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«EU's legal history in the making». Substantive Rule of Law in the Deep Culture of European Law*

MARTIN SUNNQVIST

1. *Introduction*

Since at least the mid-1980s, the European Union (or, as it was then, the European Economic Community) has been described as a «Community based on the rule of law»[1] – or, to make a more literal translation of other language versions, as a «Community based on law»[2]. This has implications for the legal status of the EU as an international organisation *sui generis* and for its inner functioning, with respect, for instance, to the primacy of EU law over national law and to the judicial review performed by its Court of Justice (CJEU) of legislation and other measures taken by the EU institutions.

Regarding the commonly made distinction between substantive and formal "Rechtsstaat" or "rule of law", it is clear to me that the version applied in EU law is of the substantive variety. I understand – to make the distinction as simple as possible – the substantive version of the *Rechtsstaat* as including the protection of positive rights and the formal version as focusing on formal legality[3]. The definition now prevailing in EU law includes several criteria that go far beyond the *Rechtsstaat* in a formal sense: it requires the law-making process to be transparent, accountable, democratic and pluralistic, and it calls for the separation of powers and effective judicial protection by independent and impartial courts to guarantee fundamental rights[4]. In analogy with a fundamental standpoint of Robert von Mohl, who developed the concept of the *Rechtsstaat* in the substantive sense, it can be considered important that States have voluntarily joined the EU and, in that sense, joined other States to form a Union, just like – in theory – individuals joined other individuals to form States[5].

In this article, I will first discuss the theoretical aspects of placing the *Rechtsstaat* or rule of law in the deeper layers of European law, seen as a multi-layered phenomenon. Then I will analyse the case-law of the CJEU to determine when and how the *Rechtsstaat* or rule of law came to be internalised as a

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fundamental principle in the EU's legal order. Finally, I will discuss the recent development of law in this area, contrasting the belief widely held not that long ago that the *Rechtsstaat* or rule of law was firmly established with the present need to develop those concepts further.

In that context, there is reason to underline that what we have witnessed in recent years is not only a quick backsliding of the rule of law in Europe[6] but also an extensive development, both in case-law and in statutory law at a European level, that has strengthened the rule of law and defined it more closely, such that it is no longer «essentially contested»[7] as regards the details of what it means. As Laurent Pech and Dimitry Kochenov have written, we have witnessed – and are witnessing – «EU's legal history in the making»[8]. That phrase is in fact an apposite "Leitmotif" for the entire project of which this article is a part.

2. *The rule of law and the Rechtsstaat as part of deep European legal culture*

2.1. *The three layers of law: the surface layer, legal culture and deep culture*

The project of which this article is a part is based on a theory of law as a multi-layered phenomenon[9]. The Finnish legal philosopher Kaarlo Tuori has introduced a model where he has structured law in three layers[10]. In the surface layer, we find statutes, court decisions in individual cases and positions 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»[11]. In a lower layer, we find the legal culture, with the general doctrines and principles of law, legal methods and patterns of argumentation. Here, we also find the «constitutional culture», that is, the «patterns of constitutional argumentation»[12]. Finally, in the deepest layer, among the deep structures or «deep culture»[13] 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»[14].

The layers may influence each other in various ways. One of them is "sedimentation", through which:

> 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[15].

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»[16]. On this view, for courts to perform judicial review of legislation is not contrary to democracy but in fact guarantees the preconditions for democracy[17]. In an EU context, the principles rooted deep in the system of law can be discussed in terms of general principles of EU law[18], such as the principle of the protection of fundamental rights[19]. The protection of the rule of law and the independence and impartiality of the judiciary also both arguably belong among those principles[20].

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, given the backsliding

Signboard of the Polish Constitutional Court

of the rule of law in Europe – the changes that might occur are of historic importance. It is perfectly possible to understand and analyse those changes as they unfold, or as they are proposed. In this context, it is relevant to elaborate further on how the "deep structures" or "deep culture" are to be understood in a longer time perspective.

In his book *Law and Revolution*[21], Harold Berman analysed the common foundations of the Western legal systems and identified important sources of the Western belief in the supremacy of law. As regards the "deep structures" or "deep culture" of law, Berman identified ten characteristics of the Western legal tradition. One of the characteristics that have defined Western law from the 12th century onwards is law's «supremacy over the political authorities»[22] – in other words, the rule of law or the *Rechtsstaat*.

However, as Berman made clear, this is not to be understood as meaning that the supremacy of law over political institutions – the rule of law or the *Rechtsstaat* – has prevailed at all times. In fact, Berman also identified a related characteristic, namely the existence of «tensions between the ideals and realities, between the dynamic qualities and the stability, between the transcendence and the immanence of the Western legal tradition»[23]. These tensions can, in fact, arguably also be placed in the "deep structures" or "deep culture" of law, because they can in themselves be seen as fundamental parts of our understanding of law.

This might seem problematic, if one sees the "deep structures" or "deep culture" as containing the eternal fundaments of law. However, this is not Tuori's view, since he considers the "deep structures" or

"deep culture" to be based on human action. The fundamental principles of law are not eternal, it is just that any change tends to be very slow. Just as statutes, judgments and statements in the legal literature can contradict each other, so can different parts of the legal culture. There can be, in the legal culture, different basic understandings of law and of the importance of principles, and those different understandings may lead to different positions being taken in the surface layer, for example in the legal literature or judgments. In turn, this can be explained through the existence of tensions in the "deep structures" or "deep culture" of law. Indeed, Tuori has discussed, for example, the tension between will and reason – *voluntas et ratio* – as based in the deep culture of law[24].

