global Trend*.[51] Nine years later, it can be said that this global trend has persisted, with a general worsening of social conflicts at all levels.

The rise of secessionist movements, regional autonomy claims, and nullification efforts remains a prominent feature of political and social landscapes worldwide. Factors such as growing nationalism, ethnic tensions and economic inequalities have further fuelled divisions, leading to increased conflicts both within and between states. Additionally, political polarization, populism, and dissatisfaction with traditional democratic systems have deepened these divides, making secession and nullification in some regions even more viable or appealing strategies for marginalized or dissenting groups seeking autonomy or protection of their interests.

Fortunately, deliberative procedures inspired by the consensus method exist and operate within the European context, even beyond or above the level of national legal systems. From this perspective, the European Union represents one

50 While secession implies a complete rejection of the oppressor state's law and the creation of a new legal order, nullification involves a selective disapplication of only those legal norms that have been tyrannically approved by the majority and that harm the vital interests of the minority. Nevertheless, the minority continues to be part of the social body and to obey all other legal norms. The doctrine of nullification was proposed by Calhoun in the *South Carolina Exposition and Protest* of 1828, drawing on the theories developed by Madison and Jefferson, as well as the Kentucky and Virginia Resolutions of 1798-1799. Later, the uncontrolled expansion of European Union law, driven by the constitutional transformation promoted by the Court of Justice, based on the integration argument, led some constitutional courts to establish limits reminiscent of nullification. Notable examples include the doctrine of *controlimiti* by the Italian Constitutional Court and the requirement for rigorous *Identitätskontrolle* by the German *Bundesverfassungsgericht*.

51 HIRSCHL, Ran, "Secession and Nullification as a Global Trend", *Constitutional Studies*, vol. 2, 2016, pp. 23-40.

of the most significant contemporary paradigms of supranational consociational governance.[52]

More specifically, certain distinctive procedures come into focus, beginning with the consensual (unanimity) and, in some cases, semi-consensual (qualified majority) decision-making that characterizes key decisions of the European Council (Article 15 TEU). In the supranational legislative procedure, which involves other EU institutions, the approval of both branches of the EU legislature is required through concurrent but separate majorities: on the one hand, the European Parliament; on the other, the Council of the European Union, which votes by qualified majority (more precisely, by double qualified majority, i.e., at least 55% of member states representing at least 65% of the EU population). When the Council acts in the absence of proposals from the Commission or the High Representative, a reinforced qualified majority is required (at least 72% of member states representing at least 65% of the population). A specific blocking minority is also foreseen, requiring at least four member states representing more than 35% of the population. Furthermore, outside the legislative field several areas remain where the Council still deliberates by unanimity, while decisions by simple majority (e.g., on procedural matters) are relatively rare.

Despite the challenges posed by multiple layers of veto powers, these deliberative approaches continue to provide a necessary balance within the EU's ongoing federalization process, helping to preserve its overall unity. Majority rule could push the EU's governance into a disruptive dynamic without addressing the democratic deficit, which should primarily be tackled through democratic and participatory bottom-up political dialogue, carried out within appropriate social and institutional forums, namely, the "public sphere" as proposed by Habermas. The EU remains, in fact, a richly diverse constellation of constitutional identities (especially following the Eastern enlargements) alongside different legal traditions, cultural heritages, and economic interests. In conclusion, what emerges is a model of consociational democracy which, although frequently criticized by those advocating for more agile and decisive EU institutions, realistically constitutes the only viable compromise for governing such a vast and heterogeneous supranational entity, regardless of whether it is understood as a *Staatenverbund* or a *Verfassungsverbund*.

52 SCHARPF, Fritz W., "Towards a More Democratic Europe: De-Constitutionalization and Majority Rule", *Journal for Comparative Government and European Policy*, vol. 15, 2017, p. 97, observes: "From a liberal perspective, of course, the need for consensus and the incapacity to inflict pareto-inferior outcomes on any veto player may be seen as a normatively very attractive characteristic of European legislation".

THE ROLE OF THE JUDGE IN THE CONTEXT OF CLIMATE LITIGATION: BOOSTING THE FIGHT AGAINST CLIMATE CHANGE AND/OR RISK TO THE RULE OF LAW.[1]

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SUMMARY: 1. INTRODUCTION. 2. THE RISK OF CLIMATE LITIGATION FOR THE RULE OF LAW. THE MEANING OF THE PRINCIPLE OF DIVISION OF POWERS AND THE ROLE OF THE JUDGE. 3. THE PRINCIPLE OF DIVISION OF POWERS AS AN OBSTACLE TO THE JUDGE'S ACTION IN THE FIGHT AGAINST CLIMATE CHANGE. THE APPROACH IN JUDICIAL PRACTICE. 4. WHAT CONTRIBUTION CAN CLIMATE LITIGATION MAKE TO THE STRENGTHENING OF THE REACTION TO CLIMATE CHANGE? 5. CONCLUSIONS.

1. INTRODUCTION.

The consolidation in a short period of time of what is known as 'climate litigation' gives the judge a major role as an actor in the fight against global warming. However, judicial action in this field does not fail to raise some questions, both as to its legitimacy and its timeliness. This study is devoted to the

1 This study is part of the R&D&I project TED2021-130264B-I00, funded by MCIN/AEI/10.13039/501100011033/ and by the European Union NextGenerationEU/PRTR and the R&D&I project PID2021-124296NB-I00 funded by MCIN/AEI/10.13039/501100011033 and by ERDF "A way of doing Europe". It should also be understood as part of the actions that the AGUDEMA Research Group (Water, Law and Environment, Competitive Reference Group S2117 R, BOA 81, 27 March 2018), develops with funding from the Government of Aragon within the IUCA (University Institute of Environmental Sciences).

analysis of both issues, mainly the first, legitimacy, although it is useful to begin by defining what we mean by climate litigation for these purposes and what the reasons are that have led to its rapid consolidation.

The concept of climate litigation describes a reality that presents various dimensions and can refer to a broad perspective as well as to any legal proceeding in which, directly or indirectly, climate change is present in the arguments of the parties. However, considering the object of analysis, especially the impact of this phenomenon on the rule of law, this study will opt for an approach that could be considered strict. In this sense, reference to climate litigation will be understood as limited to a type of procedure in which an individual, whether a natural or legal person, initiates legal proceedings against the Administration, demanding a greater effort to reduce Greenhouse Gas (GHG) emissions.[2]

A relevant feature of these cases is their general nature, insofar as the effects of the judge's eventual decision transcend the level of the mere specific interests of the plaintiffs to reach the level of general interests, which is why this litigation can be identified as strategic.[3] According to this, the judge assumes the defence of a common good, which, as will be seen below, is important from the perspective of one of the reasons for the rapid consolidation of this phenomenon: judicial activism.

Focusing more on the question of motives, it should be noted that the rise of climate litigation is due to a combination of factors, two of which stand out in particular: 1) the dissatisfaction of citizens, especially groups of climate activists, with respect to the reaction that, at least so far, has been articulated at the political level, and 2) the aforementioned predisposition on the part of judges to climate activism which, as we shall see, can have two sides that are not necessarily alternatives.[4]

2 This demand for a greater mitigation effort can take the form of requiring the state authorities to adopt new provisions in this sense, or to modify or even annul existing ones when they are considered an obstacle to reaching the mitigation threshold considered adequate by the plaintiffs. This option, in the strictest sense, would leave out other types of litigation which, although they could also be considered as climate-related, as already noted, are not so relevant for the purposes of this study, such as litigation between private parties, particularly companies, whether under international or domestic law. On the delimitation of the concept of climate litigation, see MORENO MOLINA, Ángel Manuel, *El Derecho del cambio climático: Retos, instrumentos y litigios*, Tirant lo Blanch, Valencia, 2023, pp. 538 et seq.

3 SCHOUKENS, Hendrik, "Climate change litigation and the separation of powers: effective legal protection as the ultimate yardstick?", in SINDICO, Francesco, Mckenzie, Kate, MEDICI-COLOMBO, Gastón, WEGENER, Lennart (eds.), *Research Handbook on Climate Change Litigation*, Edward Elgar Publishing, Cheltenham, 2024, p. 185.

4 In addition, there are other elements that contribute to climate activist groups opting for the courtroom rather than the political arena to continue their struggle for the intensification of mitigation efforts by states. In this sense, a certain simplification of the actors present in the context of the judicial procedure is put on the table, pointing out that before the courts these groups face *only* the state, as opposed to the cacophony of the political debate, with a set of voices that hinder the transmission of the message to citizens. This is made difficult by the intervention of

The first of these factors, which would be preceded by growing climate awareness among the public, or at least among certain groups of citizens, responds, as has already been said, to the consideration that the reaction to climate change articulated at the political and legislative level is insufficient, with the negative consequences that this would have for people's lives and health. In this respect, it should be recognised that this conclusion regarding the insufficient reaction, until now, to global warming seems to be supported by scientific reports, on which, as will be seen later, the judge's action in climate matters rests in part. The consequence of this insufficient reaction is a constant increase in GHG emissions and average temperatures on the planet, without the structure of international cooperation – with the Paris Agreement as the last link –making it possible to reverse the phenomenon and consequently its negative impacts.[5]

The second factor mentioned is that of judicial activism, to which reference was made when pointing out the strategic nature of climate litigation, highlighting the status of the judge as defender of the general interest. As also noted, this second factor has two sides that are not alternatives; the first is what is described as the hope of notoriety or fame,[6] which is driven by the media attention given to these matters, presented as a sort of David against Goliath fight[7] or as the reaction of especially vulnerable groups to the impact of climate change, be it children or young people[8]

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industry, including their advisors, qualified as *merchants of doubt*, which contributes to the fact that governments, conditioned by short-term economic interests, are not capable of resolving the climate crisis. BERGKAMP, Lucas and HANEKAMP, Jaap, "Climate Change Litigation against states: The Perils of Court-Made Climate Policies", *European Energy and Environmental Law Review*, 24, 2015, p. 104.

5 This, in turn, should lead to a negative assessment, at least for the time being, of this cooperation structure, without the philosophical transformation introduced in the Paris Agreement, from a *top-down* to a *bottom-up* model in determining the contribution of each state to the global mitigation effort, has been sufficient to bring about a significant change in this regard.

6 MORENO MOLINA, Ángel Manuel, *El Derecho del cambio climático...*, *op. cit.*, pp. 539 et seq. In the same sense see SCHOUKENS, Hendrik, "Climate change litigation and the separation of Powers:..." *op. cit.*, pp. 185 et seq.

7 Such as the proceedings initiated in 2015 before the District Court of Essen by Luciano Saúl Lliuva, a Peruvian farmer, against the parent company and owner of the RWE Group, a German energy company. Mr. Lliuva's lawsuit claimed the company's liability, as a consequence of its contribution to GHG emissions, for the melting of mountain glaciers near his town, Huaraz. The case was dismissed by the Essen District Court in December 2016 and Mr. Lliuva's subsequent appeal to the Hamm Higher Regional Court in 2017 is still unresolved. In this regard see https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/

8 Like the case filed also in 2015 by 21 children and adolescents, aged 8 to 19, before the District Court for the District of Oregon against the US Government for violating their constitutional rights by its action in relation to global warming. Or the case filed in 2020 by six Portuguese children and young people, aged 11 to 24, before the European Court of Human Rights against Portugal and 32 other states Parties to the Rome Convention for the threat posed to their rights, including the right to life, by the inadequate action of those states against climate change. In both cases the claims were declared inadmissible. *Justice Department statement on Juliana Case*, 24 March 2025. Available at: https://www.justice.gov/opa/pr/justice-department-statement-juliana-case Grand Chamber,

or the elderly.[9] This arouses popular sympathy and amplifies the media impact of the positions of the judges, as well as increasing social pressure on them.

Moreover, this greater media attention that judges may receive has the added element, and this is the other side of the issue alluded to above, of identifying them as defenders of a public interest that other state powers have not adequately addressed.[10] Thus the judge would be presented, albeit implicitly, and especially by those who bring these disputes before him, as a sort of 'climate saviour' whose action will make it possible to overcome the obstacle of politics, with its inability so far to adopt decisions that give sufficient impetus to an adequate reaction against climate change.

In any case, climate litigation, beyond its consolidation, has offered results that could be described as uneven, with pronouncements that could well be defined as contradictory and with a success rate that is at least moderate in terms of the estimation of the claims presented before the judges. This does not prevent us from mentioning judicial pronouncements that are seen as milestones on this path of climate litigation as an instrument for the reaction against climate change. In this respect, and simply by way of example, judicial decisions in cases such as *Urgenda*, in the domestic sphere, or the aforementioned *KlimaSeniorinnen*, in the international sphere, are worthy of note. In these cases, the judge notes the insufficiency of the efforts of the states concerned (the Netherlands and Switzerland respectively) in relation to the reduction of GHG emissions, and even, as will be pointed out later, establishes precisely the level of effort that these states should make in this matter.

However, beyond this vision of these pronouncements as milestones in the fight against the insufficient action of states, an adequate assessment of the role of the judge as a climate actor should take additional elements into consideration, proceeding, as noted at the beginning of this study, with an examination of both the legitimacy and opportunity or usefulness in relation to climate litigation. In the first case, it would be a matter of assessing the risks of such litigation, particularly from the perspective of its impact on the rule of law through

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Decision of 9 April 2024, case of *Duarte Agostinho and Others v. Portugal and 32 Others* (Application no. 39371/20) (ECLI:EC:ECHR:2024:0409DEC003937120).

9 The judgment adopted by the European Court of Human Rights on 9 April 2024, in which it ruled on the claim brought by an association of elderly women, in addition to some of its individual members, against Switzerland for violation of the right of the members of this association to protection against the harmful effects of climate change, as a result of the insufficient action of this state in this regard, is of obligatory reference. Grand Chamber, Judgment (Merits and Satisfaction) of 9 April 2024, case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application no. 53600/20) (ECLI:EC:ECHR:2024:0409JUD005360020).

10 This leads to identifying climate litigation as an invitation to judges to gain importance and prominence *by doing Good.* BERGKAMP, Lucas and HANEKAMP, Jaap, "Climate Change Litigation against states:...", *op. cit.*, pp. 103 et seq.

the alteration of the principle of division of powers as a result of the possible usurpation by the judge of the competences and functions of the other powers of the state. In the second case, the examination would focus on having a more precise idea of the positive effects that climate litigation may have on the effort to react to climate change.

The result of this analysis leads, as will be seen in more detail later, to the conclusion that the role of the judge as a climate actor is not absolutely beneficial or perverse. Thus, they can neither be seen as the saviours of the climate nor (in principle) represent an essential threat to the rule of law, although, as will be seen later, an element of confusion can be introduced in this respect. However, the judge can indeed be an actor in this complex and collective effort to react to climate change, and what is important is to specify what his or her role should be, how he/she should act so that, as far as possible, his/her contribution to this objective is maximised, but at the same time reducing, or at best eliminating, any risk to the functioning of the rule of law which, as pointed out in other contributions included in this volume, faces, especially in these times, multiple threats. We will begin our analysis precisely from the first of these perspectives by attempting to specify the impact of climate litigation on the principle of the division of powers and, by extension, on the functioning of the rule of law.

2. THE RISK OF CLIMATE LITIGATION FOR THE RULE OF LAW. THE MEANING OF THE PRINCIPLE OF DIVISION OF POWERS AND THE ROLE OF THE JUDGE.

One of the first theoreticians of the principle of separation of powers – *political trias* – a pillar of the rule of law was the French jurist and philosopher Charles Louis de Secondat, Sieur de la Brède and Baron of Montesquieu, particularly in his work *De l'esprit des lois* written in 1748. This principle, based on the reciprocal control of the three powers of the state – Executive, Legislative and Judicial – aims to ensure respect for each of them by the competences of the others, thus avoiding a concentration of power that could open the door to arbitrariness and corruption. In this context, the judge was considered as the *bouche de la loi*, which, taken to the extreme, would limit his/her function to an automatic application of the law.

However, this maximalist approach does not seem to be applicable nowadays, the approach to this principle being based not so much on a rigid separation of the three powers of the state but rather on a set of interactions between them, through a system of *checks and balances*, all the while maintaining the principle as the backbone of the political system and the rule of law in

modern states.[11] A more current approach to the meaning of the rule of law can be found in the identification of the elements that make up the rule of law by the *European Commission for Democracy through Law* (Venice Commission) in a 2011 Report, including: legality, legal certainty, prohibition of arbitrariness of public authorities, independence and impartiality of the courts, effective judicial protection and respect for fundamental rights; and non-discrimination and equality before the law.[12] From this list of elements of the rule of law we can deduce, on the one hand, a role for the judiciary that obviously goes beyond that of a mere enforcer of the law and, on the other, its function in the game of checks and balances mentioned above, which would focus mainly on guaranteeing the control of the legality of the actions of the Executive and the Legislature.[13]

Having identified, albeit synthetically, the meaning of the principle of division of powers in the modern rule of law, it is time to address the threat that climate litigation represents to it as a consequence, as already noted, of the judge's usurpation of functions that in principle would correspond to the Executive and the Legislature. This usurpation of functions would occur indirectly through the imposition of obligations, mainly in the form of more ambitious mitigation objectives for the state, which condition the fulfilment of its functions by other powers of the state. In the case of the Executive, this conditioning would take the form of an obligation to reorientate the state's climate policy which, given the global nature of the phenomenon of the release of GHG emissions, which involves practically all sectors of activity, is equivalent to a reorientation of economic policy and even beyond. In the case of the Legislature, conditioning would take the form of requiring the development of an appropriate regulatory framework, either, as already mentioned, through the adoption of provisions that will make it possible to achieve the mitigation objective set by the judge or through the elimination of provisions that represent an obstacle to achieving that end.

As a consequence of this usurpation of powers, there would be a risk of substituting, in the courtroom, what was decided by the majority in democratic processes, resulting in what is called an 'institutional shortcut'.[14] The resulting negative consequences for the rule of law are based on a series of elements ranging from the inadequacy of the courts to adopt this type of measures to

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11 BERGKAMP, Lucas and HANEKAMP, Jaap, "Climate Change Litigation against states:...," *op. cit.*

12 *Report on the Rule of Law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011*), 4 April 2011, CDL-AD(2011)003rev, pp. 13 et seq. Available at: https://www.coe.int/en/web/venice-commission/-/CDL-AD(2011)003rev-e

13 In principle, this would require the plaintiffs in this type of litigation to demonstrate the illegality of the administrative action being challenged, and it would not be sufficient to allege its insufficiency or lack of ambition. MORENO MOLINA, Ángel Manuel, *El Derecho del cambio climático*:..., *op. cit.*, pp. 554 et seq.

14 *Ibid*, p. 540.

the lack of representation of part of society in the procedures leading to them. In relation to the inadequacy of the judicial procedure for the adoption of this type of measures imposing targets for the reductions of GHG emissions, it is necessary to begin with the logical observation of a lack of training among judges, who are specialists in law, for the proper understanding of extremely complex scientific-technical issues. In this respect, it could be argued that this shortcoming, however difficult to dispute, can be at least partially offset by the role of technically competent experts to help judges to properly understand what is at stake, in addition to the possibility, which as we shall see has been used in climate litigation, of relying on scientific reports.

However, even with the assistance of experts to clarify technical issues, it can be argued that the courts are still unable to fully replace the Legislature and the Executive in the adoption of this type of decisions with global implications, due to their limitations in relation to these other powers of the state in order to weigh up the complex set of interests at stake and the implications, not only technical but also economic and financial, of these decisions.[15] In addition to this limit focused on the qualification of judges for this type of decision, there is another limit that is much more directly related to the principle of the division of powers. This is the aforementioned global nature of this type of decisions, which is specified in that they will have repercussions on persons who have not been parties to the proceedings, and it is at this level that the 'institutional shortcut' would occur.[16]

In any case, the aforementioned usurpation by the judge of functions that correspond to the Executive and the Legislature, and therefore the impact of climate legislation on the principle of division of powers, are nuanced by the characteristic features of the reaction to a global phenomenon such as climate change. In this sense, the judge, in view of the technical and material limits pointed out above, is limited to the determination of thresholds in relation to the mitigation effort to be undertaken by a state. However, he/she does not go a step further to determine the specific measures that should be adopted to achieve this objective, even expressly recognising this inability in some cases as, for example, the European Court of Human Rights did in its judgment in the *KlimaSeniorinnen* case.[17]

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15 In this regard, it is recalled, among other things, that the judge does not have advisory bodies to inform him/her of such implications and lacks the capacity to decide on the allocation of scarce resources. Added to this is the impossibility of adapting his opinions quickly and regularly to reflect the latest scientific developments. All these shortcomings seem sufficient to conclude that courts should reject this type of case. BERGKAMP, Lucas and HANEKAMP, Jaap, "Climate Change Litigation against states:...", *op. cit.*, pp. 106 et seq.

16 This leads to an alternative view of these landmark climate litigation pronouncements as a manifestation of the *green tyranny* of a minority rather than a victory for *green democracy*.*Ibid*, pp. 102 et seq.

17 In stating that: "In the present case, having regard to the complexity and the nature of the issues involved, the Court is unable to be detailed or prescriptive as regards any measures to

This does not preclude that, although circumscribed to the setting of state objectives in mitigation matters, the intervention of the judge may alter the principle of division of powers. And at this point it is convenient to return to the previously mentioned idea of the judge's role in the framework of the rule of law centred on the control of the legality of the action of the Executive and the Legislature. In other words, in reality, when a judge indicates that the climate policy established by the state is not sufficient to comply with its obligations under domestic and international law, he/she is not intervening beyond the role that corresponds to him/her. In such a case, the judge would not be usurping the role of the other two powers, but rather guaranteeing compliance with the law through their action.

The scenario changes for the purposes that are of interest here when the threshold for the reduction of GHG emissions set by the judge is not based on a breach of the state's legal obligations but on scientific reports. In this regard, a relevant element should be noted, namely the scientific confirmation of the insufficiency of the set of legal obligations assumed by states to achieve internationally established objectives. This insufficiency, noted for example in the various reports of the Intergovernmental Panel on Climate Change (IPCC), has been recognised on several occasions by international organisations and in particular by the Conference of the Parties to the Paris Agreement itself, which establishes these objectives, stating that the sum of mitigation efforts set by the states in their respective Nationally Determined Contributions is not sufficient to achieve the objective of limiting the temperature increase to 2ºC and, if possible, to 1.5ºC.[18]

In this supposition of the judge's reliance on science to establish a new, more demanding target for the reduction of GHG emissions for the state, two circumstances converge: on the one hand, that the state may have complied with its legal obligations and, on the other, that it is not clear that it can be said that it has satisfied its duty of care, acting in a way that guarantees the protection of its citizens from the impacts of climate change. Although it must be recognised that an additional consideration could be added, namely the doubtful (if not non-

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be implemented in order to effectively comply with the present judgment. Given the differentiated margin of appreciation accorded to the state in this area [...] the Court considers that the respondent state, with the assistance of the Committee of Ministers, is better placed than the Court to assess the specific measures to be taken". Grand Chamber, Judgment (Merits and Satisfaction) of 9 April 2024, case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *op. cit.* par. 657.

18 In relation to the finding of the insufficiency of the mitigation effort in the framework of international climate cooperation, both past and present, and the prospects for the future, see SALINAS ALCEGA, Sergio, "El esfuerzo de mitigación en el marco del Acuerdo de París. Una visión crítica de la efectividad, presente y futura de la cooperación climática global", *Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería*, no. 35-36, November-December 2022/January-October 2024, 2024, pp. 23 *et seq*.

existent) capacity of the state to guarantee this protection on an individual basis, no matter how much it intensifies its efforts to reduce GHG emissions. In any case, a state's failure to comply with its duty of care can be concluded by taking as a reference the aliquot part of the effort that, according to scientific reports, would correspond to it in the context of the global mitigation effort.

Thus, through the eventual breach by the state of this duty of care, the judge would not assume the substitution of the measures to be taken by the other powers of the state, but would continue to act as a guarantor that they comply with the provisions of the legal system, but integrating in this compliance the necessary respect for the rights of citizens established both in its own legal system and in international law.[19] In this respect, the support of scientific reports could be taken as a reference, not on the basis of their legal value, as has been seen to be non-existent, but as a measure of the possible non-compliance by the state of that duty, which can be measured on the basis of what science indicates.[20]

However, this does not prevent us from recognising that on that occasion the judge adopts a position, the one put forward by the plaintiffs in the event of accepting their position, establishing a threshold for the reduction of GHG emissions which, as has already been said, gives rise to a very wide range of consequences in multiple areas, and all of this without relying on the complex weighing up of interests that lead to the determination of climate policy. This circumstance, being a scenario in which the principle of division of powers can be considered altered by substituting complex political decisions adopted from democratic legitimacy after carefully weighing up competing interests and parliamentary debate, through judicial decisions that being apparently constrained to a simple contrast of legality, can suppose in practice a significant change in the broad range of policy options that affect the order of coexistence.[21]

19 In this way, the role of the judge in these cases would be part of a vision of democracy that is not reduced to the majority will of the electors and the elected. BOUAZZA ARIÑO, Omar, "El desafío del cambio climático ante el Tribunal europeo de Derechos Humanos", *Revista de Administración Pública*, 224, 2024, pp. 166 *et seq*.

20 In this sense, the role of science would not be that of a direct source of legal consequences, but rather that of a guideline for measuring the reasoned and reasonable behaviour that should be demanded of the Executive and the Legislature. JIMÉNEZ GARCÍA, Francisco, "Cambio climático antropogénico, litigación climática y activismo judicial: hacia un consenso emergente de protección de derechos humanos y generaciones futuras respecto a un medio ambiente sano y sostenible", *Revista Electrónica de Estudios Internacionales*, 46, December 2023, p. 912.

21 MORENO MOLINA, Ángel Manuel, *El Derecho del cambio climático:..., op. cit.*, pp. 583 et seq. In a similar vein, reference can be made to the consideration of the recourse to the courts to order the government to adopt stricter environmental rules as an anti-democratic move, simply aimed at avoiding a political stalemate in relation to serious environmental issues. SCHOUKENS, Hendrik, "Climate change litigation and the separation of Powers:...", *op. cit.*, p. 186.

It would therefore be in these cases when the courtroom would come to constitute the institutional shortcut referred to above, replacing decisions with direct democratic legitimacy. It should be noted, however, that the argument of the imposition of the judiciary by the back door of options that did not win at the ballot box is much more diffuse. Indeed, it seems difficult, although one never knows, that any political option beyond certain ultraconservative and negationist positions would consider the fight against climate change outside its objectives. Therefore, most of the political options put to the vote do not take up positions rejecting this reaction against this phenomenon. The problem is that, in view of its ubiquitous nature, this reaction must take the form of a plurality of measures where the crux of the matter lies, and which lead governments to sometimes opt for immediate benefits rather than the greater good in the medium or long term. That is where the courts can play a counterbalancing role to ensure that the majority options that emerge from the ballot box in democratic systems do not imply a violation of rights, especially in a case such as this one in which this violation is of a general nature, including the rights of those who opted for these other options in electoral processes.[22]

However, this does not prevent us from seeing that this substitution of what is expressed by the citizens in elections or through democratic procedures can materialise much more clearly in specific cases, citing as an example the case of Switzerland in the *KlimaSeniorinnen* case, in which that state argued before the European Court of Human Rights that the Federal Council and Parliament showed their determination to reduce GHG emissions by trying to revise the CO_2 *Act* to set at least a 50% reduction in 2030 in relation to 1990 levels. However, the Swiss people, in a referendum held on June 13, 2021, rejected such a revision by a small majority.[23]

From what has been said so far, it can be deduced firstly that the role of the judge in the framework of climate litigation cannot be considered as contrary to the principle of division of powers, limiting this risk fundamentally to those cases in which this role exceeds its function of controlling the legality of the action of

22 SALINAS ALCEGA, Sergio, "Litigación climática en Estrasburgo. Obstáculos y aportes del derecho a un clima estable desde la perspectiva del esfuerzo de mitigación", *Revista Española de Derecho Europeo*, 92, 2024, p. 30.

23 The Swiss Government recalled in its submissions in Strasbourg the principle of subsidiarity that governs the Convention system and warned that a decision of an international tribunal that raises the objectives set by the Government, Parliament or even the people in a referendum, could generate tensions from the perspective of the separation of powers and the aforementioned principle of subsidiarity. To this he added that the Court is not expected to be a Supreme Court for environmental or climate disputes and is not competent to hear the application of international treaties or obligations other than the Convention. Grand Chamber, Judgment (Merits and Satisfaction) of 9 April 2024, case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *op. cit.* par. 338.

the Executive and the Legislature. In such cases, the intervention of the judge as a climate actor has the alibi of the insufficiency of the domestic and international regulatory framework with respect to an adequate reaction to climate change. Thus, the examination of legitimacy would not allow a definitive conclusion in the sense of classifying climate litigation as a risk to the rule of law, thereby ruling it out as a means of action in the fight against climate change, although it would put elements on the table that should be taken into consideration so that this risk is reduced, making it clear that the role of the judge is in no case a substitute for action at the political and regulatory levels, but is rather complementary, and in some way an incentive for the latter.[24]

3. THE PRINCIPLE OF DIVISION OF POWERS AS AN OBSTACLE TO THE JUDGE'S ACTION IN THE FIGHT AGAINST CLIMATE CHANGE. THE APPROACH IN JUDICIAL PRACTICE.

Having addressed the risk that climate litigation may represent for the rule of law, we must now consider the courts' approach to this issue. In this regard, it should be noted that the reference made earlier to the uneven results of the judge's action in this area includes taking into consideration the principle of the division of powers as a limiting factor in his/her capacity to act. This analysis of judicial practice must begin with the observation of a certain contagion effect, which leads to the reproduction not only of the claim but also of the arguments used in the proceedings before the courts of one state in another state. However, an observation of the reality shows that this strategy is far from ensuring positive results, at least frequently, and thus not only different but contradictory approaches can be found in the courts of different states; sometimes there are even changes in the position of the same court in relation to this issue, as for example in the case of the Supreme Court of the Netherlands, as will be noted below.

In fact, these differences in the approach to the condition of the principle of separation of powers as an obstacle to the role of the judge as a climate actor can be seen in decisions separated by a short distance, both geographically and temporally. This is the case of the paths followed by the courts in the *Urgenda* and *Klimaatzaak* cases, with the Dutch judge ruling in the former, on up to three

24 In this sense, there are those who conclude that the exit of climate change from the courtroom is no longer a sustainable position in the light of the prevailing scientific evidence, but that the judge cannot be seen as the saviour of the climate, at least alone, so that his role is not to replace the political decision-making process, but to push states to justify their long-term climate policies in the light of the rights of present and future generations. SHOUKENS, Hendrik, "Climate change litigation and the separation of powers:...", *op. cit.*, p. 206.

occasions, including the Supreme Court, that his action in the fight against climate change does not constitute any kind of contravention of the aforementioned principle. This, despite the fact that previously, in its judgment of 21 March 2003, in the *Waterparkt* case, the same Court had decided otherwise, stating that the aforementioned principle of the division of powers prevents the judge from intervening in the political decision-making process. This assertion became even stronger in a case such as this, in which what was at stake was the responsibility of the state for not having adopted a domestic rule transposing a European Union Directive. In this regard, the Dutch judge expressly stated the following: "[...] the question of whether legislation should be introduced and, if so, what its content should be, requires the weighing up of many interests, including those of parties not involved in a procedure such as the present one, and calls for a political assessment in which the court cannot intervene".[25]

However, in the *Urgenda* case the judge did not seem to take such considerations into account, and supported his determination of a more demanding threshold for the reduction of GHG emissions, not on a breach by the state of its international obligations, but, as noted in the judgment of 20 December 2019 of the Supreme Court, on the failure of the state to comply with its obligation, qualified as open and undefined,[26] to avoid the risk of dangerous climate change that could seriously affect the right to life and well-being of the residents of the Netherlands.[27] In reaching this conclusion, the Dutch courts took as a reference the IPCC Reports, which they considered as supporting a high degree of international consensus, to affirm the emission reduction target of 25-40% in 2020 compared to 1990 for developed countries as necessary to limit the temperature increase to 2ºC.[28]

However, less than 200 kilometres away (the distance separating The Hague from Brussels) and in a very short lapse of time, a Belgian Court of First Instance decided otherwise. In a judgment on 17 June 2021, the Belgian judge in

25 Hooge Raad, 21 March 2003, Eerste Kamer, Nr. C01/327HR, Arrest, *Stichting Waterpakt, Stichting Natuur en Milieu, Vereniging consumentenbond en anderen tegen de Staat der Nederlanden* (ECLI:NL:HR:2003:AE8462), para. 3.5. Available at: https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2003:AE8462 On the consideration of the principle of division of powers in that judgment see BESSELINK, Leonard F. M., "Supreme Court of Netherlands (Hoge Raad der Nederlanden), 21 March 2003, Civil Chamber, no. C01/327HR. Stichting Waterpark, Stichting Natuur en Milieu, Vereniging Consumentenbond and three others v. state of the Netherlands", *Common Market Law Review*, 41 Issue 5, 2004, pp. 1429 ff.

26 BERGKAMP, Lucas and HANEKAMP, Jaap, "Climate Change Litigation against states:...", *op. cit*.

27 Hooge Raad, 20 December 2019, Civiele Kamer, Nr. 19/00135, Arrest, *De Staat der Nederlanden (Ministerie Van Economische Zaken En Klimaat) tegen Stichting Urgenda* (ECLI:NL:HR:2019:2006), par. 2.3.1. and 2.3.2. Available at: https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2019:2006

28 *Ibid*, par. 7.2.11.

the *Klimaatzaak* case concluded – similarly to the previous case – that the state had breached its duty of care by failing to take the necessary measures to prevent the harmful effects of climate change. On this occasion, however, and in contrast to what was pointed out by the Dutch Supreme Court, at least in the *Urgenda* case, for the Belgian judge the principle of division of powers is presented as a limit to its scope of action, so he declined to set specific thresholds for the state in terms of reducing GHG emissions.[29] He even adopted a contrary position in his judgment with respect to taking science into consideration as a criterion for assessing the omission of the duty of care, since, again in contrast to what was decided by the Dutch judge in the *Urgenda* case, in this case it was noted that the scientific report on which the plaintiffs essentially based their claim to determine the targets for the reduction of the GHG emissions they are asking the Tribunal to impose collectively on the Federal state and the Regions: "[...] whose scientific merit is certainly not disputed [...] does not constitute a legally binding source of obligation for the public authorities. It is an expert opinion that can assist the public authorities in implementing their climate policy, but it is not binding on the defendants or the court".

In the same sense, in favour of a more restricted approach to the judge's role as a climate actor based on the principle of division of powers, we can cite the pronouncements of the Spanish Supreme Court in the so-called *Climate Trials*, in its judgments of July 18 and 24, 2023. On both occasions the Court responded to the plaintiffs' claim to review the mitigation targets established in the *National Integrated Energy and Climate Plan*, to bring them into line with the commitments assumed by Spain on the occasion of the ratification of the Paris Agreement and the scientific recommendations of the IPCC not to exceed the 1.5 ºC global temperature increase threshold. In the second of these judgments, the Spanish judge expressly states [that "[...] ... the power] to control the principle of legality of regulatory provisions, as imposed, among others, by article 106 of the Constitution, [...] does not authorise the Courts to impose on the Administration the criteria of opportunity, except for the cases of the specific imposition made by a rule of higher rank, in which case there is no such discretion".[30]

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29 The Court expressly stated this point: "In other words, while it is within the remit of the tribunal to note a failure on the part of the federal state and the three regions, this does not authorise it, by virtue of the principle of separation of powers, to itself set targets for reducing Belgium's GHG emissions". Tribunal de première instance francophone de Bruxelles, Section Civile, Jugement 4ème chambre affaires civiles, *ABSL Klimaatzaak contre l'Etat belge, la region wallone, la region flamande et la region de Bruxelles-capitale*, 17 juin 2021, numéro de rôle 2015/4585/A, par. 2.3.2. Available at: https://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/

30 STS 1079/2023, of July 24, 2023 (appeal no. 162/2021) (ECLI:ES:TS:2023:3556), Legal Basis 2º. Available at: https://www.poderjudicial.es/search/DeActualidad/TS/Contencioso/STS 1038/2023, of 18 July 2023 (appeal no. 265/2023) (ECLI:ES:TS:2023:3410), Legal Basis 5º. Available at: https://www.poderjudicial.es/search/sentencias/proceso%20para%20la%20proteccion%20de%20los%20derechos%20fundamentales/111/PUB On these pronouncements

4. WHAT CONTRIBUTION CAN CLIMATE LITIGATION MAKE TO STRENGTHENING THE RESPONSE TO CLIMATE CHANGE?

The judgment of legitimacy made in the previous sections specifies the risk of climate litigation for the rule of law to those cases in which the judge transcends his function of controlling the legality of the action of the Executive and the Legislature, setting GHG reduction thresholds not based on legal obligations required of the state but on what he/she deduces from scientific reports in this regard. As already mentioned, this risk for the rule of law is centred on a type of confusion, with the judge assigning himself/herself a function that goes beyond the natural one, centred mainly on the control of the legality of the action of the Executive and the Legislature, but for which he/she also presents, as was also seen, a series of limits that turn the courtroom into a totally inadequate forum for this type of decision.

However, in addition to the disadvantages that this role of the judge poses from the perspective of its legitimacy, its contribution, at least directly, to the intensification of the global mitigation effort is very limited. This is primarily a consequence of the complexity of the enforcement of these judgments, which impose more intensive mitigation efforts on states. To such an extent that such implementation appears to be extremely difficult, and even close to impossible, in the short or medium term, in view of the uncertainty posed by the evolution of climate change and its global nature, which involves practically all sectors of activity in this mitigation effort. Furthermore, the qualification of the progress resulting from these pronouncements as minor from a quantitative point of view is based on the residual contribution, which is not negligible since any improvement in this area should not be qualified as such, which implies increases in the reduction of GHG emissions as those set out in rulings such as *Urgenda* or *KlimaSeniorinnen*. The minimal percentage contribution of the Netherlands or Switzerland to the overall figures of these emissions implies that, even with the intensification of the mitigation effort for these states resulting from the court rulings, their impact in global terms is far from being considerable in quantitative terms.[31] This does not preclude that this intensification of the mitigation effort

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see SETUÁIN MENDÍA, Beatriz, "El actual alcance de la litigación climática en España a la vista de la reciente jurisprudencia del Tribunal Supremo (Reflexiones procesales y sustantivas en torno a las Sentencias de la Sala de lo Contencioso-Administrativo 1038/2023, de 18 de julio y 1079/2023, de 24 de julio)" in SETUÁIN MENDÍA, Beatriz and SALINAS ALCEGA, Sergio (Dir.), *Perspectivas jurídicas sobre clima, agua y energía. Estudios en reconocimiento al magisterio del profesor Antonio Embid Irujo*, Aranzadi, Madrid, 2024, pp. 81 *et seq*.

31 As an example, it can be noted that the plaintiffs in the *KlimaSeniorinnen* case acknowledge that Switzerland's contribution to the total global GHG emissions is 0.18%. Grand Chamber, Judgment (Merits and Satisfaction) of 9 April 2024, case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *op. cit.* para. 68. And in the same vein may be noted the argument

could serve as an example, forcing these governments to assume their share of responsibility, at least that which corresponds to science, although the possible contagion effect that could result from this is doubtful, to say the least.

It is this observation that the judgment of opportunity or usefulness referred to above seeks to address, and this in no way suggests that, given its residual impact in quantitative terms, climate litigation is a useless phenomenon, but rather with the intention of delving deeper into its true contribution, definitively dismantling the version, already rejected above, of the judge as the saviour of the climate, which is deduced from the attention given to these matters in the media.[32] In fact, this possible conclusion of climate litigation as lacking in usefulness is ruled out by the mere fact that, understood in broad terms, it would seem to oppose the exercise by the judge of the control of legality of the action of the other two powers of the state in relation to the legal obligations incumbent upon them within the framework of climate, domestic and international norms.

Nevertheless, it cannot be denied that this sort of idealisation of the role of the judge in relation to the climate carries a certain risk, beyond that already addressed in relation to the principle of division of powers, since it may distract attention from the need for action at the political and regulatory levels, which remains unavoidable as a result of the limitations of the judge in this field. In fact, it is at these levels that the reaction against the negative impacts of climate change must be developed. Moreover, it is precisely with regard to this political and legislative action that climate litigation can develop its most positive effects, with the judge presenting him/herself as a complement to the action of these two other powers,[33] which takes the form of various ways of contributing that can help the progress of action, so far insufficient, at the political and regulatory levels, both at the national level and with regard to international climate cooperation.

In this respect, a first contribution is the one already mentioned in relation to the exercise by the judge of a control of legality of the actions of the other

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presented by the Portuguese Government before the same European Court of Human Rights in the *Duarte Agostinho* case, according to which its responsibility in this area did not exceed 0.14% in 2018. Grand Chamber, Decision of 9 April 2024, case of *Duarte Agostinho and Others v. Portugal and 32 Others*, *op. cit.* para. 110

32 See, in this regard, ROLLER, Gerhard, "Les juges peuvent-ils sauver le climat? Quelques réflexions concernant les actions juridiques en faveur du climat", in SAMBON, Jacques (ed.), *L'environnement, le droit et le maagistrat. Mélanges en l'honneur de Benoît Jadot*, Larcier, Brussels, 2021, pp. 274 *et seq*.

33 This role of the judge leads to presenting him/her as a complementary or auxiliary actor to the other powers in the field of climate policy, which helps or encourages the modification of the maps of priorities to be addressed by the political option. JIMÉNEZ GARCÍA, Francisco, "Cambio climático antropogénico, litigación climática y activismo judicial:...", *op. cit.*, p. 9; MORENO MOLINA, Ángel Manuel, *El Derecho del cambio climático*:..., *op. cit.* p. 583,

two powers of the state, guaranteeing that the behaviour of the Executive and the Legislature is in compliance with their legal obligations, both domestic and international. It can even be considered sufficient in terms of respect for their duty of care in relation to the effects that climate change may have on the lives, health or rights of people, for example by analysing the behaviour of the state in terms of adaptation actions, giving rise to the responsibility of the Administration in terms of providing reparation for damages caused when necessary.

Climate litigation can also make other contributions that may be relevant to achieve this objective of an adequate reaction to climate change, all from the perspective of its complementary nature to action at the political and legislative level. In this regard, mention should be made of the condition of access to justice as a means of social mobilisation and citizen participation, which can then be transferred to political mobilisation, promoting changes at the regulatory level to make more decisive progress in terms of intensifying the mitigation efforts of the states. In this way, citizens' access to justice in defence of the climate, and the role of the judge in this regard, give greater visibility to the issue of the state's climate action, which otherwise, and especially in election periods, is diluted in the broad programmes of the various political actions.[34] In this sense, the contributions of an eventual ruling, although they do not translate into the immediate reinforcement of climate action, can lead to changes in the short or medium term, whether in public opinion, which thus becomes more aware, which, as already mentioned, is a first step towards the promotion of a more demanding regulatory framework,[35] or in the actors that emit GHGs, for example, companies.

As an example of this incentive function of the role of the judiciary in speeding up the legislative process, the case of the legislative reforms in France following the *Grand Synthé* case can be pointed out.[36] This incentive function

34 In this way, the exercise of the jurisdictional function is seen as an opportunity for the development of a new climate governance, in the sense that it provides, like no other public scenario, the opportunity for the direct participation of citizens in the analysis and discussion of the legal instruments for the fight against climate change. GALERA RODRIGO, Susana, "El interés general de divulgar información sobre emisiones al medio ambiente" in TORRE-SCHAUB, Marta y SORO MATEO, Blanca (dir.), ÁLVAREZ CARREÑO, Santiago (coord.), *Litigios climáticos y justicia: luces y sombras*, Laborum ediciones, Murcia, 2020, p. 112.

35 In this regard, the need to take into account this indirect effectiveness is noted, as these cases are often linked to social mobilisation campaigns that place the climate issue at the centre of public debate. DE VILCHEZ MORAGUES, Pau, "Panorama de litigios climáticos en el mundo" in FERNÁNDEZ EGEA, Rosa María and MACÍA MORILLO, Andrea (dir.), *El Derecho en la encrucijada: los retos y oportunidades que plantea el cambio climático. Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, 26, 2022, p. 354. See also in this sense MARTÍNEZ PÉREZ, Enrique Jesús, "state liability for damage caused to individuals for breach of EU air quality law", *Spanish Yearbook of International Law*, 27 (2023, p. 161.

36 TORRE-SCHAUB, Marta, "New developments in climate litigation: trends, opportunities and obstacles" in TORRE-SCHAUB, Marta and SORO MATEO, Blanca (dir.), ÁLVAREZ CARREÑO, Santiago (coord.), *Litigios climáticos y justicia...*, *op. cit.* p. 160. Although there is some disappointment

can be amplified in the case of the European jurisprudence, given its scope both in terms of social awareness and, consequently, the possible incitement by those citizens who are more aware to policy makers to carry out legislative developments that allow a greater contribution by the state to react to climate change.[37]

5. CONCLUSIONS.

The role of the judge in the fight against climate change should be analysed critically, leaving aside extreme views. Unfortunately, climate litigation alone is not the answer to the impasse in which we find ourselves, or at least to the stage of clearly insufficient progress towards a scenario in relation to the mitigation effort that allows us to glimpse an adequate reaction to the problem of global warming, but neither can it be considered as a major threat to the functioning of the rule of law. The features that characterise climate action, which have already been described throughout this study, greatly relativise these negative impacts and allow us to conclude that this is not a major threat to the principle of the division of powers and to the rule of law, but occupies a secondary place in relation to others that are the object of attention in this same volume.

However, this does not prevent us from making a judgment on both the legitimacy and the timeliness of the judge's role in this area of the fight for the climate. Regarding the former, the legitimacy of the judge, who certainly cannot be considered as a simple *bouche de la loi* according to Montesquieu, does not seem to pose difficulties provided that he/she focuses on controlling the legality of the actions of the Executive and the Legislature. That is to say, as long as the objective is to guarantee that both powers adjust their behaviour to the legal obligations imposed on them by the Law, both of the state itself and internationally. Doubts arise when the judge goes beyond that function, or approaches its sometimes-diffuse limit, relying on science to establish precise mitigation objectives that are not supported by any legal, domestic or international obligation. In this case, yes, it could be argued that the judge's action continues to be part of the control of

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in this respect in the French case, despite the adoption of Law no. 2012-1104 of 22 August 2021 to combat climate change and strengthen resilience to its effects. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043956924 However, some proposed provisions in this area, such as Energy and Climate Programming Law, which was to be ready by July 2023 have not seen the light of day, leading the Conseil d'État, in May 2023, to consider the measures taken to comply with its previous decision as insufficient, again granting a new deadline for this ending in June 2024. Conseil d'État - 6ème - 5ème chambres réunies, Lecture du mercredi 10 mai 2023, no. 467982, ECLI:FR:CECHR:2023:467982.20230510. Available at: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000047540937

37 SALINAS ALCEGA, Sergio, "Litigación climática en Estrasburgo...," *op. cit*.

legality of the action of the other powers, since in this way he/she supervises that they comply with their legal obligations of care, guaranteeing respect for the rights of the population that could be affected by the negative impacts of climate change. However, it cannot be concealed that in such cases there is a risk of affecting the principle of division of powers through interference in the fulfilment of their functions by the other powers of the state, without being in the best position to do so.

However, the main risk of this action by the judge is that it may distract from the real objective of appropriate action at the political and regulatory levels, which are the areas in which we must really react to this problem. In this sense, however, climate litigation can be a useful instrument in this fight, not only by monitoring compliance with their obligations by the Executive and the Legislature, but also as a lever for mobilising citizens, which can then be transferred, mainly through democratic processes, to administrative and regulatory action. In short, the judge is not the solution to climate change nor an existential threat to the rule of law through his/her action in relation to climate, but can make a relevant contribution in this field, increasing the possibilities of an effective response to one of the main problems facing the human race in the near future.

CONSTITUTIONAL COURT: REGULATION, POLITICS AND THE HUMAN FACTOR. THE TIGHTROPE WALKER AND THE BALANCE POLE.[1]

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SUMMARY: 1. PRELIMINARY CONSIDERATIONS. 1.1. Constitutional Court, Democracy and rule of law and their linked development. 1.2. How to defend Democracy in a critical context: the capital role of judges and Constitutional Courts. 1.3. A figure: the *tightrope* walker and the balance pole. 2. THE GUARDIAN FACED WITH THE POTENTIAL RISK FOR THE FIRST DIVISION OF POWERS: CONSTITUENT AND CONSTITUTED POWER. 3. CONSTITUTIONAL COURT: DIFFERENT TIMES, DIFFERENT CONDITIONS, ADEQUATED PROFILES. 4. A BRIEF REFERENCE TO THE SPANISH CASE. 4.1. The context and establishment. The first CC: priority to protect and prolong the constitutional consensus. 4.2. The composition: the symbolic number of twelve members and their plural extraction. 4.3. Erosion: the political "capture". Between the dreamed Constitutional Court and the current Constitutional Court. 5. A PROPOSAL TO RECOVER PRESTIGE: JUDICIAL INDEPENDENCE, SUITABILITY AND THE HUMAN FACTOR. 5.1. Regulated suitability 5.2. Human factor: Additional qualities. 5.3. Relational suitability. 6. TO FINISH: RETURNING TO THE FIGURE OF THE TIGHTROPE WALKER: RECOVER PRESTIGE OR FALL.

1 Research Project MIC de I+D+I PID 2022-141112NB-100 "La importancia de la independencia de la defensa del Tribunal Constitucional para la defensa de la democracia". This text is a continuation and development for a global context of a previous work focused on the Spanish Constitutional Court published under the title "Sobre la idoneidad de los magistrados del Tribunal Constitucional y los mecanismos y criterios de valoración", RODRÍGUEZ-PATRÓN, Patricia and DE LA IGLESIA CHAMARRO, Asunción (coors.), *La independencia de la Justicia Constitucional a examen*, Aranzadi, 2025.

1. PRELIMINARY CONSIDERATIONS.

1.1. Constitutional Court, Democracy and rule of law and their linked development.

Constitutional Democracy moves between strength and fragility. Its establishment and consolidation is challenging, although it is even more difficult to preserve it. The notion of a 'conquered summit' is a fallacy. The factors that cause the regression of democratic institutions are well known, and it is disconcerting to observe the reversal process that is underway.[2] The decline in reputation of the role of courts and judges is an obvious element in this democratic regression, and it erodes the *rule of law*.

I think that there are at least one endogenous and one exogenous problem in this process. The latter is multifactorial, and undermines the credibility of judges, due to them being publicly called into question, especially from the spheres of politics and the media. This questioning is facilitated by widespread ignorance in society about the relevance of the judiciary. Besides, people tend to accept any discourse about the power of the judges and their lack of democratic credentials, since they are not elected in a popular vote. The third issue is endogenous: when judges are seduced by the sirens of political capture, or are already marked from the very beginning, and are therefore questioned for their lack of appearance of impartiality. It is inevitable that this process will result in the erosion of Constitutional Democracy.[3] Finally, it is also risky when judges become protagonists of the political process, or give their consent to the opposite of what the Constitution establishes. Perhaps they succumb out of cowardice or complicity, possibly, being a victim of their own success?

Of course, the rule of law is a cornerstone of Democracy. It incorporates the defence of the Constitution itself. Constitutional Democracy or the respect for its principles and its limits, especially by the legislative power, requires effective and specific defence mechanisms against popular processes acting outside the framework of the Constitution.

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2 Among the many works that have become popular is the book by LEVITSKY, Steven and ZIBLATT, Daniel, Cómo mueren las democracias, Ariel, 2018. For a useful synthesis of the different concepts of democracy and its phase of decline since the 1970s, and the role of the rule of law and in particular of constitutional courts can be found in RIVERO RODRÍGUEZ, Ángel, "La independencia de los tribunales constitucionales y la disputa sobre la democracia", in RODRÍGUEZ-PATRÓN, Patricia and DE LA IGLESIA CHAMARRO, Asunción (oors.), *La independencia de la Justicia Constitucional a examen*, Aranzadi, 2025, in particular, pp. 35-54.

3 TAJADURA TEJADA, Javier, "El populismo iliberal contra el Estado de Derecho: la defensa europea de la independencia judicial", *Araucaria. Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales*, 2023, pp. 409-431.

1.2. How to defend Democracy in a critical context: the capital role of judges and Constitutional Courts.

This presentation briefly explores the question of how to defend democracy from the challenges facing it. The question that arises is how to defend the fundamental agreement of coexistence, not only its words but also the values and principles on which it is based. How is it possible to survive in a critical democratic context, when the same democratic institutions approve laws and decisions outside the constitutional framework, including, in the worst context, self-destructive impulses against Democracy itself? As Zakaria says, "Democratically elected regimes, often ones that have been re-elected or reaffirmed though referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms (...) we see the rise of a disturbing phenomenon in international life – "Illiberal democracy".[4]

However, it is important to point out the unnoticed role of political, institutional, social, educational (or public opinion in general) defence in this regard, which can be termed as "primary defence", and, of course, the media. In addition, legal scholarship and Law Schools[5] should not relinquish their responsibility at this pivotal juncture for legal security and peaceful coexistence.

In any case, judges and Constitutional Courts play a pivotal role in this defence, both through the ordinary jurisdictional defence of the Constitution and the specific and extraordinary defence through judicial review. The jurisdictional defence of the Constitution is a diffuse and specific function, shared by the Judiciary (judges cannot abdicate their function of applying and defending the Constitution) and the Constitutional Court. Consequently, it can be posited that Democracy, the rule of law and Constitutional Justice are inextricably linked, and their respective destinies are intertwined.

In this context, the Constitutional Court's neutrality, independence and prestige are essential for the preservation of the Fundamental Law; without these, Constitutional Justice is unable to fulfil its role. It is clear that a Constitutional Court that is discredited and lacks independence is not up to its role, and not in a position to function as a mechanism to control the excesses of power.

There is another important limitation: if the Constitutional Court 'recreates' rather than interprets the Constitution (Aragón Reyes). In the words of Berger,

4 ZAKARIA, Fareed, "The Rise of Illiberal Democracy", *Foreign Affairs*, no. 76, 6, 1997, p. 22.

5 Indeed, civic education and knowledge of the role of institutions is something that is very much neglected among us. TOCQUEVILLE, always insightful, warned when thinking of the American people, but his words are applicable to all: "The education of the people is a powerful means of maintaining a democratic republic. It will be so, I think, wherever instruction, which enlightens the spirit, is not separated from education, which regulates morals". (Alexis de Tocqueville, *La Democracia en América*, p. 301). (trans. 1987, Fondo de Cultura Económica, México.

"If the Court substitutes its own meaning for that of the Framers, it may, rewrite the Constitution without limit".[6] A similar situation arises when an institution selectively chooses to refrain from exercising its watchdog function in the face of political or media pressure, or when it neglects its duty to defend its neutrality.

This phenomenon is indicative of a breach in the defence of the Constitution and is connected with the erosion of the rule of law. The former is characterised by a gradual decline, while the latter is characterised by an unstoppable progression, ultimately leading to the degradation of the complex system that qualifies the model of Constitutional Democracy. Both the principle of judicial independence and the perception of it constitute a fundamental prerequisite for the establishment of a functioning democratic system.

Furthermore, in the present era it is imperative to emphasize the fundamental truth that the autonomy of judges, courts, and the Constitutional Court is paramount for the establishment of a robust rule of law. As Aragón Reyes (2025, p. 21–22) observes, the absence of a guarantee of the autonomy of the Constitutional Court engenders an environment in which the rule of law cannot prevail.

1.3. A figure: the tightrope walker and the balancing pole.

In this context, I propose a figure that may also be deemed appropriate: the tightrope walker Philip Petit, who traversed the forty-two metres of cable between the Twin Towers in New York. The image from 1974 conjures up notions of equilibrium and the potential for hazardous circumstances that could result in a fall. Democracy is an intricate system of balances that is perpetually in flux. The primary element enabling the tightrope walker to maintain his or her balance and progress along the cable is the cable itself; it needs to be sufficiently tight (not too much) but not too loose, and it must be securely anchored, taking into account the prevailing circumstances and external factors. The cable is constituted of a braid of wires of variable width (support base). Within the metaphor, the cable is analogous to the Constitution. It is also evident that the conditions of the subject, and its own balanced step (*Demos*), are of pivotal significance. It is evident that a substandard foundation of support, an insufficient level of tension, inadequate anchorage, and the subject's endeavour to advance beyond the confines of the cable are the primary factors that lead to the inevitable fall. In addition to these elements, the value of the balancing pole must be emphasised, as it enables the correction of position (thereby reinforcing the position of the centre of gravity) and functions as a factor of inertia that assists in propelling the body of the

6 BERGER, Raoul, *Government by Judiciary: The Transformation of the Fourteenth Amendment*. Indianapolis: Liberty Fund, Inc., 1997, p. 408. The limits of constitutional interpretation are certainly an ongoing debate.

tightrope walker forward on the steel cable, thereby generating confidence. To a certain extent, the Constitutional Court could be considered the balancing pole and the tightrope walker somewhere between the demands of the *demos* and the requirements of representative institutions. Adverse conditions can also be political cycles or destabilising factors (social, economic, geopolitical, etc.). This is a complex art, involving a delicate system of balances, and in this case, a balance between powers and guarantees.

2. THE GUARDIAN FACED WITH THE POTENTIAL RISK FOR THE FIRST DIVISION OF POWERS: CONSTITUENT AND CONSTITUTED POWER.

At the inauguration of the Spanish Constitutional Court, its first president, Manuel García Pelayo, alluded to the institution's role in maintaining the equilibrium of the division of powers in order to avert the deterioration of the system. In anticipation of the potential risks, García Pelayo cautioned that the primary division of powers that is entrusted to protect the Constitution is the one between constituent power and constituted power. The democratic principle, it was asserted, cannot serve to obfuscate this distinction. Ever since its inception, the fundamental purpose of the Constitutional Court has been to ensure that the realm of politics is subject to the rule of law, rather than the opposite. In other words, the Law and the Constitution are to be shaped by the prevailing political will. To summarise, the Constitutional Court is required to act as a balancing pole, correcting excesses and progressing with caution. Also, in the same first session of the Court, the García Pelayo noted that "(...) constitutional jurisdiction is a logical development and a technical refinement of the idea of the rule of law, and this jurisdiction necessarily implies a high degree of submission of politics to the Law. The responsibility entrusted to us is to ensure that this submission does not result in the production of political decisions in a jurisdictional form, a task which is both delicate and significant".[7]

Constitutional justice is ultimately required to favour integration and social consensus, as García de Enterría rightly pointed out.[8] This is because the Constitutional Court is subject to a 'daily plebiscite' to reposition "the centre of gravity". As García Pelayo said, the primary function of the Court is to influence the political trajectory of the state through its pivotal role in the interpretation and supreme application of the law of the Constitution. The Court, in its capacity as a constitutional body, fulfils a crucial function of preserving the values on which the Constitution is based, establishing limits and guidelines for state action

7 GARCÍA PELAYO, Manuel, *El Tribunal Constitucional*, 1980, pp. 19-20.

8 GARCÍA DE ENTERRÍA, Eduardo, *La Constitución como norma y el Tribunal Constitucional*, Civitas, Madrid, 1988, p. 203.

and, through the institution of bodies, the determination of their competences and the system of relations between them, regulating the structure and political functions of the state.[9] In this manner, it fulfils the role of safeguarding the pillar of the rule of law. However, in order to develop this function of guaranteeing the supreme constitutional institutional system, it is imperative that it retains its "special dignity, since its function is integrating and unique".[10]

In this regard, the organisation and functions of the model for electing CC judges, the processes involved, the autonomy granted to the relevant bodies, the manner in which the model is applied by the proposing bodies, and how CC judges perform their functions, are of pivotal significance. Ultimately, the human element will invariably prove to be the determining factor. Should the judges be deemed to have been compromised by partiality, corruption, or unsuitability for the exercise of their high function, the Constitutional Court will be rendered ineffective, and consequently, the Constitutional State will be in jeopardy.

3. CONSTITUTIONAL COURT: DIFFERENT TIMES, DIFFERENT CONDITIONS, ADEQUATED PROFILES.

In the late 1970s constitutional justice was in its "golden age", and it was also in full expansion.[11] This expansion occurred in most cases along the lines of Kelsen's (European) model of concentrated justice. Constitutional courts had become a "must-have" part of modern constitutions.[12]

In this regard, Tushnet refers to the terms of the Constitutional Courts: from the boldness of the first generation of the Court (heroic judges) in periods of political transformation to normal periods. His main conclusion emphasizes the importance of attending to temporality when studying who sits on constitutional courts and what those courts do: "Heroic judges emerge from a combination of circumstances, individuals, and constituencies. In the years immediately following a constitutional transformation, much work remains to be done to flesh out the new system. A great deal of that work will be done by executive officials and legislators. They will engage in practices that, in the

9 GARCÍA PELAYO, Manuel, "El "status" del Tribunal Constitucional", *Revista Española de Derecho Constitucional*, núm. 1, 1981, pág. 24.

10 Thus, GARCÍA PELAYO, Manuel, Discurso con motivo de la constitución del primer Tribunal Constitucional, *El Tribunal constitucional*, Servicio Central de Publicaciones, Presidencia del Gobierno, 1980, pp.13 et seq.

11 On the original models and stages of constitutional justice, I refer to the classic ROUSSEAU, Dominique, ROUSSEAU, Dominique, *La justicia constitucional en Europa*, CEPC, Madrid, 2002. A useful synthesis that is still of interest is that of FAVOUREU, Louis, *Los tribunales constitucionales*, Ariel, Barcelona, 1994 (translation of the 2nd French edition of 1992).

12 ROUSSEAU, Dominique, *op. cit.*, p. 3.

terms used in contemporary US constitutional theory, construe the constitution by constructing institutions that reflect their judgment about the constitution's meaning. (....) And, when the court performs that work, both the work and the court may be seen as important contributors to constitutional development. At the time the work is done, the court might be seen as working alongside parliament and the executive in building the system. In retrospect, if the system works well, what the courts did may be taken as contributing to that success".[13] "The early collaboration among the branches builds governing capacity in the political branches, after which the leaders of the political branches believe that they have the ability to do the rest of the job of constructing the constitutional system".[14] Afterwards, the second generation of judges have a different role: the Successor Courts. This is the time to choose "other profiles" in the negotiation among political actors: "most constitutional courts are ordinary courts most of the time",[15] with strong differences and expressions around the world.

4. A BRIEF REFERENCE TO THE SPANISH CASE.

4.1. The context and establishment. The first CC: the priority to protect and prolong the constitutional consensus.

The Spanish Constitutional Court was established in 1980. Spain had a failed precedent in the Second Republic (1931–1936): the Court of Guarantees of the Republic. Between the two experiences, Spain suffered a civil war and forty years of Franco's regime, including dictatorship and autocracy. It was a long period, more than a generation, without Freedom and a Constitution, Democracy, political rights and public liberties. Meanwhile, Europe advanced in the construction of solid democracies, integration and constitutional identity (Democracy, rule of law, and rights and freedoms). Franco died in November 1975, and with his death his autocratic regime came to an end. In accordance with the succession laws of Franco's regime, he was succeeded as Head of State by Juan Carlos I as King; he then promoted the democratization process by opening up the transition to democracy. The great milestone was the approval of the 1978 Spanish Constitution with broad parliamentary support: 326/350 in the Congress and Senate (226/239 votes, only 5 against and 8 abstentions) and direct democracy (87% affirmative in the referendum of 6 December 1978). The

13 TUSHNET, Marc, "After Heroes Have Left the Scene", in LANDRIEL, Christine, *Judicial Power: How Constitutional Courts Affect Political Transformations*, Cambridge University Press, Cambridge, 2019, pp. 293-294.

14 TUSHNET, *op. cit.*, p. 295.

15 TUSHNET, *op. cit.,* p. 201.

1978 Constitution was a gigantic step forward, turning Spain into a "Social and Democratic State of Law" (art. 1.1. Spanish Constitution).

Thus, it is understood that it was a priority to protect and prolong the constitutional consensus and to establish effective mechanisms to defend the Constitution. Judicial Power was inherited from the previous regime and had to be renewed, but this did not happen immediately. There was no experience of a legally binding Constitution, nor of political parties, nor of parliamentary monarchy. In short, everything was still to be done.

The constitutional agreement and the Constitution were a historical milestone: the great hope of reconciliation of the "two Spains". The Constitution was approved, but not implemented. The Constitutional Court was then designed as the institution of Guarantees, the Defender of the Constitution, and was one of the protagonists of the construction of democracy in Spain. It had to guarantee, apply and develop the constitutional agreement as well as being a very prominent and very strong constitutional body. Indeed, it was designed as such.

The Spanish Constitutional Court is inspired by the German and Italian models, with some influence from the French *Conseil Constitutionnel*. It is a model of concentrated constitutional justice.[16] The Spanish Constitutional Court was designed as a "strong" Court, or rather "very strong". Its members act through argumentative mechanics, and it rules by means of sentences, orders and rulings. It functions, therefore, through jurisdictional mechanisms.

In the first Constitutional Court, the judges nominated were "the best".

4.2. The composition: the symbolic number of twelve members and their plural extraction.

The CC is composed of twelve judges (even numbers, associated with perfection, governance and divine order). They are appointed every three years through a multi-institutional process designed to ensure a balance of powers and legal expertise: four by the Parliament with a reinforced three-fifths majority and four by the Senate; in both cases, by a three-fifths majority. Two are elected by the General Council of the Judicial Power and two by the Government. Each judge serves a nine-year term, and re-election is prohibited (art. 159.1 CE). The Constitution requires specific qualifications: candidates must be chosen from among senior judges, prosecutors, university professors, public officials or lawyers, in all cases jurists of recognized competence with more than fifteen years of professional practice (art. 159.2 CE).

16 ARAGÓN REYES, Manuel, "Del Tribunal Constitucional. Comentario introductorio al Título IX", *Comentarios a la Constitución Española de 1978* (Dir. ALZAGA VILLAAMIL, Óscar), Tomo XII, EDERSA, Madrid, 1999, p. 34.

Certainly, the strength of the Constitutional Court lies not only in the constitutional recognition of its position, but also in the prestige and authority of the institution, of its individual members, and its functioning as a college. Only from this prestige – which requires the definition of suitability and the criteria for the selection of suitable profiles – can the Constitutional Court exercise its pace-making function as guarantor of the Constitution to which it is called. And prestige is not presumed. Of course, it is a constitutional mandate to elect those who already enjoy "recognized competence" as jurists, but this prestige is consolidated through the proper exercise of the judicial function... or, on the contrary, it is called into question, and prestige is lost at a speed infinitely greater than the time required to build up this moral credit before peers and public opinion. It is, ultimately, the human factor, not just the rules or the institutional design.

4.3. Erosion: the political "capture". Between the dreamed Constitutional Court and the current Constitutional Court.

More than forty years since its establishment, the institution finds itself under heightened scrutiny, as evidenced by the pervasive sense of deterioration, the encroachment of political influences on its public image, and the gradual eroding of its prestige. The potential for collapse is heightened if the institution's authority and the perception of impartiality are not restored in the eyes of the public. The court's legitimacy is undermined by various factors, including recusals, delays, the appointment of judges with strong political affiliations, and statements made by judges, particularly those in positions of leadership. Additionally, tensions surrounding the renewal process contribute to the court's perceived legitimacy challenges. These challenges are further compounded by hasty jurisprudential rectifications that appear to delineate a division between 'them' and 'us' within the Constitutional Court, particularly concerning politically salient issues. Its prestige and independence are subjected to considerable scrutiny, and its institutional image has deteriorated in the present context of polarization.[17]

In practice, most of the political parties have perverted the spirit of the system and corrupted the spirit of the appointments because they have prioritized their own interests, falling into a distribution of seats: "consensus is one thing, and the distribution of quotas is quite another". In this sense, the rules may formally be "apparently" respected, but if the "institutional philosophy" is corrupted, the deterioration of the institution is unstoppable. If "obedient" profiles are chosen of docile people aligned with the proposing parties, even if

17 Cf. In particular, SIMÓN YARZA, Fernando, "Justicia constitucional y polarización política en España", *International Journal of Constitutional Law*, 2024, pp. 1-25.

they formally meet the conditions required to be proposed as judges, the root has been affected; the court lacks the appearance of neutrality and impartiality and they become judges with a "politicized" profile. In addition, there are cases in which practice reveals not only an "appearance of politicization," but an effective confirmation of it, a submission, subservience, in short, a clientelist concession to the interests of the proponent, which destroys the image of independence and the rule of law.

Thus, the problem affecting the Court's composition is not so much a question of the letter but rather of the application of the rules by political parties. The consensus model was displaced decades ago by the "sharing of seats between two parties," even renouncing the right to block candidates who might raise doubts about their suitability, and voting the other way. Once the names are agreed upon, everything is a validation game, a "compromise" (Bilbao Ubillos), a far cry from the election of the first judges of the Constitutional Court, when "the best" were sought. Cruz Villalón gives a stark summary of the vote-market process: "I lend you the votes you need to elect yours, you lend me yours to elect mine".

5. A PROPOSAL TO RECOVER PRESTIGE: JUDICIAL INDEPENDENCE, SUITABILITY AND THE HUMAN FACTOR.

The Constitutional Court will be whatever those who compose it are and how they act at any given time: their integrity, competence, prestige, prudence, discretion, independence… in short, a whole set of traits that make up what we call individual and collegial suitability, which is a difficult concept to grasp. All this, knowing that restoring prestige does not end with a mere appointment – taking Weber's distinction, along with suitability of origin, there is also the suitability of tenure of each judge – and also in the responsibility of the rest of the actors who can contribute to (or undermine) the image of the 'best' Constitutional Court.

In this context, I want to underline the human factor as the most relevant point; indeed, I recently published a paper on the suitable profile of judges.

Generally speaking, and therefore in any field, suitability refers to the quality necessary for the performance of a function. It is a concept used in all areas, and I propose to distinguish the following aspects:

a) regulated suitability.

b) additional suitability, which would include the assessment of personal qualities and the appearance of impartiality: independence and neutrality.

c) relational suitability or insertion of judges in the Court.

5.1. **Regulated suitability**.

Constitutional judges must be chosen from among Spanish citizens who are jurists of recognized competence, selected from among senior judges, prosecutors, civil servants, lawyers or university professors with at least fifteen years' professional experience.

Prolonged practice does not, per se, confer "recognized prestige," only a long professional career. These are different issues, and, as far as "suitability" is concerned, it is important to emphasize that dedication to the profession is no guarantee of the profile required for the complexity of the role of constitutional judge. If independence is to be enhanced, candidates must be at the top of the peer recognition table for professional performance, whether they be senior judges, civil servants, university professors, prosecutors, or lawyers.

The requirement of recognized competence is, without a doubt, the most indeterminate of the conditions, but that does not mean that it is empty of content and that it can be relativized. In STC 174/1996, the Constitutional Court, referring to judges, pointed out a dual dimension to "recognized competence": positive and negative. The positive aspect of suitability refers to the merits that must be provided to demonstrate competence. The negative aspect, on the other hand, consists of the absence of demerits. As for the *recognized prestige*, it must be at the level of relevance of the function to be performed, such as the function of the constitutional judge.

5.2. Human factor: Additional qualities.

Certainly, this presents a greater difficulty in its implementation because it refers to the personal qualities of a judge, but it is a central aspect nevertheless. Tomás y Valiente, President of the Constitutional Court (1986–1992), who was unanimously reappointed, said that "every institution acts through men, through individuals who carry it on their shoulders". Tomás y Valiente was murdered by the terrorist group ETA in his office at the University in Madrid, and Cruz Villalón has highlighted him as characteristic of the archetype of constitutional judge (not the phenotype): constitutional integrity and responsibility, intellectual capacity, technical competence, capacity to maintain control over his own ideology, the absence of what could be called "ideological bias" or "agenda" as a constitutional judge – he warns that this risk is higher in the case of judges of academic origin – and a certain social permeability. García Roca has pointed out that they are required to be jurists with an appearance of independence in their judgments, being prudent and excellent as jurists.

The recruitment of judges – good judges – is one of the main challenges, and it is very difficult to evaluate the candidates. There are different systems. In the United States, the doctrine has particularly studied the question of the "good

judge" and his virtues. Among others, Seldom Goldman[18] distinguishes eight qualities:

1. Neutrality as to the parties in litigation.
2. Fair-mindedness.
3. Being well versed in the Law.
4. Ability to think and write logically and lucidly.
5. Personal Integrity. A judge must have high moral standards, be able to withstand political and economic pressures, and carry out the law to the best of his or her ability.
6. Good physical and mental health
7. Judicial temperament, even under tension and a pressure-cooker atmosphere
8. Ability to handle judicial power sensibly. Of course, this quality is defined differently by those who differ as to what is "sensible" or "common sense".

Goldman does not exclude other qualities, but he points these out as necessary.

Furthermore, regarding neutrality and impartiality, I think there are no judges without their own ideology; García Pelayo insists on this. However, having political ideas is one thing, and being politicized (serving those political ideas) is quite another, and judges must be able to distinguish their ideology and maintain the necessary distance when performing their role.

5.3. Relational suitability.

Finally, the Constitutional Court is a collegiate body, and therefore, suitability also requires a comprehensive view. It is necessary to "build the constitutional justice community" based on a combination of personal profiles and professional qualifications.[19] For example, in Spain the composition has historically combined judicial and university backgrounds, with periods in which university-trained judges predominate, and others in which judges from judicial backgrounds are more prevalent.

In any case, I think the criterion is not representation, but balance. In my opinion, the composition of the Constitutional Courts is problematic in terms

18 GOLDMAN, Sheldom, *Judicial Selection and the Qualities that Make a "Good" judge*, ANNALS, 462, July, 1982, pp. 112 *et seq.*

19 CRUZ VILLALÓN, Pedro, in "El juez constitucional, entre el arquetipo y el fenotipo", A*nuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, núm. 27, 2023, pp. 159-160.

of political representation or identity origin (racial, territorial, religious...). Less than a year ago, Spanish legislation was reformed to introduce a balanced composition between men and women,[20] but this is not the main problem of the Constitutional Court today. The Constitutional Court is not a miniature parliament, nor is it a representation of society, although it should be balanced, without extremes or quotas.

Complementary personal profiles are important in terms of their deliberative capacity and the ability to integrate legal reasoning. It is extremely serious for a Constitutional Court to become polarized and express the same divisions present in parliament. Its integrative function through legal reasoning and prudence are essential for the proper functioning of the system. Dissent exists in Spain, but dissent is one thing, and disqualifying animosity between one group of judges and another is something quite different. It is a highly complex balance, especially in complex times, but in these times this balance and prudence and the capacity for integration are essential. In times of polarization, heroic judges and the CC are once again essential, because these are times of testing and resistance for the survival of democracy.

6. TO FINISH: RETURNING TO THE FIGURE OF THE TIGHTROPE WALKER: RECOVER PRESTIGE OR FALL.

I previously mentioned the different times and conditions that affect the exercise of Constitutional Justice. Polarization, the spread of populism, and the more complex context that I have not addressed (the international dimension of legal systems and multi-level constitutionalism) are all part of the mix. The last-named is a guarantee of the rule of law when domestic conditions become adverse, but it is not sufficient.

I talked about the 'balance position' using the figure of the tightrope walker.

We may find ourselves in stormy times, with strong headwinds, and a somewhat schizophrenic and unbalanced character walking the wire. The Constitutional Court – as I said at the beginning – functions as a balancing pole, and its quality is indispensable to fulfil that role. The rules are not enough for the constitutional courts to function well automatically…. above all, it will be the human factor that will manage to maintain the balance of the system, defending the Constitution and Democracy. If this fails, it will be difficult to avoid the fall.

20 Organic Law 2/2024, Official State Gazette no. 186, 2 August 2024.

STANDARDS FOR JUDICIAL COUNCILS IN THE CASE LAW OF THE CJEU AND THE ECtHR. FROM SOFT LAW TO HARD LAW?

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SUMMARY: 1. INTRODUCTION. 2. CJEU CASE LAW CONCERNING COUNCILS FOR THE JUDICIARY. 2.1. C–216/18 PPU–Minister for Justice and Equality. 2.2. C–619/18 Commission v Poland (Independence of the Supreme Court). 2.3. C–585/18 AK v KRS. 2.4. C–824/18 AB v KRS. 2.5. C–791/19 Commission v Poland (Disciplinary regime applicable to judges). 2.6. C–718/21 KRS. 2.7. C–647/21 DK, MC and MF. 3. ECtHR CASE LAW CONCERNING COUNCILS FOR THE JUDICIARY. 3.1. 21 June 2016 Ramos Nunes de Carvalho v Portugal. 3.2. 22 November 2021, Reczkowicz v Poland. 3.3. February 2022, Advance Pharma v Poland. 3.4. 22 June 2023 Lorenzo Bragado v Spain. 3.5. 8 June 2023 Alonso Saura v Spain. 3.6. 23 November 2023, Walesa v Poland. 4. CONCLUSIONS.

1. INTRODUCTION.

As it is well known, Councils for the Judiciary (or Judicial Councils) are common in constitutional democracies. They exercise governing functions of the Judiciary with the aim of guaranteeing its independence, and these functions include appointments, promotions, transfers, the inspection of the functioning of the Courts and the disciplinary responsibility of the members of the Judiciary. Attributing this type of powers to the Councils prevents another branch of the state, particularly the executive branch, from directly or indirectly influencing judicial independence.

The Venice Commission has admitted that in some constitutional democracies with a long-established legal culture and traditions of restraint, Councils for the Judiciary might not be necessary, and the fact that the executive branch may have an influence on judicial appointments has not, in practice, led to an erosion of judicial independence.[1]

In the case of Spain, the Judicial Council (Spanish acronym CGPJ) is a "constitutional and autonomous body" established in Article 122 of the Spanish Constitution. The constitutional definition aims at making the otherness of this body clearly explicit with respect to the Judiciary, as well as its non-dependence on the other powers of the state.[2] It is also well known that the CGPJ is formed by the President of the Supreme Court and 20 members: 12 judges and 8 jurists (non-judges), with its members being appointed for non-renewable terms of 5 years. While the Constitution requires the 8 jurists to be elected by a 3/5 majority in each chamber of the Spanish Parliament (4 in the Congress and 4 in the Senate), the constitutional text does not specify how the 12 judicial members are to be elected. The model of appointment of these 12 members has undergone important variations over time and represents one of the most controversial issues of the CGPJ.[3] At the moment, and according to Article 567 of Organic Law 6/1985 of the Judiciary, these 12 members are also appointed by a 3/5 majority in each chamber (6 in the Congress and 6 in the Senate). This could be "easily" changed, however, as amending any Organic Law "only" requires an absolute majority (i.e., half+1, which means less than 3/5). In the Spanish system, in practice, absolute majority means the party (or parties) supporting the government, while the qualified 3/5 majority requires that the political party (or parties) supporting the government reach an agreement with the main opposition party.[4] When there is no will to reach a deal between the two main Spanish political players (i.e. the Socialists [PSOE], and the Popular Party [PP]), the appointment is blocked, as happened between 2018 and 2024. For six years, all members of the Spanish CGPJ continued to act with their mandate expired,

1 Venice Commission, CDL-AD(2010)004, Report on the independence of the judicial system. Part I: the independence of judges, para. 32.

2 AGUIAR DE LUQUE, Luis, "Artículo 122", in RODRÍGUEZ PIÑERO, Miguel and CASAS BAAMONDE, María Emilia (Ed.), *Comentarios a la Constitución Española*, vol. II, BOE, Madrid, 2018, p. 725.

3 A brief summary of all the legislative changes affecting the election of the 12 judicial members undergone since 1978 to be found in CASTELLÀ ANDREU, Josep Maria, "Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España", *DPCE online* 4, 2022, p. 2260.

4 A critical review of the system at TORRES, Aida, "Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of Judiciary in Spain", *German Law Journal* 19 (7), 2018, p. 1770.

waiting for a renewal that did not come due to lack of agreement between the PSOE and the PP.[5]

In recent years, mainly in the 2022, 2023 and 2024 Rule of Law Reports on Spain,[6] the European Commission has been constantly urging Spain i) to renew the CGPJ and ii) to modify the method for appointing the members of the judiciary (foreseen in the Organic Law) taking into account European standards.[7] Such standards are summarized in the 2010 Recommendation of the Committee of Ministers of the Council of Europe on judges: Independence, Efficiency and Accountability. When it comes to the Councils for the Judiciary, the text states that "at least half of the members of these Councils should be judges elected by other judges at all levels of the legal profession" (para. 27). In similar terms, the Venice Commission's report on the independence of the judiciary established that "the Council should have a pluralistic composition, with a substantial part, if not a majority, of its members being judges. With the exception of *ex officio* members, judges should be elected by their peers".[8] Thus, the Venice Commission advocates a pluralistic composition of the Judicial Councils, including judges and jurists, as well as a dual method of selection, including judges and Parliament. This mix should avoid, on the one hand, corporatism (if all members were elected by judges) and, on the other hand, excessive politicization (if all were elected by the parliament). In summary, according to European standards in the scope of the Council of Europe, the Spanish anomaly is that all members of the CGPJ are elected by Parliament.

In June 2024, following a structured dialogue with the European Commission as facilitator, an agreement[9] was reached between the main party supporting the current government (PSOE) and the main opposition party (PP) to i) renew the Council for the Judiciary and ii) to modify the appointment

5 A critique of this lack of agreement to be found at CARMONA, Ana, "Renovación de los órganos constitucionales, ¿Misión impossible?" (*Agenda Pública*, 21 September 2020) https://agendapublica.es/noticia/16827/renovacion-organos-constitucionales-mision-imposible A recent critical review of the measures that were introduced by the government to deal with the blocking at DELGADO, Luis, "Régimen jurídico del Consejo General del Poder Judicial en funciones: observaciones críticas a la STC 128/2023, de 2 de octubre, que lo declara constitucional", *Revista Española de Derecho Constitucional* 133, 2025, p. 295 ff.

6 European Commission, SWD (2024) 809 final, 2024 Rule of Law Report. Country Chapter on the rule of law situation in Spain, p. 4.

7 More generally, it should be noted that a highly-elaborated acquis on the concept of judicial independence was developed in *soft law* instruments within the Council of Europe. See BUSTOS GISBERT, Rafael, "La influencia de los textos no vinculantes del Consejo de Europa sobre independencia judicial en TEDH y en la UE", *Teoría y Realidad Constitucional*, 47, 2021, p. 161.

8 Venice Commission, CDL-AD(2010)004, Report on the independence of the judicial system. Part I: the independence of judges, paras. 31-32.

9 A positive assessment of the agreement to be found at LOUSADA AROCHENA, José Fernando, "Politización de la justicia, judicialización de la política: Estado de la cuestión en España", *Revista de Derecho Político*, 121 (2024) p. 87.

method of the judicial members following European standards.[10] The renewal of the Council took place, but the legislative modification of the appointment method is still pending.[11]

The question that now arises is whether Spain has a legal obligation to reform the system following the European standards or whether such standards are merely *soft law*. There is no clear response, as will be shown in the opposing views of Argelia Queralt and José María Macías.

In an article published in February 2025 in *Agenda Pública,*[12] *Argelia Queralt, Associate Professor of Constitutional Law and a member of the Spanish Judiciary Council since 2024, stated that after analysing i) documents drafted by different advisory bodies of the Council of Europe or by European judges' organizations, and ii) the Rule of Law Reports of the European Commission, it should be argued, as explained above, that where judiciary councils exist they should be composed of a majority of judges elected by and from among them. However, she considers that all these documents have solely soft law* value; they can be used as references or good practice guides, but, she contends, none of their conclusions has yet become a legal norm and, therefore, Spain is not legally obliged to follow them. On the contrary, if one analyses the legal instruments in force, i.e. EU treaties and EU secondary law, as well as the CJEU case law, one concludes, according to Queralt, that "from the perspective of judicial independence, it cannot be deduced that only one single system of election of members of the judiciary

10 A critical review of the agreement to be found at FAGGIANI, Valentina, "El acuerdo de renovación del CGPJ: ¿hacia un nuevo modelo de justicia más independiente o vuelta al bipartidismo?" (*Hay Derecho*, 15 July 2024).

https://www.hayderecho.com/2024/07/15/renovacion-cgpj-bipartidismo/.

11 On 5 February 2025 the Plenary of the CGPJ unanimously agreed to submit to the Spanish Government and Parliament the proposal to reform the system for electing judicial members. Thus, the CGPJ complied with the deadline established in the additional provision of Organic Law 3/2024, of August 2, reforming Organic Law 6/1985 on the Judiciary. This 2024 law was approved as part of the agreement for the renewal of the previous CGPJ that PSOE and PP reached in Brussels on 25 June 2024, mediated by the European Commission. The law granted a period of six months from its entry into force, a deadline that expired on 6 February 2025, for the Spanish Judicial Council Plenary to approve a "report" on the European systems for electing members of the Councils for the Judiciary analogous to the Spanish Council, and a "proposal" to reform the system for electing members of judicial origin. At the end, the CGPJ submitted two proposals, because there was no way of coming up with a unitary one. One of the proposals follows the European standards, while the other supports the current system. https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Oficina-de-Comunicacion/Archivo-de-notas-de-prensa/El-CGPJ-cumple-en-plazo-el-mandato-del-legislador-y-acuerda-por-unanimidad-remitir-al-Gobierno-y-a-las-Cortes. In any event, the Spanish Parliament has not yet started the legislative procedure to modify the system for electing members of judicial origin. Besides, on February 5th the CGPJ also agreed to forward the proposals to reform the system for the election of the judicial members to the Venice Commission, whose Opinion is also still pending.

12 QUERALT, Argelia, "El CGPJ no es el órgano de gobierno de los jueces" (*Agenda Pública* 17 February 2025), https://agendapublica.es/noticia/19646/cgpj-no-es-organo-gobierno-jueces.

councils is admissible and that this excludes the election of these members by the Parliament" [which is the current system in Spain, as noted above]. In addition, she argues, "[t]he same can be said with respect to the Council of Europe, where the legal standards in this area, the European Convention on Human Rights and the case law of the European Court of Human Rights, do not oblige the choice of a specific model of judicial government, nor, therefore, do they determine how that model should be designed."

However, current Spanish Constitutional Court judge José María Macías, who had been a member of the Spanish Judiciary Council from 2015 to 2024, stated in 2022 that "[t]he case law of the CJEU has given concrete content to judicial independence as a necessary condition for the validity of the rule of law, based on the standards previously established in non-binding instruments approved by advisory bodies of the Council of Europe and by the institutions of the European Union. The incorporation of soft law into the case law of the CJEU has meant the transformation of this soft law into hard law or binding law". He goes on to add that "[t]he standards elevated to legal status by the case law of the CJEU include, most importantly, the standard requiring that the Judiciary Councils should be composed, in a substantial proportion, of members of the judiciary elected by their peers".[13]

As stated above, this paper is aimed at exploring whether Spain has a legal obligation to reform the system following the European standards (as Macías suggests) or whether such standards are merely *soft law* (as Queralt argues). In order to do this, the CJEU and ECtHR case law regarding the composition of the Councils for the Judiciary will be explored.

2. CJEU CASE LAW CONCERNING COUNCILS FOR THE JUDICIARY.

Before entering into the specific analysis of the case law of the CJEU dealing with the appointment of members of Judicial Councils, one must first take into account the broader context: the defence of judicial independence within the framework of the protection of the rule of law in the EU. Judiciary Councils are relevant since, at least in those countries where they have been established, they are essential to ensure judicial independence (or the perception thereof).

Article 2 of the TEU lists the values on which the Union is founded, values common to the member states and which constitute the axiological cornerstone

13 MACÍAS, José María, "Poder judicial e independencia judicial: el Consejo General del Poder Judicial frente a la Jurisprudencia del TJUE y del TEDH", *Anuario de Derecho Administrativo*, 2022, p. 201. A more balanched approach in BIGLINO, Paloma, "Los estándares europeos sobre la elección de los Consejos Judiciales", *Revista General de Derecho Constitucional*, 2023 (38).

of EU law. Among these values is the rule of law.[14] Article 2 TEU is not only a declaration of those values, but also a source of binding legal rules, as recalled by the Full Court of the CJEU in its judgment of 16 February 2022.[15] In that decision, the CJEU underlined that "[t]he values contained in Article 2 TEU have been identified and are shared by the member states. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties" (para. 127). In order to avoid any doubt, the CJEU insists that the rule of law constitutes a common value of the Union and of the member states, which is part of the very foundations of the EU and its legal system (para. 128), Besides, the Court of Justice pointed out that compliance with these values cannot be reduced to an obligation to which a candidate state is subject in order to join the Union, and from which it may be exempted after its accession (para. 126).

In this regard, judicial independence can be seen as a *sine qua non* of all other elements of the rule of law. Without it, the principles that make up the rule of law are left without judicial protection. Judges assume a special responsibility, as they are "the ultimate guardians of the *Rechtsstaat*".[16] It has been said that judicial integration has become a cornerstone of European integration, because it should not be forgotten that this integration is articulated through law, and to be effective, it requires law to be applied by a judiciary free of pressure from other authorities.[17]

Within the EU legal order, judicial independence is embodied in two rules: the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights. The former is a legal rule addressed to the member states, which are obliged to "provide sufficient resources to ensure effective legal protection in the areas covered by Union law". Furthermore, Article 47 enshrines the fundamental rights to an effective remedy and to a fair trial before "an independent and impartial tribunal previously established by law". In the

14 The CJEU has recognised that the rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. CRAIG, Paul, "Definition and conceptualization of the Rule of Law and the role of Judicial Independence therein", in European Judicial Training Network (ed), *Rule of Law in Europe. Perspectives from practitioners and academics*, 2020, p. 12. https://ejtn.eu/wp-content/uploads/2022/12/2019-056-RoL-Manual-170x240-WEB_FINAL.pdf.

