Judges Assessing the Independence of Judges. Historical Foundations and Practical Procedures in Facing the Threats against the Rule of Law in Europe*

MARTIN SUNNQVIST, XAVIER GROUSSOT, LOTTA MAUNSBACH

1. *Introduction*

The existence of impartial and independent courts is a cornerstone of the success of the European project. The recent renaissance of "illiberal States" jeopardises the application of the rule of law and risks destroying the foundations of the EU legal order. In 2018, the Court of Justice of the European Union (CJEU) began developing two new lines of case-law. Firstly, the CJEU found itself to be competent to rule on matters regarding the independence of the judiciary, which used to be part of the purely internal competence of the Member States. Secondly, the CJEU empowered national courts to perform a "rule-of-law check" of courts in other Member States by assessing the independence and impartiality of judicial authorities having issued a European Arrest Warrant (EAW). This represents a new task for what are often courts of first instance.

In the project, we aim to analyse this recent evolution using a European, historical and procedural perspective. We combine a historical analysis of the development of the rule of law and of the similar – but not identical – concepts of "Rechtsstaat" and "État de droit" with an analysis of the roles of the EU institutions and the procedural aspects of a "fair trial" and of "mutual trust" (and distrust) between courts and judiciaries in different Member States. We believe that this will be a fruitful way to obtain a better understanding of the strengths and weaknesses characterising the protection of the independence and impartiality of the judiciary in Europe.

In this introductory article, we explain how the project was formed, how it has developed and what we wished to achieve with the two-day online conference held on 28-29 September 2021 that constitutes the backdrop to the articles by Dorota Zabłudowska, Marie-France Fortin, Raffaella Bianchi Riva, Martin Sunnqvist, Xavier Groussot and Anna Zemskova, Birgit Aasa, and Lotta Maunsbach included in this issue of the journal. The main themes of those articles revolve around the historical and

ISSN 1593-0793 / ISBN 978-88-6056-825-0 / © eum 2022

procedural aspects relevant to our project, with questions such as, «How do we define the "rule of law" and the "Rechtsstaat" that we are discussing?», «What is the origin of these concepts?» and «What approaches can courts use in dealing procedurally with a rule-of-law crisis in another country?».

Our historical approach has a double rationale. While it is important to understand the historical development of the concepts we are using, we can also already see the historic dimensions of the ongoing developments: values that seemed to be secured in Europe after the fall of the Berlin Wall and of the "People's Republics" of Eastern Europe are again questioned, and as we write in 2022 the response of the EU institutions is partially held back by the unifying effects within the EU of supporting Ukraine against Russia's invasion.

According to the Finnish legal philosopher Professor Kaarlo Tuori, law can be analysed in terms of several layers[1]. In the surface layer, we find statutes, court decisions in individual cases and standpoints taken in the legal literature. In this layer, "law" can be understood as «the constantly changing outcome of an ongoing discussion where the legislator, the judges and the legal scholars all make their interventions»[2]. In a lower layer, we find the legal culture, with the general doctrines and principles of law, legal methods and patterns of argumentation. Finally, in the deepest layer, among the deep structures or «deep culture»[3] of law, the change is slowest; this is where we can find a pattern that «divides legal history into epochs, each dominated by a specific type of law»[4]. Those layers may influence each other in various ways. One of them is "sedimentation", which Tuori describes as follows:

> every act of legislation, every decision made in court, each piece of legal dogmatical research participates in the production, reproduction and modification of legal culture and the deep structure of law. From the perspective of the surface level, the legal culture and the deep structure of law can be regarded as sedimentations of the turbulent changes on the surface[5].

Whilst the legal culture and the deep structures make it possible to analyse difficult legal questions, for example in "hard cases"[6], they also restrict the possible outcomes of such analysis.

One tenet of Tuori's theory is that change is rapid at the surface level but progressively slows down deeper in the model. This makes it particularly interesting to analyse, especially from a legal-historical perspective, situations involving rapid change to aspects that could plausibly be found deep in the system. For example, the accession by a State to the European Convention on Human Rights (ECHR) or to the EU typically brings about important changes likely to affect such aspects[7]. According to Tuori, the "Rechtsstaat" is one of the aspects that are rooted deep down in the system; he defines it as «a state where the law's self-limitation functions»[8]. On this view, for courts to perform judicial review of legislation is not contrary to democracy but in fact guarantees the preconditions for democracy[9]. Assuming that the "Rechtsstaat" and judicial review of legislation are indeed aspects that have "sedimented down" to the "deep structures" or "deep culture" and are now under attack, the changes that might occur are of historic importance, which can be seen even as changes are proposed or ongoing.

In an EU context, the principles rooted deep in the system of the law can be discussed in terms of general principles of EU

law[10], such as the principle of the protection of fundamental rights[11]. The protection of the rule of law and the independence and impartiality of the judiciary also both arguably belong among those principles.