Another example is that Robert von Mohl and Friedrich Julius Stahl had different understandings of the concept of the *Rechtsstaat*, based on different fundamental understandings of the "social contract" and the "monarchical principle", respectively. This led to the development of the *Rechtsstaat* in the substantive and formal senses, respectively[25]. In fact, their explanations of the State as based on a "social contract" or the "monarchical principle" are a good example of tensions in the "deep structures" or "deep culture" of law; both of those explanations have been fundamental for our understanding of what law is. I would therefore conclude that making a claim to the effect that the *Rechtsstaat* is to be found in the "deep structures" or "deep culture" of law does not exclude the existence of different understandings of that concept or even the existence of tensions between those understandings.

When Kaarlo Tuori defined the rule of law or *Rechtsstaat* – which he did before he developed his theory of law as a multi-layered phenomenon – he divided the concept into four categories[26]: the liberal *Rechtsstaat*, the substantive *Rechtsstaat*, the formal *Rechtsstaat* and the democratic *Rechtsstaat*. The liberal *Rechtsstaat* was understood as an Enlightenment predecessor to the substantive and formal ones. As regards the latter two, Tuori discussed a problem that emerged with positivism, namely that, if the State determines the law, it cannot be restricted by law external to the State. Tuori's solution was to understand the *Rechtsstaat* as working through the «self-limitation of the state»[27]. This yielded a formal *Rechtsstaat* with «the principle of the legality of administration»[28] as its most important characteristic.

According to Tuori, the problem of the *Rechtsstaat* as working through the self-limitation of the State can be solved through understanding constitutions as a sort of «positivized social contract»[29]. He builds his fourth category, the democratic *Rechtsstaat*, on the constitutional legacy of the Enlightenment but also considers the development thereafter. Thus,

> in a democratic *Rechtsstaat*, the principle of popular sovereignty is realized by an independent and pluralistic civil society and its political public sphere or, rather, a net of autonomous public sub-spheres; the people is not conceived of as an aggregation of individual subjects. In a democratic *Rechtsstaat*, institutionalized political decision-making, such as the establishment of laws, is open to the influence and control of the civil society. The fundamental rights, especially the political ones, guarantee the autonomy of the civil society, its organisation and its internal processes of communication, and keep open the channels of communication between the civil society and the state apparatus, laying thus re-

> straints on the detachment of the political system[30].

The development of civil society cannot take place through law but must occur in the realm of political culture, even though there are juridical preconditions that must be met in order for it to develop. In this development, all types of human rights can be important. This is because the democratic *Rechtsstaat* requires not only a constitution based on democracy and human rights but also an active and independent civil society[31]. Admittedly, Tuori describes his democratic *Rechtsstaat* as closer to the *Rechtsstaat* in a formal sense than to the *Rechtsstaat* in a substantive sense, since in a democratic *Rechtsstaat* «no immutable value order is raised above positive law as its positive limit»[32]. In my view, however, this is not required in order for the *Rechtsstaat* to be of the substantive kind, and I believe that Tuori has later solved this problem through his model of law as a multi-layered phenomenon.

2.2. *Expert legal culture and general legal culture*

The relationship between law and civil society can be further discussed in light of Tuori's model. He has mentioned this relationship as regards «the separation of an elite or *expert culture* of legal professionals from *the general legal culture* of ordinary citizens»[33]. The expert legal culture consists of the general doctrines of different fields of law, which are «composed of two main ingredients: the general principles and the basic concepts of the field of law in question»[34]. Further, the expert legal culture contains «canons used in interpreting norms» and «in solving norm conflicts» as well as models or patterns for argumentation and decision-making[35].

What, then, about the general legal culture of ordinary citizens? I would like to add the observation that there are interactions between the layers of law both as seen from the perspective of the legal experts and as seen from the perspective of ordinary citizens. This is perhaps most clearly visible in the middle layer of legal culture, where the expert legal culture can be compared with the general legal culture of ordinary citizens, defined as public opinion or public attitudes in legal matters, as the general sense of justice, or – as civil society. When Tuori discussed different models of the *Rechtsstaat*, he mentioned civil society as the

> sphere of the voluntary, spontaneous political communication, organization, and activity of the citizens, independent of the state apparatus. Also the political public sphere, where political opinion and will formation takes place, is part of the domain of civil society[36].

In Sweden and the other Nordic countries, the relationship between the law and the "allmänna rättsmedvetandet" or "allmänna rättsuppfattningen" is often discussed. These expressions are difficult to translate into English, but "the general (or public) sense of justice" may not be too far off the mark. German has a similar concept in "das Rechtsbewusstsein der Allgemeinheit"[37]. The relationship between the expert legal culture and the "general sense of justice" goes both ways: there are cases where the Swedish legislator has wished to influence the general sense of justice through legislation, but there are also cas-

es where the same legislator has awaited changes in the general sense of justice and later adapted legislation in accordance with those changes[38]. It should be noted that it is impossible to pin-point the general sense of justice above and beyond the very rough conclusions that can be drawn from public-election outcomes.

As regards the surface layer, there are two relevant interfaces between lawyers and the general public where one may influence the other. One of those interfaces pertains to various decision-making processes, such as the drafting of legislation, where lawyers serve as mere assistants to elected representatives of the general public, such as members of Parliament fulfilling the function of legislators. The other interface pertains to adjudication, where lay judges or jurors have important functions alongside professional judges. And as regards the deep culture or deep structures of law, democracy and the rule of law are relevant not only for the law but for society at large.

Just as there are vertical relationships between the layers, I would argue that there is a horizontal relationship between the expert legal culture and the general legal culture of ordinary citizens. Hence the legitimacy of law does not depend only on «sedimentations of the turbulent changes on the surface»[39] down to the deeper layers, which in turn «provide a justification for individual legal regulations, court decisions, and legal dogmatical standpoints» emanating from the legal culture, which finds its «justification in the deep structure of law»[40]. Rather, the legitimacy of law can be threatened at all levels: at the surface level if it is generally known that a certain statute or judgments of a certain type are not enforced or complied with, at the level of the expert versus general legal culture if it is generally known that the law is not the prevailing normative system, and at the level of the deep structures or deep culture if democracy – and the rule of law and the *Rechtsstaat* – is not generally accepted in, and supported by, society at large. On the other hand, civil society can be a tremendously important factor in supporting the *Rechtsstaat* and the associated legislative and adjudicative processes[41].