15 Case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97 and Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

16 ADAM, Stanislas, "Judicial independence as a functional and constitutional instrument for upholding the Rule of Law in the European Union", in European Judicial Training Network (ed), *Rule of Law in Europe. Perspectives from practitioners and academics*, *cit.*, p. 16.

17 BUSTOS GISBERT, Rafael, "Judicial independence in European Constitutional Law", *European Constitutional Law Review*, 18, 2022, p. 598.

groundbreaking Judgment of 27 February 2018, ASJP,[18] the Court said that "it should be recalled that, although the organization of justice in the member states falls within the competence of those member states, the fact remains that, when exercising that competence, the member states are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU" (para. 36). Therefore, the interpretation given by the CJEU on judicial independence is mandatory since it falls within the scope of EU law. I would add the following: as long as it only establishes the red lines or the playing field. Otherwise, it would be an *ultra vires* activity.[19]

Another caveat or clarification to be made is that most of the CJEU rulings analysed below come from infringement proceedings against Poland or arise as a result of preliminary rulings submitted by Polish judges. It should be recalled that in 2015–2017 Poland adopted a series of legislative reforms aimed at changing the country's judicial system (particularly relevant for this study is the 2017 Law amending the Law on the National Council of the Judiciary).[20] That is why most of the judicial precedents have a Polish origin, and one could wonder whether the Court's response would differ had a similar question originated in a country with a different context.

2.1. C–216/18 PPU–Minister for Justice and Equality.

The 25 July 2018 preliminary ruling judgment[21] dealt with a question raised by an Irish court which had doubts about whether to execute a European Arrest

18 Case C-64/16, Grand Chamber, *Associação Sindical dos Juízes Portugueses,* ECLI:EU:C:2018:117.

19 Article 19(1) TEU can hardly impose detailed or positive obligations upon the member states as to how to organize its judicial system. This would ignore the existing constitutional pluralism in the Union. But it can determine negatively what is not allowed, it can draw red lines. TABOROWSKI, Maciej, "Guest Editorial: A Potential Constitutional Moment for the European Rule of Law - The Importance of Red Lines", *Common Market Law Review*, 55, 2018, p. 989.

20 The concerning reforms were the following: the Law on the Supreme Court, approved by the Senate on December 15, 2017; the Law amending the Law on the Organization of Ordinary Courts, in force since August 12, 2017; the Law amending the Law on the National Council of the Judiciary and other laws, approved by the Senate on December 15, 2017; the Law amending the Law on the National School of the Judiciary and the Prosecutor's Office and the Law on the Organization of Ordinary Courts and other laws, in force since 20 June 2017. See COM(2017) 835 final, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland. This list makes clear that it was not a mere isolated reform, but a real legislative plan promoted by the former Polish government. See KRZYWON, Adam, "La crisis constitucional en Polonia (2015-2017): cómo cuestionar el sistema del equilibrio constitucional en dos años", *Teoría y Realidad Constitucional*, 41 (2018), p. 359 ff. An in-depth analysis of the difficult relationship between EU law and Polish legal order in MAGALDI, Nuria and KRZYWON, Adam, "Poder judicial nacional y primacía del Derecho de la Unión (a propósito de la sentencia del Tribunal Constitucional de Polonia K 3/21)", *Revista Española de Derecho Europeo* 83, 2022, p. 75.

21 Case C-216/18, Grand Chamber, *PPU-Minister for Justice and Equality*, ECLI:EU:C:2018:586.

Warrant and surrender a detainee to the Polish authorities. The CJEU admitted, based on previous case law, that in exceptional circumstances "limitations may be placed on the principles of mutual recognition and mutual trust between member states" (para. 43). In discussing specific elements of judicial independence, the CJEU noted that rules are required "in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it" (para. 66).

In particular, with respect to the issue at hand, the Irish court noted, *inter alia*, the changes to the constitutional role of the Council of the Judiciary in Poland (Polish acronym KRS) in safeguarding the independence of the judiciary and that the new composition of the KRS would be largely dominated by political appointees. The CJEU held that the mere fact that there are systemic deficiencies in the rule of law in the issuing member state (i.e. Poland – the KRS debate being only one of many elements) is not sufficient to refuse the arrest warrant. The personal situation of the detainee must be analysed, as well as the nature of the crime committed and the factual context, and it must be ascertained whether there are reasonable grounds to believe that the person is at risk of not receiving a fair trial.[22]

One must underline that in the case at hand the CJEU took into account the documents issued by the European Commission assessing the systemic deficiencies[23] (para. 80). In this case, the CJEU seemed to be aware of the systemic deficiencies of the Polish judicial system, yet it did not draw any conclusions; it was too soon. Just a few years later, the position of the Court would be radically different.

2.2. C–619/18 Commission v Poland (Independence of the Supreme Court).

In the 24 June 2019 judgment,[24] after an action brought by the European Commission against Poland (Article 258 TFEU) concerning the reduction of the retirement age of Supreme Court justices and the discretionary power of the President of the Republic to extend their period of judicial activity, the Court held that Poland had not complied with its obligations under Article 19 TEU, stating that although the organization of justice in the member states is a competence of the member states, in exercising that competence they must comply with their obligations under EU law, in particular Article 19(1) TEU.[25]

22 The Irish Supreme Court, in its judgment of 12 November 2019, concluded that deficiencies in the rule of law in Poland did not deprive the detainee of his right to a fair trial.

23 The CJEU refers also to the Venice Commission, but only as evidences submitted by the referring judicial body (paras. 19-21), without incorporating its reasoning in the findings of the Court.

24 Case C-619/18, Grand Chamber, *Commission v Poland*, ECLI:EU:C:2019:531.

25 The Court will insist on this in subsequent decisions. For instance, in the 26 March 2020 preliminary ruling judgment: cases C-558/18 and C-563/18, Grand Chamber, *Miasto Łowicz v Wojewoda Łódzki*, ECLI:EU:C:2020:234.

Thus, it is clear that member states are free to decide on the organization of justice as long as they do not violate EU law, which has increasingly imposed new limits in recent years when it comes to the rule of law and, in particular, to the independence of the judiciary.

We should also observe that the Court referred to the European Commission and the Venice Commission as a source of valid information in the case at hand.[26]

2.3. C–585/18 AK v KRS.

In a preliminary ruling judgment[27] dated 19 November 2019 the CJEU addressed the independence of the newly created Disciplinary Chamber in Poland,[28] a body in charge of disciplinary cases of judges, prosecutors and lawyers, as well as deciding on the lifting of judicial and procedural immunity. The referring court had doubts as to whether this Chamber, which was in the process of being appointed at the time of the question, would provide sufficient guarantees of independence and impartiality.

In its judgment, the CJEU referred to the case law of the ECtHR (paras. 126–130) and analysed whether the Disciplinary Chamber was independent and objective in the light of various judgments. Ultimately, however, it noted that it was for the national referring court to rule on the question, as Article 267 TFEU does not empower the CJEU to apply EU law rules to a particular case but only to rule on the interpretation of EU law. What is of interest now is that the CJEU focused on the role of the KRS in the appointment of the members of the Disciplinary Chamber in its analysis. This is, therefore, a particularly relevant case for our analysis.

Since the KRS had recently been reformed, the CJEU asked the body that raised the question to examine whether or not the KRS offered sufficient guarantees of independence in relation to the legislature and the executive. Not only that, the CJEU offered a number of indications. In particular, the referring body should take into account the following: (i) it was formed by reducing the four-year term of office of the members; (ii) while the 15 members of the

26 "[T]he Commission points out, as has already been observed by the European Commission for Democracy through Law ('Venice Commission') in points 33 and 47 of its Opinion no. 904/2017 (CDL-AD(2017)031), the explanatory memorandum to the draft New Law on the Supreme Court contains information that raises serious doubts as to whether the reform of the retirement age of serving judges of the Sąd Najwyższy (Supreme Court) was made in pursuance of such objectives, and not with the aim of side-lining a certain group of judges of that court" (para. 82).

27 Joined Cases C-585/18, C-624/18 and C-625/18, Grand Chamber, *AK v KRS*, ECLI:EU:C:2019:982.

28 Note that the Disciplinary Chamber was abolished and replaced by an independent and impartial court established by law through the Law adopted on 9 June 2022, i.e. the Professional Liability Chamber (June 2022 law).

KRS elected from among the members of the judiciary were previously elected by their peers, those judges are now elected by the legislature. This reform increased the number of KRS members elected by the political authorities to 23 of its 25 members, whereas previously there were only 10; (iii) the possible existence of irregularities that may have corrupted the appointment process of certain members of the KRS in its new composition; (iv) in an overall assessment of the KRS, the referring Court should take into account the manner in which the reformed KRS exercises its constitutional responsibilities to ensure the independence of courts and the judiciary, in particular whether it does so in a manner that is capable of calling into question its independence from the legislature and the executive. In this regard, it is interesting to note that in the *AB v KRS* judgment (analysed below), following the *AK v KRS* reasoning, the Court insisted that when analysing the context to verify whether the KRS is an independent body or not, the possible existence of privileged relations between the members of the KRS thus constituted and the Polish executive power should be examined.[29] In effect, the Court requires to explore both the systemic model and the way in which the body operates.

In short, the Court offered criteria to verify whether the design and functioning of the Council for the Judiciary violated the judicial independence protected by the TEU. It should be underlined that, for the CJEU, a faulty design is not enough to conclude the lack of independence.

As for *soft law*, the CJEU only refers to Council of Europe bodies as a source of evidence because the referring judicial body had mentioned them.[30] Interestingly,

29 As an example of privileged relations, the Court noted that "the referring court states that the fact that the KRS is composed, as regards the 15 members representing the judiciary, of 14 representatives of the judges of the ordinary courts and one representative of the judges of the administrative courts, and does not include any representative of the judges of the *Sąd Najwyższy* (Supreme Court) - contrary to the provisions of Article 187(2) of the Constitution - is also problematic. The same is true of the fact that those 14 judges of the ordinary courts include the Presidents and Vice-Presidents of such courts who are appointed by the executive and have replaced persons dismissed by the executive, which could mean that the executive's influence has thus increased in the KRS" (para. 44).

30 Thus, according to the referring court, the new situation of the KRS (i.e. that the 15 judicial members are now not elected by judges of all levels as before, but by the Lower Chamber of the Polish Parliament) "disregards the principle of the separation of powers as the basis for a democratic state governed by the rule of law and is not consistent with the prevailing international and European standards in that regard, as is clear, in particular, from Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities of 17 November 2010, from Opinion No 904/2017 (CDL-AD(2017)031) of the European Commission for Democracy through Law (Venice Commission) of 11 December 2017 and from Opinion No 10(2007) of the Consultative Council of European judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society of 23 November 2007" (para. 41).

in his Opinion, the Advocate General did make an effort to showcase European *soft law.*[31]

2.4. C–824/18 AB v KRS.

In the 2 March 2021 preliminary ruling judgment,[32] the CJEU understood that, given the controversies regarding the independence of the KRS (that had already been established in previous case law), it was necessary to have an effective judicial review against its resolutions, particularly the most relevant ones, such as those that culminated in the procedure for appointing Supreme Court judges.[33]

In short, if the referring court were to conclude that the KRS did not offer sufficient guarantees of independence, the existence of a judicial remedy available to unsuccessful candidates would be necessary in order to help safeguard the process of appointing the judges concerned from direct or indirect influence and, ultimately, to prevent legitimate doubts from arising in the minds of individuals regarding the independence of the judges appointed at the end of that process.

It has to be noted that now for the CJEU (and for the ECtHR as well) appearances may have a certain importance when it comes to judicial independence: "Once again, what is at stake is the confidence which the courts

31 Opinion of the Advocate General, 27 June 2019, Joined cases C-585/18, C-624/18 and C-625/18, AK v KRS, ECLI:EU:C:2019:551: "Guidelines issued by European and international bodies, embodying principles shared by the member states relating to judicial independence, also provide a useful point of reference. These are the sources on which I will draw in deciding whether the arrangements at issue in the main proceedings are consistent with the requirements of judicial independence under EU law" (para. 107).

32 Case C-824/18, Grand Chamber, *AB v KRS*, ECLI:EU:C:2021:153. The facts of the case were the following: in 2018 five individuals applied to be candidates for judges in the Supreme Court of Poland. The KRS rejected them and selected others. The unsuccessful candidates appealed to the SC, which raised the preliminary question noting that, following a recent legislative reform of the KRS, in individual cases related to the appointment to a position as a judge of the Supreme Court, unless all participants in the procedure had contested, the KRS resolution becomes final. Those selected, naturally, did not intend to challenge the resolution. As a result, judicial review of the KRS decision was not possible.

33 "Thus, while the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU, the situation is different in circumstances in which all the relevant factors characterising such a process in a specific national legal and factual context, and in particular the circumstances in which possibilities for obtaining judicial remedies which previously existed are suddenly eliminated, are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process" (para. 129).

in a democratic society must inspire in the public, and first and foremost in the parties to the proceedings" (para. 128). The evolution in the CJEU's approach is worth mentioning, since in *AK v KRS* it had requested clear consequences, not just lack of appearances.

2.5. C–791/19 Commission v Poland (Disciplinary regime applicable to judges).

The tone changed in the 15 July 2021 infringement procedure judgment.[34] The Court concluded that Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. In the previous preliminary judgments, the resolution of the specific case depended on the referring court. Here the Court, since it was an infringement procedure, was able to state Poland's non-compliance more categorically.[35]

Among other issues, in the judicial proceeding before the CJEU the European Commission pointed to the lack of guarantees of independence and impartiality of the Disciplinary Chamber of the Polish Supreme Court, whose members were appointed at the request of the KRS. The problem with the KRS, and the CJEU agrees, lies in the new method of appointing its 15 members, all of whom are of judicial origin: "it should be noted, first, that, as has been argued by the Commission, whereas the 15 members of the KRS selected from among the judges were previously selected by their peers, the Law on the KRS has recently been amended so that, as is apparent from Article 9a of that law, those 15 members are now appointed by a branch of the Polish legislature. The result is that 23 of the 25 members of the KRS in that new composition have been appointed by the Polish executive or legislature or are members thereof. Such changes are liable to create a risk, hitherto absent from the selection procedure previously in force, of the legislature and the executive having a greater influence over the KRS and of the independence of that body being undermined" (para. 104). And then, "[i]t must be held that the factors highlighted in paragraphs 104 to 107 of the present judgment are such as to give rise to legitimate doubts as to the independence of the KRS and its role in an appointment process, such as that resulting in the appointment of the members of the Disciplinary Chamber" (para.108).

It should be acknowledged that the appointing method of the 15 judges-members was not the only reason for doubt. Poland was facing a systemic breakdown of guarantees of the rule of law, and the CJEU was well aware of

34 Case C-791/19, Grand Chamber, *Commission v Poland*, ECLI:EU:C:2021:596.

35 MAGALDI, Nuria, "La construcción de un poder judicial europeo y las garantías de su independencia", *Revista Española de Derecho Constitucional*, 125, 2022, p. 143.

that.[36] Thus, the importance of the whole picture (or the context) in the findings of the Court should not be underestimated.

As for *soft law*, the CJEU only refers to Council of Europe bodies as a source of evidence because the European Commission had quoted them (para. 66).

2.6. C–718/21 KRS.

In its judgment of 21 December 2023,[37] the Court of Justice held that the questions referred[38] for a preliminary ruling by the Extraordinary Control and Public Affairs Chamber of the Polish Supreme Court did not originate from a body having the status of an independent and impartial tribunal, pre-established by law, as required by EU law. Consequently, it declared them inadmissible. In order to reach this conclusion, the Court first referred to the ECtHR's *Dolinska* judgment (analysed below), which held that two compositions of the Extraordinary Control Chamber had not been previously established by law and were not independent. One of the reasons to sustain the lack of independence of the Chamber is that their members had been appointed by the President of the Polish Republic following KRS recommendations. Since the KRS is a body whose independence cannot be guaranteed, says the Court, the Chamber does not have the status of an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU.

Again, it should be noted that the final decision of the CJEU complies with a combination of factors, the new KRS appointing method being one of them, although it should be underlined that in just a few years the CJEU was ready to firmly establish – in a preliminary ruling – the lack of independence of the KRS.

2.7. C–647/21 DK, MC and MF.

In a judgment of 6 March 2025,[39] a Polish judge decided to turn to the Court of Justice after being removed from more than 70 criminal cases. Her removal followed a series of decisions by the judge annulling decisions of lower courts because they had been issued by judges illegally appointed by the KRS.

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36 There were other judgments where the reasoning of the Court was similar. For instance, Judgment of 6 October 2021, case C-487/19, Grand Chamber, *WZ*, ECLI:EU:C:2021:798.

37 Case C-718/21, Grand Chamber, *KRS*, ECLI:EU:C:2023:1015.

38 In Poland, judges who wish to continue serving beyond retirement age are required to inform the KRS of their wishes to that effect. A judge of an ordinary court is challenging the KRS's decision to dismiss his declaration of wishes because it was made outside the legally established time limit. The Extraordinary Control and Public Affairs Chamber of the Polish Supreme Court hearing the appeal brought by this judge asked the CJEU for clarification on certain principles of judicial independence.

39 Case C-647/21, *DK, MC and MF*, ECLI:EU:C:2025:143.

In other words, the judge was sanctioned for having applied the CJEU ruling in *Commission v Poland* (C–791/19), which stated that the composition of the KRS is incompatible with the requirements of Article 19(1) TEU, and therefore all appointments made by the KRS are unlawful. As for the KRS in its new composition, in the case at hand the CJEU states that it does not present sufficient guarantees of independence.

3. ECTHR CASE LAW CONCERNING COUNCILS FOR THE JUDICIARY.

Focusing on the ECHR's case law, as early as 1975, in *Golder v. United Kingdom*,[40] the Strasbourg Court ruled that it would be a mistake to consider the rule of law as "a merely, 'more or less rhetorical reference', devoid of relevance for those interpreting the Convention" (para. 34). Specifically, when speaking of judicial independence, the President of the ECtHR, Siofra O'Leary, has stated that "an efficient, impartial, and independent judiciary is the cornerstone of any functioning system of democratic checks and balances".[41] O'Leary believes that judges are no longer merely the spokespersons of the law. Sensitive social issues are increasingly being raised before the courts, and in this sense, it is essential to protect citizens' trust in the judicial system: "The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed state, must enjoy public confidence if it is to be successful in carrying out its duties".[42] The ECtHR's jurisprudence has been very creative in safeguarding judicial independence and has included several references to the Judiciary Councils.

3.1. 21 June 2016 Ramos Nunes de Carvalho v Portugal.

Nunes de Carvalho[43] refers to disciplinary proceedings against three judges that ended with the imposition of disciplinary sanctions by the Portuguese Council for the Judiciary (Portuguese acronym CSM) and the subsequent review by the Supreme Court. In 2016, a Chamber of the European Court unanimously decided that there had been a violation of Article 6 of the Convention in the present case, which was referred for review to the Grand Chamber, that rendered its judgment in

40 ECtHR 21 February 1975, no. 4451/70, *Golder v UK*.

41 O'LEARY, Síofra, "Independencia judicial y Estado de Derecho: perspectivas desde el TEDH", *V Congreso Internacional Unión Iberoamericana de Universidades y Cortes Supremas*, Madrid, October 2023, p. 4. https://www.echr.coe.int/documents/d/echr/speech-20231006-oleary-complutense-university-madrid-spa

42 ECtHR 23 June 2016, Grand Chamber, no. 20261/12, *Baka v Hungary*, para. 164.

43 ECtHR 21 June 2016, Fourth Section, no. 55391/13, 57728/13 and 74041/13, *Ramos Nunes de Carvalho e Sá v Portugal*.

2018.[44] *What is interesting to note here is that, inter alia*, the Chamber examined the principles governing the composition of the CSM and concluded that its independence and impartiality could be open to doubt. The CSM issue was not further reviewed by the Grand Chamber in 2018, since "no such serious issues have been established in terms of structural deficiencies or an appearance of bias within the Portuguese CSM" (para. 160).[45]

However, why had the Chamber in 2016 considered that the independence and impartiality of the Judicial Council could be open to doubt? First, the Court made a long referral to international and European standards regarding judicial independence in paras. 41–50.

The reasoning followed. First, the Court noted that the notion of the separation of powers between the executive and the judiciary had assumed growing importance in its case law. However, neither Article 6 nor any other provision of the Convention required states to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction (para. 70). The Court also emphasized the importance of appearances: "What is at stake is the confidence which the courts in a democratic society must inspire in the public" (para. 73).

The Chamber then recalled all the European standards that suggest that Judiciary Councils should be composed of, at least, a majority of judges elected by their peers (para. 75) with a view to guaranteeing their independence. Later, the Court examined the composition of the Portuguese CSM: seventeen members appointed by various bodies. Two of these members are appointed directly by the President of the Republic, seven are elected by the Assembly of the Republic, and seven are elected by judges from among their peers. The usual composition consists of eight judges (including the President, who has a casting vote) and nine non-judicial members. Thus, the CSM may comprise a majority of non-judicial members appointed directly by the executive and legislative authorities (para. 77).

In the Court's view, this situation is problematic from the standpoint of Article 6.1 ECHR. Besides, the Court also noted with concern that the law does not lay down any specific requirement in the Portuguese legal system regarding the qualifications of the non-judicial members of the CSM (para. 79).

That is why the Court considered that the independence and impartiality of the CSM could be open to doubt (para. 80). It is interesting to note that the Court's

44 ECtHR 6 November 2018, Grand Chamber, no. 55391/13, 57728/13 and 74041/13, *Ramos Nunes de Carvalho e Sá v Portugal*.

45 In any event, in 2018 the Grand Chamber of the ECtHR found that Portugal had indeed violated Article 6.1 ECHR, but not because of the CSM composition: "the combined effect of two factors, namely the insufficiency of the judicial review performed by the Judicial Division of the Supreme Court and the lack of a hearing either at the stage of the disciplinary proceedings or at the judicial review stage, meant that the applicant's case was not heard in accordance with the requirements of Article 6 § 1 of the Convention" (para. 214).

concerns did not come because of a legislative reform, but merely focusing on the *status quo*. However, as said, this reasoning was later abandoned and is not to be found in the 2018 Grand Chamber judgment.

3.2. 22 November 2021, Reczkowicz v Poland.

In *Reczkowicz v Poland*,[46] the applicant is a lawyer who was sanctioned in Poland. She argued that she had not had a fair trial because the Disciplinary Chamber (that dealt with her case) was neither a court established by law nor could it be considered an independent and impartial court. The reason was that the Disciplinary Chamber members had been appointed at the request of the KRS, the composition of which prevented it from being considered an independent body. Thus, "[a]s regards the degree of independence of the NCJ [KRS] and the issue whether there was undue interference by the legislative and executive powers with the appointment process, the Court would first refer to the various – and in substance unanimous – opinions of the international organisation and bodies which have already been cited above, according to which the changes in the election procedure for the judicial members of the NCJ introduced under the 2017 Amending Act resulted in the NCJ no longer being independent or able to fulfil its constitutional obligation of safeguarding the independence of courts and judges" (para. 269). The Court refers to different Council of Europe bodies: "The Venice Commission, for its part, stated that while the exact composition of judicial councils varied, it was widely accepted – for states which had such a council – that at least half of the council members should be judges elected by their peers. It further emphasised that 'the 2017 Amending Act was at odds with the European standards since the fifteen judicial members were not elected by their peers, but received their mandates from Parliament'. It also took the view that the proposed reform would lead to the NCJ being dominated by political

46 ECtHR 22 November 2021, First Section, no. 43447/19, *Reczkowicz v Poland*. Similar reasoning to be found in ECtHR 8 November 2021, First Section, no. 49868/19 and 57511/19, *Dolinska, Ficek and Ozimek v Poland*. Something particularly interesting in the *Dolinska* case affecting Polish judges whose applications to judicial promotions were rejected is the following: "the Court notes that the mere interference of the legislative or the executive branch, regardless of the effects, is worrisome: the Court has condemned, in the strongest terms, any attempts by the legislative or executive power to intervene in court proceedings, considering such attempts to be ipso facto incompatible with the notion of an 'independent and impartial tribunal' within the meaning of Article 6 § 1 of the Convention. Whether such interventions have actually affected the course of the proceedings is of no relevance since, coming from the executive and legislative branches of the state, they reveal a lack of respect for the judicial office itself and as such are capable of justifying fears as to the independence and impartiality of the courts concerned" (para. 329). In sum, for the ECtHR a faulty design is enough to conclude that there is a violation of the ECHR. Another very similar case to *Reczkowicz v Poland* is ECtHR 6 July 2023, First Section, no. 21181/19, *Tuleya v Poland*. It is also a case affecting the disciplinary regime of Polish judges.

nominees, '[g]iven that six other members of the NCJ [were] parliamentarians, and four others *ex officio* members or appointed by the President of the Republic'. It recommended that judicial members should be elected by their peers" (para. 242). The Court also refers to the CJEU 19 November 2019 judgment, *AK v KRS* (abovementioned).

Later, "the Court finds that by virtue of the 2017 Amending Act, which deprived the judiciary of the right to nominate and elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognised by international standards – the legislative and the executive powers achieved a decisive influence on the composition of the NCJ. […] This, in effect, enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, a possibility of which these authorities took advantage" (para. 274), In sum, "there was a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Disciplinary Chamber of the Supreme Court, since the appointment was effected upon a recommendation of the NCJ, established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers" (para. 280).

It is clear that the findings of the ECtHR are more straightforward than those of the CJEU. and seem to turn European guidelines into *hard law* overtly.

3.3. February 2022, Advance Pharma v Poland.

In *Advance Pharma v Poland*,[47] there are two novelties with respect to the previous case law. First, the applicants were not judges but a private company, and second, the Chamber that gives rise to doubts about its composition is not a chamber resulting from the Polish legislative reforms but a traditional chamber of the Supreme Court. The company had sought compensation for the decision of a public body prohibiting the distribution of a drug it marketed. The claim for compensation was rejected in two instances and also in cassation before the Supreme Court. Advance Pharma appealed to the ECtHR, alleging infringement of Article 6.1 ECHR, as the appeal had not been heard by a court established by law, since its members had been appointed by the KRS, whose composition was flawed. The ECtHR, following its previous case law (and the CJEU *AK v KRS* judgment), upheld the complaint and concluded that there had been a violation of Article 6.1 ECHR, *inter alia*, because given the defects of the KRS any appointment made by the KRS also transmits its lack of independence to the judges appointed by the KRS. Thus, that gave rise to a violation of the applicant company's right to a "tribunal established by law". One should note that there

47 ECtHR 3 February 2022, First Section, no. 1469/20, *Advance Pharma v Poland*.

were other irregularities in the procedure, but the flawed composition of the KRS was a decisive factor: "First, the appointment was made upon a recommendation of the NCJ, as established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers" (para. 349).

3.4. 22 June 2023 Lorenzo Bragado v Spain.

In *Lorenzo Bragado v Spain*,[48] the Court did not deal directly with the composition of a Judicial Council but it is interesting to note the case, because the ECtHR became aware of the problems surrounding the Spanish CGPJ, which might pave the way for further decisions. In short, six Spanish judges filed a lawsuit to denounce the impasse in the CGPJ. The plaintiffs considered themselves direct victims of the infringement of their right of access to public office (to the CGPJ, it is understood) and to effective judicial protection. They turned to the ECtHR because the Spanish Constitutional Court (SCC) did not admit their appeal. The ECtHR agreed with the judges. The ECtHR emphasized that, in this case, what was at stake was not a subjective right of the appellants to become members of the CGPJ, which as such did not exist (para. 82). The problem (or the infringement) lay in the SCC summarily rejecting the appeal. Given the obvious importance of the case, the novelty of the legal issues raised before the SCC and the 'particular circumstances' of the case, in the words of the ECtHR, it was reasonable to expect that the rejection of the application would have to be based on adequate reasoning.

In the concurring opinion of the Spanish judge Elósegui, she recalled that "GRECO, the Venice Commission and the European Commission have all stressed the necessity of reinforcing the independence of the judiciary in Spain."

3.5. 8 June 2023 Alonso Saura v Spain.

Alonso Saura v Spain[49] deals with an appointment made by the CGPJ (the presidency of the Superior Court of Justice of Murcia) that was appealed to the Supreme Court. At first, the Supreme Court ordered the CGPJ to provide more detailed reasoning concerning the merits of the person to be appointed. In a fresh decision, the CGPJ again appointed the same candidate and the applicant (Alonso Saura) again appealed to the Supreme Court. In its second decision, however, the Spanish Highest Court held that the CGPJ had complied with the Supreme Court's previous judgment and given sufficient reasons for its choice. Besides, the Supreme Court stressed the wide discretion the Council enjoyed as

48 ECtHR 22 June 2023, Fifth Section, no. 53193/21, *Lorenzo Bragado and others v Spain*.
49 ECtHR 8 June 2023, Fifth Section, no. 18326/19, *Alonso Saura v Spain.*

regards discretionary appointments, in particular where the post to be filled had a governmental component, as in the case in issue. The ECtHR found that "[g]iving preference to one of the candidates where both candidates have sufficient merits for the post in issue cannot in itself be regarded as contrary to the ECHR," (para. 38). Furthermore, "[i]t has not been demonstrated that the findings of the Supreme Court were arbitrary or manifestly unreasonable to the point of prejudicing the fairness of the proceedings" (para. 39).

What is truly interesting in this case is the dissenting opinion of the Spanish ad hoc judge Jimena Quesada, where, in an exercise of evolutionary interpretation, he connected the current appointing method of the CGPJ (i.e. all members appointed by Spanish Parliament) with the discretionary powers it enjoys. Thus, he considers that beyond the resolution of the specific case, the usefulness of the ECHR consists in reinforcing the three pillars of the Council of Europe: rule of law, democracy and human rights. "This consideration is not negligible, since the [CGPJ]'s supposed strength in resisting the jurisdictional control of the Supreme Court may paradoxically become its weakness, viewed from the same perspective of the rule of law and the separation of powers. In effect, a judicial council with such an 'absolute' configuration [referring to the discretionary powers] is likely to be more vulnerable to politicisation, given that political parties may be tempted to enact legislation, notably in matters concerning judicial appointments, that would make councils of the judiciary less autonomous in the face of possible encroachment by the legislative and executive powers" (para. 17). Jimena Quesada then recalls European standards: "measures should be taken to depoliticise the process of electing or appointing persons to judicial councils, where they exist, or other appropriate bodies of judicial governance. Members should not represent political factions or be politically partisan in the performance of their functions. They should also not be subject to, or be susceptible to, political influence either from the executive or the legislature" (para. 18).

For the first time, even if it was in a dissenting opinion, the ECtHR took note of the problems of lack of independence surrounding the CGPJ.

3.6. 23 November 2023, Walesa v Poland.

Walesa v Poland[50] *concerned a civil suit that former Polish President of Poland Lech Walesa had taken against a former friend who had accused him publicly of collaboration with the communist secret services. Although Walesa won*

50 ECtHR 23 November 2023, First Section, no. 50849/21, *Walesa v Poland*. In another 2023 case, and based on the consolidated case law mentioned in the previous pages, the ECtHR had also taken the view that the KRS was subordinated to the political authorities and that in its current state did not offer sufficient guarantees of independence from the executive and legislative powers. ECtHR 24 October 2023, First Section, no. 25226/18, *Pajak and other v Poland*, para. 192.

the case, the final judgment was overturned nine years later by the Chamber of Extraordinary Review and Public Affairs (a new Chamber added to the Supreme Court in the 2017 legislative reforms). The Court found that such Chamber was not an "independent and impartial tribunal established by the law". Therefore, Walesa's right to a fair hearing had been breached. In the light of previous judgments (e.g. Dolinska) concerning the judicial reform in Poland initiated in 2017, the Court held that the violation of Article 6.1 ECHR had originated in the interrelated systemic problems caused by, *inter alia*, i) a defective procedure for judicial appointments involving the KRS and ii) the resulting lack of independence on the part of the referred chamber.

In its findings the Court again relied heavily on Council of Europe standards (para. 114–121), and coincides with the reasoning (quoted above) of *Reczkowicz v Poland* in para. 173–176.

It is not the role of the ECtHR to pronounce on the appropriateness of reforms of the judiciary or to determine their constitutionality under the national constitutional framework. What the ECtHR focuses on is whether an applicant's Convention rights are affected by the manner in which a reform is implemented. Although the ECHR does not require a specific system of judicial administration, the ECtHR does demand that national courts meet the conditions necessary to judge impartially and independently of the other branches of government. Here, the ECtHR issues a pilot judgment, the first in the institutional sphere (para. 311), in which it indicates to the state the measures it must adopt to comply with Article 6 ECHR. The first of these measures is precisely to "restore the independence of the National Council of the Judiciary by introducing legislation guaranteeing the Polish judiciary's right to elect the judicial members of the National Council of the Judiciary" (para. 329). In other words, the ECHR requires the country to reform its legislation in accordance with the minimum content of European standards on Judicial Councils. It is this interpretation, I believe, that allows us to affirm that the *soft law* of European standards on judicial councils has now become *hard law*.

4. CONCLUSIONS.

After analysing the case law of both Courts, some considerations should be made:

First, the ECtHR has been more forceful than the CJEU, which has not yet firmly stated that a strong connection between a Judicial Council and the executive and/or legislative powers alone is a clear sign of a lack of independence. This should not surprise us. For instance, when it comes to the subjective dimension of judicial independence (i.e. the right to an independent judge) "[t]he leading case law is elaborated in Strasbourg and subsequently incorporated into EU law

by the Court of Justice".[51] This could mean that it is only a matter of time before the CJEU incorporates the ECtHR case law.

Second, it has also been clear that the ECtHR relies much more heavily on *soft law* instruments than the CJEU.

Third, given i) the traditional evolutionary approach of EU law offered by the CJEU and ii) the increasing attention to judicial independence (bear in mind that when it comes to the CJEU, the focus on judicial independence is still very recent, only starting in 2018 with the ASJP case), it might be only a matter of time before the CJEU is called upon to decide whether a new reform that does not fulfil the European standards does or does not conform to EU law. It is not far-fetched to believe, also taking into account the rule of non-regression in judicial independence established in *Republika*,[52] that the CJEU will rule against a member state ignorant of European standards that have already been clearly assumed by the ECtHR and the European Commission as legally binding.

In an attempt to answer the question posed at the beginning of this paper, that is why I sustain that, after a legal analysis of the CJEU and the ECtHR case law on Judicial Councils, European standards seem to be *hard law* for the ECtHR but not yet for the CJEU. Thus, neither of the approaches mentioned above (Queralt or Macías) seem entirely convincing.

51 BUSTOS GISBERT, Rafael, "Judicial independence in European Constitutional Law", *op. cit*., p. 603.

52 Judgment of 20 April 2021, case C-896/19, Grand Chamber, *Repubblika*, ECLI:EU:C:2021:311. The Court had to adjudicate on a constitutional amendment that increased the powers of the Prime Minister to appoint judges. The compatibility of the constitutional reform (introducing such new competences for the Prime Minister) with European standards was questioned. In the case at hand the CJEU found that the reform did not violate EU law. But more importantly, the Court established the non-regression rule. Before joining the EU, EU member states should meet certain requirements that qualify its judiciary to act as European judges. The rule of non-regression argues that these minimum requirements cannot decline after accession: "A member state cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU. […] The member states are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary". (paras. 63-64).

THE RULE OF LAW AND JUDICIAL INDEPENDENCE IN THE FACE OF THE PRIMACY OF EU LAW: CONFLICTS BETWEEN THE CJEU AND THE CONSTITUTIONAL COURTS

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SUMMARY: 1. INTRODUCTION: NEW FORMULATIONS OF AN OLD JURISDICTIONAL CONFLICT. 2. BRIEF HISTORICAL EXPERIENCE ON THE CLASHES BETWEEN THE CJEU AND CONSTITUTIONAL COURTS ON THE PRINCIPLE OF PRIMACY. 3. JUDICIAL INDEPENDENCE AS A NEW CAUSE OF CONFLICT. 3.1. A *twist* in the CJEU's case law on judicial independence. 3.2. The CJEU's assault to judicial reforms contrary to judicial independence: the Polish saga. 3.3. The reaction of the TK: the disruption of the balance between primacy and sovereignty. 4. LUXEMBOURG IN THE MIRROR OF EUROPEAN INTEGRATION: FROM *ULTRA VIRES* CONTROL TO A CLASH OF LEGITIMACY. 5. CONCLUSIONS: A CONFLICT BEYOND THE JUDGE'S ROBE. 6. BIBLIOGRAPHY. 7. CASE–LAW.

1. INTRODUCTION: NEW FORMULATIONS OF AN OLD JURISDICTIONAL CONFLICT.

Article 2 of the Treaty on European Union (hereinafter TEU) sets out the fundamental values that make up the identity of the European Union (hereinafter EU). These values are not created *ex novo*, but rather, as the provision itself recognises, "are common to the member states", i.e. they are common to their

constitutional traditions, which implies recognising them as having a core normative dimension and, consequently, a justiciable nature.[1]

Among these values, respect for the rule of law stands out, within which the independence of the judiciary is a key element. Their relevance in terms of the basic principles of European integration is such that they are among the fundamental pillars that constitute existential conditions for being part – and continuing to be part – of the EU, by direct mandate of Article 49 of the TEU.[2] Likewise, the right to effective judicial protection and a fair trial, enshrined in Article 47 of the Charter of Fundamental Rights of the EU (hereinafter CFR), includes judicial independence as a crucial component for its compliance.[3]

Beyond identifying the essential elements of the rule of law or the strict legal basis of judicial independence within the EU,[4] we would like to point out that, despite this varied normative basis, the Court of Justice of the European Union (hereinafter CJEU), has recently developed an autonomous and substantive body to guarantee and control the independence of state courts. This recent development, which arose in the context of (and in response to) the crisis of the rule of law in some member states, will be examined below.

Due to its underlying alignment with the constitutional traditions from which it originated, the independence of the judiciary was always perceived as an unquestionable fact and had not represented any concern.[5] However, it began to be seen as one of the central challenges and concerns for the EU, prompting high-level institutional mechanisms to safeguard it.[6]

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1 MARTÍN Y PEREZ DE NANCLARES, José, "La Unión Europea como comunidad de valores: a vueltas con la crisis de la democracia y del Estado de Derecho", in *Teoría y Realidad Constitucional*, no. 43, pp. 129-131.

2 The "Copenhagen criteria", adopted by the Council held in Copenhagen under the Danish Presidency in 1993, are the elements that any EU candidate state must fulfil in order to join the EU. LÓPEZ AGUILAR, Juan Fernando, "El caso de Polonia en la UE: retrocesos democráticos y del estado de derecho y "dilema de Copenague", in *Teoría y realidad constitucional*, no. 38, 2016, p. 107.

3 LIÑÁN NOGUERAS, Diego J., "La internacionalización del Estado de Derecho y la Unión Europea: una traslación categorial imperfecta", in *Estado de derecho y Unión Europea*, dir. Diego J. Liñán Nogueras and Pablo J. Martín Rodríguez. Tecnos, Madrid, 2018, pp. 39-68.

4 URBANEJA CILLÁN, Jorge, "El régimen general de condicionalidad para la protección del presupuesto de la Unión Europea: ¿un mecanismo efectivo de garantía del Estado de Derecho en los Estados miembros de la Unión Europea?", in *REDE. Revista española de derecho europeo*, no. 78-79, 2021, pp. 144-153.

5 CORTÉS MARTÍN, José Manuel, "Sorteando los inconvenientes del artículo 7 TUE: el advenimiento del control jurisdiccional del Estado de derecho", in *Revista de Derecho Comunitario Europeo*, no. 66, 2020, p. 478.

6 The activation by the Commission of the different policy mechanisms, such as the preventive mechanism (Article 7(1) TEU), the sanctioning mechanism (Article 7(2) TEU), or conditionality in access to EU budget funding, are not covered in this study.

This study focuses on the evolving role of the CJEU since 2018 in reviewing state judicial reforms, particularly through the litigation initiated against Poland.[7] This lawsuit has given rise to an interesting substantive debate, which refers not only to the characterisation of judicial independence as part of the rule of law and the delimitation of its contents, but more directly to the justiciability that a new formulation of effective judicial protection has received under EU law. Specifically, the scope of the CJEU's competences to control the impact of internal regulations of the administration of justice, as well as the limits of its jurisdiction.

The essential question underlying this discussion has been summarised, in simple terms, as follows: when the essential assumptions of the rule of law begin to breakdown in one of the member states, what is the normative basis for the jurisdictional control of these elements and how far can the CJEU go?[8] The aim of this paper is to delve into the conflict generated by the answer to this question, depending on the perspective taken and defended by each jurisdictional body.

In fact, this embodies one of the core and recurring dilemmas in the European integration process, namely, what is the role of the member states within the EU integration's framework, built as a supra-state organisation with an eminently political character? Or, brought into the scope of our study, what is the role and the relationship that the CJEU should fulfil with respect to the internal judicial bodies, including the constitutional courts, especially in the context of a blockage in the deepening of European integration, aggravated by the so-called crisis of the rule of law, which has sparked strong clashes among the different bodies?

While a full analysis of all the issues raised by the considerable judicial (and political) conflicts arising from the application of the principle of judicial independence at the European level is clearly beyond the scope of this paper, we will focus on the interrelation of the different categories and issues contained in its title: the origin of conflicts between the EU and some member states and the clash between the CJEU and the constitutional courts, which necessarily leads us to analyse their operability with the primacy of EU law.

Thus, against a backdrop of the scenario of conflict between the highest jurisdictional spheres of the states and the EU, in this study we will first deal with the effects derived from the convergence of the primacy clause and this new jurisprudence on judicial independence and the rule of law, which will lead to progress in the paradigm of EU constitutionalisation with consequences that are as yet unfinished. For this purpose, we will address the precedents of

7 TORRECILLAS MARTÍNEZ, Ana, *La crisis del Estado de Derecho en la Unión Europea: el caso polaco*, Tirant lo Blanch, Valencia, 2023.

8 IGLESIAS SÁNCHEZ, Sara, "La independencia judicial como principio constitucional en la UE: los límites del control por el Tribunal de Justicia de la UE", in *Teoría y Realidad Constitucional*, no. 50, 2022, p. 488.

conflicts raised by some constitutional courts and the development of theories about the nature of the relationship between the primacy of EU law and national Constitutions, and then the change in the case law of the CJEU adopted in 2018, applying Article 19(1)(2) TEU to the member states in matters related to judicial independence at the internal level and the relevance of its effects, regardless of the competences expressly attributed to the EU in this area.

We will then address the challenges that the constitutional courts, especially the Polish one, see in this new panorama, by reconstructing and evaluating their growing reaction against the primacy clause. Here we will focus on the latest pronouncements of the constitutional courts and their position on EU control of the principle of judicial independence and institutional autonomy in an area that they understand to be closely related to their constitutional identity.

We will conclude the paper with some brief reflections on the challenges posed by the conflict of competence between the CJEU and the constitutional courts, offering some considerations of constitutional policy related to the causes underlying this institutional confrontation.

2. BRIEF HISTORICAL EXPERIENCE ON THE CLASHES BETWEEN THE CJEU AND CONSTITUTIONAL COURTS ON THE PRINCIPLE OF PRIMACY.

The complex relationship between EU law and the legal systems of member states emerges from a long-standing legal debate, addressed not only in the theoretical-doctrinal sphere[9] but also in a more practical sense, applied to the rulings of the CJEU and the constitutional courts of the member states. It is on this second level that we wish to frame the debate on the integration of EU law, and in particular, on the primacy of EU law over state law, making brief references to rulings that provide us with some relevant precedents on the state of this matter.

As is well known, the pioneering judgment for the recognition of the primacy clause as a fundamental principle of EU law is decision C–6/64 *Costa v. Enel* of 15 July 1964.[10] On the grounds of incompatibility with the Treaty establishing the European Economic Community and electricity nationalisation legislation, an Italian lawyer refused to pay an electricity bill from the Italian

9 Thus, different theories are born that try to provide a solution to the diversity of related legal systems, such as the concept of "multi-level constitutionalism" or "constitutional pluralism", referring to coexisting legal orders, networks and systems in the same geographical space. PERNICE, Ingolf, "El constitucionalismo multinivel en la Unión Europea", in *Revista de Derecho Constitucional Europeo*, no. 17, 2012, pp. 639-674.

10 Judgment of the Court of Justice of the European Communities C-6/64 Flaminio Costa v. Ente Nazionale Energia Elettrica (ENEL) of 15 July 1964. ECLI:EU:C:1964:66.

state electricity company (ENEL), as a form of protest against the nationalisation of the electricity sector by the Italian government. The European Court of Justice (now the CJEU) ruled that: a) the effect of EU law would be nullified if any state could repeal a EU rule by a unilateral measure; b) the transfer of the rights and obligations corresponding to the provisions of the Treaty in favour of the EU legal order entails a definitive limitation of their sovereignty, against which a subsequent unilateral act incompatible with the concept of the EU cannot prevail; and c) the enforceability of EU law could not, in fact, vary from one state to another, because the EU legal system requires a certain unity and uniformity of application. In essence, this means that, rooted in an autonomous source, the law deriving from the Treaty could not be judicially confronted with an internal text, whatever it might be, without losing its character and without challenging the legal basis of the EU itself.

This ruling implies that primacy is an existential condition of EU law, which has direct or indirect effect on all state legislation, regardless of its level and subject matter, as well as the time at which it was enacted, and that it is applicable not to only to Primary Law but also to Secondary Law. Consequently, if a state rule conflicts with an EU provision the authorities of the member state must apply the EU provision as a matter of priority.

Although this principle of primacy was consolidated in subsequent resolutions,[11] special attention should be paid to the attempt to positivise the principle in the Treaty establishing a Constitution for Europe,[12] *ex* Article I–6. The wording stated that "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the member states".[13] The positivisation of values in the TEU implies that the principles included in the corresponding legal text at the apex of the EU legal order gives the Treaties binding legal force, rather than soft law status.

Nevertheless, given its failure[14] it was removed from the text and relegated to a mere Declaration annexed to the Final Act of the Intergovernmental

11 This is confirmed by the most important subsequent decisions in the field, such as Judgment of the European Court of Justice 11/70 Internationale Handelsgesellschaft mbH/Einfuhr v. und Vorratsstelle für Getreide und Futtermittel of 17 December 1970. ECLI:EU:C:1970:114; Judgment of the Court of Justice of the European Communities 345/82, Wünsche Handelsgesellschaft GmbH & Co v. Germany, of 12 April 1984. ECLI:EU:C:1984:166 and Judgment of the European Court of Justice 106/77 Amministrazione delle Finanze dello Stato v SpA Simmenthal of 9 March 1978. ECLI:EU:C:1978:49.

12 The difficulties arising as a result of the crisis of the European constitutionalisation project can be seen in LÓPEZ PARADA, Rafael Antonio, "Conflictos recientes entre el TJUE y los tribunales nacionales alrededor del principio de primacía" in *REDE, Revista Española de Derecho Europeo*, no. 73-74, 2020, pp. 94-100.

13 Official Journal of the EU, no. 310, 16 December 2004, p. 1-474. OJEU-Z-2004-70001.

14 Given the negative results of the referendums held in France and the Netherlands when more than ten member states had already ratified the Treaty, most of the countries that had yet

Conference that adopted the Treaty of Lisbon. Here it is introduced as a reminder[15] that, according to the settled case law of the CJEU, the Treaties and the law adopted by the Union on the basis of them take precedence over the law of the member states, under the conditions established by the aforementioned case law.

One should not ignore the fact that, historically, the most delicate experiences in this clash have been related to the ambition to constitutionalise the EU throughout the principle of primacy with respect to those rules of constitutional level. As we shall see, despite the fact that the CJEU has repeatedly ruled that constitutions are also subject to the principle of primacy and that, therefore, it is up to any internal instance to overlook provisions of such status that conflict with EU law. The pronouncements of very different constitutional courts have attempted to establish limits to the full operability of this principle by referring to the necessary normativity that emerges from the hard core of their *norma normarum*.

Although we will delve deeper into the decisions of the Polish *Trybunał Konstytucyjny* (TK), it is worth briefly highlighting that, as this high court acknowledges, its jurisprudence is preceded and inspired by the legacy of its counterparts. This is an expression of the tense relationship between the indispensability for the EU of the primacy of its legal system as a lever for deepening the process of European integration, on the one hand, and the reluctance of states to get rid of their constitutional identity[16] or to allow the EU to act beyond the insurmountable barrier of the principle of conferral,[17]

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to ratify it rushed to paralyse the processes, after which the EU was at an impasse for more than two years. MELLADO PRADO, Pilar, "La integración europea: historia de una policrisis", in *Revista De Derecho De La Unión Europea*, no. 32, 2018, 19-35.

15 We say "by way of reminder" because Declaration No 17 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon states that "The Conference *recalls* that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of member states, under the conditions laid down by the said case law" (emphasis added). Official Journal of the EU no. 83 of 30 March 2010, p. 1-388. DOUE-Z-2010-70002.

16 It is traditionally understood to be recognised in Article 4(2) TEU, according to which "The Union shall respect the equality of member states before the Treaties and their national identities, inherent in their fundamental structures, political and constitutional, including as regards regional and local self-government. It shall respect the essential functions of the state, in particular those of guaranteeing its territorial integrity, maintaining law and order and safeguarding national security". Rivers of ink have run on this subject in recent years, and we simply quote a work that delves into it: CRUZ MANTILLA DE LOS RÍOS, Pablo, *La identidad nacional de los Estados miembros en el Derecho de la Unión Europea*, Thomson Reuters Aranzadi, 2021.

17 The principle of conferral, for its part, is regulated in Article 5 TEU, which in its first paragraph establishes that "The delimitation of the competences of the Union is governed by the principle of conferral", and in its second paragraph it is defined in such a way that "By virtue of the principle of conferral, the Union shall act within the limits of the competences conferred upon it

on the other. Among all of them, attention is drawn to the most significant cases of pause in legal development, which occurred in relation to the modifications introduced by the Treaties of Maastricht and Lisbon.[18] These treaties are the last two important milestones in terms of progress in the deepening and political, economic and institutional integration of the EU, which obliged the constitutional courts to assess their compatibility, among which we will focus on the rulings of the German Bundesverfassungsgericht (hereinafter BVerfGE) and the Spanish Constitutional Court (hereinafter TC).

The case law of the BVerfGE[19] has tried to set express limits to the action of the CJEU from different perspectives. The Maastricht Treaty Judgment[20] assigned itself the competence to decide whether or not EU acts fall under the umbrella of the competences transferred by virtue of the treaties (*ultra vires* control), while the Lisbon Treaty Judgment[21] assumed the control of the compatibility of EU acts with the German constitutional identity. All this jurisprudence is imbued with a mistrust of the disproportionate progress of the integration process and a desire to ensure that the matters most closely linked to state sovereignty remain under the guardianship of the constitutional courts.[22]

The main lesson of this case law is the warning given to German state bodies about the prohibition on applying legal acts that exceed the scope of application of the Treaties, reserving the final power of the BVerfGE in order to examine whether the EU institutions complied with the Treaties or exceeded the powers granted to them. However, no decision of the BVerfGE had gone so far as

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by the member states in the Treaties to attain the objectives defined in them. Any competence not conferred on the Union in the Treaties lies with the member states". For an overview of the changes that occurred in these matters between the failed Constitutional Treaty and the new TEU after Lisbon, see BAR CENDÓN, Antonio, "La nueva constitución de la Unión Europea: el tratado de Lisboa y la reforma de los tratados constitutivos", in *Teoría Y Realidad Constitucional*, no. 25, 2010, pp. 167-210.

18 BALAGUER CALLEJÓN, Francisco, "Los tribunales constitucionales en el proceso de integración europea", in *Revista Española de Derecho Constitucional Europeo*, no. 7, 2007, p. 365.

19 The BVerfGE had given earlier, well-known decisions on the subject, in the *Solange I* case (BVerfGE 37, 271 - 1974) in which it held that, as long as EU law did not guarantee a protection of fundamental rights equivalent to that of the German Basic Law, it reserved the right to review the compatibility of EU rules with German fundamental rights, or the *Solange II* case (BVerfGE 73, 339 - 1986), in which, revising its previous position, the Court stated that, since the CJEU had developed a substantial protection of fundamental rights, it would not exercise its review as long as this protection was maintained.

20 Judgment of the BVerfGE in Cases 2 BvR 2134/92 and 2159/92 of 12 October 1993 (Maastricht), published in BVerfGE 89, 155.

21 Judgment of the BVerfGE in cases 2 BvE 2/08, 5/08, 1010/08, 1022/08, 1259/08 and 182/09 of 30 June 2009 (Lisbon), published in BVerfGE 123, 267.

22 CORTI VARELA, Justo; PORRAS BELARRA, Javier; & ROMÁN VACA, Carmen, "El control ultra vires del Tribunal Constitucional alemán. Comentario de la Decisión de 06.07.2010 (2 bvr 2661/06, Honeywell)", in *Revista De Derecho Comunitario Europeo*, no. 40, 2015, pp. 829-835.

to declare an EU act inapplicable for failing one of these controls, but restricted itself to the strictest abstract study of the limits of the constitutionality of the Treaties, until the aforementioned warning materialised in BVerfGE Judgment 2 BvR 859/15.[23] For the first time in history, in a concrete and not merely abstract analysis, the Court overruled a CJEU ruling on the *Weiss/PSPP* case[24] and declared that a CJEU decision on the European Central Bank's bond purchase programme had been pronounced *ultra vires*, which meant not recognising its binding nature in Germany, and ordered that neither the European Central Bank rule nor the CJEU decision declaring the validity of that act[25] should be applied.

A historical assessment of the decisions of the Spanish TC reveals a more evasive and hesitant character when it comes to making direct reference to a possible conflict between the Constitution and EU law.[26] Initially, in the context of the Maastricht Treaty, it denied the primacy clause understood in a broad sense, as the CJEU does, and limited it to infra-constitutional legislation.[27] This jurisprudential orientation was subsequently shifted, in the context of Declaration 1/2004,[28] which coincided with the approval of the Lisbon Treaty.

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23 Judgment of the BVerfGE 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 of 5 May 2020.

24 Judgment of the CJEU C-493/17 *Weiss and Others* of 11 December 2018. ECLI:EU:C:2018:1000.

25 In any case, we will not delve into the argumentation of this case, as what is at issue here is the ECB's Public Sector Purchase Programme (PSPP) and the ECB's own capacity to adopt this type of decision, which may exceed its competence as regulator of EU monetary policy and enter fully into the field of economic policy, so that it does not deal with a matter of judicial independence. For a better understanding of its content, see MANGAS MARTÍN, Araceli, "El Tribunal Constitucional alemán y su fuego amigo sobre el Tribunal de Justicia de la UE y el BCE", in *Análisis del Real Instituto Elcano*, no. 72, 2020; CORTI VARELA, Justi, "El Public Sector Purchase Programme (PSPP) a la luz de las jurisprudencias del TJUE y del Tribunal Constitucional Federal Alemán: antecedentes y consecuencias de la sentencia del BVerfGE de 5 de mayo de 2020 (2 BvR 859/15)", in *Revista de Derecho Comunitario Europeo*, no. 68, 2021, pp. 67-112; or BAR CENDÓN, Antonio, "El conflicto entre el Tribunal Constitucional Federal Alemán y el Tribunal de Justicia de la Unión Europea: comentario a la sentencia del Tribunal Constitucional Federal de Alemania, Sala Segunda [Bundesverfassungsgericht, Zweiten Senats], 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, de 5 de mayo de 2020", in *Revista de las Cortes Generales*, no. 109, 2020, pp. 655-682.

26 TERUEL LOZANO, Germán T., "El Tribunal Constitucional ante el principio de primacía del Derecho Comunitario. Análisis de la jurisprudencia constitucional respecto de la compatibilidad del principio de primacía con la Constitución de la Nación española de 1978", in *Anales de Derecho*, no. 24, 2006, pp. 333-337.

27 Particularly illustrative, in this regard, is the Judgment of the TC 180/1993, of 31 May. Official State Gazette no. 159, of 5 July 1993. ECLI:ES:TC:1993:180, whose third legal basis condenses the doctrinal case law on the matter, according to which the conflict between state law and EU law is reduced to the choice of law applicable to the specific case, so that it is a purely legal question that must be resolved in the ordinary courts and not in the constitutional courts.

28 Declaration of the TC 1/2004, of 13 December. Official State Gazette no. 3, 4 January 2005. ECLI:EN:TC:2004:1D.

This decision is particularly interesting because, in this second pronouncement,[29] the TC ruled on what is commonly known as the "European Constitution Treaty", which positivises all the case law developed by the CJEU on the principle of primacy and expressly incorporates it into the Treaties.[30] In this case, the TC, like the BVerfGE, carries out an abstract analysis of the compatibility of both normative texts, concluding that, once the introduction of an autonomous legal system such as that of the EU has been permitted, the Constitution can no longer be the parameter of validity of the EU's rules, but rather the Treaty itself, since the corresponding sovereign operation of transferring the exercise of competences has been carried out. The key to the non-contradiction between texts is that we are not, in the words of the TC, dealing with a primacy of general scope, but referring exclusively to the EU's own competences, delimited in accordance with the principle of conferral, and always in accordance with a recognition that the operation of transferring the exercise of competences to the EU has clear material limits in some elements, such as the fundamental principles of the social and democratic rule of law established by the Constitution, respect for state sovereignty, basic constitutional structures and the system of fundamental values and principles enshrined in the Constitution, where fundamental rights are treated as autonomous legal principles.[31]

In order to reach these conclusions, the TC formulates an original theory on the principle of the primacy of EU law and the so-called supremacy of the Constitution. Supremacy and primacy are categories that operate at different levels, the former on the basis of the supreme hierarchical nature of a norm and, therefore, serves as a source of validity for inferior norms, i.e. that if they contradict the provisions of the supreme law, they will be declared invalid. The latter, however, would operate in the area of competence according to which a distinction can be made between different areas of application for each of the rules, which means that both rules are valid in principle, although one or some of them have the capacity to displace the others, either by virtue of

29 In the Declaration of the TC 1/1992, of 1 July. Official State Gazette no. 177, of 24 July 1992. ECLI:ES:TC:1992:1D, the TC will adhere strictly to the Government's petition, i.e. the contradiction between Article 8B of the TCEE and Article 13.2 of the Constitution, which prevented it from making a global pronouncement on the relationship between domestic law and EU law.

30 The Council of State understood that the wording of the aforementioned Article I-6 of the new Treaty establishing a Constitution for Europe could clash with the consideration of the Constitution as the supreme rule of the legal system and recommended, in this respect, that the TC declare whether or not such a contradiction exists. Opinion 2544/2004, on the Treaty establishing the European Constitution, of 21 October, legal ground II. Official State Gazette no. 3, 4 January 2005, pp. 5-21.

31 Declaration of the TC 1/2004 of 13 December, legal ground 2 and 3. Official State Gazette no. 3, of 4 January 2005. ECLI:EN:TC:2004:1D.

their preferential application or by virtue of their predominance for various reasons.[32]

This way, accession to the EU would entail the integration of an autonomous normative system into the state legal system, endowed with a specific regime of applicability based on the principle of prevalence of its own provisions. After affirming that there is no contradiction between the constitutional text and the principle of primacy recognised in the European Constitution, the TC nevertheless affirms that, in the event of a particular future conflict between EU law and the Spanish Constitution, and given the case in which the usual mechanisms included in the European Constitution do not manage to preserve the core elements of state law that are based on its sovereignty, the TC itself would be empowered to address the problems that would arise in such a case. It thus reserves the possibility of finding that the Constitution has been violated *in extremis*.

Ultimately, both constitutional courts confirmed the compatibility of the treaties provided that strict compliance with the principle of conferral (Article 5 TEU) is observed, under which the European institutions should act only within the limits of the competences that the member states have attributed to them in the Treaties, with those competences not attributed to the EU by the Treaties fully corresponding to the states.[33] In other words, as long as the integration of the new European order is not conceived as absolute and unconditional it is

32 TC Declaration 1/2004 of 13 December, legal ground 4. Official State Gazette no. 3, of 4 January 2005. ECLI:EN:TC:2004:1D.

33 Although we cannot elaborate on them, in its Decision no. 2004-505 DC the French *Conseil Constitutionnel* had to pronounce, regarding the Treaty establishing a Constitution for Europe, that the French Constitution remained the supreme norm and that, in the event of incompatibility with an EU treaty, constitutional reform would be necessary prior to its ratification. Similarly, in its Decision No 2006-540 DC on the Lisbon Treaty, it reiterated that any transfer of competences affecting sovereignty would require constitutional review prior to ratification of the relevant treaty. The Italian *Corte Costituzionale* has made similar pronouncements: in its Judgment no. 183/1973 (Frontini Case) it recognised the primacy of EU law but established that this primacy may not infringe the fundamental principles of the Italian constitutional order; in its subsequent Judgment no. 232/1989 (*Granital* case) it ruled that ordinary judges may disapply state rules contrary to EU law, without the need for intervention by the Constitutional Court, but provided that fundamental principles are not affected. In its most recent pronouncement on the matter, in Judgment 238/2014, Ferrini II, the Court refused to apply an CJEU judgment granting immunity to Germany for war crimes, arguing that it violated fundamental principles of the Italian Constitution, such as the right to effective judicial protection. Other high court decisions have reflected the establishment of limits to the principle of the primacy of EU law, such as the Constitutional Court of the Czech Republic, which in its Judgment Pl. ÚS 19/08, *Slovak Pensions* Case, warned that, if the CJEU exceeds its competence, its decisions could be unenforceable in the Czech legal order, reserving the right of review in such cases, or the Danish Supreme Court or *Højesteret*, which in its *Ajos* Case Judgment refused to apply a judgment of the CJEU that gave horizontal effect to general principles of EU law, arguing that it violated the principle of predictability and legality of Danish law.

subject to the material limits inherent to the sovereignty and *causa essendi* of the state.[34]

In any case, this brief digression into the background to the conflict generated by the EU's primacy of law will illuminate the fact that the conflicts presented today as highly topical are no more than contemporary manifestations of old yet unresolved disputes. This way, the last confrontation over the competence of the *control of europeanness* has endowed the issue with specific characteristics that deserve to be taken into account, especially if we consider the constitutional importance that the organisation and functioning of the administration of justice has for every state. Nevertheless, as we will see below, the issue of judicial independence, although novel in terms of the case law of the CJEU, is nothing more than a reproduction of the previous conflict between the constitutional courts and the Court of Luxembourg over the limits of the primacy of one law and one instance or another, and thus, a confrontation between the constitutional courts and the Court of Justice.

3. JUDICIAL INDEPENDENCE AS A NEW CAUSE OF CONFLICT.

3.1. A *twist* in the CJEU's case law on judicial independence.

The fundamental right to effective judicial protection, whose jurisprudential origin at European level is based on an initial recognition by the CJEU,[35] had its first normative translation as a fundamental right in Article 47 of the CFR and in Article 267 of the TFEU, as an instrumental formulation for its guarantee through the well-known mechanism of the 'preliminary ruling procedure'.[36] However,

34 In a certain manner, the evolution of constitutional identity has been configured as a counter-limit to the primacy clause. MARTÍNEZ LÓPEZ-SAEZ, Mónica, "A la búsqueda de la identidad constitucional: una aproximación al caso español y europeo en clave de pluralismo constitucional y diálogo judicial", in *Revista De Derecho Político*, no. 105, p. 338.

35 CJEU Judgment C-222/84 M. Johnston v. Chief Constable of the Royal Ulster Constabulary, 15 May 1986, paragraphs 18 and 19. ECLI:EU:C:1986:206; CJEU Judgment C-222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*, 15 October 1987, paragraphs 14 and 15. ECLI: EU:C:1987:442; Judgment of the CJEU C-50/00 *Unión de Pequeños Agricultores v Council*, 25 July 2002, paragraph 39. ECLI: EU:C:2002:462; CJEU Judgment C-432/05 *Unibet* of 13 March 2007, paragraph 37. ECLI: EU:C:2007:163; CJEU Judgment C-334/12 RX-II *Arango Jaramillo and Others v EIB* of 28 February 2013, paragraph 40; CJEU Judgment C-584/10 *Commission and Others v Kadi* of 18 July 2013. ECLI: EU:C:2013:518.

36 The CJEU's control over judicial independence has thus been taking place on a solid legal basis. IGLESIAS SÁNCHEZ, Sara, "La independencia judicial como principio constitucional en la UE: los límites del control por el Tribunal de Justicia de la UE", in *Teoría y Realidad Constitucional*, no. 50, 2022, p. 492.

repeated appeals by the CJEU on the obligation of member states to provide for a system of appeals and procedures to guarantee respect for the fundamental right to effective judicial protection led to the Treaty of Lisbon making this clause a positive one and including it in the EU's sphere of competence, *ex* Article 19(1)(2) of the TEU. The not inconsiderable advances in the regulation of effective judicial protection, however, have gone a step further. A series of pronouncements made by the CJEU in recent years advocate that the literalness of Article 19(1)(2) of the TEU should lead to a strengthening of the objective, systemic or structural dimension of the right.[37]

Therefore, among the various approaches employed by the EU institutions to overcome the intrinsic fragility of the political control of the rule of law at a time of crisis,[38] the role of the EU is strengthened in relation to safeguarding a principle of judicial independence that was not defined in any text.[39] In other words, faced with the weakness of the political-institutional channels for the resolution of the conflict, the CJEU changed its script: initially limited to recognise and guarantee the existence of sufficient means of appeal in the domestic sphere for individuals in those areas in which EU law could be applied, it went on to forge a European control with regard to respect for judicial independence, for whose control the EU and, more specifically, the CJEU, would be competent.[40]

This new push stems from the doctrinal line recently opened with Judgment C–64/16 Portuguese judges' Union Association (hereinafter ASJP),[41] which deals with the economic independence of judges, following an appeal brought before the state courts regarding the salary reduction applied to judges of the Court of Auditors of Portugal. Within the framework of the austerity measures adopted by the Portuguese government following the agreements with the

37 UGARTEMENDIA ECEIZABARRENA, Juan Ignacio, "The fundamental right to an effective judicial protection and the rule of law in the EU and their impact on member states' administration of justice", in *Freedom, Security & Justice: European Legal Studies*, no. 1, 2021, pp. 241-242.

38 The various EU instruments for curbing and reversing breaches of the rule of law in the member states – Article 7 TEU, infringement proceedings and preliminary rulings, Rule of Law Framework Mechanism, Rule of Law Reports and the Regulation on a general system of conditionality for the protection of the Union budget – can be consulted in GONZÁLEZ CAMPAÑA, Nuria, "La defensa europea de la independencia del Poder Judicial en el marco de la protección del Estado de derecho: la crisis del CGPJ en España", in *Teoría y Realidad Constitucional*, no. 50, 2022, pp. 462-475.

39 SARMIENTO RAMÍREZ-ESCUDERO, Daniel and ARNALDOS ORTS, Enrique, "La independencia judicial en la jurisprudencia del Tribunal de Justicia de la Unión Europea", in *Revista de Estudios Políticos*, no. 198, 2022, p. 125.

40 ANDRÉS SÁENZ DE SANTAMARÍA, Paz, "Rule of Law and Judicial Independence in the Light of CJEU and ECtHR Case Law", in *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation*, dir. Cristina Izquierdo Sans, Carmen Martínez Capdevila and Magdalena Nogueira Guastavino, Springer, 2021, p. 167.

41 Judgment of the CJEU C-64/16 Associação Sindical dos Juízes Portugueses v. Tribunal das Contas of 27 February 2018. ECLI:EU:C:2018:117.

Troika, the Portuguese court referred a question to the CJEU for a preliminary ruling, asking whether that measure was compatible with the aforementioned Article 19(1)(2) TEU. The CJEU will conclude that the EU principle of judicial independence does not preclude the application of general salary reduction measures to members of the state Court, since they are linked to the imperative requirements of the elimination of the excessive budget deficit and applied to all members of the state public administration, not only to judges, on a temporary basis.[42]

As can be deduced, the interest of the decision lies not so much in the ruling as in the novel reasoning that the CJEU uses to interpret the aforementioned provision, recognising the competence of the CJEU to control aspects of internal judicial organisation despite the fact that this competence has historically been attributed to the member states.[43]

In its legal reasoning, the CJEU assumes, firstly, that the essential function of judicial review of EU law, whichever body performs it, must be carried out in accordance with the principle of effective judicial protection;[44] secondly, that guaranteeing effective judicial protection necessarily requires the impartiality of the courts responsible for providing it,[45] so judicial independence is a structural requirement of EU law given its direct connection with the value of the rule of law; and, thirdly, that Article 19(1)(2) of the TEU, although belonging to the EU sphere, is a rule directly applicable not only to the judges and Advocates General of the CJEU, but also to all domestic judges, who, as the courts responsible for applying the EU legal order, must comply with the requirement of judicial independence.[46]

Thus, in a case which, *a priori*, sought to enrich the standard of protection of judicial independence on the basis of the salary consolidation of the judiciary,

42 Judgment of the CJEU C-64/16 Associação Sindical dos Juízes Portugueses v. Tribunal das Contas of 27 February 2018, paragraphs 46-49. ECLI:EU:C:2018:117.

43 In the review carried out by the CJEU in all these cases, it will always establish, as a starting point, that "it is for the member states to determine how they organise their administration of justice", expressly recognising that this is a competence of the states and that the Court neither intends to exercise this competence itself, nor is it arrogating it to itself. For all, *vid*. Judgment of the CJEU C-585/18 AK v National Council of the Judiciary; and C-624/18 and 625/18 CP and OJ v Supreme Court of Poland, 19 November 2019, paragraph 75, ECLI:EU:C:2019:982 and Judgment of the CJEU C-192/18 Commission v Poland, 5 November 2019, paragraph 52, ECLI:EU:C:2019:924.

44 Judgment of the CJEU C-64/16 Associação Sindical dos Juízes Portugueses v. Tribunal das Contas of 27 February 2018, paragraphs 32-34. ECLI:EU:C:2018:117.

45 Judgment of the CJEU C-64/16 Associação Sindical dos Juízes Portugueses v. Tribunal das Contas of 27 February 2018, paragraphs 35-37. ECLI:EU:C:2018:117.

46 Judgment of the CJEU C-64/16 Associação Sindical dos Juízes Portugueses v. Tribunal das Contas of 27 February 2018, paragraph 42. ECLI:EU:C:2018:117.

the unexpected result[47] was a paradigm shift whereby the CFR ceased to be the instrument of reference and a new normative basis emerged, hitherto conceived as merely instrumental and, admittedly, also somewhat diffuse.[48]

ASPJ constitutes the "case zero" of a now consolidated interpretation of Article 19 TEU, which makes it an essential pillar for the protection of judicial independence within the EU. Through this provision, directly connected to the values of the rule of law enshrined in Article 2 TEU, it is established that effective judicial protection requires independent judges, and this requirement acquires an autonomous and substantive character. In an innovative manner, the CJEU eliminates the need to have a link with other rules of EU law in order to apply the precept, which makes it possible to establish a broad European control over aspects of the judicial system of the member states, since the breadth of the matters covered by EU law means that it is certainly difficult to find a judicial body that is not capable of ruling, within the scope of its competences, on that law.[49]

Ultimately, the jurisprudential evolution of the concept of judicial independence has led to a transformation of its legal treatment, from an individual perspective applied to the judge who was to dispense the specific judicial protection towards a more structural approach applied to the system as a whole.[50] In other words, what in the beginning was understood as a subjective right of the defendant as a guarantee of due process has evolved into an objective guarantee that is presented as an institutional protection of judicial independence from the other powers of the state.[51] Based on this observation,

47 The reasoning of the CJEU is surprising, since Advocate General Saugmandsgaard Øe, who drafted the Opinion in this case, had, contrary to what the CJEU stated, configured Article 19(1)(2) TEU as a purely procedural provision. Opinion of Advocate General Henrik Saugmandsgaard Øe C-64/16 Associaçao Sindical dos Juízes Portugueses v. Tribunal das Contas of 18 May 2017, paragraphs 63-64 and 66-67. ECLI:EU:C:2017:395.

48 This has led to the case law being described as a kind of judicial serendipity, since in order to achieve this result, the CJEU had to overcome several obstacles that required a notable degree of interpretative creativity: on the one hand, it declared the case admissible despite the fact that, in previous cases related to austerity measures, it had chosen not to rule; on the other hand, when assuming its jurisdiction, it deliberately avoided an exhaustive analysis of Article 47 of the CFR in order to identify an alternative legal basis in Article 19(1)(2) TEU, with which it was empowered to act against the crisis of the rule of law in the EU. BONELLI, Matteo and CLAES, Monica, "Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary", in *European Constitutional Law Review*, no. 14, 2018, pp. 624-632.

49 CERVELL HORTAL, María José, "Independencia judicial: ¿Siempre nos quedará Luxemburgo?", in *Cuadernos de Derecho Transnacional*, vol. 16, no. 2, 2024, p. 405.

50 ESCALADA LÓPEZ, María Luisa, "Independencia de los jueces e independencia del Judicial en la Unión Europea", in *Revista de Estudios Europeos*, no. 85, 2025, pp. 266-269.

51 ULLOA RUBIO, Ignacio, "La primacía del Derecho de la Unión en materia de Estado de Derecho: un repaso a la jurisprudencia del TJUE sobre la independencia judicial", in *La Ley Unión Europea*, no. 104, 2022.

the key innovation introduced are the effects derived from the combination of this autonomous concept of judicial independence within the EU legal system and its interaction with other standards, especially the aforementioned principle of primacy. This manifests itself in an unprecedented legal potential, not only because of the variety and breadth of cases that can be submitted to the CJEU in these matters,[52] but also because of the strong impact that its rulings can have on the judicial organisation of the member states, in priority application of the provisions of the constitutional rules of the states.[53]

That said, the change of the jurisprudential basis analysed here will represent a new chapter in the already historic conflict between the CJEU and the constitutional courts, but now affecting a more sensitive matter: the internal organisation of the justice system – including the election of the members of the high courts –, among which we will give an account of the most well-known, problematic and bizarre case, the Polish case.[54]

3.2. The CJEU's assault on judicial reforms contrary to judicial independence: the Polish saga.

The Polish case is an important escalation in the conflict between state and EU legal operators: the Commission successfully brought infringement proceedings against Poland (*ex* Article 258 TEU), which were intertwined with a veritable avalanche of preliminary rulings (Article 267 TEU) whereby Polish judges highlighted problematic aspects of the reforms that their justice system had undergone, after which the executive and the TK reacted virulently.

As a result of this confrontation, the aforementioned line of jurisprudence –inspired by the advances introduced in the ASJP case – was consolidated by extending the combination of judicial independence as an autonomous legal basis together with the primacy of the decisions of the CJEU over domestic provisions

52 UGARTEMENDIA ECEIZABARRENA, Juan Ignacio, "The fundamental right to an effective judicial protection and the rule of law in the EU and their impact on member states' administration of justice", in *Freedom, Security & Justice: European Legal Studies*, no. 1, 2021, p. 262.

53 Just two weeks after the CJEU's judgment in the ASJP case, the Irish High Court referred for a preliminary ruling a question on the lack of judicial independence as a ground for suspension of a European arrest warrant submitted by Poland. CJEU Judgment C-216/18 PPU Minister of Justice & Equality v. LM of 25 July 2018. ECLI:EU:C:2018:586 accepted systemic shortcomings in the guarantee of judicial independence in the Polish judicial system as a ground for refusing to execute the warrant.

54 At the time of the judgment, the Commission's reasoned proposal, issued in accordance with Article 7(1) TEU, had already been published, in which it noted the existence of a clear risk of a serious breach of the rule of law in Poland due to, inter alia, the threat to judicial independence. *Vid*. COM(2017) 835 final, 2017/0360(NLE), Reasoned proposal for a Council Decision in accordance with Article 7(1) of the Treaty on European Union regarding the clear risk of a serious breach by the Republic of Poland of the rule of law.

to the Polish judicial reforms.[55] We cannot even provide a concise overview on this complex body of case law, although we could make a synthesised reading in order to investigate the shared key arguments, focusing exclusively on the progressive advances made, case by case, with regard to European control of the organisation of the Polish justice system.[56]

In the first case, C–619/18 *Commission v. Poland* (Independence of the Supreme Court),[57] the CJEU resolved the conflict arising from the reform of the Supreme Court Act, which reduced the retirement age of judges from 70 to 65 years, applied retroactively, and allowing the executive to decide which judges could continue by means of extensions granted at the discretion of the President of the Republic. The CJEU went on to consider the merits of the case and to assess the conformity of the organisation of the Polish administration of justice, on the basis that the Polish Supreme Court is a state court which, in so far as it may be called upon to rule on questions relating to the application or interpretation of EU law and which forms part of the Polish system of remedies in areas covered by EU law "within the meaning of Article 19(1)(2) TEU", is subject to the requirements of effective judicial protection, including respect for judicial independence, and the CJEU therefore has jurisdiction to examine whether or not the provisions of national law at issue are contrary to it. Briefly, it made a representative application of the doctrine of judicial independence contained in the ASJP case, declaring for the first time the incompatibility of a domestic regulation with the aforementioned precept.

In the second infringement procedure, in Case C–192/18 Commission v Poland (Independence of ordinary courts),[58] the dispute arises in the context

55 CAMPOS SÁNCHEZ-BORDONA, Manuel, "La protección de la independencia judicial en el Derecho de la Unión Europea", in *Revista de Derecho Comunitario Europeo*, año 24, no. 65, 2020, pp. 14-28.

56 For reasons of space, we will only deal with the judicial aspect of the multiple cases. For the preceding legislative dimension, see KRZYWON, Adam, "La crisis constitucional en Polonia (2015-2017): como cuestionar el sistema del equilibrio constitucional en dos años", in *Teoría y realidad constitucional*, no. 41, pp. 359-379.

57 Judgment of the CJEU C-619/18 PPU Commission v Poland of 24 June 2019. ECLI:EU:C:2019:531. The CJEU ruled that the measure allowing the executive to dismiss active judges early caused legitimate concerns about respect for the principle of judicial irremovability. It also found that the President's discretionary power to prolong the activity of judges, once the new retirement age has been reached, may also undermine judicial independence, as it is carried out without clear and objective criteria, and is not subject to reasoning or judicial review (paragraphs 47-55).

58 Judgment of the CJEU C-192/18 of 5 November 2019, Commission v Poland. ECLI:EU:C:2019:924. In this case, in addition to the infringement of the principle of effective judicial protection by compromising judicial independence, the Commission alleged infringement of the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54/EC). The CJEU reached similar conclusions on judicial independence (paragraphs 108 et seq.), adding a reproach

of the Polish judicial reform initiated in 2017 whereby a new disciplinary regime for ordinary judges was introduced that gave broad powers to the Minister of Justice and the executive branch to control, initiate and supervise disciplinary proceedings against judges, in particular to dismiss presidents and vice-presidents of ordinary courts within six months of its entry into force and without justification. This reform also reduced the retirement age from 67 to 65 for judges and from 67 to 60 for female judges, giving the Minister of Justice the power to extend mandates until the age of seventy, but under unspecified criteria. Although the consequences would not go beyond compensation by the Polish government for the majority of retired judges, with no possibility of them returning to their previous professional activity, it was significant in terms of its legal basis, reiterating that the principle of judicial independence is an autonomous and substantive concept sufficient for the CJEU to carry out an European review of internal measures relating to the administration of justice.

The CJEU then had to rule in its judgment in *AK and Others* (Independence of the Disciplinary Chamber of the Supreme Court)[59] on judicial independence in two references for a preliminary ruling from the Employment Division of the Supreme Court of Poland. Using the rediscovered concept of judicial independence, which arose in the context of two disputes between AK, a judge of the Supreme Administrative Court of Poland, and the National Council of the Judiciary (KRS) of Poland, on the one hand; and, second, CP and DO, judges of the Polish Supreme Court, and the latter court, on the legality of the Disciplinary Chamber of the Polish Supreme Court, established *ex nihil* in the context of the Polish Government's judicial reforms. As a preliminary ruling, the CJEU did not rule directly on whether or not the Disciplinary Chamber was independent, but set out very clear criteria[60] for the Polish Supreme Court to decide the case, after which the high court concluded in January 2020 that the Disciplinary Chamber was not an independent body.[61] In this case, the most important thing

concerning the discrimination between male and female judges represented by the Polish law providing for a different retirement age for each of these groups (paragraphs 58-84).

59 CJEU Judgment C-585/18 AK v National Council of the Judiciary; and C-624/18 and 625/18 CP and OJ v Supreme Court of Poland, 19 November 2019. ECLI:EU:C:2019:982.

60 In its CJEU Judgment C-585/18 AK v National Council of the Judiciary; and C-624/18 and 625/18 CP and OJ v Supreme Court of Poland of 19 November 2019, paragraph 118. ECLI:EU:C:2019:982, the CJEU ruled that independence requires that there be no external pressures, including political influences on the appointment of judges, for which consideration must be given to: the manner of appointment of judges, the duration of the term of office, guarantees against external pressures and the appearance of impartiality and independence vis-à-vis the citizen. All of this, as we have said, operates on the basis of Article 19(1)(2) TEU, which obliges member states to guarantee judicial independence in any body that can apply EU law, including all domestic judges and courts.

61 CAMPOS SÁNCHEZ-BORDONA, Manuel, "La protección de la independencia judicial en el Derecho de la Unión Europea", in *Revista de Derecho Comunitario Europeo*, año 24, no. 65, 2020, p. 13.

is the recognition of the competence of the CJEU to rule on judicial independence, not only of the ordinary courts, but also of the governing bodies of the judicial powers of the member states, as well as the duty to safeguard the primacy clause, which must lead the Court *a quo* to disapply state laws contrary to judicial independence, because they condition the effective judicial protection of Polish judges, as functionally European jurisdictional bodies.[62]

The next decision of the CJEU came in joined cases C–558/18 and C–563/18 *Miasto Łowicz and others*,[63] ruling on another question referred for a preliminary ruling by two Polish judges who expressed doubts about judicial independence in Poland following legislative reforms that established a specific disciplinary regime for judges, including the possibility to initiate disciplinary proceedings for the content of their decisions. Both judges feared that referring questions to the CJEU for a preliminary ruling could lead to disciplinary action by the executive, through the new Disciplinary Chamber of the Supreme Court, whose functioning had been widely questioned. Although the CJEU rejected the proceedings, it confirmed that judicial independence is essential to the principle of effective judicial protection, producing effects towards the mechanism of preliminary rulings, so that this mechanism is covered by Article 19(1)(2), which must be able to be raised without fear of sanctions or pressure. This implicitly warned Poland to eliminate any mechanism that could have a dissuasive effect on judges when it comes to turning to the CJEU.

Judgment C–824/18 AB and others, referring to the non-challengeability of decisions appointing judges,[64] resolves the case of the Administrative Chamber of the Polish Supreme Court concerning the procedure for appointing judges to this Supreme Court, but focusing on the role of the KRS, which had been reformed, and whose procedure did not provide for appeals against decisions proposing candidates to the President of the Republic for appointment. In addition to reiterating the argument on judicial independence,[65] this decision is clarifying

62 SARMIENTO RAMÍREZ-ESCUDERO, Daniel, *El derecho de la Unión Europea*. Marcial Pons, Madrid, 2020, p. 343.

63 Judgment of the CJEU C-558/18 and C-563/18 Miasto Łowicz v Skarb Państwa - Wojewoda Łódzki and Prokurator Generalny v VX and Others of 26 March 2020. ECLI:EU:C:2020:234. In this case, the CJEU declares both proceedings inadmissible, considering that they were not directly related to the main proceedings. In other words, the judges asked hypothetical or preventive questions based on a possible opening of disciplinary proceedings, but not connected to an actual conflict in the specific litigation before them.

64 Judgment of the CJEU C-824/18 AB e.a v CNPJ (*Krajowa Rada Sądownictwa*) of 2 March 2021. ECLI:EU:C:2021:153.

65 In its decision, the CJEU recalls that member states must guarantee citizens effective access to an independent and impartial tribunal, especially in proceedings concerning access to judicial office, and criticises the fact that the Polish legal system excluded any judicial review of decisions of the KRS proposing candidates for the Supreme Court. This exclusion, aggravated by the fact that the KRS could no longer be considered an independent body, violates the principles

with regard to the operative nature of judicial independence and its interrelation with the principle of primacy: the CJEU establishes that any state rule contrary to the judicial independence guaranteed by EU law must be disregarded without exception, so that if a domestic court finds that a provision violates Article 19(1)(2) TEU, it must cease to apply it (paragraph 142) without being able to oppose domestic provisions, even those of constitutional level, such as those relating to the distribution of judicial jurisdiction (paragraph 148).

In the third infringement procedure brought against Poland, the CJEU ruled in Case C–791/19 *Commission v Poland*,[66] assessing in the substance of what, due to the procedure followed in the previous case of Miasto Łowicz and others, fell outside its jurisdiction. The CJEU now challenges the new disciplinary regime for judges in Poland, in particular the Disciplinary Chamber of the Supreme Court, which allows judges to be subject to investigations into the content of their decisions when they refer questions to the CJEU for preliminary rulings.[67] The CJEU considers itself competent to assess whether or not the domestic legal regulation of disciplinary proceedings complies with the guarantees of judicial independence established in its case law, and considering that Polish legislation is aimed at pressuring, intimidating or politically controlling judges, it concludes that it does not comply with the standards of the European control of the formation of its judicial structures and their concordance with the principles of judicial independence and the rule of law, pillars of the EU's legal order.

Subsequently, in Case C–487/19 W.Ż., the CJEU ruled on a question referred for a preliminary ruling by the Warsaw District Court, in the context of a

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of the rule of law. Thus, the CJEU complements the previous doctrine that gives special weight to the analysis of the domestic court, which had already cast doubt on the impartiality of the KRS and the legality of the appointment procedure, to strengthen the doctrine that the judicial appointment procedure must be subject to control mechanisms that ensure its independence, with the CJEU reviewing this type of national judicial reform when it compromises compliance with EU law (paragraphs 68, 69 and 79).

66 Judgment of the CJEU C-791/19 *Commission v. Poland* of 15 July 2021. ECLI:EU:C:2021:596.

67 The decision condemns Poland for non-compliance with EU law, finding that judicial independence is compromised for a number of reasons: failure to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court by giving the President of the Chamber the power to designate the disciplinary tribunal competent to initiate such disciplinary proceedings, allowing the content of judicial decisions to be classified as a disciplinary offence, failure to ensure that disciplinary proceedings against judges are examined by a tribunal established by law and failure to guarantee the rights of defence in such disciplinary proceedings, and more particularly, that ordinary Polish judges are exposed to disciplinary liability before the Chamber for merely raising questions for preliminary rulings The Judgment concludes that respect by a member state of the values enshrined in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that state, so that its domestic legislation cannot be amended in order to reduce the protection of the value of the rule of law expressed, inter alia, in Article 19 TEU (paragraph 51).

complaint by judge W.Ż, who had been forcibly transferred from one chamber to another within that court. The CJEU reaffirms that a judicial authority cannot be considered independent if its composition or functioning is subject to the influence of the legislature or the executive and analyses the lack of remedies against the decision of the president of the court, concluding that the absence of judicial review of internal decisions on judges may violate fundamental rights. In the case of non-voluntary transfers of a judge to another jurisdiction, or to another section within the same court, without due guarantees against possible direct or indirect influences, the principle of irremovability and judicial independence would be violated (paragraph 116).[68]

In its decision in Joined Cases C–748/19 to C–754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*,[69] the CJEU points out that not every irregularity in judicial appointments justifies disregarding their legality, especially if that entails calling into question the authority of the judges appointed in a generalised manner. It reaffirms, however, that the independence of judges forms part of the essential content of the right to effective judicial protection, so that in the event that serious and verifiable indications are found that the appointment process has been vitiated by political interference, the domestic judge must be able to examine whether the right to an independent and impartial judge has been respected (paragraph 79). In any event, the CJEU confirms that the right to an independent and legally established judge, as a cornerstone of the rule of law in the EU, enables its counterparts to question, in exceptional circumstances, the validity of a judge's appointment, opening the door for domestic courts to challenge the independence of judges appointed in flawed processes, in line with previous doctrine.

The latest judgment in case C–204/21 *Commission v Poland*,[70] concerns an infringement procedure initiated by the Commission in relation to the latest legislation on the organisation of the judiciary, which directly affected the

68 Judgment of the CJEU C-487/19 W.Ż. of 6 October 2021. ECLI:EU:C:2021:798. As was the case here, where the transfer was decided by the president of the court, appointed on a proposal from the KRS, whose independence was under question due to its new legislative composition, in the terms described. The CJEU recalled that, according to Article 19 TEU and Article 47 CFR, the right to a fair trial before an independent judge is an essential part of EU law. The decision underlines that domestic judicial bodies applying EU law must offer guarantees of independence and impartiality, not only in their formal status, but also in the reasonable perception of citizens.

69 Judgment of the CJEU C-748/19 *WB & XA v. Prokuratura Krajowa*, C-749/19, C-750/19, C-751/19, C-752/19, C-753/19 and C-754/19 of 16 November 2021. ECLI:EU:C:2021:931.