2. *Background to and aims of the project*

2.1. *The rule of law in Europe and the independence and impartiality of judges*

Since the early years of European integration, the existence of impartial and independent courts has been a cornerstone of the success of the European project. The rule of law prevails over the tyranny of illegitimate powers. As put by Walter Hallstein, the first President of the Commission, in a speech in 1962:

> This community […] is based on sound legal standards and its institutions are subject to legal control. For the first time, the rule of law takes the place of power and its manipulation, of the equilibrium of forces, of hegemonic aspirations, and of the game of alliances. […] In the relations between Member States, violence and political pressure will be replaced by the pre-eminence of the law[12].

The impartiality and independence of judges is also a cornerstone of the rule of law and the "Rechtsstaat" and of the right to a fair trial according to Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union (CFR). In the preamble to the Treaty on European Union (TEU), the Member States confirm «their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law», and according to Article 2 TEU,

> [t]he 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.

The renaissance of «illiberal states»[13], to use the words of Viktor Orbán in 2014, which enact legislation destined to modify in depth the national judicial landscape and to shape a new (non-liberal) State, jeopardises the application of the rule of law and risks destroying the foundations of the EU legal order. At the moment, we see such tendencies not only in Hungary, but also – to a various extent – in Poland, Romania and Bulgaria. When we were preparing the project, we could see similar tendencies even in Italy, one of the EU's founding Member States: Matteo Salvini, who was then Deputy Prime Minister and Minister of the Interior, said on 9 January 2019 that «Poland and Italy will be part of the new spring of Europe» and that the EU elections were «vital for creating a "reformist" bloc that could overhaul the Brussels institutions from within»[14].

This «backsliding of the rule of law»[15] was reported, in the judicial context of impartiality and independence, by the Bureau of the Consultative Council of European Judges (CCJE)[16]. According to the 2017 edition of its *Report on judicial independence and impartiality in the Council of Europe member States*,

> [i]t is clear from the reports and requests that have been received by the CCJE during the reporting period that there have been continuing concerns about the proper implementation of relevant standards of the Council of Europe in a number of member States. In some cases and in

> some countries, these concerns are very serious indeed and the developments observed pose a threat to the very foundation of the rule of law[17].

In the 2019 edition of the report, the «concerns about the proper implementation of relevant standards of the [Council of Europe] in a number of member States» were described as «continuing», and it was repeated that, «in some cases and in some countries, the concerns are very serious and the developments observed pose a threat to the very foundation of the rule of law»[18]. In the EU legal order, there is a "Rule of Law Mechanism" in place which «provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law»[19]. An annual *Rule of Law Report*, so far published in 2020, 2021 and 2022[20], monitors significant developments relating to the rule of law in Member States as well as the justice system, the anti-corruption framework, media pluralism and other institutional issues related to checks and balances. However, those rule-of-law reports have been criticised for not being clear enough about the shortcomings in several countries and for not being effective in stopping the deterioration of the rule of law[21].

A further interesting development at the EU level is that Council Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget[22] (Budget Conditionality Regulation) includes the following definition (Art. 2 (a)):

> "the rule of law" refers to the Union value enshrined in Article 2 TEU. It includes the principles of 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; and non-discrimination and equality before the law.

In terms of terminology, it should be noted that "rule of law" in the English version of that definition corresponds to "Rechtsstaatlichkeit" (a noun based on an adjective based on the noun "Rechtsstaat") in the German one and to "État de droit" in the French one. There is reason to believe that the German preference for "Rechtsstaatlichkeit" over "Rechtsstaat" is due to the fact that the EU cannot be described as a "State" (German: "Staat"). Indeed, the terminology on this point is far from fixed. In the first CJEU judgment where the «principle of the rule of law within the Community context» was mentioned in the English version, the French version used the expression «[le] principe de la légalité communautaire», although the German one used «[der Grundsatz] der Rechtsstaatlichkeit in der Gemeinschaft» then as well[23].

According to recital 3 of the Budget Conditionality Regulation, the rule of law

> requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union [...] and other applicable instruments, and under the control of independent and impartial courts.

That recital then goes on to lay down that the "rule of law" requires the following principles to be respected, giving explicit references to the case-law of the CJEU for each of them:

- legality, implying a transparent, accountable, democratic and pluralistic law-making process[24];
- legal certainty[25];
- prohibition of arbitrariness of the executive powers[26];
- effective judicial protection, including access to justice, by independent and impartial courts[27];
- separation of powers[28].

What is especially noteworthy in our context is that the notion of effective judicial protection, including access to justice, by independent and impartial courts, is based on the *Portuguese Judges* and *LM* judgments, which will be discussed in the next section. Hungary and Poland asked the CJEU to annul the regulation, arguing that it lacked an appropriate legal basis, but the CJEU dismissed their complaints. However, the CJEU did rule that only violations of the principle of the rule of law that are relevant to the efficient implementation of the Union budget can provide reasons for withdrawing funds[29].

According to Article 7 TEU, the Council, acting by a majority of four-fifths of its members and after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU (quoted above). If it does, the suspension of rights of that Member State will then take place in two steps. Firstly, the European Council, acting by unanimity on a proposal by one-third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU, after inviting the Member State in question to submit its observations. Secondly, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. According to Article 354 of the Treaty on the Functioning of the European Union (TFEU), the Member State accused of breaching the Article 2 TEU values does not take part in the vote, but if there are several Member State with similar interests in this regard, the system easily ends in deadlock because of the requirement for unanimity. The Commission initiated an Article 7 procedure against Poland in 2017[30]; and in 2018, the European Parliament initiated such a procedure against Hungary[31]. So far, however, Member States have never unanimously agreed that there is «a clear risk of a serious breach» of the Article 2 TEU values. Hence it would appear to be clear that the mechanism of prevention and sanction provided for in Article 7 TEU is ineffective in stemming this backsliding of the rule of law.