2.3. *Traces of the* Rechtsstaat *in legal culture before 1800*

It should be pointed out that, in his theory of law as a multi-layered phenomenon, Tuori focuses on «mature modern law» from about 1800 onwards[42]. At that point, morality and law had been distinguished through Immanuel Kant's theories. The «positive nature of modern law» means that «law is based on and shaped through explicit human decisions»[43]. How, then, should we treat older legal sources in the light of this theory, considering that authors such as Isidore of Seville and Thomas Aquinas did not see themselves as actors in a surface layer of positive law shaped through explicit human decisions but rather as bound by divine or natural law? My reflection on this is that their own understanding of law does not prevent us from seeing their views as having sedimented down to what we today – if we accept Tuori's theory – understand as the "deep structures" or "deep culture" of law. In fact, natural law can be said to have sedimented down from the numer-

ous texts produced by scholars about it, to become «embedded in the positive legal order»[44].

Then, if we are to trace some basic standards of the rule of law or *Rechtsstaat* back in time, we may well start with the notion of the King's two bodies, as identified by Ernst H. Kantorowicz[45]. In the context of the difference between the king's "body natural" and "body politic", Kantorowicz discussed the basis for the king's legislation, contrasting the view that «what pleases the prince has the power of law» in a literal sense against Bracton's 13th-century elaboration of that concept[46]. The principle that what pleases the prince has the force of law (*Quod principi placuit, legis habet vigorem*) is an ancient Roman quote from Ulpian included in the *Digest* (Dig. 1.4.1. pr.)[47], which also includes another quote from Ulpian (Dig. 1.3.31.) to the effect that the prince is not bound by the laws (*Princeps legibus solutus est*)[48]. According to Bracton, what pleases the prince is law but «not what has been rashly presumed by the [personal] will of the king, but what has been rightly defined by the *consilium* of his magnates, by the king's authorization, and after deliberation and conference concerning it»[49]. The word *consilium* means both "counsel" and "council" – both "advice" and "group of people giving advice"[50].

Kantorowicz called Bracton's statement a «constitutionalist qualification of the dangerous word *placuit*»[51]. Before Bracton, his contemporary glossator Accursius had «displayed considerable ingenuity in extracting a constitutionalist doctrine»[52] from *Princeps legibus solutus est*, and Bracton was inspired by him. In support of a claim about the supremacy of law over political authorities, Berman has argued that, since the 12th century,

> in all countries of the West, even under absolute monarchies, it has been widely said and often accepted that in some important respects law transcends politics. The monarch, it is argued, may make law, but he may not make it arbitrarily, and until he has remade it – lawfully – he is bound by it[53].

Thus, even then there was a lawful (and hence an unlawful) way of making law, which is part of what would later be referred to as the *Rechtsstaat* in a formal sense. However, the problem was, of course, the difficulty of finding an authority higher than the monarch who might intervene in case of unlawful law-making. Certain fundamental documents, such as the English *Magna Carta* of 1215 and the Hungarian *Golden Bull* of 1222, did provide for a right to resist when the monarch broke the rules laid down in them, but that right was in most cases more of a theoretical than a practical nature[54]. However, the meaning of the notion that «the King can do no wrong» did develop over time from "the King is not entitled to do wrong" over "everything the King does is lawful" to "if a wrong was done, it was the King's ministers' doing and could not be imputed to the King"[55].

In this context, there are also traces of the medieval thinking that a king could act either in a private capacity or in the capacity of a representative of the Crown. For example, it is well known that the king could own land either as a private person or as a representative of the Crown[56] – and this was reflected in decision-making processes, where the king could act either in his capacity as a private landowner or in his capacity as a ruler, taking advice from his council or the parliament.

As regards the rule of law or *Rechtsstaat*, a similar notion with the meaning of "lawful government" or the like can be found among scholars from the early 16th century onwards[57]. From the 16th to the 18th century, fundamental laws (*leges fundamentales*) aimed at making the rulers bound by law[58]. In this vein, the separation of powers developed as a doctrine intended to protect the rule of law through checks and balances[59]. In this context, the rule of law was meant to safeguard liberty, and liberty was defined by the laws. This «liberty under the rule of law [...] successfully led the struggle against repressive government to triumph in the seventeenth and eighteenth centuries»[60]. The protection of liberty was also essential for an early developer of the concept of the *Rechtsstaat* like Robert von Mohl, even though he did not discuss the State in terms of the separation of powers[61]. What is essential, then, are different ways of limiting power, and of providing citizens with at least foreseeability and a prohibition against arbitrariness, but hopefully also some sense of certainty as to their legal situation.

Having now discussed the *Rechtsstaat* and the rule of law as part of the deep culture of law according to Tuori's model, and having examined how these concepts were already established in the fundaments of law before what Tuori calls «mature modern law» started to develop around 1800, it is time for us to have a look at the development of the *Rechtsstaat* and the rule of law in EU law.

3. *The rule of law*, Rechtsstaat(lichkeit) *and a Community based on law*

3.1. *The first appearances of the rule of law and the Rechtsstaat in EU case-law*

The adherence by a country to the rule of law has arguably always been an implicit criterion for membership of the EU (and its predecessors), even though the rule of law has largely been left undefined[62]. Through a declaration in 1991, and more clearly through the "Copenhagen criteria" in 1993, the rule of law was established as a criterion for accession. More precisely, it was laid down that a candidate country must have achieved «stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities»[63]. The rule of law was also mentioned in the preamble of the 1992 Maastricht Treaty. Subsequently, the Copenhagen criteria were taken into Article 49 of the Treaty of the European Union (TEU), which lays down criteria for membership, through a reference to «the values referred to in Article 2» (earlier, the principles in Article 6 TEU as amended by the Amsterdam Treaty)[64]. Article 2 TEU reads as follows:

> 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.