70 Judgment of the CJEU C-204/21 *Commission v Poland* of 5 June 2023. ECLI:EU:C:2023:44, concerning several questions referred for a preliminary ruling by the Warsaw Regional Court (10th Section, Criminal Division) in relation to seven criminal cases in which a judge, on secondment, appointed at the discretion of the Ministry of Justice on the proposal of the KRS, was sitting on the bench in a procedure whose independence had been called into question following the judicial reforms carried out in Poland. The issues involved the validity of pre-trial detention orders issued

freedom of expression of judges, the possibility for courts to review the legality of judicial appointments and the competence of the courts to review the validity of the KRS itself and of the Disciplinary Chamber of the Supreme Court. In addition, it severely limited the possibility of raising preliminary rulings on judicial independence, imposing disciplinary sanctions on judges who do so. The CJEU again found Poland in breach of Article 19(1)(2) TEU and Article 267 TEU, for having adopted a legal framework which seriously undermines judicial independence and infringes judicial cooperation in the EU, stressing that the application of the TEU and the decisions of the CJEU cannot be circumvented by invoking constitutional provisions, as the principle of primacy imposes their pre-eminence over all state law, including the Constitution (paragraphs 75–77).[71]

The conversion of the value of the rule of law into an operational principle through the case law of the CJEU, however, is not a phenomenon limited to Poland alone. Since the development of the aforementioned jurisprudential saga, other proceedings have begun to proliferate in other states such as Malta.[72] Hungary,[73]

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by judges appointed in this context, and whether this possible lack of judicial independence could affect the right to a fair trial.

71 The CJEU states that the legislative measures introduced violate the minimum requirements of judicial independence required by EU law; in particular, it criticises the fact that judges cannot challenge the legality of judicial appointments or bodies, such as the new KRS or the Disciplinary Chamber. The judgment emphasises that sanctioning or discouraging judges from raising questions for preliminary rulings goes against the essence of the EU judicial system, strongly criticises the use of a disciplinary system which threatens judges with proceedings or sanctions for the content of their judicial decisions (paragraphs 140, 152, 153-156) and criticises the use of a disciplinary system which threatens judges with proceedings or sanctions for the content of their judicial decisions (paragraphs 140, 152, 153-156 and 153-156)) or for addressing the CJEU and emphasises that these reforms undermine mutual trust between member states and jeopardise the principle of mutual recognition of judgments within the EU (paragraphs 94, 140 and 160).

72 The Judgment of the CJEU C-896/19, in the Repubblika case, resolves a case on judicial independence related to the appointment of judges by the Maltese executive. In this case, however, the CJEU rejects the question referred for a preliminary ruling by the Civil Division of the Maltese Supreme Court, which, exercising constitutional functions, questions the CJEU on the consistency with EU law and the new case law of judicial independence in the case of the appointment of judges and magistrates by the Prime Minister. The judgment is novel in terms of judicial independence, because it declares that the appointment of judges by the prime minister of a Member state is not contrary to Article 19(1)(2) TEU or Article 47 CFR, if an independent committee for judicial appointments is involved beforehand, and if the legal regime of the selection procedure for judges in Malta is governed by rules that do not create an appearance of lack of independence or impartiality, thus distinguishing it from what happened in Poland. However, the most far-reaching aspect of this judgment is the declaration that member states may not amend *in peius* their legislation on the organisation of the administration of justice in such a way as to reduce the protection of independence granted by Article 19 TEU. Judgment of the CJEU C-896/19 *Repubblika v. Il-Prim Ministru* of 20 April 2021. ECLI:EU:C:2021:311.

73 In Case C-564/19 IS (*Illégalité de l'ordonnance de renvoi*), the relationship between judicial independence in Hungary and the procedural rights of the accused is substantiated

or Romania,[74] which illustrate how European control of the different elements of the Polish judicial system has opened the door to scrutiny of the exercise of judicial power in other member states.

We are therefore faced with an expansive line of jurisprudence, which implies that any type of state measure on the organisation or functioning of its administration of justice is subject to the regulation on judicial protection, as recognised by the EU and interpreted by the CJEU. This inexhaustible parameter or canon of European control of state measures, combined with the application of the principle of primacy, means that European control of the judicial independence has preferential application over state regulations and remains *in extrema res* under the control of the CJEU.

What has just been described, initially conceived for ordinary courts, was extended following Polish legislative reforms to apply to the supreme courts and the governing bodies of the judiciary, thus extending its scope to the highest

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in a case where a Swedish citizen of Turkish origin, arrested in Hungary in 2015 for allegedly violating arms regulations, was completely dependent on an interpreter who was appointed without information about his qualifications or guarantees of understanding with the accused, which could affect the right to a fair trial. In turn, the Hungarian judicial system is managed by the National Office of the Judiciary, headed by a president appointed by Parliament, but with wide discretionary powers and who has ignored and delegitimised the body over which he presides, raising doubts about the impartiality and structural independence of the courts. However, in the absence of a connecting link between the dispute and the provisions of EU law whose interpretation is sought, so that the interpretation in question meets an objective need for the decision which the referring court is called upon to adopt, the question referred for a preliminary ruling is inadmissible (paragraphs 139-147). Judgment of the CJEU C-564/19 IS of 23 November 2021. ECLI:EU:C:2021:949.

74 The judgment in Case C-83/19 Asociația 'Forumul Judecătorilor Din România' resolves together six questions referred by various Romanian courts for a preliminary ruling on the legislative amendments made between 2017-2019 concerning the Statute of judges and Prosecutors, the Law on Judicial Organisation and the Law on the High Council of the Judiciary, which affected the fight against corruption and judicial independence. The judgment resolves three substantial issues. First, that the disciplinary regime of judges is an integral part of the statute of judicial independence. Secondly, that the creation of a specialised section within the public prosecutor's office for the investigation of crimes committed by judges (and the appointment of its members) will only be appropriate under EU law: a) if there are objective and verifiable reasons justifying such creation and appointment, b) if guarantees are established that protect judges and prosecutors from political control, and c) if the functioning of this section respects the CFR (paragraph 213). Thirdly, it states that liability for miscarriage of justice should be limited to exceptional, clear and precise cases necessary for the proper administration of justice. Consequently: a) a mere miscarriage of justice should not be based on the judge's personal liability; and b) the procedure, conditions and circumstances of the action for pecuniary liability must be objective and impartial (paragraph 233). Judgments of the CJEU C-83/19 *Asocia ia 'Forumul Judecătorilor Din România' v. Inspecția Judiciară*, C-127/19 and C-195/19; C-291/19, C-355/19 and C-397/19 of 18 May 2021. ECLI:EU:C:2021:393.

levels of the judicial system.[75] In response, the reaction of the highest guardian of the Polish legal system was not long in coming.

3.3. The reaction of the TK: the disruption of the balance between primacy and sovereignty.

Following the list of judgments discussed, and with the precedent of the conflict between the CJEU and the constitutional courts, it was foreseeable that Poland and its TK would react to a CJEU which has relied on novel jurisprudence regarding Article 19(1)(2) of the TEU since 2018 to act as a barrier to any state provision or decision by any domestic legal entity relating to the judicial system that, in its view, contradicts the judicial independence recognized in EU law. What happens is that, unlike the pronouncements of the constitutional courts that we saw in the first sections of this paper, this latest reaction of the TK aims to confront the novel conceptual elaboration that the CJEU has carried out based on the interrelation of those basic postulates of EU law – the connection of the state judge as a European judge, the fundamental right to effective judicial protection, the principle of judicial independence and the value of the rule of law (Article 19 and 2 TEU) –, which has led to the reaffirmation of the principle of primacy of EU law itself in unsuspected areas by alluding to the fact that the organisation and functioning of the Administration of Justice is not a matter that has been competentially attributed to the EU and, therefore, it is not possible for EU law to take precedence over that of the member state.

The high point of the confrontation between the parties followed with the judgments of the Polish Constitutional Court in Case P 7/20 and Case K 3/21.[76] The first of the proceedings[77] stems from the application of the aforementioned Disciplinary Chamber of the Supreme Court challenging the constitutionality of the interim measures adopted by CJEU Order C–791/19 R in the *Commission v Poland* case,[78] ordering Poland to immediately suspend the application of the provisions on the powers conferred on the said Chamber with regard to disciplinary cases concerning judges. In its judgment, the CJEU examines the

75 ULLOA RUBIO, Ignacio, "La primacía del Derecho de la Unión en materia de Estado de Derecho: un repaso a la jurisprudencia del TJUE sobre la independencia judicial", in *La Ley Unión Europea*, no. 104, 2022.

76 GRABOWSKA-MOROZ, Barbara, "How was the 'Rule of Law' dismantled in Poland and what does it mean for the EU? The decision of the Polish Constitutional Tribunal of 7 October 2021 (K 3/21) - the European game changer or a quasi-judicial bluff?", in *La Unión Europea y el reto del Estado de Derecho*, coord. by Susana Sanz Caballero, Árbol Académico, Thomson Reuters Aranzadi, 2022, pp. 277-294.

77 Judgment of the Trybunału Konstytucyjnego P 7/20 of 14 July 2021. OTK ZU A/2021.

78 Order of the CJEU C-791/19 R *European Commission v Republic of Poland* of 8 April 2020. ECLI:EU:C:2020:277.

constitutionality of the judgment, relying on the contradiction between the TEU and its Constitution,[79] and in short, declares that the CJEU has acted *ultra vires*, i.e. by imposing obligations on Poland as a member state beyond the competences legally attributed to it through the TEU, as interim measures concerning the organisational structure, competence and functioning of the Polish courts and the manner of proceeding before those courts is not a matter attributed to the EU.

Amongst the extensive legal argumentation of the decision, it is interesting to note that the CJEU is aware that EU law, which is subject to constant interpretation by the CJEU itself, is characterised by a clear evolution towards the primacy of the application of such law, even over the constitutions of the member states in order to ensure homogeneity in the implementation of EU law. However, it limits the priority of the application of EU law by state authorities only to the area of the matters transferred to the EU. According to Article 5(1) TEU, the EU would only have the competences expressly conferred on it by the Treaties, so Poland would not have conferred on the EU competences which, *ex* Article 90 of its Constitution, are matters of fundamental importance for the foundations of the political system of its state.[80]

As part of its legal reasoning, the TK expressly cites the case law of the BVerfGE in the aforementioned Weiss case,[81] emphasising that in the negotiations on the Lisbon Treaty it was not decided to include *expressis verbis* the principle of the primacy of EU law over national law (including the Constitution) after the failure of the European Constitution Treaty. From that moment on, the EU authorities, bodies and institutions only have the rights that have been granted to them by the sovereign states, and must exercise them within the limits of such conferral. This means also that the CJEU, in its jurisprudential work,

79 It examines the interrelationship between Article 4(3)(2) TEU, according to which "member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from action taken by the institutions of the Union", the normative basis on which the CJEU adopted interim measures concerning the form of the system and the functioning of the constitutional bodies of the Polish judicial authority, and the list of constitutional precepts: Article 2 of the state values "The Republic of Poland is a democratic state based on the rule of law and promoting the principles of social justice", Article 7 on the principle of legality "The bodies of state power shall operate in submission to the law and within its limits", Article 8.1 on the supremacy of the Constitution "The Constitution shall be the supreme law of the Republic of Poland", and Article 90.1 on the attribution of competences to supra-state entities "The Republic of Poland may, by virtue of an international treaty, delegate to an international organisation or institution the competence of state bodies in relation to certain matters" in connection with Article 4.1 principle of sovereignty "The supreme power of the Republic of Poland resides in the Nation".

80 Judgment of the Trybunału Konstytucyjnego P 7/20 of 14 July 2021, legal ground 4 and 6(2). OTK ZU A/2021.

81 Judgment of the Bundesverfassungsgericht 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 of 5 May 2020.

should not exceed the limits of the competences conferred on it or arbitrarily enter into the sphere of constitutional identity, but rather ensures that it is the TK that controls the constitutionality of any legal norm binding on the Republic of Poland, safeguarding the most essential aspects of sovereignty in this respect.[82] Therefore, the TK excludes the recognition that the EU can independently extend its scope or create competences by way of presumption.[83] Thereupon, the TK concludes by ruling that the judgment has *erga omnes* effect throughout Polish territory (Article 190.1 of the Constitution), so that as the EU acts and the CJEU ruling are *ultra vires*, they do not enjoy primacy and cannot be directly applied in Poland, and their internal applicability must be suspended by declaring their incompatibility with the Constitution.[84]

The bases established by this decision will acquire greater significance with the second of these proceedings (K 3/21),[85] in which the Polish Court of Cassation not only questions the principle of the primacy of the TEU but also directly decrees the incompatibility of articles 1 and 19 TEU with the Polish Constitution. In reality, the basic argument is the same, because in the final analysis a comparison is being made as to whether the progressive but constant strengthening of the EU can lead to a departure from the application of the Constitution or to the application of legal provisions interpreted as contrary to the Constitution, in the exercise of the principle of the primacy clause. Nevertheless, the origin is different, because this time the TK's pronouncement is based on the request of the President of the Republic of Poland, who urges the Court to expressly assess the degree of compatibility of the content of Article 19(1)(2) TEU in its relationship with Article 2 TEU (and, indeed, the recent interpretation that the CJEU has been making of this interrelation) with the Polish Constitution.

According to the ruling, the CJEU's control over how member states ensure the legal protection of their administration of justice, in particular, how they appoint judges, how disciplinary proceedings against judges are conducted and how they guarantee a level of impartiality and independence of their judiciary has resulted in a standard that allows judges and courts to circumvent the Constitution and state law, to judge on the basis of non-binding provisions and grant the EU new competences, is an action that excessively infringes on the Polish constitutional identity.[86] Moreover, this idea confers a quasi-legislative

82 Judgment of the Trybunału Konstytucyjnego P 7/20 of 14 July 2021, legal ground 6(2) and 6(5). OTK ZU A/2021.

83 Judgment of the Trybunału Konstytucyjnego P 7/20 of 14 July 2021, legal ground 5. OTK ZU A/2021.

84 Judgment of the Trybunału Konstytucyjnego P 7/20 of 14 July 2021, legal ground 7. OTK ZU A/2021.

85 Judgment of the Trybunału Konstytucyjnego K 3/21 of 7 October 2021. OTK ZU A/2022.

86 Judgment of the Trybunału Konstytucyjnego K 3/21 of 7 October 2021, legal ground 8(1). OTK ZU A/2022.

role on the CJEU, one that does not expressly derive from the Treaties. On the contrary, a rational, objective analysis, in accordance with European legal culture, leads to the conclusion that there are obvious limits to the CJEU's interpretative power in respect of the EU Treaties, which in the case under analysis would have been contravened, with the CJEU acting *ultra vires*, manifestly acting outside the framework of competences attributed to it and causing a significant structural affectation of the distribution of competences between the EU and the member states. Due to the encroachment on the constitutional core, the TK rejects the CJEU's capacity to redefine the powers conferred in the Treaties, especially those that may affect the fundamental constitutional order of the member states.[87]

As a novelty, the consequences go beyond the mere non-application of the CJEU's decisions or the provisions of the TEU. The CJEU declares that the EU law rules referred to, being unconstitutional, lose their legal effectiveness in Poland as of the date of the judgment.[88] In this respect, the judgement has had a decisive effect on the theories about the nature of the primacy of EU law and the supremacy of constitutions of member states in terms of the relationship between binding sources of law.[89]

4. LUXEMBOURG IN THE MIRROR OF EUROPEAN INTEGRATION: FROM *ULTRA VIRES* CONTROL TO A CLASH OF LEGITIMACY.

Following the TK's reaction in seeking to circumvent the application of the European line of case law on judicial independence, the CJEU has issued two decisions in which it has explicitly extended its case law on the primacy clause on judicial independence (and the correlative European control) to the field of constitutional norms. In this way, the recent case law of the CJEU has been strengthened, presenting the primacy and direct applicability of the European standards on judicial independence not only against ordinary rules, but also

87 Judgment of the Trybunału Konstytucyjnego K 3/21 of 7 October 2021, legal ground 4. OTK ZU A/2022.

88 Judgment of the Trybunału Konstytucyjnego K 3/21 of 7 October 2021, legal ground 10. OTK ZU A/2022.

89 The ruling intensified the crisis between the Polish authorities and the EU institutions. In response, the European Parliament adopted a resolution (approved with 502 votes in favour, 153 against and 16 abstentions) in which it rejected the ruling and requested the application of the mechanisms provided for in EU law, including the opening of infringement proceedings before the CJEU, the non-approval of Poland's recovery and resilience plan, the reactivation of Article 7 of the TEU and the application of the budgetary conditionality mechanism. URBANEJA CILLÁN, Jorge, "El régimen general de condicionalidad para la protección del presupuesto de la Unión Europea: ¿un mecanismo efectivo de garantía del Estado de Derecho en los Estados miembros de la Unión Europea?" in *Revista Española De Derecho Europeo*, no. 78-79, 2021, pp. 164-165.

against constitutional interpretations, thus extending their scope of effectiveness to all levels of the domestic l egal system.

The first is the judgment in Case C–357/19 Eurobox Promotion.[90] The Romanian Constitutional Court had issued several judgments questioning the judicial decisions of ordinary judges and courts in relation to corruption investigations, ordering the review of certain proceedings under threat of disciplinary sanctions, an issue which created a conflict between domestic constitutional control and the principle of judicial independence under EU law.[91] Although in the specific case the CJEU did not find sufficient evidence that the Constitutional Court lacked independence in its composition, it did find the situation problematic whereby judges were sanctioned for raising preliminary rulings or for applying a judgment of the CJEU that contradicted the Romanian Constitutional Court. In particular, the CJEU noted that the fact that judges could face disciplinary sanctions for not following Constitutional rulings when the duty of the lower courts is to apply – according to the principle of the primacy of EU law – the standards of the rulings of the European courts, constitutes a violation of the principle of judicial independence.[92] In conclusion, the CJEU found that the principle of primacy requires ordinary judges to apply EU law directly even in the face of domestic rules of constitutional status, and that judges may directly disapply it if it contradicts EU law and they may not be disciplined for doing so, even in matters of judicial independence.

The second is Judgment C–430/21 RS, *Effet des arrêts d'une cour constitutionnelle*,[93] which deals with the question referred for a preliminary ruling by the Court of Appeal of Craiova (Romania) in response to the dilemma

90 Judgment of the CJEU C-357/19 EuroBox Promotion and others of 21 December 2021. ECLI:EU:C:2021:1034.

91 Specifically, the Romanian judges faced with this situation decided to ask the CJEU for a preliminary ruling to determine whether they could not apply the decisions of the Romanian Constitutional Court which, in their opinion, contravened EU rules on judicial independence, since the TC, a non-jurisdictional body, had exceeded its powers and had invaded those of the ordinary jurisdiction, and they stressed that the order given by the TC could lead to impunity in the face of the danger of the statute of limitations for the crimes. In view of this, the CJEU ruled, on the one hand, reaffirming its previous case law according to which judicial independence is essential to guarantee effective judicial protection (Article 19(1)(2) TEU), which requires protection against external pressures and guarantees against hierarchical or political controls. The CJEU thus confirmed that disciplinary rules may not be used to control the content of judicial decisions (paragraph 227) or to dissuade judges from applying EU law or from submitting questions for preliminary rulings (paragraph 260). On the other hand, it established that among the conditions for a constitutional court to be able to bind ordinary judges, it must be independent of the executive and legislative powers.

92 The CJEU reaffirmed the primacy of EU law, making it clear that constitutional provisions cannot prevail if they are incompatible with the fundamental principles of EU law, without needing to be repealed (paragraphs 250-252).

93 Judgment of the CJEU C-430/21 RS of 22 February 2022. ECLI:EU:C:2022:99.

created by the judgment no. 390/2021 of the Romanian Constitutional Court, compliance with which meant depriving any ordinary judge of the power to refer a question to the CJEU for a preliminary ruling under the threat of disciplinary sanctions, on the grounds that the Romanian high court had previously declared the legislation applicable to the case in question to be constitutional. A recurring problem emerges behind all these judicial intricacies: in matters relating to the constitutional identity of a member state, should the principle of the primacy of EU law (and the case law of the CJEU) prevail or, on the contrary, according to the Romanian TC, the Constitution itself (and the case law of the state TC)?[94]

In its decision, the CJEU takes up its arguments on judicial independence (Article 19(1)(2) and Article 2 TEU), according to which judges must be protected from external influences and be impartial (paragraphs 40–42, 81–82). It also reaffirms the idea that every judge must be able to disapply a domestic rule that is contrary to EU law without fear of sanction (paragraphs 62–63, 85–86), since disciplinary rules cannot be used to punish interpretative errors or to prevent the application of EU law (paragraphs 83–84 and 87–88). At the same time, it states that EU law even takes precedence over constitutional rules, and no judicial body of the state, not even a constitutional court, can deny the binding effect of the judgments of the CJEU (paragraphs 52, 66–68 and 70–72).

However, the CJEU does not stop there: as a consequence of the above, it states that this principle imposes an obligation on the domestic court to disapply an internal rule that contradicts the EU legal order, even in cases where that rule has been declared to be in conformity with the Constitution by the relevant constitutional court (paragraphs 45–46, 60–61). In this way, the CJEU declares itself to be the only court with jurisdiction to interpret EU law, without the domestic courts being able to depart from its judgments on the grounds of "constitutional identity" (paragraphs 52, 69–71, 75–77).

In this sense, the CJEU has insisted that constitutional courts must also act independently and abide by the principle of the primacy of EU law, fundamental pillars of the rule of law, so that no constitutional court can impose the non-application of a judgment of the CJEU on a lower court, including decisions that

94 The case concerned a challenge to the excessive duration of criminal proceedings against a judge, for which the Bucharest Court of Appeal was required to assess and rule beforehand on the competence of the Section of the Public Prosecutor's Office specialising in offences against the administration of justice (created as a result of EU Decision 2006/928). That body of law had been declared to be in conformity with EU law (in the previous C-83/19 Asocia ia 'Forumul Judecătorilor Din România' v Inspec ia Judiciară) and also in conformity with Article 148 of the Romanian Constitution, on the primacy of EU law (in that case, by Judgment no. 390/2021, which precluded the raising of a new question for a preliminary ruling).

deal with the matter of judicial independence in cases of infringement of Article 19(1)(2) TEU.[95]

In other words, this latest ruling clarifies that a judge is not obliged to comply with a decision of its Constitutional Court if it is contrary to the interpretation of EU law given by the CJEU, taking its consolidated doctrine on primacy to its ultimate consequences.[96] For these purposes, this includes questions related to judicial independence in such a way that, however much this matter may be considered to be part of the constitutional identity of a state, a Constitutional Court cannot, in interpreting provisions of EU law, declare that the CJEU has exceeded its powers or has acted *ultra vires* in order to oppose the raising of a question for a preliminary ruling.

In order to guarantee the independence of the constitutional courts, this ruling explicitly extends the primacy clause and the decisions of the CJEU to all legal systems and all domestic judicial levels, including the constitutional sphere. This represents an important milestone in the chain of historical clashes that we have described, but with the novelty that this logic also begins to affect matters which, until now, had been considered the competence of the states themselves and which they included in the hard core of their constitutions.[97]

Moreover, the legal reasoning also assumes that since the CJEU has exclusive jurisdiction to give the definitive interpretation of EU law, no constitutional court can argue that the European rule that can be applied infringes its constitutional identity – as defined by the supreme interpreter of that law – nor can it validly declare that the CJEU has issued a judgment that exceeds the limits of its jurisdiction and, therefore, refuse to abide by a judgment issued *ultra vires.*[98] This last finding implies, correlatively, that the CJEU is not only empowered to verify such a collision between legal systems, but is also the competent body –

95 Summarising the case law in the last two judgments, the CJEU rules that while it is for the member states to determine how they organise their administration of justice, including the establishment, composition and functioning of a constitutional court, they may not, in exercising this competence, fail to comply with their obligations under EU law and, in particular, Articles 2 and 19 TEU. Judgment of the CJEU C-357/19 *EuroBox Promotion and Others* of 21 December 2021, paragraph 216, ECLI:EU:C:2021:1034 and Judgment C-430/21 RS of 22 February 2022, paragraph 38. ECLI:EU:C:2022:99.

96 The very recent Judgment of the CJEU C-792/22 Energotehnica of 26 September 2024. ECLI:EU:C:2024:788 confirms this case law, but we will not analyse it, as the subject matter is not judicial independence.

97 MAGALDI, Nuria, "La independencia de los tribunales constitucionales nacionales: Una visión desde el derecho europeo", *Toqueville Papers*, no. 23, 2022, pp. 3-4.

98 In view of this, the CJEU provides that, in order to assess the conflict of a rule and its European interpretation with the constitutional identity, the only way open to a constitutional court is to suspend the proceedings in order to ask the CJEU to verify whether the obligation of EU law infringes that identity, by means of a preliminary ruling. Judgment C-430/21 RS of 22 February 2022, paragraphs 69-70. ECLI:EU:C:2022:99.

indeed the only one – to delimit the constitutional identity of a member state and the degree to which they are of sufficient significance to justify non-compliance with EU law,[99] this being a question subject, once again, to European control.[100]

5. CONCLUSIONS: A CONFLICT BEYOND THE JUDGE'S ROBE.

In the chaos produced by the rule of law crisis, the basic idea of the new scenario posed by the European institutions with regard to judicial independence is as follows: although it is true that the approval of rules on the organisation and functioning of the judiciary falls within the (exclusive) competence of the member states, when they exercise this competence they must ensure that their own judges and courts comply with the requirements of judicial independence enshrined in the EU legal system. The logical result of such a finding is that state rules regulating such courts, including those of constitutional level, are subject to review by the CJEU, because these courts are organically state courts, but functionally European.

In contrast, the Polish TK has stated that the organisation and regime of the judiciary of a member state cannot be understood as falling within the scope of EU law, because the EU Treaties do not regulate its government or administration, which would mean that, due to the requirements of the principle of conferral, the principle of primacy could not be applied in this area. Any act adopted by the Commission and the CJEU would therefore be *ultra vires*, i.e. without any basis in the competences conferred by the EU Treaties.[101]

This conflict of arguments has led to a historic clash between the constitutional courts and the CJEU that has reached its peak in the last five years, and although it is particularly harsh in the Polish case, we understand that it should not be seen as a mere legal conflict, much less an isolated case. Starting from the end, it would be dangerous to assume that the TK's confrontation

99 In the words of the Advocate General in that case: "Where a Member state invokes national identity to justify its failure to comply with provisions of EU law, the Court must examine whether those provisions constitute a genuine and sufficiently serious threat affecting a fundamental interest of society or the fundamental political and constitutional structures of a Member state. (30) Vague, general and abstract assertions do not satisfy this requirement". Opinion of Advocate General Anthony Michael Collins C-430/21 RS of 20 January 2022, paragraph 62, ECLI:EU:C:2022:44.

100 GARCÍA-VALDECASASAS DORREGO, María José, "Estado de derecho e independencia judicial en la jurisprudencia del Tribunal de Justicia de la UE: la consagración de la identidad constitucional europea", in *REDE. Revista Española de Derecho Europeo*, no. 82, 2022, pp. 67-68.

101 This question acquires particular relevance if one considers that the rule of law is a legal category conceived and applied mainly within the framework of the nation-state. LIÑÁN NOGUERAS, Diego J., "La internacionalización del Estado de Derecho y la Unión Europea: una traslación categorial imperfecta", in *Estado de derecho y Unión Europea*, Dir. Diego J. Liñán Nogueras and Pablo J. Martín Rodríguez. Tecnos, Madrid, 2018, pp. 39-68.

with the CJEU is a case that affects only one state. While it is true that the Polish Constitutional Court has gone the furthest, not only challenging certain decisions but declaring entire articles of the TEU incompatible with its Constitution, the historical trajectory of the legal questioning of the principle of primacy by so many other states and constitutional courts – especially, in its latest pronouncements, the German one – shows that the unresolved conflict is of a general nature.

In turn, it is undeniable that the confrontation between Poland and the EU, i.e. between the TK and the CJEU, has an important legal dimension concerning the scope and limitation of the primacy of EU law over the law of the states, and by this means, the scope and limitations of the jurisdiction of the CJEU over the domestic constitutional courts.[102] However, underlying the discussion of a cornerstone principle of the European system, but not enshrined in the Treaties, is an obvious discussion that transcends the mere legal sphere and crosses over into the political sphere.[103] Indeed, the conflict does not boil down to a legal misunderstanding of the way in which judicial independence is understood by one or the other instance, but goes much further and deeper. The existence and scope of European control, implemented by an organically state judge who functionally acts as a European judge, and who gives the CJEU the last word, even on the decisions of the constitutional jurisdiction,[104] does not so much refer to respect for the rule of law but is related to the conflict between instances over the *kompetenz* of matters inherent to *state essences*.

Behind the legal debate lies the political dispute of the preservation of sovereignty in the process of European integration, given that the configuration of the organisation and functioning of the state apparatus, including the organisation and functioning of the judicial system, has been recognised as an element of core state powers and, as such, belong to its constitutional identity.[105] The latest European rulings, however, seem to indicate that the CJEU is not prepared to relinquish its role, or in other words, to accept that the processes of constitutionality and the rulings of the constitutional courts should condition or place restrictions to the CJEU's ability to have the final say, including on matters of

102 The scheme of the relationship between legal systems presents, in the opinion of several authors, unresolved logical-legal difficulties. LÓPEZ PARADA, Rafael Antonio, "Conflictos recientes entre el TJUEUE y los tribunales nacionales alrededor del principio de primacía", in *REDE. Revista Española de Derecho Europeo*, no. 73-74, 2020, pp. 104-108.

103 STEIBLE, Bettina, "The Court of Justice of the Union, National Courts and Safeguarding the Rule of Law in the EU", in *European Constitutional Law Review*, no. 35, 2021.

104 UGARTEMENDÍA ECEIZABARRENA, Juan Ignacio, "El control de comunitariedad de las resoluciones jurisdiccionales y el límite de la identidad constitucional", in *Revista Española de Derecho Europeo*, no. 59, 2016, p. 20.

105 Judgment of the Trybunału Konstytucyjnego P 7/20 of 14 July 2021, legal ground 5. OTK ZU A/2021.

sufficient importance to be treated as components of the constitutional identity of the states.[106]

The last debate places us in a scenario in which European identity, superimposed on state identity and serving as a *limit to the counter-limits* that the constitutional identity of the state imposes on EU powers. In those cases where there is a clash between state constitutional identity and European constitutional identity, the matter must be resolved by the CJEU.[107]

The CJEU's case law on judicial independence has been described as revolutionary,[108] on the understanding that giving justiciability to one of the central elements of the rule of law, with a general, substantive and autonomous character, essentially implies the existence of a constituent moment in the EU's transition towards a genuine constitutionalisation of order. From this point onwards, it should come as no surprise that tensions arise between constitutional courts which, internally, have the recognised competence to safeguard the constitutional identity of their states and their distinctive elements, and a CJEU which is destined to establish itself as the new *lord of the treaties*, and, in short, the body responsible for resolving conflicts of *constitutional* competences. Not only the legal validity of the rule of law in the Union and its member states is at stake, but also, inseparably, the political formulation of the European project itself.[109] The conflicts that have arisen to date are evidence of the enormous difficulties and resistance that persist in the face of a true constitutionalisation of the process of European integration.[110]

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106 In this respect, the doctrinal struggle is being renewed between those who understand that there is indeed an unsustainable contradiction between two opposing constitutionalisms that is being resolved through the primacy clause, but formally maintaining both (MAESTRO BUELGA, Gonzalo, "Del Estado social a la forma global de mercado", in *Constitucionalismo crítico: Liber Amicorum Carlos de Cabo Martín*, coord. by Miguel Ángel García Herrera, José Asensi Sabater and Francisco Balaguer Callejón. Tirant lo Blanch, Valencia, 2015, pp. 83-86), and those who argue that the conflict does not develop in contradictory terms in the diminution of the state sovereignty and the prevalence of the constitutional structure of the EU, given that common interests converge in them (GUTIÉRREZ FONS, José Antonio, "El Tribunal de Justicia y la Unión Europea como una unión de valores", in *Revista de Derecho Comunitario Europeo*, year 27, no. 76, 2023, pp. 11-28).

107 GARCÍA-VALDECASASAS DORREGO, María José, "Estado de derecho e independencia judicial en la jurisprudencia del Tribunal de Justicia de la UE: la consagración de la identidad constitucional europea", in *REDE. Revista Española de Derecho Europeo*, no. 82, 2022, pp. 67-68.

108 BUSTOS GISBERT, Rafael, *Independencia judicial e integración europea*, Tirant lo Blanch, Valencia, 2022, p. 211.

109 UGARTEMENDIA ECEIZABARRENA, Juan Ignacio, "The fundamental right to an effective judicial protection and the rule of law in the EU and their impact on member states' administration of justice", in *Freedom, Security & Justice: European Legal Studies*, no. 1, 2021, p. 264.

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RULE OF LAW, JUDICIAL INDEPENDENCE AND GOVERNMENT OF THE JUDICIARY IN SPAIN

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SUMMARY: 1. INTRODUCTION. 2. THE UNIQUE CASE OF SPAIN: PARLIAMENTARY ELECTION OF ALL COUNCIL OF JUDICIARY MEMBERS. 2.1. Constitutional framework and early legislative developments. 2.2. Jurisprudence of the Constitutional Court and subsequent developments. 3. EUROPEAN STANDARDS FOR THE ELECTION OF THE MEMBERS OF THE COUNCILS OF THE MAGISTRATURE. 3.1. Standards within the Council of Europe. 3.2. Standards within the European Union. 4. THE PRIMACY OF THE DEMOCRATIC PRINCIPLE? 5. PROPOSED SOLUTIONS.

1. INTRODUCTION.

One of the pillars on which the rule of law is based, regardless of whether one starts from a formal or substantive conception of the rule of law, has been and continues to be judicial independence. Craig has pedagogically and simply explained the importance of judicial independence in relation to one of the basic principles of the rule of law, namely the principle of legality.[1] The courts play an essential role in ensuring that the executive and legislative powers do not exceed the limits of the norms that serve as the legal basis for their actions, which, if exceeded, imply the nullity or invalidity of such actions. Consequently, the courts that are called upon to control legislative and executive activity must

1 CRAIG, Paul, "Definición y conceptualización del Estado de Derecho. La importancia de la independencia judicial", *Teoría y Realidad Constitucional*, no. 50, 2022, pp. 167.

be independent and free from any interference that might subject them to the will of the political power. Otherwise, there is a risk that they will not observe these limits or that they will interpret them extensively, "legitimizing legislative or executive actions that should be annulled".[2]

In the specific case of the Spanish state, the risk of a lack of judicial independence with respect to the political power, in its legislative or executive aspect, is clearly observed because the Third Chamber of the Supreme Court controls the acts of the Council of Ministers and the Second Chamber is in charge of prosecuting the members of the Government and the Parliament. This scheme is reproduced with respect to the Autonomous Communities (regions) through the Chambers for Contentious Administrative proceedings of the High Courts of Justice for the Councils of Government and the Civil and Criminal Chambers for the members of regional parliaments.[3] It is for this reason that the temptation to influence the appointment of judges with spurious intentions to these judicial bodies should not be surprising.

This long-standing problem was addressed after World War II by the French Constitution of 1946 and the Italian Constitution of 1947. Through the creation of Councils of Magistracy or Judiciary, the aim was to remove the application of the professional status of the judge from the Ministry of Justice, which until then had been competent to do so. The idea was to create independent bodies to administer everything related to promotions, appointments and disciplinary matters, which, for obvious reasons, could influence the legal profession and the independence of its members.[4] In Spain, due to Franco's dictatorship, it was not until the transition to democracy and the 1978 Constitution that such a body could be established.

2. THE UNIQUE SPANISH CASE: PARLIAMENTARY ELECTION OF ALL COUNCIL OF THE JUDICIARY MEMBERS.

2.1. Constitutional framework and early legislative developments.

The Spanish Constitution regulates the General Council of the Judiciary in paragraphs 2 and 3 of Article 122, the content of which is reproduced in its

2 *Ibidem*, p. 167.

3 MURILLO DE LA CUEVA, Pablo Lucas, *La independencia y el gobierno de los jueces. Un debate constitucional*, Reus, Madrid, 2018, p. 159.

4 REQUERO IBÁÑEZ, José Luis, *El Gobierno Judicial y el Consejo General del Poder Judicial*, Fundación para el Análisis y los Estudios Sociales, Madrid, 1996, p. 53.

entirety for a better understanding of the development and study that will be made of it below:

> "2. The General Council of the Judiciary is its governing body. An organic law shall set up its statutes and the system of incompatibilities applicable to its members and their functions, especially in connection with appointments, promotions, inspection and the disciplinary system.
>
> 3. The General Council of the Judiciary shall consist of the President of the Supreme Court, who shall preside it, and of twenty members appointed by the King for a five-year term, comprising twelve judges and magistrates of all judicial categories, under the terms established by the organic law; four nominated by the Parliament and four by the Senate, elected in both cases by three-fifths of their members from amongst lawyers and other jurists of acknowledged competence and over fifteen years of professional experience."

As can be seen, section 2 is dedicated to the definition and attribution of the competences of the Council of the Judiciary, at the same time establishing it as the governing body of the Judiciary. The minimum competences assigned to it are in matters of appointments, promotions, inspection and disciplinary regime, i.e. those relating to the professional status of judges and magistrates. In addition to those contained in said precept, the Council of the Judiciary also has other powers described in the constitutional text, such as the proposal of two judges for the Constitutional Court or the appointment of the President of the Supreme Court, who is at the same time the President of the Council of the Judiciary.

Section 3 of Article 122 is dedicated to establishing the composition and system of appointment of the members of the Council of the Judiciary. This body is presided over, as already mentioned, by the President of the Supreme Court, who is elected, in turn, by the members of the Council of the Judiciary. Of the twenty members that make up the body, art. 122.3 establishes that eight will be from among jurists and lawyers of recognized competence with more than fifteen years in the profession, four at the proposal of the Parliament and another four at the proposal of the Senate by a majority of 3/5 in both. As for the rest of the members, who must be from among judges and Magistrates of all categories, the Constitution does not establish the method of election, but refers its regulation to an organic law, this being the most problematic aspect of the constitutional regulation of the Council of the Judiciary, the origin of a problematic doctrinal and political discussion, and the cause of the current problems of the Council of the Judiciary.

Based on the regulation explained above, the first government of Spanish democracy had to organically develop art. 122 of the Spanish Constitution and establish the system for the election of the members of the judiciary. To this end,

Organic Law 1/1980 of 10 January 1980 on the General Council of the Judiciary[5] was approved. It established (art. 13) that the members of judicial origin would be elected by the judges and magistrates themselves, following the manner in which they are elected in Italy and mainly inspired by the Constitution.[6] Specifically, arts. 13 and 14 of the aforementioned law established a single constituency and a corrected majority electoral system. The result of this system was that all the elected judicial members belonged to the conservative (and at that time only) Professional Association of the Magistracy (APM).[7] This first Council of the Judiciary, influenced by its composition, was characterized by its self-proclamation as an organ of judicial self-government, in other words, as "the apex of an independent power, which provides a unitary and overcoming response to the traditional atomized or diffuse conception of the judiciary".[8] This led it to try to strengthen its institutional position by demanding an expansion and increase of political powers and to put itself on a par with the rest of the branches of government.[9]

However, following the accession of the Spanish Socialist Workers Party to the executive in 1982 with an overwhelming absolute majority in the Parliament, Organic Law 6/1985 of 1 July on the Judiciary[10] was approved. Its articles reformed the system of election of the members of the Council of the Judiciary, passing to a system of parliamentary election, six at the proposal of the Parliament and another six at the proposal of the Senate, all of them by a 3/5 majority. This means that all the members of the Council of the Judiciary, both lay and judicial, were now elected by the legislative branch, specifically ten by the Parliament and ten by the Senate.

The fact is that this system was not included in the original draft of the Organic Law on the Judiciary but originated in an amendment by the *Euzkadiko Ezkerra* deputy, Juan María Bandrés, which was later incorporated in a compromise by a socialist minority in the Commission of Justice.[11] With the

5 Organic Law 1/1980 of 10 January 1980 on the General Council of the Judiciary. Official State Gazette no. 11 of 12/01/1980.

6 DÍEZ-PICAZO GIMÉNEZ, Luis María, "Artículo 122", PÉREZ TREMPS, Pablo and SAIZ ARNAIZ, Alejandro (Eds.) and MONTESINOS PADILLA, Carmen (Coord), *Comentario a la Constitución Española: 40 aniversario 1978-2018, Libro-homenaje a Luis López Guerra*, Tome II, Tirant lo Blanch, Valencia, 2018, p. 1728.

7 REQUERO IBÁÑEZ, José Luis, *El Gobierno Judicial y el Consejo General del Poder Judicial*, Fundación para el Análisis y los Estudios Sociales, Madrid, 1996, p. 20.

8 GERPE LANDÍN, Manuel, "La composición del Consejo General del Poder Judicial", *Revista del Centro de Estudios Constitucionales*, no. 9, 1991, p. 153.

9 ROSADO IGLESIAS, Gema, "La constitucionalización del gobierno judicial: cuarenta años de Consejo General del Poder Judicial, régimen actual y cuestiones pendientes", *Revista de Derecho Político*, no. 101, 2018, p. 357.

10 Organic Law 6/1985 of 1 July on the Judiciary. Official State Gazette no. 157, 02/07/1985.

11 For the debate that took place in this regard within the Justice Committee, see SÁNCHEZ BARRIOS, María Inmaculada, *La elección de los miembros del Consejo General del Poder Judicial*

exception of minor reforms undertaken over the years which, although they have not transformed the essence of this election system, as we will briefly comment, this system has been maintained to the present day and has been the object of severe criticism by constitutionalist doctrine ever since.

2.2. Jurisprudence of the Constitutional Court and further developments.

Before doing this, however, it is necessary to comment on the rulings handed down by the Constitutional Court as a result of the conflicts of competence brought by the Council of the Judiciary itself and the appeal brought by 55 members of the Popular Group against the Organic Law of the Judiciary. In the first, Judgment 45/1986,[12] the Constitutional Court responded to several accumulated constitutional conflicts of competence brought by the Council of the Judiciary against the Parliament and the Senate on the grounds that the new regulation deprived them of their *right* to elect judicial representatives and claimed as their own the regulatory power that the new legislation attributed to the Government.[13] Thus, the Council of the Judiciary understands that it is entitled to represent the Judiciary itself, something that the Constitutional Court categorically denies, arguing that "There is nothing in the Constitution, nor in the previous Organic Law of the General Council of the Judiciary, nor in the current Organic Law of the Judiciary, that authorizes the claim of procedural representation by the General Council of the Judiciary as such".[14] Furthermore, the highest interpreter of the Constitution understands that since it is configured as a governing body of the Judiciary "it could not be, not even for procedural purposes, a 'representative' of the Judiciary, since this would be in contradiction with the constitutional principle of "independence of judges and Magistrates".[15]

Once the representative character that the Council of the Judiciary claimed to have was denied to it, the constitutionality of the parliamentary election of judicial members was addressed in the subsequent Judgment 108/1996,[16] which is more interesting for the purposes of this study due to its content and the constant use that the doctrine has made of it to defend a system of judicial election. The Constitutional Court's examination began by denying the power of

Español y de sus homólogos europeos, Tirant lo Blanch, Valencia, 2009, pp. 137 *et seq*.

12 Judgment of the Constitutional Court 25/1986, of 17 April 1986. Official State Gazette no. 102 of 28 April 1986.

13 MURILLO DE LA CUEVA, Pablo Lucas, *La independencia y el gobierno de los jueces. Un debate constitucional*, Reus, Madrid, 2018, pp. 30 *et seq*.

14 Judgment of the Constitutional Court 45/1986 of 17 April 1986, Legal Basis 5.

15 *Ibid.*

16 Judgment of the Constitutional Court 108/1986 of 24 July 1986, Official State Gazette no. 193 of 12 August 1986.

self-government to the Judiciary given that it is not included in the Constitution, nor can it be derived "logically from the existence, composition and functions of the Council".[17] In the words of the Constitutional Court, the only thing that can be deduced from the constitutional text is the creation of an autonomous body "that performs certain functions, the assumption of which by the Government could tarnish the image of judicial independence, but it does not follow that this body is an expression of the self-government of the judges".[18]

As for the purpose of art. 122.3, it is none other than "to ensure that the composition of the Council reflects the pluralism existing within society and very especially within the Judiciary".[19] The passage most often quoted by the detractors of parliamentary election will come from the hand of an *obiter dictum* in which the Constitutional Court points out the risks of such an election system, but which do not imply a criticism of constitutionality given that it cannot be interpreted from the constitutional text that the only possible election system is the one carried out by the judges and magistrates themselves. Thus, the Constitutional Court first points out that the purpose of the rule "is more easily achieved by attributing to the judges and magistrates themselves the power to elect twelve of the members of the Council of the Judiciary… [which] is something that offers little doubt". The Constitutional Court goes on to state that, with the parliamentary election and the logic of the state of parties, "there is a risk of frustrating the stated purpose of the Constitutional Rule if the Chambers, when making their proposals, forget the objective pursued and, acting with admissible criteria in other areas, but not in this one, attend only to the division of forces existing within them and distribute the posts to be filled among the different parties, in proportion to their parliamentary strength".[20] For all these reasons, the Constitutional Court considers its replacement to be appropriate, although this "is not sufficient grounds to declare it invalid, since it is a constant doctrine of this Court that the validity of the law must be preserved when its text does not prevent an interpretation that is in keeping with the Constitution".[21]

However, what the detractors of the election seem to overlook in the reproduction of this legal basis is that the Constitutional Court also points out the risk "that the electoral procedure may transfer the ideological divisions existing in society to the heart of the Judiciary (so the effect achieved would be different from that pursued)" and that the purpose of pluralism within the Council of the Judiciary "would be absolutely denied by adopting another procedure and, in particular, that of also attributing to the Courts the power to propose the

17 Judgment of the Constitutional Court 108/1986 of 29 July 1986, Legal Basis 8.
18 *Ibid*.
19 Judgment of the Constitutional Court 108/1986 of 29 July 1986, Legal Basis 13.
20 *Ibid*.
21 *Ibid.*

members of the Council from the Corps of judges and magistrates, especially when the Law adopts certain precautions, such as requiring the Courts the power to propose the members of the Council from the Corps of judges and magistrates, especially when the Law adopts certain precautions, such as requiring a qualified majority of three-fifths in each Chamber (art. 112.3 LOPJ)," and that the purpose of pluralism within the Council of the Judiciary "is absolutely denied by adopting another procedure and, in particular, that of attributing to the Courts the power to propose the members of the Council from the Corps of judges and magistrates. 112.3 LOPJ)".[22]

From the resolutions of the Constitutional Court we can conclude that, in the first place, the Council of the Judiciary is not a representative and self-governing body of the Judiciary but rather an autonomous body called on to preserve the independence of the judiciary, possessing an autonomous character with respect to the rest of the powers of the state. Secondly, it also makes it clear that the system of election by the Parliament is perfectly constitutional given the wording of art. 122.3, which does not require that the judicial members be elected "by" their peers, but from "among" them, although, just as the system of judicial election involves certain risks, the parliamentary election entails the dangerous possibility of blindly distributing quotas among the different parties.

In 2001, after more than fifteen years of the parliamentary election system, when the Popular Party (PP) was in government, the election system was reformed to move to a system that some authors have called "mixed",[23] through the approval of Organic Law 2/2001 of June 28 on the composition of the General Council of the Judiciary.[24] The new system contained in art. 112 of the LOPJ established that it was still the Courts that would propose the members, but first the candidates had to be pre-selected by the judges and magistrates themselves, with a maximum of three times the number of positions to be proposed. The proposals could come from both judicial associations and independent judges with the endorsement of at least two percent of the active judges.

The last reform of the election system also took place under the mandate of the Popular Party in 2013. Through Organic Law 4/2013 of June 28 on the reform of the General Council of the Judiciary,[25] the legislator intended to increase the participation of members of the legal profession in the election of the members,

22 *Ibid.*

23 For example, BALLESTER CARDELL, María, *El Consejo General del Poder Judicial. Su función constitucional y legal*, Consejo General del Poder Judicial, Madrid, 2007.

24 Organic Law 2/2001, of June 28, 2001, on the composition of the General Council of the Judiciary, which amends Organic Law 6/1985 of July 1, 1985, on the Judiciary, Official State Gazette no. 155 of June 29, 2001.

25 Organic Law 4/2013, of June 28, 2013, on the reform of the General Council of the Judiciary, which amends Organic Law 6/1985 of July 1, 1985, on the Judiciary, Official State Gazette no. 155 of June 29, 2013.

mainly through a reduction in the number of endorsements required to be a candidate, something that was positively valued by the doctrine.[26] Thus, if two percent (which required approximately 100 endorsements) was previously necessary for independents or to be part of a judicial association, the new regulation only required the endorsement of 25 judges or a judicial association, eliminating the possibility for the associations themselves to present candidates.

The latter has been the system that has been maintained to the present day, with the exception of an attempt at reform by the progressive coalition government of the Socialist Party and Unidas Podemos to reduce the 3/5 majority required to propose candidates to an absolute majority in the event that the deadline established in the Constitution was not met. This set off alarm bells in the European headquarters and caused the President of GRECO to send the Head of the Spanish Delegation to express his concern.[27] To this measure, designed to put pressure on the opposition and to be able to renew the composition of the Council of the Judiciary, should be added the reform aimed at limiting the powers of the Council of the Judiciary in office once its mandate had expired. This reform, which prevented one of the most important functions of the Council of the Judiciary from being carried out – that of appointing judges to the Supreme Court and the High Courts of Justice – was intended to put pressure on the rest of the political forces necessary for the renewal of the Council of the Judiciary in order to break the deadlock at that time.[28] The first, a source of intense political and doctrinal criticism, did not see the light of day due to the intercession of the European Commission.

In addition to the substantive debate on the mode of election of the members of judicial origin, one of the main problems that the first system has adduced is the distribution of the members in blind quotas, also known as *lottizzazione*, whereby the parties distribute the members of the Council of the Judiciary in proportion to their parliamentary representation, so that a member of the opposite party is accepted as long as one of their own is accepted. Another of the problems attributed to the parliamentary election is the inherent politicization of the members of the Council of the Judiciary and their subordination to partisan interests that can sometimes differ from the interests of Justice. Finally, another of the main criticisms is related to delays in the renewal process due to the lack of agreement between the different political parties. Since the entry into force of

26 GERPE LANDÍN, Manuel and CABELLOS ESPIÉRREZ, Miguel Ángel, "La reforma permanente: el Consejo General del Poder Judicial a la búsqueda de un modelo", *Revista Española de Derecho Constitucional*, no. 103, 2015, p. 16.

27 CARMONA CONTRERAS, Ana, "Democracia, Estado de Derecho e independencia judicial en España: un análisis en perspectiva europea", *Estudios de Deusto. Revista de Derecho Público*, vol. 70, no. 1, 2022, p. 13.

28 MIGUEL BARRIO, Rodrigo, "El Consejo General del Poder Judicial en perspectiva: análisis, desafíos y propuesta de reforma", *Revista de Derecho Político*, no. 120, 2024, p. 302.

the parliamentary election system in 1985, only the first two renewals took place without delay. Since then, with the terms of office of the Council of the Judiciary having run out, there have always been delays. Specifically, it was renewed in 1996 with a delay of eight months, four months in 2001, one year and ten months in 2006, two months[29] in 2013 and the last renewal, which should have taken place in 2018, took more than five years, i.e. what should have lasted the entire mandate, and was done under the tutelage of the European Union.[30] This will be discussed in the section on the primacy of the democratic principle in the election of the members of judicial origin.

5. EUROPEAN STANDARDS FOR THE ELECTION OF MEMBERS OF JUDICIAL COUNCILS.

The unique and exclusively parliamentary election of the members of the Council of the Judiciary is a peculiarity in comparative law, to the extent that no state that has such a body elects all of its members through Parliament.[31] Furthermore, as will be seen below, several studies have already noted the inadequacy of the Spanish election system with respect to the European standards provided for by various rules and documents of international organizations to which the Spanish state belongs.

3.1. Standards within the Council of Europe.

Starting at the level of the Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities[32] of the Committee of Ministers is well known. Its Chapter IV is dedicated to the Councils of the Judiciary, clearly

29 LÓPEZ GUERRA, Luis, "Vexata quaestio: sobre las dilaciones parlamentarias en la designación de titulares de órganos constitucionales", *Revista de las Cortes Generales*, no. 108 202, p. 77.

30 This agreement also included a proposal to reform the Organic Law of the Judiciary regarding the requirements to be a member of the Council of the Judiciary.

31 For the election methods of the other countries with Judicial Councils, see ORTEGA GUTIÉRREZ, David, "La elección del Consejo General del Poder Judicial a debate: el contraste con Europa", *Revista General de Derecho Público Comparado*, no. 20, 2021, pp. 1-18; AGUIAR DE LUQUE, Luis (Dir.), *El gobierno del poder judicial. Una perspectiva comparada*, Centro de Estudios Políticos y Constitucionales, Madrid, 2012. SÁNCHEZ BARRIOS, María Inmaculada, *La elección de los miembros del Consejo General del Poder Judicial Español y de sus homólogos europeos*, Tirant lo Blanch, Valencia, 2009. MURILLO DE LA CUEVA, Pablo Lucas, "El gobierno del Poder Judicial: los modelos y el caso español", *Revista de las Cortes Generales*, no. 35, 1995, pp. 167-239.

32 Available at: https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d

stating that "not less than half of the members of these Councils should be judges elected by their peers from all levels of the judiciary and with respect for plurality within the judiciary". That recommendation was cited by the European Court of Human Rights (ECtHR, hereinafter) in the *Ramon Nunes de Carvalho v. Portugal* Judgment of 21 June 2016.[33] The merits of the case concerned a possible politically motivated sanction by the Portuguese Superior Council of the Judiciary against three female judges. The ECtHR refers to the aforementioned recommendation at various points in its argumentation, as well as to the Magna Carta of European Judges, which will be seen below, upholding the appeal of the female judges and making a harsh criticism of the lack of independence of the Portuguese body, seven of whose members are elected by their parties.[34] Subsequently, the ECtHR has been kind enough to cite Recommendation CM/Rec(2010)12, as in the case of the judgments *Reczkowicz v. Poland*, 22 July 2021,[35] *Juszczyszyn v. Poland*, of 6 October 2021 and *Juszczyszyn v. Poland*, of 6 October 2022.[36] On both occasions the ECtHR mentions that the reform that occurred in 2017, in which judges were deprived of electing fifteen members of the National Council of the Judiciary, a right that it recognizes was in accordance with international standards, removed guarantees of independence in this regard. More intense, if possible, is the *Grzęda v. Poland* judgment of 15 March 2022,[37] in which the ECtHR endorses the recommendation that at least half of the members of the councils should be judges elected by their peers.[38]

On 17 November 2010 the Magna Carta of European Judges[39] was published under the auspices of the Consultative Council of European Judges belonging to the Council of Europe. Its point number 13 establishes that the Councils of the Judiciary must be independent of the executive and legislative and, to this end, "the Council must be composed either exclusively of judges or, where appropriate, by a substantial majority of judges elected by themselves".

Also within the scope of the Council of Europe are a number of reports on Spain by the Group of States against Corruption (GRECO). Indeed, since the 2014

33 Case of Ramos Nunes de Carvaljo e SÁ v. Portugal *(Applications nos. 55391/13, 57728/13 and 74041/13)*, 6 November 2018. Available at: https://hudoc.echr.coe.int/eng?i=001-187507

34 ORTERGA GUTIÉRREZ, David, "Elección del Consejo General del Poder Judicial: un análisis panorámico", *Revista de Derecho Político*, no. 114, 2022, pp. 17-18.

35 Case of Reczkowicz v. Poland (*Application* no. *43447/19),* 22 July 2021, § 247. Available at: https://hudoc.echr.coe.int/fre?i=001-211127

36 Case of Juszczyszyn v. Poland *(Application* no. *35599/20),* 6 October 2022, § 196. Available at: https://hudoc.echr.coe.int/fre?i=001-219563

37 Case of Grzęda v. Poland *(Application* no. *43572/18),* 15 March 2022, § 305. Available at: https://hudoc.echr.coe.int/fre?i=001-216400

38 BIGLINO CAMPOS, Paloma, "Los estándares europeos sobre la elección de los consejos judiciales", *Revista General de Derecho Constitucional*, no. 38 (2023), p. 8.

39 Available at: https://rm.coe.int/16807482c6

GRECO Report[40], echoing Recommendation CM/Rec(2010)12, the requirement "that the twelve members of the Council of judicial origin be elected *directly* by their peers" was highlighted, and particularly critical when pointing out the threat of politicization of the Council of the Judiciary, its potential to be a focus of corruption and the opposite image to the safeguarding of judicial independence projected.[41] The report published in 2017[42] welcomed the possible reform that Mariano Rajoy's government tried to undertake, but sharply recalls "its position around the need for political authorities not to intervene at any stage of the selection process of members of the judiciary". Two years later, in the 2019 report,[43] when the aforementioned attempt at reform failed, GRECO considered "that the opportunity to remedy what has proven to be, in the eyes of the citizens, the Achilles heel of the Spanish judiciary, has been lost". References to the dissatisfaction with the recommendation that members of the Council of the Judiciary be elected by their peers continued to be made in subsequent periodic reports.

The European Commission for Democracy through Law, better known as the Venice Commission, emerged as a consultative body of the Council of Europe and has focused much of its interest on safeguarding the rule of law. In its 2010 Report on the Independence of the Judiciary[44] it states (in point 32) that within the pluralist character that such a body should have "with the exception of *ex officio* members, these judges should be elected or appointed by their peers". Together with the criteria for verifying the rule of law published in 2016[45] in which it emphasizes that the "judiciary is free from external pressures, and is not subject to political influence or manipulation of any kind, in particular from the executive power", the Commission opts for a 'Mediterranean model' of mixed composition of judges and jurists, with a dual election method by judges and Parliament, which avoids the two major risks of corporatism and politicization.[46]

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40 Available at:
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ca048

41 CARMONA CONTRERAS, Ana, "Democracia, Estado de Derecho e independencia judicial en España: un análisis en perspectiva europea", *Estudios de Deusto. Revista de Derecho Público*, vol. 70, no. 1, 2022, pp. 9-10.

42 Available at:
http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ca04a

43 Available at: https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168098c67d

44 Available at: https://rm.coe.int/1680700a63

45 Available at: https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

46 CASTELLÁ ANDREU, Josep María, "Estado de Derecho e independencia judicial según la Comisión de Venecia", *Estudios de Deusto. Revista de Derecho Público*, vol. 70, no. 1, 2022, p. 43.

3.2. Standards within the European Union.

As far as the European Union is concerned, the European Network of Councils for the Judiciary, co-financed by the EU,[47] contains various documents addressing the composition of the Councils for the Judiciary, such as the Budapest Resolution on Self-Governance of the Judiciary: balancing independence and accountability[48] (2008) or its own guide[49] published in 2017. While it is true that in both texts the Network positions itself in favour of an exclusive composition of members of the judiciary or, in the case of mixed composition, of a majority or at least 50% from a judicial background, the mode of appointment is not taken into account, as stated when requiring them to act as representatives of the entire judiciary.[50]

The Court of Justice of the European Union has also ruled on the composition of the Councils of the Judiciary, extending the principles relating to judicial independence for the courts that it has developed in its case law to them.[51] It is worth highlighting different judgments,[52] also coinciding with the 2017 Polish reform on its National Council of the Judiciary, in which the CJEU considered that the change to parliamentary election of the members of the Council of judicial origin, despite not being a decisive factor, can have negative consequences that manifest the erosion of the autonomy of such institution,[53] because it led to a composition in which "twenty-three of the twenty-five members of the National Council of the Judiciary come directly from the political powers or are elected by them".[54] Thus, directly linking the independence of a court and the independence of the body that appoints it,[55] the CJEU does not consider that the National Council of the Judiciary is independent of the executive and the legislature, which

47 ORTERGA GUTIÉRREZ, David, "Elección del Consejo General del Poder Judicial: un análisis panorámico", *Revista de Derecho Político*, no. 114, 2022, p. 25.

48 https://www.encj.eu/images/stories/pdf/opinions/budapestresolution.pdf

49 https://www.encj.eu/encj-guide

50 In both texts it is identically stated in this way: "in any case (whether there is a mixed composition or not) the judicial members of the Council (however appointed) must act as the representatives of the entire judiciary".

51 VILLEGAS FERNÁNDEZ, Jesús Manuel, "Consejo General del Poder Judicial e independencia de la justicia a la luz de la jurisprudencia europea", *Revista jurídica valenciana*, no. 42, 2023, p. 120.

52 We discuss the judgments CJEU *AK and others*, 19 November 2019, C- 585/18*; AB and others*, 2 March 2021, C 824/18; *Commission v Poland*, 15 July 2021, C-791/19.

53 BIGLINO CAMPOS, Paloma, "Los estándares europeos sobre la elección de los consejos judiciales", *Revista General de Derecho Constitucional*, no. 38, 2023, p. 10.

54 CJEU *AK and others*, 19 November 2019, C- 585/18, § 243.

55 KRZYWON, Adam, "La defensa y el desarrollo del principio de independencia judicial en la Unión Europea", in *Revista Española de Derecho Constitucional*, no. 119, 2020, pp. 103-104.

raises doubts about the inflexibility of the judges appointed by it, something that is certainly detrimental to the rule of law.[56]

As Biglino Campos points out, there is no rule in the legal system of the European Union requiring that members of judicial councils be elected by their peers.[57] This is not stated in art. 2. a) of the Conditionality Regulation establishing the principles of the rule of law, nor is it specifically stated in Regulation (EU, Euratom) 2020/2092,[58] establishing that the rules of composition and status of the Councils must ensure the autonomy and impartiality of those who are to pass judgment. It is only indirectly possible to deduce such an obligation when the methodology for the preparation of the annual Rule of Law report[59] includes Recommendation CM/Rec(2010)12 of the Council of Europe in specifying the established European standards to be taken into account when preparing the report of each state.[60]

Following on from above, it should be mentioned that the mechanisms of the European Union for alleged violations of the rule of law, such as the procedure of Art. 7 TEU, the procedures before the CJEU (appeal for failure to comply or preliminary ruling), the rule of law framework mechanism or the aforementioned Regulation (EU, Euratom) 2020/2092 have not been effective for the preservation of the rule of law, highlighting, despite its non-execution on occasions, the clear and direct language of the judgments of the CJEU on the erosion of the rule of law and judicial independence.[61]

In short, we can say that European standards, both within the Council of Europe and the European Union, require that at least half of the members of the Councils of the Judiciary be of judicial origin and, in turn, that they be elected by their peers, something that we can deduce from the many documents and

56 ULLOA RUBIO, Ignacio, "La primacía del Derecho de la Unión en materia de Estado de Derecho: un repaso a la jurisprudencia del TJUE sobre la independencia judicial", in *La Ley Unión Europea*, no. 104, 2022, pp. 7-9.

57 BIGLINO CAMPOS, Paloma, "Los estándares europeos sobre la elección de los consejos judiciales", *Revista General de Derecho Constitucional*, no. 38, 2023, p. 9.

58 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, available at: https://eur-lex.europa.eu/eli/reg/2020/2092/oj/eng This regulation conditions the management of European funds to member states if they violate the principles of the rule of law if they seriously affect or threaten to seriously affect the sound financial management of the European Union.

59 https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf

60 BIGLINO CAMPOS, Paloma, "Los estándares europeos sobre la elección de los consejos judiciales", *Revista General de Derecho Constitucional*, no. 38, 2023, p. 10.

61 GONZÁLEZ CAMPAÑA, Nuria, "La defensa europea de la independencia del poder judicial en el marco de la protección del Estado de Derecho: la crisis del CGPJ en España", *Teoría y Realidad Constitucional*, no. 50, 2022, p. 474.

resolutions that have been mentioned. However, their *soft law* nature means that there is no binding rule that obliges the member states of these organizations to have a certain composition and election system for the members.

5. PRIMACY OF THE DEMOCRATIC PRINCIPLE?

Since the 1985 reform, which gave rise to the parliamentary election system, the doctrine has been stuck in a debate on the system for electing the members of the Council of the Judiciary. In order to defend the different existing positions, a multitude of legal resources and different instances have been resorted to, such as international standards, comparative law, the constituent debate, different interpretations of art. 122 of the Spanish Constitution or of the Constitution as a whole. After years of intense debate, recurrently spurred on by scandals of various kinds related to the Council of the Judiciary, there is little consensus to be found between the opposing positions. This may be due to the fact that we are facing a debate that transcends the legal or even legal policy, giving rise to a discussion that obeys more to ideological-political questions than to strictly dogmatic-legal ones. As Gómez Colomer states, "this is not, however, only a legal question, but above all a political one, since it affects the configuration of the state, and let's see which politician with possibilities dares to propose this today in Spain".[62]

We have already commented that, in the literal and grammatical sense of art. 122.3 of the Spanish Constitution, the system of parliamentary election fits perfectly insofar as it requires that the members of the Council of the Judiciary be elected from *among* the judges and not *by* them, referring the specific form of proposal to the organic law regulating the Council of the Judiciary. However, for Díez-Picazo the arguments in favour of such a system end there. Against it we would find Comparative Law – no other country has such a system – and the intention of the constituent, on the one hand, and also "the most elementary systematic and finalist interpretation" on the other.[63] This is simply because, if the constituent had wanted the system of parliamentary election for all the members of the Council, he would have simply made it explicit in the wording of the article, as he does with the rest of the jurist members.

In a debate of this nature, in which a certain interpretation of an article of the Constitution is disputed, it is a common option to turn to the debates

62 GÓMEZ COLOMER, Juan-Luis, "Sobre el nombramiento del presidente y de los vocales del Consejo General del Poder Judicial. Una reflexión desde el sentido común", *Teoría y Realidad Constitucional*, no. 44, 2019, p. 231.

63 DÍEZ-PICAZO, Luis María, *Régimen constitucional del Poder Judicial*, Civitas, Madrid, 1991, pp. 141-142.

of the constituent to know the true meaning that was tried to give to a certain provision. Naturally, several authors have studied the parliamentary ether of the article called to regulate the Council of the Judiciary, which was originally article 112, and its successive amendments and changes, in order to ascertain the true intention of the constituent. The wording of the Preliminary Draft explicitly stated that the twelve judicial members were to be elected "at the proposal of, and from among, the different categories of the legal profession", something that was changed after the first report of the *Ponencia* and which would later undergo continuous alternations due to amendments *in voce.*[64] However, as on other occasions, because the question was left open it was possible to reach consensus in the constitutional debate, thus leaving an open constitutional framework with ample room for legal development.[65] The study of the constituent debate was also carried out by the Constitutional Court, which stated that "the background of the elaboration of the text does not shed enough light to solve the problem in a way that leaves no room for doubt".[66] Consequently, the constituent way of interpretation is not conclusive when it comes to providing a single interpretation of art. 122 of the Spanish Constitution.

For authors such as Murillo de la Cueva, the full parliamentary option is much more coherent with the Constitution in its entirety than the partially corporate option due to the proclamation made in art. 1.2 of the same,[67] according to which national sovereignty resides in the Spanish people, from whom all the powers of the state emanate, i.e. also the judicial power. In other words, if the judicial power, as a power of the state, emanates from the sovereign people, who better to elect those who are to govern the judicial power than the Parliament? (which, in accordance with art. 66 of the Spanish Constitution, represents the Spanish people).

According to the wording of Article 122.2, the Council of the Judiciary is the governing body of the Judiciary. Although normally the term "government" is broader and more complex, this article states that among the functions of the Council of the Judiciary are those related to appointments, promotions, inspections and disciplinary regime. This activity of government, according to López Guerra, "implies choosing one of several courses of action, according to

64 For a detailed study, see TEROL BECERRA, Manuel José, *El Consejo General del Poder Judicial*, Centro de Estudios Constitucionales, Madrid, 1990, pp. 66 *et seq*.

65 RON LATAS, Ricardo Pedro and LOUSADA AROCHENA, José Fernando, "El Consejo General del Poder Judicial: marco constitucional", *Anuario da Facultade de Dereito da Universidade da Coruña*, vol. 20, 2016, p. 216.

66 Judgment of the Constitutional Court 108/1986, Legal Basis 13.

67 MURILLO DE LA CUEVA, Pablo Lucas, "El Consejo General del Poder Judicial y la Constitución," *Jueces por la Democracia*, no. 110, 2014, p. 34.

considerations of opportunity and cost".[68] Far from the jurisdictional activity to which judges devote themselves, the government of the judiciary "involves the management of resources and the choice between alternative paths in such important matters as policies on selection and training, promotion and disciplinary procedures".[69] In short, although it is not political activity in the strict sense to which we are accustomed, it is necessary to recognize, as Jiménez Asensio states, that there is an undeniable political character in the actions of a body such as the Council of the Judiciary and, therefore, it is unreasonable that it should not be subject to any kind of direct or indirect control or political responsibility.[70] Through parliamentary election by the representatives of the Spanish people, citizens would be given the possibility of evaluating the successes and errors of the tasks of government that ultimately affect them, something that is not possible through the abstraction of said political responsibility if the electors of the members are the judges and magistrates, lacking democratic legitimacy at source.

This 'government of the judges', as we have seen in the Constitutional Court's jurisprudence on the matter, is not a self-government of the judges. It cannot be deduced from the articles of the Constitution that the Council of the Judiciary is the apex of the judicial power, in which the judges are the holders with the capacity to govern themselves. As López Guerra states, it cannot be admitted that "the governing body of the judges acts on their behalf and in their interest", but rather that it does so to guarantee the fulfilment of aims that transcend the perspectives and desires of an occupational sector, so that self-government of the judges and the democratic principle are incompatible.[71] In a similar sense, Aguiar de Luque states that the purpose of the Council of the Judiciary is to guarantee the independence of the holders of jurisdictional power so that they submit exclusively to the mandates of the law, not to a sector of professionals in general, so that it is not possible to attribute the substantivity of a political subject capable of representing itself politically to the judiciary.[72]

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68 LÓPEZ GUERRA, Luis, "Modelos de gobierno de los jueces", *Revista Anuario. Parlamento y Constitución*, no. 1, 1997, p. 25.

69 LÓPEZ GUERRA, Luis, "Democracia y división del poder", in TEZANOS TORTAJADA, José Félix (coord.), *La democracia post-liberal*, Fundación Sistema, 1996, p. 253.

70 JIMÉNEZ ASENSIO, Rafael, "El gobierno del poder judicial en España y el sistema político" in AGUIAR DE LUQUE, Luis (Dir.), *El gobierno del poder judicial. Una perspectiva comparada*, Centro de Estudios Políticos y Constitucionales, Madrid, 2012, p. 151.

71 LÓPEZ GUERRA, Luis, "Democracia y división del poder", in TEZANOS TORTAJADA, José Félix (Coord.), *La democracia post-liberal*, Fundación Sistema, 1996, p. 255.

72 AGUIAR DE LUQUE, Luis, "El gobierno del Poder Judicial en la España actual: funciones y disfunciones", *Nuevas Políticas Públicas. Anuario multidisciplinar para la modernización de las Administraciones Públicas*, no. 5, 2009, p. 62.

The election by the judges of the members of the Council of the Judiciary is often criticized precisely because of an issue that emerges from the above: for some authors the election of judicial members by their peers allows the emergence of corporatist approaches that are traditionally biased towards conservative ideological positions that are distant from the dominant trends in society.[73] An example of such corporatist approaches is the aforementioned and controversial first Council of the Judiciary in 1980, which was elected through this system. Such interests would divert the role of the Council of the Judiciary away from the main reason for its creation, the safeguarding of judicial independence. Although the use of this experience has been refuted by authors such as Elvira Perales, who attributes the dysfunctionalities of the first council not to the direct election but to the haste in its configuration, which gave rise to the excessive benefit of it being the only judicial association existing at the time.[74]

Based on the aforementioned democratic legitimacy of judges, it is possible to find another argument that is more favourable to full parliamentary election. As is well known, judges in Spain, as well as in other countries close to us, are career civil servants who gain access to their posts through a meritocratic system or through competitive examinations. It is for this reason, due to their lack of election by the citizens, that it can be argued that judges lack democratic legitimacy of origin. Furthermore, their legitimacy in this type of system has been rooted in their exercise of functions fully subject to the law, which is, under the parameters of liberal democracy, the expression of the will of the people. As long as the judge submits to the expression of the popular will transformed into law, he/she is democratically legitimized, which makes judges politically irresponsible, as they can be in other systems in which their legitimacy is of origin. Under this "paleodemocratic" or "paleopositivist" construction, the legitimacy of the judge is identified with the very legitimacy of the law, eliminating the innovative or creative function of the judge.[75] From the outset, and based on the above, it should be noted that in a democratic state there is a body of civil servants, recruited on the basis of merit and ability, whose government is exempt from subjection to the

73 AGUIAR DE LUQUE, Luis, "El gobierno judicial en el derecho comparado: entre la dirección política y la gestión administrativa" in AGUIAR DE LUQUE, Luis (Dir.), *El gobierno del poder judicial. Una perspectiva comparada*, Centro de Estudios Políticos y Constitucionales, Madrid, 2012, pp. 13-14.

74 SASTRE LEGIDO, Ramón, "Propuesta para una solución definitiva para la renovación del Consejo General del Poder Judicial", *Boletín Digital Contencioso*, no. 32, 2022, pp. 43-44.

75 LÓPEZ GUERRA, Luis, "Legitimad democrática del juez", *Cuadernos de Derecho Público*, no. 1, 1997, p. 50.

representative public powers,[76] especially if we are dealing with functions that have nothing to do with the exercise of jurisdiction.

This classical conception should be qualified by the evolution of the role of the judge in the continental law system. Thus, it should come as no surprise to anyone if a judge today has acquired a kind of formal law-creating function through his/her jurisprudence. The judge has ceased to be the 'mouth' that pronounces the words of the law, limited to the "mere task of mechanically applying the law to the controversial case by means of logical operations", but rather "judges frequently operate as authentic law-creating agents without it being rare for them to assume tasks of clear active dimension and high political significance".[77] Judicial precedent has become increasingly important in our legal systems, establishing "general guidelines of behaviour that bind judges and courts", with the Supreme Court having the last word.[78]

In this way, there is a gap between this legitimacy and the effective exercise of jurisdictional power, and a need to link this creative capacity with the democratic principle. One of the ways to solve the dilemmas could come precisely from the Council of the Judiciary and the parliamentary election of its members. Given that it is the Council of the Judiciary that is responsible for appointing and promoting the most important judicial bodies in charge of formally creating jurisprudence, through the parliamentary election of its members, this function could be indirectly linked to the representatives of the people and, thus, legitimize the new law-creating function that our courts have. This would also indirectly solve the lack of political accountability of judges in systems where their legitimacy is classically exercised.[79]

In addition, the periodic renewal of the members by the representatives of the popular will would help to guarantee "the adjustment and correspondence of the judicial interpretation of the law with the evolution of reality and the legal culture",[80] helping to make the Constitution and the law true living instruments and not merely texts subject to immobile and frozen interpretations. This cannot mean that judges become "transmitters of the public opinion of the moment",

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76 DÍEZ-PICAZO, Luis María, *Régimen constitucional del Poder Judicial*, Civitas, Madrid, 1991, p. 45.

77 AGUIAR DE LUQUE, Luis, "El gobierno judicial en el derecho comparado: entre la dirección política y la gestión administrativa", in AGUIAR DE LUQUE, Luis (dir.), *El gobierno del poder judicial. Una perspectiva comparada*, Centro de Estudios Políticos y Constitucionales, Madrid, 2012, p. 26.

78 LÓPEZ GUERRA, Luis, "Legitimad democrática del juez", *Cuadernos de Derecho Público*, no. 1, 1997, p. 54.

79 *Ibidem*, pp. 70 *et seq*.

80 LÓPEZ GUERRA, Luis, "Vexata quaestio: sobre las dilaciones parlamentarias en la designación de titulares de órganos constitucionales", *Revista de las Cortes Generales*, no. 108, 2020, pp. 80-81.

but rather that the exercise of judicial power should not be in permanent conflict with the will of the people[81] through the distortion or derogation of the parliamentary laws emanating from it.

One of the main 'evils' attributed to the system of parliamentary election is the politicization of judicial members. According to this view, the composition of the Council of the Judiciary would reflect that of the Chambers, turning this body into a secondary theatre of the general political confrontation.[82] Under this view, a kind of politicization, more or less clientelist, would be attributed to the member elected by the Parliament. This would not occur with a judicial election, the elective election being the way to depoliticize the Council of the Judiciary. This perspective could be refuted in two ways, namely, through the inherent politicization that all individuals have and that which judicial associations also have. As for the first, the members and judges also have their own ideology and political convictions like any ordinary citizen, which is perfectly normal and desirable. However, when carrying out their jurisdictional work, they need to leave such convictions aside and submit solely and exclusively to the legal system. The same can be said of the members of the Council of the Judiciary, who cannot be guided by political postulates and must always ensure judicial independence. The political position that a member holds personally must not be an obstacle to carrying out their function. Likewise, and following the words of Murillo de la Cueva, the reality is that all the members are politicized in the noblest sense of the word, since the political connotation is inevitable in a constitutional body".[83]

This personal ideology that judges have, which is totally normal, can be channelled through the different existing associations and has, as a consequence, a thinly veiled connection of these to political parties.[84] So much so that no one can ignore the existing links of the conservative Professional Association of the Magistracy with the Partido Popular and of the progressive *Jueces por la Democracia* with parties on the Left such as the Socialist Party (PSOE) or, in its day, Izquierda Unida.[85] However, the fact that, fortunately, judges have ideology, and even that their associations are linked to different political forces on the left and right of the political spectrum, should not imply that they allow themselves

81 LÓPEZ GUERRA, Luis, "Legitimad democrática del juez", *Cuadernos de Derecho Público*, no. 1, 1997, p. 58.

82 ÍÑIGUEZ HERNANDEZ, Diego, "La reforma del Consejo General del Poder Judicial en España. Noticia de otra reforma fallida", *Cuadernos Miguel Giménez Abad*, no. 7, 2014, p. 149.

83 MURILLO DE LA CUEVA, Pablo Lucas, "El Consejo General del Poder Judicial y la Constitución", *Jueces para la Democracia*, no. 110, 2024, p. 36.

84 VIDAL MARÍN, Tomás, "Una propuesta conciliadora para la designación de los miembros del Consejo General del Poder Judicial: la necesaria despolitización del mismo y la superación de las situaciones de bloqueo", *Teoría y Realidad Constitucional*, no. 51, 2023, p. 369.

85 MURILLO DE LA CUEVA, Pablo Lucas, "La independencia y el gobierno de los jueces. Un debate constitucional", *Teoría y Realidad Constitucional*, no. 40, 2017, p. 355.

to be influenced by prejudices or political positions when deciding certain cases, no longer being subject to the Constitution and the laws.[86]

In this sense, and contrary to what is generally thought, it can even be said that election by the judges themselves would even further politicize the judiciary, since the judicial associations would gain an important role in the electoral process of the members and, being ideologically aligned with the main political parties, would transfer partisan confrontations to the judicial world.[87] The Constitutional Court warned of this possibility when it pointed out the risks of both election systems, stating that "it is not possible to ignore the risk, also expressed by some members of the Courts that approved the Constitution, that the electoral procedure could transfer the ideological divisions existing in society to the heart of the Judiciary".[88] Furthermore, if – from parliamentary appointment – we deduce the subordination of the members to the parties that appointed them, we could also necessarily deduce the same subordination and its undesirable consequences to the proposal of members by judicial associations to follow their postulates and defend their candidates in discretionary appointments.[89]

Although there are no doubts about the other eight jurist members as to how they are elected, since the Constitution clearly states that they must be proposed by the Parliament and the Senate, they do not emerge unscathed from the present debate. Given another harmful consequence of assigning a necessary politicization to the members, the fact that they have been proposed by Parliament, we are tacitly recognizing the curious circumstance that the constituent wanted: twelve members elected by their peers to coexist within the Council of the Judiciary who were not politicized, and another eight necessarily politicized,[90] 'contaminated' by their election by the Parliament and possibly loyal to interests that could contravene those of Justice.[91]

Consequently, whatever the case, politics will be present in the Council of the Judiciary, whether through the personal ideology of the members, the ideology of the association to which they belong, or the party that elected them. A good example of this is the history of the Italian *Consiglio Superiore della Magistratura*,

86 SALA SÁNCHEZ, Pascual, "El gobierno del Poder Judicial", *Constitución y Poder Judicial*, Consejo General del Poder Judicial, Madrid, 2003, pp. 245-246.

87 LÓPEZ GUERRA, Luis, "The General Council of the Judiciary. Evaluación y propuestas de reforma" (Working paper), *Laboratorio Alternativas*, no. 18, 2003, p. 14.

88 Judgment of the Constitutional Court 108/1986, Legal Basis 13.

89 MURILLO DE LA CUEVA, Pablo Lucas, "El Consejo General del Poder Judicial y la Constitución", *Jueces para la Democracia*, no. 110, 2024, p. 36.

90 MURILLO DE LA CUEVA, Pablo Lucas, "El gobierno del Poder Judicial: los modelos y el caso español", *Revista de las Cortes Generales*, no. 35, 1995, p. 220.

91 SALA SÁNCHEZ, Pascual, "El gobierno del Poder Judicial", *Constitución y Poder Judicial*, Consejo General del Poder Judicial, Madrid, 2003, p. 245.

which, despite being made up mainly of judges elected by their peers, has also been involved in episodes similar to those of the Spanish Council of the Judiciary.[92] Therefore, politicization and the consequences that derive from it cannot be attributed to the system of election of the body or to its institutional design. On the contrary, as will be seen in the analysis of the proposed solutions, it would be more accurate to refer to the criteria for the election of the persons to be elected and the loyalty and good will of the electors.

5. PROPOSED SOLUTIONS.

In view of the existing problems and debate, there has been a multitude of proposals and ideas from the doctrine, from small reforms in terms of proposal deadlines and some minor procedural issues to constitutional reforms of art. 122 for a clearer wording that does not leave room for contradictory interpretations. Continuing with the purpose of the study, we will only deal with those related to the election system in the strict sense, i.e. who should elect the twelve members of judicial origin that should make up the Council of the Judiciary.

Broadly speaking, we can find two well-defined positions in the doctrine. First, those who see the parliamentary election system as the origin of the problems in which the Council of the Judiciary is involved. They opt for a return to the 1980 system, i.e., the election of judicial members by their peers. Within this group it is possible to find some divergences as to the type of electoral system to be established so that judges can elect, but they agree on the main point: it must be the judges who elect the judicial members. A good exponent of this trend is Gómez Colomer, who proposes a return to the 1980 system through a system of direct election by the judges that is not based on quotas of judicial associations, controlled by the outgoing Council of the Judiciary and which basically guarantees the presence of judges of all categories.[93] In the political sphere, the Popular Party has always been critical of the current system and is in favour of returning

92 MURILLO DE LA CUEVA, Pablo Lucas, "La independencia y el gobierno de los jueces. Un debate constitucional", *Teoría y Realidad Constitucional*, no. 40, 2017, p. 355 and MURILLO DE LA CUEVA, Pablo Lucas, "El gobierno del Poder Judicial: los modelos y el caso español", *Revista de las Cortes Generales*, no. 35, 1995, pp. 220-221.

93 GÓMEZ COLOMER, Juan-Luis, "Sobre el nombramiento del presidente y de los vocales del Consejo General del Poder Judicial. Una reflexión desde el sentido común", *Teoría y Realidad Constitucional*, no. 44, 2019, p. 233. Among the most recent articles proposing a return to the 1980 system we also find MARTÍN GUARDADO, Sergio, "Polarización política y crisis en la renovación del Consejo General del Poder Judicial", *Revista de Derecho Político*, no. 117 2023, pp. 131-152; MIGUEL BARRIO, Rodrigo, "El Consejo General del Poder Judicial en perspectiva: análisis, desafíos y propuesta de reforma", *Revista de Derecho Político*, no. 120 2024, pp. 289-317; CARMONA CONTRERAS, Ana, "Democracia, Estado de Derecho e independencia judicial en España: un análisis en perspectiva europea", *Estudios de Deusto. Revista de Derecho Público*, vol. 70, no. 1, 2022, pp. 141-

to the original system, but, in practice, when it has obtained sufficient absolute majorities to reform the Organic Law of the Judiciary and reinstate the judicial election, it has not done so.[94] For its part, the Socialist Party, which approved the Organic Law of the Judiciary with the system that is maintained today, has always been in favour of maintaining it and has not considered the possibility of reforming it to return to the previous system.

Furthermore, there are authors (although not numerous) who defend the current system while criticizing the partisan use made of it by the country's political forces, and they propose various ways to alleviate the problems of the Council of the Judiciary. I refer here to authors who do not see the problem in the design of the system of election of judicial members by Parliament; in fact, as has been explained, they believe that it may be more consistent with the constitutional system as a whole, but rather they point to the form. For them, the problem lies in the use of representative criteria and blind quotas in the election of members. The function of the qualified majority of 3/5 established in the Constitution for the jurist members and in the Organic Law of the Judiciary for the judicial members removes the ability of the ruling majority to choose the members and thus forces the different political forces to reach consensus on the different candidates, with the ultimate intention of ensuring the autonomy of the Council of the Judiciary through the majority of the popular will in the Parliament.[95] However, as stated by Presno Linera, this agreement between political forces can be used to depoliticize the election as much as possible and promote the proper functioning of the institution or, on the contrary, to guarantee the presence in the institutions of persons guided by criteria of political representativeness of the parliamentary groups.[96] Such use of the qualified majority entails a system of distribution of seats by means of blind quotas, whereby a party only accepts the seat of the opposing political party if in return the latter has accepted its own. However, there are those who argue that *lottizazione* is not in itself bad, but rather that it is the badly done *lottizazione*, one that "which seeks supporters or has been done by each one ignoring who proposes the other as long as he accepts his own"[97]

157. CABELLOS ESPIÉRREZ, Miguel Ángel, "La reforma inacabada: el Consejo del Poder Judicial ante su enésima reformulación", *Revista Española de Derecho Constitucional*, no. 118, 202), pp. 13-44.

94 AGUIAR DE LUQUE, Luis, "Continuidad y reforma en el régimen jurídico del Consejo General del Poder Judicial" in AGUIAR DE LUQUE, Luis (Ed.), *Independencia judicial y Estado constitucional. El gobierno judicial*, Tirant Lo Blanch, Valencia, 2016, pp. 5-20. [Electronic Resource], p. 13.

95 MURIILLO DE LA CUEVA, Pablo Lucas, "Las mayorías reforzadas y la formación de los órganos constitucionales (comentarios sobre actualidad)", *Parlamento y Constitución*, no. 13, 2010, p. 131.

96 PRESNO LINERA, Miguel Ángel, "'Cuotas de Partido', 'Sistema de Botín' y 'Clientelismo Político'", *Revista Jurídica de Asturias*, no. 23, 1999, pp. 132-133.

97 MURILLO DE LA CUEVA, Pablo Lucas, *La independencia y el gobierno de los jueces. Un debate constitucional*, Reus, Madrid, 2018, pp. 159-160.

which generates the deterioration of the image of the Council of the Judiciary.[98] The main solution, apart from others aimed at streamlining the election system and avoiding deadlocks, is very simple and would come from the hand of a constitutional convention by the political parties to focus their negotiating efforts on "the search for solvent candidates acceptable to all or to a large majority, and the exclusion of those who are technically incompetent, politically sectarian or of inadequate personal conduct",[99] and in the responsibility of the voters, taking into account a fundamental factor such as the human factor, whereby a good choice "contributes to making even poorly designed institutions good, but an ill-advised choice destroys even the best designed".[100] Although I fully agree with both the analysis and the proposal, given the current political situation, which is festering in partisan interests, it is difficult to imagine a scenario in which the parties look beyond their particular interests in an election such as that of the Council of the Judiciary.

A more peculiar and unusual proposal and, therefore, totally minority in the doctrine, although not for that reason unworthy of mention, is the one defended by Sosa Wagner. He argues that, once the regularity of the candidacies has been verified and they have appeared in parliament, the election of the members should be done by drawing lots, thus rescuing "a system that has illustrious precedents in the history of democracy, and advocated by Montesquieu in the first pages of his immortal work."[101] In spite of the originality of the idea, in this

98 Similar opinions on the parliamentary election system can be found among authors in favour of returning to the 1980 system, such as SÁNCHEZ BARRIOS, María Inmaculada, *La elección de los miembros del Consejo General del Poder Judicial Español y de sus homólogos europeos*, Tirant lo Blanch, Valencia, 2009, p. 174, when she argues that: "In our opinion, the parliamentary election of all the members of the CGPJ in itself should not be negative, but what makes it negative is the distribution of quotas by party, especially in the case of absolute majorities, and the problem is that this happens frequently".

99 MURILLO DE LA CUEVA, Pablo Lucas, "El gobierno del Poder Judicial: los modelos y el caso español", *Revista de las Cortes Generales*, no. 35, 1995, p. 223. In the same vein, SALA SÁNCHEZ, Pascual, "El gobierno del Poder Judicial", *Constitución y Poder Judicial*, Consejo General del Poder Judicial, Madrid, 2003, p. 247: "If the system were to fail, it would not be the responsibility of its constitutional design, but of the negotiating political forces, which would have limited themselves to determining the number of posts corresponding to their parliamentary representation, without caring about the specific persons who would be called upon to fill them. This would mean that what has come to be called 'constitutional conventions' have not taken place, or, in other words, constitutional agreements that would allow to bring to the governing body of the Judiciary fully qualified and solvent judges, Magistrates and Jurists, that is, of proven honesty and independence".