Further, Article 258 TFEU allows the Commission to bring an infringement action where it considers that a Member State has failed to fulfil «an obligation under the Treaties». In case C-619/18, the Commission brought such an action against Poland for interfering with the independence of the judges serving on the Polish Supreme Court[32]. The CJEU granted interim measures against Poland on 17 December 2018[33] and handed down a judgment on 24 June 2019[34] in which it declared that, by lowering the retirement age of those judges and by granting the President of the Republic of Poland the discretion to extend

the period of those judges' judicial activity beyond the newly fixed retirement age, Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. This subparagraph states that «Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law». According to the CJEU, that subparagraph

> gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice[35].

The CJEU noted that the principle of the effective judicial protection of individuals' rights under EU law «is a general principle of EU law stemming from the constitutional traditions common to the Member States», and it also referred to Articles 6 and 13 ECHR and Article 47 CFR. Judicial protection requires, *inter alia*, that judges should be irremovable, which is why the CJEU found Poland to be in breach.

As regards the new Disciplinary Chamber of the Polish Supreme Court, the CJEU handed down a judgment on 15 July 2021 in which it declared that, by failing to guarantee the independence and impartiality of that chamber, by allowing judges of the ordinary courts to be charged with a disciplinary offence based on the content of their judicial decisions, by failing to guarantee that disciplinary cases were examined by a tribunal "established by law", and because of further procedural shortcomings, Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU[36].

The concept of the rule of law and that of the independence and impartiality of judges have never before received this much attention in EU law. And nor have they been so contested since the fall of the Berlin Wall and of the "People's Republics" of Eastern Europe.

2.2. *Two new lines of case-law:* Portuguese Judges *and* LM

In its judgment of 24 June 2019 in the first-mentioned *Commission v. Poland* case (C-619/18), the CJEU referred to two cases from 2018, the *Associação Sindical dos Juízes Portugueses* or *Portuguese Judges* case[37] and the *LM* case[38]. These two cases are also referred to in the Budget Conditionality Regulation, and they may in fact constitute the basis for the development of a new culture of judicial independence in Europe through "judge-to-judge dialogues". Importantly, these "judge-to-judge dialogues" are not only vertical (between the CJEU and the national courts) through the preliminary-ruling procedure but also horizontal (between national courts) through the new possibilities fashioned by this case-law. This dual dialogue is illustrated in an especially clear manner by the reasoning of the CJEU in *LM* and by the consequences in domestic law of that case for national judges.

Portuguese Judges and *LM* can be said to lay the cornerstone for two different lines of case-law. On the one hand, the CJEU has found itself competent to rule on matters regarding the independence of the judiciary, which used to be part of the purely internal competence of the Member States (the *Portuguese Judges* line of case-law). The

CJEU achieved this by using Article 19 TEU to assess whether a court asking for a preliminary ruling meets the standards of independence and impartiality. According to the CJEU, Member States have a justiciable duty under EU law to ensure judicial independence[39]. It should be noted that there has also been a string of references for preliminary rulings submitted by Polish courts asking for their national legal changes to be assessed from the perspective of independence and impartiality[40].

On the other hand, in the context of mutual recognition and in that of the EAW, the CJEU has empowered national courts, in their capacity as executing authorities, to perform a "rule-of-law check" of the issuing Member State by assessing the independence and impartiality of the issuing judicial authorities (the *LM* line of case-law). This reflects the empowerment of national judges as ordinary judges of Union law[41], but it does so in a new way. In *LM*, the CJEU ruled that «[t]he requirement of independence also means that the disciplinary regime governing [judges] must display the necessary guarantees in order to prevent any risk of it being used as a system of political control of the content of judicial decisions». The "rule-of-law check" is thus directly intended to assess independence.

These two lines of case-law are complementary and fit in well with the case-law on the independence and impartiality of bodies making references for preliminary rulings under Article 267 TFEU as well as with the case-law of the European Court of Human Rights (ECtHR) on Article 6 ECHR. As regards the preliminary-ruling procedure, the referring body must qualify as a court or tribunal within the meaning of Article 267 TFEU[42]. This is a matter for the CJEU to verify based on the request for a preliminary ruling. The preliminary-ruling procedure is in fact designed to guarantee that national courts and EU courts work together as if they belonged to a single legal community, to ensure the effectiveness of EU law in a "judge-to-judge dialogue"[43].

In the *Dorsch Consult* case of 1997, the CJEU emphasised that, when assessing whether a body having requested a preliminary ruling qualifies as a court or tribunal, it considers a number of circumstances, such as whether that body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. The preliminary-ruling procedure may be relied on only by a body which is responsible for applying EU law and which can be said to be a court or tribunal satisfying the criteria inherent in that classification. This is so because that procedure is an instrument for co-operation between the CJEU and the national courts, as was reaffirmed in the judgment in the high-profile *Achmea* case[44], which was delivered in 2018, only a few weeks after that in the *Portuguese Judges* case.