The first time that the CJEU mentioned the «rule of law» was in its 1979 *Granaria* judgment[65], where it noted that

> it follows from the legislative and judicial system established by the Treaty that, although respect for the principle of the rule of law within the Community context entails for persons amenable to Community law the right to challenge the validity of regulations by legal action, that principle also imposes upon all persons subject to Community law the obligation to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court[66].

What is reflected in this quote is the formal sense of the rule of law: legal certainty and an accountable law-making process require that the validity of regulations can be challenged, but this requirement must be balanced against the duty to follow rules that are valid. It should be pointed out that the significance of access to justice was also underlined in this judgment[67].

However, the English term "rule of law" – which is an obvious starting-point for someone writing in English – does not have entirely expected equivalents in the other language versions of *Granaria*. In the German version, «[der Grundsatz] der Rechtsstaatlichkeit in der Gemeinschaft» (the basic principle of the rule of law in the Community) is used[68]. In French, the "principle of legality" is referred to: «[le] principe de la légalité communautaire», and similar expressions are used in some other versions, such as the Danish one («Fællesskabets legalitetsprincip») and the Dutch one («het communautaire wettigheidsbeginsel»). In Italian, reference is made to legitimacy ("legittimità") rather than legality ("legalità"): «[il] principio della legittimità comunitaria».

The second time the CJEU mentioned the «rule of law»[69], in the better-known 1986 *Les Verts* case[70], it «explicitly set out the fully-fledged loyalty of the EU legal order to the principle of the rule of law»[71]. According to that judgment, it

> must first be emphasized […] that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty[72].

The CJEU's main finding with regard to the rule of law was again that legal certainty and an accountable law-making process required that the validity of regulations could be challenged. *Les Verts* has prompted the conclusion that the CJEU, by reviewing legislation, sets «"substantive" limits within which democratic government must take place»[73] and that it does so in a «context where [it] decide[s] to exercise a constitutional gap-filling role»[74].

Here, too, it is interesting to have a look at the terminology used. In the German version, we find «Rechtsgemeinschaft»[75], in the Spanish one «comunidad de Derecho», in the French one «communauté de droit» and in the Italian one «comunità di diritto»; in Portuguese, Danish and Dutch, similar expressions are used. In this case it is clearer that the English version deviates from the other languages, where the expressions used mean something along the lines of "Community based on law". In fact, the mention in the English version of the «rule of law» arguably adds something that is not present to the same extent in the other versions. However, this does not make *Les Verts* any less important in a discussion about the history of the concept of the rule of law in the case-law of the CJEU. In fact, whatever wording is used, at a substantive level *Les Verts* contains an important statement to the effect that there should

be judicial review in order to assess whether measures adopted by the EU institutions are in conformity with the EU's basic constitutional instrument. Even so, it is open for discussion whether this should be called "rule of law" or something else. In this specific context, it was presumably not possible to use the word "Rechtsstaat" in German (or "État de droit" in French, for that matter), because it would have been inappropriate to refer to the concept of "State"[76].

It is clear from the above that the "rule of law" (or at least the principle of legality, or the idea that the Community was based on law) emerged in the CJEU's case-law in the late 1970s and the 1980s. Since a similar development occurred in the case-law of the European Court of Human Rights (ECtHR) during the same period, it is relevant to make a comparison. According to the preamble of the European Convention on Human Rights (ECHR), the rule of law is part of the common heritage of the contracting States. The ECtHR first mentioned the "rule of law" in its 1975 *Golder* judgment[77], where it found that the right to access to court is part of the right to a fair trial, noting that it

> may also be accepted [...] that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The [ECtHR] however considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 according to their context and in the light of the object and purpose of the Convention[78].

The ECtHR established that «in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts»[79]. Further, access to court «ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice»[80]. The right to a fair trial under Article 6 of the ECHR must, according to the ECtHR, be read in the light of these principles, especially as it would be inconceivable for the procedural guarantees under Article 6 to exist at all without access to court in the first place. Hence the right to access to court «constitutes an element which is inherent in the right stated by Article 6 para. 1»[81] – and the latter right, in turn, must be seen as an element inherent in the rule of law.

3.2. *References to the rule-of-law and* Rechtsstaat *case-law in the Conditionality Regulation*

Having described the first small steps in the development of the concept of the "rule of law" at the European level, we will now turn to what may represent the greatest leap yet in that development: the 2020 Conditionality Regulation, which is «the first EU legislative act to contain a definition of the rule of law»[82]. In that regulation, the "rule of law" is mentioned with specific references to cases. While most of those cases belong

to a younger generation than the ones just mentioned, it is possible to trace the references given in them backwards to find the original cases where the principles of the rule of law were established. We then again end up in the late 1970s and the 1980s.

The definition set out in Article 2(a) of the Conditionality Regulation is the following:

> "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 the German version, what corresponds to "rule of law" is "Rechtsstaatlichkeit" (a noun based on the adjective "Rechtsstaatlich", which in its turn is based on the noun "Rechtsstaat"). In French, the noun "État de droit" is used.

Further, according to Recital 3 of the preamble of the 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.

Recital 3 goes on to say that the rule of law «requires, in particular», that certain principles «be respected», listing almost all of those mentioned in the definition in Article 2(a) and citing the case-law ultimately relied upon in notes. Those principles (with the case-law in notes here as well) are the following:

- Legality, implying a transparent, accountable, democratic and pluralistic law-making process[83].
- Legal certainty[84].
- Prohibition of arbitrariness of the executive powers[85].
- Effective judicial protection, including access to justice, by independent and impartial courts[86].
- Separation of powers[87].