100 MURILLO DE LA CUEVA, Pablo Lucas, *La independencia y el gobierno de los jueces. Un debate constitucional*, Reus, Madrid, 2018, p. 160.

101 SOSA WAGNER, Francisco "Jueces e indoendencia. Propuestas de reforma del Consejo General del Poder Judicial y del Tribunal Constitucional" in GARRIDO LÓPEZ, Carlos and SÁENZ ROYO, Eva (Coords.), *La reforma del Estado de partidos*, Marcial Pons, Madrid, 2016, pp. 142-143. In the same sense is also pronounced BUSTOS GISBERT in his monography *Calidad democrática*, Marcial Pons, Madrid, 2017.

day and age it cannot be considered desirable that a matter of such importance should be left to chance.

The legal and doctrinal panorama that we have tried to present, the entrenchment of the issue and the current political situation, leave little room for a glimpse of a change that could alleviate the problems we are facing. In view of this, we humbly propose something that we find more in line with the social and democratic rule of law advocated by the Magna Carta, trying to reconcile the democratic principle and European standards for the election of members of the Councils of the Judiciary. As an intermediate route, the proposal made by Cabellos Espiérrez is of interest.[102] In it, he states that, given that the Constitution refers the election of the twelve judicial members to the Organic Law, a mixed system could be introduced among them. A part of the twelve, for example, eight, if the democratic principle is to continue to prevail, or ten, if European standards are to be strictly complied with, could be elected by a vote of their peers, while the remaining one would continue to be elected by the Parliament. Such a system would help to force the parliamentary renewal of the members, given that the judicial renewal would be done systematically once the term of the outgoing Council of the Judiciary had expired. As we have said, and this is one of the strong points of the proposal, it would help to comply with – or at least bring the system of election of judicial members closer to – what the standards of the Council of Europe and the European Union require, although this would be to the detriment of the democratic principle, which could continue to prevail. The disgraced image of judicial independence that the public has been assimilating due to situations that have occurred in the Council of the Judiciary requires both a change at the legislative level and a change in the way the political parties in charge of renewing the Council of the Judiciary work in order to achieve more quality and transparency. Although the current political scenario may seem increasingly polarized, the main political forces should act in a spirit more in line with that of the Constitution and with an honourable breadth of vision.

102 CABELLOS ESPIÉRREZ, Miguel Ángel, "La reforma inacabada: el Consejo del Poder Judicial ante su enésima reformulación", *Revista Española de Derecho Constitucional*, no. 118, 2020, p. 40.

PART VI.
LEGISLATIVE FUNCTION AND RULE OF LAW

THE ABUSIVE USE OF THE ROYAL DECREE LAW BY THE EXECUTIVE IN SPAIN

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SUMMARY: 1. INTRODUCTION. 2. CONSTITUTIONAL ENABLING CONDITIONS: EXTRAORDINARY URGENCY AND NECESSITY. 3. THE *EXCEPTION* BECOMES THE *RULE*. 4. CLEAR CASES OF MISUSE OF THE DECREE-LAW. 4.1. The so-called *omnibus* Royal Decree-Laws and the *sui generis* Constitutional Court's doctrine. 4.2. The use of the Decree-Law on matters that can be regulated by an administrative regulation. 5. THE NEED OF A PARLIAMENTARY CONTROL. 6. THE AUTONOMOUS COMMUNITIES *JOIN* THE *PARTY*. 7. CONCLUSIONS. 8. BIBLIOGRAPHY.

1. INTRODUCTION.

The Rule of Law is a notion under construction, a concept in evolution, even in consolidated western democracies, such as Spain is today, almost half a century after the entry into force of the Constitution of 1978. One of the main challenges to the rule of law in contemporary Spain is the abusive participation of executive power in the legislative process through the instrument of the Royal Decree-Law (too strong a temptation, which may call into question the fair checks and balances between the executive and legislative branches).[1]

1 Previous reflections of the author on this topic were published in: TORRES GUTIÉRREZ, Alejandro, *Contemporary Challenges for the Application of the Rule of Law in Spain*, in BAINCZYK, Magdalena (Ed.), *Challenges for the application of Rule of Law in European states*, Institut Zachodni, Poznan, 2019, pp. 87-107. TORRES GUTIÉRREZ, Alejandro, *Implementation of the Rule of Law in*

To start, we will provide a short introduction to the Spanish legal system, where we may find two types of norms with "force of Law".

1) The first case is formal Law. Technically speaking this is a kind of norm that was formally passed by both houses of Parliament. Inside this category of formal Law, we have 2 subtypes of Laws, with identical rank, Organic Law and Ordinary Law. The difference between them is based on a delimitation of competence, rather than reasons of hierarchy, because Organic Law materially[2] regulates the main content of fundamental rights, electoral legislation, [regional] statutes of autonomy and other cases foreseen in the Constitution, and formally,[3] an absolute majority in the Congress is needed for its approval.

2) The second type of norm with force of law, is the Royal Decree-Law, which is drawn up by the Government and is formally ratified by the Congress within 30 days. The main function of the Decree-Law is to implement necessary, urgent, and unforeseen legal reforms.[4]

The abusive use of the instrument of the Decree-Law during General Franco's Dictatorship led to deep discussion during the constitutional debates, in an attempt to formulate a strict constitutional regulation, in a double sense:

a) Limiting the use of this figure to a very specific context. According to article 86 of the Spanish Constitution,[5] it is possible to use the figure of the Royal Decree-Law only in cases of extraordinary and urgent need. Just in this context, the Government may issue temporary legislative provisions which take the form of Royal Decree-Laws.

b) Prohibiting the regulation of a wide range of subjects through this type of norms. For this reason, this legal instrument does not have an unlimited regulatory spectre, because it is not allowed – under article 86.1 of the Constitution – to use this figure for the following crucial matters: The legal system of the basic state institutions; the rights, duties

Spain: Challenges, Mistakes and Opportunities, in *Unia Suwerennych Państw czy scentralizowana Nowa Europa?*, Narodowy Bank Polski - Akademia Kopernikańska, Warsaw, 2024, pp. 49-70.

2 Article 81.1 of the Spanish Constitution.

3 Article 81.2 of the Spanish Constitution.

4 GUTIÉRREZ GUTIÉRREZ, Ignacio, *Los controles de la legislación delegada*, Centro de Estudios Constitucionales, Madrid, 1995, p. 130.

5 The direct democratic precedent of this figure in Spain can be found in article 80 of the Constitution of the Second Spanish Republic, which foresaw the use of this legislative instrument only when the Congress was not in session, following a previous proposal and by unanimous agreement of the Government. It needed the approval of two thirds of the Permanent Deputation on matters reserved to the competence of the Parliament that, in exceptional cases, require an urgent decision, or when the defence of the Republic required it. These decrees should have only a provisional character, and their validity should be limited to the time it takes for the Congress to resolve the matter. This figure was used during Franco's Dictatorship as an ordinary way of legislating.

> and freedoms of the citizen contained in the First Part of the Spanish Constitution, which must be regulated by Organic Law, and the system of Self-governing Communities [regions], and electoral law (also subject to specific organic legislation). This limitation should not be understood as an absolute veto, because this proscription only affects the structural regulation of a particular institution.[6] From a quantitative point of view, the list of excluded matters is perhaps excessive. The list is so broad that, if it were to be interpreted in all its literalness, the use of the Decree-Law would be impossible.[7]

The Spanish Constitutional Court has coined the so-called 'substantial modification' doctrine, according to which a Decree-Law is not prohibited from any modification that affects tax regulations, for instance, but only those that, due to their qualitative or quantitative nature, significantly alter the position of the person liable to contribute according to their economic capacity within the entire tax system. To do so, it is necessary to take into account, in each case, which specific tax the decree-law affects – stating its nature, structure and the function it performs within the entire tax system, as well as the degree or extent to which the principle of economic capacity intervenes –, which elements of it (essential or not) are altered by this exceptional method of normative production and, finally, the nature and scope of the specific regulation in question (STC 73/2017 of 8 June).[8]

From a formal perspective, Royal Decree-Laws must be immediately submitted for debate and vote by the Parliament, which must be called for this purpose if it is not already in session, within 30 days of their promulgation.[9]

In the absence of an express pronouncement by Congress, it would have to be understood that such silence would be negative, because tacit favourable pronouncement is not provided for in the Constitution (only an express pronouncement is provided), and because the Government regulation is provisional in nature, and its definitive conversion into a Law requires the

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6 CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado: separación y conflicto. XX Jornadas de Estudio del Gabinete Jurídico de la Junta de Andalucía*, FAYA BARRIOS, Antonio Luis (Coord.), Instituto Andaluz de Administración Pública, Seville, 2020, p. 362.

7 CARMONA CONTRERAS, Ana, *La configuración constitucional de Decreto-Ley*, Centro de Estudios Políticos y Constitucionales, Madrid, 1997, p. 315.

8 ABELLÁN MATESANZ, Isabel María, "Límites de los Decretos-Leyes. La "extraordinaria y urgente necesidad" como presupuesto habilitante. Legitimidad del Decreto-Ley para regular una materia Reglamentaria. Modificación de normas tributarias por Decreto-Ley. Comentario a la Sentencia del Tribunal Constitucional 14/2020, de 28 de enero. Recurso de Inconstitucionalidad núm. 2208-2019. (BOE núm. 52, de 29 de febrero de 2020)", in *Revista de las Cortes Generales*, no. 109, 2020, pp. 606-607.

9 Article 81.2 of the Spanish Constitution.

express agreement of the Parliament. If the 30-day deadline is not met, the Decree-Law would lapse, expire and be automatically deleted from the Spanish legal system.[10]

Nevertheless, during the period of 30 days the Parliament may process Royal Decree-Laws as Government Bills through the urgency procedure.[11] These Government Bills have priority in parliamentary procedures, [12] although the number of Royal Decree-Laws which are finally processed as Government Bills through the urgency procedure is very low, and almost none become ordinary law.[13]

The modern state could be ungovernable without flexible legislative instruments. The Parliament cannot be the only source of norms to deal with complex problems and situations that need a quick response. Nevertheless, the use of the Royal Decree-Law must be adapted to the constitutional enabling circumstances. Its abusive use may make article 23 of the Spanish Constitution meaningless (the citizens' right to participate in public affairs through representatives) because it limits the parliamentary prerogatives.[14]

In drafting Decree-Laws, article 26 of Law 50/1997 on the Government does not apply, which means that certain procedures (such as the regulatory impact report, or the report of the Ministry of the Presidency on coordination and regulatory quality, among others) that provide rigour and legal certainty to the content of the norms issued by the Government are not guaranteed in this case. Neither would the opinion of the Council of State be mandatory. According to Martín Núñez, the decision to use one type of regulation or another cannot solely be based on political convenience, as the principle of legal certainty must be preserved and the rights of parliamentarians and citizens must be guaranteed.

The procedural requirements in the drafting of Government Bills and administrative regulations are not minor. It is easier for state and regional governments to issue a Decree-Law than a simple administrative regulation. However, the force and effects of Decree-Laws and administrative regulations cannot be compared, nor, above all, the position in which citizens are placed when the Government uses the figure of the Decree-Law. Therefore, the Government should justify that the measures adopted to address the urgency provide a

10 TUR AUSINA, Rosario, *El control parlamentario de los Decretos-Leyes*, Centro de Estudios Políticos y Constitucionales, Madrid, 2002, p. 136.

11 Article 81.3 of the Spanish Constitution.

12 Article 89 of the Spanish Constitution.

13 MARTÍNEZ MARÍN, Antonio, *Un Gobierno que regula la sociedad por Decreto-Ley quebranta el Estado de Derecho*, Diego Marín, Murcia, 2021, p. 315.

14 GESTO RODRÍGUEZ, José, *Estudio del uso o abuso del Decreto Ley por parte el Ejecutivo nacional y autonómico en la etapa democrática española*, Lekla, Madrid, 2022, pp. 366-367.

greater benefit than the harm caused by avoiding the procedural requirements in the drafting of mere administrative regulations.[15]

The Royal Decree-Law, a legislative tool constitutionally foreseen as extraordinary, has become a *de facto*, quasi-ordinary form of legislation, because of the low vigour of our parliamentarianism and the lax interpretation of article 86 of the Spanish Constitution, drawn up by the executive. This urgent legislator may not be converted into an ordinary legislator because it is incompatible with the democratic principle, which gives Parliament the representation of the people. For this reason, the legislative power belongs to the Parliament, and the Government only may exercise this function in a vicarious and limited manner (by parliamentary delegation, or in cases of extraordinary and urgent need). The democratic legitimacy of the Law is based not only on the majority which approved it, but also on the procedures that create it, which are open to amendments and public debate. This is not the case of the Decree-Law, drawn up by the Government and which enters into force only through the will of the executive, with the only subsequent intervention of only one of the Chambers, the Congress (whose role is only to validate or repeal it), and with the mute presence of the Senate.[16]

As described above, technically speaking the Decree-Law is an extraordinary source of Law because it alters the distribution of normative functions between the legislative and executive branches. The Spanish Constitution attempts to offer a flexible, quick-response mechanism to immediate problems, but always maintaining the central role of Parliament in the legislative process. For this reason the Decree-Law is a legislative tool that should be interpreted from a restrictive perspective. The reality is quite different, because the notoriously excessive – and sometimes fraudulent – use of the Decree-Law leads to a serious imbalance in the constitutional architecture, calling the very notion of parliamentary democracy into question.[17]

The sad landscape of political life is quite different, far from the happy constitutional *Arcadia*, from a quantitative point of view. For instance, in 2020 (the year of the Covid–19 Pandemic), 76% of the norms with force of law published

15 MARCO MARCO, Joaquín J. and PÉREZ GABALDÓN, Marta, "Regulación y uso de los Decretos-Leyes en las Comunidades Autónomas: La silenciosa invasión del ejecutivo al legislativo", in *Cuadernos Manuel Giménez Abad*, no. 25, June 2023, p. 58. MARTÍN NÚÑEZ, Esther, "El Gobierno legislador. ¿Una respuesta a la debilidad del Parlamento?", in CASTELLÀ ANDREU, Josep Mª and EXPÓSITO, Enriqueta (Eds.), *Contrapoderes en la democracia constitucional ante la amenaza populista*, Marcial Pons, Madrid, 2024, pp. 129-130.

16 ARAGÓN REYES, Manuel, *Uso y abuso del Decreto-Ley. Una propuesta de reinterpretación constitucional*, Iustel, Madrid, 2016, pp. 18-19.

17 MARTÍN NÚÑEZ, Esther, "El Gobierno legislador. ¿Una respuesta a la debilidad del Parlamento?, in CASTELLÀ ANDREU, Josep Mª and EXPÓSITO, Enriqueta (Eds.), *Contrapoderes en la democracia constitucional ante la amenaza populista*, Marcial Pons, Madrid, 2024, p. 108.

in the Spanish Official Bulletin of the state were Royal Decree-Laws. Only 11 laws entered into force, in contrast to 36 Royal Decree-Laws. The indiscriminate use of the Royal Decree-Law during the pandemic was widespread.[18]

The risk of trivialization of the use of the Royal Decree-Law is clear. Nowadays it is used as a routine tool to provide a legal solution in relation to problems which are not of extraordinary *urgency* and *need*.[19]

Doctrinally, recourse to the Royal Decree-Law to proceed with the accession of Spain to an International Treaty has also been criticized, as occurred with Royal Decree-Law 14/1998 of 9 October,[20] on the accession of Spain to various agreements of the International Monetary Fund, ignoring the fact that, in accordance with Article 94.1.d) of the Constitution, it requires the prior authorization of the Parliament and Senate in the case of Treaties or agreements that imply financial obligations for the Treasury. The literal wording of this provision excludes any interpretative doubt in this respect, since it strictly requires that Parliament must intervene prior to the ratification of the treaty. Until such parliamentary authorization is given, the agreement signed by the executive will have no binding effect, and no international obligation will be generated with respect to the Spanish State. Since the Decree-Law is a norm with legal effectiveness and binding force from the moment of its publication in the Official State Gazette, its validation by Congress operates on a rule already in force. The alleged substitution of one route – that of the prior authorization of the Parliament and the Senate – for another (the subsequent validation of the governmental norm) is hardly acceptable in constitutional terms.[21]

According to Santaolalla, the granting of parliamentary authorization to ratify or adhere to an international convention should be included among the matters prohibited in Royal Decree-Laws, as happened with Royal Decree-Law 14/1998 of 9 October, which had to be annulled by STC 155/2005 of 9 June.[22]

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18 This is also the case in the United States, where the President's Executive Orders have neem systematically resorted to. CORRES-ILLERA, María, and CUEVAS LANCHARES, Juan Carlos, "Un estudio comparativo sobre el poder ejecutivo entre Estados Unidos y España: El uso y abuso de las órdenes ejecutivas y los Reales Decretos-Ley", in *Revista de las Cortes Generales*, vol. 116, 2023, p. 321.

19 DÍAZ DE MERA RODRÍGUEZ, Ana, *Gobierno de la crisis. Uso y abuso del Decreto-Ley*, in *Asamblea. Revista Parlamentaria de la Asamblea de Madrid*, no. 27, 2011, p. 175.

20 Official State Gazette of 10 October 1998.

21 CARMONA CONTRERAS, Ana, "Decreto-Ley y relaciones internacionales: Una compatibilidad constitucionalmente problemática", in *Revista de Estudios Políticos*, no. 110, October-December 2000, pp. 59-78.

22 SANTAOLALLA LÓPEZ, Fernando, "La reforma de los Decretos-Leyes en Italia y sus posibles lecciones en España", in *Revista de Derecho Político*, no. 98, January-April 2017, p. 41.

2. CONSTITUTIONAL ENABLING CONDITIONS: EXTRAORDINARY URGENCY AND NECESSITY.

One of the reasons for the approval of Decree-Laws is that the time required to adopt the measures contained in them through the legislative procedure would be too long to address the urgent need. In the event of a crisis, or when a quick answer is needed, the legal system must allow the executive to react in an appropriate and effective way. The ordinary legislative procedure is too long, and those answers may arrive too late.

"Necessity" should be understood as a situation in which the lack of government action would cause harm to the social interest, so that only government intervention would achieve a reduction (or cancellation) of the harm resulting from a given situation.[23] "Urgent" would mean that ordinary legislative action cannot take the necessary measures to satisfy a specific social need.[24]

The "extraordinary" circumstance that enables the issuance of a Decree-Law is related to a situation that is not ordinary, out of the ordinary and the everyday, and should not be made equivalent to something exceptional, neither an absolute necessity, a crisis of the system, or a threat to the constitutional order. It does not imply a situation of institutional crisis, or a danger of rupture of the 'essential given order' (as foreseen in Article 116 of the Spanish Constitution). In a context of economic crisis, an urgent need arises as something habitual and recurrent in the normal performance of the Government's work, in such a way that the Royal Decree-Law serves to respond to the changing needs of reality. It is a normative response directly linked to the concrete priorities of the executive power.[25]

The idea of "necessity" should be directly connected to a factual element, something that is perceived as such by citizens in general, or by some specific sectors of society. A teleological element should be added to this, one that implies a certain importance in relation to the objectives or aims that the social group concerned considers to be relevant.[26]

The intervention of the Constitutional Court to monitor the constitutionality of the Decree-Law must be confined to carrying out a strictly legal external

23 SANTOLAYA MACHETTI, Pablo, *El régimen constitucional de los Decretos-Leyes*, Tecnos, Madrid, 1988, p. 106.

24 SANTOLAYA MACHETTI, Pablo, *El régimen constitucional de los Decretos-Leyes*, Tecnos, Madrid, 1988, p. 112.

25 CARMONA CONTRERAS, Ana, *La configuración constitucional de Decreto-Ley*, Centro de Estudios Políticos y Constitucionales, Madrid, 1997, pp. 77 and 311-312.

26 CARMONA CONTRERAS, Ana, *La configuración constitucional de Decreto-Ley*, Centro de Estudios Políticos y Constitucionales, Madrid, 1997, p. 87.

review of the norm from a strictly legal perspective, without being able to extend this to a political judgement or a judgement of opportunity.[27]

The enabling condition is 'extraordinary and urgent necessity'. This requirement is very controversial, because it is an indeterminate legal concept that becomes an enabling condition for the constitutionality of the Decree-Law. In reality, although we speak of a requirement, it is a triple prerequisite: there must be a need; this need must be urgent, requiring a peremptory response; and it must be extraordinary.[28]

What is the real meaning of extraordinary urgency and necessity?

Carmona Contreras considers that these terms are a clear example of constitutional concepts of a schematic, abstract, indeterminate and elastic nature. Stable constitutional definitions, defined *a priori*, according to the 19th-century model of the state, have disappeared. Dynamism, and a dialectical approach to the underlying reality permeate the content of the Constitution.[29] How may the necessary reasonable margin of discretion be determined?

'Urgent necessity' would be any situation that requires a legal response in a shorter time than that needed to process a Government Bill under the urgency procedure. What is essential is not that such rules are immediately applicable, or that they provide a solution to the problem posed, but that they are approved, published and enter into force before the period required for an urgent procedure has elapsed. The aim is to provide a rapid and expeditious response to the problem that has arisen.[30]

The initial requirement of unpredictability has been passed over. Recent constitutional jurisprudence focusses on seriousness, and the necessity to address a problem quickly, within a short period of time, compared to the urgent parliamentary legislative procedure. According to Legal Basis 6 of the Sentence of the Constitutional Court 11/2002 of 17 January, it is only of interest whether the situation objectively warranted regulatory treatment through emergency legislation, regardless of the causes that may have led to it. A connection of

27 ABELLÁN MATESANZ, Isabel María, "Límites de los Decretos-Leyes. La "extraordinaria y urgente necesidad" como presupuesto habilitante. Legitimidad del Decreto-Ley para regular una materia Reglamentaria. Modificación de normas tributarias por Decreto-Ley. Comentario a la Sentencia del Tribunal Constitucional 14/2020, de 28 de enero. Recurso de Inconstitucionalidad núm. 2208-2019. (BOE núm. 52, de 29 de febrero de 2020)", in *Revista de las Cortes Generales*, no. 109, 2020, p. 602.

28 MARCO MARCO, Joaquín J. and PÉREZ GABALDÓN, Marta, "Regulación y uso de los Decretos-Leyes en las Comunidades Autónomas: La silenciosa invasión del ejecutivo al legislativo", in *Cuadernos Manuel Giménez Abad*, no. 25, June 2023, p. 58.

29 CARMONA CONTRERAS, Ana, "Algunas reflexiones en torno a la urgente necesidad", in *Revista de Estudios Políticos*, no. 96, April-June 1997, pp. 258-259.

30 CARMONA CONTRERAS, Ana, "Algunas reflexiones en torno a la urgente necesidad", in *Revista de Estudios Políticos*, no. 96, April-June 1997, p. 313.

congruency is required between the considered situation of urgency and the normative answer through the Decree-Law. No political assessment or calculation of the technical merits of the measures adopted is permitted.[31] Unconstitutionality is reserved only for cases of manifest inconsistency or obvious arbitrariness, because the oversight that falls to the Constitutional Court on this point is external, in the sense that it must verify, but not replace, the political or expedient judgment that corresponds to the Government and the Parliament in their exercise of their parliamentary oversight function (Article 86.2 of the Spanish Constitution),[32] as Carmona Contreras has aptly pointed out.[33]

In cases of abusive or arbitrary use, the Constitutional Court may reject the definition made by political bodies of a given situation as a case of extraordinary and urgent necessity, of such a nature that it cannot be addressed through emergency legislative procedure. It is clear that the exercise of this supervisory power by the Constitutional Court requires that the definition be explicit and reasoned, and that there should be a meaningful connection between the defined situation and the measures adopted in the Decree–Law.[34]

Political institutions are not allowed to include any type of provision in the Decree-Law, nor those which, by their content and in an evident manner, bear no relation, direct or indirect, to the situation that is being addressed, nor, very especially, those which, by their very structure, independently of their content, do not instantly modify the existing legal situation, since it is difficult to obtain the justification of the extraordinary and urgent need from them.[35]

Today, we are witnessing an intense conceptual 'blurring' of its enabling presupposition, expressly endorsed by the Constitutional Court.[36]

The Government has used this figure in times of peace for the acquisition of military material, such as tanks or airplanes. The question that comes to mind is: was this correct? According to the Government it was a case of urgent and extraordinary need, but it was not so for the political parties that have appealed to the Constitutional Court:[37]

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31 Sentence of the Constitutional Court 111/1983, of 2 December 1983, Legal Basis 4.

32 Sentence of the Constitutional Court 182/1997 of 28 October, Legal Basis 3.

33 CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado: separación y conflicto. XX Jornadas de Estudio del Gabinete Jurídico de la Junta de Andalucía*, FAYA BARRIOS, Antonio Luis (Coord.), Instituto Andaluz de Administración Pública, Seville, 2020, pp. 364-366.

34 Sentence of the Constitutional Court 29/1982 of 31 May 1982, Legal Basis 3.

35 Sentence of the Constitutional Court 29/1982 of 31 May 1982, Legal Basis 3.

36 CARMONA CONTRERAS, Ana, "El Decreto-Ley en tiempos de crisis", in *Revista catalana de dret públic*, no. 47, 2013, p. 4.

37 The Socialist Parliamentary Group, and deputies from the left and center-left wing of Parliament: IU, ICV-EUIA, CHA: La Izquierda Plural, and Unión Progreso y Democracia.

1) The Government knew in advance the existence of armament agreements and commitments.
2) These obligations were:
   a) Foreseeable
   b) Not spontaneous
   c) Not unexpected
3) It may be urgent, but not extraordinary.
4) It was a usual practice, and it was questionable.

Constitutional Court Sentence 126/2016 of 7 July[38] declared it unconstitutional, but did not annul the acquisition of military armament for legal security reasons.

During the COVID–19 Pandemic, the legislation of urgency, the so-called Royal Decree-Laws,[39] was used recurrently The use of this legislative tool was justified from a theoretical point of view by reasons of extraordinary and urgent necessity, but it is also a juridical phenomenon that sometimes seems to put the principle of separation of powers at serious risk, and it attacks the central role that Parliament must have during these circumstances of serious social and health crises.[40] Additionally, some provisions included in these Royal Decree-Laws were of very dubious[41] 'extraordinary and urgent necessity', for instance the inclusion of the Vice-President of the Government in the Delegated Commission of the Government on Intelligence Affairs, through Final Disposition no. 2 of Royal Decree-Law 8/2020 of 17 March,[42] which was doctrinally questioned.[43]

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38 Official State Gazette of 19 August 2016.

39 TORRES GUTIÉRREZ, Alejandro, *Impact of COVID-19 Pandemic on fundamental right of Religious freedom in Spain*, in *Nottingham Law Journal*, vol. 30, 2022, p. 49.

40 RUIZ RICO, Gerardo, *Las dimensiones constitucionales de la crisis sanitaria en España. Dudas e incertidumbres presentes y futuras*, in DPCE online, 2020/2, p. 1513.

41 ARAGÓN REYES, Manuel, *COVID-19: Aproximación constitucional a una crisis*, in *Revista General de Derecho Constitucional*, no. 32, April 2020. FERNÁNDEZ DE GATTA SÁNCHEZ, Dionisio, *Los problemas de las medidas jurídicas contra el coronavirus: las dudas constitucionales sobre el Estado de Alarma y los excesos normativos*, in *La Ley*, 6 May 2020. RUIZ ROBLEDO, Agustín, *Debemos vigilar al Capitán Sánchez*, *El Español*, 25 March 2020, accesible at: https://www.elespanol.com/opinion/tribunas/20200325/debemos-vigilar-capitan-sanchez/477572242_12.html TORRES GUTIÉRREZ, Alejandro, *Retos de la declaración del estado de alarma con motivo de la COVID-19 para el estado de derecho y el ejercicio de los derechos fundamentales*, in LUQUIN BERGARECHE, Raquel, *Covid-19: conflictos jurídicos actuales y desafíos*", Wolters Kluver, Madrid, 2020, pp. 489-490.

42 *Official State Gazette* of 18 March 2020, accessible at: https://www.boe.es/buscar/act.php?id=BOE-A-2020-3824

43 TERUEL LOZANO, Germán M., "Los Decretos-Leyes en la crisis del Coronavirus: Perspectiva Constitucional", in *Cuadernos Manuel Giménez Abad*, Extraordinary number 8, June 2020, p. 222. TORRES GUTIÉRREZ, Alejandro, *Retos de la declaración del estado de alarma con motivo*

This unconstitutionality was finally declared by the Sentence of the Constitutional Court 110/2021 of 13 May.[44]

3. THE *EXCEPTION* BECOMES THE *RULE*.

Carmona[45] and Aragón[46] spoke about the Royal Decree-Law's standardization,[47] because the exception became the rule. In the last decade, this legal instrument became the 'star' of the Parliament's legislative function. The number of Royal Decree-Laws prepared by the Government was higher than the number of Ordinary Laws passed by the Parliament.

NORMATIVE PRODUCTION IN DEMOCRATIC SPAIN FROM 1979 TO 2024.[48]

	Constitut. reforms	Organic Laws	Ordinary Laws	R. De-cree-Laws	Royal Decrees	Internat. Agree-ments	Total
1979		4	45	22	1	23	95
1980		13	83	16	3	27	142
1981		8	50	19	1	18	96
1982		13	53	26		11	103
1983		14	46	9		26	95
1984		10	53	15		52	130
1985		14	51	8	1	42	116
1986		4	25	3	16	35	83
1987		7	34	7	1	60	109
1988		7	44	7	1	36	95

de la COVID-19 para el estado de derecho y el ejercicio de los derechos fundamentales, in LUQUIN BERGARECHE, Raquel, *Covid-19: conflictos jurídicos actuales y desafíos*", Wolters Kluver, Madrid, 2020, pp. 489-490. TORRES GUTIÉRREZ, Alejandro, *Impact of COVID-19 Pandemic on fundamental right of Religious freedom in Spain*, in *Nottingham Law Journal*, vol. 30, 2022, p. 49.

44 *Official State Gazette* of 15 June 2020, accessible at: https://www.boe.es/boe/dias/2021/06/15/pdfs/BOE-A-2021-10023.pdf

45 CARMONA, Ana, *La configuración constitucional de Decreto-Ley*, Centro de Estudios Políticos y Constitucionales, Madrid, 1997.

46 ARAGÓN REYES, Manuel, *Uso y abuso del Decreto-Ley. Una propuesta de reinterpretación constitucional*, Iustel, Madrid, 2016.

47 In Spanish: *normalización*.

48 Source: Spanish Parliament. https://app.congreso.es/est_leyes/

1989		3	20	7	1	59	90
1990		1	31	6	3	69	110
1991		13	31	5	1	64	114
1992	Art. 13.2 SC	10	39	6	1	70	127
1993			23	22	1	62	108
1994		20	43	13	2	88	166
1995		16	44	12	2	76	150
1996		5	14	17	1	33	70
1997		6	66	29		107	208
1998		11	50	20		66	147
1999		15	55	22	1	82	175
2000		9	14	10	5	50	88
2001		7	26	16	1	60	110
2002		10	53	10	1	91	165
2003		20	62	7		76	165
2004		3	4	11	8	7	33
2005		6	30	16		60	112
2006		8	44	13		65	130
2007		16	56	11	2	98	183
2008		2	4	10	2	54	72
2009		3	29	14		75	121
2010		9	44	14	1	91	159
2011	Art. 135 SC	12	38	20	3	59	133
2012		8	17	29		52	106
2013		9	27	17	1	53	107
2014		8	36	17		31	92
2015		16	48	12	8	49	133
2016		2		7	1	2	12
2017		1	12	21		51	85

2018		5	11	28		33	77
2019		3	5	18			26
2020		3	11	39	1	39	93
2021		11	22	32		38	103
2022		15	39	20		26	100
2023		4	13	8		11	36
2024	Art. 49 SC	6	7	11		36	61
TOTAL	3	390	1552	702	70	2313	5031

The economic crisis of 2008 was the perfect alibi. From 1990 to 2008 (the year in which the economic crisis began), Decree-Laws represented almost 25% of the norms with force of law passed by the state. From 2008 to the end of 2012, this percentage, also at the state level, rose to 40%. In 2012, for instance, 29 Decree-Laws were adopted, compared to only 17 ordinary laws and 8 Organic Laws passed in the state during this period.[49]

According to Tudela Aranda,[50] the economic crisis of 2008 led to a blossoming of the use of the mechanism, but the real change in its constitutional role occurred in the context of the fragmented Parliament of the last decade, from the tenth term onwards, with a succession of minority governments. The 11th and 13th Terms were a failure in this sense. For the first time since the implementation of democracy in 1978, the 12th Term was divided into 2 different periods, with 2 different Governments of opposite political colour. During the first one, Mariano Rajoy governed with 170 MPs from July 2016 to June 2018, and after the triumph of the no-confidence motion on 1 June 2018 Pedro Sánchez became the President of the Government, supported by 151 MPs. In that 12th Term, 49 Government Bills and 65 Decree-Laws were discussed in Parliament. Mariano Rajoy's Government sent 30 Decree-Laws to the Parliament in 22 months, and Pedro Sánchez 35 in 9 months. With the only exception of one of them, sent by Mariano Rajoy, all the other 64 Royal Decrees were validated by the Congress. Government Bills were less successful: only 17 of those sent by Mariano Rajoy were approved and 6 expired or were withdrawn by the Government. The ratio in the case of Pedro Sánchez was even worse: only 4 of his 32 Government Bills were passed. The figures provided by Tudela Aranda are very conclusive.

What has happened during the 12th Term is particularly serious because there is an important difference between the frequent use of the Royal Decree-

49 ARANA GARCÍA, Estanislao, "Uso y abuso del Decreto Ley", in *Revista de Administración Pública*, no. 191, May-August 2013, pp. 340-341.

50 TUDELA ARANDA, José, "Nuevos reflejos de la debilidad del Parlamento", in *Cuadernos Constitucionales*, vol 1, 2021, p. 100.

Law while still exercising the normal legislative power of the Parliament and the real scenario of governing almost exclusively based on Decree-Laws, in a context in which parliamentary laws are not passed. This is precisely the novelty of what has happened in this legislature, in which there are not two centres for drafting regulations with the rank of Law (Parliament and Government), but Parliament has largely been replaced by the Government. The Government has been using the Decree-Law to amend specific aspects of laws that would require a parliamentary norm, risking a possible declaration of unconstitutionality (which would not occur for several years). The particular weakness of the Executive in the Parliament has had the consequence of increasing difficulty in passing new laws, after complex negotiations which have not always had a positive outcome for the Government. For weak Governments it is easier to negotiate a one-off majority to pass a Decree-Law than to follow the complex legislative procedure of amendments and negotiations required for the approval of an ordinary law. However, the health of democratic parliamentarianism may deteriorate with these kinds of practices.[51]

'Crisis' and 'Decree-Law' are linked concepts. Their massive use during the last economic crisis is good proof of this.[52]

Aragón Reyes considers that this abusive recourse to the use of the Royal Decree-Law does not correspond to the sense of the Constitution. The situation has its origin in the very weakness of our parliamentary model, since it is the Congress that is responsible for controlling this type of legislation, something that has not occurred *de facto*. This author also blames the Constitutional Court for this result, as its flexible interpretation has contributed to this misuse by the government. However, the Constitutional Court is not the only one to blame, since, on the one hand, it can only act when Decree-Laws are challenged before its jurisdiction (and not all Decree-Laws have been challenged), and on the other, because the control of constitutional jurisdiction cannot replace the necessary political control. In reality, much of the blame is also attributable to the Parliament itself, which has only left a very small number of Royal Decree-Laws without validation during almost half a century of democratic experience in Spain. Only a very limited number of Decree-Laws have subsequently been

51 GÓMEZ CORONA, Esperanza, "El ejercicio de la potestad legislativa en un Parlamento fragmentado", in *Teoría y Realidad Constitucional*, no. 55, 2025, pp. 185-187.

52 DE LA IGLESIA CHAMARRO, Asunción, "Crisis económica y expansión del ejercicio normativo del Gobierno. En particular, los decretos-leyes nacionales y autonómicos", in *Revista Estudios de Deusto*, no. 61, 2013, p. 70. CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado: separación y conflicto. XX Jornadas de Estudio del Gabinete Jurídico de la Junta de Andalucía*, FAYA BARRIOS, Antonio Luis (Coord.), Instituto Andaluz de Administración Pública, Seville, 2020, p. 364.

processed as Government Bills; voting discipline in the Parliament has worked like an authentic steamroller.[53]

4. CLEAR CASES OF MISUSE OF THE DECREE-LAW.

4.1. The so-called *omnibus* royal decree-laws and the *sui generis* Constitutional Court's doctrine.

in recent years, governments supported by political majorities of different colour have not hesitated to succumb to the temptation of resorting to the figure of the so-called 'omnibus' Royal Decree-Law; these have addressed a wide variety of issues.

A good example of this controversial practice could be, for instance, Royal Decree-Law 8/2014 of July 4 approving urgent measures for growth, competitiveness and efficiency.[54] The norm has 147 pages and modifies more than 30 laws.[55]

The first question that arises is: what happens to the principle of legal certainty? The answer given by the Spanish Constitutional Court is questionable. According to the supreme interpreter of our Magna Carta, this type of rules do not automatically infringe the principle of legal certainty (art. 9.3 CE), because they have an object that, "although heterogeneous, is perfectly delimited at the time of presentation of the project to the Parliament, with all its potential recipients (legal operators and citizens) having knowledge of it through its publication in the Official Journal of the Parliament and Senate, as they ultimately have knowledge of the final text through its insertion in the Official State Gazette".[56]

The most contradictory and paradoxical aspect of all this is that the Constitutional Court has washed its hands of such a thorny issue, like Pontius

53 ARAGÓN REYES, Manuel, *Uso y abuso del Decreto-Ley. Una propuesta de reinterpretación constitucional*, Iustel, Madrid, 2016, pp. 38-39.

54 *Official State Gazette* of 5 July 2014, accessible at: https://www.boe.es/buscar/act.php?id=BOE-A-2014-7064

55 This text includes measures to promote economic activity (financing of economic activity, retail trade and market unity, and limits on interchange fees in card payment transactions), regulations on infrastructures and transport (civil aviation, airports regulations, remotely piloted civil aircraft, air navigation and safety), urgent measures in the energy field (liquefied petroleum gases, economic sustainability of the natural gas system, and other measures in the area of the hydrocarbons and mining sector, energy efficiency measures), measures to promote employability and employment, and reforms of the Tax System.

56 Sentences of the Constitutional Court 136/2011 of 13 September, 176/2011 of 8 November, 209/2012 of 14 November, 132/2013 of 5 June and 199/2015 of 24 September, Legal Basis 3.

Pilate, stating that its function is not to judge the legislative quality of the rules being judged and limiting itself to saying that it "is not, *per se*, constitutionally proscribed, however technically inadvisable such a practice may appear to be",[57] and that such heterogeneous content only entails a "mere defect of regulatory technique, devoid of constitutional relevance", because the Constitutional Court denies having the power to analyse "the technical perfection of laws".

According to the Constitutional Court's doctrine, "the heterogeneous content of the Decree-Law neither modifies its nature as a Decree-Law, nor alters its relationship with the other rules of the legal system, nor the system of sources established in the Constitution". This Court limits its function to making an evaluative judgment regarding the concurrence of "the enabling conditions and the observance of the material limits of the Decree-Law".[58]

The Constitutional Court has played a very self-contained role in monitoring the possible unconstitutionality of the Royal Decree-Laws, limiting its activity to a *mere* external control without replacing the political decision of opportunity, which must be carried out by the constitutional organs qualified for the approval and validation of the Royal Decree-Law: the Government (constitutional holder of the emergency legislative power) and Parliament (holder of the power to validate, repeal or process the text as a Bill). The breadth and variety of the matters referred to in certain Decree-Laws is not in itself unconstitutional, but rather gives them uniqueness.[59]

Doctrinally, the desperate consequences of such ill-advised constitutional jurisprudence have been criticised, due to the fact that in this normative scenario drawn by the 'omnibus' Decree-Laws, not only are the enabling conditions for the elaboration of such type of rules blurred (this "blurring" is very close to "non-existence") but the right of political participation of the parliamentary minorities is seriously harmed, since their capacity to control the Government is emptied of its content through their effective participation in the procedure of the Decree-Law. In this context, the right of political participation of the parliamentary minorities is seriously impaired, since their capacity to control the Government is made meaningless through their effective participation in the process of validation of the Decree-Law, which is practically deactivated.[60]

We may not forget, in the line of Aragón Reyes, that according to article 150 of the Standing Orders of the Parliament, the procedure of single reading

57 Sentence of the Constitutional Court 102/2012 of 8 May, Legal Basis 2.

58 Sentence of the Constitutional Court 199/2015 of 24 September, Legal Basis 3.

59 Sentence of the Constitutional Court 199/2015 of 24 September, Legal Basis 4.

60 CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado: separación y conflicto. XX Jornadas de Estudio del Gabinete Jurídico de la Junta de Andalucía*, FAYA BARRIOS, Antonio Luis (Coord.), Instituto Andaluz de Administración Pública, Seville, 2020, p. 370.

in case of Government Bills or Non-governmental Bills is only possible when the simplicity of its formulation so permits. This philosophy, which inspires the Standing Orders of the Spanish Parliament, is incompatible with the possibility of an 'omnibus' Decree-Law of 100 or 200 pages being validated in a single vote, without the possibility of introducing amendments.[61]

4.2. The use of the decree-law on matters that can be regulated by an administrative regulation.

according to the Ex-President of the Constitutional Court, Maria Emilia Casas, in her dissenting opinion formulated in Sentence 332/2005 of 15 December, the idea in principle should be that the adoption of a Decree-Law is only admissible, if it cannot be postponed, to regulate a matter reserved to the Law in less time than is necessary for the approval of a formal Law by the Parliament and Senate. It is therefore not appropriate to resort to this form of legislation to regulate matters that can be regulated by administrative regulation. Not because a non-existent administrative regulatory reserve must be respected, nor because the legislator cannot regulate any matter with no other limit than respect for the Constitution, but simply because only the true legislator, i.e. the Parliament and Senate, can do so, not the Government in the exceptional exercise of legislative powers. The majority identifies the need to adopt a legislative provision urgently with the constitutional legality of adopting a Decree-Law. However, the 'extraordinary and urgent need' stated art. 86.1 CE only refers to the adoption of norms with the rank or value of Law, so that if the accredited urgency of the adoption of a regulation is sufficiently provided for with the issuing of a decree, that is, if the Government can resolve the situation of urgency with the exercise of its own administrative regulatory powers, it is not constitutionally licit to make use of powers which it can only have when the necessary regulatory intervention is in a field reserved for the legislator. In short, the Government cannot regulate legislatively on any matter and in any circumstance, but only when it is unavoidable. In short, when matters inaccessible to administrative regulation are to be affected and for which, therefore, the exercise of its own administrative regulatory power is not sufficient.

The consequences are not minor, because according to María Emilia Casas, leaving it to the Government's discretion to decide to regulate a matter that is subject to administrative regulation with the force of law has the not inconsiderable consequence of also leaving it to its discretion to decide on the system of possible judicial review of the rule adopted, with the obvious harm that this may cause to the defence of the rights of individuals.

61 ARAGÓN REYES, Manuel, *Uso y abuso del Decreto-Ley. Una propuesta de reinterpretación constitucional*, Iustel, Madrid, 2016, p. 104.

With the humility of the wise, Manuel Aragón regretted a few years later that he had not adhered to this doctrine.[62]

5. THE NEED FOR PARLIAMENTARY CONTROL.

Decree-Laws are the product of the executive branch's will. They are not primarily drafted by Parliament, and therefore these government provisions have less democratic legitimacy compared to laws passed by Parliament if we adopt a procedural perspective. This status of inferiority must be compensated, *a posteriori*, with the intervention of the Parliament. These norms are born with an expiration date, they are initially provisional, and they must later be incorporated into the legal order in a stable way. This second step requires the prior intervention of Parliament, that must manifest its affirmative will within 30 days.[63]

During the almost half a century of democracy, the Parliament has systematically validated governmental Decree-Laws, and the cases of rejection had been really exceptional.[64] They can be counted on the fingers of one hand, with one-off exceptions. In fact, this only happened three times during the first forty years of democracy, in 1979 (during the mandate of Adolfo Suárez, the Permanent Deputation of the Congress did not validate Royal Decree-Law 1/1979 of 8 January, extending the activities of the Central Board of Quartering of Defence Forces)[65] for the indispensable period of time. The next time was in 2006 (during the mandate of José Luis Rodríguez Zapatero), because some socialist deputies voted erroneously on Royal Decree-Law 1/2006 of 20 January[66] modifying the tax rates on tobacco products, so it was not validated. A second Royal Decree-Law with some minor changes was published immediately,[67] and then in 2017 (during the government of Mariano Rajoy) Royal Decree-Law 4/2017 of 24 February amending the regime of port workers was not validated.[68]

Some additional cases of rejection have happened recently, during the mandate of Pedro Sánchez, but these situations remain rather exceptional.

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62 ARAGÓN REYES, Manuel, *Uso y abuso del Decreto-Ley. Una propuesta de reinterpretación constitucional*, Iustel, Madrid, 2016, p. 62.

63 CARMONA CONTRERAS, Ana, *La configuración constitucional de Decreto-Ley*, Centro de Estudios Políticos y Constitucionales, Madrid, 1997, p. 233.

64 TUR AUSINA, Rosario, *El control parlamentario de los Decretos-Leyes*, Centro de Estudios Políticos y Constitucionales, Madrid, 2002, p. 130.

65 https://www.boe.es/diario_boe/txt.php?id=BOE-A-1979-2433

66 https://www.boe.es/buscar/doc.php?id=BOE-A-2006-929

67 https://www.boe.es/buscar/doc.php?id=BOE-A-2006-2300

68 https://www.boe.es/buscar/doc.php?id=BOE-A-2017-1933

Examples are Royal Decree-Law 21/2018 of 14 December on urgent housing and rental measures,[69] Royal Decree-Law 27/2020 of 4 August on extraordinary and urgent financial measures applicable to local entities,[70] Royal Decree-Law 9/2024 of 23 December[71] on urgent economic, tax, transportation and social security measures, and Royal Decree-Law 10/2024 of 23 December[72] for the establishment of a temporary energy tax in 2025.

An immediate conclusion may be that the existence of fragile governments with less parliamentary support has led to the repeal of several Royal Decree-Laws in Parliament, which had been quite unusual in the past.[73]

It would be advisable for the Rules of Procedure of the Congress to regulate the consequences of a possible lack of parliamentary approval of Royal Decree-Laws[74] in detail. The non validation of Royal Decree-Law 9/2024 of 23 December left the transmission of the property of a Palace reclaimed by the Basque Nationalist Party in Paris unresolved; it was finally ratified by Royal Decree-Law 1/2025 of 28 January.

The political arena, controlled by the political parties, has transformed the rules and principles of parliamentarism, and has also subjected it to a dramatization, or staging, of debates, designed for the media rather than for discussion in the Parliament itself, according to García Roca[75] and Carmona Contreras.[76] In particular contexts of governmental weakness in Parliament, such as the end of Mariano Rajoy's term and the current situation of Pedro Sánchez, opposition and minority parties can play a leading role in parliamentary control over the executive, offering alternatives to citizens.

69 https://www.boe.es/buscar/act.php?id=BOE-A-2018-17293

70 https://www.boe.es/buscar/act.php?id=BOE-A-2020-9131

71 https://www.boe.es/buscar/doc.php?id=BOE-A-2024-26915

72 https://www.boe.es/diario_boe/txt.php?id=BOE-A-2024-26916

73 LÓPEZ PICÓ, Carles, "Una nueva era del procedimiento de conversión de los decretos-leyes en ley? De su fundamento inicial a su auge actual bajo la fragmentación parlamentaria", in *Revista CEF Legal*, vol. 270, July 2023, p. 93.

74 DE LA IGLESIA CHAMARRO, Asunción, "La "convalidación" parlamentaria del Decreto-Ley en España", en *Revista de las Cortes Generales*, vol. 44, 1998, pp. 7-61.

75 GARCÍA ROCA, Javier, "Control parlamentario y convergencia entre presidencialismo y parlamentarismo", in *Cuestiones Constitucionales*, vol. 37, 2017, p. 8.

76 CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado: separación y conflicto. XX Jornadas de Estudio del Gabinete Jurídico de la Junta de Andalucía*, FAYA BARRIOS, Antonio Luis (Coord.), Instituto Andaluz de Administración Pública, Seville, 2020, pp. 367-368.

Salas,[77] Astarloa,[78] Santolaya Machetti,[79] Carmona Contreras[80], De la Iglesia Chamarro[81] and Tur Ausina[82] have criticised the weak role of the opposition during this parliamentary procedure of validation, because the knowledge that the parliamentary groups have of the text of the regulation is limited to the publication of the Official State Gazette, since there is no express provision in the Standing Orders of Parliament on the communication of the regulation to the Chamber. Furthermore, the debate must be held following the rules concerning the debates on the whole text of a norm (amendments are not permitted, and the speaking time allowed is fifteen minutes). The parliamentary groups may later determine their position in speaking times not exceeding ten minutes each. The parliamentary procedure of Decree-Laws continues to be, therefore, a vulnerable and contradictory point of the constitutional regime of Decree-Laws in the Spanish legal system.

The validation procedure in the Parliament does not offer sufficient guarantees for parliamentary action, constituting, according to Santolaya,[83] one of the major problems for the consideration of this type of regulations as fully democratic instruments in the Spanish legal system.

Moreover, validation of Decrees-Laws is an exclusive competence of the Parliament, whose role is limited to ratifying or repealing the full Decree-Law text, in the said period of 30 days. This fact highlights out the secondary political role of the theorical chamber of territorial representation, the Senate, in the Spanish constitutional system. The Senate only enters the political arena if the Parliament decides to open the procedure of conversion in law, because during the referred period of 30 days the Parliament may decide to process them as Government Bills through the urgency procedure (article 86.3 of the Spanish Constitution). This second option is really marginal, because only around 18% of Decree-Laws are processed as Government Bills in both Chambers, allowing

77 SALAS, Javier, *Los Decretos-Leyes en la Constitución española de 1978*, Civitas, Madrid, 1979, pp. 86-89.

78 ASTARLOA HUARTE-MENDOZA, Ignacio, "Teoría y práctica del Decreto-Ley en el ordenamiento español", en *Revista Española de Administración Pública*, no. 106, 1985, pp. 141-142.

79 SANTOLAYA MACHETTI, Pablo, *El régimen constitucional de los Decretos-Leyes*, Tecnos, Madrid, 1988, pp. 82-84.

80 CARMONA CONTRERAS, Ana, *La configuración constitucional de Decreto-Ley*, Centro de Estudios Políticos y Constitucionales, Madrid, 1997, pp. 257-259.

81 DE LA IGLESIA CHAMARRO, Asunción, "La "convalidación" parlamentaria del Decreto-Ley en España", en *Revista de las Cortes Generales*, vol. 44, 1998, p. 40.

82 TUR AUSINA, ROSARIO, "La participación de la oposición en el control de los Decretos-leyes", in *Cuadernos de Derecho Público*, no. 8, September-December 1999, pp. 112-113.

83 SANTOLAYA MACHETTI, Pablo, *El régimen constitucional de los Decretos-Leyes*, Tecnos, Madrid, 1988, p. 256.

them to introduce possible amendments.[84] The number that finally became ordinary laws is very low (in some terms, hardly any).[85]

In recent years the Decree-Law has become a habitual form of legislating, transforming the Executive into an alternative legislator. The final consequence is not only a quantitative increase in Decree-Laws, but also a decrease in ordinary legislative initiatives as an instrument of the Government to legislate.[86]

6. THE AUTONOMOUS COMMUNITIES JOIN THE PARTY.

In 2002, more than two decades ago, the intuitive researcher Tur Ausina studied the viability of autonomous [regional] Decree-Laws, despite the fact that there was no express provision in the Constitution or in the Statutes of Autonomy of the regions at that time, when only the Basque Country had issued a series of Royal Decree-Laws following the serious floods of 1983.[87]

Before the reform of the Statute of Autonomy of Valencia through Organic Law 1/2006 of 10 April, the figure of the Decree-Law was not envisaged in any of the seventeen Statutes of Autonomy of the regions, and theoretically it was not possible to use this figure at the regional level of governance. This reform of the Statute of Autonomy of Valencia set a precedent and led to the successive incorporation of the instrument of the Decree-Law into regional legal systems. A new tendency to emulate the state appeared, trying to create, instead of Autonomous Communities, mini-states that replicate and duplicate the state. The use of the traditional mechanism of the law would prevent the flight of the Government from the necessary prior, general and extensive control of Parliament, which is in the essence of the parliamentary democratic system.[88]

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84 CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado: separación y conflicto. XX Jornadas de Estudio del Gabinete Jurídico de la Junta de Andalucía*, FAYA BARRIOS, Antonio Luis (Coord.), Instituto Andaluz de Administración Pública, Seville, 2020, p. 368.

85 MARTÍNEZ MARÍN, Antonio, *Un Gobierno que regula la sociedad por Decreto-Ley quebranta el Estado de Derecho*, Diego Marín, Murcia, 2021, p. 315. MARTÍNEZ MARÍN, Antonio, *Un Gobierno que regula la sociedad por Decreto-Ley quebranta el Estado de Derecho*, Diego Marín, Murcia, 2021, p. 315.

86 TUDELA ARANDA, José, "Nuevos reflejos de la debilidad del Parlamento", in *Cuadernos Constitucionales*, vol. 1, 2021, p. 97. MARTÍN NÚÑEZ, Esther, "El Gobierno legislador. ¿Una respuesta a la debilidad del Parlamento?", in CASTELLÀ ANDREU, Josep Mª and EXPÓSITO, Enriqueta (Eds.), *Contrapoderes en la democracia constitucional ante la amenaza populista*, Marcial Pons, Madrid, 2024, p. 112.

87 TUR AUSINA, Rosario, *El control parlamentario de los Decretos-Leyes*, Centro de Estudios Políticos y Constitucionales, Madrid, 2002, pp. 190-195.

88 Nevertheless, in 1983 the instrument of the Decree-Law was used five times by the Basque Government in order to give a response to the floods of that year. The legal authorisation

The region of Valencia was the pioneer (2006), with the inspiration for its legislation coming from article 86 of the Spanish Constitution. It was followed in the same year by Catalonia (2006) and then the Balearic Islands (2007), Andalusia (2007), Aragon (2007), Castile and Leon (2007), Navarre (2010), Extremadura (2011), Murcia (2013), Navarre (2010), Extremadura (2011), Murcia (2013) and the Canary Islands (2018). The 'imitation effect' also occurred in the rest of the Spanish regions; in some cases, they literally copied article 86 of the Spanish Constitution.[89]

NUMBER OF LAWS PASSED BY THE AUTONOMOUS PARLIAMENTS AND DECREE-LAWS MADE BY THE GOVERNMENTS OF THE AUTONOMOUS COMMUNITIES.[90]

	From regulation to 2019		From 2019 to June 2024	
	Laws	Decree-Laws	Laws	Decree-Laws
Andalusia	87	65	33	98
Aragon	144	35	51	41
Canary Islands	36	5	49	76

of this regional government came from the Law of the Basque Parliament 17/1983 of 8 September, allowing its use for a limited period of four months in order to compensate the consequences of the catastrophic rainfall. At that time, this solution was not questioned, nor was any appeal filed before the Constitutional Court, even if it was possible to detect some doubts of unconstitutionality because of the lack of Constitutional or Statutory legitimization. DÍAZ DE MERA RODRÍGUEZ, ANA, *Gobierno de la crisis. Uso y abuso del Decreto-Ley*, in *Asamblea. Revista Parlamentaria de la Asamblea de Madrid*, no. 27 (2011), p. 176.

89 MARCO MARCO, JOAQUÍN J. and PÉREZ GABALDÓN, MARTA, "Regulación y uso de los Decretos-Leyes en las Comunidades Autónomas: La silenciosa invasión del ejecutivo al legislativo", in *Cuadernos Manuel Giménez Abad*, no. 25, June 2023, pp. 55-56.

90 MARTÍN NÚÑEZ, ESTHER, "El Gobierno legislador. ¿Una respuesta a la debilidad del Parlamento?", in CASTELLÀ ANDREU, JOSEP Mª and EXPÓSITO, ENRIQUETA (Eds.), *Contrapoderes en la democracia constitucional ante la amenaza populista*, Marcial Pons, Madrid, 2024, p. 117.

Castilla y Leon	133	19	31	21
Catalonia	181	51	55	127
Valencia	170	53	39	78
Extremadura	85	12	35	37
Balearic Islands	147	49	54	45
Navarre	232	11	143	24
Murcia	108	13	36	30

According to these data to 2019 (inclusive) the regions made a weighted use of this figure, with a clear preponderance of the law in comparison with the Decree-Law, although after that year the trend was dramatically inverted. Only Navarre shows a clear preference for the use of the law. Some regions, such as Castilla y León, Aragon, the Balearic Islands and Murcia maintain Decree-Law use rates above 67%. However, others, especially Andalusia, the Canary Islands, Catalonia, Extremadura and Valencia, have carried out a truly abusive use of the Decree-Law, passing more Decree-Laws than ordinary laws. During the Covid-19 pandemic, the reason argued was the need for immediate economic, financial, social, health, educational and sanitary measures. After the pandemic the reasons are different, such as organizational and fiscal aspects, the incorporation of European directives, the promotion of economic activity and, more recently, matters related to drought and fire prevention.[91]

Doctrinally,[92] the concept of the "Autonomous Communities legal shielding" through Decree-Laws was coined. It consists of the abusive use of this instrument to legislate on matters that could very well be regulated by administrative

91 MARTÍN NÚÑEZ, Esther, "El Gobierno legislador. ¿Una respuesta a la debilidad del Parlamento?", in CASTELLÀ ANDREU, Josep Mª and EXPÓSITO, Enriqueta (Eds.), *Contrapoderes en la democracia constitucional ante la amenaza populista*, Marcial Pons, Madrid, 2024, pp. 117-118.

92 ARANA GARCÍA, Estanislao, "Uso y abuso del Decreto Ley", in *Revista de Administración Pública*, no. 191, May-August 2013, p. 342.

regulations of lower rank, with disastrous consequences. Citizen participation in the procedure for drawing up this kind of norm is impeded, undermining the rights of citizens and infringing, above all, their fundamental right to effective judicial protection. In this scenario, citizens will not be able to defend themselves judicially and individually against this kind of norm with the status of law; it cannot be checked by the ordinary courts (as happens in the case of mere administrative regulations) because they are only subject to control by the Constitutional Court.[93]

The recent Sentence 14/2002 of the Constitutional Court of 28 January makes the use of the Decree-Law more flexible, allowing its use in matters of an administrative regulatory nature whenever the need for a systematic approach to the regulation of the matter makes it advisable to regulate it jointly through a Decree-Law.[94]

The standardisation of this legal instrument entails an invasion of the functional sphere reserved by the Statutes of Autonomy (within the scope of their respective competences) for the regional Parliaments. If what should be extraordinary becomes ordinary, Parliament is displaced from its fundamental mission of ordering the social relations of the political community it represents, also giving a leading role to the executive in the legislative function. Parliament is relegated, and this inevitably leads to a de-parliamentarisation of the Autonomous Communities system.[95]

Additionally, only a very limited number of regional Decree-Laws have not been validated by the regional Parliaments, and a very low percentage were converted into laws through the urgent procedure. It is surprising to note the capacity shown by the regions to replicate all the defects that have been incurred at the state level, such as the issuing of singular Decree-Laws, or with the aim of shielding the decisions of the regional government from possible judicial resolutions, or of heterogeneous content ('omnibus'), or with a purely administrative nature, where an administrative regulation would have sufficed.[96]

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93 MARCO MARCO, Joaquín J. and PÉREZ GABALDÓN, Marta, "Regulación y uso de los Decretos-Leyes en las Comunidades Autónomas: La silenciosa invasión del ejecutivo al legislativo", in *Cuadernos Manuel Giménez Abad*, no. 25, June 2023, p. 59.

94 MARCO MARCO, Joaquín J. and PÉREZ GABALDÓN, Marta, "Regulación y uso de los Decretos-Leyes en las Comunidades Autónomas: La silenciosa invasión del ejecutivo al legislativo", in *Cuadernos Manuel Giménez Abad*, no. 25, June 2023, p. 59.

95 MARCO MARCO, Joaquín J. and PÉREZ GABALDÓN, Marta, "Regulación y uso de los Decretos-Leyes en las Comunidades Autónomas: La silenciosa invasión del ejecutivo al legislativo", in *Cuadernos Manuel Giménez Abad*, no. 25, June 2023, p. 69.

96 ARAGÓN REYES, Manuel, *Uso y abuso del Decreto-Ley. Una propuesta de reinterpretación constitucional*, Iustel, Madrid, 2016, pp. 127-130.

This exponential multiplication and proliferation of the Decree-Law at the regional level has been described as alarming[97] and unjustifiable[98] in such circumstances. The main consequence of this phenomenon is that the role of parliamentary debate has been weakened, and the need of supervision by the Constitutional Court appears as more necessary than ever. The consequences are even more serious than at a national level, because of the lack of procedural legitimacy of political minorities in regional parliaments to lodge appeals with the Constitutional Court. In these cases, the most frequent appeal to this tribunal is done by the President of the [regional] Government, based on competences.[99]

7. CONCLUSION.

The exceptional nature of the Decree-Law derives from the way in which it arises, as it constitutes an exception to the normal way of producing laws, which is none other than through the Parliament. Decree-Laws do not emanate from the Parliament and Senate, which are the holders of the state's legislative power, but from the Government, which in principle only has regulatory power through administrative regulations, and can only exceptionally produce this type of provisional legislation, with force of law, known as "Decree-Law".[100]

The rule of law is always a notion under construction, a concept in evolution, even in consolidated western democracies, such as Spain is today, almost half a century after the entry into force of the Constitution of 1978. Nowadays, although Spain is a solid democracy and a Parliamentary Monarchy, there are still many contemporary challenges to the rule of law in the country.

The pre-eminence of the Decree-Law represents a further step in disempowering Parliament in its entire legislative function. From the pessimistic – and realistic – point of view of Tudela Aranda, we are witnessing the crisis of the Law as the ordinary source of general norms and the expression of the political direction of a community. This circumstance is accompanied by a change in the party system and, consequently, in the governability of the state, to which

97 ARANA GARCÍA, Estanislao, "Uso y abuso del Decreto Ley", in *Revista de Administración Pública*, no. 191, May-August 2013, p. 341.

98 PORRAS RAMÍREZ, José Manuel, "El debilitamiento de las Cortes por la acción de Gobierno ¿una quiebra de la separación de poderes?", in MORENO GONZÁLEZ, Gabriel (Dir.). *El Estado del derecho en el siglo XXI. Actas del XX Congreso de la Asociación de Constitucionalistas de España*, Tirant lo Blanch, Valencia, 2024, p. 136.

99 MARTÍN NÚÑEZ, Esther, "El Gobierno legislador. ¿Una respuesta a la debilidad del Parlamento?", in CASTELLÀ ANDREU, Josep Mª and EXPÓSITO, Enriqueta (Eds.), *Contrapoderes en la democracia constitucional ante la amenaza populista*, Marcial Pons, Madrid, 2024, pp. 118-119.

100 ARAGÓN REYES, Manuel, *Uso y abuso del Decreto-Ley. Una propuesta de reinterpretación constitucional*, Iustel, Madrid, 2016, p. 57.

the actors have failed to respond. This general landscape is accompanied by a third negative factor, the weak institutional culture of Spanish politics.[101] The final result may be an explosive cocktail.

Aragón Reyes has identified the weakness of our parliament system as among the causes of this abusive use of the Decree-Law; it has drifted towards a presidentialism. The iron discipline of voting in the political parties eliminates any hint of independence of individual parliamentarians. The consequence has been a reduction in the Parliament's ability to control the government, particularly evident on this particular point. The weakness of political control over the Government means that the only hope of effective control lies in the actions of the Courts, and ultimately, in the case of Decree-Laws, in the Constitutional Court, since they are regulations with the force of law. The flexibility of the Constitutional Court's doctrine in this area has been of very little help, as it has allowed the Government and Parliament a wide margin for manoeuvre in the assessment of urgency, and has developed a very restrictive doctrine on the topics constitutionally excluded in relation to this regulatory tool.[102]

The current vitality shown by the Royal Decree-Law may not be justified as the product of a historical fatal circumstance of autocratic European regimes, neither as an unavoidable evil, because of a supposed congenital inability of parliaments to produce quick, technical and adequate answers to compelling social needs.[103]

It might be useful to establish new material limits for Decree-Laws, such as those included in the new Italian regulation, consisting of an obligation to adhere to immediately applicable measures and a uniform regulation. This would exclude Decree-Laws that reform very diverse sectors, or at least make it much more difficult for them to do so. Another possible suggestion would be to include an express prohibition on using Decree-Laws to approve budgets, extraordinary appropriations, and credit supplements. Likewise, granting parliamentary authorization to ratify or accede to an international treaty should be included among the prohibited matters.[104]

The abusive participation of executive power in the legislative process through the instrument of the Royal Decree-Law (too strong a temptation, which

101 TUDELA ARANDA, José, "Nuevos reflejos de la debilidad del Parlamento", in *Cuadernos Constitucionales*, vol. 1, 2021, p. 101.

102 ARAGÓN REYES, Manuel, *Uso y abuso del Decreto-Ley. Una propuesta de reinterpretación constitucional*, Iustel, Madrid, 2016, pp. 29-53.

103 SANTAMARÍA PASTOR, Juan Alfonso, *Fundamentos de Derecho Administrativo*, Centro de Estudios Ramón Areces, Madrid, 1998, vol. 1, p. 626.

104 SANTAOLALLA LÓPEZ, Fernando, "La reforma de los Decretos-Leyes en Italia y sus posibles lecciones en España", in *Revista de Derecho Político*, no. 98, January-April 2017, p. 41.

can call into question the checks and balances between the executive and the legislative branches) is always very risky. Academics have pointed out the risk of trivialization of the use of the Royal Decree Law, used in a routine manner to provide a legal solution to problems which are not of extraordinary urgency and need (the two conditions required by the Spanish Constitution).

Carmona has recently spoken ironically about the risk of normalization of something which is extraordinary.[105]

The final consequence has been a growing monopoly of Government over the legislative process, not only in quantitative terms (an excessive number of Decree-Laws) but also in qualitative terms because of the strong temptation for the Government to cover all kinds of issues, and all kinds of circumstances, under this legislative umbrella, especially during the last economic crisis. In this particular context, the weakness of Parliament's control during the validation procedure has become particularly worrying and enormously risky for the democratic health of the Spanish constitutional architecture, particularly from the point of view of the democratic quality of the system of normative production, especially in the case of the 'omnibus' Decree-Laws, of cross-cutting content.[106]

Governments of all political colours have fallen into the temptation of abusing the figure of the Decree-Law (unfortunately it is not the exclusive and sad legacy of only one political party).[107] Meanwhile, the Parliament has been left defenceless before the flood of regulations that have fallen upon it. The political minorities have seen their role limited to that of being mere 'voiceless witnesses' when it comes to being able to effectively control the political action of the executive power during the validation procedure in the Parliament. However, the Government has had a wake-up call because the Parliament has begun to reject the abusive use of the Royal Decree-Law (e.g. Royal Decree-Law 4/2017 on the reform of the regulations for port workers). The final consequence could not be more discouraging. It is all just a self-interested arithmetical calculation, because when the government has

105 CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado: separación y conflicto. XX Jornadas de Estudio del Gabinete Jurídico de la Junta de Andalucía*, FAYA BARRIOS, Antonio Luis (Coord.), Instituto Andaluz de Administración Pública, Seville, 2020, p. 363.

106 CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado: separación y conflicto. XX Jornadas de Estudio del Gabinete Jurídico de la Junta de Andalucía*, FAYA BARRIOS, Antonio Luis (Coord.), Instituto Andaluz de Administración Pública, Seville, 2020, p. 369.

107 It is not the exclusive behaviour of one particular political party, such as some authors pretended to argue. MARTÍNEZ MARÍN, Antonio, *Un Gobierno que regula la sociedad por Decreto-Ley quebranta el Estado de Derecho*, Diego Marín, Murcia, 2021, pp. 57-348.

sufficient parliamentary support it will not hesitate to resort to this regulatory instrument again in an abusive manner.[108]

The intensive use of the Decree-Law has a negative impact on the role of parliamentary minorities. This is because, when the parliamentary validation of a Decree-Law is processed, they are deprived of the possibility of presenting amendments and of debating them in Parliament, which is the usual procedure in the ordinary legislative process. In fact, the only possibility of this occurring when dealing with a Decree-Law is that, once it has been validated, it is processed as a draft law, a circumstance which is rare and which, in any case, is more common at the state level than at the regional level, where this option is practically anecdotal. The abuse of this figure allows certain controls to be evaded, partly due to the fact that the Decree-Law reduces procedural requirements in comparison with those required for a Bill. Its use on matters which may be regulated by mere administrative dispositions prevents the possibility of recourse to ordinary courts by citizens.[109]

The existence of strong parliamentary majorities to approve any type of source of law is not a reason to govern on the basis of Decree-Laws. The opportunity to debate the content of a norm of the importance of a Law in Parliament is an essential guarantee of democracy, regardless of whether the political party supporting the Government has a sufficient majority to pass any kind of norms without difficulty.[110]

The only imaginable solution is to strengthen the instruments of parliamentary control over the executive, and judicial action, especially by the Constitutional Court. To date, the Constitutional Court has not been able to curb the abusive recourse to this normative figure, and it would be advisable if it were more coherent with the consequences of its own doctrine (without the need to exceed its own limits as a "negative legislator").[111] The first

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108 CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado: separación y conflicto. XX Jornadas de Estudio del Gabinete Jurídico de la Junta de Andalucía*, FAYA BARRIOS, Antonio Luis (Coord.), Instituto Andaluz de Administración Pública, Seville, 2020, p. 371.

109 GESTO RODRÍGUEZ, José, *Estudio del uso o abuso del Decreto Ley por parte el Ejecutivo nacional y autonómico en la etapa democrática española*, Lekla, Madrid, 2022, p. 157. MARCO MARCO, Joaquín J. and PÉREZ GABALDÓN, Marta, "Regulación y uso de los Decretos-Leyes en las Comunidades Autónomas: La silenciosa invasión del ejecutivo al legislativo", in *Cuadernos Manuel Giménez Abad*, no. 25, June 2023, p. 69. MARTÍN NÚÑEZ, Esther, "El Gobierno legislador. ¿Una respuesta a la debilidad del Parlamento?", in CASTELLÀ ANDREU, Josep Mª and EXPÓSITO, Enriqueta (Eds.), *Contrapoderes en la democracia constitucional ante la amenaza populista*, Marcial Pons, Madrid, 2024, p. 126.

110 ARANA GARCÍA, Estanislao, "Uso y abuso del Decreto Ley", in *Revista de Administración Pública*, no. 191, May-August 2013, p. 365.

111 CARMONA CONTRERAS, Ana, "El Decreto-Ley y sus controles: Jurisprudencia constitucional y fiscalización parlamentaria", in *Las relaciones entre los poderes del Estado:*

premise should be a really independent Constitutional Court free of political influences.[112]

If the Constitution requires Parliament to carry out political oversight through the act of validation, it seems obvious to require that parliamentarians be given the necessary powers to effectively carry it out.[113]

The procedural requirements in the drafting of Bills and administrative regulations make it easier for state and regional governments to issue a Decree-Law than a simple administrative regulation. However, the force and effects of both cannot be compared, nor, above all, can the position in which citizens are placed when exercising these powers. Therefore, the Government should justify that the measures adopted to address the urgency provide a greater benefit than the harm caused by evading the procedural requirements in the drafting of government regulations.[114]

The most ironic aspect of all this, as Aragón Reyes points out, is that it would not be necessary to reform the Constitution to solve this problem, it would be enough to apply it.[115]

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112 MARTÍNEZ MARÍN, Antonio, *Un Gobierno que regula la sociedad por Decreto-Ley quebranta el Estado de Derecho*, Diego Marín, Murcia, 2021, pp. 336-347.

113 MARTÍN NÚÑEZ, Esther, "El Gobierno legislador. ¿Una respuesta a la debilidad del Parlamento?", in CASTELLÀ ANDREU, Josep Mª and EXPÓSITO, Enriqueta (Eds.), *Contrapoderes en la democracia constitucional ante la amenaza populista*, Marcial Pons, Madrid, 2024, p. 128.

114 MARTÍN NÚÑEZ, Esther, "El Gobierno legislador. ¿Una respuesta a la debilidad del Parlamento?", in CASTELLÀ ANDREU, Josep Mª and EXPÓSITO, Enriqueta (Eds.), *Contrapoderes en la democracia constitucional ante la amenaza populista*, Marcial Pons, Madrid, 2024, p. 131.

115 ARAGÓN REYES, Manuel, *Uso y abuso del Decreto-Ley. Una propuesta de reinterpretación constitucional*, Iustel, Madrid, 2016, p. 203.

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NATIONALS, INDIGENOUS PEOPLES, MIGRANTS, STATELESS PERSONS, REFUGEES AND DIASPORAS: A GLOBAL VIEW FROM INTERNATIONAL LAW

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SUMMARY: 1. INTRODUCTION. 2. NATIONALS, THE NATIONALITY AS A LEGAL STATUS. 2.1. Nationality as a link with the state. 2.2. Attribution of nationality. 2.3. Content of the legal status. 2.4. Inequality between mononationals, binationals and multinationals. 3. INDIGENOUS PEOPLES. 4. MIGRANTS. 5. STATELESS PERSONS. 6. REFUGEES. 7. DIASPORAS. 8. CONCLUSIONS. 9. BIBLIOGRAPHY.

1. INTRODUCTION.

This paper makes a comparison of the legal status of nationals, binationals, multinationals, indigenous peoples, migrants, stateless persons, refugees and diasporas using a legal-descriptive method, with the aim of corroborating the thesis of inequality among them. We are not going to compare every right in the multitude of legal statuses linked to nationality and which, within the limits of respect for human rights, each of the 193 states grant their nationals. Certainly, these statutes contain different civil, political and social rights and duties in areas so different such as social assistance, including education, health or dependency, the age of majority, the right to bear arms or the right to freedom of expression, as well as obligations, such as the military service. International law considers the regulation of all these rights, freedoms and obligations being the *domaine réservé* of each state.

We will take the status of nationals as a standard, identifying categories with an extended status (e.g. binationals), and categories with a reduced status, such as that of stateless persons, identifying a variety of possible situations marked by inequality between them. Both the rights of nationals and the possibility and extension of the rights in the case of binationals, multinationals and aliens depend on the domestic legislation of the states, as well as the rest of the situations under study with limits on human rights. The exercise of active suffrage in national elections is a very appropriate benchmark for comparisons in this area, and we will therefore focus mainly on this issue other rights and obligations that are more difficult to compare, for instance civil rights such as those related to marriage or political rights like the level of freedom of expression, or even other rights related to political participation such as passive suffrage and the possibility of standing for, or holding, political office. In any case, situations of inequality can be seen in all of them.

Focusing on the political franchise, this possibility reports to the domestic legislation of each state, which may establish or not limitations on double or multiple voting. International law does not establish limitations, so binationals are allowed to vote in two countries and multinationals in several, thus producing an inequality between different categories of people. We will also take the situation of indigenous peoples, migrants and diasporas into consideration; in these cases, we will conclude that the most disadvantaged situation is also that of *mononationals*, since indigenous peoples have the status of nationals and also have their collective rights recognised. Migrants with the nationality of the country of origin have full rights in the country of origin and often additional rights in the country of residence, which may even include a second right to vote, and diasporas, in the case of citizens with the nationality of the country of residence, have some rights recognised by the country of affection, which may include the right of return or heritage rights. We will also analyse the status of refugees and stateless persons, who are more disadvantaged than nationals. This general overview may be affected by limitations and variations that will have to be considered on a case-by-case basis.

2. NATIONALS, NATIONALITY AS A LEGAL STATUS.

2.1. Nationality as a link with the state.

In this section we will address the legal status of the citizens of a state from the perspective of international law. The terms ‘citizens’ and ‘nationals’

are sometimes used as equivalents,[1] but they are not synonymous. Nationality is the link between the individual and the state; it has the dual aspect of being a fundamental right and constituting the legal status of individuals. Citizenship is a narrower concept than nationality, being a quality possessed by the national of a given state by virtue of which he or she enjoys the effective exercise of political rights (being able to vote or stand for election) and bears obligations of the same nature (e.g. military service). Those who, for reasons of age, sex, illiteracy, racial discrimination, criminal convictions or other reasons, are deprived or suspended of their political rights, are nationals of a state but not citizens.

Furthermore, the term 'national' refers to a person's relationship with the nation when it should refer to his or her relationship with the state. 'State' is a concept that refers to the political organisation that integrates a population in a territory under one authority. 'Nation' is a historical and cultural concept that refers to a group of people who share a common language, history, culture and traditions. State and nation may not coincide, although the post-Westphalian conception of an international society composed of nation-states seems to point towards the opposite. The state may harbour different human groups within its borders living alongside a main national group, and those groups can be identified as minorities or as diasporas, and some even may aspire to be recognised as nations by themselves, some of them already enjoying such recognition in some cases in the state's domestic law. An example of a true nation-state might be Japan or Portugal, and examples of a multi-nation state with recognition in domestic law is the Plurinational State of Bolivia, which since 2009 has recognised 36 indigenous nations, or the Kurds living in Syria, although in this case without recognition in Syria's domestic law.

Public international law is in no way intrusive in the regulation of nationality, which falls within the *domaine resérvé* of the state,[2] both in the attribution of nationality and its content, i.e. the status of rights, freedoms and obligations of nationals.

2.2. Attribution of nationality.

With regard to the attribution of nationality, international law leaves it to the free and sovereign decision of the states, which determine who can hold nationality. Thus, each state grants nationality according to the criteria it freely

1 GIBNEY, MATTHEW "Denationalization" *The Oxford handbook of citizenship* (First edition). SHACHAR, AYELET, BAUBÖCK, RAYNER, BLOEMRAAD, IRENE, & VINK, MAARTEN P. (Eds.). Oxford University Press. Oxford, 2017, p. 360.

2 Art. 2.7 United Nations. (1945). Charter of the United Nations and Statute of the International Court of Justice. https://www.un.org/en/about-us/un-charter

establishes. The Hague Convention on certain questions relating to the conflict of nationality laws[3] states:

> Art. 1: It is for each state to determine under its own law who are its nationals. This law shall be recognised by *other* states in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Comparative law shows that the main means of attributing nationality by states are the rules of *ius soli* and *ius sanguinis*, or combinations of both.[4] Of lesser importance we find naturalisations, although mass immigration has turned them into tools of important population transformation. *Ex-gratia* concessions, obtained through economic investment in the country or programmes for the purchase of nationality, are of testimonial value. Although states may sovereignly determine the requirements and the way in which nationality is attributed, international law certainly does require effective nationality. Nationality cannot remain a mere formal act and must not be fictitious, i.e. there must be effective links between the national and his or her state. This was reflected in the paradigmatic *Nottebohm* case before the International Court of Justice.[5]

2.3. Content of legal status.

The legal status of nationals is defined by the domestic laws of the state of which they are nationals. It takes into account civil and political rights and also freedoms such as freedom of expression and association, as well as social, economic and cultural rights, such as the right to education, health or work, as well as obligations, a general compliance with laws and in some countries the obligation to perform military service or to pay taxes when these are not linked to residence in the country, as in the case of the United States and Eritrea. From the point of view of international law, the limit of such a status for nationals or any person, regardless of nationality, is set by respect for human rights, which are part of international *ius cogens* and which have *erga omnes* effect.[6] International

3 The Hague Conference on Private International Law. (1930). *The Convention on certain questions relating to the conflict of nationality laws*. The Hague.
https://www.hcch.net/en/instruments/conventions/details/?cid=24

4 BAUBÖCK, RAINER, ERSBØLL, EVA, GROENENDIJK, KEES., & WALDRAUCH, HAARALD (Eds.). *Acquisition and Loss of Nationality, Volume 1: Comparative Analyses*. Amsterdam University Press. Amsterdam, 2007.

5 International Court of Justice. (1955). *Nottebohm case (Liechtenstein v. Guatemala)*, Judgment of 6 April 1955, ICJ Reports 1955, 4. https://www.icj-cij.org/en/case/18

6 Based in different sources such as the United Nations General Assembly. (1970). *Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations* [Resolution 2625 (XXV)].

law includes the right to a nationality among human rights, enshrined in Article 15 of the Universal Declaration of Human Rights[7]:

1) Everyone has the right to a nationality.
2) No one shall be arbitrarily deprived of his nationality nor of the right to change their nationality.

The Universal Declaration of Human Rights has no normative value, but it has an immense political and soft law value and its content has been taken up by numerous laws and constitutions worldwide. Its content has been taken up in various international treaties, thus having the full normative force inherent to them. With the focus on ensuring the nationality of persons from childhood, this right is enshrined in the Art. 24.3 of the Covenant on Civil and Political Rights (1966)[8] and in Art. 7 of the Convention on the Rights of the Child (1989).[9] Furthermore, some articles have been recognised as international custom by international jurisprudence. The effort of international law to eliminate statelessness and ensure that every person has a nationality has its basis in the consideration that having a nationality is a guarantee of safeguarding the rights of individuals. In this assumption, the state guarantees the rights of its citizens in its territorial space and provides them with consular assistance and diplomatic protection beyond its borders. This is not always true, as there are states that persecute some of their nationals whom they consider to be enemies or politically dangerous. The Second World War provides us with the starkest examples of how some states went to the extent of persecuting and even organising the extermination of their own citizens.

Following on from the above, the nationals of each state in international society have the legal status of rights and freedoms conferred on them by the domestic law of their respective states. International law, through human rights treaties and their protection mechanisms, guarantees a minimum of rights

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https://www.un.org/ruleoflaw/files/3dda1f104.pdf, art. 53 United Nations. (1969). *Vienna Convention on the Law of Treaties.* United Nations Treaty Series, vol. 1155, p. 331.

https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, International Court of Justice. (1970). *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Second Phase, Judgment of 5 February 1970. I.C.J. Reports 1970, 3. https://www.icj-cij.org/en/case/50, International Law Commission. (2019). Peremptory norms of general international law (*ius cogens*): Draft conclusions with commentaries. *Yearbook of the International Law Commission*, 2019, vol. II, part Two. https://legal.un.org/ilc/texts/instruments/english/commentaries/1_18_2019.pdf

7 United Nations. (1948). *Universal Declaration of Human Rights.* https://www.un.org/en/about-us/universal-declaration-of-human-rights.

8 United Nations. (1966). *International Covenant on Civil and Political Rights*. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

9 United Nations. (1989). *Convention on the Rights of the Child.* https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child

for all nationals of different states in accordance with their status as persons, without regard to their nationality. Even if a state were not a party to the many conventions that recognise human rights in general or specifically (children, women, people with disabilities, minorities, etc.), it should respect those rights that have the status of *ius cogens*, whose effect is *erga omnes* and therefore all states should comply with them. In this way, nationals would be guaranteed a minimum level of respect for their rights, defined as human rights, which could be extended in their sphere of rights and freedoms by the domestic legal system, in this case in accordance with their status as nationals. Moreover, nationality confers the right to enjoy diplomatic protection of the state so that, on the basis of customary international law, the state of their nationality can demand that another state comply with international law on an state-state level. Nationals also enjoy consular protection as defined in the Vienna Convention on Consular Relations (1963) but always, in both cases, with the scope that each state determines for its nationals.[10]

The recognition of the rights and duties of nationals is different in each state. Although some states do not respect some rights and freedoms for their nationals in violation of *ius cogens*, there is no list within the UN or its specialised agencies with a classification of non-compliant states, although such classifications can be found in the sphere of civil society.[11] Certainly, reports are produced on a recurrent basis at the UN level through the Office of the High Commissioner for Human Rights (OHCHR), but they are a description of specific violations, even if they are referred to as an index.[12] Respect for human rights is a requirement for states that respect the rule of law. At the European level, these states are subject to the scrutiny of the Council of Europe through the Venice Commission and the reports of the Commission of the European Union.[13]

A comparison of national statutes can become even more complex if we consider the so-called 'sub-national' citizenships. China provides an example of inequality of rights of citizens of the same nationality: those who reside permanently in Hong Kong and Macao and permanent residents on the mainland have different status. Then there is the case of permanent residents, among other examples we can mention the Aaland islands legal regulation that allows residents to buy land and real estate on the island while their Finnish compatriots

10 United Nations. (1963). *Vienna Convention on Consular Relations*. https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-convention-consular-relations

11 International Trade Union Confederation, *Human Rights and Rule of Law Index*, Global Rights Index: Published annually by the International Trade Union Confederation (ITUC) or World Justice Project Rule of Law Index.

12 https://uhri.ohchr.org/es

13 European Commission. (2024). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2024 Rule of Law Report. European Union*. https://eur-lex.europa.eu/

cannot do so until they have obtained this right with at least five years' residence on the island. Supranational citizenships are another example of the complexity of nationals' statuses. European citizenship grants additional rights to citizens of EU member states (i.e. the right to petition the European Parliament) or extends them territorially (i.e. freedom of movement);[14] other supra-national statuses occur in the cases of Mercosur, the Nordic Passport Union, and the Commonwealth.

2. 4. Inequality between mononationals, binationals and multinationals.

We will now consider the inequality that arises between mononational, binational or multinational citizens. International law allows the possibility of dual or even multiple nationality. The Hague Convention of 1930[15] recognised the possibility of dual nationality, but its recognition was not widespread; quite the contrary, instruments were adopted to reduce this multiple nationality,[16] considering that a plurality of nationalities implied a plurality of loyalties, something that was difficult to assume in a society with conflicting national interests. This approach was modified from the 1970s onwards due to the influence of the relationship between nationality and human rights; from then on, dual nationality found considerably greater acceptance in national legal systems. Faist points out that:

> The stipulations on the loss or relinquishment of one's citizenship show similar tendencies. Some states, for instance France in 1973, Portugal in 1981, and Italy in 1992, which in the past required a person to relinquish their citizenship if they became naturalized in another state, have changed

14 The *Treaty on the Functioning of the European Union* (TFEU), which regulates citizenship of the Union in Articles 18 to 25, lists a set of rights that citizenship includes:

- Freedom of movement and residence throughout the territory of the Union.
- The right to vote and to stand as a candidate in elections to the European Parliament and municipal elections in the state of residence.
- Diplomatic and consular protection by the authorities of any of the member states, when the state of which the person in need of such protection is a national is not represented in the third country.
- The right to petition the European Parliament.
- The right of appeal to the European Ombudsman.
- Transparency and the right of access to official documents of the institutions.
- The right to write to any Community institution or body in one of the official languages and receive a reply in the same language.
- The right of legislative initiative.

15 League of Nations. (1930). *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*. Cited.

16 Council of Europe. (1963). *Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality*. Retrieved from https://www.coe.int

> their citizenship laws in this respect in various ways. Nowadays, the retention of the original citizenship is possible to a much greater degree. For their part, numerous emigration countries – e.g. Mexico, Turkey, Tunisia, El Salvador, Columbia, the Dominican Republic – have modified their citizenship laws, either enabling their nationals to become naturalized elsewhere while retaining their original citizenship, or facilitating the re-acquisition of their original citizenship, or mitigating the consequences of losing one's citizenship.[17]

The status of binationals and multinationals reports to the domestic legislation of states and dual nationality treaties. Countries such as Austria, India, Indonesia or Japan do not allow dual nationality. Other states have restrictions for binationals or multinationals on passive suffrage or on holding government posts, such as the Philippines, Egypt, Armenia and Colombia. Spain, in its dual nationality treaties with Hispano-American countries, introduces a nationality model based on the preponderance[18] of the country of residence, so the legal status of the country of residence will be that applicable to the binational, while the status of the second country remains dormant.[19]

If states' domestic legislation and dual nationality treaties allows it, citizens with dual or multiple nationality to two or more states enjoy an extended status of rights and obligations as they have full citizenship in those two or more states, in comparison to the vast majority of nationals who have only one nationality. This fundamentally advantageous situation also poses disadvantages, such as military service and tax obligations if they are linked to nationality.[20] In addition, registration obligations also arise as in the case of birth registers. A specific and representative example of the situation and its advantages and disadvantages for individuals can be found in people with Spanish nationality with a Moroccan background. This is a case of 'forced' dual nationality, as Morocco does not allow the loss of nationality in the case of acquiring a new one. Cembrero points out:

> However, some Moroccans naturalized as Spaniards operate with a *de facto* bi-nationality. The use of Moroccan documents by Spanish nationals is frequent, as they are useful to facilitate the acquisition of land or housing in Morocco, although they may entail other disadvantages such as the impossibility of being transferred to Spanish prisons in case of conviction.[21]

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17 FAIST, THOMAS, *Dual Citizenship in Europe: From Nationhood to Societal Integration*. Ashgate Publishing, Ltd., 2007, p. 14.

18 MIAJA DE LA MUELA, ADOLFO, "Convenios de doble nacionalidad", Escuela de Derecho y Economía, 1999, p. 397.

19 PÉREZ VERA, ELISA, "El sistema español de doble nacionalidad ante la futura adhesión de España a las Comunidades Europeas", *Revista de Instituciones Europeas*, 8(3), 1981, p. 700.