In *Wilson*[45], and as confirmed in *TDC*[46], the CJEU stated that the test of independence, a concept inherent in the task of adjudication, primarily involves determining whether the body in question is acting as a third party in relation to the authority that adopted the contested decision. As noted above, the preliminary-ruling procedure is designed to guarantee that national courts and EU courts work together as if they belonged to a single legal community. However, the *Wilson* case is also an example of how the criteria to establish whether a body

qualifies as a court or tribunal have most often been used to assess quasi-judicial bodies. Recently, by contrast, the question to be answered has often been whether ordinary national courts meet those criteria. If such courts were no longer accepted as tribunals or courts for the purposes of EU law, that would be a clear statement showing that the Member State in question does not satisfy the principle of the rule of law – but at the same time it would cut the lifeline between the CJEU and the national courts, which are highly likely to be under pressure in such a situation, fighting for their independence via the preliminary-ruling procedure.

In *LM*, the CJEU made it clear that an individual assessment must be performed before a person is surrendered to another Member State under an EAW. Specifically, the executing judicial authority must examine whether, in the circumstances of the case, there are substantial grounds to believe that the individual will be dealt with by a compromised court in terms of its independence and impartiality. This specific assessment is necessary even when the issuing Member State has been the subject of a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU in order for the Council to determine whether there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU. This means that national courts, often first-instance courts, have to investigate whether courts of other Member States are independent and impartial as well as, where the independence and impartiality of the courts of the Member State concerned is generally questioned, whether that could affect the individual in the case.

This individual approach has been questioned. Where there is a «breach of the fundamental right to an independent tribunal for any suspected person – and thus also for the requested person»[47], is it really necessary to make an individual assessment of that person's risk of not having a fair trial? However, the CJEU has upheld the requirement that an individual assessment is to be made, ruling that the executing judicial authority

> must determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject and whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued, and in the light of any information provided by that Member State […], there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State[48].

According to the CJEU, «to accept that systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, however serious they may be», give rise to a presumption to the effect that «there are substantial grounds for believing that that person will run a real risk of breach of his or her fundamental right to a fair trial if he or she is surrendered to that Member State» would lead to an «automatic refusal to execute any arrest warrant issued by that Member State». This would be a «de facto suspension of the implementation of» the EAW, and that would not be acceptable[49]. In fact, it is only in a very small number of cases that national courts have made use of their limited opportunities to refuse surrender[50].

The CJEU has stressed several criteria that are important for the assessment of

whether a court can be considered independent and impartial. For example, the court concerned must exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, such that it is protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions[51]. Through *Wilson*[52], there are references to the *Campbell and Fell* judgment of the ECtHR from 1984[53] as regards the interpretation of the guarantees of independence and impartiality in Article 6 ECHR. In that judgment, the ECtHR summarised and developed its case-law on judicial independence and impartiality into what came to be a standard phrase[54].

To all of this must be added the development in the ECtHR's case-law of the criterion of "tribunal established by law" set out in Article 6 ECHR (a criterion that also exists in Article 47 CFR). In fact, the ECtHR has rephrased that requirement into "tribunal established in accordance with the law" to stress that it is not only necessary for the court as an institution to have been established by law, but that the composition of the court must also be in accordance with the relevant rules and the judges must have been appointed in a correct way in a given case[55]. The ECtHR has developed a "threshold test" to answer «the basic question whether any form of irregularity in a judicial appointment process, however minor or technical that irregularity may be, and regardless of when the breach may have taken place, could automatically contravene that right»[56]. The analysis of the concept of "established in accordance with the law" has influenced the case-law of the CJEU[57].

Finally, in a case about the procedures for the appointment of judges in Malta, the CJEU made it clear that, although the organisation of justice in a Member State falls within the competence of that Member State, such procedures must safeguard the independence of judges. The CJEU added, interestingly, that a Member State cannot «amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law» and that the Member States are «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»[58].

3. *Development of the project with online conferences*

When we started the project early in 2020, we made rather detailed plans about what conferences we were going to participate in and what other scholars and project groups we were going to contact. This was important to us, since many scholars are working on issues that are similar and related to ours, and we needed to further develop our specific approach to the problems. However, the Covid-19 pandemic forced us to make certain changes; many meetings and conferences were cancelled or postponed, and, for most scholars, a great deal of time was consumed by adapting to new methods of teaching law. Like everybody else, we had problems predicting for how long the pan-

demic would last and when it would be possible to meet in person again.

We arranged two online seminars with invited scholars from other universities in the spring of 2021. The first one was with Dr. Cristina Saenz Perez (University of Leeds) on the topic of «An Autonomous Conception of the Rule of Law: The Experience of the EAW»[59]. The second was with Professor Hans Petter Graver (University of Oslo) on the topic of «Heroes of the Law», based on his book with the same name (albeit in Norwegian)[60].