The cases referred to as regards legality, effective judicial protection and the separation of powers are all from the 21st century. By contrast, the cases referred to when it comes to legal certainty and the prohibition of arbitrariness of the executive powers are from the 1980s. In the definition of the rule of law, but not in the preamble, it is mentioned that the access to justice by independent and impartial courts should also regard fundamental rights, but since this is not mentioned in the preamble, there is no case reference. It should also be noted that the enumeration in Article 2(a) of the Conditionality Regulation closely resembles that found in a 2011 report from the Venice Commission on the rule of law[88].

The CJEU has found that the definition in Article 2(a) should be read in the light of Recital 3 and the case-law referred to there[89]. According to the CJEU, the principles are not only «developed in the case-law of the C[JEU] on the basis of the EU Treaties», and thus recognised and specified in the legal order of the European Union, but «have their source in common values which are also recognised and applied by the Member States in their own legal systems»[90].

It is noteworthy that the inclusion of a definition of the rule of law in the Conditionality Regulation may represent a new

standard practice. According to Werner Schroeder, the EU should «systematically [incorporate] rule-of-law considerations into all its policies to actively promote, realise and sustain the rule of law throughout the Union»[91].

3.3. *Legality, implying a transparent, accountable, democratic and pluralistic law-making process*

As regards legality, reference is made to the 2004 *Succhi di Frutta* case. In its judgment, the CJEU made clear – in its reply to a question as to whether the company Succhi di Frutta was sufficiently directly and individually concerned to claim annulment of a decision by the Commission – that

> a tenderer retains an interest in the annulment of such a decision; such interest consists either in the tenderer's being properly restored by the Commission to his original position or in prompting the Commission to make suitable amendments in the future to the system of invitations to tender if that system is found to be incompatible with certain legal requirements[92].

That paragraph in *Succhi di Frutta* contains a reference to paragraph 32 of the 1979 *Simmenthal v. Commission* judgment, where essentially the same statement is made without a reference to an earlier case[93].

3.4. *Legal certainty*

As regards legal certainty, reference is made to the 1981 judgment in *Meridionale Industria Salumi and Others*[94]. In that judgment, the CJEU drew a distinction between procedural rules, which are generally held to apply to all proceedings pending at the time when they enter into force, and substantive rules, which are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them. That interpretation, the CJEU noted, was made in the interest of legal certainty:

> This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it. The C[JEU] has repeatedly emphasized the importance of those principles, in particular in the [1979 *Racke* and *Decker* judgments], in which it stated that in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication and that it may be otherwise only exceptionally, where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected[95].

In the 1979 *Racke* and *Decker* judgments, the CJEU had established that «[a] fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it»[96]. Further, although this principle normally «precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected»[97]. Hence the principle of

non-retroactivity forms an important part of the principle of legal certainty[98].

3.5. *Prohibition of arbitrariness of the executive powers*

As regards the prohibition of arbitrariness of the executive powers, reference is made to the 1989 *Hoechst* judgment[99]. It is, of course, difficult to distinguish between legality, legal certainty and prohibition of arbitrariness. If legality focuses on the regulatory basis for the decision, and legal certainty focuses on predictability, the clarity of the decision and the prohibition of retroactive legal effects, then the prohibition of arbitrariness must be taken to refer to the need for the rules to be applied in a sense that meets the requirement of equality before the law.

In *Hoechst*, the CJEU underlined precisely that, although not only with reference to equality before the law but also with reference to proportionality:

> Nonetheless, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law[100].

The CJEU pointed out that it had «held that it has the power to determine whether measures of investigation taken by the Commission under the [European Coal and Steel Community] Treaty are excessive», referring to a brief passage in its 1962 *San Michele* judgment: «As there is no express rule on this matter in Community law, it is for the C[JEU] to determine whether the measures of investigation taken by the High Authority were excessive»[101].

In the context of judicial review of legislation and the rule of law, one might well add the 2008 *Unión General de Trabajadores de La Rioja* judgment, where the CJEU made it clear that the «purpose of reviewing the legality of acts is to enforce compliance with the pre-established limits on the areas of competence of the different State authorities, organs or bodies, not to determine those limits» and pointed out that it agreed with the Spanish Government that «the existence of judicial review is inherent in the existence of the rule of law»[102].

3.6. *Effective judicial protection, including access to justice, by independent and impartial courts*

For the three components of the rule of law dealt with above, the case-law referred to dates back rather far. From here on, by contrast, significant case-law development has been taking place more recently. As regards effective judicial protection, including access to justice, by independent and impartial courts, Recital 3 of the Conditionality Regulation includes references to the *Associação Sindical (Portuguese Judges)*[103] and *LM*[104] judgments, both issued in 2018. These cases are highly important in the recent development of the standards of independent and impartial judging, but they also refer – directly or indirectly – to many important earlier CJEU and ECtHR

judgments on these matters in the context of the right to a fair trial.

The reference to these two cases highlights two different lines of case-law as relevant to discuss here. The first represents a more general discussion on the rule of law and judicial review, while the second relates more precisely to the independence and impartiality of judges.

As regards the more general discussion, the CJEU in *Portuguese Judges* first recalled in paragraph 30 that, according to Article 2 TEU, «the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails»[105]. It then went on to specify – in paragraph 31, to which there is a reference in the Conditionality Regulation – that the European Union «is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act»[106]. In this passage, the CJEU brings together the concept of the rule of law with the principle of legality and the prohibition of arbitrariness as well as with the right to judicial review of legislation.