20 The case of the United States and Eritrea.

21 OLIVAR, JOSÉ MANUEL, "The Moroccan Diaspora in Spain", *Diaspora Review*. Amsterdam, 2024. https://doi.org/10.1163/09763457-bja10095

The disadvantages of binationals or multinationals have been reduced or eliminated in some cases through a series of bilateral treaties signed to eliminate the obligation to perform military service in two or more countries. Regarding tax obligations, a wide network of bilateral treaties has been signed to remove double taxation. With the recognition of additional rights and with a reduction close to elimination of duplicity of obligations, binational or multinational citizens are thus placed on a higher level than nationals, creating a situation of inequality. The concern of international law is not to avoid these inequalities with respect to mononationals, but to protect the rights of binationals and multinationals. In this line, Art. 17 of the European Convention on Nationality (1997)[22] states that:

> Nationals of a State Party in possession of another nationality shall have the same rights and duties as other nationals of that State Party in the territory of the State Party in which they reside.

In other words, if no restrictions are established in domestic law and in binationality treaties, international law allows binationals or multinationals to enjoy more rights than mononationals. Among those differential rights, active and passive suffrage are the clearest demonstration of this situation of inequality tolerated by international law. As we have pointed out, municipal law does not always permit this possibility, but in those cases where the laws of the states involved do not prevent it, binationals and multinationals are able to exercise the right to vote in two or more states. This marks a clear inequality vis-à-vis mononational citizens, considering that this situation goes against the principle of 'one person, one vote'.[23] With regard to passive suffrage, i.e. the capacity to be eligible for public office, this is permitted in some states for binationals or persons with multiple nationality, although in other countries there are restrictions or prohibitions.[24] Gooding and Tanasoka have studied the issue in the case of dual Australian and US citizens and conclude that it is unfair and contrary to egalitarianism for binationals to have double voting and multinationals to have

22 Council of Europe. (1997). *European Convention on Nationality*. Retrieved from https://www.coe.int

23 Which is deduced not only from the domestic constitutional law of states, but also from various instruments of international law, such as Article 21.3 of the Universal Declaration of Human Rights, which states that "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

24 Three member states of the Council of Europe (Bulgaria, Malta and Moldova) currently allow dual nationality but prohibit dual nationals from becoming Members of Parliament (MPs). In addition, Azerbaijan and Lithuania, which prohibit dual nationality, also prohibit dual nationals becoming MPs European Court of Human Rights. (2010). *Tanase v. Moldova*, Application no. 7/08. Retrieved from

https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-98428%22].

multiple voting.[25] In addition to the United States and Australia, states such as France, Belgium, the United Kingdom, Switzerland, New Zealand, Hungary or Canada make binational or multinational situations possible, with the possibility for citizens who enjoy them to exercise the right to vote in national elections in several countries.

3. INDIGENOUS PEOPLES.

In the United States, Native Indians who maintained relations with their tribe were not considered citizens until 1924,[26] while in Canada indigenous peoples were not considered full Canadian citizens until 1960. In Australia aboriginal Australians were not counted in the national census until 1967 and were excluded from many federal laws; in some states they could not vote. This situation has evolved and indigenous peoples were granted not only citizenship rights but a catalogue of their own rights to the extent that indigenous peoples can be considered to have dual citizenship in some countries.[27] International law offers various instruments for the protection of indigenous peoples, as well as *soft law* declarations,[28] Article VI of The American Declaration on the Rights of Indigenous Peoples[29] offers an example of how indigenous peoples are able

25 GOODIN, ROBERT E., & TANASOCA, ANA, "Double Voting", Australasian Journal of Philosophy, 92(4), 2014, pp. 743-758. https://doi.org/10.1080/00048402.2014.913300

26 United States Congress. (1924). Indian Citizenship Act of 1924, Pub. L. no. 68-175, 43 Stat. 253.

27 GOVER, KIRSTY, "Indigenous citizenship in settler states", *The Oxford handbook of citizenship* (First edition). SHACHAR, AYELET, BAUBÖCK, RAYNER, BLOEMRAAD, IRENE, & VINK, MAARTEN P. (Eds.), Oxford University Press, Oxford, 2017, p. 454.

28 United Nations. (1965). *International Convention on the Elimination of All Forms of Racial Discrimination.* Treaty Series, 660, 195.

https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial

African Union. (1981). *African Charter on Human and Peoples' Rights*. https://au.int/en/treaties/african-charter-human-and-peoples-rights

International Labour Organization. (1989). *Indigenous and Tribal Peoples Convention, 1989 (no. 169)*. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314

United Nations. (2007). *United Nations Declaration on the Rights of Indigenous Peoples*. https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

Organization of American states. (2016). *American Declaration on the Rights of Indigenous Peoples*. https://www.oas.org/en/sare/documents/DecAmIND.pdf

Besides the cited instruments is worthy to consider this judgement,

European Court of Human Rights. (2020). *Jonsson et al. v. Sweden* (Application no. XXXXXX/XX. https://hudoc.echr.coe.int

29 Cited.

to enjoy an additional status over the citizenship status of their nationality, considering that Indigenous peoples have collective rights that are indispensable for their existence, well-being, and integral development as peoples. In that regard, states recognize and respect the right of indigenous peoples to their collective action; to their juridical, social, political, and economic systems or institutions; to their own cultures; to profess and practice their spiritual beliefs; to use their own tongues and languages; and to their lands, territories and resources. States shall promote the harmonious coexistence of the rights and systems of different population groups and cultures with the full and effective participation of indigenous peoples.

As to whether indigenous peoples have a double vote, it reports to the consideration given to elections to their own governing bodies of each indigenous group; in any case they have a higher right of political choice than the nationals of the country. Greenland can be taken as an example, with the Indigenous Inuit having their own government for internal affairs. They also vote in national elections, in this case Danish elections, but this is not really a double national vote case.

4. MIGRANTS.

We understand the term 'migrant' to mean a natural person who does not have the nationality of the country where they have their residence. There are no international rules that make a migrant's admission compulsory, nor an international rule that prohibits the expulsion of aliens. However, there may be limits based on commitments made by accession or the signature of treaties, such as those treaties connected with their condition of refugees[30] or stateless persons.[31]

In classic international law, a minimum standard of rights was recognized to aliens on a customary basis.[32] Human rights linked to contemporary international law warrant a set of rights and freedom on the basis of the human person, without requiring a nationality or a regular stay in a state. However, the rights of aliens are generally inferior to those of nationals. Aliens in an irregular

30 United Nations. (1951/1967). The 1951 *Refugee Convention* and 1967 *Protocol relating to the Status of Refugees*.

https://www.unhcr.org/media/1951-refugee-convention-and-1967-protocol-relating-status-refugees

31 United Nations. (1954). *Convention relating to the Status of stateless Persons.*

32 United States-Mexico General Claims Commission. (1926). *Neer v. United Mexican states*, 4 R.I.A.A. 60. and eventually other recent cases with an equivalent basis, International Centre for Settlement of Investment Disputes (ICSID). (1999). *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican states*, ICSID Case no. ARB(AF)/97/2, Award of November 1, 1999.

situation do not have the right of residence or the right to work and their situation may constitute an offence with different consequences in different states. Aliens in a regular situation, beyond the rights recognised by the minimum standard and human rights, will enjoy those rights granted to aliens by each state. In Spain, Article 13.1 of the Constitution states that: "Aliens in Spain shall enjoy the public freedoms guaranteed by this Title under the terms established by treaties and the law" and Article 27 of the Spanish Civil Code states that "Aliens enjoy the same civil rights in Spain as Spaniards, except as provided for in special laws and treaties", with a specific law to define their status.[33]

Unlike tourists or travellers, aliens are supposed to be willing to reside and generally work in a state other than that of their nationality. In contrast to nationals, aliens need a residence permit to justify their stay in the country and a work or business permit to work or carry out a business activity. The status of aliens in their country of residence means fewer rights than that of nationals. Even with work and residence permits, they may encounter different types of limitations such as areas of business that are off-limits to aliens, as happens in China, or the lack of the right of alien workers to travel in the country Saudi Arabia. In addition, aliens are generally unable to exercise active and passive suffrage. However, Shaw points out that:

> … More than sixty countries worldwide allow for some resident non-citizens to vote in some local or municipal elections, but fewer than ten countries[34] allow some resident non-citizens to vote in national elections.[35]

At first sight, it could be concluded that the legal status of aliens in their country of residence is inferior to that of nationals, and this is indeed the case. However, we should consider that aliens are nationals of their state of origin, and as such they have a legal status that includes rights and freedoms comparable

33 Organic Law 2/2009 of 11 December, reforming Organic Law 4/2000 of January 11 on the rights and freedoms of foreigners in Spain and their social integration. Official State Gazette no. 299.

34 In Australia, where they able to vote in national elections if they have been registered before 1984, and Israel, where only immigrants who have arrived under the *Law of Return* but have not acquired Israeli nationality may vote in local elections. At the other end of the spectrum there are only four countries with a residence-based right to vote in national elections that does not discriminate between different citizenships. New Zealand has the most inclusive franchise of this kind with access after one year of legal residence, but still requires that candidates must be nationals of New Zealand. Malawi, also a Commonwealth Country, grants the franchise after seven years. In Chile, the residence requirement is five years and in Uruguay it is rather extensive with 15 years. Baubock, R. (2005). Expansive Citizenship - Voting beyond Territory and Membership. PS: Political Science & Politics, 38, 684-685. https://doi.org/10.1017/S1049096505050341

35 SHAW, JO, "Citizenship and the franchise", *The Oxford handbook of citizenship* (First edition). SHACHAR, AYELET, BAUBÖCK, RAYNER, BLOEMRAAD, IRENE, & VINK, MAARTEN P. (Eds.), Oxford University Press, Oxford, 2017, p. 296-297.

to the status of nationals of other states, including diplomatic protection and consular assistance. Besides their home country status, aliens also have the status of aliens in their country of residence with several rights and freedoms. In the cases indicated, although few in number, aliens are able to exercise a second right to vote in national elections. International law, for its part, is not contrary to this double right of foreigners to vote.[36] The consideration that aliens have a higher status of rights than nationals of the country of residence does not take into account the principles of social justice, nor the possible conditions of poverty or lack of opportunities in their country of origin, but is a mere formal consideration of the rights they have recognised in their status as nationals of their home country alongside the rights they have recognised as aliens in the country of residence. This consideration is consistent with the application of international law by the International Court of Justice, not subordinated to social justice as can be deduced from Articles 34 and 38 of its Statute and its case law.[37]

In a hierarchy of citizenship status, foreigners legally resident in a state other than the one of which they are nationals would have all the rights inherent to their nationality, including the right to vote and to stand for election, diplomatic protection and consular assistance, and also the rights recognised by the state of residence, which in some cases may include a second right to vote in national elections.

5. STATELESS PERSONS.

The term 'stateless person' refers to a person who is not considered by any state as its national according to its legislation.[38] International law has tried to find a solution to this problem, which is not very prevalent in the world population in numerical terms. The main instrument for this is the 1954 New

36 United Nations. (1948). Art. 21 *Universal Declaration of Human Rights.* https://www.un.org/en/about-us/universal-declaration-of-human-rights

United Nations. (1966). Art. 25 *International Covenant on Civil and Political Rights*. Treaty Series, 999, 171. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

Council of Europe. (1952). Art. 3 *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Protocol no. 1). European Treaty Series, no. 009. https://www.echr.coe.int/documents/d/echr/protocol_01_eng

37 International Court of Justice. (2005). *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005. I.C.J. Reports 2005, p. 168.

38 United Nations. (1954). *Convention relating to the status of stateless persons*. https://www.unhcr.org/what-we-do/protect-human-rights/ending-statelessness/un-conventions-statelessness

York Convention relating to the Status of Stateless Persons[39] and the 1961 Convention on the Reduction of Statelessness.[40]

In a hierarchy of rights, asylum seekers and stateless persons would be ranked lower than nationals. Unlike foreigners, stateless persons do not have a nationality and thus the legal status attached to it, which also deprives them of a state's diplomatic protection and consular assistance. The Convention relating to the Status of Stateless Persons grants them at least the same degree of rights as aliens in terms of the right to gainful employment, the right to engage in self-employment, access to public education other than elementary education, housing, and freedom of movement with better conditions than aliens regarding their expulsion from the territory, which is more restrictive. They have the same rights as nationals regarding public elementary education and public relief.

6. REFUGEES.

A refugee is a person persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion who is outside the country of their nationality and is unable or, owing to fear, unwilling to avail themselves of the protection of that country; or who, not having a nationality and being outside the country of their former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.[41] The Convention governing the specific aspects of refugee problems in Africa gives a broader concept[42] and could be even broader if those suffering from climate change as refugees are considered; this approach is now part of the social and political debate, leading to very high numbers of people. Contemporary international law that gained its definitive momentum with the Second World War, has paid great attention to this subject from the very beginning, as one of the

39 United Nations. (1954). *Convention relating to the Status of stateless Persons*. Adopted on 28 September 1954, entered into force on 6 June 1960. United Nations Treaty Series, 360, 117. https://www.unhcr.org/protection/statelessness/3bbb25729/convention-relating-status-stateless-persons.html

40 United Nations. (1961). *Convention on the Reduction of statelessness*. Adopted on 30 August 1961, entered into force on 13 December 1975. United Nations Treaty Series, 989, 175. https://www.unhcr.org/protection/statelessness/3bbb286d8/convention-reduction-statelessness.html

41 Art. 1 United Nations. (1951). *Convention relating to the status of refugees*. https://www.unhcr.org/3b66c2aa10

42 Organisation of African Unity. (1969). *Convention governing the specific aspects of refugee problems in Africa*. https://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html

consequences of that global confrontation was the thousands of refugees who fell victim to it.[43]

In terms of their status, the situation of refugees is very similar to that of stateless persons. Thus, once they are granted asylum and their refugee status is recognised, their rights apply to them, the minimum ones being set out in the 1951 Convention on the status of refugees. Refugees have the nationality of their state of origin, but in practice their status as persecuted persons can deprive them of all or some of their rights, such as diplomatic protection and consular assistance, although the casuistry is very different. The personal and political situations of refugees can be very different and affect their legal status in the country of their nationality, so the situation of Ukrainian refugees who are supported by their state government is not the same as that of Iranian dissidents who are persecuted by the state apparatus. The Convention accords refugees at least the same degree of rights as aliens in relation to the right to gainful employment, the right to engage in self-employment, access to public education other than elementary education, housing, and freedom of movement with better conditions than aliens regarding their expulsion from the territory, which is more restrictive, especially as they are recognised as having the right to *non refoulement*,[44] but they have the same rights as nationals regarding public elementary education and public relief.

Although refugees do not lose their legal status as nationals, their situation of vulnerability and persecution generally makes it difficult for them to exercise their right to vote in the country of which they are nationals, especially if they must first register or exercise their right to vote at consular offices. In any case, the casuistry can be very varied.

7. DIASPORAS.

The term 'diaspora' has several meanings, its use in academic papers became popular in the 1980s.[45] It refers to groups of people of a certain numerical size with strong affective ties to a country from which they or their

43 Besides the creation of the UN High Commissioner for Refugees, we would point out United Nations. (1951). *Convention relating to the status of refugees*. https://www.unhcr.org/3b66c2aa10 and its United Nations. (1967). https://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf. Also the *New York Declaration on Refugees and Migrants*, UN General Assembly 2016.

44 Art. 33 United Nations. (1951). *Convention relating to the status of refugees*. Also cited in soft law art. 3.UN General Assembly Resolution 2312 of 1967.

45 COLLYER, MICHAEL, "Diasporas and transnational citizenship" *The Oxford handbook of citizenship* (First edition). SHACHAR, AYELET, BAUBÖCK, RAYNER, BLOEMRAAD, IRENE, & VINK, MAARTEN P. (Eds.), Oxford University Press, Oxford, 2017, p. 579.

ancestors originate. The legal status of diaspora members can be very varied, including nationals of the country of residence with a single nationality, binationals with the nationality of the country of residence and the country with which they have emotional ties, nationals of the country of origin with regular or irregular status, and even stateless persons and refugees.

Even in cases of greater legal disaffection with the diaspora's country of origin, nationals of the country of residence have rights in the country of origin that are maintained even in cases where the nationality of the diaspora country has been lost. These may include the right of return, the right to a speedy recovery of the original nationality or the nationality of one's ancestors, rights for descendants, or cultural and heritage-related rights. An example of this can be seen in the activities of the Office of the High Commissioner for Diaspora Affairs of the Republic of Armenia. This is not a case of a catalogue of rights (although a right to repatriation is inferred) but activities to be carried out with the Armenian diaspora regardless of whether or not they retain Armenian nationality.[46]

1. Encouraging state-centred identity formation in the Diaspora
2. Cultivating strong Diaspora ties with the homeland through partnerships, programs and events
3. Supporting youth leadership and community organizations in the Diaspora
4. Consolidating and involving Pan-Armenian organizations in Armenia's development.
5. Bringing Armenian professional potential to bear on building and strengthening institutions in Armenia.
6. Promoting repatriation and ensuring a smooth integration process for repatriates.
7. Assisting Diaspora investors and philanthropists with their projects in Armenia.
8. Mapping the Diaspora's professional potential.
9. Keeping the Diaspora informed regarding current events in Armenia and in Diaspora communities.

The Ministry of Diaspora Affairs of Israel is entrusted with fostering the connection between Jewry worldwide and the state of Israel through joint activities and ongoing dialogue, since the Israeli government sees itself as being responsible for all Jews worldwide, whether they live in Israel or elsewhere. The Irish Emigrant Support Programme includes the *Back for Business* initiative, which supports returning Irish entrepreneurs. Portugal has a *Return of*

46 http://diaspora.gov.am/en

Emigrants programme with tax benefits and financial support. There are similar programmes in Italy and Lithuania.[47]. The *Polish card* granted to ethnic Poles recognises a number of rights, including a residence and work permit.

Diaspora members, even if they only have the nationality of the state of residence, also enjoy rights, benefits and assistance from their country of origin in addition to those of their compatriots. In any case, in order to be able to exercise the right to vote in the country culturally and emotionally linked to the diaspora, they need to hold the nationality of that state.

8. CONCLUSIONS.

International law and municipal systems mean that people find themselves in different situations with respect to the legal statuses connected with their nationality. They can be nationals, but also binationals or multinationals, and thus enjoy the rights and also face the obligations inherent in each legal consideration linked to the corresponding nationality. With regard to obligations related to military service, these have been rationalised through bilateral or multilateral treaties. The concurrence of fiscal obligations has been redirected by establishing the domestic law of states in most cases, with residence as a connecting point for taxation and setting up a whole network of conventions to avoid double taxation. Among political rights, the possibility, sometimes limited, of exercising the right to vote in several states stands out, marking a situation of inequality vis-à-vis mononationals who can only express their political will in one state.

Following a period with limited rights and sometimes without the right to vote, indigenous peoples have a catalogue of rights, especially collective rights, which extends the rights inherent to their status as nationals. They can participate in the elections of their state of nationality and also in the election of some indigenous representative structures. In Greenland the Inuit have their own government for internal affairs and they also vote in Danish elections, although it is not a double vote.

Migrants can have different statuses as they can only hold the nationality of the country of origin, dual nationality, or only the nationality of the state of

47 In the Americas, Mexico has the *Somos Mexicanos* programme to support returnees with employment, health and education, Colombia the *Colombia Nos Une* programme with incentives for scientists and entrepreneurs, while Argentina has the *Raices* programme for scientists and academics who wish to return. Chile also offers benefits for returning professionals and academics. In Asia, China offers incentives for Chinese scientists, engineers and entrepreneurs abroad; India offers an 'Overseas Citizen' programme and the Philippines supports migrant workers who wish to start entrepreneurship on their return, Africa has a 'Year of Return' programme to attract the African diaspora, and Rwanda a reintegration programme for citizens trained abroad.

residence. Those with only the nationality of the country of origin may be in a regular or irregular situation, or even be refugees or stateless persons. In the case of migrants, who only have the nationality of the country of origin, they may have a status that grants them rights over and above those already recognised as human rights, and may even have the right to vote in local elections. There are countries where foreigners have the right to vote in local, regional and even national elections, such as New Zealand, Malawi, Chile and Uruguay.

Stateless persons are persons without the legal status of nationals because they have lost their nationality. International law grants them a status similar to that of aliens, and in some cases superior to that of aliens, such as the right to elementary public education and public relief at the level of nationals. Except in cases where the right to vote is recognised for aliens, and even in cases with additional limitations linked to their lack of nationality, they do not have the right to vote in any state.

Refugees are persons who retain their status as nationals in some cases while in others they do not; the circumstances can vary widely. In the case of maintaining their status as nationals, they may have the right to vote in their country of origin and have rights similar to those of stateless persons in their country of residence with special protection of *non-refoulement* that reserves them against expulsion, with certain limitations in the case of being based on reasons of public order.

Diasporas consist of individuals who may find themselves in very different situations with regard to their legal status. Even in cases of greater legal disaffection with the diaspora's country of origin, nationals of the country of residence have rights in their country of origin that are maintained, even in cases where the nationality of the diaspora country has been lost.

This paper shows that there are different legal statuses for the above-mentioned cases and, in particular, inequalities in voting rights that are tolerated under international law, but which are contrary to the democratic principle of 'one person, one vote', and in general terms against the equal rights of individuals.

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NEGATIVE EFFECTS OF REGULATORY FRAGMENTATION ON SOCIAL PROTECTION OF MINISTERS OF RELIGION IN SPAIN[1]

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SUMMARY: 1. INTRODUCTION. 2. SUBSTANTIATION OF THE INITIAL THESIS: APPRECIATION AND REASONING EXERCISES AT THE RELATIONAL LEVEL THROUGH DIFFERENT APPROACHES TO THE PROBLEM. 2.1. Norm-norm relations. *2.1.1. Accelerated review: regulations on social protection for ministers of religion in Spain. 2.1.2. General conceptualization of fragmentation and particular application.* 2.2. Norm-subject relations. *2.2.1. Conceptualization: disaffection towards the legal domain. 2.2.2. Hypothesis in application: disaffection of members of religious denominations.* 2.3. Subject-subject relations. 3. PROPOSAL FOR FUTURE LAW AND REGULATION. 4. BIBLIOGRAPHY.

1. INTRODUCTION.

This research is based on an initial thesis: the current regulation on social security for ministers of religion in Spain is fragmented and this fragmentation

1 This study is part of the research project PID2023-147184NB-I00, funded by the Spanish Ministry of Science, Innovation and Universities (*Ministerio de Ciencia, Innovación y Universidades*), through the State Research Agency (*Agencia Estatal de Investigación*, AEI) and the European Social Fund Plus (FSE+), under the call for Knowledge Generation Projects 2023, within the framework of the state Programme for the Promotion of Scientific and Technical Research and its Transfer, of the state Plan for Scientific, Technical and Innovation Research 2021-2023. The project, entitled "Asymmetries in the Financial, Asset, and Social Security Regime of Religious Denominations" (*Asimetrías en el régimen financiero, patrimonial y de la seguridad social de las confesiones religiosas*), is led by Main Researchers Prof. Dr. Alejandro Torres Gutiérrez and Prof. Dr. Óscar Celador Angón.

is generating negative effects. Narrowing the object of this research down to the negative effects is nothing more than a way of promoting the agenda, establishing a discursive framework and, as an exercise in clarity and honesty, anticipating the thesis that guides this work.

It is widely known that the world is undergoing a process of political change. New and old political actors are gaining relevance on the Spanish and European scene. The role that religious denominations and ministers of religion play in the political landscape of many countries is well known. Consider certain Latin American countries, for example, where they have taken sides in the political arena either as active participants or as sources of destabilization.

Far from falling into the trap of believing that Spain and Europe are immune to such phenomena, and with the conviction that indifference to the needs of these organizations and their members may pose a threat to the rule of law, we hereby present, defend, and proclaim the need for governance in the management of religious diversity. We hold the view that accommodating religious denominations within a democratic institutional framework, governed by state neutrality and cooperation, is the most suitable model in a state governed by the rule of law. This research addresses how social protection is handled in Spain, a matter that has a particular impact on the personal sphere of ministers of religion.

Insofar as the political domain has always been, and remains, inextricably linked to the legal one, the relevance of this research can be situated within the central theme of this collective work: regulatory fragmentation leads to serious negative effects, as we will see, and therefore constitutes a challenge for the rule of law in Europe.

That said, I should acknowledge that these effects of regulatory fragmentation can be approached from several disciplines. Knowing, explaining and understanding *in totum* the impact that the current regulation has on ministers of religion, members of religious denominations and society in general would require a multifaceted approach, which we cannot cover here either because the scope of this study is limited, or because of the intellectual limitations of the undersigned.

In this chapter we will propose three approaches to the regulation of the social security situation of ministers of religion in Spain, with an emphasis on its fragmentation: focusing on the legal aspect of the question, orienting ourselves towards a description of the problem and putting forward proposals for a solution in law.

As we have already said, we start from a particular thesis, which we have arrived at after initial observation, enquiry, reasoning and further observation that has led us to detect the fragmented nature of the regulation and to ask ourselves about its effects. In order to substantiate this first spark of spontaneous

reasoning on law, we will carry out some exercises of appreciation and reasoning, mainly centred on an area that we dare to call meso, intermediate or relational.

We therefore propose three epistemological approaches: to the relations between the norms that regulate the social security of ministers of religion, to the relations between these norms and the subjects involved, and to the relations in a legal order between the different subjects involved. We will leave the interpretation of the rules at the micro level for another time, as well as the conventions, structures and global trends in the field of social protection and the relations between the state and the religious denominations at the macro level. What we understand and practice here are approaches at diverse levels. In the aggregation of norms and subjects: from the norm-centred approach, aggregating norms and subjects, to the approach that aggregates all norms, the legal system, and all subjects (society). We situate the study of legal values at this highest level, since, although they permeate all norms, values are what inspire the legal system, and it is at this level where their true role lies.

We will try, as far as possible, to ensure that these proposals go beyond the simple compilation of regulations and recognition of the legal panorama, as simple manifestations of positive knowledge, in order to detect and expose clearly and precisely that the fragmentation of the regulation is having negative effects on the lives of the subjects involved.

In a cursory manner, our first approach will help us to detect and characterize the legal problem we are dealing with, while the second will help us to understand a specific facet of the effects of the problem – disaffection with the legal domain –, while the last approach will help us to suggest proposals for future laws. Through these approaches we intend to contribute to a tranquil and fruitful academic debate, materially orienting the script to the solution of the conflict.

2. SUBSTANTIATION OF THE INITIAL THESIS: APPRECIATION AND REASONING EXERCISES AT THE RELATIONAL LEVEL THROUGH DIFFERENT APPROACHES TO THE PROBLEM.

2.1. Norm-norm relations.

The first approach I propose is to focus on the rules that regulate the social security situation of ministers of religion in Spain. As we have said, we are not going to subject these rules to interpretation, insofar as their specific content and nature is not our field of research. Here we will deal with their place and, in particular, with the relationship that these rules have with each other and with the legal system.

Before addressing the approach, we will briefly review the regulations concerning the social security situation of ministers of religion in Spain. This section is primarily descriptive but it will serve to frame the core issue of this research: the current state of these rules within the legal system is one of fragmentation. Following this, we will proceed to define a general concept of regulatory fragmentation and conduct an applicative analysis to determine whether this notion can be applied to the current state of the rules in this area. The objective of this initial approach is to establish a working definition that allows us to characterize what we preliminarily identify as the pathology of regulatory fragmentation.

2.1.1. Accelerated review: regulations on social protection for ministers of religion in Spain.

The regulation in this area is based on two constitutional precepts, which are at the core of different sectors of the legal system: Social Security and the Ecclesiastical Law of the State,[2] our field of study is situated at the intersection of these sectors.

On the one hand, art. 41 of the Spanish Constitution (SC), states that "the public authorities shall maintain a public Social Security system for all citizens that guarantees sufficient social assistance and benefits in situations of need". On the other hand, paragraphs 1 and 3 of art. 16 of the SC, state, respectively, that "freedom of ideology, religion and worship of individuals and communities is guaranteed" and that "public authorities shall take the religious beliefs of Spanish society into account and shall consequently maintain appropriate cooperation with the Catholic Church and the other confessions".

The general framework of Social Security is regulated in Royal Legislative Decree 8/2015 of 30 October, approving the revised text of the General Law on Social Security (LGSS), while relations between the state and religious confessions are regulated, on the general side, in Organic Law 7/1980 of 5 July, on Religious Freedom (LOLR), and, on the specific side of each confession, in the 1979 Agreements between the Holy See and the Spanish state, and the state Cooperation Agreements with the Federation of Evangelical Religious Entities of Spain (FEREDE), the Federation of Israelite Communities of Spain[3] and the

2 Some authors dispute that this sector of the legal system can be classified as an independent branch of Law, reasoning that what has been called state Ecclesiastical Law should be redefined. LOYOLA SERGIO, Ander, "Crítica a la autonomía del derecho eclesiástico del Estado", *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 67, 2025, pp. 47-48: "We are convinced that it is obligatory to reconfigure the traditional consideration that has been given to the autonomy of the discipline on the material basis of the constitutional provisions and the new guidelines that predetermine the validity of a whole system of rights and freedoms of a secular nature, with a view to dedicating a new place to state Ecclesiastical Law as a norm and science".

3 Currently under the name of *Federación de Comunidades Judías de España* (Federation of Jewish Communities of Spain).

Islamic Commission of Spain (CIE). Likewise, although neither at the same nor at a similar level, certain religious confessions enjoy the declaration of "well-known roots", referred to in arts. 7 and 8 of the LOLR.

Moreover, this general framework is supplemented by government regulations. Thus, in order to complement this accelerated compendium of regulations in this intersection between the two sectors of the legal system, we can include the plurality of royal decrees that regulate either the Social Security system in general[4] or the social protection of ministers of religion.[5] We have chosen not to overwhelm the reader and to gather these regulations together in a footnote. In addition, Royal Decree 3325/1981 of 29 December incorporates religious men and women of the Catholic Church into the Special Social Security Scheme for Self-Employed Workers (RETA), the only group with the same or similar characteristics to have this status.

However, and above all, it is worth mentioning the following point in this regulatory panorama: the absence of rules regulating the social security of ministers of religion of religious denominations that do not have a royal decree that assimilates their ministers of religion as employees.

2.1.2. General conceptualization of fragmentation and particular application.

Having made a quick but sufficient review of the regulations, we now move on to conceptualization. The logical process employed has been to formulate a concept of fragmentation in the abstract, in order to subsequently specify its

4 Royal Decree 84/1996 of 26 January, approving the General Regulations on the registration of companies and affiliation, registration, deregistration and variations of workers' details in the Social Security system, as well as Royal Decree 2064/1995 of 22 December, approving the General Regulations on Contribution and Settlement of other Social Security Rights.

5 On the one hand, as regards ministers of religion of the Catholic Church, Royal Decree 2398/1977 of 27 August, which regulates social security for the clergy, assimilates diocesan clergy of the Catholic Church as employees for the purposes of their inclusion in the General Social Security Scheme, and the Order of 19 December 1977 regulates certain aspects relating to the inclusion of diocesan clergy of the Catholic Church in the General Social Security Scheme. In addition, Royal Decrees 369/1999 of 5 March, 822/2005 of 8 July, 176/2006 of 10 February, 1614/2007 of 7 July and 1614/2007 of 7 February regulate certain aspects relating to the inclusion of the diocesan clergy of the Catholic Church in the General Social Security Scheme. RD 1614/2007 of 7 December does the same, respectively, for the ministers of religion of the churches belonging to the Federation of Evangelical Religious Entities of Spain, the clergy of the Russian Orthodox Church of the Moscow Patriarchate in Spain, the religious leaders and imams of the communities belonging to the Islamic Commission of Spain, and the members of the religious order of Jehovah's Witnesses in Spain. The ministers of religion of the Communities belonging to the Federation of Jewish Communities of Spain are assimilated as employees under the same conditions that the current legislation establishes for clergymen of the Catholic Church, *ex* art. 5.d of Law 25/1992.

characteristics with regard to the regulations on the social protection of ministers of religion in Spain.

The idea that runs through this study and the quality that we attribute to this legal framework is that of fragmentation: what is fragmented is that which is not concentrated. What is fragmented is divided excessively, however much the parts are connected to each other, can be grouped into sectors, and however much the system has instruments, in a broad sense, that fill gaps and order it. Fragmentation is also the state of deconcentration, the obstacle to reason that hinders prudence and damages justice. In certain circumstances, fragmentation can be a symptom of the de-rationalization of the legal system as an expression of the undermining of legal certainty by questioning the predictability of rules. This sets the stage for legal artifices and poor regulatory technique, as well as to the battle of interests which, as a result of maladministration, ends up shaping an asymmetrical regulation. Fragmentation is thus understood as a state of rules that is *a priori* undesirable, unless it can be justified for reasons of a higher order. Let us go through each of these statements.

We affirm that the regulation on social security of ministers of religion in Spain is fragmented and divided, reaching this conclusion through the simple inductive inference resulting from observing, with a broad perspective, the range of rules that regulate the social protection of ministers of religion. Each religious denomination has its own regulations, and some even not having any.

It could well be maintained that the Social Security system, although divided, is connected, in such a way that, starting from certain constitutional precepts, a number of rules have been approved, all of which are woven together by the unitary, coherent and complete framework that is the legal system; consequently, the regulations we are referring to are not fragmented but connected to each other. In such a case, we would be assigning characteristics to specific sectors of the legal system as a whole, which would make this type of analysis useless. The ideal characteristics of the legal system may well be challenged by the fragmentation of parts of the system. Indeed, fragmentation may well serve as a wake-up call to the idea that such characteristics are materially far from the ideal.

We apply the same reasoning to reject the possibility of grouping the parts into sectors, in addition to the fact that the act of categorizing the sectors of the system (a form of systematization and the result of the rationalization of the system) can, like all good human acts, be subject to better judgement.

Note how we maintain that what is fragmented is excessively divided. Naturally, the legal system is made up of rules, sources of law, divided by concepts with the status of legal principles. The rules are divided according to hierarchies or competences, so this means we cannot describe the whole legal system as fragmented. This is where the service of the instruments for the integration of

gaps and organization come into play. However, this function does not detract from the reasoning that excessive division leads to fragmentation when these instruments of integration serve their purpose inefficiently.

We also maintain that fragmentation constitutes an obstacle to reason. We put forward this value judgement as an axiomatic proposition, on the understanding that the rule of reason in Law, as an ideal good, is achieved by its expansion to all sectors and cases of the legal system. Therefore, wherever excess occurs or is practised, reason is obstructed and, therefore, prudence is hindered and justice is damaged. The legal framework hastily set out earlier in this paper is a good example, for the undersigned, of how fragmentation is an obstacle to reason: moderation that turns into excess; regulatory fragmentation, generating distinctly different and asymmetrical regimes, and excluding certain ministers from social security, which leads to a *de facto* unjust situation in Law.

We even maintain and defend that, in certain circumstances, excessive division can end up leading to unreason and nonsense, to the de-rationalization of the legal system and the ultimate stripping of its meaning. These major evils are illustrated in the harm caused to legal certainty[6] and a rupture between the rule and the feeling of predictability that it generates in citizens. This happened to the clergy of the Romanian Orthodox Church in Spain, who had to face the apparently coordinated and surprising *ex officio* review of their registration in the General Social Security Regime (RGSS) as assimilated to salaried workers, at the time undertaken in application of Royal Decree 822/2005 of 8 July regulating the terms and conditions of inclusion in the General Social Security Scheme for clerics of the Russian Orthodox Church of the Moscow Patriarchate in Spain.[7]

Continuing with the notion of greater evils, this situation of fragmentation is a favourable scenario for a system that is fertile in legal artifices and deficient regulatory technique. This is how we define and qualify it through different legal conflicts that have arisen in this area, whose origin we detect in this fragmentation combined with regulatory deficiency.

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6 According to article 8.3 of the EC and, as defined by the Constitutional Court, for many, in its judgement no. 27/1981, of 20 July, Legal Basis 10, legal certainty is the "sum of certainty and legality, hierarchy and publicity of regulations, non-retroactivity of what is not favourable, interdiction of arbitrariness". In the field of European Union Law, according to the doctrine of the CJEU and, for example, its Judgement of 25 April 2024, Joined Cases C-309/22 and C-310/22, paragraph 96, "the principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law".

7 VIDAL GALLARDO, Mercedes, "Seguridad Social de los ministros de culto y dirigentes religiosos de las minorías religiosas en España", *Estatuto jurídico de las minorías religiosas sin acuerdo de cooperación*, TORRES GUTIÉRREZ, Alejandro y CELADOR ANGÓN, Óscar (Coords.), vol. 1, Dykinson, Madrid, 2024, pp. 337-339.

For instance, the annulment – by Supreme Court judgement of 13/11/2017[8] – of the 2nd Additional Disposition (DA) included in RD 839/2015 of 21 September,[9] in amendment by addition – in RD 369/1999 of 5 March – on the assimilation of ministers of religion of the FEREDE as employees, for violating the right to equality of art. 14 of the SC and the prohibition of discrimination of art. 14 of the ECHR, when enabling Evangelical ministers, in conditions of inequality in comparison with Catholic clergy, to accredit having exercised the activity at a time prior to the entry into force of the regulation in order to facilitate their access to contributory benefits.[10]

Another element to take into account is the need for the issuance of RD 1384/2011 of 14 October, a government regulation that, in implementation of art. 1 of the state Cooperation Agreement with the Islamic Commission of Spain, approved by Law 26/1992 of 10 November 1992, intended to end the blockade in this organization which, *de facto*, had prevented certain imams from benefiting from their assimilation as employees. This was due to the organization's refusal to integrate certain duly registered Islamic communities and federations into its ranks, as the only interlocutor legally recognized by the state. This is a legal artifice, a state interference, whether justified or not, in the autonomy of the confessions that has been encouraged by past decisions to fragment the social protection system. It had to be resorted to due to the Social Security regulations, with a deficient regulatory technique, which in the absence of the certification referred to in art. 2 of RD 176/2006 made it impossible in Law to recognize the *de facto* situation of imams whose organization, for reasons that we will not go into here, had not been integrated into the CIE.

Also, consider the needs that may arise to update the conditions of assimilation of ministers of religion as employees. These updates which, due to fragmentation, would have to be undertaken individually, as had already been done by RD 1613/2007 of 7 December, which modifies RD 2398/1977 of 27 August, which regulates the Social Security situation of the Clergy.

Then there is the battle of interests of the non-Catholic religious denominations to raise their issues on the political and administrative agenda, in

8 Supreme Court, Chamber III, no. 1712/2017, 13/11/2017, ECLI:ES:TS:2017:3988.

9 As stated in the explanatory memorandum to RD 839/2015 of 21 September, the incorporation of this additional regime for the recognition of periods prior to the provision and entry into force of RD 369/1999, of 5 March, is due to the need to adapt the national legal system in the light of the ECHR judgement of 3 April 2012 (*Manzanas Martín v. Spain* case).

10 CAÑAMARES ARRIBAS, Santiago, "La jurisprudencia de los tribunales españoles sobre la pensión de jubilación de los ministros de culto", *Foro, Nueva época*, 23, 2, 2020, p. 361: "Undoubtedly this pronouncement cast uncertainty on the possibilities of retroactive contribution by this group, revealing an absence of regulation that should be made up for by the administration through the analogical application of the regime applicable to secularized Catholic priests and religious persons".

a sort of neglected pluralism that is always dominated by the Catholic Church. As an illustration, ministers of religion belonging to the Orthodox Church of Romania still do not have a royal decree for their assimilation as employees, while those belonging to the Russian Orthodox Church of the Moscow Patriarchate in Spain do, even though the former outnumber the latter in Spain.[11]

In the final analysis, this brings us to the conclusion of our last postulate, the *a priori* undesirability of a fragmented state of norms. We reach this conclusion by means of a syllogism based on the above; fragmentation leads to the de-rationalization of the legal system, the use of legal artifices, deficient normative technique, and the creation of asymmetries in the legal regime of religious minorities; if what causes these effects is undesirable, then fragmentation is undesirable. Note how we qualify and say that reasons of another order can motivate and justify the fragmentation of the norms, which we cannot deny because the logical process of our reasoning does not allow us to reach such a conclusion. What we have qualified in general terms, we can categorize here in particular terms: the fragmentation of regulations on the social security of ministers of religion in Spain is undesirable because it is generating negative effects.

2.2. Norm-subject relations.

In this second approach, we shift the focus from the norms, their place in the legal system and their relations, to the relations between those norms and the subjects involved. These are the ministers of religion, their relatives, the confessions, worshippers and the administration.

We have defined the concept of normative fragmentation and postulated that it is a harmful state. Through this second approach, we will try to characterize what we see as a symptom of this fragmented state of norms. We will not deprive this phenomenon of its multi-causality, but we will maintain the guiding thread of this study around the negative effects of normative fragmentation.

The approach that we propose is based on the idea of disaffection, in a preliminary assessment that the current state of the rules described above can lead to such a feeling in the subjects involved. The methodology we will employ in

11 BALTARETU, David, "Las Iglesias Ortodoxas en España y su camino hacia el pleno reconocimiento jurídico", *Laicidad y libertades. Escritos Jurídicos*, 2019, pp. 123-124, notes that, in 2019, of the 213 Orthodox parishes in Spain, 125 are Romanian, belonging to the Romanian Orthodox Bishopric of Spain and Portugal. VIDAL GALLARDO, Mercedes, "Informe sobre régimen de la Seguridad Social de los ministros de culto y religiosos de las confesiones sin acuerdo en España", *Libro blanco sobre el estatuto de las confesiones religiosas sin acuerdo de cooperación en España*, TORRES GUTIÉRREZ, Alejandro (Coord.), Tirant lo Blanch, Valencia, 2022, p. 364, points out that 105 of the 107 Orthodox ministers of religion, registered and with the power to carry out actions with civil effects, were Romanian.

this approach will consist of an initial theoretical conceptualization of the notion of disaffection, paying special attention to its legal dimension. Subsequently, and for reasons that make it impossible for us to undertake fieldwork, we will proceed using the logical-normative method, trying to represent ministers of religion without social security, and we will review the positions of minority religious confessions in relation to the social protection of their ministers of religion on the basis of academic literature. All this, in order to ascribe or discard disaffection as a potential feeling that the current fragmented state of the rules can provoke in the subjects involved.

2.2.1. Conceptualization: disaffection towards the legal.

The approach we propose to the concept of disaffection in order to bring it into the legal sphere begins in the area of sociology and political science. These disciplines have dealt with this concept and provided various definitions.

It has been said that political disaffection is a feeling of distrust and alienation, different from support and trust, which is related to a citizen's feeling of being part of the process and having a predisposition to participate in it, as well as the feeling of inefficiency, cynicism and lack of trust. It is a concept of a multidimensional nature, whose analysis requires sophisticated techniques.[12] We thus situate disaffection as that which "goes beyond disagreement with concrete decisions taken (...). But it does not go as far as delegitimizing the system or actively mobilizing to defeat it".[13]

Here we will adopt this definition and, in order to study the disaffection of ministers of religion of religious denominations in Spain, we will use the framework of dimensions of political orientation used by Almond and Verba, referring, in our case, to internalized aspects of objects and relations of a legal and administrative nature.[14]

The two authors used these dimensions in relation to political objects in order to characterize three types of political culture. In our (modest) case, we will only take the dimensions of political orientation that they propose, considering that this will allow us to dimension the orientation of ministers of religion, as

12 MEGÍAS, Adrián, MORENO, Cristina and VILLAPLANA, F. Ramón, "Desafección política: una propuesta de reconceptualización", *Revista Internacional de Pensamiento Político*, 19, 2024, pp. 305-326.

13 BOTELLA CORRAL, Joan, "Desafección política", *Enciclopedia de las Ciencias Morales y Políticas para el siglo XXI: Ciencias Políticas y Jurídicas (con especial referencia a la sociedad poscovid 19),* Real Academia de Ciencias Morales y Políticas, Boletín Oficial del Estado (BOE), Madrid, 2020, p.202.

14 ALMOND, Gabriel A. and VERBA, Sidney, *The Civic Culture: Political Attitudes and Democracy in Five Nations*, SAGE Publications, Newbury Park, 1989 (First Sage Printing) (Original work published in 1963).

subjects of the social domain, in terms of the current regulation of their social security, as a legal and therefore political facet.

As they postulate, subjects' orientation to the political sphere – the 'legal' sphere for us here – includes a "cognitive" orientation related to "knowledge and belief about the political system, its roles and the incumbents of these roles and its inputs and outputs"; an "affective" orientation through "feelings about the political system, its roles, personnel and performance"; and an "evaluative" orientation about "judgments and opinions about political objects that typically involve the combination of value standards and criteria with information and feelings".[15] Thus, we propose that disaffection towards the legal plane of the political sphere is achieved with some combination of dysfunctionalities in these three dimensions.

In order to break these ideas down, and for pedagogical purposes, we will summarise each of the dimensions as manifestations of the subjects in terms of their trust or distrust in the system and its processes; their liking or disliking of the system, its actors and their ways of doing things; and their satisfaction or dissatisfaction about the system and their position in it. We will apply this framework to our case and try to characterize these abstract definitions through examples.

2.2.2. Hypothesis in application: disaffection of members of religious denominations.

2.2.2.a. Cognitive orientation: knowledge of the System and its processes.

Subjects' knowledge of the system and its processes largely determines their orientation towards it. Subjects may have a great deal of knowledge about the system or fail to understand what it entails and how it works. This completeness or failure of knowledge may, moreover, be supported by diverse sources, such as the intelligibility of the regulation, which may vary according to the subject, or the intrinsic conditions of the subject, which predispose them to know what is put before them.

Our starting premise is that ministers of religion do not start from a qualified level of predisposition to know about the law, the social security provisions of the public authorities and the administrative processes linked to regulation. Their position is at an ordinary level, however much the legal aspect here concerns them in their personal sphere. Moreover, it should be added that, in this case, the

15 ALMOND, Gabriel A. and VERBA, Sydney, *op. cit.*, p.14.

legal aspect involves an elevated level of difficulty, given the intersectionality of the subject matter and the fragmented nature of the regulation.

Consequently, here we consider the regulation of social protection for ministers of religion in Spain in terms of it being known and understood. In turn, we will focus on the dual facet that hides this aspect: the accessibility and clarity of the rules. It should be noted here that the assessments and reasoning that we are making refer to the general diversity of ministers of religion.

In order to assess the cognitive facet, as far as accessibility and clarity of rules and processes are concerned, we start by defining the notes of these concepts, which will allow us to evaluate the current regulation to give it – or not – the value that will allow us to assess the orientation of ministers of religion in this respect.

For us, what is 'accessible' is that which is easy to know and understand, and what is clear and does not lead to confusion, for which precision is required. Both accessibility and clarity are qualities of intelligibility. Furthermore, accessibility is inextricably linked to publicity and both, in turn, to legal certainty, as is clarity. To speak of legal certainty is to speak of predictability in Law, but it is not the requirement of the application of the Law limited to the subsumption of predetermined legal rules. On the contrary, it is the combination of rigidity and flexibility that makes it possible to optimize protection in the light of the circumstances of each case.[16] Here we focus on the subjective dimension of legal foreseeability, *id est* the ease with which individuals are able to make predictions about the application of the Law.[17]

As a result, we would say, firstly, that in this situation in which accessibility and clarity are prerequisites for legal security, we describe here a substantive and real responsibility of the public authorities to provide the ideal scenario that facilitates the access of ministers of religion to social security, ensuring clarity in the processes and regulations.[18] This is the logical expression behind the plurality of provisions on legal certainty, good administration and good regulation. This responsibility can be modulated where the subject matter is complex or where a higher level of predisposition is required of the subjects.

Secondly, we recall that we said that the knowledge that subjects have of the system and its processes largely determines their orientation towards it, and that this knowledge is conditioned by the intelligibility of the rules and the inherent conditions of the subjects. Insofar as the ultimate addressees of these rules

16 LIFANTE VIDAL, Isabel, "Seguridad jurídica y previsibilidad", *DOXA, Cuadernos de Filosofía del Derecho*, 36, 2013, p. 96-97.

17 LIFANTE VIDAL, Isabel, *op. cit.*, pp. 98-99.

18 Compare arts. 9.3 and 103.1 of the EC, art. 129.1 of Law 39/2015, art. 3.1.b of Law 40/2015, art. 9.1.e of Law 50/1997, or art. 41 of the Charter of Fundamental Rights of the European Union.

cannot be required to have a special predisposition towards the legal domain, the inference is simple. Performance in this dimension depends exclusively on the level of comprehensibility of the regulation[19] and, consequently, on the responsibility of the Administration to regulate clearly and in an accessible manner.

Having seen how social security provision for ministers of religion is currently configured, consisting of four laws, five royal decrees of assimilation to employed workers, a royal decree of incorporation of religious men and women into the RETA, specific provisions scattered in royal decrees, and a ministerial order, together with the unpredictability of the application of the Law by the Administration, we can conclude, on the one hand, that the Administration has failed to comply with its abstract obligation of good regulation and, on the other, with regard to the cognitive dimension, that the panorama does not favour the confidence of ministers of religion in the system, as its configuration implies obstacles to clarity and accessibility.

2.2.2.b. Affective orientation: critical points of the Social Security system.

From the affective orientation perspective, we analyse the subjects' evaluation of the system, its actors and its performance. This includes feelings such as joy, indifference or displeasure related to the regulation, administrative processes or the factual situation produced in Law. It deals with the innermost facet of the individual and groups. This dimension is an orientation that extends both outside and inside the subjects, insofar as it includes what the subject demands from the system and what the system offers them. The analysis will consist in assessing how the one fits the other.

As we already know what the system offers ministers of religion in Spain, we will now try to analyse what the subjects demand from the system in order to determine how they fit into it. Prior to this analysis, it is worth making a few remarks. First, we must recognize our limitations in that we are unable at this point to carry out fieldwork that would allow us to obtain primary data. Secondly, as there are asymmetries in the social security system within the group of ministers of religion, depending on the religious denomination to which they belong, the values between what people expect and what they actually receive vary enormously from one denomination to another. Thirdly, insofar as we set

19 By way of an aside, I would like to recall that what we are analysing is the orientation of ministers of religion towards the regulation of their social protection. We are discussing how intelligible the current regulation in the matter is in the eyes of ministers, since we are analysing how they relate to the legal, in order to characterize the current problems of regulation. We do not intend to project how intelligible the regulation is in the eyes of the enlightened legal operator.

out to analyse how legal content is valued by people who, as we have already said, cannot be required to have a qualified predisposition for legal knowledge, our analysis may err on the side of superficiality.

That said, given the difficulty of analysing this dimension of orientation towards the legal domain, we propose to deal with the question in a global sense, treating the minister of religion also as worshipper, and starting from that which, in Law, best illustrates the existence of mismatches between what one demands and what one is offered: judicial decisions. However, beforehand, we should recognise that it is difficult to find judicial pronouncements on the subject, as not all court decisions are subject to active publication.

To begin, let us return to the aforementioned Supreme Court judgement of 13/11/2017, which declared the nullity of the 2nd DA which included RD 839/2015 in RD 369/1999 to enable ministers of religion to pay the capital-cost for periods of activity prior to their assimilation as salaried workers, for the purposes of recognition of the right to benefits. This annulment is tributary to the previous ECHR judgement of 03/04/2012 in the case *Manzanas Martín v. Spain*, in which it was declared that the normative difference, consisting of not offering evangelical ministers the same possibility as Catholic priests "of using their years of service prior to their inclusion in the Social Security scheme to qualify for a retirement pension" constitutes a violation of art. 14 of the ECHR in relation to art. 1 of Protocol no. 1.

This gap left by the Supreme Court judgement of 13/11/2017 was filled by the Supreme Court judgement of 24/04/2018,[20] which established an explicit doctrine for the analogous application to Evangelical ministers of the right to add prior years of activity to qualify for the corresponding social benefits "under the same terms and through the same contribution mechanism as provided by the legislator for Catholic priests".[21]

Similarly, although the doctrine was established in the past and it seems that there is no longer any latency,[22] the notion of reimbursement of medical expenses, as a manifestation of the provision of health care under art. 42.1.a of the LGSS, persists for ministers, family members or simple believers who profess religions that prohibit blood transfusions, such as members of the Order of Jehovah's Witnesses, when the treatment proposed by the Public Health Systems

20 Supreme Court, Chamber IV, 24/04/2018, rec. 538/2016, ECLI:ES:TS:2018:1770.

21 Other rulings have dealt with the claim of ministers of worship of the right to compute and pay contributions, not only to reach the minimum qualifying period required in each case, but also to reach the maximum period. All of them have been rejected, such as Andalusian Supreme Court of Justice, Chamber of the Social, 21/12/2017, rec. 127/2017, ECLIS:ES:TSJAND:2017:12179.

22 On social security, on the demands made by the Order of Jehovah's Witnesses, as stated in VIDAL GALLARDO, Mercedes, *op. cit.,* "Informe...", p. 369.

is not in accordance with their beliefs and they need to resort to alternative treatments in private clinics.

In the oldest and most recent case, the Supreme Court judgement of 14/04/1993,[23] cited by the Supreme Court judgement of 25/06/2009,[24] established that the duty of the state to respect religious beliefs (art. 16.1 of the EC) does not include "the duty to finance those aspects of the same that are not worthy of protection or promotion from the point of view of the general interest", so that the expenses arising from "the observance of the religious precept (...) must be borne by whoever wishes to abide by it", and the refusal of reimbursement cannot be considered unjustified.

Finally, the question of the assignation of widows' benefits is still open when the deceased is united in polygamy, This can happen, for example, when the same man marries two wives in a third country, in accordance with his personal law and following the Koranic rite. When the man dies, he generates entitlements to several social security benefits which, in the case of widows' benefits, could be payable to several women; this could enter into conflict with art. 12.3. of the Civil Code.

The question seems to be closed when the deceased was or is a Moroccan national, in application of art. 23 of the 1979 Convention on Social Security between Spain and the Kingdom of Morocco, which establishes that "the widow's pension caused by a Moroccan worker will be distributed, if necessary, equally and definitively among those who, according to Moroccan legislation, are beneficiaries of this benefit".[25] However, this is not the case when there is no international treaty on the matter, causing different treatment within the same religious denomination depending on the country of origin.[26]

The usefulness of the accelerated case study we have presented lies in its usefulness as an illustration of the link between the rules and the subjects directly concerned, the rules on social security, and the members of religious denominations. Naturally, the ever-latent conflict of interests, necessarily inspired by cooperation, is subordinated to the rest of the legal system, which is why questions such as the legal effects of polygamy find it difficult to gain acceptance.

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23 Supreme Court, Chamber IV, 14/04/1993, rec. 1446/1992, ECLI:ES:TS:1993:2415.

24 Supreme Court, Chamber IV, 25/06/2009, rec. 3404/2008, ECLI:ES:TS:2009:4926.

25 Even for passive class schemes, according to Supreme Court judgement, Chamber IV, 24/01/2018, rec. 98/2014, ECLI:ES:TS:2018:121. The same idea is included in art. 24 of the Social Security Agreement between the Kingdom of Spain and the Republic of Tunisia of 2001.

26 See Supreme Court of Justice of Catalonia, Social Chamber, 25/04/2016, rec. 768/2016, ECLI:ES:TSJCAT:2016:2468; outcome due to inadmissibility of the appeal for unification of doctrine by Supreme Court Order, Chamber IV, 28/03/2017, rec. 2287/2016, ECLI:ES:TS:2017:3554A.

Now, remembering that the object of study in this section is the field of feelings – the individual and collective feelings of the members of denominations – we can infer that the scenario is not peaceful, to say the least, despite what art. 16.3 of the SC seems to advocate. We have set out some of the conflictive cases, given that we propose considering affective orientation as the breakdown of agreement and recourse to judicial settlement of the conflict. In view of the situation, and with due caution, we can now conclude that the affective dimension of the orientation of the subjects of social security regulations is characterized, at the very least, by indifference, insofar as there are, albeit few, sources of conflict.

2.2.2.c. Evaluative orientation: satisfaction with the Social Security System and its processes.

The last type of orientation, the evaluative, incorporates the aspirations and values of the subjects, reflecting their goals in life or what they consider most important. Here we will describe it as an orientation centred on the priorities of individuals. This dimension encompasses the most intimate desires of the subjects and, like all the others, should not be evaluated dichotomously, but within a broad spectrum in terms of the outcome and the way in which these aspirations are materialised.

In our case, it is a question of assessing the achievement of the aspirations of ministers of religion to obtain social security. We will take it as given, and therefore as unnecessary to justify, that ministers of religion of all religious denominations in Spain not only aspire to have social protection based on contributions[27] but also that such protection should take place under certain conditions.

First, it is worth noting the asymmetry in the social security afforded to ministers of religion. At present, only ministers of religion of the Catholic Church, the FEREDE, the Communities belonging to the Federation of Jewish Communities of Spain, religious leaders and imams of the communities integrated in the CIE, clergymen of the Russian Orthodox Church of the Moscow Patriarchate in Spain,[28] and members of the religious Order of Jehovah's Witnesses in Spain are assimilated as employees.

This means that ministers of religion of other religious denominations are not assimilated as employees and, therefore, have no access to contributory

27 The Spanish Social Security System provides for different levels of social protection (see arts. 2 and 109 of the LGSS). Firstly, the contributory level related to the performance of activities. Secondly, the non-contributory and universal level, financed from the General State Budget, which includes all Spaniards resident in Spanish territory. Lastly, a complementary level of protection, corporate or individual, and voluntary, such as that provided for in arts. 238 et seq. of the LGSS.

28 As mentioned above, ministers of religion of the Romanian Orthodox Church in Spain are also affected, despite not having their own royal decree of assimilation.

social protection, including religious denominations with a long-standing presence in Spain such as the Church of the Latter-Day Saints, with a declaration of well-known roots since 2003;[29] the Buddhist denomination, with well-known roots since 2007; and the Baha'i Community, with well-known roots since 2023. Hindu and Taoist denominations, both duly registered in the Register of Religious Entities, also expressly claim social protection.[30]

To this we should add, although not *stricto sensu* referring to ministers of religion due to the treatment and evolution of this concept,[31] the social security provided to religious men and women. As mentioned earlier in this paper, the religious men and women of the Catholic Church are included in the Special Social Security Scheme for Self-Employed Workers. This is the only group with these characteristics that has access to contributory social security in Spain, leaving out similar groups belonging to other religious denominations.

Furthermore, in another facet of asymmetry, beyond the fact that ministers of certain religious denominations do have social security and others do not, we should remember that the protection provided to each group and the contribution obligations are different.[32] For example, ministers of religion of the Jewish, Orthodox and Jehovah's Witness denominations do not have temporary incapacity protection,[33] whereas ministers of religion of the FEREDE and CIE do have such protection.[34] Or, by way of example, the payment of dues for ministers of religion of the Catholic Church is carried out on a quarterly basis,[35] while for other ministers it is done on a monthly basis.[36]

As far as the evaluative dimension is concerned, we are therefore in a position to conclude that the social security provided to ministers of religion in Spain hardly fulfils their aspirations.

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29 It should be noted that the Church of the Latter-day Saints does not claim the assimilation of its members to employees. See VIDAL GALLARDO, Mercedes, *op. cit.*, "Informe...", p. 365-366.

30 VIDAL GALLARDO, Mercedes, *op. cit.,* "Informe...", pp. 382-386.

31 RODRÍGUEZ BLANCO, Miguel, "Relevancia de la condición de ministro de culto a efectos de la Seguridad Social", *Relaciones Laborales*, 6, 2002, pp. 303-305.

32 ORTIZ CASTILLO, Francisco, *La protección social de los ministros de culto, religiosos y secularizados*, Doctoral thesis, University of Murcia, 2014, pp. 97-98.

33 See art. 2.1 of RD 2398/1977, in relation to art. 5 of Law 25/1992; art. 3.1 of RD 822/2005; and art. 3.1 of RD 1614/2007.

34 See the respective articles of RD 369/1999 and RD 176/2006.

35 See art. 6.1 of the Order of 19 December 1977 regulating certain aspects relating to the inclusion of the Diocesan Clergy of the Catholic Church in the General Social Security Scheme.

36 In accordance with the general procedure established in art. 16 of Royal Decree 2064/1995 of 22 December, approving the General Regulations on Contributions and Settlement of other Social Security Rights.

2.2.2.d. Assessing performance: results on the hypothesis.

We have obtained and provided a definition of the concept of "disaffection towards the legal [domain]". We have also carried out analyses of the notion of orientation towards this domain insofar as it refers to three dimensions. As we have undertaken these analyses, we have inferred conclusions on the performance of the legal domain in each of these dimensions. As we have maintained, disaffection toward the legal plane of the political sphere is achieved with some combinations of dysfunctionalities in these three dimensions. The nature of the background of this model, which, despite preferring quantitative methodology, does not exclude the qualitative, and limits the possibility of establishing a boundary around favourable orientation with the legal domain. However, we can conclude that the regulations on the social security of ministers of religion in Spain, which suffer from fragmentation, may be generating the symptoms of disaffection with the legal domain.

The relevance of this statement lies in its connection to the central theme of this collective study. Fragmentation becomes a problem insofar as it leads certain segments of society to become disaffected with the legal domain, which is inherently political and, ultimately, may result in a loss of support for the political system, which, in the European case, is always the rule of law. Note how we previously endorsed the definition of disaffection as a sentiment that does not reach the point of delegitimizing the system or actively mobilizing to overthrow it. To analyse how disaffection can lead to a loss of support for the system, we will draw on the five indicators of system support proposed by Norris, ordered from the most specific to the most diffuse: approval of current political leaders, trust in regime institutions, evaluation of the regime's performance, approval of the regime's core principles and values, and the sense of belonging to the national identity.[37]

This is a graduated typology, understood as a continuum, which will allow us to assess certain critical points in the relationship between ministers of religion and the political system. For our purposes, we consider it appropriate to exclude the indicators concerning approval of current political leaders and the sense of belonging to national identity, due to our lack of interest in the confessions' affinity or preference for specific leaders, and because we believe that the breakdown of support for the system does not currently stem from the prioritization of religious identity over other elements that constitute national and European identity.

What concerns us, rather, is the trust or distrust that institutions may generate among ministers and religious denominations. Specifically, we believe

37 NORRIS, Pippa, Democratic deficit, Cambridge University Press, Cambridge, 2011, pp. 24-25.

that the current state of the legal framework – fragmented, inaccessible, obscure, failing to meet the legitimate expectations of religious ministers and creating clearly distinct social security regimes – fosters distrust within this sector of society towards at least four institutions: the national Parliament, the national Government, political parties, and the judiciary. We are also concerned about the assessment that ministers of religion and denominations may make regarding compliance with the rule of law, which may lead to the detachment of this group from the core principles and fundamental values of the state.

2.3. Subject-subject relations.

As a result of all of the above, we have arrived at this last approach. The first approach we proposed (referring to the notion of fragmentation) was intended to be the definition of a specific and harmful state of rules, by way of a diagnosis of the legal system. The second dealt with a specific symptom being produced by the current state of the rules: the notion of disaffection with the legal system, which, in our opinion, is caused, among other evils, by normative fragmentation. Next, we will undertake and present a final approach, centred on the subjects.

It is not our intention here to address other disciplines outside the field of Law. Far from it. The aim of this approach is to outline the common denominators of ministers of religion of all denominations, if they exist, in order to propose (at least suggestively) the undertaking of legal and regulatory reforms to solve the problem of fragmentation. Thus, this approach aims to serve as a treatment and prognosis.

As a starting point, we would say that the figure of assimilation as an employee is the ideal one for the general treatment of the question. The doctrine has described the assimilation of ministers of religion as employees as the "only viable" way of including them in the system, once "the employment relationship has been discarded".[38] In this regard, although we agree that ministers should be included through their assimilation as employees, we do not find any regulatory obstacles to their ordinary inclusion, for example, through the modification of art. 136.2 of the LGSS, to the extent of explicitly stating that they will also be considered expressly included, for all purposes and without assimilation, in the RGSS. This would not mean that these relationships would be considered to be labour relationships, an intrusion into the autonomy of confessions, but rather the simple regulation of the conditions for the exercise of religious freedom (which could be seen as limiting by those who do so, but always as a regulation of

38 HIERRO HIERRO, Francisco Javier, "Ministros de Culto Seguridad Social: una regulación consolidada", *Incidencia del ejercicio de la libertad religiosa en el ámbito laboral y de la Seguridad Social: diálogo, tolerancia y convivencia*, SOLÍS PRIETO, Carmen (Coord.), Aranzadi, Cizur Menor, 2024, p. 344.

a fundamental right, *ex* art. 9.2 of the EC). In this way, by simply putting the Social Security system on an equal footing with that of salaried workers, there would be no room for exceptions to protective action or contributions.

Moreover, we can leave open the services that other figures can provide for the dispensation of social security to other groups of religious denominations that merit it, but which, strictly speaking, organically or functionally, do not fall within this definition. We recognize the incorporation into the RETA or the special agreements.

The technique we have used in order to trace these notes that serve as the lowest common and legal denominator of the ministers of religion of all religious denominations has mainly consisted of the treatment of the various royal decrees of assimilation of the ministers of religion mentioned earlier in this study.

2.3.1. Common notes to ministers of religion.

First of all, we will not go into an analysis of the content of the function of worship, as we consider that its content is a strict sphere of confessional autonomy.[39] Although we consider it necessary to establish three levels, in terms of intensity and typology, in the exercise of work within a confession, all of which cannot be classified as a ministry of religion. We maintain this to establish a classification, like every other manifestation of the rationalization of the system, which would be useful in efficiently conducting us through the process of overcoming fragmentation. Nevertheless, we do not neglect the doctrine, which is reluctant to use a generic definition of the ministry of religion and acknowledges the heterology of the concept employed within the legal system.[40]

The three levels we suggest are the following:

I. The work of religious assistance and direction or management, totally ordered and integrated within the religious denomination.

II. Non-assistance work, but ordered and integrated within the confession.

III. Not ordered non-assistance work that is integrated within the denomination.

We will try to explain what we mean by this accelerated typology that we propose. In our opinion, three characteristics can be used to differentiate the

39 Note that art. 2.2 of the LOLR recognizes the right of "the right of Churches, Denominations and Religious Communities to (...) appoint and train their ministers".

40 We maintain it as a useful classification, bearing in mind and subscribing to RODRÍGUEZ BLANCO, Miguel, *op. cit.*, p. 305: "For all these reasons, definitions or generic concepts of minister of religion are not an adequate legislative technique: on the one hand, this notion encompasses diverse realities; and, on the other, the legal consequences of the category of minister of religion can be very heterogeneous, which prevents us from dealing with a single normative content. In short, it is not possible to create legal dogmatics with the concept of minister of religion".

relationship between the faithful and religious denominations: the function of worship or management activity, ordination and integration. We will do this through a few examples.

An imam may well perform management functions for the denomination and provide training in Islam. Moreover, he is ordained, in that he is invested with certain powers over the faithful, and integrated within the confession in that he has a closer relationship with it than that of a simple member of the faithful. A Romanian Orthodox nun, on the other hand, does not perform functions of management or assistance, but is ordained, not because she is invested with powers but because she is incorporated into the order of confessional power, and is integrated into the confession by maintaining a close relationship with it. Finally, a Bahá'í member, while volunteering within their denomination, also does not do welfare work, nor are they incorporated into the confessional order, but does increase their dedication to the denomination on a temporary basis vis-à-vis other members. Catholic volunteer catechists could also be included in the latter group.

Bearing this in mind, our analysis will mainly concentrate on the first type of relationship, while also taking the others into consideration. From a careful reading of the regulations, we recognize that the personal scope of application of assimilation includes various notes, although not all of them coincide. Specifically, we detect the following characteristics: stability or permanence, remuneration, principality, exclusivity, and the relative breadth of the definition. We will analyse each one separately.

Firstly, we note that the personal application areas of assimilation of ministers of religion of the CIE, the FEREDE, Jehovah's Witnesses and the Russian Orthodox Church of the Moscow Patriarchate in Spain describe ministers of religion in terms of the exercise of their activity in conditions of stability or permanence. Furthermore, neither RD 2398/1977 nor the Order of 19 December 1977, applicable to priests of the Catholic Church and Jewish ministers, do so. This characteristic must be interpreted not as a *de facto* situation, but as a vocational vision. It is not a question of habituality becoming stability or permanence, but of the significance underlying the function.

Secondly, we detected the generalized requirement of remuneration for the exercise of the activity, as is required for ministers of the Catholic Church, the CIE, the FEREDE and the Russian Orthodox Church of the Moscow Patriarchate in Spain. For Jehovah's Witnesses, on the other hand, remuneration is not explicitly required. It is well known, and therefore unnecessary to quote, that the work of worship or the beliefs of certain denominations dictate certain manifestations of detachment from earthly things or goods. It can now be accepted that the work of worship will always require some kind of remuneration, either in money or in kind, to ensure the minister's maintenance. This requirement is

intended to complete the stability requirement in order to exclude those who carry out voluntary work from this concept, and thus avoid the possible abusive use of assimilation with the intention of taking advantage of the benefits that are recognized. Therefore, the combination of the remuneration and stability requirements takes the form of the requirement of principality.

Thirdly, RD 822/2005 on the assimilation of ministers of religion of the Russian Orthodox Church of the Moscow Patriarchate in Spain expressly requires ministers to be characterized by the exclusivity of the exercise of their duties. Although the rest of the regulations do not expressly do so, we can venture to infer this requirement from the demand for permanence or stability.

Fourthly and finally, we note how some assimilation regulations explicitly speak of the content and substance of the function of worship. For example, RD 1614/2007, applicable to Jehovah's Witnesses, speaks of dedication to "missionary, pastoral or religious training functions, as well as, in a complementary manner, to other activities that may be necessary". RD 176/2006, applicable to Islamic ministers, includes and, at the same time, differentiates between community leadership, prayer leadership, training and religious assistance. In our opinion, some areas of application are carefully and defined and characterize the material content of the relationship between the minister and the confession in a relatively broad manner in order to outline a due interpretation as extensively as possible.

3. PROPOSAL FOR FUTURE LAW AND REGULATION.

We are now in a position to formulate, in a non-exhaustive but precise way, some sort of proposal for a future law and regulation.

First of all, we should – and do – criticise RD 2398/1977 which, contrary to what its title suggests, does not regulate the social security of ministers of religion.[41] The treatment of the 'disease' of fragmentation that we propose necessarily involves the issuance of a regulation which, by repealing it, declares the assimilation of all ministers of religion, without particular attention to denominations and without exclusions, as well as concentrates the general provisions on the conditions of such incorporation.

It is suggested that such assimilation could be carried out by removing the last paragraph of article 1.1 RD 2398/1977 and replacing the predicate "will be included" with "are assimilated". It would also be appropriate to remove the express reference to the Catholic Church. Moreover, it is not necessary to remove the sole requirement of prior registration in the Register of Religious Entities. The

41 Only the social security of ministers of religion of the Catholic Church.

assimilation could be carried out by law by expressly contemplating it as a letter of art. 136.2 of the LGSS, but the possibility of it being carried out by regulation under the protection of art. 136.2.q of the aforementioned law is maintained.

Secondly, continuing with assimilation, it would be necessary for the regulation we hypothesize to include the personal scope of application. To this extent, it is proposed that the broadest possible definition be used, in line with that used, for example, in art. 1 of RD 2765/1976, which assimilates persons who provide compulsory personal services as employees, for the purposes of protection in the event of an accident at work or occupational disease.

Following the characteristic notes set out above, by way of a proposition, the aim would be to extend the scope of the general assimilation "to individuals who, in accordance with the rules governing their confession, are engaged in the functions of worship, provided that these are their main activity and that the notes of stability, exclusivity and minimum remuneration are observed".[42] In this way, the aforementioned notes of stability, exclusivity, principality and remuneration would be incorporated within a totalizing definition, maintaining a relatively broad criterion of the function of worship, the content of which we place at the heart of confessional autonomy. Note how we propose to relativize the element of remuneration. Although it is required, we shall reduce its importance, given the vow of poverty that some religions require of their ministers, and the varying financial situations of religious denominations. Although we have not detected all these characteristics in all the regulations, they are necessary for this general definition.

This change would have an impact on the dimensions of orientation towards the legal domain that we discussed. 1) By establishing this definition, we believe that it would improve performance in the evaluative dimension of the legal orientation of ministers of religion in their social security. Thus, those groups of ministers of religion who do not currently have social security could see their aspirations fulfilled if they meet the simple requirements of principality, stability, exclusivity and minimum remuneration. 2) We cannot deny that the affective dimension, which we measure as the level of judicial conflict, could be negatively affected, insofar as the establishment of a broad term could give rise to conflicting interpretations of the personal scope of application between the Social Security Administration, religious denominations and ministers of religion; and, therefore, to more litigation. 3) As regards the cognitive dimension, we consider that there would be a net positive result, since the unpredictability of interpretations of the scope of protection would be offset by an improvement in the accessibility and clarity of the regulation.

42 Own literal proposal.

4) Another aspect that should be modified would be the formal requirement of accreditation of the status of minister of religion by means of certification by the religious denomination. This is particularly important. We echo the relative importance of the power of certification, which is an expression of confessional autonomy in the determination of the notion of minister and of the specific art. 2.2 of the LORL; as well as a source of legal certainty caused by the polysemy of the concept.[43] However, its elimination would make the procedure ordering the integration of Islamic communities into the CIE unnecessary for the purposes at hand.

We recognize that the characterization of the functions of worship may entail the infringement of confessional autonomy by limiting their faculty of self-definition. However, insofar as we are dealing with Labour and Social Security Law, and given that the idea we are dealing with is the assimilation of ministers of religion as employees, with whom, incidentally, they share obvious similarities. In order to incorporate them into the contributory social security system, we consider it prudent to subject confessional autonomy to a homogeneous canon between confessions and in accordance, in an all-encompassing manner, using the terminology of labour relations.

In other words, we argue that a professionalizing treatment of the concept and the relationship of minister of religion is acceptable when we seek to include them in this sphere of the legal system, since we are talking about the civil effects of legal-religious considerations and not about state interference in the religious legal system, which is always untouched.

5) It would be necessary to recognize an additional and a transitional regime. With regard to the additional regime, it would be advisable to include in this new royal decree the possibility of recognising the periods of activity prior to assimilation as social security contributions with a view, in particular, to those who are not yet assimilated as employees. It is understood that such a recognition system should be in line with the system already in place for priests in the Catholic Church.

Likewise, with regard to the transitional nature, we realize that with the establishment of this new regime, with the aim of homogenization, it could well happen that ministers of religion of certain denominations could see a change in their protective action or contribution. Insofar as these changes could be favourable or unfavourable in various ways, and in order to avoid the search for the most favourable condition, it is suggested that registrations declared prior to the entry into force of this new royal decree should continue to be governed by the regulations in force at the time.

43 RODRÍGUEZ BLANCO, Miguel, *op. cit.,* p. 304.

6) We consider it essential that the treatment of social security for ministers of religion be accompanied by the treatment of social security for the other groups whose relationships we previously classified in a somewhat summary manner. In this chapter, we will not analyse the characteristic features that might be attributed to these groups, as such an analysis falls outside the scope of our study. The typology we propose serves to describe the relationship of ministers of religion, but also proves useful, instrumentally, in helping to complete this proposal for a future law and regulation, even if only in a suggestive manner.

The social security protection afforded to religious men and women in Spain can, in fact, be channelled indirectly through its contributory form through the performance of other activities. The same could be said in relation to the protection granted to ministers of religion, yet this should not preclude the ambition to establish a social protection regime that enables exclusive dedication to religious activity. Indeed, such dedication, specifically in the context of the relationship between religious organizations and ministers, has been treated as a situation assimilated to that of self-employed workers, at least since 1981 with regard to the Catholic Church.

This gives rise to several legal questions, such as whether the status of self-employed worker is appropriate given the specific characteristics of the activity, or whether the applicable regime contains comparative biases between religious men and women and ministers. However, the most pressing issue is the asymmetry in access to protection for different religious denominations. Therefore, without taking a position on what the appropriate legal classification ought to be, we purport that there should be no differences in the treatment granted to the various religious denominations.

Lastly, and also with a view to completing our reform proposal, we suggest the introduction of a new type of special agreement aimed at covering the contingencies arising from the activity carried out by members of the religious denomination who, although not engaged in assistance or management activities nor formally incorporated into the religious organization, nonetheless participate at some level in the activities of the religious denomination.

The introduction of this mechanism, intended to guarantee coverage of common contingencies such as permanent disability, death and survivorship, and retirement, would not distort the nature of the special agreement when applied to this group of believers by extending its scope to an unrelated situation. This is particularly the case considering that the special agreement mechanism has already been used in similarly broad contexts, such as the inclusion of Spanish emigrants and their children in the scope of the General Social Security Scheme (RGSS), as established by Royal Decree 996/1986 of 25 April, which regulates the subscription of special agreements for emigrants and their children. On the contrary, the aim would be to provide additional protection for those who, due

to religious convictions, temporarily withdraw from the labour market or devote themselves to religious activities in addition to another principal occupation.

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CURRENT CHALLENGES FOR ELECTORAL MANAGEMENT IN FRANCE AND IN SPAIN

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SUMMARY: 1. FIRST CHALLENGE: WHAT IS ELECTORAL MANAGEMENT? 1.1. General approach of an electoral management definition 1.2. The complexity and the diversity of electoral law and rules 2. SECOND CHALLENGE: FRENCH AND THE SPANISH ELECTORAL MANAGEMENT DESIGN 2.1. Impartiality and electoral management: risks of a governmental model. 2.2. The problematic figure of the mayor.

1. FIRST CHALLENGE: WHAT IS ELECTORAL MANAGEMENT?

1.1. General approach of an electoral management definition.

Elections are often imagined as a process in which only two actors are involved: the voter and the candidate. However, the most important actor seems to be overlooked, forgotten, and neglected, a silent but powerful actor: the Administration. In fact, it is to the Administration that the voter has entrusted his wishes. The citizen places his/her vote in the hands of the Administration, which transforms the votes into a seat for the elected candidate, proclaiming the final results of the election. Thus, voting is an act of trust between the citizen and the Administration.

An election, as a procedure, implies a succession of acts and electoral operations which generally take place between the registration of candidacies

and the call for elections to the proclamation of the elected offices. Consequently, if voters decide, the Administration prepares and executes a certain number of operations of a purely material nature.[1]

Therefore, electoral management is a relation between elections and the Administration. In order to understand this, it is important to take the definition of electoral management provided by the Spanish professor Gema Pastor Albaladejo, who describes it as a heterogeneous set of bodies that participate in the management, control and supervision of the electoral procedure, so that elections take place with respect for objectivity, transparency and equality.[2]

However, the general literature defines an Election Management Body (EMBs)[3] as a public entity that performs certain functions: determining who is eligible to vote, receiving and validating nominations, conducting the process of casting votes, counting the votes, tabulating elections results, registration of voters, boundary delimitation, regulation of parties and campaign finance.[4]

For a long time many scholars have noted that the only body to which the organization of a political election could be entrusted was the Administration, as private management of an election would be impossible for the correct functioning of democracy.

This was the case of Georges Coville, a French scholar who authored a thesis on the process of public elections as early as 1909. He considered the organization of elections a "normal and very important" function of the Administration.[5]

Moreover, Maurice Hauriou, in his *Précis élémentaire de droit constitutionnel*, republished in 1929, considered elections to be an administrative operation due to the intervention of the Administration in the organization of elections.[6]

1.2. The complexity and the diversity of electoral law and rules.

Each country has its own way of ruling elections according to their history or traditions. In that context it is hard for the academic sector to understand and to unify the meaning of electoral management. In some countries, EMBs

1 COVILLE, Georges, *Le contentieux de l'élection publique: ses éléments, ses caractères, ses limites*, Thesis, Law, Université de Rennes, 1909, p. 56.

2 PASTOR ALBALADEJO, Gema, *La administración electoral española*, Thesis, Political Sciences, Universidad complutense de Madrid, 2018, p. 14.

3 Electoral Mangament Bodies (EMBs) should be understood as a synonym of Electoral Administration.

4 TOKAJI, Daniel P., "Comparative election administration: a legal perspective on electoral institutions" in GARDNER, James A., *Comparative Election Law*, Cheltenham, Edward Elgar, 2022, p. 438.

5 COVILLE, Georges, *op. cit.*, pp. 6-7.

6 HAURIOU, Maurice, *Précis élémentaire de droit constitutionnel*, Librairie du Recueil Sirey, 1929, 2nd ed., p. 590.

work under the control of a special electoral court.[7] In others, constitutional or administrative judges control the activity of EMBs but there is no special 'electoral judge'.[8]

Also, the political organization of each country, as if it is a federal, regional or a unitary state, will also have an impact on electoral management. Nevertheless, in some cases, the structure of EMBs does not correspond to the political organization of the state. For example, France is a unitary state but its EMBs are highly decentralized and divided into various special commissions. Also, Spain is a 'regional'' state but its EMBs are more centralized and unified than in France. This absence of unification of EMBs, associated with the technicism of electoral law, make it difficult for scholars to understand the meaning of electoral management.

Compared to other academic fields, and specially in France, few studies have been conducted to explain what should be understood by electoral management. This is not the case of Spain where its electoral law gives a description of Spanish EMBs, known as "*administración electoral*". Article 8 of its Electoral Law establishes that "The purpose of the Electoral Administration is to guarantee, under the terms of this Law, the transparency and objectivity of the electoral process and the principle of equality". The definition of Spanish EMBs or the electoral administration has been extensively addressed by Spanish scholars.[9]

However, academic interest in electoral management is increasing around the world. Global interest of studying electoral management began in the early 2000s in the United States following fraud scandals in US elections and the necessity of applying the principles of New Public Management theories to EMBs.[10] Since then a first global study of electoral management was published in 2000 by professor Rafael López Pintor;[11] the Venice Commission of the European Union has organized an Annual Conference on Electoral Management since 2002;[12] some international NGOs,[13] e.g. Idea International and the Ace

7 This is the case of most countries of Latin America.

8 This is the case of some countries of Europe.

9 See, for example, theses by MARTÍNEZ RUANO, Pedro, *La administración electoral*, Tesis, Universidad de Almería, 2008, 696 p. and PASTOR ALBALADEJO, Gema, *La administración electoral española*, Tesis, Universidad Complutense de Madrid, 2018, 516 p.

10 JAMES, Toby S., GARNETT, Holly Ann, LOEBER, Leontine, VAN HAM, Carolien "Electoral management and the organisational determinants of electoral integrity: Introduction", *International Political Science Review*, 2019, no. 40, vol. 3, pp. 295-312; HUU DONG, Nguyen, "L'administration des élections: une technique non-politique au service de la politique", in *L'État, le droit, le politique. Mélanges en l'honneur de Jean-Claude Colliard*, Paris, Dalloz, 2014, pp. 447-462.

11 LÓPEZ-PINTOR, Rafael, *Electoral Management Bodies as Institutions of Governance,*Programme de développement des Nations-Unies, 2000.

12 Venice Commission's website for European Conferences of Electoral Management Bodies https://www.coe.int/en/web/electoral-management-bodies-conference/about-us

13 Non-Governmental Organization.

Project, conducted research on electoral quality and published some studies on their websites[14] as a Code of Conduct for ethical and professional election administration published by Idea International,[15] together with the Code of Good Practice in Electoral Matters by the Venice Commission.[16]

2. SECOND CHALLENGE: FRENCH AND THE SPANISH ELECTORAL MANAGEMENT DESIGN.

As mentioned, electoral management design is slightly different in France and in Spain and does not correspond to a territorial distribution of power. In Spain, the *Juntas* (administrative structures) in charge of organizing the first elections in Spanish history date back to the beginning of the 19th century and the War of Independence against France. In this context, the *Juntas Provinciales* appear, an organ that assumes the sovereignty and the government of the nation, creating the *Junta Central* as the organ that sanctions the Royal Decree of 22 May 1809, which established the convening of the nation's *Cortes* (Parliament) in 1810.[17]

According to Spanish Law, the electoral administration is composed of: *Juntas Electorales, Central, Provincial, de Zona, Comunidad Autónoma,* and the *Mesas Electorales*,[18] i.e. the Spanish electoral administration organs. Nevertheless, some organs of the Government also perform certain tasks related to electoral management. For example, the Electoral Census Office, reporting to the Ministry of Economy, the Ministry of Foreign Affairs, which deals with absentee voting by correspondence, the Post Office Service, the Sociological Research Center, which belongs to the Ministry of the Presidency and is in charge of preparing official electoral surveys, and the Directorate-General of Internal Policy, which reports to the Ministry of the Interior.[19]

Fort this reason, in Spain some academics distinguish between: a) the autonomous and independent electoral administration (*strictu sensu)* from

14 Website ACE project: https://aceproject.org/about-fr; website Idea international https://www.idea.int/about-us/people.

15 Code of Conduct for the Ethical and Professional Administration of Elections, Stockholm, 1998.

16 https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Code_conduite_PREMS%20026115%20GBR.pdf

17 FERNÁNDEZ DOMÍNGUEZ, Arturo, *Leyes electorales españolas de Diputados a Cortes en el siglo XIX. Estudio histórico y jurídico-político*, Madrid, Civitas, 1992, pp. 17-20.

18 Art. 8, LOREG.

19 SANTOLAYA, Pablo, "El modelo español de administración electoral", in BIGLINO CAMPOS, Paloma y DELGADO DEL RINCÓN, Luis E. (eds.), *La resolución de los conflictos electorales: un análisis comparado*, Madrid, CEPC, 2010, pp. 26-27.

b) the Administration, recognizing that the latter continues to participate in the electoral process.[20] Other scholars consider that Spanish electoral administration consists of a governmental administration not recognized as "electoral administration" in law, and an electoral administration (*strictu sensu*) recognized as such in law,[21] as different governmental administration bodies exercising electoral administration functions.[22]

The French model of electoral management differs from the Spanish one. In France, there is a special body in charge of the control of each electoral operation. For example, commissions that deal with the control of electoral lists,[23] electoral advertising,[24] opinion polls,[25] control of voting operations,[26] vote counting,[27] the conduct of the vote count,[28] control of advertising for the presidential election,[29] control of election expenses,[30] transparency,[31] protection of voters' personal data,[32] audiovisual and digital regulation.[33] The nature of these commissions and their authority is not homogeneous; some are described as independent administrative authorities,[34] others as independent public authorities,[35] and others as simple commissions.[36] The structure of the last-mentioned is not confined to any one group and is problematic.

Furthermore, other actors intervene on behalf of the state and in a decentralised manner (the mayor and the *Préfet*), in addition to the main authority in charge of the organization of elections, the Ministry of the Interior.[37]

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20 FERNÁNDEZ DE CASADEVANTE MAYORDOMO, Pablo, "El Control electoral como elemento indisociable de toda democracia: los orígenes de la administración electoral española.", *Revista de las Cortes Generales*, no. 116, 2023, p. 357, p. 391.

21 SANTOLAYA, Pablo, "El modelo español de administración electoral", *op cit.*, pp. 26-27.

22 *Ibid.*

23 *La Commission de contrôle des listes électorales.*

24 *La Commission de propagande.*

25 *La Commission de sondages.*

26 *La Commission de contrôle des opérations de vote* (not for presidential elections).

27 *La Commission de recensement.*

28 *Le Bureau de vote.*

29 *La CNCCEP.*

30 *La CNCCFP.*

31 *L'HATVP.*

32 *La CNIL.*

33 *L'ARCOM.*

34 *La CNCCFP, la CNIL et la HATVP.*

35 *L'ARCOM.*

36 *La Commission de contrôle des listes électorales, la Commission de propagande, la Commission de sondages, la Commission de recensement, le Bureau de vote, la CNCCEP, la Commission de l'article 25 de la Constitution et la Commission de contrôle des opérations de vote* (not for presidential elections).

37 Article 1 of Decree no. 2017-1070 of 24 May 2017, amended by Decree no. 2018-912 of 24 October 2018, on the powers of the Minister of the Interior.

These circumstances make it difficult in both France and Spain to place the electoral administration within the system of separation of powers. It is not possible to identify whether in Spain it should be located within the judicial power, due to the composition of the *Junta Electoral Central*, or in the executive power due to its nature of 'administration', or within the legislative power due to the place where the *Junta Electoral Central* itself is located, which is the Parliament.

Similarly, in France, the intervention of figures of different nature such as the mayor and the *Préfet* (representing the state in electoral matters), the Ministry of the Interior (Government), and numerous commissions and authorities whose legal conception is ambiguous, make it difficult to place it within the system of separation of powers.

The Spanish model of electoral administration seems to be a permanent model, but of discontinuous exercise. In France, however, some commissions are permanent and others appear and disappear depending on whether or not an electoral process is underway.

2.1. Impartiality and electoral management: risks of a governmental model.

Impartiality is one of the main challenges faced by electoral management bodies, especially when government is involved. Both, the French and the Spanish model of electoral management, like in most European countries, is characterized by the government itself managing the organization of elections through the Ministry of the Interior.