Having realised that an in-person conference would not be possible in 2021 either, we then arranged an online conference on 28-29 September 2021. About 100 participants attended it, most of them from academia but also judges and some advanced-level students. We approached a number of speakers whom we knew to be working on interesting issues in relevant areas related to our project. Some of those speakers presented research that had already been published elsewhere, whilst some presented new research. This mixture was a deliberate choice, due to our remaining need to orientate ourselves in ongoing research.

We started the conference with a session on the theme of «Rule of law – the origins and the implementation of the thought that the ruler is bound by the laws». Professor Atria Larson (Saint Louis University) spoke about «Liberty and the Rule of Law in the Medieval Age», based on her contribution[61] to «A Cultural History of Democracy», published by Bloomsbury Academic in six volumes in 2021[62]. Each of those volumes contains a chapter on «Liberty and the Rule of Law». At first glance, it might seem anachronistic to discuss "the rule of law" as it manifested itself before the 19th century, when the term was made popular by Albert Venn Dicey in his *Introduction to the Study of the Law of the Constitution*, but the thought as such can in fact be traced back to Antiquity.

Next, Assistant Professor Marie-France Fortin (University of Ottawa) spoke about «The King Can Do No Wrong – the Evolution of the Rule of Law from the Late Middle Ages up to the 21st Century», Associate Professor Raffaella Bianchi Riva (University of Milan) spoke about «Independence of Advocates as a Requirement for Independence of Judges» and Associate Professor Martin Sunnqvist (Lund University) spoke about «The Rechtsstaat in a Substantive and a Formal Sense». In all three cases, those presentations have developed into articles included in this issue.

Finally, Associate Professor William Phelan (Trinity College, Dublin) talked about «Robert Lecourt and the Development of the Basic Principles of the EU Legal Order». This presentation was based on his recent book *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period*[63].

The next day, we started with the theme of «Procedure – how does a court assess whether another State does not adhere to the principle of the rule of law?». This is in fact a core problem in the aftermath of the *LM* judgment and will be further analysed in the project. Associate Professor Petra Bárd (Central European University/European University Institute) spoke on the topic of «How to Deal with the *LM* Test?»; an article by her and Professor John Morijn is to be published elsewhere.

Next, Postdoc Birgit Aasa (Copenhagen University) spoke on the theme of «Mutual

Trust and the Rule of Law», a presentation that has developed into an article in this issue. As is clear from the *LM* judgment, the principle of mutual trust and the protection of the rule of law can easily come into conflict in ways that are difficult to resolve. Professor Vincent Glerum (Rechtbank Amsterdam/University of Groningen) spoke about «The Case Law of Dutch Courts Relating to the EAW and Poland»; a text related to that topic by him and H.P. Kijlstra has since been published elsewhere[64]. The session was concluded by Assistant Professor Lotta Maunsbach (Lund University), who spoke on the theme of «Procedural Aspects on Impartial and Independent Judging. How Can a Court Decide Whether Another Court and its Judges are Impartial and Independent?», a presentation that has also developed into an article in this issue.

To learn more about the current status of judicial independence and the rule of law in Hungary and Poland, we had invited Viktor Vadász (Hungarian Judge, member of the National Judicial Council) and Dorota Zabłudowska (Polish Judge, board member of the Polish Judges' Association Iustitia) to present the current situation in their respective countries. Dorota Zabłudowska has developed her presentation into an essay included in this issue.

In a concluding discussion, many of the participants discussed how the concept of "the rule of law" can be defined. Our discussion received some guidance in the form of two presentations. First, Professor Xavier Groussot (Lund University) spoke on the theme of «The Distinction between "Rule of Law" and "Rule by Law". A common concept of "Rule of Law" in the European Union?», which he and Doctoral Candidate Anna Zemskova (Lund University) have developed into an article included in this issue. Second, Professor Theodore Konstadinides (University of Essex) spoke on the theme of «The Rule of Law in the UK Post-Brexit: An Uncommon Concept of "Rule of Law" outside the European Union?», partly based on his book *The Rule of Law in the European Union: The Internal Dimension*[65].

4. *The contributions to this issue*

As already mentioned, it is important for us to obtain a first-hand view of the development in some of the countries where the rule of law is endangered the most. In Poland, the judges' association Iustitia has been the staunchest opponent of the deterioration of the rule of law, in close co-operation with the International Association of Judges (IAJ) and the European Association of Judges (EAJ)[66]. It is therefore very important that Dorota Zabłudowska, a Polish judge and board member of Iustitia, has been kind enough to write «The battle for judicial independence in Poland, 2017-2022». Through her essay, she provides us with first-hand information about the pressures under which Polish judges are working.

Next, Marie-France Fortin analyses the *Miller I* and *Miller II* judgments of the United Kingdom Supreme Court in relation to the principle "The king can do no wrong". Those cases dealt with Brexit, specifically with the issue of whether Parliament had to be involved in the withdrawal from the treaties and whether the Prime Minister's advice to the Queen to prorogue Parliament was unreasonable and therefore unlawful. Professor Fortin argues that the many

understandings of "The king can do no wrong", taken as a whole, can offer an apt representation of the constitution. «The king can do no wrong» does not mean that the representatives of the State are immune; on the contrary, government ministers are politically accountable before Parliament and legally accountable before the courts.