Further on[107] in *Portuguese Judges*, there is a reference to the 2013 *Inuit Tapiriit Kanatami* judgment[108], where the CJEU also made a general reference to the rule of law and underlined that the acts of the EU institutions «are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights»[109]. This, in turn, stems from the *E and F* judgment issued in 2010[110] and the *Unión de Pequeños Agricultores*[111] and *Kadi and Al Barakaat*[112] judgments, both issued in 2008. Further, both *Unión de Pequeños Agricultores*[113] and *Kadi and Al Barakaat*[114] ultimately refer back to *Les Verts* from 1986. In addition, the 1987 *Foto-Frost* judgment[115] also contains a reference to *Les Verts* and the CJEU's statement there that it is vested with the task of reviewing the legality of measures adopted by the institutions[116].

To sum up: the general principle of the rule of law and the right to judicial review of legislation and other measures adopted by the institutions have their basis in *Les Verts*. In fact, the CJEU made this very clear in *Portuguese Judges* when it noted that the «very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law»[117] and, in doing so, referred to the 2017 *Rosneft* judgment[118], which in turn refers – via *Schrems*[119] – to *Les Verts*.

As regards the second line of case-law, that regarding the independence and impartiality of judges, the CJEU in *Portuguese Judges* made general statements about the independence and impartiality of judges, pointing out that not only itself but also national courts and tribunals need to meet those criteria[120]. In this context, the CJEU referred both to the second subparagraph of Article 19(1) TEU («Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law») and to the second subparagraph of Article 47 of the Charter of Fundamental Rights («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.»)[121].

Later on in *Portuguese Judges*[122], the CJEU referred to the *Wilson*[123] and *Margarit Panicello*[124] judgments. However, the Conditionality Regulation in fact also includes indirect references to those cases through the reference to paragraphs 63-67 in *LM*. Those paragraphs contain a detailed discussion of the independence and impartiality of judges where a distinction is made between the external and internal aspects of independence; that distinction had previously been used in the 2006 *Wilson* case[125]. In *LM*, the CJEU wrote the following:

> The first aspect, which is external in nature, presupposes that the court concerned exercises 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, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions[126].

This is based on *Portuguese Judges*[127], which, as noted above, in turn refers to *Wilson* and *Margarit Panicello*. As regards guarantees for judges against their removal from office, *LM* refers directly to *Wilson*[128], and as regards the remuneration of judges, it refers to *Portuguese Judges*[129]. The division between the "external" and "internal" aspects of independence was a novelty in *Wilson*. Elsewhere[130], I have wondered whether the CJEU may have been inspired by the way the ECtHR had discussed independence and impartiality, taken together, as independence «of the executive and of the parties to the case»[131] but may have failed to notice at the time that the ECtHR had even earlier, in 1988, used the word «impartiality» rather than the expression «independence of [...] the parties to the case»[132].

As regards impartiality, or the internal aspect of independence, the CJEU not only refers to *Wilson*[133] but also[134] to the 2014 *TDC* judgment[135] as regards matters such as the need to regulate the composition of the court and the appointment, length of service and grounds for abstention, rejection and dismissal of its members. Finally, in *LM*, the CJEU supplements its earlier case-law by making it clear that independence also requires «that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions»[136].

3.7. *Separation of powers*

As regards the separation of powers, Recital 3 of the Conditionality Regulation includes references to the *Kovalkovas*[137], *Poltorak*[138] and *DEB*[139] judgments. These cases mainly concern how the concept of "judiciary" is to be interpreted. In *Kovalkovas*, the CJEU took note of the fact that «it is generally accepted that the term "judiciary" does not cover the ministries of Member States»[140]. Rather, the "judiciary" must «be distinguished, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, from the executive»[141]. The CJEU continued:

> Thus, judicial authorities are traditionally construed as the authorities that administer justice, unlike, inter alia, ministries or other government organs, which are within the province of the executive[142].

In *Poltorak*, the CJEU added that the term "judiciary" «does not cover police services»[143], using the same reasoning as in *Kovalkovas* to relegate police authorities to the province of the executive. Finally, in *DEB*, the CJEU made it clear that

> EU law does not preclude a Member State from simultaneously exercising legislative, administrative and judicial functions, provided that those functions are exercised in compliance with the principle of the separation of powers which characterises the operation of the rule of law[144].

It should be added that the mention made of the separation of powers also relates to the increasing importance ascribed to that concept in the case-law of the ECtHR[145].

3.8. *Fundamental rights*

The mention of fundamental rights in Recital 3 of the Conditionality Regulation was not accompanied by any case-law references. However, since 2009, those rights have been defined at the EU level by the Charter of Fundamental Rights. As mentioned in Section 3.1 above, the 1986 *Les Verts* case has prompted the conclusion that the CJEU, since it reviewed legislation, sets «"substantive" limits within which democratic government must take place»[146]. Human rights have in fact been dealt with in the case-law of the CJEU since around 1970. Through the three cases *Stauder*[147], *Internationale Handelsgesellschaft*[148] and *Nold*[149], it was established that

> respect for fundamental rights – inspired by the common constitutional traditions of the Member States and international human rights treaties on which they collaborated – was part of the general principles of Community law, and the C[JEU] would henceforth entertain claims that such rights had been adversely affected by Community acts and policies[150].

That respect for human rights is a condition of the lawfulness of Community, and later EU, acts has since then been repeatedly held by the CJEU, with references ultimately leading back to *Nold*[151].

3.9. *Non-discrimination and equality before the law*

As regards non-discrimination and equality before the law, references were also absent from the preamble of the Conditionality Regulation, but such references were added by the CJEU in cases where Hungary and Poland challenged the validity of that regulation[152]. The judgments invoked are from 2021[153]. However, through a series of references, their ultimate basis is to be found in the principle of non-discrimination between EU producers or consumers established in *Sermide*[154], according to which «comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified» In fact, non-discrimination and equality before the law have a long-standing basis in the treaties and have been discussed in detail in the case-law of the CJEU. The above-mentioned *Sermide* judgment, which was delivered in 1984, is not the first example; there are also examples from the 1970s. Equality in this sense must be seen as a general principle of EU law[155].