According to the Venice Commission "In states where the administrative authorities have a long-standing tradition of independence from the political authorities, the civil service applies electoral law without being subjected to political pressures. It is therefore both normal and acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior. However, in states with little experience of organising pluralist elections, there is too great a risk of governments pushing the administrative authorities to do what it wants. This applies both to central and local government – even when the latter is controlled by the national opposition".[38] As Daniel P. Tokaji points out, this formulation tends to conflate independence

38 Explanatory Report, 3. Procedural Safeguards, *Code of Good Practice in Electoral Matters*, Adopted by the Venice Commission at its 51st Plenary Session, Venice, 5-6 July 2002, p. 35. See also: GARRONE, Pierre, "Le patrimoine électoral européen. Une décennie d'expérience de la Commission de Venise dans le domaine électoral", *RDP,* no. 5, 2021, pp. 1417-1440, p. 1431.

and impartiality, but when it is about electoral management impartiality seems to be more important.[39]

It would seem that assigning the management of elections to the government's own bodies is a matter of well-established democracy. Nevertheless, according to Rafael López Pintor, this choice of government corresponds to the historical experiences of each country rather than to contemporary political needs.[40]

In France, The Minister of the Interior is appointed by the President of the Republic following nomination by the Prime Minister.[41] Their political and administrative nature is not in doubt, and their role in the organization of elections is well defined in a decree.[42] They are the authority responsible for "the organization of elections".[43] To carry out their functions, they have considerable normative power, making them "the linchpin of the electoral public service".[44] They issue circulars giving instructions to mayors "under cover of the *Préfet*" on the material organization of elections[45] and produces guides for candidates.[46] They also have hierarchical authority over the *Préfets*.[47]

For European elections, the Minister of Interior checks the legality of candidacy declarations, sending those deemed irregular directly to the Council of State (*Conseil d'État*).[48] *The majority of circulars and guides are produced (except for the presidential election) by the Bureau d'élections et des études politiques,* which reports to the *Direction de la modernisation et de l'action territoriale*.

However, if the Ministry of the Interior is a central government body, political in nature, would it not be risky to assign it the organization of elections in which it would be likely to have an interest? The culture of "well-established democracy"[49] is the answer that would justify the existence of "government" or "ministerial"

39 TOKAJI, Daniel P., "Comparative election administration: a legal perspective on electoral institutions", *op. cit.*, p. 440.

40 LÓPEZ-PINTOR, Rafael, *op. cit.*, p.11.

41 Art. 8 of the French Constitution.

42 Article 1 of decree no. 2017-1070 of 24 May, modified by decree no. 2018-912 of 24 October relating to the powers of the Minister of the Interior.

43 *Ibid.*

44 MARKUS, Jean-Paul, "Le statut administratif des élections politiques", *RFDA*, no. 2, 2020, p. 349.

45 Instruction INTA2214915C issued by the French Ministry of the Interior on May 24, 2022, *Instruction relative à l'organisation matérielle et au déroulement des élections législatives.*

46 Ministry of the Interior handbook for candidates in metropolitan and overseas France, 2022 legislative elections, May 3, 2022.

47 RAMBAUD, Romain, *Droit des élections et des référendums politiques*, Issy-les-Moulineaux, LGDJ, 2019, p. 462.

48 Article 12 of Law no. 77-729 of 7 July 1977 on the election of representatives to the European Parliament.

49 V. GARRONE, Pierre, *op. cit.*

models of electoral management.[50] Nevertheless, some authors have not hesitated to identify the weaknesses and problems of this mode of electoral management and the need to separate administration from politics in these cases.[51]

In Spain, various bodies belonging to the Government also have specific competences in electoral matters. These include the Electoral Census Office, which reports to the Ministry of Finance; the Ministry of Foreign Affairs, which deals with absentee voting; the autonomous Post Office, and the Sociological Research Center, which reports to the Ministry of the Presidency and is charged with creating official electoral surveys. The most important of these bodies is the Directorate-General of Domestic Policy (*Dirección General de Política Interior*), which reports to the Ministry of the Interior. The Directorate-General of Domestic Policy is responsible for carrying out the necessary actions to conduct electoral processes,[52] in conjunction with the Electoral Administration, in particular with the *Junta Electoral Central*,[53] The appointment of the Administration's representatives under Article 91.3 of the LOREG serves to obtain information on vote count results,[54] the custody and public dissemination of provisional election results[55] and the processing of electoral subsidies,[56] among other tasks. In this sense, it provides significant support in electoral matters.

It should be noted that the legal bases defining these competences in Spain are not laws. They are: 1) Article 11 of Royal Decree 207/2024 of 27 February, which establishes the fundamental organizational structure of the Ministry of the Interior,[57] and 2) the Order of 21 January 1999 regarding relations with Ministry of the Interior services integrated into Government Delegations.[58]

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50 CAMGUILHEM, Benoît, *op. cit.*

51 V. DEMICHEL, André et Francine, *Droit électoral*, Paris, Dalloz, 1973, p. 29. COLLIARD, Jean-Claude, preface to the first edition of the work of TOUVET, Laurent *y* DOUBLET, Yves-Marie, *Droit des élections*, Paris, Economica, 2007, 596 p.

52 Article 11 of Royal Decree 207/2024, of 27 February, which implements the basic organizational structure of the Ministry of the Interior and the Order dated 21 January 1999 on relations with the services of the Ministry of the Interior integrated into the Government Delegations.

53 Article 11 of Royal Decree 207/2024, of February 27, which develops the basic organizational structure of the Ministry of the Interior and the Order dated 21 January 1999 on relations with the services of the Ministry of the Interior integrated into the Government Delegations [in the 17 autonomous regions of the country].

54 PASCUA MATEO, Fabio, "Las unidades de la administración gubernativa de apoyo técnico al proceso electoral", p. 437 in PASCUA MATEO, Fabio (*dir.*), *Estado democrático y elecciones libres: cuestiones fundamentales de derecho electoral*, Pamplola, Thomson Reuters, 2010, 686 pp.

55 *Ibid.*

56 Royal Decree 1907/1995 of 24 November regulating the processing of annual state subsidies and election expense subsidies for political parties.

57 Article 11 of Royal Decree 207/2024, of February 27, which develops the basic organic structure of the Ministry of the Interior.

58 Order of January 21, 1999, on relations with the services of the Ministry of the Interior integrated into the Government Delegations.

The relationship between the Government (the Ministry of the Interior) and the electoral administration is unclear in Spain. It is unclear whether the Government is subordinate to the electoral administration or if the relationship is one of complementarity. Some authors affirm the Ministry's functional subordination to the electoral administration's organs in electoral matters.[59] This subordination stems from the disciplinary power that the Central Electoral Board exercises over "all persons who officially intervene in electoral operations",[60] in addition to the other powers of the electoral boards.

It is important to mention some cases where the impartiality of 'governmental' EMBs has been in doubt. In France, Decree no. 2014-1479 of 9 December[61] implements two automated personal data processing systems called "*Application élection*" and "*Répertoire national des élus*". The purpose of the first is to collect, store and process (on computer or electronic media) data showing the political affiliations of candidates in the presidential and legislative elections. The electoral administration (the *Préfet*) is responsible for assigning a political grade (*nuances politiques*) to the candidacies, and the grid for assigning these grades is set in advance by the Ministry of the Interior through a circular. The circulars issued by the Ministry of the Interior to assign these political grades have given rise to a number of cases[62] in which the impartiality, neutrality and independence of the electoral administration have been called into question.

Thus, on the occasion of the 2022 presidential and legislative elections, two petitions were filed, one in May 2022 by the association *Organe national indépendant de contrôle de l'exécutif (ONICE)*, which was rejected, and the other in June 2022 by the political parties La France insoumise, Europe Écologie les Verts, Générations, Génération Écologie, Les nouveaux Démocrates, the French Communist Party, the Socialist Party and the coalition Nouvelle Union populaire écologique et sociale (NUPES). They asked the Council of State to enjoin the electoral administration (the Ministry of the Interior) to consider the NUPES as an autonomous political nuance.

According to the petitioners, the grid for the allocation of nuances established by the Ministry of the Interior infringes the principle of equality before the law, since it grants a political nuance to the group representing the presidential majority in the National Assembly but denies it to certain other

59 PASCUA MATEO, Fabio, *op. cit.*, p. 438.

60 Art 19.1 LOREG, *Ibid.*, p. 438.

61 Decree no. 2014-1479 of December 9, 2014 concerning the implementation of two automated personal data processing operations named "*Application élection*" and "*Répertoire national des élus*".

62 RAMBAUD, Romain, "*Nuances politiques: le Conseil d'État enjoint au Gouvernement de considérer la NUPES comme une nuance en tant que telle "Le blog du droit électoral*", https://blogdudroitelectoral.fr/tag/nupes/page/3/.

political coalitions, such as the NUPES. Thus, in its decision of 7 June 2022 the Council of State enjoined the government to amend the circular, giving the NUPES its own political grade.[63]

In addition, it could be possible to consider the President of the Republic and the Prime Minister among the EMBs, insofar as they have the "power to convene the electorate'' when they issue the decree convening the electorate for the presidential election. For the latter, Article 7 of the French Constitution stipulates that "the ballot shall be opened following convening by the Government'', so the President of the Republic participates in the convening of voters through a decree signed by the Council of Ministers.[64]

The legal nature of the decree convening the meeting poses a problem as the Constitution does not specify whether it is a decree of the Council of Ministers (with the participation of the President of the Republic, who chairs the Council of Ministers) or a simple decree without the participation of the President of the Republic. Article 1 *bis* of Law no. 62–1292 of 6 November 1962[65] stipulates that only a "decree" is involved, but does not specify whether it is a simple decree without the participation of the President of the Republic. In decision no. 2022 184/188 PDR of 24 March the Constitutional Council confirmed the competence of the President of the Republic to sign the convening decree in his capacity as President of the Council of Ministers, even though the law in question did not specify the scope of the decree. Nevertheless, as Romain Rambaud points out, there is a problem if the President of the Republic refuses to call elections.[66]

In the French model of EMBs, it is the President of the Republic who signs the decree convening voters to elections in which he is likely to have an interest, in his capacity as President of the Council of Ministers. Beyond considerations linked to the independence of the electoral administration, this way of proceeding has its origins in history. Indeed, in Year VIII there was no need to call voters to the polls, as elections were legally held at regular intervals. It was only after

63 Conseil d'État, Juge des référés, formation collégiale, 07/06/2022, 464414, Inédit au recueil Lebon.

64 Decree no. 2022-66 of 26 January 2022 convening the electorate for the election of the President of the Republic.

65 Article 1-bis of Law no. 62-1292 of November 6, 1962 on the election of the President of the Republic by universal suffrage was amended by Organic Law no. 2021-335 of 29 March 2021 on various measures relating to the election of the President of the Republic.

66 RAMBAUD, Romain, "Élection présidentielle: quelques réflexions sur la nature juridique et l'autorité signataire du décret de convocation des électeurs'', https://blogdudroitelectoral.fr/2022/01/election-presidentielle-quelques-reflexions-sur-la-nature-juridique-et-lautorite-signataire-du-decret-de-convocation-des-electeurs-r-rambaud/.

the recognition of the 'Consulate for Life' in Year X that elections were called exclusively by the executive.[67]

In conclusion, it is important to mention this situation because it highlights the difficulties linked to the fact that the government itself organizes elections. To remedy this problem, several authors have proposed that this type of competence be transferred from the Ministry of the Interior to an independent electoral authority.[68] For example, Jean Claude Colliard has pointed out that "(...) the fact that a minister signs the texts organizing an election in which he himself is going to be a candidate only adds the anecdotal to the permanent. Admittedly, in a country with a long-standing democratic tradition, where the administrative judge is particularly vigilant, this has not been the cause of major disorders, at most of minor cleverness, but the theory of appearances, dear to the Strasbourg court, argues against this system".[69] He is in favour of removing electoral powers from the Ministry of the Interior and creating an "authority for elections" with well-established regulatory powers acting under the control of a judge. Other authors favour centralizing functions in a single body, ideally the Ministry of the Interior, which would serve as a valid interlocutor with the electoral administration.[70]

Nevertheless, it would not be correct to assert that the solution to the problems of impartiality and independence of an electoral administration would be in the form of model of independent electoral administration. The electoral administration model is in itself a source of problems, as all power is concentrated in a single authority, which could undermine the separation of powers.

The advantage of dispersing electoral tasks among different government bodies is that it avoids concentration in a single body. As discussed throughout this paper, however, the government's presence in election administration can lead to conflicts of interest that can undermine confidence in electoral management.

2.2. The problematic figure of the mayor.

It is important to mention some cases in which the role of political actors such as municipalities has been problematic in the electoral process, both in Spain and in France.

According to Article 26 of the Organic Law on General Electoral Regime (LOREG), the formation of Polling Stations *(Mesas Electorales*), the primary body

67 TANCHOUX, Philippe, *Les procédures électorales en France: de la fin de l'Ancien Régime à la Première Guerre mondiale*, Comité des travaux historiques et scientifiques, Paris, 2004, p.292.

68 COLLIARD, Jean-Claude, *op. cit.* p. *IX.*

69 *Ibid.*

70 PASCUA MATEO, Fabio, *op. cit.*, p. 437.

of the electoral administration that directs the voting and scrutiny process,[71] is done by the municipal councils (mayors) under the supervision of the *Juntas Electorales de Zona*. (Area Electoral Boards). Members of polling stations are elected by public drawing of lots, and the *Junta Electoral de Zona* supervises the municipal councils in their competence to draw lots for polling station members.[72] Nevertheless, during the municipal and regional elections in the Canary Islands in 2015 a municipal council delegate altered the results of the random draw system to designate the members of the electoral tables. The purpose was to exclude individuals with foreign names or surnames under the pretext that they probably did not speak Spanish well and could cause problems on election day. The judgement recognizing an infringement of electoral criminal law was appealed before the Constitutional Court, which dismissed the appeal in judgement STC 51/2025 on 26 February that year. The Constitutional Court recalled the relationship in which municipal council delegates reported to the *Junta Electoral de Zona* in electoral matters.

Similarly, the role of the mayor in the electoral administration is problematic in France. The mayor may preside over the polling stations' *Bureau de Vote*,[73] which is, to a certain extent, the equivalent of the *Mesas Electorales* in Spain. During a municipal election held in a small town in 2020 the outgoing mayor prohibited access to the electoral precinct (located at the entrance to the town hall) after election operations concluded at 6:00 p.m. This prevented the public from participating in the vote count. The mayor was acting in his capacity as president of the polling station *(Bureau de Vote)*. The French electoral judge (the *Conseil d'État* for municipal elections) issued a decision declaring that voters cannot be deprived of their right to monitor the counting process, thus rejecting the appeal.[74] When a party-affiliated election official runs an election, it creates a conflict of interest that may fuel the public perception that elections are rigged, with destabilizing effects.[75]

In conclusion, although the French and Spanish models of electoral administration are reputed to be democratic, an in-depth analysis of their strong governmental or political composition reveals certain weaknesses that cannot

71 Judgement of the Constitutional Court no. 51/2025, February 26, Legal Ground 3.

72 Art. 26 LOREG and Art. 11.4 LOREG.

73 Article R.43 of the Electoral Code: "*Les bureaux de vote sont présidés par les maire, adjoints et conseillers municipaux dans l'ordre du tableau. A leur défaut, les présidents sont désignés par le maire parmi les électeurs de la commune. En cas d'absence, le président est remplacé par un suppléant désigné par lui parmi les conseillers municipaux ou les électeurs de la commune, ou, à défaut, par le plus âgé des assesseurs. Le suppléant exerce toutes les attributions du président. Le secrétaire est remplacé en cas d'absence par l'assesseur le plus jeune*".

74 Conseil d'État, 8ème - 3ème chambres réunies, 11/12/2020, 445424, Inédit au recueil Lebon.

75 TOKAJI, Daniel P., *op. cit.*, p. 442.

go unnoticed by scholars. Research in comparative electoral law should delve more deeply into these aspects. This article has mentioned several cases that demonstrate the risk of the government organising elections. Therefore, legal research should continue to expose these failures and propose solutions that guarantee the rule of law and democratic quality.

PART VII.
POPULISM AND THE RULE OF LAW

DEMOCRATIC PRINCIPLE, POPULISM AND RULE OF LAW

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SUMMARY: 1. INTRODUCTION. 2. SPAIN AND THE RULE OF LAW. 3. RULE OF LAW AND NEW POPULISM. 4. NEW POPULISM, POLARISATION AND FRAGMENTATION. 5. THE RULE OF LAW AT RISK. 6. FINAL REFLECTION.

1. INTRODUCTION.

For a short time, a climate of optimism prevailed: constitutional democracy had defeated the last of its enemies, and one could only hope for the beginning of a long and prosperous period. However, it soon became clear that the difficulties had not disappeared, and the old problems were soon to be replaced by others.

It is a time of crisis in the strictest sense of the word: the old has not yet died and the new has not yet been consolidated, not least because we are still in a period of transformation. It is impossible to foresee what life will be like in ten years' time, although it is inevitable that uncertainty, confusion and even fear will grip many segments of society. Life has lost predictability. It does not even matter how strong the objective reasons behind these fears are, or the obvious existence of advantages and advances that can lead to a better life; the fear of uncertainty is more powerful. In addition to this, as mentioned above, there are the errors of traditional politics... from corruption to incomprehension and distance from the main concerns of society, the traditional parties and their leaders have progressively distanced themselves from citizens. Everything has come together to create a new political map, one that is disconcerting and, when interpreted with the old paradigms, inevitably leads to false diagnoses.

This is a good time to remember Don Fabrizio from the novel *The Leopard*: everything has to change so that everything remains the same. Understanding that, in this case, that this should be translated as the essence of constitutional democracy, i.e. the guarantee of freedom and its proper balance with equality; the guarantee of the rule of law and, with it, the broadest catalogue of rights and freedoms, and the vindication of reason against any expression of the irrational in the public sphere. If this is not done, there is no guarantee that the core of constitutional democracy can survive. The new ideological scenario and the political formations that represent it are not exactly the best guarantee. The demands are considerable and superficial tinkering is not enough, and the emergence of a new model of state and society, dominated by technology, requires a different way of understanding the development of the democratic principle and the demands involved in guaranteeing the rule of law.

2. SPAIN AND THE RULE OF LAW.

Understanding the present situation of the Spanish constitutional system requires special attention to the unique vicissitudes of the democratic principle. It is a propitious time for an expansive (and singular) understanding of this principle. A series of events have determined that its evolution in Spain has been particularly powerful, and in my opinion this is a decisive element for understanding the reasons behind the distortions suffered by the constitutional model today. Although the connections with what I believe is a distorted interpretation of the democratic principle may seem distant, it is still possible to see a thread of continuity: the primacy of the power of the people and, consequently, of the person who embodies it, in the face of everything. Ultimately, this interpretation of the democratic principle will justify any decision.

Having noted the disaffection of citizens and an objective loss of legitimacy of both representative institutions and the political system as a whole, analysts, academics and politicians from different backgrounds began to make a diagnosis of the ills and look for possible solutions. Almost unanimously, the solution found can be summed up in the formula “more democracy”.

The emerging political currents are necessarily connected to the aforementioned advocacy of the democratic principle. Of course, not all speeches made in favour of increased participation or the further development of the democratic principle are related to these movements. Most of them sincerely consider that the good health of democracy – a democracy that was meant to be representative – requires taking this path. Alongside them, however, there were those who saw an opportunity to raise the ever-present spectre of “true” democracy in this movement. Representative democracy would only be an

instrument of the elites to prevent the genuine exercise of power by the people;[1] representative democracy and its evolution deserved a severe judgement.[2] Although the principles had old foundations, they were dressed in new clothes and, above all, had new instruments at their disposal.

The parties and their leaders, far from reducing the risks arising from this dangerous situation, contributed to increasing them. Mistakes were not rectified; on the contrary, they were compounded and new ones were added. Different political actors explicitly advocated the separation of the principle of democracy from the principle of legality; the strength of the principle of political representation was directly and indirectly eroded, not due to a specific action of the Constitutional Court or the judiciary but their role in the system was questioned, In general, violations of the different projections of the rule of law increased, generating a serious and widespread feeling of political disaffection.

The consequences for the constitutional order were inevitable: relativisation of the legal relevance of political pluralism and diversity in the name of the 'unity' of the will of the political subject (Rousseau or echoes of Schmitt); vindication of forms of direct democracy such as the plebiscite or the assembly, as well as an institutional design based on a strong Executive; the delegitimization of 'traditional' parties, Parliament and the organs that control power, and in particular judges, as part of the elite, and questioning the Constitution as a framework for coexistence. In this way, the foundations of constitutional democracy suffered while a new democratic order was being advocated. The after-effects are still evident more than seven years after these events, as evidenced by the relationship between political leaders and the judiciary.

A further thought: at least one other determining factor needs to be mentioned: the characteristics of Spanish political culture. It can be said that one of the features that characterises it is the partiality and weakness with which the meaning of democracy is understood. This is a common trait across the political spectrum, with many Spanish political actors reducing democracy to the existence of electoral procedures and majority rule. The delicate balance that is any democratic system, best synthesised in Kelsen's formidable formula, is largely ignored. Naturally, the backbone of the democratic principle has always been respected, but that is not all. The organism that is constitutional democracy has been damaged in aspects that may be considered non-vertebral (some of

1 LACLAU, Ernesto, *La razón populista,* Fondo de Cultura Económica de España, Madrid, 2005.

2 DE CABO, Carlos, *Teoría crítica de la democracia* en (NOGUERA FERNÁNDEZ, Albert. Coord.), *Crisis de la democracia y nuevas formas de participación,* Tirant Lo Blanch, Valencia, pp. 17-40.

them are), but without which its quality is diminished and, ultimately, it ends up being difficult to recognise.

Studies and analyses denouncing the erosion of the rule of law in Spain are growing at a worrying rate, and an objective analysis of the functioning of the different institutions supports this concern. The Parliament and Senate, the Constitutional Court, the judiciary and the Attorney General's Office are the protagonists of permanent controversy. The normative nature of the Constitution is even weakened by such significant breaches as the failure to present budgets, both at the state level and in a number of regions. There is an ongoing, unbalanced struggle between the democratic principle and the rule of law. To understand this fully, it is necessary to perceive that it is a global phenomenon. Different circumstances drive political visions that abuse democratic legitimacy by eroding the functioning of institutions, and this is happening, to a greater or lesser extent, in many countries.

3. RULE OF LAW AND NEW POPULISM.

The movements that are best identified with this new populism have certain ideological traits that identify them. It is possible to distinguish at least two unifying features: 1) identities and the democratic principle that characterises what is usually considered left-wing populism; 2) order and nationalism as the banner of right-wing populism, which would also be identified by the reaction to the culture of political correctness and migratory tensions. On the Left, the decline of social equality as a banner in the face of "identity" equality is surprising. Women against men, whites against blacks, without paying attention (on most occasions) to the inequality that exists within each of these groups. Attention is also drawn to the emergence of an ideological discourse that is brought together under what is known as 'political correctness', and which represents a profound rectification of the historical cross-cutting spirit of the Left. This discourse is gaining traction every day as the hegemonic official doctrine, to the extent that it can be seen in the shadows of the old censorship customs of the Church, and with effects on freedom of expression.[3] Today, the ideological primacy of identity has become a discourse that becomes aggressive and does not admit dissent. Identity, or "identities", will be the new but eternal binder of the people, as a subject that must be reborn from its ashes in order to play a leading role in "authentic" democracy.[4] It is a skilful

3 VARELA, Ignacio*, La libertad de expresión en peligro: no es la censura, es la autocensura*, El Confidencial 14 de febrero de 2025, https://blogs.elconfidencial.com/espana/una-cierta-mirada/2025-02-14/libertad-expresion-peligro-autocensura_4064678/

4 LACLAU, Ernesto y MOUFFE, Chantal, *Hegemonía y estrategia socialista. Hacia una radicalización de la democracia,* Editorial SigloXXi, Madrid, 2015.

discourse with a great capacity for seduction, but is full of traps and appearances that deny the truth.

On the Right, there is not, or was not, so much novelty behind the discourse: order, nationalism and old habits. The rest is a reaction to most of the discourses stemming from the new identity order and, of particular relevance, the tensions arising from the strong migratory currents that characterise our times. Alongside this, of course, and to a greater extent than in left-wing populisms, there is confusion and fear of an undetermined future. Uncertainty and fear have always been powerful allies of reactionary elements. The novelty of right-wing populism (so far) is its perfect adaptation to the new rules of communication. It is normal that these formations are in the majority on social networks and, in any case, their message spreads easily.

When I alluded to right-wing populism I added "so far", and the reason is none other than the consequences of the emerging neo-libertarian discourse for the ideological debate. Although the visibility of this discourse is something that was already there (the personality and policies of the Argentine President Javier Milei can be ascribed to it), its emergence has taken place with the election for the second time of Donald Trump and the prominence acquired by the tycoon Elon Musk, who has become its most significant reference.[5] It is too early to measure the consequences, or even to describe it, but I think there are two features that can be highlighted. On the one hand, the mixture between the reactionary conservatism that characterises Trump's positions in relation to social and political rights and a radical ultra-liberalism in the economic sphere, reducing the role of the state to the minimum required at the beginning of the liberal state. On the other hand, the rupture of any established consensus and, even more, a proud exhibitionism to contradict not only all the classic premises established by a left-wing ideological order that has been considered dominant until now, but also the premises of the great social and political consensuses of the 20th century; not even national borders can withstand the onslaught.[6] In any case, what is most relevant is the premise of not respecting established rules, neither national nor international ones. A singularly important expression for the argument that follows in these pages is President Trump's exorbitant use of his pardoning power to mould justice according to ideological criteria.[7]

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5 As on other occasions (Peronism in Argentina; the Cuban revolution; Maduro's interpretation of democracy), Ibero-America emerges as the protagonist of precedents. Seen with a little perspective, it is possible to consider that Milei represents the first model of a politics that denies rules and conventions and ruthlessly confronts traditional ideological points of agreement.

6 GONZÁLEZ-FERRIZ, Ramón, *La trampa del optimismo. Como los años noventa explican el mundo actual,* Debate, Madrid, 2020.

7 After pardoning the assailants of the Capitol in one of his first measures or threatening sanctions against members of the International Criminal Court who take action against American citizens and their allies, President Trump has ordered the withdrawal of charges against the mayor

4. NEW POPULISM, POLARISATION AND FRAGMENTATION.

The polarisation and fragmentation of political systems are inevitable consequences of the consolidation of this political trend. Although, as will be seen, the two phenomena are mutually reinforcing, it is necessary to briefly analyse them separately. Polarisation, as can be deduced from what has been described, is the *raison d'être* of populism. It is part of its ideological core and essential to its political tactics. From an ideological standpoint, radicalisation is innate to its discourse of good/evil, friend/enemy.[8] As noted, central to all currents is the exercise of a single truth which, of course, they embody. In the face of that truth, there is only room for evil; whether out of a desire to deceive the people or simple incompetence, the others are in opposition, they are enemies. This division feeds on the simplification denounced above. In tactical terms, polarisation is essential for the emergence and consolidation of these formations. Their messages are weak both ideologically and technically, and in order to nuclearize their own and win followers, they need to strengthen confrontation and the negative vision of the other, 'the enemy of the real people'. Ideology and tactics end up being identified. Today, this is a widespread trait that transcends borders.[9]

This discourse is characterised by its strong irrationalism. Data do not matter; neither does the scientific basis, nor does experience. Obviously, nothing needs to be argued, as everything is self-evident. Reason does not exist in their discourse, whereas public debate goes back centuries. I understand that this is one of the reasons why the development of social networks as a new *agora* has strengthened this political current. In contrast to the initial hope that they would provide the space needed for the development of a deliberative democracy that would broaden opportunities for participation and improve the quality of democracy as a whole, their evolution has shown that, without forgetting their advantages, they can contribute effectively to the radicalisation of the political system. The result is an ecosystem conducive to diatribes and pamphleteering, i.e. an excellent breeding ground for expelling reason from debate.

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of New York in exchange for his cooperation in the capture of undocumented immigrants, provoking the rebellion of several prosecutors. https://news.un.org/es/story/2025/02/1536351; https://www.lavanguardia.com/internacional/20250214/10384928/rebelion-fiscales-trump-ordenar-retirada-cargos-alcalde-nueva-york.html

8 SCHMITT, Carl, *El concepto de lo político*, Alianza, Madrid, 1998.

9 For a casuistic analysis of populist phenomena in Europe, see the Friedrich-Ebert-Stiftung report titled "Identity, partisanship, polarization. How democratically elected politicians get away with autocratizing their country" https://brussels.fes.de/e/fes-study-identity-partisanship-polarization-how-democratically-elected-politicians-get-away-with-autocratizing-their-country.html.

As mentioned, the most significant expression of the contemporary crisis of democracy is the weakening of the rule of law and, in particular, of the idea of limited power.[10] The rule of law is the shell that supports a democratic system and allows it to develop harmoniously without falling into the imbalances inherent to democratic radicalism. The relationship between democratic principle and freedom is necessarily conflictive.[11] If the former were understood absolutely, freedom and citizens' rights would be a chimera; at best, pure rhetoric. Constitutional democracy is the best way man has found to balance these two principles: power lies with the people, and society is governed by the principle of majority rule. That majority cannot do everything, because that same democratic principle demands both respect for the freedom and rights of citizens and the possibility of alternation in power.[12] Conjunctural democratic legitimacy cannot be translated into absolute power; a democratic society demands that this power be effectively limited and that, to this end, checks and balances function satisfactorily.

This implies, together with the recognition and effectiveness of rights and freedoms, the necessary independence of the judiciary, including, where appropriate, constitutional jurisdiction, and the radical guarantee of freedom of expression, with the corresponding media pluralism that ensures the ability of citizens to choose between different options as equally as possible, together with a series of counterweights that limit the emergence of possible pathologies. Today, many of these axioms are being questioned.[13]

It is no coincidence that this situation is more pronounced in countries with weaker democratic traditions. It is only natural that the simplification of identifying democracy with the will of the majority is more convincing in these countries. A weak democratic tradition inexorably corresponds to a weak culture of respect for the rule of law and, in general, for institutions. Spain is a reflection of this situation, to whatever degree one wishes to attribute to it. Our historical relationship with the set of rules and values that make up the culture of the rule of law is not exactly positive. It can be said that the convictions of the rule of law have always been weaker than those of the democratic principle: the democratic principle has always been more seductive than respect for the law. The worrying thing is that the ruling elites do not depart from this general assessment; indeed, far from setting an example, they too often behave with disdain for it. In any case, it should be remembered that, although it is possible to detect singular

10 BALAGUER CALLEJÓN, Francisco, "Democracia y Estado de derecho en Europa", *La cittadinanza europea 2,* 2020, pp. 33-60.

11 DE MIGUEL BÁRCENAS, Josu, *La libertad. Historia de una idea,* Athenaica, Seville.

12 KELSEN, Hans, *Esencia y valor de la democracia,* Labor, Madrid, 1934.

13 CASTELLA ANDREU, Josep Maria y EXPÓSITO, Enriqueta (Coordinadores), *Contrapoderes en la democracia constitucional frente a la amenaza populista,* Marcial Pons-Fundación Manuel Giménez Abad, Madrid Zaragoza, 2024.

expressions of this drift in Spain, it is by no means an isolated phenomenon but rather a universal trend.

5. THE RULE OF LAW AT RISK.

The questioning of the rule of law is arguably the greatest challenge for the future of constitutional political systems. At this point in the paper, I will limit myself to underlining the progressive weakness of the system of checks and balances that characterises democracy by definition. Constitutional democracy is the control of power.[14] Its construction is the result of the balance between the principle of legality and the democratic principle. Legality is an expression of the power of the people; once formulated, this power is subject to laws, laws that can be changed, but always in accordance with due process. There can be no contradiction between democracy and legality because the latter is an expression of democracy.

This is the great formula that underpins the whole constitutional archetype. A brilliant invention that, with the desired nuances, has made it possible to reconcile freedom and the power of the people, finding a way to solve the serious problems that the dialectic between the two sides could produce. From this premise, an extensive system of checks and balances was built to guarantee that public power submits unconditionally to the law. It is no coincidence that attacks on the institutional order concentrate on this equation and are directed both at the premise (balance between freedom and the power of the people) and the consequence (the power of the people – not in constituent expression – also has limits and, consequently, is subject to controls). The balance that guarantees the harmony of political systems built on the foundations of constitutional democracy is unbalanced in favour of a democratic principle reduced to its most elementary expression: the power of the people.

The functioning of this model has never been perfect, and nowhere. There have always been times when it has been more respected and others when less. What is significant is the trend and the generalisation of discourses that justify it. Two factors have contributed with special relevance; on the one hand, the aforementioned resurgence of the democratic principle. In some cases, it has come to be regarded as an absolute value. Once again, a powerful communicative discourse that no one has bothered to counter has been of particular importance: who and how can someone oppose the will of the people without undermining democracy?

14 ARAGÓN REYES, Manuel, "El control como elemento inseparable del concepto de Constitución", *Revista Española de Derecho Constitucional*, no. 19, 1987, pp. 15-52.

On the other hand, the aforementioned malfeasance of parties and leaders who, seeking cover for bad, if not outright illegal, practices, have weakened the system of controls. All power sets out to be unlimited,[15] and not only political power but any manifestation of social power. Even the most sober rulers have at some point been tempted to overstep the natural limits for the exercise of power. It is precisely this 'natural' nuance to the exercise of power that led to the existence of caveats in the design of constitutional democracy from its origins. In recent decades, however, the 'fear' of power seems to have been lost or, if you prefer, its inevitable tendency to abuse has been forgotten. This has happened both because of the conscious influence of ideologies and formations that wish to exercise it without limits, and because of the trivialisation of its exercise and possible abuses.

The consequence is that the rule of law has been eroded from a dual perspective. It has lost legitimacy in favour of an erroneous and absolute understanding of the democratic principle, and it has lost functionality and effectiveness in the sense that it is less capable of effectively controlling the various manifestations of abuse. This incapacity is further compounded by the increasingly objective difficulty of exercising control, but controlling power in all its manifestations is increasingly difficult. However, far from strengthening the means to try to redress this situation as far as possible, they are weakened, either consciously or unconsciously.[16] Naturally, this situation is fertile ground for currents that base a large part of their ideological discourse on an absolute understanding of the democratic principle. It also is for simple authoritarian formulas that have never understood that the exercise of 'their' power must be limited. A comment should be made in this regard: while the new technological tools make power, without redundancy, more powerful, they could simultaneously provide forms of control that are much more effective than those that currently serve this purpose. Curiously, there does not seem to be much interest in developing these possibilities for additional control. At least, no major steps have been taken in this direction so far.[17]

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15 DE TOCQUEVILLE, Alexis, *La democracia en América,* Alianza Editorial, p. 207. DE JOUVENEL, Bertrand, *El poder,* Editora Nacional, Madrid.

16 SIMONELLI, Marco Antonio, "Las relaciones entre el Parlamento y las autoridades independientes. Sistemas de nombramiento y control parlamentario", in CASTELLA ANDREU, Josep Maria y EXPÓSITO, Enriqueta (Coordinadores), *Contrapoderes en la democracia constitucional frente a la amenaza populista,* Marcial Pons-Fundación Manuel Giménez Abad, Madrid Zaragoza, 2024, pp. 271-298.

17 GARCÍA ROCA, Javier, "El fortalecimiento de la democracia y el Estado de derecho a través de la Inteligencia Artificial: conclusiones del seminario", in BUSTOS GISBERT, Rafael and GARCÍA ROCA, Javier (Coordinadores), *Fortalecimiento de la democracia y el Estado de derecho a través de la Inteligencia Artificial,* Instituto Vasco de Administración Pública, Vitoria, 2025.

Furthermore, in the contemporary debate on democracy, attention should be drawn to the situation in which public law, and in particular the Law, finds itself. Reference was made to the difficulties it is facing in regulating the new technological society; the inevitable consequence was its growing weakness. It is a central issue that receives less attention than it should, at least from Constitutional Law.[18] There has been much discussion and theorising on different problems raised around the legislating state and, in particular, around the qualities (or rather shortcomings) of the law as a normative instrument. Some of these questions will be dealt with in some detail in later pages. Above all, however, there is an objective fact: the law has lost its functionality, and many of the evils attributed to it are not temporary issues or a consequence of the bad actions of certain individuals but the result of structural problems that are difficult to solve. The law and its proper relationship with the rule of law have never reached the revolutionary ideal, but today they are further apart than ever.[19]

It is not possible to go into detail on this here, but at least two circumstances can be highlighted that explain this weakness.[20] The first, and the most relevant, is the speed with which matters subject to regulation change. The law, by definition, requires stability, with a requirement that the reality on which laws are projected does not substantially alter over a relatively long period of time. Nowadays, the opposite is the case, with everything changing at great speed. For the legislator, the consequence is that by the time a law is passed it is often already out of date, as a lot has changed during the processing time. The distorting factor, for the legislating state, introduced by the speed and intensity of change is probably one of the greatest challenges facing democratic society.

In addition to the speed factor, the extraordinary increase in the complexity of the objects to be regulated should be highlighted. Technical complexity, social complexity, complexity of interests. In the face of this, the basis of any regulation: language. The instrument of the legislator is none other than language. and the language of the jurist has its limits, basically related to the need for legal certainty, understood as the understanding of the rule and the capacity for coherent application. The matters that must be legislated on today are very different from those faced by the classic legislator. Their common characteristic is that they are much more technical, with their own nomenclature, which in most cases is incomprehensible to the legislator. Beyond the language, however, there are matters that are very difficult to address in terms of regulation, and the global nature of many of these issues only aggravates the problem. The difficulties that

18 ATIENZA, Manuel, *Contribución a una teoría de la legislación,* Cívitas, Madrid.

19 LAPORTA, Francisco, *El imperio de la ley. Una visión actual,* Trotta, Madrid, 2020.

20 TUDELA ARANDA, José, "Populist parties or populist politics?" in CASTELLA ANDREU, Josep María and SIMONELLI, Marco Antonio, *Populism and contemporary democracy in Europe. Old problems and new challenges,* StudenVerlag, 2021, pp. 135-148.

European institutions and states are facing in regulating artificial intelligence is the latest example of this.[21]

The consequences of this situation are manifold. In summary, I will refer only to those that I consider essential. Firstly, they weaken the idea of the law as an instrument of expression of the will of the majority and, therefore, as the culmination of democratic ingenuity. Secondly, their ineffectiveness as an instrument of regulation results in the delegitimization of the whole system. Thirdly, it favours the disempowerment of public power. Without effective law, the latter loses its main instrument of intervention. Fourthly, the impact of this weakness on the formulation and effectiveness of subjective rights. Finally, it is inevitable to allude to the repercussions of the new distribution of powers on the legal system, both territorially and economically, and this scenario inevitably favours institutional weakness as a whole. Ideologies that question the foundations of constitutional democracy are comfortable in anomie and see the consequences of this deterioration as a profitable niche for political gain.

For these and other reasons, the fragility of the institutional system built around the rule of law has increased. Naturally, the situation is not the same in all countries, but it is sufficiently widespread to be a general feature of contemporary political systems. It is a characteristic directly linked to all political currents that need the confusion, fear and impotence that can be caused by the decay of institutions in order to grow and consolidate. Therefore, they will take advantage of the damage caused by others and will try to increase it according to their possibilities. If they come to power, their aim will be to destroy it, saving only the appearances they deem necessary to legitimise themselves.

6. FINAL REFLECTION.

The history of constitutional democracy is the history of its permanent evolution towards a greater rationalisation of power. It is the history of the struggle against the immunities of power, against arbitrariness as a way of exercising power.[22] The objective is predictable power, subject to controls that condition it in all its manifestations, and limited by the necessary respect for the legal system as a requirement of any quality democracy. Today, the general pattern is to go in the opposite direction.

21 For this reason, the European Union's ability to finally pass the so-called European Artificial Intelligence Act is to be welcomed.

22 GARCÍA DE ENTERRÍA, Eduardo, *La lucha contra las inmunidades del poder,* Civitas, Madrid, 1986.

It is also necessary to mention the transformations undergone by two actors that formed part of the classical institutional conception, understood in a broad manner. From their position in the institutional system, they acted as guarantors of the backbone of the rule of law: political parties. It should be remembered that without parties there is no democracy, at least for the time being.[23] Alongside the parties, the other side of the scale was public opinion. In the middle, freedom of expression and the right of access to information stood in the balance and were *primus inter pares* among the other rights and freedoms, precisely because of their direct relationship with the formation of free public opinion and, therefore, with the proper development of democracy.

Once again, it is clear that it is not possible to describe the present as it was only ten years ago. The shaping of public opinion has changed radically in recent years, with the technological revolution having had a profound impact on the way we communicate and access information.[24] Sources have multiplied, traditional media have seen their importance and presence diluted, and a space without rules or apparent control has emerged which, in just a few years, has become an inexcusable reference in political dynamics. This is a crucial fact which, more than a symptom, is a cause, and one of the essential reasons for the objective transformation of the political system. The changes in communication, and in the actors involved, are closely linked to the successful development of new ideologies and ways of doing politics. This is not, and it is relevant to repeat, their cause, not even the main cause, but it is an important factor in understanding their success, even a certain qualitative modulation of this political phenomenon. A characteristic of network communication is the simplification and radicalisation of messages; moreover, anyone can become a communicator, as there is no quality filter. The demands of an editorial staff committed to the prestige and history of a medium disappear, as all that matters is impact. In a way, information disappears… all that matters is the act of communicating.

Disdain for institutions is not new in political discourse. According to a long-standing tradition, they represent a formal order that hides real power relations. Institutions would be conservative by definition, and it is possible to agree with some of the ideas that underlie this reproach: on too many occasions, when governed by unsuitable actors, institutions depart from the virtue that is presupposed of them. However, this this does not detract one iota from their value and their necessity for the proper functioning of constitutional democracy. The necessary criticism of their deviations cannot

23 GARCÍA PELAYO, Manuel, *El Estado de partidos,* Alianza editorial, Madrid, 1987.

24 SARTORI, Giovani, *Homovidens. La sociedad teledirigida,* Taurus, Madrid, 2012. BUSTOS GISBERT, Rafael, *Calidad democrática. Reflexiones constitucionales desde la teoría, la realidad y el deseo,* Marcial Pons-Fundación Manuel Giménez Abad, Madrid Zaragoza, 2017.

lead to their lack of meaning; rather, those who postulate such disdain must not be allowed to achieve their goal. Theirs is not a logical and necessary constructive criticism; on the contrary, any weaknesses are denounced, and exponentially increased, in order to destroy the system they shape. Constitutional democracy – democracy without adjectives – can only persist with a solid and effective institutional order. The existing order is subject to extraordinary challenges, as are all facets of life. The response cannot be merely destructive because destruction can originate in action or inaction. Genuine democratic conviction implies, simultaneously, a reaffirmation of its inexcusable necessity and a diagnosis that facilitates its adaptation to the emerging social order. Until this adaptation takes place, however, those who defend the essence of democracy must remain vigilant and safeguard the current institutional order. Yes, they should denounce its dysfunctions, but with the awareness that there is a vacuum on the other side.

As indicated in the opening pages, it is not possible to understand what is happening in Spain without taking a broader view. Spain is only a reflection of a change, indeed, of a generalised crisis of constitutional democracy. What is at stake is not the democratic principle, at least not its appearance. Quite the contrary; everyone claims it, everyone, even the most authoritarian actor, speaks in the name of the people and even (and here lies the novelty) claims the purity of their power by the backing of apparently free electoral processes. What is at risk is constitutional democracy as an ideology.

Even in states with unquestionably democratic systems, as is the case of Spain, political forms have been contaminated by winds that come from a social culture in transformation. The most relevant consequence is, as has been noted, the generalisation of a way of doing politics that abandons reason and self-restraint; that exchanges the adversary for the enemy; that substitutes the law for the will. With the nuances that everyone wants to put on the table, with the distribution of responsibilities that each one considers appropriate, I believe that the majority can agree that these features are present today in Spanish politics and that they even play an almost leading role, excluding other ways of doing politics. The weakening of the rule of law in Spain seems an objective reality.

THE RISE OF THE FAR RIGHT IN EUROPE. A STUDY OF SEVERAL MILESTONES FROM A LEGAL HISTORICAL PERSPECTIVE

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SUMMARY: 1. INTRODUCTION. 2. THE HISTORICAL AND LEGAL CONTEXT. 2.1. The origins: 17th and 18th Centuries. 2.2. The 19th century and the liberal state. 2.3. The 20th century. *2.3.1. The first half of the 20th century. 2.3.2. Post Second World War period.* 2.4. The idea of global crisis in the 21st century. 3. CRITICAL ELEMENTS FOR FRAMING THE CURENT FAR RIGHT. 3.1. A mainstream actor. 3.2. *Othering* populist politics in the digital space. 3.3. The context of *normalised crisis* and *steady uncertainty*. 4. CONCLUSIONS. 5. BIBLIOGRAPHY.

1. INTRODUCTION.

The rise of the far right in Europe and in other parts of the world has attracted the attention of academics, politicians and members of a variety of social movements. In the current stage of this resurrection radical far-right parties have achieved unprecedented influence in Germany, Rumania and France, rising to power in some countries, such as Italy and Hungary, while governing in coalition with other parties in Croatia, Finland and Slovakia. This situation presents numerous risks: democratic values are called into question since these movements do not adhere to ideas of human rights and the rule of law. In fact, it

is well known that these groups are opposed to migration, gender equality and social rights, among other democratic ideals.

This situation has caused alarm because the far right is no longer a marginal force. Many researchers have analysed the rise of the far right in recent times in order to discover the reasons why it has acquired so much social support and political power.[1] This paper makes a contribution to that debate through the study of several milestones in the evolution of the far right in Europe from a historical and legal perspective. It argues, among other things, that the roots of the far right can be traced back to the history of racism, but its modern political roots began taking shape during the Enlightenment and in opposition to new liberal ideas. Firstly, the paper carries out an analysis of the historical evolution of the far right, studying the main elements of the movement from the 17th to the 21st Centuries. Secondly, it outlines three critical elements that explain the situation of the far right today: 1) its ability to form alliances with other parties, 2) how it exploits social media, and 3) the fact that the current situation of *normalised crisis* and *steady uncertainty* is helping the far right to gain and sustain power. Finally, this study concludes by arguing that understanding the long historical and legal roots of the far right can be crucial for planning strategies to stop this expansion.

2. THE HISTORICAL AND LEGAL CONTEXT.

2.1. The origins: 17th and 18th Centuries.

The premise of this work is that the modern origins of the far right can be found in the 17th century and not in the period between the two world wars, as other academics have argued.[2] Thus, the historical roots of the current far right relate to the traditionalist, reactionary and counter-revolutionary movements of the 17th and 18th Centuries. We can identify some roots that connect far-right ideology with thinkers such as a Jacob B. Bossuet, Louis de Bonald and Joseph Maistre.[3] These authors believed that the liberal ideas of their time threatened

1 The most recent research on the far right analyses, among other aspects, the impact of migration politics and the use of social media by these movements. See, for instance: MONDON, Aurelien, "Populism, public opinion, and the mainstreaming of the far right: The 'immigration issue' and the construction of a reactionary 'people'", *Politics*, 45, 2025, pp. 19-36.

2 DAVIES, Peter J. and LYNCH, Derek, *The Routledge companion to fascism and the far right,* Routledge, London, 2002.

3 RODRÍGUEZ JIMÉNEZ, José Luis, "De la Vieja a la nueva extrema derecha (pasando por la fascinación por el fascismo)", *Historia Actual Online*, 9, 2006, p. 87.

the unity that religion provided to the social and feudal order. In fact, these authors were strong defenders of the *Ancien Régime*.

During the 17th and 18th Centuries, the aim of reactionary movements was to prevent the social, legal and political changes promoted by the new liberal thought. The ideology of these thinkers fought against the ideas put forward by Voltaire, Rousseau and Montesquieu, who were part of the Enlightenment – a wide intellectual movement which believed in equality under the law and promoted the idea of universal rights. The reactionary and traditionalist movements of the time opposed the idea of rationality and defended revealed truth, instead of the new philosophical, legal and political understanding of society.[4]

Although the origins of the political philosophy of the far right can be established during the Enlightenment and the opposition to these new ideas, some of the elements of the far right, such as racism and xenophobia, take us further back in history to the times of blood cleansing and the origins of racism. The Hispanic Monarchy, for instance, had a legal discriminatory framework of blood cleansing against the Jewish population from the 15th century; and the Ancient world and the Middle Ages show significant examples of discrimination against religious minorities.

Moreover, the current far-right movements hark back to the Middle Ages as some sort of golden era, referring to a "white, racially pure Middle Ages", even though race-based political ideology was an invention of the Enlightenment. More specifically, Carl Linnaeus first categorised humans into races in 1738 in his highly influential *Systema Naturae*. This study (and others) were used during that period by European nations to create new narratives about their national origins that worked within a racial framework. Furthermore, the Enlightenment was closely related to the process and development of the creation of the nation state from the 16th century onwards.

2.2. The 19th century and the liberal state.

The crisis of the *Ancien Régime* reorganised the way of understanding the state and the law. The nation state was transformed again during the 19th century with the expansion and power of liberalism and the significant landmarks of the French revolution and the American War of Independence, which had a huge impact all over Europe. However, it took the entire century for the liberal state to be consolidated, a milestone reached in most western countries in the late 19th century.

During this long period of consolidation, the long-standing powers of the *Ancien Régime* (mostly powers associated with the Church and Monarchs)

4 *Ibid.* p. 88.

resisted the new liberal ideas. However, in the later decades of the 19th century the counter reactionary movements of the Modern Age underwent a transformation, becoming part of the new conservative liberal parties. Reactionary movements opposed liberalism in the 17th, 18th, and early 19th centuries, but as the 19th century progressed, reactionary and traditionalist movements were also transformed. In the late 19th century, the doctrine developed by the traditionalist movements gave shape to the new conservative radicals.

The political conflicts between the progressive and conservative liberal parties during the 19th century are well known. Each movement promoted the idea of rights from a very different political point of view. On the one hand, conservative parties framed liberal revolutions as part of the promotion of individual and property rights, and were represented mainly by the bourgeois classes. On the other, progressive liberal parties put forward ideas related to universal suffrage and, in the late part of the 19th century, the concept of collective rights.

Political parties as modern entities were also created during the last decades of the 19th century, although it was in the 20th century that they would become a democratic political tool, in line with the consolidation of the new democratic forms of the state. One of the paradigmatic examples of this step was the Weimar Republic (1918–1933), which represented the ideas of the new constitutionalism and the new state in the 20th century. However, before that (late 19th century) there were different factions within the conservative liberal parties and movements, with some of them being categorised as radical conservatives. It is within these radical conservative movements that the origins of the current far right lie.

Despite their political conflicts, both progressive and conservative parties formed power-sharing governments in many European countries during the late 19th and early 20th centuries. In Spain, for instance, this system was called the 'Restoration' and lasted from 1876 to 1923. There are several reasons that explain these alliances, although the new left-wing movements, associated with workers' organisations, are crucial to understanding these alliances. Something that we can see in the origins of the current far-right movements in every period is their reactionary nature. That is, the ideas of traditionalist and conservative groups are always generated and developed in reaction to new liberal or social movements. Indeed, their ideas develop within the friend/enemy dialectic: they try to make alliances among conservative and traditionalist parties in order to confront new political movements within the democratic system (liberals, republicans, progressive parties) and new left-wing movements (socialist and anarchist).

During the last decades of the 19th century workers' movements, trade unions and the creation of class-based political parties increasingly became

the main political enemy of the radical conservative parties. The conservative extremist movements accepted some of the economic and political changes that liberalism brought (liberal economy, the abolition of the political structures of the *Ancien Régime*, and guilds, for instance), while in the 20th century they fought against the new social and political ideas linked to workers' rights and movements – the 'New Left'.

Furthermore, a critical element of far-right ideology – racism – was significantly developed during modern colonialism towards the end of the 19th century. As previously mentioned, the origins of racist theories fall outside the remit of this paper, but it is important to note that discriminatory legal frameworks promoted by liberal states were applied in the colonies during the 19th century. There were two periods of European colonialism: an initial one led by the Spanish and Portuguese Empires in the 16th century, and a second period mainly in the late 19th century and the initial stages of the 20th century, when large parts of Africa and Asia were conquered by European countries such as Great Britain, France and Belgium, among others. In this second period, which took place at the same time as the consolidation of the liberal state in Europe, European countries established legal discriminatory colonial law in the conquered territories. These racist colonial legal frameworks were related to the idea of superior races, which was also developed during this period.

It was within this context that a well-known far right group was born – the Ku Klux Klan. This violent extremist group was created in 1867 following the American Civil War, which led to the abolition of slavery. They violently attacked the African American community in the United States and became one of the symbols of racism. The group's strength was reinforced during two subsequent periods: in the aftermath of the First World War (1918–1919) when it promoted anti-migration ideology, and also in the 1960s when it rose up against the civil rights movement.

2.3. The 20th century.

2.3.1. The first half of the 20th century.

In the late 19th century far-right movements were related to conservative radical parties, whereas we can see a direct connection between these movements and fascism in the 20th. In fact, many academics have argued that this connection is the origin of the far right. Nonetheless, if we analyse history from a wider point of view, the ideological roots of the far right can be found much earlier than the beginning of formal fascism, as we have previously argued.

In any case, several events transformed the established way of thinking in the early 20th century, and these also had an impact on reactionary movements. The First World War and social revolution are critical to understanding the inter-war period, but we should also pay attention to some other changes that took place after the 1890s; changes that promoted the cultural crisis that led to the theorisation of racism as well as the glorification of war and violence. This trend is called scientific racism, sometimes also called biological racism, and refers to the belief that the human species is divided into biologically distinct taxa called races. Another thing that the 20th century brought was mass mobilisation and direct action, which were promoted by a variety of political entities (both on the left and right) during this period.

These intellectual and social changes explain the creation of fascism in the inter-war period, in which the liberal state was plunged into a profound crisis. Fascism emerged after the 1914–18 war, as European empires disintegrated and the Russian Revolution triumphed. Between the wars, the fascists built on pre-war ultra-nationalist feelings and responded violently against working-class struggles, claiming to provide a better solution to acute economic crises. For most of this period the main dominant forces on the right were authoritarian, nationalist and traditional: regimes and parties that defended the old order of existing elites – the Church, the Civil Service, the army and the monarchy. In contrast the fascists, starting with Mussolini, were revolutionary in their ultra-nationalism – the fascist party was intended to form the basis of a new elite. Fascist influences spread far and wide and many non-fascist groups shared their ideas and awareness. The widespread diffusion of fascist political formations across the whole of Europe only came after Hitler's rise to power in 1933. In that same year the Spanish fascist party *Falange Española* was created, even though its roots were established in the 1920s.

New fascist ideologies recovered some of the traditionalist ideas developed in the previous centuries: they were anti-liberal, with political views built on antagonistic politics (friends/enemies), also known as *othering*, which was a far cry from the pluralist views that began taking shape during the early decades of the 20th century. As previously stated, the ultra-nationalist ideology and view of the party was one of the new aspects that fascism added to the development of the conservative right up to that point. At this time, European politics took a remarkably authoritarian and violent turn, including the legalisation of racist theories.

Both Hitler and Mussolini, as well as other dictators of this period such as Franco in Spain, created institutional and legal frameworks that gave shape to the fascist ideology, which included xenophobic and racist laws. These repressive legal frameworks were constructed within the context of the crisis of the liberal state and the new mass movement techniques of mobilisation and propaganda.

2.3.2. Post Second World War period.

According to Beye, far-right success in post-war Europe came in waves,[5] with the first wave – which he refers to as neo-fascism – beginning in the aftermath of the war. This first wave is closely related to the birth of fascism; groups that did not accept losing the war did not disappear in 1945 but remained strong and organised. They worked in small groups and promoted Nazism and fascist ideas, even though they were marginalised in most European countries, since antifascist ideologies were the rule in the new political systems. Initially, these neo-fascist groups were organised into political entities supporting former war combatants (e.g. the *Wehrmacht* in Germany). They made an attempt to become political parties, and although these parties were banned in countries such as Germany and the Netherlands, in other parts of Europe, such as Italy, they managed to enter parliament; such is the case of the Italian Social Movement, a fascist party that became part of the Italian parliament in 1948.[6] In 1951, the neo-fascist parties of Europe created the European Social Movement, but it did not have the same success as in Italy.

The second wave of the rise of the far right began in 1955 and was promoted by new populist right wing movements. The *poujadist* movement in France was the most successful movement within this period – the anti-parliamentarian party, *Union de défense des commerçants et artisans* (UDCA) promoted by Pierre Poujade. This movement obtained two seats in the French election held in 1956, one of those seats being taken by Jean-Marie Le Pen. In the United States this right-wing populism was represented by Senator Joseph McCarthy and his repression against left-wing and communist movements within the context of the Cold War.

Neo-fascism and its anti-immigration policies continued to develop during this period, although these groups were still marginal. The situation shifted in the 1980s, as extreme right-wing parties began to win seats in different parliaments. The third wave of the rise of the far right, which continued during the 1990s began,[7] the reason being the economic crisis of the 1970s and 1980s. In criticising migrants, ethnic minorities and also the national and European elite, far-right parties emerged as the voice of the people in the 80s and the early 90s.

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5 BEYME, Klaus Von, *Right-wing Extremism in Western Europe*, Routledge, 1st edition, 1988.

6 This party transformed in 1995 into National Alliance, and in 2009 they fused together with Silvio Berlusconi´s Forza Italia.

7 RYDGREN, Jens, "The Sociology of the Radical Right", *Annual Review of Sociology*, 33 2007, pp. 241-262.

2.4. The idea of global crisis in the 21st century.

The new millennium began with progressively stronger far-right movements worldwide: we are currently in the fourth wave of this rise. After 2000, far-right political parties ceased to be marginal in many countries with traditional right-wing parties creating closer connections with them, and in some cases becoming political allies. In this same year, the Austrian centre-right formed a coalition government with the far-right Freedom Party. It was a shocking step back at the time, and the European Union even imposed diplomatic sanctions on the government in Vienna. Tolerance of far-right parties, or the normalisation of the power of the far right, has continued since then.

If the new millennium arrived with an exaltation of globalisation, the economic crisis of 2008 marked the end of enthusiasm towards the global era, and new criticisms against liberal democracy arose in the aftermath of this financial catastrophe. Since then a series of economic, sanitary and war-related disasters has continued to influence the political arena.

In the context of this situation of constant crisis, the centre political parties increasingly lost power and the so-called era of populism began. Despite the prevalence of the term 'populism', it lacks a clear definition; in contemporary understanding, populism is most often associated with an authoritarian form of politics and, more specifically, with far-right parties. From this viewpoint, "populism consists of a transmutation of the democratic principles of the majority and the people in a way that is meant to celebrate one subset of the people as opposed to another, through a leader embodying it and an audience legitimizing it".[8] That is, right-wing populism relates to the concept of *othering* referred to above.

These populist right wing parties emerged in the context of global politics, influenced by the increasing use of social media. Currently, the impact of the digital world, especially social media, has made it possible for the far right to become a strong political actor that promotes ultra-patriotic views of politics that are opposed to migrants and globalisation.

3. CRITICAL ELEMENTS TO FRAMING THE CURENT FAR RIGHT.

3.1. A mainstream actor.

One of the critical elements of the current far right is that it is a mainstream political actor.[9] Its power has become normalised throughout the last decade:

8 URBINATI, Nadia, "Political Theory of Populism", *Annual review of Political Science*, 22 2019, pp. 111-127.

9 MUDDE, Cas, "From the Margins to the Mainstream: A Personal Reflection on Three Decades of Studying and Teaching Far-Right Politics", *Journal of Right-Wing Studies* (2), 2024, pp. 139-151.

far-right parties have participated in coalition governments in Austria, Croatia, Estonia, Finland, Latvia, the Netherlands, Poland, Serbia, Slovakia, and Switzerland. They have also supported minority governments in Bulgaria, Denmark, the Netherlands, and Norway. They are in power in countries such as Italy and Hungary, where President Viktor Orbán is the longest-serving government executive and the leading voice of the so-called radical-right populism. Furthermore, radical right-wing populism and the extreme Right, or the far right, are currently becoming one voice,[10] and Orbán has become the symbol of a European leader who rejects the model of European liberal democracy and its values, such as respect of minorities and a free media.[11]

As we have seen in previous sections, far-right parties have made alliances with other political entities over the centuries, although history also shows that they have experienced periods of marginalisation, such as the decades after the Second World War. In more recent times, far from being marginalised, they have influenced moderate right-wing parties and we could even say that the differences between the far right and the right are fading in some respects. As Brown *et al.* argue, the blurring of the boundaries between mainstream and far-right politics began in 2016, with Brexit and the election of Donald Trump.[12] Following this line, the rise of far-right populist parties in Europe led some mainstream parties or centre-right parties to attempt to regain voters' support by adopting some ideas from the rhetoric of the far right, such as ultra-nationalism and anti-immigration slogans.

3.2. *Othering* populist politics in the digital space.

In the last 25 years global and digital politics have transformed the political arena, and far-right parties have managed not only to adapt to the new scenario but to exploit it to the full. The digital global world has become a perfect space for the far right to connect people and promote its *othering* and discriminatory political ideology. Social media is used as a mechanism to get the message across: there is no legal control over it and it can reach people from very different backgrounds. It is, in fact, the best way to expand its simplistic and populist political message.[13]

10 GEORGIADOU, Vasiliki; RORI, Lamprini; ROUMANIAS, Costas, "Mapping the European far right in the 21st century: A meso-level analysis", *Electoral Studies,* 54, 2018, pp. 103-115.

11 LAMOUR, Christian, "Orbán Placed in Europe: Ukraine, Russia and the Radical-Right Populist Heartland", *Geopolitics*, 29 (4), 2023, pp. 1297-1323.

12 BROWN, Katy, MONDONA, Aurelien, WINTER, Aaron, "The far right, the mainstream and mainstreaming: towards a heuristic framework", *Journal of Political Ideologies*, 28 (2), 2023, pp. 162-179.

13 URBINATI, Nadia, "Political Theory of Populism", *Annual review of Political Science*, 22, 2019, pp. 111-127.

The far right has always made great use of mass movement and propaganda methods, as shown by the expansion of fascism during the initial decades of the 20th century. One of the key elements in understanding the current global rise of the far right is the way in which visual and digital images serve its ideology.[14] For this reason, in recent times many authors have researched the connection between the far right and the changing digital landscape.[15] Among other aspects, scholars have analysed how the far right is using propaganda techniques that do not focus on the context of the political message but on the emotions of the general public.

The historical tradition of the far right as based on *othering* politics – i.e. their Manichean view of the world – has found an ideal scenario in the digital world, where the possibilities of getting the message across to other individuals have multiplied and, more importantly, there are very little – if none– legal limits imposed on its xenophobic and racist politics. Indeed, the digital space has allowed the far right to become a wide social movement rather than a traditional political party. The far right includes social movements or networks that aim to mobilise public support, and a conglomeration of subculture and marginal groups. The far right today is, in fact, a social and digital movement that influences traditional right-wing parties and the entire European political scenario.

3.3. The context of *normalised crisis* and *steady uncertainty.*

One of the aspects that the historical account of the far right shows is that these movements expand in crisis situations, whether political or economic, or both. The reason for this is clear: in moments of crisis the status quo changes and the far right is reactionary in nature, i.e. it opposes new ideas that are associated with periods of transformation or crisis. The far right reacted against the crisis of the *Ancien Régime* and the expansion of liberalism, against the crisis of the liberal state in the late 19th early 20th Centuries, and is currently resurging in opposition to the crisis of the global world. Moreover, the far right has been able to exploit situations of political opportunity – such as the crisis of traditional and centre parties – to attract support.[16] Authors such as Mudde explain that the success of the current far right lies in the cultural and global crisis that we are living today as

14 AWAD, Sarah; DOERR, Nicole and NISSEN, Anita, "Far-right boundary construction towards the "other": Visual communication of Danish People's Party on social media", *The British Journal of Sociology*, 73 (5), 2022, pp. 921-1040.

15 See, for instance: ZHANG, Xinyi, and DAVIS, Mark, "E-Extremism: A Conceptual Framework for Studying the Online Far Right", *New Media & Society*, 26 (5) (2024), pp. 2954-2970; and HOPSTER, Jeroen, "Mutual affordances: the dynamics between social media and populism", *Media, Culture & Society*, 43(3), 2021, pp. 551-560.

16 GOLDER, Matt, "Far Right Parties in Europe", *Annual Review of Political Science*, 19 2016, pp. 477-497.

a consequence of the huge, rapid transformations that our world is undergoing in terms of digitalisation, international relations and labour. The current world is, in fact, immersed in a normalised situation of crisis and steady uncertainty that the far right is using to further its rise.

4. CONCLUSIONS.

This paper has studied some milestones in the historical and legal developments of the far right in order to have a better understanding of its roots and, ultimately, make a contribution to the process of addressing its expansion. The current resurrection of the far right is calling the very basic elements of democracy into question, and therefore there is a need to create strategies to stop this expansion. These strategies are necessarily complex, and to outline them would be outside the scope of this paper; however, the historical milestones analysed in this study may throw some light on this process.

As the historical analysis has shown, the far right has made alliances with other conservative parties at different points in history, but this movement had less political and social support after the Second World War, precisely when there was a broad marginalisation of these movements. Another aspect to take into account is how the far right is exploiting social media and the digital space. At the beginning of the 20th century fascist movements also made very good use of the new tools for mass mobilisation and propaganda. For this reason, there is a need to take some sort of control of the digital space to prevent it from being an open arena for the development of antidemocratic ideas such as hate speech or xenophobic and racist ideology. Current policy and legal proposals for regulating the digital world are in line with punishing racist attitudes in order to avoid or penalise hate discourses; apart from doing that, however, there is also a need to think about how the digital environment should be used to promote pluralist and democratic values that, ultimately, could neutralise the discourses and the networks that the far right are developing using the Internet.

A final element to consider is the fact that a crisis situation is beneficial for the expansion of the far right. Historically, we have seen how conservative parties have expanded during several crisis situations, such as that of the liberal state in the late 19th century and the crisis of the global model at the beginning of the 21st century. One of the aspects to consider in this sense would be the role of law and politics towards the various crisis. In conclusion, based on some milestones in the historical and legal analysis of the far right, we could argue that it is important to rethink three critical aspects: 1) alliances with the far right; 2) the legal regulation and use of the digital space; and 3) the way in which we have normalised a crisis situation.

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MUDDE, Cas, "From the Margins to the Mainstream: A Personal Reflection on Three Decades of Studying and Teaching Far-Right Politics", *Journal of Right-Wing Studies* (2), 2024, pp. 139–151.

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DEMOCRACY, PUBLIC OPINION AND ALGORITHMIC LITERACY: THE CASE OF THE SPANISH *XENOMETER* (*S-XENOMETER*), ARTIFICIAL INTELLIGENCE AGAINST XENOPHOBIA.

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SUMMARY: 1. GENERAL FRAMEWORK: INTRODUCTORY CONTEXTUALIZATION. 1.1. The nature of humanity's most pressing problems. 1.2. The need to innovate. 1.3. Technology, society and social research. 2. THE SPANISH XENOPHOBIA METER. 2.1. Mid- and long-term vision. 2.2. Work dynamics. 2.3. Technical remarks. 3. RESULTS, LIMITATION AND FUTURE STEPS. 3.1. Results. 3.2. Limitations and future steps. 4. CONCLUSION

1. GENERAL FRAMEWORK: INTRODUCTORY CONTEXTUALIZATION.

This chapter aims to systematize and conceptualize a collaborative research project launched at Cornell University (Cornell) in 2019[1] and in Spain with the Public University of Navarra (*Universidad Pública de Navarra* [UPNA]) in 2024. The project is an attempt to devise and train an algorithm capable of assessing xenophobia online in various national jurisdictions. This paper reports on the Spanish research, which is based at the UPNA.

The paper is structured around three threads. The first places the project within a wider context, marked by the challenges humanity is facing, especially with respect to democratic quality, the impact of digital social networks on public debate, and the need to innovate to address global issues. Our work is situated at the intersection of technology and society, in general, and of Artificial Intelligence (AI) and social research, in particular. The second thread documents and conceptualizes the work of the Spanish team at the Public University of Navarra over a period of 14 months, from February 2024 to April 2025, and the third presents some of the most salient results attained and puts forward the next steps and some future lines of research and action.

The reason the chapter starts by examining the challenges that current societies face is not only because science cannot be separated from the context within which it operates, but also because the vocation of the social sciences is both to describe evolving social reality and contribute to its transformation. Furthermore, science does not only 'analyse' by breaking down phenomena into smaller pieces to see their nature, connections and relations; it also contextualizes, by placing phenomena in broader frames, whether historical, cultural or territorial. Hence, from our perspective the explanation of even a narrow, although rigorous, research project like the one proposed here, should begin with an effort to frame it properly. This framing is linked to two more facts: first, the fact that many social issues, like xenophobia, have a global dimension, but politics is probably the less globalized social process; second, xenophobia is not a simple prejudice. Nowadays, some organizations (including the US government) use the many resources of the state and the most sophisticated technological devices to promote hate speech against certain groups. For all these reasons, a bit of context seems timely.

1 UMAROVA, Khonzoda, OKORAFOR, Oluchi, LU, Pinxian, SHAN, Sophia, XU, Alex, ZHOU, Ray, OTIONO, Jennifer, LYON, Beth & LESHED, Gilly, "Xenophobia Meter: Defning and Measuring Online Sentiment toward Foreigners on Twitter", *Proceedings of the Eighteenth International AAAI Conference on Web and Social Media*, 18, 2024, pp. 1517-1530. https://doi.org/10.7910/DVN/KYR4IY (reporting US-based research methodology).

1.1. The nature of humanity's most pressing problems.

The 21st century is marked by certain challenges that seem to be uniquely global, complex, and interconnected.[2] They are the unintended result of previously successful policies[3] and they bypass the mainstream and prevalent political instruments and strategies that were designed to govern societies.[4] Some of these singular challenges are climate change (or 'global boiling', as the United Nations has started to call it);[5] population ageing and its impact on the maintenance of social protection systems; the consequences of robotization on the organization of labour; fragmentation; international terrorism; weapons of mass destruction; international crime: wars (civil or international); growing inequalities;[6] disinformation; the exhaustion of the development model; the uncertainty of the massive and uncontrolled expansion of AI; the *autocratization* of historical democracies; the management of diversity; global population movements; work-family conciliation; energy and food sovereignty, and gender violence, to name a few.[7]

The first feature of these issues, as mentioned above, is that they are global, complex, systemic and interdependent, so they must be addressed collaboratively. In addition, they have never been resolved, so the knowledge

2 INNERATY, Daniel, *Una teoría de la democracia compleja: gobernar en el siglo XXI,* Galaxia Gutenberg, Barcelona, 2020.

3 The notion traces back to Robert Merton. He underlined the fact that many policies try to address a social problem, but they generate other consequences that will need to be addressed in the future too. Social intervention, especially when is conducted top-down, has unanticipated results. This is one of reasons why sociology attained prevalence and popularity, to assess these kinds of unintended results of public policies. MERTON, Robert, "The Unanticipated Consequences of Purposive Social Action", *American Sociological Review*, 1(6), 1936, pp. 894-904.

4 INNES, Judith & BOOHER, David, *Planning with complexity: An Introduction to Collaborative Rationality for Public Policy*, Routledge, London, 2018.

5 AMNUAYLOJAROEN, Teerachai, "Perspective on the Era of Global Boiling: A Future beyond Global Warming", Advances in Meteorology, 5580606, 2023, pp. 1-12. https://doi.org/10.1155/2023/5580606

6 The study of inequalities has been a historical concern of sociology, political science and social sciences in general. This area of research has discovered multifaceted forms of inequality and discrimination, hidden in the pasta, but also has shown that society is very imaginative to generate new forms of inequality. In global terms, in can be affirm that, despite some progress during the early 20th century, the situation during the 21st century has changed. As the United Nations' 2023 report on the advancement towards the "Agenda 2030 Goals" points out, three decades of progress were interrupted because of the pandemics, wars and natural disasters. UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, "The Sustainable Development Goals Report 2023: Special Edition", *United Nations* (Jul. 2023). https://doi.org/10.18356/9789210024914c007

7 LÓPEZ CLAROS, Augusto & FALC, Richard, *Global Governance and International Cooperation: Managing Global Catastrophic Risks in the 21st century*, Routledge, London, 2024.

needed to approach them must be generated in practice.[8] In other words, these challenges are somehow unique.

The second feature is linked to a dilemma that makes addressing these challenges complicated is their paradoxical nature: they emerged out of, or at least are in some cases, associated with, previously successful policies that involved deleterious externalities.

Climate change, for instance, may be considered the result of successful policies of industrialization, promoting consumption and economic growth fostered by the governments of the world as modernization strategies. Indeed, despite the vast pool of new, fresh and alternative insights generated in the interdisciplinary development field since 1950 (including the sharpest critiques), industrialization and efforts to increase productivity through human, technological and physical capital while preserving political stability, are implemented as the foundations for national development worldwide.[9] Another example is disinformation, which is associated with successful advances in communication technologies. The assumption was that ignorance can be addressed by making more information available to the peoples of the world. However, now there is a more sophisticated (and ever more prevalent) type of ignorance, grounded in the inability to discriminate between truth and falsehood. The fact that organizations and governments deliberately try to disinform high numbers of people to promote their agenda should not be neglected, either; even so, current high levels of disinformation would not be possible without that progress referred to before. Furthermore, the rampant individualism and prevailing conflicts that threaten social cohesion in many western countries are connected to the empowerment and emancipation of the individual from traditional and oppressive communities. Previously, the strengthening of individuality and the massive re-orientation of society around the principle of competition was considered the best strategy to achieve excellence in all aspects of social life. Finally, the fragmentation affecting public administrations or academia and the cognitive inability to address systemic, complex, holistic and interdependent problems is the product, among other things, of the way knowledge has been organized since the Enlightenment in order to penetrate more profoundly into reality through specialization and the creation of ever-narrowing fields of research. However, this useful arrangement to address very concrete and constrained phenomena in depth does not seem suitable to approach complex ones.[10]

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8 GARCÍA-MAGARIÑO, Sergio and DELGADO, Nahia, *Experimentos políticos en tiempo real: la gobernanza colaborativa en Gipuzkoa,* Sindéresis/Dykinson, Madrid, 2024.

9 RAHMAN, Mohammad Mafizur & ALAM, Khosrul, "Impact of industrialization and non-renewable energy on environmental pollution in Australia: do renewable energy and financial development play a mitigating role?", *Renewable Energy*, 195, 2022, pp. 203-213.

10 GARCÍA-MAGARIÑO, Sergio, *Cronología de una pandemia: ¿podría tornarse la crisis en oportunidad?*, Sindéresis, Madrid, 2022.

The third and last feature of the global, complex, and paradoxical challenges framing the instant project is that they bypass the political instruments[11] devised to govern society: globalization defies the nation-state as the paramount political arrangement to organize society, and complexity and interdependency challenge competition as the axis of collective life. The resulting uncertainty demands a reconsideration of the expert knowledge that once informed public policy. The current situation is placing extreme ethical demands on politicians that far surpass the actual capacity of the government and traditional forms of political behaviour, as governments are forced to reconceive legitimacy. The machinery of policymaking and enforcement, including political instruments, are outdated; they were not designed for the new social reality and they are unable to manage it.[12]

1.2. The need to innovate.

The creation of the imaginary social construct of the nation has proven to be extremely fruitful in organizing society and avoiding religious wars, as was the case before the Westphalia Treaties in Europe. Even though its effectiveness has been called into question in recent decades, the conception of the United Nations as a system to apply the principle of collective security to international relations was an outstanding innovation in the path towards a more rational and peaceful international order, and it has probably prevented a third world war. The European Union, designed to transcend national sovereignty and establish interdependence to dissuade its members from using violence towards one other, is another remarkable innovation. Scholars continue to promote collaborative forms of rationality for public policy definition and decision-making processes,[13] including progressive and peaceful external intervention.[14]

Social research is not exempt from the need to innovate. Social reality changes, so new realities may need new methodologies to be developed. Moreover, advances in other areas of social endeavour, such as technological devices and information-related instruments, can be used to further social research in ways that were previously impossible.

The evolution of democracy and public opinion and the growth of different forms of polarization in the era of internet, AI and social media are areas of research that need to be studied in imaginative ways to be better understood.

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11 WHEATLEY, Margaret, *Leadership and the new science: Discovering order in a chaotic world,* Berrett-Koehler Publishers, San Francisco, 2006 (Third Edition) [1996, First Edition].

12 INNERARITY, Daniel, *Una teoría de la democracia compleja,* Galaxia Gutenberg, Barcelona, 2019.

13 See, e.g., INNES, Judith & BOOHER, David, *Planning with complexity: An introduction to collaborative rationality for public policy*, Routledge, London, 2010.

14 See, e.g., GARCÍA-MAGARIÑO, Sergio, *La gobernanza y sus enfoques*, Delta, Madrid, 2016.

This is of urgent importance, particularly given the fact that tech companies are clustering in sophisticated oligopolies that are more powerful than many states; that some governments are combining those instruments with the resources of the state to manipulate and deliberately disinform; and that these companies and some states are establishing dangerous alliances.[15]

1.3. Technology, society and social research.

The term innovation evokes technology and patents. When most governments talk about 'innovation', what they really mean is technological innovation that can be patented. However, innovation goes beyond this narrow concept, it means doing things differently, creating new tools to achieve a goal, to improve human life. From this perspective, innovation also has to do with social systems, protocols, procedures and forms or organization. Indeed, some of the most extraordinary innovations have come from the realm of politics.

The relationship between technology and society, in general, and between AI and social research, in particular, is not straightforward. Sociology and political science have tried to understand and describe the potential impact of technological disruptions on society. The initial core team of the *Xenophobia Meter* project in Spain (*S-Xenometer*) came from the areas of sociology and political science, so they were familiar with this approach. Over ten years they had received continuous grants from the Spanish Ministry of Science, Innovation and Universities (or former equivalents) to examine the connection between technology, war and conflicts. In addition, they had published various books and papers on the matter, including the monograph *Al borde del abismo: guerra, tecnología y derecho.*[16] *Beyond that, one member of the team coordinated a special issue in the journal Sociology and Technoscience* on the social, political, economic, legal, ethical and organizational (business included) impact of Artificial Intelligence (AI).[17]

The team also made a government-financed documentary[18] as a dissemination tool on the evolution of war and technology for the broader public, particularly after the disruption of AI. The film gathers testimonies of key figures, some of

15 INNERARITY, Daniel, "Artificial Intelligence and democracy", *United Nations Educational, Scientific and Cultural Organization*, 2024; LEVITSKY, Steven & WAY, Lucan, "Democracy's Surprising Resilience", *Journal of Democracy*, 34(4), 2024, pp. 5-20; LIEBERMAN, Robert, METTLER, Suzanne, ROBERTS, Kenneth (ed.), *Democratic resilience: Can the United States withstand rising polarization?*, Cambridge University Press, Cambridge, 2021.

16 CAMPIONE, Roger, ALDAVE, Ana y RUSCHI, Filippo, *Al borde del abismo: guerra, tecnología y derecho*, Tirant Lo Blanc, Valencia, 2022.

17 GARCÍA-MAGARIÑO, Sergio. "Introduction", *Sociología Y Tecnociencia*, 11(Extra_2) (2022). https://revistas.uva.es/index.php/sociotecno/article/view/6205

18 *La guerra de las máquinas*, 2024. https://www.imdb.com/es-es/title/tt32273133/

them internationally recognized, from the fields of AI and fuzzy logic, the military, economics, law and philosophy. The members of the team participated in a series of activities related to algorithmic and technological literacy, in an attempt to enhance civil society's ability to read behind the obvious, to detect the values associated with the different devices and to understand how algorithms work in social media. Finally, some members led a wide-ranging survey in Navarre involving 3000 companies to identify their needs for digital talent, human resources with AI, and data science capabilities.

All these activities could be conceived as a traditional approach to technology and AI, and as an initial attempt of the team to get closer to this field. However, over time we became aware that a lot of social research was being done by people trained in technology but who lacked a social science background, and that those tools might be further exploited for rigorous and imaginative social research. The team decided to approach AI from within, and new members with technical skills were required to do this.

As an initial step, a research project was undertaken in collaboration with a group from the University of the Basque Country (UPV–EHU) from the area of didactics and technology. The idea was to depict, using some simple AI tools, the perspective that the most influential politicians of Spain held on migration. The team used 'word trees' or 'cloud words' via the platforms *Vicinitas, Nubedepalabras* and *Jasondavies*[19] to analyse the Twitter [X] accounts of several of the most influential Spanish political parties, finding statistically significant levels of anti-immigrant sentiment. These results were published in *OBETS* journal in 2023.[20]

A member of the team was invited to present these results at a conference held at Cornell Tech in New York City in September 2023, co-organized by the NGO *Define American* and Professor Beth Lyon, a co-director of the Xenophobia Meter Project (XMP) team at Cornell University.

At the conference, the XMP presented its ongoing research. In 2024, it completed a multi-year project in the United States. The team developed labelling guidelines and hand-labelled over 7000 tweets downloaded in 2020 from eleven 'verified' accounts.[21] The labelling guidelines were nuanced, requiring labellers

19 The links to the programs are the following: a) Vicinitas.io; b) nubedepalabras.es; and c) jasondavies.com.

20 GALINDO, Héctor, GARCÍA-MAGARIÑO, Sergio & LOSADA, Daniel, "Discurso político en redes sociales sobre el colectivo minoritario inmigrante: análisis de las narrativas e implicaciones educativas", *Revista OBETS,* 18(1), 2023, pp. 97-114. https://doi.org/10.14198/obets.22342

21 UMAROVA, Khonzoda, OKORAFOR, Oluchi, LU, Pinxian, SHAN, Sophia, XU, Alex, ZHOU, Ray, OTIONO, Jennifer, LYON, Beth & LESHED, Gilly, "Xenophobia Meter: Defining and Measuring Online Sentiment toward Foreigners on Twitter", *Proceedings of the Eighteenth International AAAI[1] Conference on Web and Social Media,* 18 (2024), pp. 1517-1530, https://ojs.aaai.org/index.php/

to select from amongst more than twenty rationales, as justification for assigning each tweet one of seven ratings (ranging from –3 as most xenophobic up to +3 being most pro–foreigner, with 0 being not-foreigner-related).[22] The team reported the trained model's best accuracy of 0.893 in distinguishing between three meta-ratings (xenophobic, pro-foreigner, and not-foreigner-related).[23]

After the 2023 conference, UPNA's Dr. Sergio García and his colleagues decided to launch the *Xenometer* project in Spain (*S-Xenometer*) in collaboration with the Cornell XMP. This was a milestone for the UPNA team, since, as discussed below, this project entailed developing an interdisciplinary team using AI for social scientific research.

2. THE SPANISH XENOPHOBIA METER.

In the first semester of March 2024, following the workshop in Manhattan, some professors of sociology, law, education and AI from the UPNA and the UPV–EHU gathered to devise a plan to set in motion a team to create a Spanish *Xenometer* (*S-Xenometer*). As part of the plan, some students and professors were identified and Beth Lyon (Cornell University) was invited to speak about the project (together with some of her team) in a Zoom meeting. She also gave a virtual presentation during an international workshop that the former UPNA Professor Roger Campione organised on war and technology in the University of Oviedo (his new seat). Thus, the connection started to go beyond individuals and became institutional.

After that, the UPNA and Cornell University advanced a Memorandum of Understanding (MOU) to formalize a grant program that Cornell started in May 2023. This consisted of bringing two or three Cornell interns a year for six weeks to Pamplona as research assistants for the I–COMMUNITAS Institute for Advanced Social Research.[24] In 2024, once the new interdisciplinary research team had been established, two interns came from Cornell with the explicit aim of training this team. Before their trip, they held several training workshops with Beth Lyon's team in Cornell. During their six weeks' stay in UPNA they consolidated a pace of work, helped to establish a coordination scheme for the

ICWSM/article/view/31406/33566 (dataset at https://doi.org/10.7910/DVN/KYR4IY) (reporting XMP's US-based research methodology).

22 *Ibid*. p. 1520.

23 *Ibid*. p. 1523.

24 From June to mid-July 2023, an initial group of three research assistants from Cornell came to Pamplona: https://www.unavarra.es/sites/actualidad/contents/noticias/2023/07/31/alumnado-americano-I-COMMUNITAS.html

project, and taught all the technicalities of the Cornell *Xenometer* (*C–Xenometer*) as it was functioning in the US context.

2.1. Mid- and long-term vision.

The *Xenometer* project aims to design and train algorithms capable of assessing the level of xenophobia of different messages in X by country on a scale of seven marks, ranging from minus three to plus three. However, the long-term vision is to have a sort of a global map of xenophobia online, divided into countries and regions, that uses a representative sample of social media and personal and institutional accounts within those geographic areas that generate maps in real time. To move forward in this direction, the next step is doing the labelling automatically in X, and within a representative sample of accounts in one country.

Currently, the project has two sections, one in the US led by Cornell University (*C-Xenometer*) and one in Spain led by the UPNA (*S-Xenometer*). However, there are some researchers in other countries that have expressed their willingness and availability to set up new units: a team in El Salvador, at Universidad Centro Americana José Simeón Cañas (UCA); another team in South Africa, which is working already with Beth Lyon and will hold an international workshop on combating xenophobia in 2026; and a team working with Beth Lyon in Indonesia. Apart from those countries, there are four more national teams with a high interest in Latin America and one in Europe: a team in Universidad Nur in Bolivia, Santa Cruz; another in the Universidad Centroccidental Lisandro Alvarado (UCLA) in Venezuela; a team in the Universidad de Buenos Aires (UBA) in Argentina; some scholars in Mexico; and a team in the University of Warsaw (Poland). The perspective is to consolidate one team after the other, beginning with El Salvador.

Beyond the territorial scaling up, other potential developments of the project in Spain are related to security issues and polarization. Even in the first stages of the project, representatives from the security forces (national and regional) came to some of the training workshops conducted by the Cornell interns in Spain and showed high interest in other applications. For instance, the Spanish National Police was very interested in devising an instrument to monitor hate speech online, as this is considered a crime under Spanish Law. The Civil Guard, another national police force, wanted to explore the implications for self-indoctrination and glorification of terrorism online, as they follow those forms of crime. All of them say that the way they follow those crimes now is through undercover online agents who download tens of thousands of messages of suspicious accounts and try to see signs of those crimes. Thus, having a system

like the *S-Xenometer,* but looking at other phenomena, would be extremely useful, at least as an initial filter.

Another future development mentioned above is an instrument to monitor levels of polarization online. Another team, coordinated by Dr. Andres Shoai, co-founder of KREAB (Bolivia), has been working on conceptualizing and objectivizing a manual system to categorize different levels of polarization in online settings. They still lack technical expertise and do not have a team of manual labellers, but there is another group of researchers, close to the IA scholar of the UPNA team, that has recently published a paper describing a methodology to do this through another algorithm.[25]

Some simple actions have been designed to disseminate the insights gained to date and consolidate the international network through a UPNA professor's recent six-week stay at Cornell.[26] First, two proposals will be submitted to research calls to obtain financial support, and second, a communication will be presented in an international conference in Pamplona in May 2025, followed by a publication; an international conference in South Africa, followed by a publication, will be held on the topic in October 2025; and a conference in Spain will be held for the whole network in 2026. In the second instance, both the Cornell and UPNA teams will review the contents of the communications and papers and make them joint contributions.

A few disclaimers about this project should be noted. First, the Spanish team is not approaching this project as an end in itself but as a means to build capacity and form an interdisciplinary team, based at I–COMMUNITAS Institute for Advanced Social Research, to use AI and data science tools for social research. In other words, despite the social relevance of combating xenophobia and the potential and originality of the project itself, the ultimate value is formative and methodological.

The research teams are also conscious of the fact that online settings in general – and X in particular – are not a mirror of in-person social life. For example, when assessing polarization, research shows that political polarization, media, and online polarization are higher than the affective polarization of society.[27] Polarization is growing in all dimensions, but the pace is not the same. However, and recognizing those limitations, devising tools to detect xenophobia

25 GUEVARA, José Antonio, CASAS-MAS, Belén & ROBLES, José Manuel, "Polarization and hate speech based on fuzzy logic and transformers: the case of the 2023 Spanish general elections", *Mathematical Population Studies*, 31(4), 2024, pp. 289-307. https://doi.org/10.1080/08898480.2024.2412337

26 From 16 March to 27 April 2025.

27 MILLER, Luis, "Polarización en España: más divididos por ideología e identidad que por políticas públicas", *EsadeEcPol Insight*, 18, 2020. https://www.esade.edu/ecpol/es/publicaciones/esdeecpol-insight-polarizacion/

and polarization online is still of great importance, given that, on the one hand, human beings and communication are intertwined in sophisticated ways, and, on the other, the percentage of people that use social media and internet is over 95%, for example, in the United States.[28] Despite this possible gap between in-person and online social relations, the dehumanization and reification[29] of the other,[30] and the massive expansion of certain hate discourses is easier in highly polarized and semi-anonymous online settings. Therefore, monitoring the kind of xenophobia that occurs in these domains acquires more importance.

2.2. Work dynamics.

As mentioned above, the *S-Xenometer* is grounded in an interdisciplinary group of 12-13 permanent members, comprised of Professors of Sociology, Law, Education and AI, and students, with some individuals occasionally participating in the dynamics of the group. The relationship among them is horizontal, although there are different roles. This has emerged from a dual recognition: first, everyone is learning and wants to contribute to the advancement of science and society, and second, the project also aims to build the capacity of a generation of social scientists capable of introducing AI expertise into their research.

This team has four main work streams: labelling, calibrating, conceptualizing, and constantly refining the categories to be labelled. Although they have worked with the very particular aim of labelling 5,000 X messages, programming and training an algorithm to automatically label messages monitor accounts in X, as well as the precise boundaries of both assignments, are still open questions to be defined in the next stage.