Raffaella Bianchi Riva then analyses the legal profession, politics and public opinion, with some reflections on the independence of lawyers and the rule of law in modern Italy. She discusses the independence of lawyers from the Middle Ages onwards, but with a certain focus on the legal profession in Italy from unification in the second half of the 19th century and during the 20th century. This offers a particular vantage point from which to reflect on the dynamics underlying the relationship between the legal profession, politics and society as well as on the effects that lawyer independence exerts on the enforcement of the rule of law. Lawyers contribute, through their defence of their clients' interests, to the administration of justice by helping the judge reach the correct ruling. This means that the independence of lawyers is as important as the independence of judges. The backsliding of the rule of law in some EU Member States is also undermining the independence of the legal profession there.

The concepts of "rule of law", "Rechtsstaat", "État de droit", etc., which are central to the project, have been discussed in many books and articles. Martin Sunnqvist's article focuses on a particular aspect: the development of the concept of "Rechtsstaat" in the thinking of the German 19th-century scholars Robert von Mohl and Friedrich Julius Stahl, of which the former first developed that concept in a substantive sense and the latter then developed it in a formal sense. The juxtaposition and analysis of their reasoning is used to shed light on later discussions about the "Rechtsstaat".

Through Xavier Groussot and Anna Zemskova's article, we turn to the manifestations of the rule of law in the EU legal order. The authors first look at the evolution of the concept of "the rule of law" in the EU from the early years of European integration, juxtaposing its evolution with that of the doctrine of general principles. Then they analyse the concept of "illiberal democracy", finding that its main ingredients are populism and legalism, or "rule by law", which they contrast with the rule of law. Finally, they conclude that, whilst "illiberal democracy" constitutes a clear and present threat to the rule of law and to constitutional democracy, the rise of "rule by law" in illiberal States paradoxically also constitutes the main source of development and concretisation of the rule of law in the EU, where what used to be an undefined and invisible principle has developed into a defined, explicit and justiciable principle.

Another important principle of EU law is that of mutual trust between Member States. In her article, Birgit Aasa places that principle in the context of the rule of law. Even though she discusses developments in recent decades, her perspective is historical in the sense that the gradual development and reconceptualisations of the principle of mutual trust are discussed. Her conclusion is that, however fundamental the principle of mutual trust is for EU co-operation, it can also be used for questionable purposes that undermine the rule of law, namely as an argument against claims based on fundamental rights and as an argument for upholding unlawful and erroneous decisions.

Finally, Lotta Maunsbach examines procedural aspects of impartial and independent judging. She analyses why the Polish court system is considered to violate the principle of the rule of law. In order to do that, she reviews the criteria that must be met for a decision-making body to qualify as a "tribunal" for the purposes of Article 6 § 1 ECHR and Article 47 CFR. This is followed by a closer analysis of one of those criteria: that based on the concept of "independent and impartial tribunal", with a certain focus on the situation in Poland.

Taken together, the articles contribute to the analysis of the fundamental thought that a ruler is bound by the laws and can be held accountable in accordance with legal procedures. The rule of law and its key component – that the citizens have the right to a fair trial before an independent and impartial judge in a court established and composed in accordance with the law – are discussed in detail. In a future issue of this journal, we plan to continue our analysis of the procedural and historical aspects of the threats against the rule of law in Europe.

* The project «Judges Assessing the Independence of Judges. Historical Foundations and Practical Procedures in Facing the Threats against the Rule of Law in Europe» is being carried out at the Faculty of Law, Lund University, Sweden, in 2020-2022, with publications planned for 2023 as well. The members of the research group are Associate Professor of Legal History Martin Sunnqvist (Project Manager), Professor of EU Law Xavier Groussot and Assistant Professor of Procedural Law Lotta Maunsbach. The project is financed by Riksbankens Jubileumsfond (The Bank of Sweden Tercentenary Foundation).
 To some extent, Sections 1 and 2 of the text are based on the application for funding jointly written by Martin Sunnqvist, Xavier Groussot and Lotta Maunsbach, but several updates have been made based on the development of the law and the political situation in Europe and on the activities carried out within the project. We would like to thank Johan Segerbäck for his work on language review of the articles.

1 K. Tuori, *Towards a Multi-Layered View of Modern Law*, in Aulis Aarnio et al. (eds.), *Justice, Morality and Society. A Tribute to Aleksander Peczenik on his 60th Birthday*, Lund, Juristförlaget, 1997, pp. 427-442; K. Tuori, *Critical Legal Positivism*, Aldershot, Ashgate, 2002, pp. 147-216.

2 Tuori, *Towards a Multi-Layered View*, cit., p. 433.

3 K. Tuori, *Ratio and Voluntas. The Tension Between Reason and Will in Law*, Aldershot, Ashgate, 2011, pp. xi, 7, 40, 44 and 180.

4 Tuori, *Towards a Multi-Layered View*, cit., p. 434.

5 Ivi, p. 437.

6 Tuori, *Critical Legal Positivism*, cit., pp. 195-196.

7 See, e.g., M. Sunnqvist, *Konstitutionellt kritiskt dömande. Förändringen av nordiska domares attityder under två sekel*, Stockholm, Institutet för Rättshistorisk

Forskning, 2014, vol. I, p. 51.