3.10. *General remarks on the case-law in relation to the Copenhagen criteria*

The overview in this part of the article has aimed to analyse the development of the *Rechtsstaat* and the rule of law in EU law. As mentioned in Section 3.1, it has always been an implicit criterion for membership of the EU that a country must adhere to the rule of law. In the case-law of the CJEU, we see a first sign of this as early as in 1962, when the prohibition of arbitrariness was mentioned in *San Michele*.

The protection of fundamental rights was included through judgments given around 1970. In 1979, the CJEU mentioned the rule of law in *Granaria*, legality in *Simmenthal v. Commission* and legal certainty in *Racke* and *Decker*. In *Granaria*, it also mentioned the principles of legal certainty, of an accountable law-making process and of access to justice. Further, at that time, non-discrimination and equality before the law both formed an important part of the CJEU's case-law. Legal certainty was again discussed in *Meridionale Industria Salumi* in 1981. It is worth pointing out that all of this happened before the better-known *Les Verts* judgment of 1986, where the CJEU was more explicit about the principle of the rule of law. Subsequently, in the 1989 *Hoechst* judgment, the CJEU again discussed the prohibition of arbitrariness of the executive powers.

Hence, when the Copenhagen rule-of-law criterion was decided a few years later, it was no novelty but confirmed an existing fundamental value or principle in EU law. Since that time, the separation of powers has also been included, at the same time as a similar development has taken place in the case-law of the ECtHR. Finally, as regards effective judicial protection, including access to justice, by independent and impartial courts, the *Wilson* judgment from 2006 is important, as is the associated case-law from the ECtHR.

4. *Rule of law in Europe – retrofuturism or real hope for the future?*

4.1. *"Juristische Zeitgeschichte" and the retrofuturism of the Copenhagen criteria*

In 1993, Professor Michael Stolleis edited a book entitled *Juristische Zeitgeschichte – Ein neues Fach?*[156] The concept of "Zeitgeschichte" can be defined as "contemporary history" in the sense that a historian researches a time period so soon after that period that there are still living witnesses who have memories from the object of research. However, Stolleis noted that historians have always written "Zeitgeschichte", in the sense that they have brought historical arguments into contemporary debates or brought contemporary perspectives into their historical research[157]. In the context of the specific German experience of the 20th century, Stolleis saw research on how dictatorial systems and a lack of liberty arose as essential for this type of research, as part of the "Bewältigung der Vergangenheit", the coming to terms with the past, but with broader and deeper research into causes and effects. If closeness to the present is emphasised, "Juristische Zeitgeschichte", contemporary legal history, appears as a «"Gelenkstelle" zwischen Heute und Gestern», a pivotal point between today and yesterday.

This way of thinking is a good fit with Kaarlo Tuori's model of the layers of law. In that model, there is no boundary between legal history and present law – rather, law has a historical dimension, which can be seen above all in the deeper layers. Harold Berman identified, as one of his ten characteristics of the Western legal tradition, that changes in the legal field «proceed by reinterpretation of the past to meet present and future needs»[158]. Law has a history and tells a story. "Juristische Zeitgeschichte", then, is something that legal historians do when they take part in contemporary debates using historical arguments and when they observe and engage in ongoing processes of change. Such engagement may well mean that legal historians, like other teachers and researchers, need to take a stand and do their best to protect a basic principle such as the rule of law[159].

As Stolleis was writing about "Juristische Zeitgeschichte", however, the final victory of democracy and the rule of law was proclaimed. The 1993 Copenhagen criterion of «stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities»[160] was not controversial at the time – it was more or less self-evident[161]. The general consensus was that liberal democracy had been established as the final form of human government[162]. However, the future has a way of arriving unannounced.

«If futurism is a term that describes our anticipation of what is to come, then retrofuturism describes how we remember these visions»[163]. Through the fascination we felt for a future once imagined that never became real, we can remember a time when we trusted that certain improvements would come about. For example, in 1962 an Italian newspaper published a fascinating picture[164] of how the artist imagined that we would be driving around in the cities in 2022. We know now that things developed differently, but today we can feel the same kind of fascination in relation to the belief from the 1990s about the finally established rule of law. At that time, many people thought that the rule of law would remain unquestioned in the 2020s. We know now that the rule of law was to be challenged. However, the question is whether, in the rule-of-law discussion in this article and elsewhere, we are just nostalgically looking back to an optimistic past. In the final section, I will argue that, while the rule of law has indeed been challenged, it has also been strengthened, in the sense that it is no longer an "essentially contested concept" as regards its definition, even if it is clearly contested as regards its desirability.

4.2. *The increasingly detailed definition of the rule of law, and hope for the future*

In *Repubblika*[165], the CJEU made it clear that «compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State» and that «[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»[166].

In doing so, the CJEU established – or referred to – a principle of non-regression. Indeed, the first question that needs to be

asked here is when that principle came into being. Was it when the ruling in *Repubblika* was made in 2019? When the value, or principle, of the rule of law was first explicitly mentioned in the treaties in 1992? Or even when the European Communities were founded in the 1950s, taking into account that the rule of law was implicitly a fundamental value right from the start? Be that as it may, it is at least reasonable to claim that, from the time when the Copenhagen criteria were established and onwards, the principle of non-regression is effective (even retroactively) from the accession to the EU of any Member State. Those that acceded after that time knew what they were joining, and those that had joined before were the ones that established the criteria, meaning that they are bound by them as well. And, as noted, the principle of non-regression entails that once the rule-of-law criterion has been met, it must continue to be met; the only change allowed is that the rule of law may be strengthened[167]. As Laurent Pech and Dimitry Kochenov have written:

> Not connecting non-regression exclusively with Article 19(1) is thus the crucial added value of *Repubblika*: what has been done by the C[JEU] under the banner of Article 19(1) TEU is but a micro-share of the potential of Article 49 TEU, as a marker of the starting standard, since Article 49 is not issue-specific and demands only one thing: full adherence to the values of Article 2 TEU at the moment of accession. Non-regression is thus the last promising chapter in the ongoing construction of a revamped values-based EU constitutional system[168].