2.2.1. Group structure.

The group is structured in the following manner: four labelling teams, comprised by three individuals; a field work coordinator (who has obtained a small grant to do it); an AI leading scientist (who has started to work with a small

28 PEW RESEARCH CENTER, "Internet, Broadband Fact Sheet", *Fact sheets: tech adoption trends* (13 November 2024).
https://www.pewresearch.org/internet/fact-sheet/internet-broadband/

29 HONNETH, Axel, *Reification: A new look at an old idea*, Oxford University Press, Oxford, 2008.

30 Humans have a kind of instinct to recognize other humans as equals in dignity. In addition, humans devise collective categories to describe the groups to which they belong: gender (man, woman…), age, national origin, migrant condition, social class, religion, ethnicity… These categories, when massively used, can become "things" that are placed between a human being and another. Those "things" avoid seeing the other as equal in dignity. This phenomenon, named "reification" in social sciences, facilitates the otherness and dehumanization of entire groups, an so, open the door to oppression and violence against them.

team of collaborators), and a general project convener, who is in touch with the *C-Xenometer* team. In this initial stage, everyone has been involved in the labelling process and in the calibrating meetings, although at different levels of intensity and continuity.

Even though the team addresses all the tasks mentioned above, they have divided the practical work into three areas: obtaining or downloading X messages and organizing a labelling system; labelling; and categorizing.

2.2.2. Obtaining messages.

The messages have been obtained following three different paths. Initially, the messages were downloaded from the same accounts used for the research on the representation of migration in X narratives of the most influential politicians in Spain.[31] However, that procedure soon ran its course, as those accounts publish few messages of migrations. Because of this limitation, it was decided to identify several institutional accounts (government, civil society organizations, companies and parties) specialized in migration and with a clear stance in favour or against foreigners. This procedure was complemented by another one: searching messages by keywords usually used to refer to migration and foreigners in positive and negative terms. The purpose of using these different mechanisms, apart from advancing towards 5,000 messages (which is a lot), is to capture subtleties and nuances of language.

Obtaining the messages entails further work. Once they are downloaded, the messages need to be transformed into Excel spreadsheets to be distributed amongst the four labelling teams. Teams, Microsoft's cloud-based team collaboration software, is being used as the central repository for the group. Every individual in each team is assigned with 100-150 messages to be labelled every two weeks. As mentioned, each message is analysed by three individuals to make sure that there is consistency in the labelling, keeping it out of intersubjective agreements.

The 'obtaining messages' phase concludes with the blending of the spreadsheets used by each team. This process permits the teams to identify labelling conflicts and serves as the basis for the second important phase: the calibration meetings.

2.2.3. Calibration meetings.

Calibration meetings serve to unify criteria, reach agreement on the labelling process, refine the categories, objectivize the analysis, address doubts

31 GALINDO, Héctor, GARCÍA-MAGARIÑO, Sergio & LOSADA, Daniel, "Discurso político en redes sociales sobre el colectivo minoritario inmigrante: análisis de las narrativas e implicaciones educativas", *Revista OBETS,* 18(1), 2023, pp. 97-114. https://doi.org/10.14198/obets.22342

and write down agreements, among other things. Aside from trying to avoid biases, those meetings, which usually occur every three-four weeks, are used as an opportunity to reflect on the *S-Xenometer* process and to identify and widen the stock of words that are used to describe migration and foreigners in positive and negative terms.

2.2.4 Categories.

Finally, categorization is crucial for the project. Both the *C-Xenometer* and the *S-Xenometer* work through a set of categories. Every message first needs to be classified as foreign (or perceived foreign) related or not, in the form of "Yes/No." If it is labelled as "Yes," seven categories open, ranging from minus 3, 2 and 1, 0, and plus 1, 2 and 3. For each category there are three or four reasons offered to the labellers to justify their choice. Category "0" means that the message is foreign related but only shares facts, without judgment, positive or negative attitude. In the section on results, more details will be provided about the labelling process and the categories. However, it is important to emphasize that "minus 1, 2 and 3" represent different levels of xenophobia intensity (1 is low, 2 is medium and 3 is high) and that "plus 1, 2, 3" show a pro-foreign attitude (1 = favourable, 2 = quite favourable, and 3 = very favourable).

2.3. Technical remarks.

The *S-Xenometer* uses various tech instruments and programs for the different stages of its dynamics: obtaining the messages, transforming and preprocessing the information, developing the model and training it, to name a few. A brief description of the instruments, programs and systems in place will be presented in the following paragraphs, as well as a forecast of the programs required in the near future to carry out the automatic selection of accounts (via glocalization), the creation of maps, the monitoring of other representative social media, and the analysis of audiovisual content.

First, the messages are extracted from social network X in which one of the main issues is migration, xenophobia and immigration-related crime, using the search criteria previously developed. To do so, we used the Zeeschuimer tool,[32] which monitors traffic on certain social networks (social media) and collects textual data for subsequent systematic analysis. The messages, in addition to the selection of the fields of interest (the text content and the associated tag after the calibration meeting), require pre-processing of their content. The main 'cleaning' process applied to the messages is (1) the removal of usernames and

32 PEETERS, Stijn, "Zeeschuimer (v1.4)", *Zenodo* (2023). https://doi.org/10.5281/zenodo.7525702

filler characters such as emojis, and (2) tokenization and vocabulary building. Tokenization consists of separating words by using the spaces between them as separators. For vocabulary building, we set the minimum frequency needed to include a token in the vocabulary (in our case, 3). Words appearing less than three times in the dataset will be considered unknown, and once we have the dataset we divide it into training, validation and test sets. The dataset is used to train a model that has a three-part architecture: embedding, encoder and classifier.

Embedding[33] is a way of encoding a sentence to a fixed (usually smaller) dimension, encoding the input words into vectors and recording values based on how the words are related in the input texts.[34] In this sense, words with close representations are more closely related. The relationship between words is defined by vector additions and subtractions, the most famous example being "king – man + woman = queen." In other words, adding the vectors associated with the words 'king' and 'woman' while subtracting 'man' equals the vector associated with 'queen'. This describes a gender relationship.

Vector features extracted by embedding must be processed by a neural layer with the ability to process sequential information. On the one hand, we use both recurrent neural network cells such as Long Short-Term Memory (LSTM)[35] because of their ability to process information flows through gates and short- and long-term memories, and on the other, due to possible limitations of LSTMs, we use the encoder of a BERT[36] transformer. Finally, the output of the encoder is transferred to a dense layer that classifies the message into one of the established classes.

There are other simple techniques used to transform the downloaded messages to Excel spreadsheets and then blend the sheets, once they have been used by individuals to label, to identify the labelling conflicts before the calibration meetings take place. For instance, the initial data appears in Newline Delimited JSON format and other simple programs are used. Small files of informatic code written in Python are also used. However, these are just simple techniques that likely do not merit inclusion in the methodological description.

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33 BENGIO, Yoshua, DUCHARME, Rejean, VINCENT, Pascal & JAUVIN, Christian, "A neural probabilistic language model", *Journal of machine learning research*, 3, Feb. 2003, pp. 1137-1155.

34 COLLOBERT, Ronan, & WESTON, Jason, "A unified architecture for natural language processing: Deep neural networks with multitask learning", in *Proceedings of the 25th international conference on machine learning*, July 2008, pp. 160-167.

35 HOCHREITER, Sepp, & SCHMIDHUBER, Jürgen, Long short-term memory. Neural computation, 9(8), 1997, pp. 1735-1780.

36 DEVLIN, Jacob, CHANG, Ming-Wei, LEE, Kenton, & TOUTANOVA, Kristina (2019, June). BERT, "Pre-training of deep bidirectional transformers for language understanding", in *Proceedings of the 2019 conference of the North American chapter of the association for computational linguistics: human language technologies, volume 1 (long and short papers)*, pp. 4171-4186.

As a future direction for this study, we plan to use the extracted metadata together with the messages for further analysis. Some of the metadata to be used could be geolocation or account verification. So far, the dataset has been extracted from social network X, but in the future we plan to extract from others such as Facebook, LinkedIn or TikTok. Although much of the content published on the new social networks is audiovisual, it is always accompanied by language content, so although the use of images and videos is a challenge we believe that we should make the most of the information we can extract through discourse.

3. RESULTS, LIMITATIONS AND FUTURE STEPS.

This section will organize the initial results around four interrelated strands: labelling outcomes, collective work methodology, conceptual insights, and algorithm performance. Then, the limitations and future steps will be clustered and presented.

3.1. Results.

In the first instance, the *S-Xenometer* has labelled 2785 messages to date. Of these, 1,813 relate to migration or foreigners (or perceived as such) and 972 do not. From those that are related to migration and foreigners, 153 are labelled as 0, so they only present facts; 75 are −3, 532 are −2, 554 are −1,274 are +1,204 and 21 are + 3. The goal is to have 5,000 messages labelled before September, by both collectively labelling more messages and creating synthetic data slightly changing sentences associated to different categories.

Secondly, one of the most useful outcomes has been the setting up of an interdisciplinary group and a real and dynamic work methodology. Collaborative work is a feature of science but there are forces that prevent groups from going beyond the formal requirements of collaboration. The group behind the project includes, as mentioned before, 12-13 regular and active participants (students and professors) of different ages, academic backgrounds (sociology, political science, law, AI and education) and stages in their professional career. They have a fluid and systematic work dynamic that has created trust and takes them beyond specific tasks such as labelling, programming and communication management to more complex collaboration including conceptualization and documentation of experience, theoretical refinement, writing, collective reflection, studying and planning.

In the third instance, the group has obtained major qualitative achievements. One of them has been the recognition that content analysis of social media for the labelling and training purposes must be national and culture-dependent. The

S-Xenometer team initially tried to use Spanish-speaking accounts, but after a while it became clear that humour, irony and xenophobic words only make sense in shared and known national cultural settings. Indeed, a trigger factor for this recognition was the inability of a research assistant from Cornell and Puerto Rico to assess and label Spanish accounts correctly.

Furthermore, agreement on the labels and categories has played a very important role in increasing the effectiveness of the process. *C-Xenometer* had a pool of instruments, including lists of words and reasonings for each category that hit with the "common sense" and "intuitive knowledge" of Spanish participants to label messages from Spanish accounts. For example, some of the words that the *C-Xenometer* would consider automatically a "minus 3" in the USA, such as 'black', did not seem to be problematic in the Spanish culture. However, what ended up being extremely useful for the *S-Xenometer* was to have a list of euphemisms that were used by anti-migrant narratives to escape verifiers. In that respect, the fact that the regulation of freedom of speech is more restrictive in Spain than in the US made xenophobic speech more subtle and sophisticated in the Spanish accounts. Instead of explicit language, irony and multiple new words are created and used to criticize foreigners, migrants, Muslims, Latinos and unaccompanied minors.

Regarding agreements on labelling, the *C-Xenometer* set of "reasons" was a fruitful departure point but the *S-Xenometer* team felt early on that there was a need to objectivize further. Thus, a set of agreements emerged progressively, some of which are shown here. As a functional and operational agreement, the team decided to follow the same pattern: 'minus 1' means subtle xenophobic language that goes against migrants or foreigners; 'minus 2' means explicit xenophobic language and direct insults; 'minus 3' was restricted to calls to action against migrants-foreigners or those perceived as migrants-foreigners. In addition, hashtags were considered a type of "call to action," as a movement is fed. Likewise, 'plus 1, 2 and 3' followed the same rule: implicit, explicit and calls to action. This simplified form of conceiving the categories has proven to be quite effective to objectivize and to come to faster and more solid agreements.

Two more agreements are worthy of mention. First, when crimes and national origin of the supposed criminal appear in the same message, despite the fact form of the content, the label will be, at least, minus one. The reason for this is that Spanish media seemed to have come to an agreement to avoid the connection between national, ethnic or religious backgrounds to criminality. Therefore, when a news outlet links both, there is an intention to generate a negative public opinion on migration and the outlet goes against the informal and ethical agreement of the journalist community. Second, before agreeing on content that both seemed to be pro-migration and used prejudiced and "charged" words to speak about it, the team decided to label those messages 'minus 1'.

Finally, in terms of the algorithm's performance, it can address two tasks: distinguishing between "foreigner-related messages" and "not-foreigner-related messages" and labelling those that are foreign related messages as xenophobic or not. In other words, in technical terms we would be talking about binary classification and multi-class classification. However, for the second task we require a larger number of instances for training and evaluation, as we are in a preliminary phase of the project in this respect. Therefore, one of the actions we will carry out will be the extension of the dataset through different oversampling techniques for natural language processing. This will allow the generation of synthetic instances and at the same time extend the capacity to extract features from the model and thus be able to satisfactorily perform multi-class classification.

3.2. Limitations and future steps.

3.2.1. Limitations.

Despite progress, a lot more needs to be done to approach the vision described before: to develop a global map of xenophobia online, divided into countries and regions, using a representative sample of social media and personal and institutional accounts within geographic areas to generate maps in real time. Tracking changes in real time would provide an 'early warning' system demanding policy interventions and validating the lived experiences of targeted immigrant communities.

The path so far has been fruitful, but various obstacles have emerged. First, consolidating an interdisciplinary team and establishing a good pace of labelling has not been easy. The people involved in the *S-Xenometer* have been inclusive and, at certain points, it seemed that the group had too many people. However, experience has shown that in order to obtain a small number of committed individuals you need to work constantly with many. Students appear and disappear according to their academic responsibilities, professors come and go, overwhelmed by their classes and diverse assignments… Nonetheless, a group of 12-13 individuals have been constant. The grant that the university offered to one student to convene the fieldwork has been very useful too, although not sufficient. The commitment of this emerging and broad group comes mainly from their social commitment, the innovative character of the methodology, and the attractiveness of the project in general. That is why there is an atmosphere of trust and a healthy collaborative environment.

Another unexpected challenge has been the time that manual labelling requires; 5,000 messages do not seem too many initially. However, the team has

tried to label messages that are migration- and foreigner-related. This does not mean that the others do not count; indeed, the algorithm is also trained to detect those that are not relevant, to distinguish between messages that are related and not related to migration and foreigners. However, the reality of the pace, when confronted with the many possibilities before the team (global map, polarization, hate, etc.) generates a frustration that needs to be tempered with patience.

Labelling was not straightforward either. Initially, as was pointed out, coming to agreements by using the *C-Xenometer* reasoning and keywords was complicated. Nevertheless, once the calibration meetings started to be used to conceptualize, objectivize and refine the categories, and agreements were written down to inform future labelling, generating a consensus began to be easier and became the norm. Decisions such as eliminating messages (a) from non-Spanish accounts (b) written in other languages beyond Spanish and (c) involving the Israeli-Palestinian conflict also helped a lot.

Finally, the *S-Xenometer* team has tried to avoid dependency. This has not been simple, however, as the AI expertise is so specialized that most of the members trained in the social sciences lack the most basic skills in it. Therefore, programming has been an exclusive task of the AI scientist. The field work coordinator (a third-year sociology student) studied a three-year Data Science degree, so she is familiar with AI approaches, although there is still some dependence. The challenge will probably be sorted out once new trained tech members join the team, as is expected to happen soon.

3.2.2. Future steps.

Future steps can be organized around scope or scale, representativeness and automatization of labelling in terms of social media and accounts, generating maps, audiovisual analysis and the application of the general methodological approach to other related social phenomena, aside from xenophobia.

Concerning scope and scale, the plan is to establish more national units like the *S-Xenometer* and the *C-Xenometer*. Teams have already been identified in El Salvador (UCA), Venezuela (UCLA), Bolivia (Nur U.), Brazil (U. Paraiba), Argentina (UBA), Mexico,[37] South Africa, and Poland (Warsaw U.). These teams will be initially invited to an online explanatory meeting and later to an online workshop to start labelling. Both meetings will be in June 2025, while the Cornell interns will be in the UPNA in Spain. In addition, a conference will be held in October 2025 in South Africa for some members of the network, and a second

37 The professor convening the team in Mexico is currently linked to the Universidad Tecnológica de Escuinapa, although he may change affiliation soon.

one will be organized in Spain in 2026.[38] The *S-Xenometer* and the *C-Xenometer* teams will initially assist the emerging teams through students and exchanges. Cornell Global Hubs network will explore the possibility of setting up a Cornell Global Hub in El Salvador, the country that will be the next to make up the new *Xenometer* unit.

Another major step will be to refine the work of the *S-Xenometer* and the *C-Xenometer*. The algorithm does not label with sufficient precision yet, and a system needs to be created to automatically select a number of accounts in X and in two more social media platforms to generate an automatic representative analysis of online xenophobia in Spain and the United States. The open questions of the usefulness of geolocalizers and the program to generate real-time maps to advance the Global Map of Online Xenophobia are also still unresolved.

Furthermore, taking audiovisual content into consideration when labelling is still not clear. There are different systems that transform this sort of content into text, but, despite the fact that audiovisual content is increasingly present in social media and has become a mainstream tendency in those settings, using it would change the labelling approach.

Finally, once the general methodological approach for xenophobia is solid, there are other social phenomena that might be assessed similarly, some of which are of great interest to the Spanish police forces, such as online hate speech, glorification of terrorism and self-indoctrination. Polarization is another phenomenon that could be addressed from a similar approach.

4. CONCLUSION.

Even though the *S-Xenometer* is still in its initial stages, there has been significant progress and the process followed so far seems rigorous enough to have reasonable expectations of eventual positive results. Hence, some final insights will be shared here as provisional conclusions.

First, the project shows methodological potential that can be applied to other areas. An interdisciplinary team has consolidated itself around the Public University of Navarre (UPNA) and over time this team may strengthen the capacity to do advanced social research using innovative and AI-related technologies.

38 The scale of the conference will vary. If *Define American* accepts the proposal recently made to them to replicate, in the Spanish context, some of the discussions at the Define American/Cornell Conference at Cornell Tech in September 2023, the conference will be wide-ranging. If not, an International Conference will be held in any case, but with a smaller number of international participants.

Second, the *S-Xenometer* has been approached from a formative and collective perspective. A meaningful outcome has been the collaborative process and the intergenerational work that the project has been able to foster. Considering some of the challenges and cultural traits of university settings, where, despite the organic interdependence and collaboration needed to manage such complex organizations, professors are often in their own 'silos' and overwhelmed by individual tasks, so the trust and collective dynamics generated by the project seems promising.

Third, the *S-Xenometer* experience has shown to the team that AI, when used uncritically to carry out social research without solid social scientific training introduces biases that grow and grow using algorithms that are trained by the data that they themselves create. In a similar manner, when a social analysis of AI-associated technologies is conducted without a solid understanding of how AI works, that analysis is usually superficial and does not exploit the potentialities of AI-associated technologies to do social research. In this respect, it is useful to be aware of the Dunning-Kruger effect:[39] people with expertise in one area often overestimate their own knowledge and understanding in areas beyond their expertise.

Fourth, the instrument appears to have the potential to detect global trends related to xenophobia in online settings. The network initially created by the UPNA and Cornell through the *S-Xenometer* and *C-Xenometer* teams and the synergies already generated are good omens for the potential scalability of the project.

There is still much work to be done, however, so despite the progress achieved the road ahead is much longer than the one already travelled.

39 DUNNING, David, "The Dunning-Kruger effect: On being ignorant of one's own ignorance", *Advances in experimental social psychology*, 44, 2011, pp. 247-296.

PART VIII.
RULE OF LAW IN THE DIGITAL AGE

HOW EU DIGITAL POLICY IS SHAPING THE DIGITAL RULE OF LAW IN THE EUROPEAN UNION

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SUMMARY: 1. INTRODUCTION. 2. EU DIGITAL POLICY – AN OVERVIEW. 2.1. Opening remarks. 2.2. Digital Sovereignty: Conceptual Foundations. 2.3. The Digital Decade and its regulatory implications. 3. THE DIGITAL RULE OF LAW. 3.1. Rule of law in times of digitalization. 3.2. Definition and components of the digital rule of law. 4. RIGHTS DRIVEN DIGITAL POLICY IN THE EU – EU DECLARATION ON DIGITAL RIGHTS AND PRINCIPLES FOR THE DIGITAL DECADE. 5. CONCLUSION. 6. BIBLIOGRAPHY.

1. INTRODUCTION.

The digital policy of the European Union is nowadays one of the most central policies, intensively developed in response to the growing power of technology in society and the stronger position of global corporations behind this dynamic progress.

The Union's regulatory response not only aims at a formal establishment of the legal norms appropriate for the proper functioning of the digital internal market in purely economic terms. It is now no less important to rethink certain legal and constitutional concepts such as sovereignty, the rule of law or human rights. Thus, the adjective 'digital' is being added to each of these concepts today, as a way of giving certain narratives or political and legal actions an attribute

of modernity and reference to the rapidly changing socio-legal and economic reality.

EU digital policy is using these modern concepts of "digital sovereignty", "digital rule of law" or "digital human rights" to strengthen its autonomy in international relations, to promote its values and pursue its role as a major technological normative power in the world.

The goal of this paper is to reflect on how the EU can pursue its digital policy while developing the concept of the rule of law at the same time. An overview of EU digital policy will be presented in section 2, with a discussion around its conceptual foundations connected with digital sovereignty. Section 3 provides a reflection on the rule of law and how new technologies shape its understanding vis-á-vis the adaptative concept of digital rule of law. Section 4 focuses on one of the most important attempts to regulate digital rights – the European Declaration on Digital Rights and Principles for the Digital Decade –, this being an example of how the construction of the digital rule of law in its substantive dimension can be supported by the EU's policy measures.

2. EU DIGITAL POLICY – AN OVERVIEW.

2.1. Opening remarks.

The technological progress achieved in the last thirty years has changed the face of the global economy, politics, and the lives of ordinary citizens. The development and spread of the Internet have modified modes of communication, facilitated access to information, affected interpersonal relations and changed the position of consumers and business operators. Particularly noticeable is the impact of digitalization on the service sector, whether of a public nature like healthcare or education, or private. No matter how much beneficial and disruptive change is associated with digitalization, a critical assessment of them is necessary. Above all, it is necessary to focus on the question of the market position of the large technology multinational corporations, which have gained enormous competitive advantages through their innovative, visionary and pioneering approach. Recently, the activities of large technology corporations have been the subject of intense debate, mainly revolving around how the market power of technological giants is able to disrupt not only economic, but also political and social realities, giving rise to

a new model of "surveillance capitalism"[40] where collected data becomes the most valuable resource.

Against this backdrop, the EU has found its role as a normative and regulatory driver of new technologies. In 2019, Ursula von der Leyen's Commission determined six political priorities derived from the Council's strategic agenda, and which marked an important step towards comprehensive regulation of largely unregulated issues like operations of digital platforms or progress in the field of Artificial Intelligence (AI).[41] The introduction of the new European digital strategy put the focus on the key objectives concerning the development of digital skills, the promotion of digital sovereignty and the regulation of AI, digital infrastructure and the enhancement of digital inclusion. Hence, since 2020 the European Union has launched an ambitious plan for the transformation of its digital governance framework.[42] This period can be best characterized by the EU's proactive vision of how the digital world should operate, with strong emphasis on the concept of digital sovereignty. The intensification of competition in global digital markets and growing geopolitical tensions has led the EU to reconsider its role as a normative power in the new technologies and digital space context. The notion of digital sovereignty has crystallized as a central narrative (and strategic goal) in reaction to problems of technological dependency, challenges in data governance, and the increasing power of foreign big tech corporations.

2.2. Digital Sovereignty: Conceptual Foundations.

In the EU context, digital sovereignty refers to the Union's capacity to act independently in the digital sphere, controlling its digital infrastructure, data, digital media content, code layers and technological innovation without excessive reliance on external actors. In its conceptual dimension, the EU's 'digital sovereignty' is strongly connected with its supranational nature, values, economic integration mechanisms that relate to the internal market principles, and fundamental rights obligations. The term gained particular political popularity after the Covid–19 pandemic exposed Europe's dependence on digital technologies originating from third countries. The concept of digital sovereignty was extensively used or referred to by various European politicians such as

40 ZUBOFF, Shoshana, "Wiek kapitalizmu inwigilacji. Walka o przysłość ludzkości na nowej granicy władzy", Warszawa, Zysk i S-KA, 2025, passim.

41 Commission's priorities 2019-2024, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024_en

42 STENGG, Werner, *Digital Policy in the EU. Towards a Human-Centred Digital Transformation*, Edward Elgar Publishing, Cheltenham, 2024, pp. 1-19.

Emmanuel Macron,[43] Angela Merkel,[44] Pedro Sánchez[45] or Thierry Breton.[46] As mentioned above, Ms. von der Leyen's European Commission (2019-2024) has integrated digital sovereignty into its comprehensive policy framework of "A Europe Fit for the Digital Age", which sets out to empower people with a new generation of technologies.[47] In 2019, the appointment of commissioner Margrethe Vestager as vice-president for the 'Europe Fit for the Digital Age' initiative framed digital sovereignty as instrumental for achieving technological resilience, strategic autonomy, and the capacity to shape global norms.[48] Such an understanding of digital sovereignty shows its broad and ambiguous character, connecting it with other political notions like strategic autonomy, which do not convey such symbolic narratives as sovereignty as they are rooted in a concept of statehood. The doctrine of strategic autonomy has gained particular importance in the context of currently collapsing transatlantic relations under the Trump Administration and an ongoing systemic rivalry with China. The EU's efforts to foster digitalization processes and a European tech sector can also be seen as an attempt to regulate global competition in the digital race.

2.3. The Digital Decade and its regulatory implications.

In order to implement its policy announced in 2019, the Commission adopted a Communication in 2021 titled "2030 Digital Compass: the European way for the Digital Decade".[49] The two notions used throughout the document, namely Digital Compass and Digital Decade, should be understood as separate concepts even if they refer to the same issue (digitalization policy). While

43 PANNIER, Alice, "Digital Sovereignty. Review of Macron's Term and Debates in the 2022 Presidential Campaign", Briefings de L'IFRI. Geopolitics of Technology Program, 15 March 2022. https://www.ifri.org/sites/default/files/migrated_files/documents/atoms/files/pannier_digital_sovereignty_2022.pdf

44 "Merkel committed to the EU's digital sovereignty", Dialogues on European Digital Transition. The Blog of the European Association for Digital Transition, 30 July 2020, https://digitalforeurope.eu/merkel-committed-to-the-eus-digital-sovereignty?lang=en

45 PASCUAL. Manuel G., "Pedro Sánchez presenta el Observatorio de Derechos Digitales, un órgano para evitar que internet sea "el salvaje Oeste", El Pais, 5 February 2025, https://elpais.com/tecnologia/2025-02-05/pedro-sanchez-presenta-el-observatorio-de-derechos-digitales-un-organo-para-evitar-que-internet-sea-el-salvaje-oeste.html

46 "Speech by Commissioner Thierry Breton at Hannover Messe Digital Days", 15 July 2020, https://ec.europa.eu/commission/presscorner/detail/pl/speech_20_1362

47 "Commission's priorities 2019-2024", https://commission.europa.eu/strategy-and-policy/priorities-2019-2024_en

48 "Debate with Margrethe Vestager: Digital sovereignty in the age of pandemics", 24 April 2020, Centre on Regulation in Europe, https://cerre.eu/news/debate-with-margrethe-vestager-digital-sovereignty-in-the-age-of-pandemics/ See, STENGG (n 3), p. 14-15.

49 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, '2030 Digital Compass: the European way for the Digital Decade' COM(2021) 118 final.

Digital Decade is a political vision and plan to make the EU a digital leader by 2030, with a strong emphasis on the achievement of digital sovereignty and reflecting EU values like democracy, privacy and inclusion, the Digital Compass should be understood more as a roadmap and implementation framework for the Digital Decade. Digital Compass attempts to translate the vision of Digital Decade with four major goals: improvement of digital skills, digital infrastructure, the digital transformation of businesses, and the digitalization of public services, into concrete governance mechanisms and measurement tools. As such, the Compass operationalizes digital sovereignty by setting concrete targets in areas such as microchip production, cloud infrastructure, AI or quantum computing.

The announcement of the Digital Decade policy programme went hand in hand with already ongoing legislative processes aiming at providing the normative regulatory frameworks for digital technologies. The EU's legislative effort has been impressive since 2021, with several examples of strong measures addressing different aspects of digital sovereignty. It should be stressed that the EU is choosing regulations as legislative measures, which, due to their legal character and direct applicability, allow the 'Brussels effect' to be achieved.[50] This notion stands for the extraterritorial applicability and effect of EU law and is understood as an example of the EU's global normative power. EU regulations in the field of digital technologies are supposed to set global regulatory standards and allow for the propagation of EU values in the tech industry. The key examples of such measures are: General Data Protection Regulation (GDPR),[51] Data Governance Act,[52] Data Act,[53] Digital Services

50 The term 'Brussels effect' was coined by Anu Bradford and encompasses *de facto* and *de iure* dimensions. *De facto*, the term describes the EU's unilateral power to regulate global markets through setting standards without the direct need to enforce them in a coercive way. The *De iure* Brussels effect describes the process whereby EU standards shape the adoption of own regulations and legislative measures by third countries. See, BRADFORD, Anu, "The Brussels Effect", *Northwestern University Law Review,* vol. 107, 2012, passim; BRADFORD, Anu, "The European Union in a globalised world: the "Brussels effect" (interview by Joachim-Nicolas Herrera and Vasile Rotaru), *Revue européenne du droit. Groupe d'études géopolitique,* vol. 2, 2021, p. 75.

51 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC (General Data Protection Regulation, GDPR), OJ L119, 4.5.2016, p. 1-88. The GDPR is a regulation that had been adopted before "EU Fit for the Digital Age", yet it is the most valid example of the normative power of the EU exercised towards third-country entities, hence it proves the efficiency of the 'Brussels effect".

52 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), OJ L 152, 3.6.2022, p. 1-44.

53 Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), OJ L, 2023/2854, 22.12.2023.

Act (DSA),[54] Digital Markets Act (DMA),[55] Chips Act[56] or Artificial Intelligence Act (AIA).[57]

Nevertheless, while pursuing its regulatory ambitions the EU faces several challenges. Most importantly, the EU's drive towards digital sovereignty may translate into public interventionism to some extent,[58] which may be justified by the value and rights-driven regulatory model. Another strain of critique concerns the influence of EU digital policy on innovation.[59] Over-regulation may hinder the development of emerging technologies such as AI or quantum computing. Furthermore, the changing geopolitical setting may undermine initiatives like the EU-US Trade and Technology Council (TTC) established in 2021. Its goal was to align the EU's policy with the USA's approaches to global trade, economics and technology issues, while pursuing common democratic values and respect for human rights. It should be borne in mind that many of the adopted EU regulations (such as DMA or DSA) are targeting American tech giants like Meta, Amazon or Google, which are providing their technologies and services to European consumers and are influencing the EU digital market. The last ministerial meeting of the TTC took place in April 2024; now, with Trump in the White House and in the context of tension resulting from new tariffs imposed by the US on the EU, the future of this forum remains uncertain.[60]

The last five years mark an incredibly intensive period of EU digital policy. Digital sovereignty as an overarching concept underpins the EU's digital regulatory efforts, but the main challenge still remains. It concerns the ways

54 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1-102.

55 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1-66.

56 Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 (Chips Act), OJ L 229, 18.9.2023, p. 1-53.

57 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008 (EU) No 167/2013 (EU) No 168/2013 (EU) 2018/858 (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L, 2024/1689, 12.7.2024.

58 HEIDEBRECHT, Sebastian, "From Market Liberalism to Public Intervention: Digital Sovereignty and Changing European Union Digital Single Market Governance", *Journal of Common Market Studies,* vol. 62, 2024, p. 209.

59 BRADFORD, Anu, "The False Choice Between Digital Regulation and Innovation", *Northwestern University Law Review,* vol. 119, 2024, p. 401-415.

60 BELTON, Ellie, GRUENIG, Max, "The Future of the EU-US Trade and Technology Council", Heinrich Böll Foundation, Washington DC, January 2025, https://us.boell.org/sites/default/files/2025-01/the-future-of-the-eu-us-trade-and-technology-council.pdf

in which the EU is able to assure its position as a normative, innovative and competitive leader while pursuing strategical technological independence and strengthening its foundational commitments to values, rights and openness.

3. THE DIGITAL RULE OF LAW.

3.1. The rule of law in an age of digitalization.

Rule of law is one of the fundamental values of the European Union, indicated in art. 2 of the Treaty on European Union.[61] It is also one of the conditions for membership set out in the Copenhagen criteria[62] and is also a cornerstone of the functioning of the European Union. Respect for the rule of law not only guarantees the proper functioning of the EU legal system, it also affects the operation of the internal market by providing the predictable and certain legal environment necessary for a proper, high level of legal protection enjoyed by citizens and businesses. The rule of law is traditionally understood as a set of principles whose observance implies that public authority acts only within the framework of the law, in accordance with democratic principles and the protection of fundamental rights, while remaining under the control of an independent judiciary. The legal definition of the rule of law in EU law was adopted in Regulation 2020/92, which established the mechanisms for protection of the EU budget in case of breaches of the principle by member states. The political context of the adoption of regulation 2020/92 is related to increasing democratic backsliding in some member states (mostly Poland and Hungary), which reached its peak between 2015 and 2023.[63] According to art. 2 of regulation 2020/92, the constitutional principles for the rule of law concept are: "legality, implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; non-discrimination and equality before the law".[64] The traditional function of the rule of law may be seen as a dual one. First and foremost, it is instrumental to assure the limitation

61 Consolidated Version of the Treaty on European Union [2016] OJ C202/01, art 2

62 Copenhagen European Council, 21-22 June 1993, Conclusions of the Presidency https://www.consilium.europa.eu/media/21225/72921.pdf

63 PECH, Laurent, "The Rule of law as a Well-Established and Well-Defined principle of EU Law", *Hague Journal on the Rule of Law*, vol. 14, 2022, p. 108.

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

of power. Secondly, it may also be considered as a tool of power.[65] The rule of law's theoretical conceptual dimensions distinguish procedural legality (formal approach) from the substantive dimension.[66] The former stresses the question of how laws are adopted, applied and enforced, focusing on principles of legal clarity, certainty and access to fair and due process, while the latter argues that the law is not only about procedures but also their content (substance) and their compliance with moral and democratic values. The substantive understanding is rights-oriented; it focuses on the equality before the law, which should be construed as a substantive fairness, and it should also be grounded in human rights, dignity and democratic principles.[67]

As the goal of this paper is not to analyse the content of the rule of law as it is traditionally understood, the following reflections will be devoted to new angles on it which result from the ongoing digitalization processes. The traditionally conceived rule of law is now confronted with the digital transformation of governance and authority. Hence the new dimension – the digital rule of law – is gaining attention. The concept of the digital rule of law is more rooted in the substantive dimension of traditionally construed rule of law. At its core, the digital rule of law aims at ensuring that the exponential growth of digital technologies does not undermine democratic accountability or fundamental rights. The digital rule of law underpins all regulatory efforts adopted thus far in the European Union. The major challenge is to create such a set of rules and rights that will respond to the new digital reality of society, politics and the economy. This regulatory response shall pursue some crucial goals: first, there is a need to curb the possible misuses of new technologies.[68] Currently, there is a significant imbalance of powers between major global technology corporations and society at large. This asymmetry results from disproportionate control over three pillars of the digital age: infrastructure, data, and knowledge. The Big Techs develop, maintain and control essential digital infrastructures – platforms, cloud services, or algorithmic systems – and they all became indispensable for public and private sector operations. These corporations also collect and process vast amounts of personal and behavioural data, giving them significant advantages in

65 ENGEL, Annegret, GROUSSOT, Xavier, "Making the Rule of Law Great Again - Building of the Digital Rule of Law in the European Union", in *New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights,* A Engel, X. Groussot, GT Petursson (eds.), Springer, Open Access 2023, p. 274-275.

66 TAMANHA, Brian Z., "On the Rule of Law. History, Politics, Theory", Cambridge University Press 2004, p. 91-92.

67 *Ibid*.

68 SUN, Xiaoxia, XIAO, Yang, "How Digital Power Shapes the Rule of Law: The Logic and Mission of Digital Rule of Law", *International Journal of Digital Law and Governance*, 2024, vol. 1(2), p. 234.

surveillance capitalism, predictive analytics, and market manipulation.[69] Finally, their powerful resources, which translate into the ability to shape knowledge and information production, permit them to influence public discourse on an unprecedented scale. This imbalance of power raises profound questions regarding democratic accountability, informational justice, and the capacity of existing legal and regulatory frameworks to protect the public interest in the digital domain.

Against this background, one should point at the need to develop new rights that will optimise the rule of law in the digital environment. Even if some existing human rights may be adapted to the new reality due to their flexible and open-ended character (ex. respect for privacy and family life or freedom of speech), there is a growing need to establish a tech-oriented set of fundamental rights that will provide stronger protection for individuals faced with the power of big tech corporations. This is where the concept of the digital rule of law comes to play.

3.2. Definition and components of the digital rule of law.

The notion of a digital rule of law is a scholarly concept, used in a descriptive way to address the necessity of adapting the existing rule of law framework to the digital age. Another notion which is closely linked to the discussed concept is 'digital constitutionalism",[70] which to some extent responds to the same problem – how to address the digitalization process through certain normative measures – yet it is more rooted in normative constitutional theory. Even if digital constitutionalism is strongly oriented towards the reconstitution of digital power through rights and values, one can agree with Engel and Groussot that it is an example of a rather neutral terminology with normative constitutional implications.[71] The digital rule of law, in its broad understanding ingrained in both procedural and substantive dimensions, may cover procedural safeguards together with rights-based frameworks of digitalisation. The notion of 'digital rule of law' conveys a stronger and more fundamental normative meaning and places digitalization at the core of the system of values.

Given the aforementioned considerations, the digital rule of law may be defined as an adaptation of traditional rule of law principles of legality, accountability, equality, transparency, access to justice to the normative rules of novel digital technologies. The digital rule of law should also be considered as an adaptation of existing rights attributed to individuals to the reality in which they

69 ZUBOFF, *ut supra*.

70 DE GREGORIO, Giovanni, "The Rise of Digital Constitutionalism in the European Union", *International Journal of Constitutional Law,* vol. 19, 2021, pp. 41-70.

71 ENGEL A., GROUSSOT X., *ut supra*, p. 3.

are faced with the ubiquitous digitalization of their socio-economic and political lives.

The European Union's Digital Decade policy programme is deeply intertwined with the principle of the digital rule of law. The abovementioned regulatory effort that resulted in the adoption of EU regulations addressed – or at least attempted to address – key legal principles that were foundational elements of the digital rule of law. Taking into account the most important EU legislative measures adopted in the field of broadly understood digital technologies, one should point at the reinforcement of the following principles: accountability and transparency are strongly enforced by the provisions of the AI Act and the DSA. Transparency obligations in case of the DSA have to do with content moderation, algorithmic decision-making and digital advertisement practices, while in the case of the AI Act, transparency has two dimensions relating to both explainability and interpretability of high-risk AI systems, as well as an appropriate labelling of AI-generated content.[72] The DMA addresses the principles of equality before the law and fair competition. Through the regulation of market behaviours of large online platforms designated as "gatekeepers", the DMA is curbing the dominance of major tech companies by assuring smaller competitors access to the platform economy designed by the dominant players. The AI Act, apart from the already-mentioned principles of accountability and transparency, also attempts to address the principle of legal certainty, human oversight and the generally trustworthy and human-centric development of AI technologies which do not undermine human rights, rule of law, democracy and environmental protection. However, in case of the AI Act one can notice that the attempted vision of ethically considerate regulation ended up as an overly prescriptive set of rules, often of a rather purely procedural character and drafted in a vague and technical way. Principles of due process and access to justice are at the heart of the DSA, which provides the framework for internal complaint mechanisms offered by online platforms to their users, as well as the options for bringing disputes arising from the application of the DSA provisions before certified out-of-court dispute settlement bodies.[73] Proper judicial redress measures should also be available to users when they are not satisfied with online platforms' decisions. Finally, data-related regulations like GDPR, DGA and the Data Act enforce individual rights concerning privacy, fair access, trust and democratic control over data.

72 KOUROUTAKIS, Antonios, "Rule of law in the AI era: addressing accountability, and the digital divide", *Discover Artifical Intelligence*, vol. 4, 2024.

73 DE GREGORIO, Giovanni, DUNN, Pietro, "The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age" (31 March 2022), *Common Market law Review*, vol. 59 (2), 2022, , pp. 11-12, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4071437

4. RIGHTS-DRIVEN DIGITAL POLICY IN THE EU – EU DECLARATION ON DIGITAL RIGHTS AND PRINCIPLES FOR THE DIGITAL DECADE.

Apart from properly binding regulatory measures which are the result of the commitment made in the EU Digital Compass, one should also point at the European Declaration on Digital Rights and Principles for the Digital Decade proclaimed by the European Parliament , the Council and the Commission in December 2022.[74] It marks a significant step forward in the European Union's policy to connect the digital transformation process with its foundational values and fundamental rights. The Declaration is not legally binding, although it may be considered as guidance for future EU strategies and policies with the goal of shaping a truly human-centric digital future.[75] The Declaration encompasses six overarching principles, structured in six chapters: 1) Putting people and their rights at the centre of the digital transformation; 2) Solidarity and inclusion; 3) Freedom of choice; 4) Participation in the digital public space; 5) Safety, security, and empowerment: 6) Sustainability. These principles are expressed through a combination of rights, forward-looking declarations, and real commitments. As far as rights are concerned, the Declaration builds upon the existing legal framework of the EU Charter of Fundamental Rights. Hence, the Declaration reinforces a paradigm of a certain level of normative equivalency, according to which fundamental rights also have a universal character in relation to the sphere of their execution. This means that traditional rights (ex. human dignity, freedom of expression, privacy rights, right to education) should be protected online as much as offline.[76] Nevertheless, the Declaration offers new ideas to some extent about the rights specifically designed for the digital era, including the right to access to affordable and high-speed Internet, the right to determine one's digital legacy, or algorithmic transparency. This is where the true transformative potential of the discussed document lies.

Apart from the reinforcement of proper digitally-oriented rights, the Declaration contains several standards and commitments that often correspond to already existing legally binding measures such as DMA, DSA, GDPR or the AI Act. These standards not only set the direction for the proper enforcement of the aforementioned regulations, but they should also guide further development of

74 European Declaration on Digital Rights and Principles for the Digital Decade, OJ C 23/1, 23.1.2023.

75 COCITO, Cristina, DE HERT, Paul, "The transformative nature of the EU Declaration on Digital Rights and Principles: replacing the old paradigm (normative equivalency of rights)". Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4341816

76 *Ibid*. See also, DROR-SHPOLIANSKY, Dafna, SHANY, Yuval, "It's the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights - A Proposed Typology", *The European Journal of International Law*, vol. 32, 2021, pp. 1251-1252.

digital policy. Indeed, among these standards are novel ones such as a workers' right to disconnect, common online access to key public services through a trustworthy digital identity, or standards for interactions with AI systems.

Despite its non-binding status, the Declaration has normative significance. It should be treated as a starting point for future legislation and policy-making,[77] while supporting the interpretation and application of existing laws at the same time. Through a clear articulation of the European vision for digital rights, it contributes to the broader discourse on the digital rule of law and digital constitutionalism.[78]

5. CONCLUSION.

In response to the digital revolution of recent decades, the European Union has adopted an ambitious digital policy agenda that does more than regulate emerging technologies, it redefines the principles on which the European project is built. As this paper has demonstrated, the EU's pursuit of digital sovereignty and the corresponding regulatory efforts have led to a profound reconceptualization of the rule of law in the digital age.

The concept of the digital rule of law is not only a purely rhetorical figure, but can be seen as an element of a necessary evolution – an adaptive framework that seeks to align classical legal values with fast-progressing digitalization. By embedding values such as transparency, accountability, fairness, and fundamental rights into its legal instruments (from the GDPR to the AI Act), the EU attempts to assert its normative authority over the digital domain. This serves the purpose of tempering the constantly growing power of the technological giants, and in doing so it affirms that innovation, though welcome, must remain within the boundaries of legality and legitimacy.

Moreover, the European Declaration on Digital Rights and Principles underscores the symbolic and aspirational dimensions of this transformation. While not legally binding, it operates as a constitutional compass, pointing towards a future where digital progress is inseparable from human dignity, inclusion, and democratic oversight. Nevertheless, the EU's normative ambitions are not without friction and problems, as the tension between regulation and innovation, autonomy and protectionism, or rights and enforcement remains largely unresolved. The very act of regulating digital spaces, which are

77 KUŹMICZ, Maksymilian, "European or Universal? The European Declaration of Digital Rights in a global context", *International Conference on Computer Ethics,* vol. 1, 2023, p. 7.

78 CELESTE, Eduardo, "Digital Constitutionalism, EU Digital Sovereignty Ambitions and the Role of the European Declaration on Digital Rights", in *New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights*, A Engel, X. Groussot, GT Petursson (eds.), Springer, Open Access 2023, pp. 267-268.

inherently global, raises perennial questions about jurisdiction, legitimacy, and effectiveness. Even so, the EU's attempt to constitutionalize digitalization is both timely and necessary.

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PROTECTING INDIVIDUALS IN THE DIGITAL AGE FROM ONLINE SEARCH ENGINE ACTIVITY

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SUMMARY: 1. INTRODUCTION. 2. FUNCTIONALITY AND IMPACT OF ONLINE SEARCH ENGINES. 2.1. Brief overview of its functionality. 2.2. Impact on fundamental rights. 3. EUROPEAN REGULATORY APPROACH TO THE PROTECTION OF INDIVIDUALS AGAINST ONLINE SEARCH ENGINES. 3.1. Introduction to the so-called digital constitutionalism. 3.2. The GDPR's role in strengthening personal data protection and individual privacy. 3.3. The DSA's role in the protection of individuals from very large online search engines. 3.4. The role of the AIA in protecting individuals from AI-powered online search engines. 4. CONCLUSION. 5. BIBLIOGRAPHY.

1. INTRODUCTION.

The Internet has become the ideal platform for exercising informational freedoms. Moreover, it has redefined traditional dynamics, enabling the freedom to express ideas, share opinions, or report facts beyond a vertical relationship between professionals and citizens and has evolved into a horizontal interaction among individuals. This characteristic, combined with the immediacy and speed of the digital environment, has led European jurisprudence[1] to describe the

1 Among others: European Court of Human Rights, case number 3002/03 and 23676/03, 10 March 2009, President: Mr. L. Garlicki, ECLI:CE:ECHR:2009:0310JUD000300203, paragraph

Internet as an unprecedented tool for the exercise of freedom of expression that enhances public access to news and generally facilitates the communication of information.

However, it is equally important to recognize that the Internet's unique attributes – and, by extension, online search engines – bring with them an increased risk of fundamental rights violations.

The potential risks posed by online search engines were first spotlighted in the landmark *Google Spain* case.[2] In paragraph 80 of this ruling, the Court of Justice of the European Union observed that "the operator of a search engine may significantly affect the fundamental rights to respect for private life and to the protection of personal data by providing, through search results, a detailed profile of a person, combining information scattered across the web and creating a structured and ubiquitous view." In this line, the European Court of Human Rights[3] has also recognized that online expressions have an "amplifying effect" characterized by their reach, immediacy, and permanence, which enhances their potential to infringe upon fundamental rights.

Within this context, this paper aims to identify the existing European regulatory provisions designed to safeguard individuals' fundamental rights from digital private actors, with a focus on online search engines. The paper will first examine the operations of online search engines and their potentially adverse effects on individuals, and will then address the European regulatory provisions applicable to online search engines that play a key role in the constitutionalisation of Internet governance, namely the General Data Protection Regulation[4] (hereinafter, GDPR), the Digital Services Act[5] (hereinafter, DSA), and the Artificial Intelligence Act[6] (hereinafter, AIA). Finally, it will analyse

27; European Court of Human Rights, case number 64569/09, June 16, 2015, President: Mr. D. Spielmann, ECLI:CE:ECHR:2015:0616JUD006456909, paragraph 110.

2 Court of Justice of the European Union, Cases C-131/12, 13 May 2014, Rapporteur: Mr. M. Ilesic, ECLI:EU:C:2014:317.

3 Among others: European Court of Human Rights, case number 33014/05, August 5, 2011, President: Mr. D. Spielmann, ECLI:CE:ECHR:2011:0505JUD003301405, paragraph 63; European Court of Human Rights, case number 48876/08, April 22, 2013, President: Mr. D. Spielmann, ECLI:CE:ECHR:2013:0422JUD004887608, paragraph 124; European Court of Human Rights, case number 18030/11, November 8, 2016, President: Mr. G. Raimondi, ECLI:CE:ECHR:2016:1108JUD001803011, paragraph 168.

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (O.J. L 119/1., 4 May 2016).

5 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act) (O.J. L 277/1, 27 October 2022).

6 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No

the effectiveness of such provisions in addressing the adverse effects of the increasing influence of private digital entities such as online search engines.

2. FUNCTIONALITY AND IMPACT OF ONLINE SEARCH ENGINES.

2.1. Brief overview of their functionality.

The Internet consists of a series of protocols designed to enable the exchange of information. Accessing resources on the Internet, including web pages, relies on the use of a Uniform Resource Locator (hereinafter, URL), a unique and specific address that, when entered into a browser, enables users to locate these resources. However, it is essential to recognize that accessing such information draws on prior knowledge of the URL of the desired page. Without this crucial detail, retrieving the intended content becomes impossible.

Online search engines have become a crucial solution to address the challenges arising from the complexity of the web. These tools, which according to the DSA are an "intermediary service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, based on a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found", have played a significant role in improving access to the vast amount of information available online.

While this intermediation process may seem straightforward, it involves a series of complex phases of information processing. The first phase is the use of 'crawling tools', commonly known as 'spiders' or 'bots', to scan the web. However, it is important to note that this scanning process does not cover all web pages and sites, partly due to the ambiguous and often indeterminate scope of the web. Additionally, certain publishers may actively prevent their pages from being included in search results by implementing robots.txt files, instructing online search engines to exclude specific pages from their indexing.

Following the initial web scanning phase, the next step involves replicating the discovered pages to create a database owned by the search engine. This database forms the basis for the subsequent stage: cataloguing the pages using the reverse indexing method. This method entails building an index comprising keywords, word stems, symbols, or word sequences. These elements are then linked to the

300/2008 (EU) No 167/2013 (EU) No 168/2013 (EU) 2018/858 (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (O.J. L 2024/1689, 12 July 2024).

web files in which they appear. Once this analysis is complete, the link to the web file is associated with these elements in the search engine's general index.

It is worth noting that online search engines also maintain vertical databases, which specialize in specific types of documents or information, such as news or images. As a result, the reverse indexing technique is applied across all the online search engine's databases, including horizontal ones (covering the entire web) and vertical ones (focused on particular types of content).

Once the online search engine databases are constructed and their contents catalogued, the next step occurs when a user submits a search query. The search engine scans its database indexes for the entered terms and, among all the links to web pages associated with those terms, selects the ones it considers most relevant to the user. This selection process factors in inputted keywords, the user's search history, queries made during the same session, clicks, time spent on web pages, and even the search engine's priorities.[7] The results are then presented on a web page format, commonly referred to as the Search Engine Result Page (hereinafter, SERP).

It is important to note that the primary business model of online search engines revolves around contextual advertising. As such, advertisements related to the user's search will also appear on the SERP. Advertisers bid for placement in search results, and the order in which ads appear is determined by the highest bid, with the top bidder securing the most prominent position.

In this role, online search engines do not maintain a neutral stance when presenting search results through their SERPs. As private, profit-driven entities, their interests and those of their external partners often take precedence over the information quality principle, indicating that the intermediation function has become secondary in the modern digital landscape.

The primary objective of leading online search engines is not to provide unbiased access to information but to act as advertising platforms for entities that pay to feature prominently in search results. As such, delivering information to users serves largely as a pretext to identify their interests. Advertisers then leverage this data to meet their needs to fine-tune their marketing efforts by targeting user profiles that have demonstrated an interest in content related to their products or services.

Essentially, the online search engine acts as a mediator between users and the vast array of information available on the Internet, systematically capturing and analysing user data. This information is then monetized, allowing the online search engine to generate revenue through targeted advertising and other commercial models.

7 LEWANDOWSKI, D., *Understanding Search Engines*, Ed. Springer, Berlin, 2023, p. 271.

2.2. Impact on fundamental rights.

Online search engines play a central role in the global dissemination of information by enabling Internet users to access content published online quickly.[8] As previously noted, online search engine activities differ fundamentally from the activity of web publishers. Online search engines do not communicate thoughts, ideas, opinions, or factual information; instead, their primary function is to provide advertising services while acting, in a secondary capacity, as intermediaries between Internet users and web publishers.

Facilitating information access through a simplified interface offers significant advantages to Internet users. Indeed, even if it is an indirect effect of their existence, online search engines contribute to the rapid access of Internet users to information published on the web to the creation of a better-informed public opinion, and have the potential to influence public opinion and discourse, as has been affirmed by the settled case law of the European Court of Human Rights in decisions such as *Hurgain v. Belgium*. These services promote freedom of information and contribute to the development of an informed public opinion, which is essential for the progress of the information society.[9] However, it is also crucial to recognize the potential harm derived from the functioning of online search engines.

One of the most notable adverse effects is connected to the personal data processing inherent to the activity of online search engines, which have the potential to negatively impact fundamental rights such as dignity, privacy, and the protection of personal data. The negative effect on these rights is caused by the unparalleled exposure of individuals derived from the use of users' search data to display personalized content and advertisements to influence decision-making, and by the communication of individuals' personal information to Internet users through search results. This ends up in the creation of detailed profiles of individuals accessible to anyone with an Internet connection, which can condition self-development and infringe upon rights and freedoms.

Another notable negative effect comes from the self-regulated and automatic design and operation of online search engines. They have the power to shape public discourse by filtering and moderating content based on criteria driven by their own interests. without including constitutional safeguards.[10]

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8 Court of Justice of the European Union, Cases C-131/12, May 13, 2014, Rapporteur: Mr. M. Ilesic, ECLI:EU:C:2014:317, paragraph 36.

9 CÓRDOBA CASTROVERDE, D., "Los retos de la protección de datos en Internet. El caso Google Spain y derecho al olvido", in *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, number 21, 2017, p. 240.

10 DE GREGORIO, G., *Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society*, Ed. Cambridge University Press, Cambridge, 2022, p. 14.

As a result, they also have the potential to impact fundamental rights such as freedom of expression and information.

In all, the Internet's status as the world's primary information platform makes the activity of online search engines a threat to the free development of individuals, fundamental rights and democracy. A democracy needs to enable individuals to express opinions and ideas freely, but this cannot be achieved if they are marginalized in spheres of data ignorance and if they fear a regime of private surveillance.[11] To counterbalance such effects, European courts and lawmakers have come up with a set of decisions and regulations that are meant to reinstate the rule of law and reduce the influence that digital private actors have over fundamental rights and constitutional values.

3. EUROPEAN REGULATORY APPROACH TO THE PROTECTION OF INDIVIDUALS AGAINST ONLINE SEARCH ENGINES.

3.1. Introduction to so-called 'digital constitutionalism'.

The Internet provides more opportunities to exercise fundamental rights but also brings more threats to them.[12] As a result, the so-called "digital constitutionalism of Internet governance"[13] seeks to leverage the effects of what is already known as "digital capitalism", which refers to the influence that private digital corporations have over social and economic dynamics, democratic processes and fundamental rights. Digital constitutionalism emerges as a reaction to the new power relationships driven by the consolidation of digital technologies in order to enhance the protection of fundamental rights and key constitutional values and principles in the digital society from the interferences of private powers.[14]

In this regard, recent European regulatory provisions, supported by the Charter of Fundamental Rights and the European Court of Justice's case law, are contributing to reducing the impact of private decisions on European democratic values, establishing a framework of rights and principles for the

11 *Ibid.,* p. 19.

12 DE GREGORIO, G., RADU, R., "Digital Constitutionalism in the Era of Internet Governance", in *International Journal of Law and Information Technology*, no. 30, 2022, p. 81.

13 FROSIO, G., GEIGER, C., "Towards a Digital Constitution: How the Digital Services Act Shapes the Future of Online Governance", in *VerfBlog*, 20/02/2024, https://verfassungsblog.de/towards-a-digital-constitution/, p. 2.

14 DE GREGORIO, G., *op. cit.*, pp. 3-4.

digital domain[15] by regulating digital markets with a constitutionally informed perspective.[16]

One of the more mature expressions of European digital constitutionalism is the GDPR.[17] This regulation protects individuals from the unlawful processing of personal data and mitigates interference with the right to privacy. It also safeguards democratic values and promotes autonomy and self-determination.[18]

The DSA is another example of digital constitutionalism. This Regulation introduces mechanisms for platform governance and imposes a fundamental rights balance approach to uphold democracy and the rule of law,[19] and particularly to protect freedom of expression.

Finally, the AIA is the latest expression of this phenomenon, laying down a uniform legal framework for the development of AI that tackles all the new risks generated by its use. It promotes a human-centric and trustworthy approach that ensures the protection of fundamental rights, democracy and the rule of law.

Overall, the new European normative framework intervenes at a horizontal level, in an attempt to break the asymmetries of powers caused by private online digital actors that threaten democratic values.[20] Thus, the goal of such a framework is to protect constitutional values, legal principles and rights from public actors and private companies such as online search engines.

3.2. GDPR's role in strengthening personal data protection and individual privacy.

According to Recitals 6 and 7 of the GDPR, the European personal data protection Regulation seeks to address the novel challenges posed by rapid technological advancements and globalization. It does so by adopting broad definitions and implementing a comprehensive framework of principles that horizontally translate constitutional values[21] and act as normative and interpretative guidelines.

Such principles, which are outlined in Article 5 of the GDPR, impose restrictions on data processing activities and avoid interference with data

15 POLLICINO, O., PAOLUCCI, F., "Digital Constitutionalism", in FLORIDI, L., ZIOSI, M., TADDEO, M., *A Companion to Digital Ethics*, Ed. Oxford University Press, forthcoming, pp. 3-4.

16 *Ibid.,* p. 7.

17 Among others: DE GREGORIO, G., *op. cit.*, p. 219, CELESTE, E., DE GREGORIO, G.: "Digital Humanism: The Constitutional Message of the GDPR", in *Global Privacy Law Review*, Volume 3, Issue 1, 2022, p. 12, POLLICINO, O., PAOLUCCI, F., *Op. cit.*, p. 7.

18 DE GREGORIO, G., *op. cit.*, p. 232.

19 FROSIO, G., GEIGER, C., *op. cit.,* p. 6.

20 DE GREGORIO, G., *op. cit.*, p. 272.

21 *Ibid*., p. 240.

subjects' fundamental rights.[22] In addition, they inspire the series of obligations and rights recognized by the GDPR, which aims to provide individuals with control and autonomy over their personal data and is designed to safeguard the fundamental rights and freedoms of natural persons, with particular emphasis on the right to the protection of personal data.

The GDPR has played an essential role in safeguarding individuals' right to privacy and personal data from the activities of online search engines, which create an unprecedented level of individual exposure that can negatively influence and condition lives, especially if the information linked to individuals is false, inaccurate, outdated, or refers to criminal convictions or other sensitive information.

The broadening of definitions through the GDPR has resolved debates regarding whether the operations of online search engines constitute data processing activities and whether they should be regarded as independent data controllers. In both cases, the GDPR has made it possible to conclude that online search engines perform processing activities as data controllers.

In addition, regarding safeguarding individuals from the effects of the processing activities conducted by online search engines, Article 17 of the GDPR, which recognizes the "right to be forgotten", has created a proactive and reactive mechanism to protect the right to information self-determination based on the idea of introducing expiration dates in the digital world.[23]

Though the right is formally referred to as the "right to erasure", the article's title includes the expression "right to be forgotten" in brackets and quotation marks. This specific reference intends to emphasize the specific application of the right to erasure within the context of the Internet, particularly concerning online search engines. Therefore, the right to be forgotten shall simply be regarded as a synonym of the right to erasure, particularly when applied to the removal of online content.

This right, which guarantees preserving the right to privacy and honour of individuals, seeks to protect human personality and human dignity, a pillar of constitutionalism. It does so by recognizing data subjects a right to request the removal of their personal data to controllers, based on one of the grounds listed in Article 17(1):

— Personal data is no longer necessary for the purposes it was collected or processed.

— Withdrawal of data subject's consent.

22 DE GREGORIO, G., *op. cit.*, p. 240.

23 VÉLIZ, C., *Privacy is power. Why and how you should take back control of your data,* Ed. Bentam Press, London, 2020, pp. 146-147.

— Data subject's objection to the processing.
— Unlawful processing of personal data.
— Personal data must be erased to comply with a legal obligation established by EU or member state law.
— Personal data were collected in the context of the offering of information society services.

Furthermore, as specified in Recital 66, together with Article 17(2) of the GDPR, when a data controller has made personal data public and an erasure request has been granted, the controller must take reasonable steps to inform other controllers processing the data to delete any links to it, as well as any copies or replicas. This provision effectively relieves the data subject of the burden of pursuing additional erasure requests with other controllers.

Nevertheless, the right to be forgotten is not absolute. In addition to constitutional constraints, it is subject to inherent limitations outlined in Article 17(3) of the GDPR. The following limitations may authorize the continued processing of personal data, provided that proportionality is maintained:

— For exercising the right to freedom of expression and information.
— For compliance with a legal obligation.
— For reasons of public interest in public health.
— For archiving purposes in the public interest, as well as for scientific or historical research or statistical purposes.
— For the establishment, exercise, or defence of legal claims.

It is important to note that these limitations do not constitute exceptions to the application of the right to be forgotten but are justifications for restricting the right under certain circumstances, which explains why recital 4 of the GDPR underscores the importance of balancing the competing interests at stake to ensure fairness and proportionality.

Applied to online search engine results, the right to be forgotten allows data subjects to request their removal when linked to their name. However, such requests can conflict with the rights of Internet users, who rely on online search engines to access information. Even if, according to Recital 153 of the GDPR, the right to freedom of expression and access to information must be interpreted broadly due to its crucial role in democratic societies, this does not mean that the right to access information always prevails. On the contrary, this leads to the need to conduct case-by-case assessments to carefully balance personal data, individual privacy, and the public's right to information.

As a result of this *ad hoc* assessment, and given the limited effect of such removal – information will be accessible through the online search engine using

different search criteria or through the website on which the information is published – the right to be forgotten cannot be labelled as an act of censure. On the contrary, it is a proportionate response adapted to the needs of all stakeholders.

As a last remark, this right is a clear example of how the mere horizontal effect of a right without proper procedural safeguards does not break the asymmetry of power exercised by online search engines over individuals. Indeed, without procedural safeguards and fixed criteria according to which search engines assess data subject's requests, individuals might come across an entirely discretionary assessment supported by algorithms, which leads to unsatisfactory results[24] and requires the intervention of public bodies, such as supervisory authorities or courts.

By defining the criteria that should bind any delisting decision-making, supervisory authorities and courts play an essential role to reinforce individuals' right to be forgotten and therefore to balance the asymmetry of power created by online search engines.

3.3. The DSA's role in the protection of individuals from very large online search engines.

In order to create a more trustworthy digital environment and balance competing interests, in Section I of Chapter III the DSA imposes due diligence obligations for all providers of intermediary services (i.e. search engines), which include the following:

— Nominating a single point of contact for communicating with public bodies and service recipients.

— Designating a legal representative in the European Union when not having an establishment in the Union.

— Make terms and conditions available in clear, plain, intelligible, user-friendly and unambiguous language, and have them publicly available in an easily accessible and machine-readable format. Terms and conditions shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system.

— Make available clear, easily comprehensible reports at least once a year on any content moderation that they have engaged in during the relevant period.

24 POLLICINO, O., *Judicial Protection of Fundamental Rights on the Internet. A Road Towards Digital Constitutionalism?*, Ed. Hart Publishing, Oxford, 2023, p. 206.

In addition, the DSA imposes enhanced preventive obligations over very large online search engines (hereinafter, VLOSE). This term refers to search engines that have a monthly average of service recipients equal to or higher than 45 million, e.g. Google or Bing. Such intermediary services play a crucial role in locating and making information retrievable online, and therefore in facilitating public debate, economic transactions and the dissemination of information, opinions, and ideas to the public, and in influencing how recipients obtain and communicate information online.

However, their algorithms and moderation policies can also lead to unprecedent individual exposure and censorship. This is the reason why, as referred to in Recitals 79 and 80 of the DSA, lawmakers have identified the existence of systemic risks derived from the activity of VLOSE.

Particularly, such risks, which are listed in Article 34(1), include:

— Dissemination of illegal content.

— Negative effects on fundamental rights such as freedom of information, human dignity, privacy, the protection of personal data, or non-discrimination.

— Negative effects on democratic processes, civic discourse, electoral processes, and public security.

— Negative effects concerning gender-based violence, the protection of public health and minors, and serious negative consequences to a person's physical and mental well-being.

As a result, Section 5 of Chapter III imposes a set of enhanced preventive obligations over VLOSE, focused on mitigating the mentioned systemic risks.

To begin with, Article 34(1) of the DSA requires VLOSE to conduct an assessment of the risks stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their service. The DSA further regulates the mentioned assessment by adding in Article 34(2) that it shall consider whether and how the following factors influence any of the systemic risks referred to before:

— The design of their recommender systems and any other relevant algorithmic system.

— The content moderation systems.

— The applicable terms and conditions and their enforcement.

— The systems for selecting and presenting advertisements.

— The data related practices.

Article 34(2) adds that the assessment shall analyse whether and how the systemic risks are influenced by intentional manipulation, including inauthentic

use or automated exploitation, as well as the amplification and potentially rapid and wide dissemination of illegal content and information that is incompatible with the applicable terms and conditions.

Moreover, Article 35 of the DSA requires VLOSE to put reasonable, proportionate and effective mitigating measures in place that are tailored to the identified risks and with specific consideration to the impacts on fundamental rights. Particularly, mitigating measures imposed over VLOSE may include, where applicable:

- Adapting the design, features or functioning of their services, including their online interfaces.
- Adapting their terms and conditions and their enforcement.
- Adapting content moderation processes related to specific types of illegal content.
- Testing and adapting their algorithmic systems, including their recommender systems.
- Adapting their advertising systems and adopting targeted measures aimed at limiting or adjusting the presentation of advertisements in association with the service they provide.
- Reinforcing internal processes, resources, testing, documentation, or supervision as regards detection of systemic risk.
- Initiating or adjusting cooperation with trusted flaggers.
- Initiating or adjusting cooperation with other providers of online search engines through codes of conduct and crisis protocols.
- Taking awareness-raising measures and adapting their online interface in order to give recipients of the service more information.
- Taking targeted measures to protect the rights of the child, including age verification and parental control tools aimed at helping minors signal abuse or obtain support, as appropriate.
- Ensuring that an item of information, whether it constitutes a generated or manipulated image, audio or video that appreciably resembles existing persons, objects, places or other entities or events and falsely appears to a person to be authentic or truthful is distinguishable through prominent markings when presented on their online interfaces, and, in addition, providing an easy-to-use functionality which enables recipients of the service to indicate such information.

Additionally, as per Article 36 of the DSA, VLOSE are also expected to, upon the Commission's request, take one or more of the following actions:

— Assess whether, and if so to what extent and how, the functioning and use of their services significantly contribute to a serious threat to public security or public health in the Union or in significant parts of it or are likely to do so.
— Identify and apply specific, effective and proportionate measures to prevent, eliminate or limit any such contribution to a serious threat identified. The service provider shall take due account of the gravity of the serious threat, of the urgency of the measures and of the actual or potential implications for the rights and legitimate interests of all parties concerned, including the possible failure of measures to respect the fundamental rights enshrined in the Charter.
— Report to the Commission, by a certain date or at regular intervals specified in the decision, on the assessments referred to in the first point, on the precise content, implementation and qualitative and quantitative impact of the specific measures taken pursuant to the second point and on any other issue related to those assessments or those measures, as specified in the decision.

Finally, VLOSE shall also conduct annual compliance audits, provide at least one option for each of their recommender systems which is not based on profiling, compile an advertising repository, make it available in a section of their interface and ensure that multicriteria queries can be made using a search tool, and provide access to the Digital Services Coordinator or the Commission to the data needed to monitor and assess compliance with this Regulation.

The objective of the abovementioned obligations applicable to VLOSE is to ensure a safe, predictable, and trusted online environment, addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate, and within which fundamental rights enshrined in the European Charter of Fundamental Rights are effectively protected.

In addition, the DSA recognizes that users of intermediary services have the right to lodge complaints alleging an infringement of the preventive obligations contained therein, and to seek compensation for damages or losses suffered due to an infringement of such obligations.

Lastly, it is important to mention that, beyond mandating preventive and reactive measures, the DSA (in Recital 22 and Article 5) establishes a potential liability of online search engines if, among other things, they do not comply with rules regarding the updating of information or fail to remove or restrict access to information upon obtaining knowledge of removal from the initial source, or when a judicial or administrative body has ordered such removal or disablement.

In all, the DSA balances fundamental rights with innovation, offering a reference for other jurisdictions looking to update their legal frameworks for platform liability, moving away from the classic *laissez-faire* approach.[25]

3.4. The role of the AIA in protecting individuals from AI-powered online search engines.

Artificial Intelligence represents the most advanced expression of digitalization and has become an integral part of online search engines. It enables content personalization, prioritization and optimization of the overall user experience.[26]

However, the use of AI by online search engines can also harm fundamental rights, be the source of new asymmetries and inequalities, and cause significant risks for individuals and societies.[27] For instance, AI-powered search engines can profile individuals using behavioural data, impact their autonomy by steering their attention towards content that serves the interest of the intermediary service, disseminate misinformation, disinformation, hate speech and hallucinations, and lead to ideological polarization, all due to their high reach.[28]

Recital 118 of the AIA explicitly refers to the risks derived from embedding AI models or systems into intermediary services. Notably, the Recital acknowledges that AI triggers a whole new set of obligations for the providers of such services. Although it acknowledges that the risk-management obligations applicable to VLOSE under the DSA should suffice to comply with the obligations triggered by the AIA, it notes that new systemic risks not identified in the DSA could emerge from the use of AI models or systems by online search engines, in which case a complementary assessment shall be conducted. Also, Recital 119 of the DSA acknowledges the fact that AI systems could be used as online search engines, performing searches of all websites, incorporating results into existing knowledge, and using this knowledge to generate an output.

However, despite acknowledging the potential negative impact of AI in online search engines, the AIA lacks specific content addressing such concerns, mainly because high-reach AI – unlike high-risk AI – has been descoped from

25 FROSIO, G., GEIGER, C., *op. cit.*, p. 9.

26 ZARKOGIANNI, K., "The AI risks in very large online platforms and search engines", in VERDUYN, P., *SEM Policy Brief Collection: Digitalisation*, Ed. Maastricht University Press, Maastricht, 2025, p.62.

27 SÖDERLUND, K., ENGSTRÖM, E., HARESAMUDRAM, K., LARSSON, S., STRIMLING, P., "Regulating high-reach AI: on transparency directions in the Digital Services Act", in *Internet Policy Review*, Volume 13, Issue 1, 2024, p. 3.

28 ZARKOGIANNI, K., "The AI risks in very large online platforms and search engines", in VERDUYN, P.: *SEM Policy Brief Collection: Digitalisation*, Ed. Maastricht University Press, Maastricht, 2025, pp. 65-66.

the regulation. Only Article 50 of the AIA includes some controls that could be applicable to AI-powered search engines, such as the introduction of disclaimers to inform individuals about the interaction with an AI system, for instance.

Hence, the AIA does not particularly address the concerns derived from the use of AI for search purposes (i.e. general-purpose AI systems like ChatGPT) or from the inclusion of AI models and systems in online search engines (e.g. RankBrain, Neural Matching, BERT or MUM).[29]

Despite the mentioned limited scope of the Regulation, the risks derived from such cases of AI use could be tackled and mitigated by the application of both DSA and GDPR. The former, to protect freedom of expression and prevent the adverse effects derived from dissemination of false information, and the latter to protect individuals' personal data and privacy from search activities conducted through the use of AI systems or from the embedding of AI systems and models into online search engines.

4. CONCLUSION.

Online search engines have transformed how individuals access and interact with information in the digital age. They empower users by providing rapid access to a vast range of content and nurturing public discourse. However, this transformative role comes with profound challenges originating from their automated functioning and widespread reach, which, together with the divergence of interests between private and public entities, threaten individual privacy, dignity, and other fundamental rights.

The profit-driven nature of these platforms – largely reliant on targeted advertising and data monetization – often means that commercial interests take precedence over unbiased information delivery and individuals' self-determination.

The so-called 'digital constitutionalism' sought to address concerns derived from the digital sphere by embedding constitutional values in the governance of digital stakeholders such as online search engines.

European regulatory frameworks such as GDPR, DSA, and AIA are legislative measures that establish a robust protection of individuals and constitutional values and principles against the adverse effects of online search engine operations.

29 NAYAK, P., "How AI powers great search results", in *Google Blog*, 03/02/2022, https://blog.google/products/search/how-ai-powers-great-search-results/.

The GDPR has notably shielded individuals' rights to privacy and personal data and serves as a pivotal legal framework designed to safeguard individuals from the processing activities conducted by online search engines. Firstly, the GDPR broadens the definitions of personal data processing and controllers, effectively ensuring that online search engines are classified as independent data controllers. This classification subjects search engines to specific obligations and accountability under the regulation.

A cornerstone of the GDPR's protection is the inclusion of the "right to be forgotten," formally recognized under Article 17 as the "right to erasure." This provision empowers individuals to request the removal of their personal data from search engine results. The regulation further mandates that data controllers inform other entities to delete related data, thereby relieving individuals from the burden of initiating multiple requests. The GDPR also emphasizes the need to balance competing rights, such as the right to freedom of expression and the public's access to information. While these limitations may restrict the application of the right to be forgotten in certain circumstances, they ensure proportionality and fairness in its implementation.

In conclusion, the GDPR's provisions empower individuals by granting them autonomy over their personal data while promoting equitable treatment through a balance of rights. This represents a significant advance in addressing the challenges posed by online search engines.

The DSA creates a regulatory framework to ensure a safe and transparent digital environment and balance the risks derived from intermediary services such as online search engines. It imposes general obligations on all intermediary services and stringent due diligence and accountability measures on VLOSE. This is to mitigate systemic risks such as unlawful content and threats to fundamental rights, particularly freedom of expression. These measures include risk assessments, tailored mitigation strategies, and compliance audits.

Meanwhile, the AIA integrates a human-centric approach but does not comprehensively address concerns related to AI's integration into online search engines. However, such risks can still be mitigated under other regulatory frameworks such as the DSA, which helps safeguard freedom of expression and mitigates the adverse effects of misinformation, or the GDPR, which protects individuals' personal data and privacy. Together, these frameworks complement the AIA's provisions, protecting the challenges posed by AI in online search engines.

In all, the three legal instruments aim to balance creating a competitive digital market with the protection of democratic values and the rights and freedoms of individuals. However, there has been a swift change in how lawmakers achieve this balance. The liberal approach governing the GDPR,

which left the application of a significant number of obligations derived from it to the discretion of regulated entities, relegating supervisory authorities' activity to a reactive rather than proactive position, has been left behind. Instead, the DSA and AIA impose more specific controls and recognize regulators as having a more prominent role by entrusting them with preventive, monitoring, and active duties.[30]

Online search engines' multifaceted activity (personal data processing, algorithmic personalization, and content mediation) demands a nuanced regulatory response. Overcoming the power asymmetries between online search engines and individuals remains a challenge, and ensuring procedural safeguards and active and harmonized oversight seems essential to prevent the infringement of freedoms while fostering a healthy digital economy.

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SHIFTING SANDS: THE US–EU DATA PRIVACY FRAMEWORK IN A CHANGING POLITICAL LANDSCAPE

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SUMMARY: 1. CONTEXT. 2. PERSONAL DATA AS AN ASSET. 3. THE JUDGEMENT OF THE ECJ OF 16 JULY 2020 – "*SCHREMS II*". 3.1. Precedents and factual framework. 3.2. Arguments of the European Court in *Schrems II* and legal framework applicable to the case. *3.2.1. Applicability of the General Data Protection Regulation (GDPR). 3.2.2. Powers of the Data Protection Commissioner and the validity of "Privacy Shield Decision" and the "SCC"s. 3.2.3. Validity of SCC Clauses. 3.2.4. Validity of the Privacy Shield Decision.* 3.3. Did US domestic law provide an equivalent level of protection? 3.4. *Schrems II* judgement – conclusions of the European Court of Justice. 4. NEXT STEPS IN THE CASE. 5. THE DATA PRIVACY FRAMEWORK. 5.1. Principles for US companies and self-certification. 5.2. Redress mechanisms – The *Data Protection Review Court.* 6. *STATU QUO* OF THE DPF – THE EUROPEAN COMMISSION AND EDPB REPORTS. 7. THE *LATOMBE* CASE AND "*TRUMP EFFECT*" – LEGAL UNCERTAINTY RETURNS. 7.1. *Latombe* case and the prospects of a "*Schrems III*" or "*Latombe I*" case. 7.2. Political instability with Trump Administration. 8. CONCLUSIONS.

1. CONTEXT.

Back in the summer of 2022, terrifying (for many) news hit the headlines across Europe. "Europe faces Facebook blackout".[1] That was the last chapter

1 https://www.politico.eu/article/europe-faces-facebook-blackout-instagram-meta-data-protection/

in a series of legal and political battles between the American multinational Meta (Facebook and Instagram's parent company) and the Irish data protection authorities about the possibility of transferring personal data of EU Meta users to the United States, following a complaint by Max Schrems, an Austrian lawyer and activist for the protection of personal data.

This dispute arose in connection with the case *Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems*[2] *(Schrems II*), decided on 16 July 2020. It stemmed from a request for a preliminary ruling by the High Court of Ireland, which sought clarification on how the General Data Protection Regulation (GDPR) and the Charter of Fundamental Rights of the European Union applied to the matter. The controversy focused on certain US surveillance programs that, under American law, permitted authorities to access the personal data of individuals outside the EU. These practices were found to conflict with the fundamental privacy rights and legal safeguards guaranteed to EU citizens, as will be analysed in the following pages.

With this most expected[3] judgement, the ECJ declared the so-called "Privacy Shield Program" invalid.[4] This instrument, administered by the US Department of Commerce's International Trade Administration (designed in cooperation with the European Commission and the Swiss Administration),[5] was supposed to create a common framework for the US, EU and Switzerland regarding personal data protection standards, with the aim of enhancing commerce between these territories and providing certainty to the users or customers of the companies affected by the programme and registered to participate in it.[6] Indeed, the programme is based on the willingness of companies to self-certify according to its principles.

From the European consumer protection perspective, the creation of the "Privacy Shield" was supposed to guarantee compliance with EU standards on both sides of the Atlantic. Its adequacy with EU law requirements was confirmed by the European Commission with an Adequacy decision[7] ("Privacy Shield

2 Judgment of the Court (Grand Chamber) of 16 July 2020. Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems. Case C-311/18. ECLI:EU:C:2020:559

3 COSTELLO, Róisin Á, "Schrems II: Everything Is Illuminated?", *European Papers*, vol. 5, 2020, no. 2, pp. 1045-1059, p. 1046.

4 https://www.privacyshield.gov/welcome

5 On 8 September 2020 the Swiss Federal Data Protection and Information Commissioner (FDPIC) of Switzerland issued an opinion that replicated the Irish Commissioners´ criteria, considering CH-US Privacy Shield does not provide adequate level of data protection. https://www.news.admin.ch/en/nsb?id=80318

6 The official website of the program publishes the list of companies, see: https://www.privacyshield.gov/list

7 Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection

Decision") of 12 July 2016, which was invalidated by an ECJ judgement for contravening, paradoxically, the privacy principles established by the European legislator in the GDPR.

Some months after the judgement, on 8 September 2020 the Swiss Federal Data Protection and Information Commissioner (FDPIC) issued an opinion that replicated the Irish Commissioners' and the ECJ's criteria, considering that the Privacy Shield did "not provide an adequate level of protection for data transfer from Switzerland to the US pursuant to the Federal Act on Data Protection (FADP)".[8]

Furthermore, the activities of the companies involved were affected by Standard Contractual Clauses (SCC),[9] an interesting tool created by the EU legislator to make sure that contracting parties abide by the provisions of the GDPR. The problem was that these clauses only affect the relationship between data controllers and processors, and they do not have to be considered by third country authorities. In other words, even though Meta abides by the GPDR, by transferring the data to the US the authorities there (in the absence of a harmonized international legal framework) can take actions that contravene the European Regulation and consequently the rights of EU consumers.

The main problem derived from the legal power of the US authorities to obtain access to non-US citizens' personal data, which clashed with the European notion of privacy established by the GDPR and the Charter of Fundamental Rights of the European Union. Even so, some years ago, European data privacy legislation – the first Directive,[10] the predecessor of the current regulation – was perceived as the way forward for some US scholars,[11] who hoped that it would lead to better privacy standards in that country, something that has still not happened.

As we will see, the scenario created after the last ECJ decision was not new, but a remake of the controversy surrounding this very same matter of personal

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provided by the EU-US Privacy Shield (notified under document C(2016) 4176) (Text with EEA relevance):

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.207.01.0001.01.ENG

8 See: https://www.edoeb.admin.ch/edoeb/en/home/latest-news/media/medienmitteilungen.msg-id-80318.html

9 Created after Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council, OJ L 39, 12.2.2010, p. 5-18. Last reformulation 4 June 2021: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en

10 Directive 95/46, cited.

11 SCHAFFER, Gregory, "Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of US Data Privacy Standards", *Yale Journal of International Law*, vol. 25, Winter 2000. Available at: https://ssrn.com/abstract=531682

data under the "International Safe Harbour Privacy Principles" created in the late 1990s between the same parties, also supported by the European Commission in its Decision of 26 July 2000[12] but later annulled by the European Court of Justice in the landmark "*Schrems I*" judgement.

In the following pages we will examine the arguments of the Court to annul "The Privacy Shield" and the long-term stability perspectives of the Data Privacy Framework currently in force, considering that it is also being challenged before the ECJ (in May 2025). Additionally, the ongoing geo-political context – with President Trump's second term in office – leaves little room for optimism.[13]

2. PERSONAL DATA AS THE GREAT XXI CENTURY ASSET.[14]

The threat posed by Facebook in summer of 2022 – which turned out to be nothing but a gigantic bluff – and the legal and political turmoil it caused brings to light an issue of endlessly increasing economical relevance. Indeed, the revenues generated by the millions of European users were close to 30 billion[15] when the controversy was in its peak (in 2021), as we can see in the following figure:

YEAR	US & Canada	Europe	Asia–Pacific	Rest of the World
2015	7.2	3.4	2.3	1.5
2016	12.9	6.2	4	2.4
2017	19.4	9.7	6.7	4
2018	26.4	13.5	9.5	5.4
2019	33.4	16.7	12.5	6.8
2020	40.5	20.4	15.4	7.6
2021	51.5	29	26.7	10.5

Figure 1 – Revenue in billion dollars – Source: company data.

12 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce.

https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000D0520#:~:text=2000%2F520%2FEC%3A%20Commission,notified%20under%20document%20number%20C

13 https://cms-lawnow.com/en/ealerts/2025/01/is-the-eu-u.s.-data-privacy-framework-in-danger

14 JAUD, Philipp, *Personal Data as an Economic Asset: Compatibility with the EU Charter of Fundamental Rights*, Mohr Siebeck Tübingen, Germany, 2024.

15 In 2024 the amount rose to 38 billion, according to https://stockdividendscreener.com/information-technology/meta-revenue-breakdown-by-region-and-user-geography/

Anyway, Meta Platforms Inc. initiated a genuine political (lobbying) fight to modify the current data transfer regulatory framework in the EU, due to the undoubted relevance of personal data of the users for the revenue figures of these companies.

So, first of all it is important to highlight how these enterprises generate revenue in order to understand the controversy. Meta, whose flagships are Facebook and Instagram (and WhatsApp, which is not a real social media app), mostly make money straight out of publicity. Nevertheless, how companies advertise in social media is a complex matter in which personalised advertising ("behavioural targeting")[16] is considered one of the most effective to engage potential consumers. So, what is the key for this personalised advertising system to work? Naturally, it is essential for companies like Facebook or Instagram – but also any other – to be able to use the enormous amount of data we "freely" share with them as they please.

"Freely" is, of course, a general perception far removed from how the actual system works. Users think that they have access to the services provided by these companies for free, but the average consumer-social media user is probably not aware of how much their personal data is worth, making every one of us an asset for the companies, i.e. "the price we pay".[17] By sharing our personal information, advertisers hope to make more money, so, depending on the user's profile and how much information he or she is willing to share online, "regular citizens" represent a substantial source of income.

Indeed, "Facebook and Google do not *sell* anything to Internet users, they sell billions of users to advertisers": that is the explanation for the direct correlation between number of users and revenue of the companies.[18]

3. THE ECJ JUDGEMENT OF 16 JULY 2020 – "*SCHREMS II*".

3.1. Precedents and factual framework.

Max Schrems, an Austrian citizen and Facebook user, signed a contract with Meta Platforms Ireland Ltd., European branch of Meta Platforms Inc (US).

16 ROESSLER, Beate and MOKROSINSKA, Dorota, "Social Dimensions of Privacy: Interdisciplinary Perspectives", *Cambridge University Press*, 26 June 2015, p. 141.

17 EHRENBERG, Billy, "How much is your personal data worth?", *The Guardian*, April 22 2014: https://www.theguardian.com/news/datablog/2014/apr/22/how-much-is-personal-data-worth

18 BECERRIL, Anahiby Anyel, "The value of our personal data in the Big Data and the Internet of all Things Era", *ADCAIJ: Advances in Distributed Computing and Artificial Intelligence Journal*, Regular Issue, vol. 7 no. 2, 2018, pp. 71-80, p. 72.

This company transfers personal data of their many users to the latter in the US, where they process them.

Mr. Schrems, concerned by the use of this data by US authorities, formulated a complaint to the Data Protection Commissioner (DPC or Commissioner)[19] seeking the prohibition for Facebook of this transatlantic data transfer, as he considered that "the law and practice in force in that country did not ensure adequate protection of the personal data held in its territory against the surveillance activities in which the public authorities were engaged".[20] Concerns from Mr. Schrems arose after the well-known revelations of Mr. Edward Snowden on how the global surveillance programs of the NSA (National Security Agency of the US) could access these data with legal authorisation.

The DPC rejected the complaint, considering that the EU authorities granted an adequate protection level in Decision 2000/520 (*Safe Harbour Principles*). Mr. Schrems initiated judicial proceedings before The High Court of Ireland, which requested a preliminary ruling from the ECJ. As we previously indicated, the Decision was considered invalid by the Court in its Judgement of 6 October 2015 (*Schrems I*)[21] and consequently the rejection of Mr. Schrems' complaint was also annulled. With this first judgement, the figure of the ECJ was strengthened, by establishing that certain red lines cannot be crossed even by the European Commission's legislative acts.[22]

After that, the Commissioner asked Mr. Schrems to reformulate his complaint, in which the claimant insisted on the prohibition of data transfer to the US, referring to the monitoring programmes followed by US authorities (NSA and FBI) and the incompatibility of those with the Charter of Fundamental Rights of the European Union,[23] specifically articles 7, 8 and 47. Those articles guarantee "respect for private and family life" (art. 7), "protection of personal data" (art. 8) and "the right to an effective remedy and to a fair trial" for citizens of contracting states under the Charter.

In this second procedure a deeper investigation was conducted by the Commissioner and the conclusions aligned with Mr. Schrems' arguments, confirming the incompatibility of the US authorities' legal power to intervene EU

19 Currently (May 2025) Dr. Des Hogan: see: https://www.dataprotection.ie/

20 *Schrems II* judgement, paragraph 52.

21 Judgement of the European Court of Justice of 6 October 2015, C-362/14, "*Schrems I*". For a deeper analysis see: DE MIGUEL ASENSIO, Pedro Alberto, "Aspectos internacionales de la protección de datos, las sentencias Schrems y Weltimmo del Tribunal de Justicia", *La Ley Unión Europea*, no. 31, 2015; URÍA GAVILÁN, Elisa, "Derechos fundamentales versus vigilancia masiva", *Revista de Derecho Comunitario Europeo,* 53, 2016, pp. 261-282.

22 URIA GAVILÁN, Elisa, cited, p. 282.

23 Charter Of Fundamental Rights of The European Union, 2012/C 326/02.

citizens' personal data with the rights introduced by the Charter.[24] Additionally, the legal framework provided by the SCCs, and that only affect the contractual parties, did not bind the US authorities, therefore not giving an effective solution to the issue.

Specifically, the US authorities' power to intervene personal data, as stated by the European Court,[25] is foreseen in US legislation in section 702 of the FISA (Foreign Intelligence Surveillance Act of 1978) Amendments Acts 2008 and the Executive Order 12333.[26]

a) The FISA Act.

The Foreign Intelligence Surveillance Act (FISA) of 1978 was enacted to regulate US government surveillance activities intended to obtain foreign intelligence information. Due to technological changes and the growth of internet-based communications, the FISA Amendments Act of 2008 introduced Section 702, which expanded the US government's authority to collect data from non-US persons outside US borders.

Specifically, this section[27] allows the Attorney General and Director of National Intelligence to jointly authorize (for up to one year) the "targeting of non-US persons reasonably believed to be located outside the United States" for the purpose of acquiring foreign intelligence information, without a requirement for individualized warrants or probable cause findings if they are outside US territory.[28] The actual collection of data is executed by all US digital services service providers (such as Meta, but also many others, e.g. Google or Apple) which are compelled under law to assist.