[8] Tuori, *Critical Legal Positivism*, cit., p. 237.

[9] Ivi, pp. 229-234.

[10] X. Groussot, *General Principles of Community Law*, Groningen, Europa Law, 2006. See also X. Groussot and A. Zemskova's article in this issue.

[11] Case C-4/73, *Nold*, 14 May 1974, ECLI:EU:C:1974:51.

[12] W. Hallstein, speech made on 12 March 1962 at the University of Padua.

[13] V. Orbán, speech made on 26 July 2014 at the Bálványos Free Summer University and Youth Camp, Băile Tuşnad (Tusnádfürdő).

[14] Euronews, 9 January 2019: <https://www.euronews.com/2019/01/09/italy-s-salvini-goes-to-poland-for-discussions-on-eurosceptic-alliance>, September 2022; Reuters, 9 January 2019: <https://www.reuters.com/article/us-eu-poland-italy-salvini/italy-and-poland-want-new-spring-in-europe-salvini-idUSKCN1P318E>, September 2022.

[15] L. Pech, K. Scheppele, *Illiberalism within: rule of law backsliding in the EU*, in «Cambridge Yearbook of European Legal Studies», n. 19, 2017, pp. 3-47.

[16] *The independence and impartiality of the judiciaries of the Council of Europe member States*, CCJE-BU (2017) 11 (published in February 2018).

[17] CCJE Report 2017, 7 February 2018, p. 71, available at <https://www.coe.int/en/web/ccje/status-and-situation-of-judges-in-member-states>, September 2022.

[18] CCJE Report 2019, 30 March 2020, p. 66, available at <https://www.coe.int/en/web/ccje/status-and-situation-of-judges-in-member-states>, September 2022.

[19] Rule of law mechanism, <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en>, September 2022.

[20] Available here: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en#general>, September 2022.

[21] See, for example, A. Mungiu-Pippidi, *Unresolved Questions on the EU Rule of Law Report*, 20 October 2020, <https://carnegieeurope.eu/2020/10/20/unresolved-questions-on-eu-rule-of-law-report-pub-82999>, September 2022; S. Priebus, *Too Little, Too Late. The Commission's New Annual Rule of Law Report and the Rule of Law Backsliding in Hungary and Poland*, in «Verfassungsblog», 2 October 2020, <https://verfassungsblog.de/too-little-too-late/», September 2022.

[22] 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.

[23] Case 101/78, *Granaria BV*, 13 February 1979, ECLI:EU:C:1979:38, p. 5.

[24] Reference made to C-496/99 P, *CAS Succhi di Frutta*, 29 April 2004, ECLI:EU:C:2004:236, p. 63.

[25] Reference made to joined cases 212-217/80, *Amministrazione delle finanze dello Stato and others*, 12 November 1981, ECLI:EU:C:1981:270, p. 10.

[26] Reference made to joined cases 46/87 and 227/88, *Hoechst*, 21 September 1989, ECLI:EU:C:1989:337, p. 19.

[27] Reference made to C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117, pp. 31, 40-41; and to C-216/18 PPU, *LM*, 25 July 2018, ECLI:EU:C:2018:586, pp. 63-67.

[28] Reference made to C-477/16, *Kovalkovas*, 10 November 2016, ECLI:EU:C:2016:861, p. 36; to C-452/16 PPU, *Poltorak*, 10 November 2016, ECLI:EU:C:2016:858, p. 35; and to C-279/09, *DEB*, 22 December 2010, ECLI:EU:C:2010:811, p. 58.

[29] C-156/21, *Hungary v. Parliament and Council*, 16 February 2022, ECLI:EU:C:2022:97; C-157/21, *Poland v. Parliament and Council*, 16 February 2022, ECLI:EU:C:2022:98.

[30] 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 - 2017/0360 (NLE).

[31] 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)).

[32] See also the earlier case C-192/18, *Commission v. Poland*, 5 November 2019, ECLI:EU:C:2019:924.

[33] C-619/18 R, *Commission v. Poland*, 17 December 2018, ECLI:EU:C:2018:1021.

[34] C-619/18 R, *Commission v. Poland*, 24 June 2019, ECLI:EU:C:2019:531.

[35] C-619/18 R, *Commission v. Poland*, 24 June 2019, ECLI:EU:C:2019:531, p. 47.

[36] C-791/19, *Commission v. Poland*, 15 July 2021, ECLI:EU:C:2021:596.

[37] C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117.

[38] C-216/18 PPU, *LM*, 25 July 2018, ECLI:EU:C:2018:586. See P. Bárd, W. van Ballegooij, *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM*, in «New Journal of European Criminal Law», IX, n. 3, 2018-09, pp. 353-365.

[39] L. Pech, D. Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Sieps Report n. 2021:3, <https://www.sieps.se/globalassets/publikationer/2021/sieps-2021_3-eng-web.pdf>, September 2022, pp. 22-32.

[40] See D. Zabłudowska's article in this issue.

[41] Cf. C-106/77, *Simmenthal*, 9 March 1978, ECLI:EU:C:1978:49.