The last reauthorizations of the act were passed with the National Defence Authorization Act in 2023,[29] which extended its application until April 2024, plus a two-year extension granted by the Congress during President Biden's term of office on that date. So, as of May 2025 the act is still in force until at least April 2026, as it is considered "indispensable to the Justice Department's work

24 See: https://www.dni.gov/files/icotr/Section702-Basics-Infographic.pdf, and https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1286

25 Schrems II judgement, paragraph 60.

26 Executive Order 12333 - "United States intelligence activities". Source: The provisions of Executive Order 12333 of Dec. 4, 1981, appear at 46 FR 59941, 3 CFR, 1981 Comp., p. 200. See: https://www.archives.gov/federal-register/codification/executive-order/12333.html

27 50 USC. § 1881a

28 This section refers only to foreign individuals as expressly prohibits targeting any US citizen or wholly domestic communications and, also "reverse targeting", which means targeting a foreign person to acquire information about a US citizen.

29 H.R.2670 - National Defence Authorization Act for Fiscal Year 2024 - 118th Congress (2023-2024). https://www.congress.gov/bill/118th-congress/house-bill/2670/text

to protect the American people from terrorist, nation-state, cyber, and other threats".[30]

b) Executive Order 12333

Executive Order 12333 'United States Intelligence Activities' was signed by President Ronald Reagan on 4 December 1981. It contributed to expanding foreign intelligence but also limited surveillance powers within the US. It was reformed in 2008 by President Bush[31] and, some years later. by the Obama Administration, although this was not a real legal reform. It set out to focus on the concerns about the rights of non-US citizens affected by surveillance programs with his Presidential Policy Directive (PPD 28),[32] but Obama's ambitious reform program did not fulfil the expectations, apparently.[33]

Specifically, the original Order provides guidelines for the organization and duties of US intelligence agencies, the collection, retention, and dissemination of information and the balancing of national security needs with privacy and civil liberties. The text strengthens the role of the Director of National Intelligence as the main coordinator of foreign intelligence actions. Regarding the collection of information, it authorizes agencies to collect foreign intelligence and counterintelligence outside the US, imposing restrictions on collecting information about US persons at the same time. Additionally, it prohibits assassination and covert support for assassination and establishes some internal oversight mechanisms.

c) The Fourth Amendment of the US Constitution and non-US-citizens

The Fourth Amendment to the US Constitution explicitly refers to the rights of the people against "unreasonable searches and seizures:"

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

30 Statement from Attorney General Merrick B. Garland on the Senate's vote on the reauthorization and reform of the Foreign Intelligence Surveillance Act Section 702: https://www.justice.gov/archives/opa/pr/attorney-general-merrick-b-garland-statement-senates-vote-reauthorization-and-reform-foreign#:~:text=%E2%80%9CThis%20reauthorization%20of%20Section%20702,ensure%20the%20protection%20of%20Americans'

31 Office of The Director of National Intelligence Civil Liberties and Privacy Office: "Civil liberties and privacy information paper: description of civil liberties and privacy protections incorporated in the 2008 revision of executive order 12333": available at https://www.dni.gov/files/documents/CLPO/CLPO_Information_Paper_on_2008_Revision_to_EO_12333.pdf

32 https://www.dhs.gov/publication/presidential-policy-directive-28-ppd-28-signals-intelligence-activities

33 https://www.brennancenter.org/our-work/research-reports/obamas-surveillance-reform-promises-one-year-later?

However, in *United States v Verdugo-Urquidez*[34] *the Supreme Court held that the term "people" in the text does not apply to non-US residents and, consequently, does not apply to aliens without a substantial connection to the US. However, this is not an absolute denial of the rights of citizens outside the country, since, in Boumendiene v Bush*, a case related to the *habeas corpus* rights of detainees at Guantanamo prison,[35] the Court (in a 5-4 decision) considered that constitutional protection applies to citizens held outside the US if the US exercises "*de facto* sovereignty or effective control" over the location, which is not the case in the data issue we are dealing with in this article.

In this context, the Irish High Court formulated a series of questions to the ECJ[36] to determine if the privacy rights of EU citizens are jeopardized by the transfer of data of a private company to the US.

3.2. Arguments of the European Court in *Schrems II* and legal framework applicable to the case.

3.2.1. Applicability of the General Data Protection Regulation (GDPR).

The first important legal issue is the potential applicability of the European GDPR to cases such as the one we are analysing. Specifically, articles 2.1 and 2.2 of the Regulation describe the situations in which the text shall not apply. According to article 2.1, the Regulation applies to "the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system." Excluded matters, according to article 2.2., consist of the processing of personal data:

a. in the course of an activity which falls outside the scope of Union law;

b. by the member states when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;

c. by a natural person in the course of a purely personal or household activity;

d. by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of

34 *United States v Vedugo-Urquidez*, 494, US 259 (1990). https://supreme.justia.com/cases/federal/us/494/259/

35 *Boumediene v. Bush* 553 US 723 (2008). https://supreme.justia.com/cases/federal/us/553/723/

36 See *Schrems II* judgement, paragraph 68.

criminal penalties, including the safeguarding against, and the prevention of, threats to public security.

Moreover, article 4.2. defines "processing" in a way that coincides, according to the European Court,[37] with transferring data from a member state to a non-member state the way Facebook and other companies do it. Indeed, the definition of processing is the following: "operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;". The operations of Meta and Facebook in Ireland do not come under the exclusion clauses of article 2, so the Court states the applicability of the European Regulation to the case.[38]

The second, and essential question, refers to the level of protection required by the GDPR for data transfers like the one discussed, based on articles 45, 46.1 and 46.2.

Indeed, the text of article 45, referring to data transfers to third countries, establishes that these may only take place "where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection". Moreover, this article should be read in combination with article 44, which confirms that "the level of protection of natural persons guaranteed by this Regulation" in international transfers cannot be undermined. In other words, European standards regarding the processing of personal data of EU citizens must always prevail, even when these data are not processed on European soil. With this provision, the European legislator provides the EU with a strong legislative instrument to assure privacy for its citizens.

To ensure that these standards are met, the Commission has the sole power to authorise a data transfer when it considers that the third country in question provides "a level of protection essentially equivalent to that which is guaranteed within the European Union",[39] a system that, as we will see, has received some criticism.

At this point, the Charter makes an appearance, given that its applicability has also been called into question before the ECJ, with the Court confirming[40] the applicability of the rights guaranteed by the Charter as a basic principle applicable to situations like these.

37 *Ibid*., paragraph 83.
38 *Ibid*., paragraph 89.
39 *Ibid*., paragraph 96.
40 *Ibid*., paragraph 101.

In conclusion, the ECJ considers that the cited European provisions regarding personal data processing, which should be "read in the light of the Charter",[41] can be applied in third countries by the referring court of the case.

3.2.2. Powers of the Data Protection Commissioner and the validity of "Privacy Shield Decision" and the "SCCs".

In this context, the fundamental issue that must be resolved by the ECJ refers to the national supervisory authority that hears the complains and must carry out the investigation to determine whether the third country that receives the data can ensure the same level of protection as European law, meaning that the provisions of the GDPR and the Charter are not violated in the indicated terms.

Competence to do so is conferred to the Commissioner, in our case, through article 58 GDPR, which not only introduces investigative powers but also corrective (58.2) and authorisation-advisory powers (58.3). Among the corrective powers, the Regulation contemplates the possibility "to order the controller or the processor to comply with the data subject's requests to exercise his or her rights pursuant to this Regulation" or to "order the suspension of data flows to a recipient in a third country or to an international organisation", that clearly could be applicable in this case. However, the Commissioner must take into account the existence of some binding European legal instruments, the SCCs, and the presumption of validity created by the Privacy Shield decision.

3.2.3. Validity of SCC Clauses.

Thus, the supervisory authority in our case, the Irish Data Protection Commissioner, should[42] "suspend or prohibit" the transfer of personal data to third countries if it thinks that "the standard data protection clauses are not or cannot be complied with in that third country."

This is another important aspect to be considered, as the court makes clear that SCCs and an SCC Decision,[43] are valid but do not determine the validity of the data transfer, since they only affect the contracting parties that are not responsible for the potential privacy violations of the local authorities of the countries they operate in (the US in this case).

Indeed, the use of the SCC by the parties does not generate *per se* the presumption that the rights protected by European provisions are indeed considered in the third country. We should bear in mind that the SCC Decision

41 *Ibid*., paragraph 105.

42 Opinion of the Advocate-General in the *Schrems II* case, paragraph 148, confirmed by the ECJ in paragraph 113 of the *Schrems II* judgement.

43 See above.

(like the Privacy Shield Decision we will analyse shortly), as we have stated, is binding for all European member states, but in any case is binding for the US authorities.

When the "controller" (Meta Platforms Ireland), established in a member state and the recipient (Meta Platforms Inc.) incorporate the SCCs into their contract, both companies are supposed to comply with the clause and, consequently, with the GDPR. It operates as a useful *lex mercatoria* or *soft law* instrument to ensure a first level of adequacy with EU law, but it may not be enough,[44] since US authorities have no obligation under the SCCs.

Unlike the situation with the Privacy Shield Decision (which we will analyse in the following paragraphs), in which the Commission has adopted the text as a sort of bilateral treaty referring specifically to the US, the SCC Decision and, therefore, the clauses included in the annex of that text, are a general text in which there has not been an exhaustive examination of the adequacy of the specific legislation of a third country, i.e. the potential recipient of the personal data in question.

Therefore, the Court basically considers these clauses "effective mechanisms"[45] to ensure the suspension of data transfers to recipients that do not comply with the obligation established by the clauses. However, since in this case issues derive from the illegitimate (in the light of European legislation) use of Europeans' personal data, the validity of the SCC decision or the clauses included in the text is not to be questioned.

3.2.4. Validity of the Privacy Shield Decision.

The context is significantly different when we refer to the Adequacy Decision adopted by the Commission. Indeed, one of the strong arguments of Facebook Ireland[46] was that the Adequacy Decision, as it was binding for the Commissioner, confirms the adequacy of the data transfer to the US from the European Union. Indeed, article 1.1 of the Decision states that "the United States ensures an adequate level of protection for personal data transferred from the [European] Union to organisations in the United States under the EU-US Privacy Shield'".

We must bear in mind, as we have stated, that the mere possibility of exporting personal data, as a principle, is not permitted by the GDPR unless the Commission authorises it.[47] This 'adequacy decision' system has been criticized

44 As the Court states in *Schrems II* judgement, paragraph 126.
45 *Ibid*. paragraph 148.
46 *Ibid*. paragraph 152.
47 Art. 44 GDPR.

by some scholars,[48] considering it more of a geo-political strategy rather than an actual safeguard of the rights of Europeans. Furthermore, some authors argue that it could even go against the international trade laws established by the WTO.[49]

This was, in any case, a rather understandable strategy by the American-based company, and there is no denying that the fact that the Commission elaborates a joint text with a foreign nation referring to the data transfer between the EU and that nation generates a high degree of certainty about the adequacy of that transfer and the respect for the rights of both parties. The big question, therefore, was whether this Adequacy Decision should prevail over the Irish Commissioner's investigation and conclusions, mainly if the conclusions go against the supposed adequacy established by the Decision.

To solve this issue, the Court first resorted to article 288 TFEU,[50] which determines the legal nature of the "Decision", considering it "binding in its entirety" in all member states, so it must, in principle, be respected by all internal authorities, including supervisory authorities such as the one addressed in this case. In other words, to prohibit the data flow as is claimed to the Irish Commissioner, the Commission's Decision must be declared invalid by the ECJ.

Nevertheless, "a Commission adequacy decision adopted pursuant to Article 45(3) of the GDPR cannot prevent persons whose personal data has been or could be transferred to a third country from lodging a complaint",[51] in which case the supervisory authority with all its supervisory powers intact could carry out the investigation and initiate the corresponding legal action before the competent national court that should bring the question to the ECJ, as in the present case, or "*Schrems I*" before it. Thus, the national supervisory authorities still hold great power, even if they cannot enable prohibitions *motu proprio*.

3.3. Did US domestic law provide an equivalent level of protection?

The ECJ resorts to the investigation of the Commissioner and the referring Irish court to question the level of protection provided by US law to personal data transferred from the EU.

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48 KUNER, Christofer, "Developing an Adequate Legal Framework for International Data Transfers", in GUTWIRTH, Serge (ed.), *Reinventing Data Protection?*, Springer, 2009, pp. 271 and next; DHONT, Jan Xavier, "Schrems II. The EU adequacy regime in existential crisis?", *Maastricht Journal of European and Comparative Law* 2019, vol. 26(5), pp. 597-601.

49 Specifically, the General Agreement on Trade in Services (or GATS), see: C.L. Reyes, "WTO-Compliant Protection of Fundamental Rights: Lessons from the EU Privacy Directive", *Melbourne Journal of International Law*, 2011, p. 20.

50 Consolidated versions of the Treaty on the Functioning of the European Union. Official Journal 326,26/10/2012, p.0001-0390.

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

51 *Schrems II* judgement, paragraph 119.

Specifically, the Irish court held that "the law of that third country does not provide for the necessary limitations and safeguards with regard to the interferences authorised by its national legislation and does not ensure effective judicial protection against such interferences", referring to the legally contemplated intromissions explained in this article. Furthermore, some concerns were pointed out by Article 29 of the Data Protection Working Party (WP29) in its opinion of 13 April 2016.[52]

Article 7 and 8 of the ECHR guarantee respect for private and family life and the protection of personal data. The legal capacities of some public authorities of the US to gain access to personal data (Section 702 of the FISA and in E.O. 12333) "constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter[53].

Additionally, the judicial protection introduced by article 47 of the ECHR[54] was not considered to be guaranteed by the Privacy Shield, since the judicial protection for the matters covered by the decision was personalized in the figure of the "Privacy Shield Ombudsperson", a new figure introduced after the failure of the Safe Harbour that has been criticised by the academic world considering it no more than a "fig leaf"[55] – it was also questioned by the aforementioned WP29[56] – that cannot provide a sufficient response to Europeans whose data are transferred to the US.

Moreover, Recital 115 of the Privacy Shield Decision states that the available causes of action for non-US persons before US courts are very limited, with the consequent inadmissibility of many claims based on the regulatory framework of the surveillance programs, "which restricts access to ordinary courts" and, therefore, the right to an effective remedy guaranteed by the Charter.

Additionally, section 702 of the FISA, for instance, included no limitations for surveillance programs on non-US nationals and constitutes an "interference

52 Article 29 data protection working party: Opinion 01/2016 on the EU - US Privacy Shield draft adequacy decision, adopted on 13 April 2016: https://ec.europa.eu/newsroom/article29/items/640157/en

53 *Ibid*. paragraph 171.

54 Article 47.

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

55 COSTELLO, Róisin Á, cited., p. 1059.

56 Opinion of Article 29 Working Party, cited, p. 46.

with fundamental rights"[57] that does not provide a level of protection equivalent to that guaranteed by the ECHR. Neither this nor Executive Order 12333 "correlate to the minimum safeguards resulting, under EU law, from the principle of proportionality, with the consequence that the surveillance programmes based on those provisions cannot be regarded as limited to what is strictly necessary".[58]

In a dense and complex argumentation, the Court dissected the controversial US surveillance programs and concluded that they do not match the "adequate level of protection" stated by article 1 of the Privacy Shield Decision, since they did not comply with articles 7,8 and 47 of the ECHR and article 45 of the GDPR. The Court also considered article 1 "inseparable",[59] and it extended the invalidity to the whole text of the Decision.

3.4. *Schrems II* judgement – conclusions of the European Court of Justice

In its conclusions the Court, applying the argumentation cited above, stated the following fundamental ideas:

- The General Data Protection Regulation is indeed applicable to the case of a data transfer from a European company to a company based in a third state.
- The processing of the data transferred from the EU must be granted a level of protection equivalent to that provided by EU law.
- The Adequacy Decision elaborated by the European Commission and US authorities is a binding legal instrument for all member states and their institutions, so in its presence the national supervisory authority will suspend its proceedings, resorting to the competent courts if it thinks that, despite the adequacy decision, there is not a sufficient level of protection in the processing country to which the data is transferred. In this regard, the Court considers the "Privacy Shield Decision" invalid, considering that surveillance programmes in place in the US contravene EU Law. Besides, there is a high risk of lack of legal protection, as those same US provisions do not always provide access to the Courts for non-US citizens.

57 Opinion of the Advocate General in *Schrems II*, paragraphs 291, 292 and 297.
58 *Schrems II* judgement, paragraphs 184 and 185.
59 *Ibid*. paragraph 200.

4. NEXT STEPS IN THE CASE.

Following the invalidation of the EU-US "Privacy Shield", the battle was not over yet, as the final decision of the Irish commissioner was still to be determined in the light of the judgement that gave her *carte blanche* to insist on the data transfer prohibition. In this regard, the Commissioner sent the draft decision to the EU data protection authorities, confirming the suspension of data transfers from Meta Platforms Ireland to Meta Platforms Inc. in the US

Another phase of the battle begun with this draft decision. It is worth mentioning that, according to article 60 of the GDPR, the Irish authority submitted "a draft decision to the other supervisory authorities concerned for their opinion"; not only that, they must "take due account of their views". The same provision (art. 60.4) provided a period of four weeks in which any of the other supervisory authorities could express "a relevant and reasoned objection" to the decision.

If this objection would have been submitted, the Irish supervisory authority would have two options; accept and follow the objection or, if it "is of the opinion that the objection is not relevant or reasoned", should submit the issue to the so-called "consistency mechanism" introduced by article 63. This is a mechanism that was created to ensure the consistent application of the Regulation throughout the member states –apart from the aforementioned – in situations, *inter alia*, where the measure taken by one national authority has effects beyond the borders of that issuing member state.

In the first scenario, the reformulated draft opinion would have to be sent to the other states' authorities (art. 60.5); they will then have two weeks to review and accept or make any additional objection to the decision. If there is a controversy between different states' authorities, the consistency mechanism will also be activated.

In this regard, article 64 introduces the figure of the "Board"[60]. This board, in which the Commission has a say, must (of a mandatory nature) issue an opinion regarding some specific matters.[61] The Chair of the Board, the Commission or any other national supervisory authority could also request the examination of the case by the Board in cases that affect more than one member state, as we have stated.

Additionally, the Board has broad dispute resolution powers (art. 65) and will adopt binding decisions referring to cases in which another supervisory authority has raised an objection to a draft decision and the leading supervisory

60 https://edpb.europa.eu/about-edpb/about-edpb/who-we-are_en
61 See article 64.1 GDPR.

authority "has not followed the objection or has rejected such an objection as being not relevant or reasoned". Furthermore, the dispute resolution mechanism would act when there are "conflicting views on which of the supervisory authorities concerned is competent for the main establishment" and when the supervisory authority does not request the opinion of the Board in the aforementioned cases of article 64.1, or "does not follow the opinion of the Board issued under Article 64".

Anyway, considering the importance of the issue discussed in the case, both parties involved in the controversy – the US and, mainly, the European Commission – worked on a quick response to end the legal uncertainty created by the resolution of the ECJ and the subsequent data transfer suspension. The new 'refurbished' deal was announced soon after the setback for the Privacy Shield.

5. THE DATA PRIVACY FRAMEWORK.

Following two attempts at creating an effective bilateral framework for data transfers, both of which stumbled on the European Court of Justice, the European Commission published a press release on 25 March 2022 with the following heading: "European Commission and United States Joint statement on Trans-Atlantic Data Privacy Framework"[62] – that hit some headlines[63] – and described a principle of agreement that set out to "address the concerns raised by the Court of Justice of the European Union in the *Schrems II* decision of July 2020".

The focus was placed on the American side, considering that the arguments of the Irish Commissioner pointed at the legislation authorizing surveillance programs on non-US citizens as the main concern regarding the transfer of data to the US.

On that regard, the new framework was supposed to be an "unprecedented commitment on the US side to implement reforms that will strengthen the privacy and civil liberties protections applicable to US signals intelligence activities". In this final part of the study, we will try to analyse to what extent this last attempt has been successful at reversing the problems pointed out by the ECJ in the judgements.[64]

62 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2087

63 *Inter alia*: https://www.politico.eu/article/eu-us-strike-preliminary-deal-to-unlock-transatlantic-data-flows/

64 Regarding the issue*, inter alia*: KUNER, Cristopher, "Protecting EU data outside EU borders under the GDPR' (2023), 60, *Common Market Law Review*, Issue 1, pp. 77-106, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/60.1/COLA2023004

Adopted on 10 July 2023, the Adequacy Decision of the European Comision created the new Data Privacy Framework (or DPF)[65] that led to some key reforms on the American side of the agreement, intended to fit with the standards set by the European Court and the concerns of the European data protection authorities. The main instrument to cope with this challenge was Executive Order 14086, according to which the US Government committed to ensure that access to personal data by public authorities for national security purposes is subject to principles of necessity and proportionality. The Order also establishes oversight mechanisms, including the Civil Liberties Protection Officer and the Data Protection Review Court (DPRC). Besides, the Data Privacy Framework Program created a self-certification system for US companies.

5.1. Principles for US companies and self-certification.

Starting with the latter, the DPF establishes some privacy principles – or "key requirements" – [66] that US organizations must adhere to when processing personal data transferred from the EU (plus Sweden and the UK). This system, existing under the previous but now invalidated Privacy Shield, works as a voluntary programme under US law, but when companies self-certify their commitments become binding for them and are enforceable under the Federal Trade Commission Act.[67] There is a list of obligations that companies must fulfil, and must be published and accessible online, based on the following:

a) Informing individuals about data processing and the provisions and rights under the DPF.

b) Providing free and accessible dispute resolution. A general obligation is set for the companies in this regard, stating that individuals must have access to bringing a claim directly to the self-certified companies, which must respond in less than 45 days. Furthermore, the US Department of Commerce's International Trade Administration (ITA) should respond to any claims presented before European (or Swiss) data protection authorities within 90 days.

c) Cooperating with the US Department of Commerce, as a general principle.

d) Maintaining data integrity and purpose limitation.

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65 Commission Implementing Decision EU 2023/1795 of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework.

66 https://www.dataprivacyframework.gov/key-requirements

67 Section 5 of the Federal Trade Commission Act related to "Unfair or Deceptive Acts or Practices": 15 USC.

e) Ensuring accountability for data transferred to third parties. In the event of the certified companies transferring data to third parties, they have a surveillance obligation to make sure that those third parties also comply with the privacy provisions of the DPF and only transfer data for limited and specific purposes. Companies must also "take steps to stop and remediate unauthorized processing". This is the US equivalent to the principles of the GDPR that limits the transmission of data to non-EU states.

f) Transparency related to enforcement actions. All legal actions(court orders) related to non-compliance with the obligations of the companies must be public.

g) Ensuring commitments are kept as long as data is held.

This program, which sets various obligations for companies and aims to close the gap between US and EU legal standards, has gathered significant practical relevance. According to the official data provided by the programme, Meta Platforms Inc.,[68] the key party in the controversial case discussed in this paper, is an active participant in the program regarding data trade with EU and Switzerland, as well as others such as Google or Apple. All of them display the abovementioned requirements on the website of the FTC.

5.2. Redress mechanisms – The Data Protection Review Court.

This is, undoubtedly, one of the most important issues. To address concerns about effective remedies for EU individuals and to comply with the requirements of article 45.2.a of the GDPR, the DPF introduces a multi-layered redress mechanism that includes a (supposedly) independent court, the Data Protection Review Court (or DPRC),[69] established in the US under Executive Order 14086.[70] This EO[71] of October 2022, enacted by President Biden, recovered Obama's efforts in PPD28 and directed the Attorney General[72] to establish the court.

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68 https://www.dataprivacyframework.gov/list

69 https://www.justice.gov/opcl/redress-data-protection-review-court

70 Executive Order (E.O.)14086 of October 7, 2022, on Enhancing Safeguards for United States Signals Intelligence Activities.

71 For a detailed explanation: https://www.state.gov/executive-order-14086-policy-and-procedures/; Executive Office of the President. (2022). *Executive Order 14086: Enhancing Safeguards for United States Signals Intelligence Activities*. https://www.federalregister.gov/documents/2022/10/14/2022-22531/enhancing-safeguards-for-united-states-signals-intelligence-activities

72 Section 3.d

The Attorney General did so, establishing the DPRC as an independent court within the Department of Justice,[73] which is not actually part of the Judicial branch established by article III of the US constitution. Its members – qualified legal professionals and not employees of the intelligence agencies – are appointed by the Attorney General in consultation with the Privacy and Civil Liberties Oversight Board, the Secretary of Commerce and the Director of National Intelligence, and serve fixed terms.

Regarding the scope of application, the DPRC is potentially empowered to hear complaints from non-US users whose personal data may have been subject to US intelligence collection. Nevertheless, a country or "regional economic integration organization" must be designated by the Attorney General as a "qualifying state" for its citizens to have standing before the Court.[74] The EU – plus the remaining states that conform the European Economic Area – were designated according to this mechanism on 30 June 2023. After that first decision, the UK (in September 2023) and Switzerland (June 2024) were also included as qualifying states.

The process before the court is a two-tier process in which the Civil Liberties Protection Officer (CLPO) conducts an initial investigation and issues findings. The second phase would involve, if the complainant is not satisfied, the DPRC, which conducts an independent review. Therefore, the Court has the authority to review the CLPO's decision and examine evidence – which may be classified – to determine if US law has been violated or personal data has not been handled properly. The court can also order the deletion of unlawfully obtained data or the cessation of processing.

However, the DPRC is not a 'traditional' federal court as established by art. III of the US Constitution. Considering the sensitive information handled in the cases, the proceedings are conducted without the presence of the complainant. Besides, its decisions are final and not subject to appeal by either the complainant or the intelligence agency involved. So, it is no surprise that some controversy[75] has arisen regarding the lack of transparency of the Court and the denial of the fundamental right to a due process established by the Constitution for US citizens, as we have stated before.

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73 87 Fed. Reg. 62304 (Oct. 7, 2022), https://www.govinfo.gov/content/pkg/FR-2022-10-14/pdf/2022-22234.pdf

74 The general requirements can be checked here: https://www.justice.gov/opcl/dprc-resources

75 NOYB (2023). Schrems criticises EU-US Data Privacy Framework. https://noyb.eu/en/european-commission-gives-eu-us-data-transfers-third-round-cjeu; Kuner, C. (2023)., "The EU-US Data Privacy Framework: A First Legal Assessment", *European Journal of Risk Regulation*, 14(1), pp. 1-10.

6. STATUS QUO OF THE DPF – THE EUROPEAN COMMISSION[76] AND EDPB[77] REPORTS

Almost two years have gone by since the implementation of the DPF, so it is time to start gathering some conclusions on the impact of the implementation for EU citizens, who are the vulnerable party in this case.

The European Data Protection Board published its last report in November 2024, addressing most of the issues discussed in this paper and its practical view under the implementation of the transatlantic agreement, in the light of the European Commission report reviewing the agreement.

The document published by the European Commission – in charge of negotiating the agreement – focuses on the positive aspects of the implementation of the DPF. In the second, the EDPB evaluates the conclusions of the EC with a more critical approach. The main areas of interest of both texts are the self-certification process/program, compliance monitoring, the renewed redress mechanism, and accessibility to the data by US authorities.

a) The certification process: according to the Commission's study, the US Department of Commerce has established all the necessary structures and procedures to ensure the effective functioning of the Framework. This includes developing a new website, updating procedures, engaging with companies,[78] and conducting awareness-raising activities.

   The report issued by the EDPB agrees on the advances in this field, but still considers that the system is similar to the one operating under the invalidated Privacy Shield US, so, it proposes that authorities might need to implement some changes in the applicability of the mechanism, taking the necessary actions to enforce the rules.

b) Compliance monitoring and enforcement: the Department of Commerce is responsible for monitoring the correct application of the DPF. Accor-

76 European Commission, 9/10/2024, Report from the commission to the European parliament and the council on the first periodic review of the functioning of the adequacy decision on the EU-US Data Privacy Framework, Brussels, 9.10.2024 COM(2024) 451 final. https://commission.europa.eu/document/download/25695177-8073-4ce3-bf81-eb816dc6b468_en?filename=Report%20on%20the%20first%20periodic%20review%20of%20the%20functioning%20of%20the%20adequacy%20decision%20on%20the%20EU-US%20Data%20Privacy%20Framework.pdf

77 European Data Protection Board Report on the first review of the European Commission Implementing Decision on the adequate protection of personal data under the EU-US Data Privacy Framework, Adopted on 4 November 2024. https://www.edpb.europa.eu/system/files/2024-11/edpb_report_20241104_reportonfirstreviewofeu-u.s.dpf_en.pdf

78 More than 2800 US companies are part of the program according to their record.

ding to the Commission report they do it through *ad hoc* web searches and (social) media checks.

The EDPB refers, in this regard, to the low number of individual complaints in the first year of operation of the mechanism, suggesting that it might be due to lack of awareness or confidence in the system or, simply, accessibility problems. Indeed, a more proactive approach by the US authorities could be taken in this matter. A lack of guidance on "onward transfers" has also been pointed out, meaning that more guidance should be available on how companies should manage transfers of EU data to third countries. The Board recommends the publication of clear, operative guidelines on the matter.

c) Redress mechanisms: The DPF allows EU individuals to request recourse for cases of non-compliance in different ways: addressing the company itself, using independent recourse mechanisms (IRMs), or commencing binding arbitration before the EU-US DPF Panel.[79] Nevertheless, we do not have notice – as of May 2025 – of procedures begun before any of those mechanisms. Additionally, the DPRC plays a key role in determining when public agencies have violated the rights of the users, as has been explained before in this article.

d) Access by US public authorities: in this sense, the Commission's report highlights the implementation of Executive Order 14086, emphasizing the clear application of principles such as necessity and proportionality, the role of the DPRC to watch over these principles being essential.

However, issues like the surveillance programs still in force must be considered a big concern for the European Commission, since one of the main arguments of Mr. Schrems to defend his cases were disproportionate and uncontrolled government surveillance programs. Even under Executive Order 14086 and the new Data Protection Review Court (DPRC), there are some fears about the way these will be implemented in practice. The singular nature of the DPRC is, undoubtedly, a controversial topic.

Finally, transparency is key nowadays, and there is not much of this regarding investigations or non-compliance cases that are being carried out. This contrasts with the much more developed transparency under EU Law regarding the actions taken by the Commission when it investigates companies for non-complying with European rules.

79 https://www.dataprivacyframework.gov/framework-article/F%E2%80%93The-Arbitration-Panel

7. THE LATOMBE CASE AND "TRUMP EFFECT" – LEGAL UNCERTAINTY RETURNS.

As we have seen, US institutions have made some structural changes to comply with European data protection standards. Nevertheless, the Data Privacy Framework continues to face substantial legal and practical challenges despite these enhancements, namely:

a) Equivalence. As has been stated, one of the fundamental requirements under the GDPR (article 45) for third country data transfers is that the recipient country ensures a level of data protection that is "essentially equivalent" to that of the EU. That this equivalence is reached with the renewed legal framework in the US is, at least, arguable.

Despite the reforms introduced by EO 14086 and the DPRC, US legislation still allows bulk surveillance under laws such as FISA Section 702. Even though these surveillance practices are theoretically subject to more strict conditions. The notion of "proportionality", for instance, may not be identical to the European interpretation in US law. This perpetuates the legal controversy regarding compatibility with articles 7 and 8 of the Charter of Fundamental Rights of the EU.

Some other major issues, such as the general requirement of consent and people's control over their data, the legal basis for data protection in the European system, do not have equal regulation in the US. Even though there are some areas in which consent is a requirement (e.g. healthcare), there is no uniform federal law that establishes this principle with general effects; it remains a matter for the state level. Some other issues such as data breach notifications are cited as key areas in which important differences appear between the two systems.

b) The independence of the DPRC. This "court" is supposed to "provide independent and impartial review" of complaints regarding unfair access to European individuals' personal data by US institutions. However, as has been stated, this "court" is not an actual court, subject to the rights and limitations of the courts in the US judicial system; indeed, it does not even come under the branch of the judiciary.

Even if its decisions are binding and final, the transparency of its procedures and the secrecy of its deliberations – linked to the secrecy of the motivations to collect the data – raise some questions about its legitimacy. Besides, the lack of an appellation system or any kind of judicial review regarding the acts of the DPRC makes this an even more worrying issue.

Nothing other than a judicial body can be understood as complying with article 47 of the EU Charter of Fundamental Rights, which guarantees the right to an effective remedy before an independent tribunal.

c) The self-certification program continues to be a weak legal instrument in a matter of such importance as is the privacy of personal data. The rigorous enforcement that is supposed to be deployed by US authorities does not equal the effectiveness of the GDPR, a legal instrument directly applicable in all 27 EU states and to companies operating in them. The legal sources system in the US is, naturally, different from ours, and only a few matters are in the hands of the federal institutions to be regulated, but data "trade" or national security matters are among those, so more effective measures could have been implemented. In any case, the effectiveness of the current legal framework will have to be analysed when we have more specific news on the issue.

d) Legal uncertainty. As a cross-cutting issue connected with the previous paragraph/issue – how data transfer relations are configured in the GDPR –, leaving the matter, somehow, in the hands of the European Commission via the adequacy decisions does not provide a stable, reliable framework to articulate foreign data relations in an interconnected but borderless digital environment. In practice, the solution lies in standard contractual clauses (SCCs) or self-imposed corporate rules that do not solve the issue; indeed, quite the opposite.

However, and even with the universal applicability of the GDPR, the alternative would imply reaching global, bilateral or, ideally, multilateral agreements on the issue to establish a harmonized standard on data privacy. This is a sensitive matter, however, especially in the US, where national security justifies disruptions in some fundamental rights, rights that are not meant to protect non-US citizens.

Considering the previous concerns, nobody can be surprised by headlines like this: "Schrems addresses emerging questions around EU-US Data Privacy Framework",[80] referring to the most likely third round in the battle of Mr Schrems and his non-profit organization NOYB ('None Of Your Business') against the transfer of EU users' data to the US.

In a publication in July 2023 Mr Schrems confirmed this possibility with strong messages like: "The Commission is meant to be the 'guardian of the treaties' and the defender or the 'rule of law'. It loves that role when it comes to member states violating EU law. Now the Commission itself simply ignores the Court of Justice for the third time".[81] However, as we will see, the case has been brought to court by another claimant on this occasion.

80 IAAP, 26 March 2025: https://iapp.org/news/a/schrems-addresses-emerging-questions-around-eu-us-data-privacy-framework/

81 NOYB, July 2023, "European Commission gives EU-US data transfers third round at CJEU" at https://noyb.eu/en/european-commission-gives-eu-us-data-transfers-third-round-cjeu

7.1. *Latombe* case and the prospects of a "*Schrems III*" or "*Latombe I*" case.

In this context, legal actions were expected. Indeed, the legality of the new adequacy decision is currently being challenged in Case T-553/23, *Philippe Latombe v. European Commission*,[82] pending before the General Court.[83] This request is based on article 263(4) of the Treaty on the Functioning of the European Union (TFEU), that states that "Any natural or legal person may (…), institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

As we can see, the procedural strategy is different from the Schrems cases so far. For the action to be admitted, the claimant must demonstrate direct and individual concern, the latter probably not being that straightforward. Nevertheless, if the action succeeds, it is a much more direct and effective strategy than the one carried out by Mr. Schrems.

Regarding the specific claims of Mr. Latombe, he claims:

— The infringement of Regulation No 1/1958,[84] irrelevant for the grounds of the case.

— Infringement of articles 7 and 8 of the Charter of Fundamental Rights of the European Union. As we can see, the arguments are the same as in the previous cases and refer to the inadequacy of guarantees of "respect for private and family life" in the light of US legislation on the matter and privacy of personal data.

— Infringement of article 47 of the Charter and of Article 45(2) of the GDPR. The right to an effective remedy and access to an independent tribunal is, according to the claimant, still not guaranteed. Specifically, as we have stated in this paper, the claimant points out that the "court" is part of the executive rather than an independent tribunal with the necessary guarantees.

— Infringement of article 22 of the GDPR. In this case, the claimant refers to the absence of a framework for "automated decision-making". This is an argument that goes beyond the previous decisions, considering the irruption of new potential threats.

— Infringement of articles 32 and 45(2) of the GDPR, referring to the "vague measures" provided by EU law, as we have stated previously in this paper.

82 Case T-553/23: Action brought on 6 September 2023 - *Latombe v Commission*.

83 The first hearing took place in April 2025.

84 Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community, English Special Edition 1952-1958, p. 59.

This action arrived after a non-successful interim measure request.[85] On 8 September 2023 the claimant, basing his request on articles 278 and 279 of the TFEU,[86] in connection with article 156 of the Rules of Procedure of the General Court, applied for the suspension of the adequacy decision – and, consequently, the DPF –.

The procedural rules incorporate the *fumus boni iuris* condition and the urgency, or *periculum in mora*, indicating that the request "shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for. It shall contain all the evidence and offers of evidence available to justify the grant of interim measures." In a resolution in October 2023, the President considered that the exceptionally admissible (art. 278 TFEU) provisional suspension of EU acts requires a certain level of urgency to be demonstrated, a requirement that was not met in the case because Latombe failed to prove that he would suffer serious harm if the execution of the DPF was not suspended.

Nevertheless, not granting the provisional measures, even if this can be considered a first procedural defeat, does not imply the definitive endorsement of the Data Privacy Framework, so the case is still pending, and we will have to wait and see.

7.2. Political instability with the Trump Administration.

Legal uncertainty is another factor for pessimism regarding this transatlantic deal. Recent political developments in the United States can be considered worrying, to say the least. For instance, on 27 January 2025, the Trump Administration dismissed all three Democrat members of the PCLOB – Privacy and Civil Liberties Oversight Board.

Furthermore, on 3 February 2025, reports[87] indicated that the Department of Government Efficiency (DOGE)[88] was being granted increasing access to

85 Ordonnance du Président du Tribunal, 12 octobre 2023, "*Référé - Protection des données à caractère personnel - Cadre de protection des données UE-États-Unis - Décision constatant l'adéquation du niveau de protection - Demande de sursis à exécution - Défaut d'urgence*".

86 Article 278 (ex Article 242 TEC).

Actions brought before the Court of Justice of the European Union shall not have suspensory effect.

The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 279 (ex Article 243 TEC).

The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

87 https://www.washingtonpost.com/business/2025/02/25/elon-musk-doge-data-privacy-security/

88 https://www.whitehouse.gov/presidential-actions/2025/01/establishing-and-implementing-the-presidents-department-of-government-efficiency/

sensitive government databases. Such is the controversy that these concerns within the US have derived in a lawsuit against this department[89] by the Electronic Privacy Information Center (EPIC),[90] arguing that "this is a massive and egregious breach of privacy that impacts the private information of millions of Americans".[91]

These two circumstances, which threaten not only non-US citizens but also Americans' privacy rights, have been brought to the EU in a written question to the Commission,[92] so, sadly, there is little room for optimism for the long-term stability of the agreement.

8. CONCLUSIONS.

Panem et circences (bread and circuses), is what the authorities of Ancient Rome provided for the people in troubled times. What is today's circus if not smartphones and social media apps launched by companies that thrive on our personal data? This new multibillion dollar trade,[93] represented to a large degree by Meta and other big American technological companies and boosted lately by the skyrocketing growth of AI based apps, is important enough for the companies to represent a pressing political issue in the agenda of the European Commission.

In the worst-case scenario, and after two reprimands by the European Court of Justice related to the previous agreements, we should count on a foreseeable third setback to the transatlantic data transfer framework represented by the DPF. One thing is clear, however: a reliable harmonized regulatory framework is essential, considering the importance of the issue.

89 Electronic Privacy Information Center v. US DOGE Service and others, filed before the United States District Court for the Eastern District of Virginia, Alexandria division on 10 February 2025. https://epic.org/wp-content/uploads/2025/02/EPIC-v-OPM-25-cv-255-complaint-021025.pdf

90 EPIC (the Electronic Privacy Information Center) is a non-profit organization established in 1994 to protect privacy, freedom of expression, and democratic values in the information age through advocacy, research, and litigation.

91 https://epic.org/press-release-epic-democracy-forward-and-federal-worker-sue-doge-for-illegal-seizure-of-personal-data-from-treasury-personnel-systems/

92 Question for written answer E-000540/2025 to the Commission, Rule 144, Raquel García Hermida-Van Der Walle (Renew). https://www.europarl.europa.eu/doceo/document/E-10-2025-000540_EN.html

93 See: "La UE y EE UU llegan a un acuerdo para poder transferir datos personales con garantías para la privacidad", *Diario Cinco Días*, Madrid, 22 March 2022. https://cincodias.elpais.com/cincodias/2022/03/25/companias/1648206086_138094.html

Changes in US legislation are being implemented through Executive Orders,[94] and without a proper federal law development these measures are likely to be easily changed when political priorities take a turn. President Biden did not pass binding federal legislation, and instead issued Executive Order 14086 without even reversing the previous EO 12333.

Thus, in our view big multilateral agreements – ideally reaching consensus on a global scale and avoiding the so-called European "legal colonialism"[95] – are the key to guarantee that fundamental privacy rights – not only of European citizens – are protected. New negotiations should lead to a new scenario with a reinforced "structure of democratic governance and rule of law (…) on both sides of the Atlantic".[96]

However, the huge defencelessness created by the loophole called "national security" will always represent a threat to privacy and other fundamental rights worldwide.

94 About the abuse of these legal instruments in the US: GAZIANO, Todd F., "The use and abuse of executive orders and other presidential directives", *Tex. Rev. L. & Pol.*, 2000, vol. 5, p. 267; BRANUM, Tara L., "President or King-The Use and Abuse of Executive Orders in Modern-Day America", *J. Legis.*, 2002, vol. 28; COOPER, Phillip J. *By Order of the President: The Use and Abuse of Executive Direct Action. Revised and Expanded*, University Press of Kansas, 2014.

95 DHONT, Jan Xavier, cited, p. 599.

96 ROTENBERG, Mark, "Schrems II, from Snowden to China: Toward a new alignment on transatlantic data protection", *European Law Journal*, vol. 26, no. 1-2, 2020, pp. 141-152, p. 152.

RISKS OF THE DIGITAL EURO PROJECT

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SUMMARY: 1. INTRODUCTION. 2. ON MONEY. 2.1. Definition by Its Functions. 2.2. Properties. *2.2.1. Properties Related to the Scale Factor. 2.2.2. Properties Related to the Spatial Factor. 2.2.3. Properties Related to the Temporal Factor* 2.3. Summary–Table. 3. RISKS OF THE FUTURE DIGITAL EURO. 3.1. Core features. 3.2. Potential Impacts on the Properties of Sound Money. *3.2.1. Impact on Scale–Factor Properties. 3.2.2. Impact on Spatial–Factor Properties. 3.2.3. Impact on Temporal–Factor Properties.*

1. INTRODUCTION.[1]

In this text, we will examine some of the main risks associated with the future Digital Euro (DE, hereafter). To unpack these threats posed by the new currency, we will employ a structure divided into two main sections.

In the first section, we will present a synthesis of the nature, features, and properties of money as a fundamental institution for the proper functioning of society. We will not refer to the DE here or to any other specific form of money; the aim is rather to clearly outline the qualities that a good [asset] 'must' possess for a society to adopt it as *money*. The origin, evolution, and characteristics of

1 I wish to express my gratitude to Felipe Schwember for his valuable comments on several aspects of this work.

money are topics widely debated in monetary theory, so we will provide as comprehensive a synthesis as possible without delving into technical subtleties.

We anticipate that our stance in this debate aligns with an evolutionary theory of money, wherein money emerges spontaneously to fulfil individuals' needs, acquiring diverse forms across history and geographies. This is currently the dominant view, though alternative theories – such as Modern Monetary Theory (MMT) – argue that money is, in essence and by nature, a state creation.[2] This first section may seem somewhat lengthy to readers unfamiliar with monetary theory, but only by thoroughly grounding our analysis in these conceptual foundations will we be able to assess the full implications of the DE's arrival and the potential risks its adoption may entail.

In the second section, we will first outline the basic features of the new digital currency (based on currently available information) and then interweave them with the essential properties of sound money (examined individually in the preceding section). As we will emphasize later, given the embryonic stage of the DE project all conclusions drawn here should necessarily be treated as strictly provisional in nature.

Let us conclude by sharing the origin of our interest in this subject. I previously worked for a banking institution (one of Spain's largest commercial banks) providing services related to anti-money laundering. Fulfilling this role required interpreting data of all types stored in the institution's databases, and in doing so, I came to understand the power derived from studying users' habits. In this regard, the advent of the DE will enable authorities with sanctioning powers to gain more direct access to data on the economic behaviour of European Union citizens. And this could entail a reduction in citizens' privacy – perhaps the most delicate aspect of the project. This is the catalyst that has led us to reflect on the issue.

2. ON MONEY.

2.1. Definition by its Functions.

Given the widespread confusion surrounding the concept, it seems necessary to begin with a preliminary definition clarifying what money truly is.

At its core, money is an indispensable institution for peaceful relations among individuals and societies. Metaphorically speaking, money is a social

2 For an introduction to evolutionary perspective, see MENGER, Carl. *The Origins of Money*. Foley, C. A., transl., Ludwig von Mises Institute, Auburn (Alabama, USA), 2009, [1892].

lubricant.[3] *Before it appeared on the scene, people were confined to self-sufficiency (where each person or tribe produced all the necessary goods for their survival), violent plunder (taking others' goods by force), or – at best – barter.*

Money enables specialization: individuals can produce specific goods and later acquire other needed goods or services in the market. Money fosters the division of labour, productivity, and ultimately social cooperation, improving material living conditions.[4] While all this is true, it is not so much a definition as a collateral feature, a consequence of having sound money that coordinates communal life.[5]

Classical definitions assert that money is a "widely accepted medium of exchange".[6] *This is its essential function, and here we can distinguish monetary goods (money) from non-monetary goods. Non-monetary goods satisfy our needs directly*; their properties interact with us to enhance our well-being. The nutrients in a banana alleviate hunger, the fleece of a sock wards off the cold, and a novelist's ingenuity delights the intellect. In contrast, a monetary good (money) does not satisfy needs *directly* but serves *indirectly* by virtue of its capacity to acquire other goods ("medium of exchange"). In short, non-monetary goods have *direct* utility, while monetary goods are defined by their *indirect* utility.[7]

The definition of money as a "widely accepted medium of exchange" (first formula) is typically accompanied by two complementary formulas: money is also a "store of value" (second formula) and a "unit of account" (third formula).[8] There is debate about the relationship between these three.

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3 Samuelson and Nordhaus also use the expression. (SAMUELSON, Paul A. & NORDHAUS, William D. *Economía*. Ceballos, Mª Guadalupe, transl., 18th edition, Mc Graw Hill, México, 2006, p. 32).

4 MISES points out the role of money as a stimulus for the necessary relationship between free exchanges and the division of labour (see MISES, Ludwig von. *Teoría del dinero y del crédito*. De la Fuente, Juan Marcos, transl., Unión Editorial, Madrid (Spain), 1997 [1912]).

5 As YEAGER notes, money constitutes half of every exchange. Hence, there can be no market without money, or rather, every market is essentially a money market. When one party purchases a pair of shoes for 50 euros, the other party is simultaneously purchasing 50 euros at the price of two shoes (YEAGER, Leland. *The International Monetary Mechanism*. Holt, Rinehart & Winston, Canada, 1968).

6 See SAMUELSON, Paul A. & NORDHAUS, William D. *Economía*. Ceballos, Mª Guadalupe, transl., 18th edition, Mc Graw Hill, México, 2006; MISES, Ludwig von. *Teoría del dinero y del crédito*. De la Fuente, Juan Marcos, transl., Unión Editorial, Madrid, 1997 [1912]); KEYNES, John Maynard. *A treatise on money: the pure theory of money.* In *The History of Banking II, 1844-1959 Vol 10*. Routledge, London (UK), 1930., ch. I); ROTHDBARD, Murray. "The Austrian Theory of Money". Reprinted from *The Foundations of Modern Austrian Economics*, DOLAN, Edwin, ed., Sheed Andrews and McMeel, Kansas City (USA), 1976, pp. 160-184.

7 This does not mean that a monetary good possesses *only* indirect utility. Under certain circumstances, monetary goods may also have direct utility. Consider, for instance, how a coin might serve a magician in performing magic tricks.

8 From a subjectivist perspective on value judgments, it should be noted that the expression "store of value" carries a metaphorical nuance. When we say that a good preserves

In our view, the second and third formulae should be integrated into the definition of money, but subordinately, as both depend on the first formula. Indeed, when people are willing to hold a certain good (money as a "store of value", second formula), they do so because they trust it will remain an effective "widely accepted medium of exchange" (first formula) in the future. If they anticipated that the good could not acquire other goods later, they would discard it immediately, causing it to lose its capacity to preserve value over time. Thus, only the prior expectation that the good will remain a "widely accepted medium of exchange" explains its role as a "store of value", so that the first formula leads to (i.e. triggers or generates) the second.[9]

Admittedly, the relationship can appear in reverse: money that loses value over time (failing as a "store of value") may gradually lose public acceptance until it ceases to be a "widely accepted medium of exchange". Here, the second formula might seem to drive the first, but this is a linguistic illusion. In reality, the expectation that money will be accepted as a "medium of exchange" arises first in the actor's mind; only later is it confirmed (or not) by whether the good proves

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its value over time, we should not literally understand that value is *stored* within the good. Only individuals make valuations (value never resides in the object itself, but rather we consider certain goods valuable based on our interpretations). Value, so to speak, is a concept that dwells solely within the valuer's mind. This observation proves relevant for critiquing Lockean property theory (see LOCKE, John. *Segundo tratado sobre el Gobierno Civil: Un ensayo acerca del verdadero origen, alcance y fin del Gobierno Civil*. MELLIZO, Carlos, transl., Tecnos, Madrid, Spain, 2010 [1689]). Locke's framework implies what might be called a mystical transfusion of value, allegedly transferring from the labouring individual into the good itself. Though seemingly paradoxical at first glance, I contend this Lockean imprint persists in Marx's labour theory of value.

9 Let us now conclude this point. To conceive of money primarily as a "medium of exchange" is, we believe, the most fitting approach under the tenets of the Austrian School of Economics. Consider this: according to the Austrian view, the starting point of economic science is the following axiom (praxeology): "human beings act to replace a less satisfactory state with a more satisfactory one". Thus, strictly speaking, what triggers human action is the desire to satisfy certain needs, and it so happens that some needs are met through external resources. These external resources are non-monetary goods - and, as we noted earlier in the text, these are goods with *direct utility*. Therefore, money is necessary, above all else, to obtain non-monetary goods that have direct utility. The idea can be expressed sequentially:

(i) Human beings have needs;

(ii) Human beings act to satisfy those needs;

(iii) Some needs can only be satisfied by acquiring external resources (non-monetary goods: goods with *direct utility*);

(iv) To acquire these (non-monetary) goods, individuals find it highly practical to use a widely accepted "medium of exchange".

In this logical chain, money arises solely because human beings need to acquire external resources. This is the indispensable condition. Hence, defining money as a "medium of exchange" can also be phrased as follows: money is the most efficient way for individuals in a society to obtain goods that directly meet their needs. In short, by defining money as a "medium of exchange" we place it in the closest possible link to praxeology's first axiom ("human beings act to replace a less satisfactory state with a more satisfactory one").

to be a "store of value". Another advantage of prioritizing the first formula is that it alone captures money's exclusive trait: its capacity to acquire other goods.[10] Only the first formula reflects *indirect* utility, the defining feature of monetary goods.[11]

Regarding the third formula, money is a "unit of account" because the value of all other goods is expressed in *monetary* terms, not in other magnitudes. If we had to reference each good's value against all others (e.g. stating that a car is worth "x" computers, "y" shirts, "z" movie tickets, etc.), the absence of a common unit would render trade nearly impossible. Thus, for a good to function as a "unit of account", it must first be a "widely accepted medium of exchange".

In summary, a classical and comprehensive definition would be: "Money is a widely accepted medium of exchange, which encourages its use as a store of value and a unit of account".

2.2. Properties.

The previous definition describes money in terms of its *functions* but remains silent about its requisite *properties*. That is, we have defined money by asking, "What is its purpose?" – answering that it serves primarily as a medium for acquiring other goods, alongside being a store of value and unit of account. Yet we have not addressed the critical question: What must this mysterious good be like? What properties must it possess to adequately fulfil these functions?

A preliminary response might be: money must have properties that ensure its *saleability*. Whatever the candidate good may be, it must exhibit characteristics that encourage widespread acceptance as a medium of exchange. Thus, the meta-property of money is its *saleability* – money is the most liquid of all goods, meaning the most universally accepted among market participants. However, this observation borders on tautology: a good that functions as a "widely accepted medium of exchange" must, by definition, possess properties that make it broadly acceptable/saleable. We must therefore carefully investigate

10 Of particular interest here is the hypothesis that the earliest goods functioning as money served as "stores of value" before becoming a "medium of exchange". Human tribes would have initially collected these goods - ivory teeth being one example - simply for their rarity and ornamental value, preserving them across generations as exotic collectibles. Only with intensified intertribal contact did these objects gradually acquire their function as a "medium of exchange". Crucially, while a good may have historically served first as a "store of value", this temporal priority does not imply conceptual primacy. We can only consider ivory teeth as money from the moment different tribes systematically accepted them in exchange for other goods.

11 Indeed, certain goods may function as "stores of value" for their owners - and exclusively for them - without ever attaining monetary status. Consider personal mementos: a wedding photograph, a childhood toy, or a love letter from one's youth.

which particular fundamental properties a given good requires to effectively function as sound money.

One approach to this problem examines how saleability is influenced by three dimensions: (i) Scale (ii) Space, and (iii) Time.[12]

We can systematically examine the six key properties (labelled P1–P6) that collectively constitute ideal money through these analytical lenses. Once properly identified, we may then reasonably speculate about which specific properties might be most vulnerable to disruption through the advent of the DE.

2.2.1. Properties Related to the Scale Factor.

The first property in this domain states that for a good to be adopted as money (a "medium of exchange"), it must be divisible into smaller units as well as combinable into larger ones. Without sufficient and easy divisibility, numerous economic exchanges (particularly small-scale routine transactions) might never effectively occur in practice. Consider how commerce would falter if the smallest monetary unit were a €100 banknote rather than a one-cent coin. This reveals the shortcomings of proto-monies like cattle or slaves, which could only facilitate limited transactions. Thus, this property proves crucial for sound money, primarily affecting its functions as a "medium of exchange" and "unit of account". We shall designate this first property (P1) as: "Easily divisible and combinable".

The second critical property concerning the scale factor demands that the monetary good exhibit homogeneity. This essential characteristic manifests itself through two distinct but interrelated aspects. First, each irreducible unit must maintain identical value to every other unit. Historical examples like cowrie shells, 'aggry beads' from Ghana or the aforementioned cattle demonstrate how heterogeneity in irreducible units' value fundamentally undermined their utility as a "unit of account". Second, the good must rigorously preserve this essential homogeneity whenever its units are operationally combined. While this second aspect becomes nearly self-evident in digital economies (where units seamlessly aggregate into precise numerical values of varying digits) it nevertheless retains critical relevance for physical monetary forms. In such cases, lower-denomination notes sometimes demonstrate greater liquidity and preference compared to higher-value ones.[13] These considerations lead us to define the second property (P2) as "homogeneity".

12 We partially follow the analysis of AMMOUS, Saifedean, *The bitcoin standard: the decentralized alternative to central banking*. John Wiley & Sons, NY (USA), 2018.

13 A practical explanation for this phenomenon lies in the heightened fraud risk borne by those accepting high-denomination banknotes. Mitigating this risk requires extra verification efforts to authenticate the bills, thereby increasing transaction costs. An extreme manifestation occurred in India on 8 November 2016, when the government - aiming to combat the shadow

2.2.2. Properties Related to the Spatial Factor.

In the pre-digital era, a fundamentally vital characteristic of monetary goods was systematically tested through their practical capacity for spatial transferability. Whenever commercial exchange occurred between geographically distant or isolated groups, the commodity functioning as money could not logically constitute immovable property. By its very nature requiring mobility, theoretically ideal money must consequently demonstrate high degrees of transportability. This requires a high *value-to-weight* (and also *value-to-volume*) ratio. In the absence of such characteristics, economic agents would be forced to transport excessively heavy loads, thereby driving up transaction costs and creating a disincentive for trade. It is precisely this principle that accounts for the historical preference for gold and other precious metals – given their exceptional value density – as widely accepted monetary goods.

Admittedly, what was sometimes transported was not the money itself (gold, for instance) but rather certificates of ownership. In such cases, when the money itself is not being transported, these ownership titles must be easily transferable. Accounting for this nuance while maintaining concision, we shall designate this third money property (P3) as "easily transportable".

Closely related to this is another desirable characteristic: concealability. Should money owners lack the ability to easily hide their holdings, they would face greater exposure to theft and confiscation. A monetary good with this deficiency would incur higher safeguarding costs, hindering its widespread adoption. All owners – whether of monetary or non-monetary goods – value stability in their possessions, expecting full disposition over them both in the present and in the future. The capacity for concealment allows protection against third-party theft and abusive government expropriation. This characteristic gains particular importance for monetary goods, as when money movements become traceable, owners reveal not only their wealth levels but also aspects of their personality that can be interpreted through their consumption patterns.

Thus, concealability addresses a deeper human need: the yearning for privacy – the ability to choose when and to whom we disclose information about ourselves. Given these conceptual connections, we shall term this fourth property (P4) as "easily concealable / privacy-preserving".

These two properties (P3 and P4) prove instrumental when examining money's evolution from recent history to contemporary *fiat* systems. Broadly

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economy - unexpectedly announced that high-value notes (500 and 1000 rupees) would cease being legal tender within 24 hours. This triggered a monetary black market where these banknotes traded below face value. See:

https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/RBIAR201617_FE1DA2F97D61249B1B21C4EA66250841F.PDF

speaking, agents delegated custody of gold (and other valuables) to specialized institutions (banks), which issued deposit certificates. These certificates eventually circulated as "widely accepted media of exchange" with holders generally able to redeem them for gold. In practice, gold increasingly served the "store of value" function while certificates became the primary "medium of exchange". European "central banks" or "national banks" later emerged, assuming not just custodial roles but also monetary control and currency issuance. Gradually – particularly post-WWII amid US dominance – nations agreed to back their currencies not in gold but in dollars, which were (theoretically) gold-redeemable.[14] This system collapsed in 1971 when President Nixon *temporarily* suspended the convertibility of the dollar, thereby exposing the true nature of the monetary order: money ceased to be backed by physical commodities and instead became reliant on government decree. This pivotal moment marked the beginning of the fiat era. In modern economies, money – whether in physical form (such as banknotes and coins) or digital form (consisting of electronic records comparable to historical bank certificates) – is fundamentally a representation of debt. Its value does not stem from any intrinsic material properties but rather from the public's trust in the institution that issues it.

2.2.3. Properties Related to the Temporal Factor.

For a good to remain saleable over time, it must first be resistant – or ideally immune – to physical deterioration. Perishable commodities such as fruits, vegetables, meat, or fish would be fundamentally unsuitable for use *as money*, since no rational economic actor would willingly accept them – especially with the intention of holding them for future exchange – given their tendency to deteriorate over time. From an evolutionary perspective, this explains why early monetary goods included salt, cattle, seashells, grains, certain stones,[15] and later silver and gold (the latter being wholly corrosion-proof). We formally designate this fifth property (P5) as: "resistance to deterioration".

A second temporally crucial aspect – particularly vital today for understanding currency preferences – is that money must be a good whose supply

14 "An important, but often overlooked, aspect of the Bretton Woods system was that most of the member countries had moved large amounts of their gold reserves to the United States and received dollars in exchange, at a rate of $35 per ounce" (AMMOUS, Saifedean, *The bitcoin standard: the decentralized alternative to central banking*. John Wiley & Sons, NY (USA), 2018, ch. 4).

15 On the island of Yap in Micronesia, a distinctive stone currency was employed: large circular rocks with hollowed centres. These were exceptionally difficult to obtain - tradition holds that tribal adventurers acquired them by exploring neighbouring islands - making their "relative scarcity" (sixth property) instrumental in establishing their monetary function (see GILLILLAND, Cora Lore C., *The Stone Money of Yap. A numismatic Survey*. Smithsonian institution press, Washington (USA) 1975).

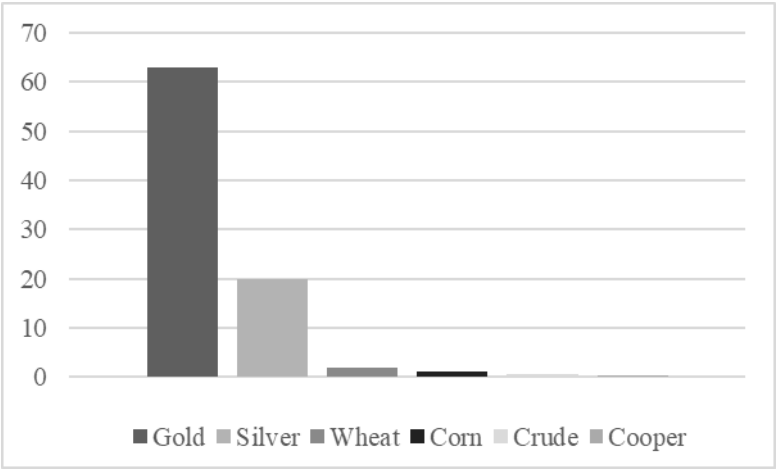
proves difficult (ideally impossible) to increase. It must exhibit what economists term "relative scarcity". This means new units (*flow*) must be scarce relative to existing stock, or analytically stated: the *stock-to-flow* ratio must remain high. The underlying principle remains clear: if acquiring the good outside trade (e.g., via direct extraction from nature) were too easy, each monetary unit's value would be diluted. Were desert-adjacent tribes to arbitrarily and unwisely adopt (let's say) "sand grains" as their medium of exchange, wealth holders would rapidly witness their accumulated value dissipate, since any individual could casually venture into the surrounding desert, collect additional grains at will and thereby catastrophically inflate the circulating money supply. As an inevitable economic consequence, the purchasing power inherent to each monetary unit (one single sand grain) would swiftly collapse toward zero.

Evolutionarily, societies and individuals choosing high stock-to-flow goods preserved purchasing power longer than those opting for less scarce alternatives.[16] The success of wise adopters likely served as a template for imitation by others seeking similar advantages. All else being equal, monetary selection thus converges toward the highest stock-to-flow option, which would explain gold's cross-cultural dominance. Gold triumphed precisely because of its exceptional stock-to-flow ratio (60:1, approximately), dwarfing its competitors:[17]

16 Let us re-emphasize that when we describe money as requiring "scarcity", we do not mean absolute scarcity. What matters is not its total abundance or shortage, but rather its relative scarcity, specifically, that new units not yet in human possession (*flow*) remain scarce compared to existing circulating units (*stock*).

17 Other metals like platinum or palladium exhibit higher stock-to-flow ratios than gold, but their discovery occurred much later (18th and 19th centuries, respectively). These metals present additional disadvantages compared to gold: first, they lack equivalent corrosion resistance; second, their geographic distribution is far more concentrated in specific regions; third, their higher melting points reduce malleability and divisibility; fourth, unlike gold, they have significant industrial applications (catalytic converters, electronics). On another note, Bitcoin proponents argue that the cryptocurrency surpasses gold in this aspect of relative scarcity. With its algorithmically decreasing and preprogrammed supply, Bitcoin's *stock-to-flow* ratio is projected to exceed 100 before 2028. Advocates also note that gold - unlike Bitcoin - could see its supply dramatically increased in futuristic (though not implausible) scenarios, such as advances in extraterrestrial mining or celestial impacts with Earth. For instance, current estimates suggest asteroid *16 Psyche*, now located between Mars and Jupiter, contains more gold than exists on our entire planet (see ELKINS-TANTON, L. T., ASPHAUG, E., BELL, J., BERCOVICI, D., BILLS, B. G., BINZEL, R. P., & ZUBER, M. T. (2016). "Asteroid (16) Psyche: the science of visiting a metal world". In 47th Annual Lunar and Planetary Science Conference, Lunar Planet. Sci. Conf, 2016).

STOCK–TO–FLOW RATIO: GOLD VERSUS OTHER COMMODITIES.[18]



This overwhelming superiority of gold (as shown in the graph) may be explained through the following observations: With a stock-to-flow ratio of approximately 60, this means that – simplifying slightly – the total amount of gold ever mined throughout history (*stock*) is sixty times greater than the amount extracted in the last year (*flow*). Or inversely stated: annual gold production (*flow*) is sixty times smaller than the existing stock, resulting in a yearly supply increase of less than 2% (1/60, approximately). This minimal annual supply growth explains why gold has been – and remains – an excellent "store of value".[19] Conversely, the low stock-to-flow ratios (or high inflation rates) of some *fiat* currencies clarify why citizens have grown distrustful of their monetary usefulness.[20]

18 See STOEFERLE (2024), "The biggest misconception with regard to gold – the high stock-to-flow ratio is the most important characteristic of gold". Article available online:

https://vongreyerz.gold/the-biggest-misconception-with-regard-to-gold-high-stock-to-flow-ratio-is-the-most-important-characteristic-of-gold

19 This also explains gold's appreciation relative to major fiat currencies like the dollar and euro. These currencies have sustained annual supply growth averaging approximately 5.5% over recent decades: from 1990 to 2015, the euro's supply increased by 5.55% annually, while the US dollar's rose by 5.45% (AMMOUS, Saifedean. *The bitcoin standard: the decentralized alternative to central banking*. John Wiley & Sons, NY (USA), 2018, ch. 4). Consequently, when matching each ounce of gold against expanding monetary bases, the precious metal's price denominated in dollars or euros inevitably rises year after year.

20 In countries with persistently high inflation rates, the state currency typically retains its function as a medium of exchange (first formula), while citizens avoid using it for savings (i.e., as a store of value, second formula) or as a unit of account (third formula). Argentina's recent history

Finally, it bears emphasizing that currency counterfeiting – the introduction of 'fake' money into circulation as genuine – represents just another economic manifestation of deficient relative scarcity. When a good can be easily counterfeited, this new supply (*flow*) inevitably triggers depreciation, impoverishing holders of existing units (*stock*). Consequently, when we demand money be "counterfeit-proof", we are not proposing a separate property but rather reaffirming our sixth (P6): namely, "relative scarcity".

2.3. Summary–Table.

We have established that money possesses *indirect utility* (money serves to acquire goods that provide *direct utility*), and in this sense, money constitutes that singular economic good which, within the framework of an ideally functioning society, serves three essential and interdependent purposes: operating as a "widely accepted medium of exchange" (first formula), "store of value" (second formula), and a standardized "unit of account" (third formula).

To properly fulfil these functions, money must exhibit specific properties that render it the most *saleable* (i.e. most liquid) good. When money displays deficiencies in these properties, citizens face diminished opportunities for trade and social cooperation. Crucially, these properties need not be binary (either present or absent), as they exist along a spectrum, allowing us to speak of better or worse forms of money. The following table summarizes the framework developed thus far:

(2000-2023, with average annual price increases around 40%) shows how agents used *pesos* for daily transactions but relied on US dollars for savings and as reference for production factor pricing. In more extreme cases, state currencies ultimately fail even as payment means. Hyperinflation episodes include Venezuela (particularly post-2016), Zimbabwe (2007-2009), Hungary (1945-1946), and the Weimar Republic (notably 1922-1923). During the Weimar crisis, prices doubled every 48 hours, and banknotes were burned as winter fuel. See REINHART, C. M., & ROGOFF, K. S., "From financial crash to debt crisis", *American economic review*, vol. 101(5), 2011, pp. 1676-1706.

TABLE 1.
FUNCTIONS AND PROPERTIES OF SOUND MONEY.

Functions	Properties	
(1) Widely accepted medium of exchange (primary function) Money is the most liquid (saleable) good. (2) Store of value (3) Unit of account	(Scale)	P1: Easily divisible and combinable
		P2: Homogeneity
	(Space)	P3: Easily transportable
		P4: Easily concealable / privacy-preserving
	(Time)	P5: Resistance to deterioration
		P6: Relative scarcity

3. RISKS OF THE FUTURE DIGITAL EURO.

At the time of writing, the Digital Euro (DE) remains a project rather than an implemented reality. The investigation phase began in 2021, concluding in October 2023 with the decision of the European Central Bank (ECB) to advance the project – though without a final determination on its issuance date or conditions.[21]

The initiative is now in its preparation phase, which includes infrastructure development (technical testing with banks and payment providers) and deliberation on legislative proposals addressing the project's most sensitive aspects. This critical phase will ultimately culminate in a final policy decision by the ECB concerning both the Digital Euro's proposed issuance framework and the projected timeline for subsequent implementation stages. Based on currently available indications and expert assessments, the prevailing expectation points toward an affirmative ruling, with what would most probably be a carefully staggered implementation phase potentially commencing no earlier than 2026, or possibly later.

Given the project's provisional status, both the core features outlined below (Section 3.1) and the risks subsequently identified (Section 3.2) must necessarily be approached with caution and recognized as tentative.

21 "A stocktake on the digital euro. Summary report on the investigation phase and outlook on the next phase", ECB, October 18th, 2023. Available here:
https://www.ecb.europa.eu/euro/digital_euro/progress/shared/pdf/ecb.dedocs231018.en.pdf

3.1. Core features.

The DE will be a digital currency issued by the ECB – that is, by a *central bank*. Several pioneering central bank digital currencies (CBDCs) already exist, such as the Bahamas' Sand Dollar, Sweden's e-Krona, or China's Digital Yuan.[22] To understand the distinctive features of the future European CBDC, it is useful to examine the two main forms of money currently used by citizens: physical cash and digital money, since the DE combines characteristics of both.

Physical cash remains today's legal tender. In Europe, it is issued directly by the ECB and consists of tangible money in the form of coins and banknotes of varying denominations. Consumers making cash payments generally maintain their anonymity and privacy (P4). For accounting and tax purposes, merchants must record certain essential transaction details, but these usually exclude the buyer's personal information.[23]

In practice, the technical possibility of leaving no transactional trace – when mutually agreed by both parties – further reinforces systemic anonymity and, consequently, the elevated privacy protections users actively seek. It must be acknowledged that the inherent untraceability of physical cash renders it particularly attractive for underground economic operations and various forms of illicit financial activities. At the same time, however, this same characteristic facilitates essential commerce for vulnerable demographic groups who face limited access to modern digital financial services, including geographically isolated populations, economically marginalized communities, and elderly people who may struggle with technological adoption. Cash also has the advantage of involving no transaction costs for users, as no third party needs to mediate the payment process (we will overlook the fact that issuance costs are ultimately borne by taxpayers). Cash transfer is straightforward and requires no third-party delegation (P3).

The other prevalent form of money is digital currency. While neither corporeal nor tangible, it would be erroneous to assume that digital money operates beyond fundamental physical laws. All electronic transactions inherently occupy *bits*, demanding both energy expenditure and physical storage infrastructure. This money essentially represents digitally recorded payment

22 See CHENG, Mikayla. "Advantages and Disadvantages of the Chinese Digital Yuan". Sigma: Journal of Political and International Studies, vol 41(1), 2024, pp. 23-48.

23 However, certain transactions do require buyer identification even when paying in cash. In Spain, for instance, purchasers must be identified for transactions exceeding €1,000 (Article 7.1 of Law 7/2012 of 29 October, "*de modificación de la normativa tributaria y presupuestaria y de adecuación de la normativa financiera para la intensificación de las actuaciones en la prevención y lucha contra el fraude*"). Identification is also mandatory in jewelry stores, precious metal dealers, real estate agencies, and specific gaming activities - regardless of the amount in these cases.

promises from commercial (not central) banks to depositors, with payments being exchanges of claims between commercial bank customers.

Notably, the quantity of digital money far exceeds physical cash, as commercial banks are empowered – through specific mechanisms – to literally create new digital money *ex nihilo,* i.e. 'out of thin air'.[24] This practice inevitably compromises the "relative scarcity" (P6) required of sound money, explaining why current fiat money performs poorly as a "store of value".

Despite these concerns, digital money offers the incomparable advantage of being extremely easy to move (P3). Payments occur through electronic record-keeping accessible globally via internet, eliminating the need for co-location. This benefit comes at the cost of privacy erosion (P4). Digital money use means that extensive transaction data, including party identities, becomes easily accessible. Payments link to financial product holders (typically current accounts and credit/debit cards), with this information stored in financial institutions' databases. Consequently, institutions can build customer profiles to approve or deny services.

More significantly, governmental authorities retain the power to scrutinize citizens whenever financial transactions trigger suspicions. While such traceability may effectively combat criminal activity and money laundering, it simultaneously establishes systemic conditions conducive to potential power abuses and arbitrary asset confiscations.

The future DE is expected to blend cash and digital money features. As a *central bank digital currency*, the DE will be issued directly by the ECB, just as physical cash is today. It will represent a digital euro with 1:1 parity to physical euros, accessible to individuals and businesses. When described as "digital cash", we must examine how it will resemble cash and how it will differ.

Being ECB-backed, this euro version avoids the *insolvency risk* of commercial bank-created digital money. This warrants clarification. Currently, those keeping savings in physical cash remain unaffected by commercial bank failures, while demand deposit holders risk losses (at least partial).[25] This provides cash (in either physical or CBDC form) with a distinct advantage. Nevertheless, given that the monetary system fundamentally reports to government credibility, the DE cannot fully remove the inherent risk that unchecked money supply growth might undermine its crucial "store of value" function.

In its form, the new euro will not be tangible like current cash, but digital. This means access will require apps or digital wallets compatible with the ECB-

24 Fractional reserve banking is a system where banks hold only a fraction of their deposits in reserve, lending out the rest to borrowers, so that *new* money is introduced into the system.

25 In Spain, for instance, the Deposit Guarantee Fund for Credit Institutions (*Fondo de Garantía de Depósitos de Entidades de Crédito*) insures up to €100,000 per account holder per bank.

controlled platform. Consequently, transactions can never be fully *anonymous*. Unlike banknotes that leave no trail of handlers, digital operations always leave traces. Despite ECB assurances about transaction privacy (especially for small amounts), promises could be broken. Currently, digital money transactions reside in commercial bank records, with banks disclosing information to authorities when required. This step would disappear with the DE.

Another key difference from physical cash is *mandatory intermediation*: cash requires no third party between transacting parties, whereas the new "digital cash" will always need authorized intermediaries (could be banks or platforms). This likely entails nominal transaction fees, however minimal, to sustain the essential technological infrastructure.

Regarding *loss risk*, the digital euro will face technical failures or cyberattacks but will not suffer physical loss or theft like cash. The greatest uncertainty persists regarding its widespread adoption: while cash currently enjoys legal tender status that cannot be refused for payments (constituting a mandatory payment discharge mechanism), it remains unclear whether the DE will fully inherit this characteristic, since mandatory acceptance decrees would demand both universal merchant/user adoption and comprehensive prior technological infrastructure deployment.

These represent the foundational features of the forthcoming DE. Having outlined them, we may now examine how the new CBDC's defining characteristics interface with money's core properties, while cautiously speculating about their broader socioeconomic impacts.

3.2. Potential Impacts on the Properties of Sound Money.

We must reiterate that the Digital Euro's effects on money's various properties will depend on how authorities ultimately implement the CBDC and how users respond to it. As both factors belong to the future and remain uncertain, the following paragraphs present cautious conjectures, i.e. carefully outlined hypotheses based on current information. Some predictions may not materialize, while unforeseen outcomes may emerge.

In any case, we will examine the DE's features against each of the six properties (P1, P2, P3, P4, P5, P6), organizing the discussion through the same analytical lenses (scale, space, and time) previously established. As noted earlier, deficiencies in these properties jeopardize a good's ability to properly fulfil money's essential functions: serving as a "widely accepted medium of exchange", "store of value", and "unit of account".

3.2.1. Impact on Scale–Factor Properties.

We established that sound money must be "easily divisible and combinable" (P1) and enjoy "homogeneity" (P2) in its irreducible units. Regarding the first property, there appears to be no practical difference between current commercial bank-created digital money and the future DE. The electronic format effortlessly divides and aggregates monetary values through information *bits* that manifest as pixel combinations on users' device screens. Managing large or small amounts is neither more nor less costly (unlike handling physical money – carrying 5,000 one-cent coins is demonstrably more cumbersome than carrying a single €50 banknote). Thus, P1 seems unaffected by the DE's introduction.

The impact on "homogeneity" of irreducible units (i.e. euro cents in most transactions) proves more uncertain. Observing current realities reveals that neither physical cash nor digital money maintains perfect homogeneity. A growing number of consumers now favour cashless payment methods to circumvent both the transactional fees associated with ATMs and the inconvenience of maintaining precise cash amounts for every potential spending scenario. The following table clearly illustrates the sharp decline in consumer cash usage in just one year in Spain, a country that can serve as a benchmark for economically developed nations:

TABLE 2.
EVOLUTION OF CASH USAGE FROM 2023 TO 2024 IN SPAIN.[26]

Use of cash	2023	2024
a) Daily	65%	57%
b) One or more times per week	25%	25%
c) Less frequently	9%	15%
d) Does not use	1%	3%

Meanwhile, businesses (not consumers) exhibit heterogeneous attitudes: highly digitalized multinationals often resist cash due to security and custodial expenses, while others actively encourage it through discounts, both for financial savings and, admittedly, looser accounting practices. The simultaneous

26 See the Bank of Spain's 2024 report "Estudio sobre hábitos en el uso de efectivo [Study on Cash Usage Habits]", available online [here]:

https://www.bde.es/wbe/es/areas-actuacion/billetes-monedas/estudios-publicaciones-relacionadas-efectivo/estudio-sobre-habitos-uso-efectivo/

circulation of different monetary instruments (currently dominated by cash and digital forms), each possessing unique characteristics and benefits, inherently prevents complete monetary uniformity. In practice, users perceive and value a digital euro differently from a physical €1 coin, with variations occurring across different transactional contexts and individual preferences.

Predicting the DE's exact impact on P2 remains challenging, but three anticipatory observations emerge. First, being digital in nature, users will probably perceive and use it more like existing digital money than traditional cash. Second, considering potential privacy erosion (to be discussed in the following section), all else being equal, the DE may face marginally lower preference than existing digital money. Third, introducing a third monetary modality – with features distinct from existing options – will further compromise unit homogeneity, slightly distorting money's "unit of account" function.

3.2.2. Impact on Space-Factor Properties.

We established that sound money should ideally be "easily transportable" (P3). In this regard, the Digital Euro appears unlikely to diminish the already outstanding performance of current digital money. In fact, given that today's digital transactions still depend on third-party reliability (commercial banks, financial intermediaries), an additional advantage of the DE is that it will not require assuming that third party's solvency. Perhaps the risk to this property reports to optimal technological development of the transaction platforms, but assuming this is achieved (which may be overly optimistic), there is no reason to believe that the third property of sound money would be negatively affected.

We have also stated that sound money should ideally be easily concealable and difficult to trace, as this enhances the *privacy* users desire (P4). This property strikes us as the most controversial of all, warranting more extensive reflection.

Privacy is not a dichotomous good (either present or absent) but rather exists on a spectrum. A person gradually loses privacy as more parties gain access to information one wished to keep private. At present, it is true that most citizens *voluntarily* surrender some privacy when choosing digital payments for transactions that could be made in cash (the word "voluntarily" here doesn't imply fully informed consent regarding consequences, but rather indicates the absence of sanctions for not doing so).

Naturally, certain transactions cannot realistically be conducted in cash, given that bank accounts or digital payment systems are essential for receiving wages, settling utility bills, processing insurance premiums, and similar obligations. In today's economy, reliance on digital money has become virtually unavoidable for participating in everyday financial life. However, in cases where citizens could pay cash but choose not to, our preferences become clear. We have

traded privacy (untraceability) for the convenience of digital money. Digital transactions remain stored in financial institutions' databases, meaning privacy-conscious users must trust that these entities will comply with data protection regulations and that authorities will restrain themselves to requesting only strictly necessary information.[27]

However, privacy is not only gradual in the aforementioned sense, but citizens may suffer significantly more severe harm when those who access the information – even if few in number – wield power that enables them to sanction users in some manner. Privacy diminishes in a gradual manner as the relative power of the party controlling the information grows stronger. Consequently, it seems significantly more hazardous when sensitive data becomes directly available to governmental authorities (as is anticipated with the implementation of DE) compared to private third parties that possess no official enforcement capabilities.

This privacy concern connects directly to philosophical conceptions of freedom, particularly those of (i) liberalism and (ii) republicanism. This proves particularly insightful because, while at first glance liberalism – with its aversion to state intervention – might seem naturally more hostile toward the future DE, there exists a specific element within the republican notion of freedom that highlights a particular risk posed by the new currency.

Let us start with Liberalism, which is not a monolithic doctrine (this is probably true of any doctrine) but rather an umbrella term encompassing various schools distinguishable by their specific political visions.[28] Nevertheless, we can coalesce liberalism around a particular notion of freedom, frequently termed "negative liberty". An individual is free to the extent that others respect

27 This gradual, widespread erosion of privacy can be partially explained by the "boiling frog" analogy (CLERC, Olivier, *Invaluable Lessons from a Frog*. Dreamriver Press, 2009.). Had citizens abruptly transitioned from complete privacy to today's reality overnight, we likely would not have tolerated it - just as a frog would instantly leap from boiling water. However, the incremental changes over recent decades have led us to accept partial privacy losses with little resistance. This mirrors how a frog in cold water gradually adapts as temperatures rise, until - exhausted and weakened - it can no longer escape the boiling pot.

28 On one end of the spectrum, anarcho-liberalism or anarcho-capitalism advocates the complete abolition of the state, considering its existence incompatible with individual freedom. Notable thinkers from this school include, for example, Murray Rothbard, Roderick Long, and Hans-Hermann Hoppe. Minarchist ('night-watchman') liberalism, on the other hand, defends a sort of "minimal state", arguing for the existence of a government limited to the essential institutions required to protect citizens from aggression (namely: police, military, and judiciary). Prominent minarchist authors include Ludwig von Mises and Robert Nozick. Other liberal thinkers support the existence of the state and assign it functions beyond those envisioned by minarchism, such as the provision of certain basic social services, monetary policy regulation, or active oversight of anticompetitive practices. Key figures in this vein include German ordoliberals like Walter Eucken, Wilhelm Röpke, and Alexander Rüstow, as well as thinkers from other schools, such as Friedrich Hayek or Milton Friedman (depending on some of their arguments).

their sphere of non-interference – that is, to the degree they avoid coercing or aggressing against them.[29] Just as theft constitutes aggression (violating property rights), other restrictions on private property represent illegitimate interferences undermining individual autonomy.[30]

An individual's degree of freedom grows in direct proportion to their capacity for autonomous decision-making regarding the disposition of their property (monetary assets included), free from externally mandated limitations. Viewed through this lens, inadequate privacy protections (P4) create conditions where governing bodies can enforce punitive measures against individuals – a circumstance that, when realized, should be interpreted as an infringement of fundamental negative liberty rights (excluding rare, legally justified exceptions).

The republican notion of freedom introduces a nuanced distinction.[31] Republican freedom maintains that an individual is free (beyond mere absence of aggression) when not subjected to arbitrary domination – the concept of "freedom as non-domination". The subtlety lies in how individuals might never suffer outright aggression yet remain trapped in contexts of structural inequality or power asymmetries creating dependency. Consider a professor who, aware of their dominant position, requests a favour from a student. The student, recognizing this hierarchical dynamic, may comply despite no explicit threat.

Comparing republican notion of freedom with the liberal conception outlined above, it is worth noting that, for liberals there must be some form of threat from subject A toward subject B for freedom (in this case, freedom of B) to be violated according to the notion of "negative liberty". For liberal thought, the mere existence of a situation of "domination", imbalance, or unequal bargaining power between A and B (e.g., teacher/student, employer/employee, etc.) is insufficient to render the agreement between them unjust. If A and B entered into that relationship freely (without coercion), then there is no injustice unless there is an explicit threat (in this case, from A toward B) that oversteps the boundaries of what was agreed upon.

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29 "Classical liberals or libertarians emphasize the near absolute freedom of the individual to do as he pleases as long as he does not initiate the use of force against others" (HUDGINS, E. "Ludwig von Mises and The Ethical Imperative". *Cato Institute,* vol. VII, no. 1, 1994, p. 6). The notion of negative liberty became firmly established after BERLIN, Isaiah. "Two Concepts of Liberty". In Hardy, H., edit., *Liberty* (ed. 2002), Oxford University Press, Oxford (UK), 1958.

30 Sobre el derecho de propiedad como derecho individual, añadido a los derechos sobre el propio cuerpo, es de gran influencia la tesis de LOCKE, John. *Segundo tratado sobre el Gobierno Civil: Un ensayo acerca del verdadero origen, alcance y fin del Gobierno Civil.* Mellizo, Carlos, transl., Tecnos, Madrid, 2010 [1689], ch. 5). Para un contenido específico del derecho de propiedad en el liberalismo, ver HONORÉ., A. M. "Ownership", in *Oxford Essays in Jurisprudence*, Guest, A. G.(edit.). Oxford University Press, Oxford (UK), 1961.

31 See PETTIT, Philip. *Republicanismo. Una teoría sobre la libertad y el gobierno.* Domenech, Toni, transl., Paidós, Barcelona, 1997, ch. 2.

Returning to the republican notion of freedom, it is reasonable to say that the student who, out of fear of hypothetical reprisals, obeys their professor is not in a position to make a fully free decision. This nuance highlights the privacy risk (and consequently freedom risk) inherent to authorities having direct access to all DE transaction records. The critical concern is not merely potential sanctions, but the latent threat of authorities abusing their dominant position. While current intentions appear reasonable,[32] any institutional design enabling governmental overreach inherently undermines money's desired "privacy" (P4).

Note that we refrain from judging whether increased governmental oversight is justified. We merely observe that if citizens perceive their privacy as compromised, they will probably prefer alternative money forms. Furthermore, privacy deficits (P4) will cascade into "homogeneity" (P2) issues, as less traceable euros (physical cash or commercial bank digital money) may become preferable to the new format.

3.2.3. Impact on Temporal-Factor Properties.

We established that sound money should exhibit "resistance to deterioration" (P5) over time. In this regard, there is no inherent reason to expect the DE to behave differently from existing digital money. Physical cash can indeed deteriorate over time (with banknotes showing particularly noticeable degradation after years of circulation), while digital money – whether in the form of CBDCs or privately issued by financial institutions – remains fundamentally intact except in cases of catastrophic energy disruptions or widespread electrical grid failures**.** Nevertheless, among the many potential risks, there exists one especially apocalyptic scenario – far more troubling than others – that warrants careful consideration.

While physical cash faces no deterioration risks beyond material decay, it remains *technically possible* to program the DE with expiration dates.[33] Such expiration- programmed euros would need to be spent or otherwise disappear or lose value. This could stimulate consumption, potentially driving price

32 "People should be able to choose how much information they want to disclose, *so long as they comply with prevailing laws*", said Christine Lagarde. See the ECB Blog, "Key objectives of the digital euro": https://www.ecb.europa.eu/press/blog/date/2022/html/ecb.blog220713~34e21c3240.de.html

33 In the early stages of the Digital Yuan, there appeared to be potential for broader use. However, as of today and to the best of our knowledge, the only concrete development has been the temporary validity of certain consumer subsidies introduced post-pandemic (but not the digital currency itself). See Economic Times, 2021, "Digital Currency: Yuan Comes with an Expiry Date: Spend or It Will Vanish", Economic Times, April 14.

https://bfsi.economictimes. indiatimes.com/news/policy/digital-currency-yuan-comes-with-an-expiry-date-spendor-it-will-vanish/82059471.

indices upward while possibly boosting employment (though the inflation-unemployment relationship remains hotly debated).

Currently, we see no grounds to anticipate such measures. Suffice it to recall that the ECB's primary mandate "shall be to maintain price stability,"[34] not employment rate improvement. Yet this risk merits attention, as future EU monetary policy trends could institutionalize designs enabling this option, undermining money's role as a social lubricant. In these circumstances, a significant portion of the population would probably resist adopting the new digital euro format, preferring instead to utilize less intrusive alternatives such as existing digital payment systems or traditional physical currency (should it remain accessible). Unless this resistance scenario materializes, the digital euro's implementation seems unlikely to adversely affect the fifth monetary property (P5): "resistance to deterioration".

We also identified "relative scarcity" (P6) as essential for sound money. Here, the current *fiat* system already embodies this flaw's extreme version. Our money, unbacked by scarcity-enforcing assets (whether physical like gold or digital like Bitcoin), constantly risks stock-to-flow ratio collapse and consequent saver value erosion. Today, money supply increases (*flow*) occur primarily through commercial banks – but only because authorities legitimize such mechanisms. Thus, claiming that the DE secretly aims to accelerate already-high monetary inflation seems untenable, as policymakers could already achieve this through existing tools like fractional reserve reductions. However, the DE's issuance will not follow predetermined scarcity protocols, instead depending entirely on authorities' discretion. Whether money originates from central or commercial banks, any flow increase diminishes the stock-to-flow ratio – eroding a monetary good's desirable "relative scarcity" (P6). Only time will reveal this property's fate, but the DE's design offers no inherent safeguards to inspire optimism.

34 Treaty on the Functioning of the European Union, art. 127.