[42] N. Wahl, L. Prete, *The Gatekeepers of Art 267: On Jurisdiction and Admissibility of References for Preliminary Rulings*, in «Common Market Law Review» 2018, n. 55, pp. 511-548.

[43] Opinion of Advocate-General Wahl in joined cases C-58/13 and C-59/13, *Torresi*, ECLI:EU:C:2014:265.

[44] C-284/16, *Achmea*, 6 March 2018, ECLI:EU:C:2018:158.

[45] C-506/04, *Wilson*, 19 September 2006, ECLI:EU:C:2006:587.

[46] C-222/13, *TDC*, 9 October 2014, ECLI:EU:C:2014:2265.

[47] Joined Cases C-354/20 PPU and C-412/20 PPU, *L and P*, 17 December 2020, ECLI:EU:C:2020:1033, p. 21.

[48] Ivi, p. 55.

[49] Ivi, p. 59.

[50] The clearest example is the decision by Rechtbank Amsterdam of 10 February 2021 in case RK 20/771 13/751021-20, ECLI:NL:RBAMS:2021:420.

[51] C-216/18 PPU, *LM*, 25 July 2018, ECLI:EU:C:2018:586, p. 63; C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117, p. 44.

[52] C-506/04, *Wilson*, 19 September 2006, EU:C:2006:587, p. 51.

[53] ECtHR, 28 June 1984, *Campbell and Fell v. The United Kingdom*, app. no. 7819/77 and 7878/77.

[54] For example, in *Langborger v. Sweden*, app. no. 11179/84, 22 June 1989, § 32, this standard phrase was worded as follows: «In order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence (see, inter alia, the Campbell and Fell judgment of 28 June 1984 [---] para. 78). / As to the question of impartiality, a distinction must be drawn between a subjective test, whereby it sought to establish the personal conviction of a given judge in a given case, and an objective test, aimed at ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, amongst other authorities, the De Cubber judgment of 26 October 1984 [---] para. 24)». See M. Sunnqvist, *Impartiality and Independence of Judges: The development in European Case Law*, in «Nordic Journal of European Law», vol. 5, n. 1, 2022, pp. 67-95 (https://doi.org/10.36969/njel.v5i1.24499).

[55] ECtHR, 1 December 2020, Ástráðsson v Iceland, app. no. 26374/18.

[56] ECtHR, 1 December 2020, Ástráðsson v Iceland, app. no. 26374/18, § 235. See Sunnqvist, *Impartiality and Independence of Judges*, cit., pp. 89-91.

[57] C-487/19, *W.Ż.*, 6 October 2021, ECLI:EU:C:2021:798, pp. 124-130; C-542/18 RX-II, *Simpson*, and C-543/18 RX-II, *HG*, ECLI:EU:C:2020:232, p. 74.

[58] C-896/19, *Repubblika*, 20 April 2021, ECLI:EU:C:2021:311, pp. 63-64. See Pech, Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice*, cit., pp. 205-216.

[59] The topic relates to C. Saenz Perez, *Judicialising the Rule of Law Through the Preliminary Ruling*, in J.M. Castellà Andreu, M.A. Antonio Simonelli (eds.), *Populism and Contemporary Democracy in Europe. Old Problems and New Challenges*, Cham, Springer/Palgrave Macmillan, 2022, pp. 233-249.

[60] H.P. Graver, *Jussens helter*, Oslo, Universitetsforlaget, 2020. See also H.P. Graver, *Judges against Justice. On Judges when the Rule of Law is under Attack*, Heidelberg, Springer, 2015.

[61] A. Larson, *Liberty and the Rule of Law*, in D. Napolitano, K. Pennington (eds.), *A Cultural History of Democracy in the Medieval Age*, London, Bloomsbury, 2021, vol. 2, pp. 37-55.

[62] E.F. Biagini (ed.), *A Cultural History of Democracy*, London, Bloomsbury, 2021, with the following volumes: *... in Antiquity* (vol. 1, edited by P. Cartledge and C. Atack), *... in the Medieval Age* (vol. 2, edited by D. Napolitano and K.J. Pennington), *... in the Renaissance* (vol. 3, edited by V. Cox and J. Paul), *... in the Age of Enlightenment* (vol. 4, edited by M. Mosher and A. Plassart), *... in*

the Age of Empire (vol. 5, edited by T. Brooking and T.M. Thompson), *… in the Modern Age* (vol. 6, edited by E.F. Biagini and G. Gerstle).

63 W. Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period*, Cambridge, Cambridge University Press, 2019.

64 V. Glerum, H.P. Kijlstra, *The practice of the Netherlands concerning the European Arrest Warrant*, in R. Barbosa et al. (eds.), *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, Maastricht Law Series, vol. 23, The Hague, Eleven International Publishing, pp. 93-226.

65 T. Konstadinides, *The Rule of Law in the European Union: The Internal Dimension*, Oxford, Hart Publishing, 2017.

66 See, as just one example, the speeches by José Igreja Matos and Duro Sessa at «The March of a Thousand Gowns, Two Years Later» on 30 March 2022 <https://www.iaj-uim.org/news/the-march-of-a-thousand-gowns-two-years-later/>, September 2022.