It has also become difficult to claim that the content of the rule-of-law principle is vague or contestable. In fact, that the rule of law was undeniably contested at one point as a concept did not undermine its status as a fundamental principle of EU membership[169], and the details of the concept are now increasingly well-defined[170]. This can actually be seen as a positive side-effect of the rule-of-law crisis[171] in that it makes it more difficult for rulers to claim that some version of legal predictability suffices to make a legal order a *Rechtsstaat*, and the rule-of-law concept is now less than ever a "rhetorical balloon"[172]. The action brought by four judges' organisations against the Council[173] – provided that it is considered admissible – will bring further clarity as regards the binding nature of the relevant CJEU judgments. What is more, other areas of EU law, such as competition law and Digital Single Market law, are equally relevant for advancing the rule of law[174]. Further, the protection of the rule of law may come into conflict with the principle of mutual trust[175], especially as regards the European Arrest Warrant procedure[176]. When it comes to access to justice, there is a need not only for independent judges to hear cases but also for independent lawyers who can represent members of the general public and help them exercise their right to a fair trial[177]. All of this is part of «EU's legal history in the making» when it comes to the rule of law.

The best reason for hope for the future, however, is that the rule of law has strong support in the populations of the Member States. According to Laurent Pech, there is no evidence for a «popular, bottom-up demand for the structural undermining of judicial independence or a new constitutional autocratic order»[178]; rather, «rule of law backsliding represents a top-down strategy»[179]. According to a special *Eurobarometer* from 2019[180], there is strong support for the rule of law and its components in, for example, Hungary and Poland.

As regards the belief that there may open up an East–West divide within the EU on the issue of the rule of law, Laurent Pech has convincingly argued that,

> rather than an East-West divide, the real divide may instead be the one opposing national elites seeking to empty the rule of law of any core legally enforceable meaning and those who aim to defend the enforcement of this core meaning against autocratic authorities[181].

Hence it is also obviously wrong to believe that there is an elite of lawyers and others defending the rule of law in the face of popular criticism. The «national elites seeking to empty the rule of law of any core legally enforceable meaning» are, I would add, using populist rhetoric as a cover for their own interests, rather than representing any serious popular criticism. There is no dividing line between "ordinary people" and "corrupt elites". What we are faced with is instead an elite-based "paternalist populism" that «rejects the political correctness of the "inorganic" establishment, but considers the people insufficiently mature to participate autonomously in decision-making, and allows the government, elected by the people, to educate and discipline the citizenry»[182].

At the beginning of this article, I discussed the expert legal culture and its relationship to the "general legal culture" of ordinary citizens. It would appear that the overwhelming view in both of these legal cultures is that the rule of law is worthy of protection. This does give hope for the future.

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[1] Judgment of 23 April 1986 in case C-294/83, *Les Verts*, ECLI:EU:C:1986:166, p. 23.

[2] See below, Section 3.1.

[3] Cf. M. Sunnqvist, *The Rechtsstaat in a Substantive and a Formal Sense: Revisiting the Theory Development of the 1830s and 1840s*, in «Journal of Constitutional History», vol. 44, n. 2/2022, pp. 81-92 with references.

[4] 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 ("Conditionality Regulation"); L. Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, in «Hague Journal on the Rule of Law», vol. 14, 2022, pp. 107-138.

[5] Sunnqvist, *The Rechtsstaat in a Substantive and a Formal Sense* cit.

[6] See, e.g., M. Sunnqvist, X. Groussot, L. Maunsbach, *Judges Assessing the Independence of Judges. Historical Foundations and Practical Procedures in Facing the Threats against the Rule of Law in Europe*, in «Journal of Constitution-

al History», vol. 44, n. 2/2022, pp. 11-26, D. Zabłudowska, *The Battle for Judicial Independence in Poland, 2017-2022*, in «Journal of Constitutional History», vol. 44, n. 2/2022, pp. 29-39, A. Sajó, *Ruling by Cheating. Governance in Illiberal Democracy*, Cambridge, Cambridge University Press, 2021, and W. Sadurski, *Poland's Constitutional Breakdown*, Oxford, Oxford University Press, 2019.

[7] W.B. Gallie, *Essentially contested concepts*, in *Proceedings of the Aristotelian Society*, vol. 56, 1956, pp. 167-198.

[8] 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, n. 3/2021, p. 13.

[9] Sunnqvist, Groussot, Maunsbach, *Judges Assessing the Independence of Judges* cit.

[10] K. Tuori, *Towards a Multi-Layered View of Modern Law*, in A. Aarnio et al. (edited by), *Justice, Morality and Society. A Tribute to Aleksander Peczenik on his 60th Birthday*, Lund, Juristförlaget, 1997, pp. 427-442, and K. Tuori, *Critical Legal Positivism*, Aldershot, Ashgate, 2002, pp. 147-216. This first part of this section recapitulates the points of departure in Sunnqvist, Groussot, Maunsbach, *Judges Assessing the Independence of Judges* cit.

[11] Tuori, *Towards a Multi-Layered View* cit., p. 433. See also Tuori, *Critical Legal Positivism* cit., pp. 154-161.

[12] Tuori, *Ratio and Voluntas* cit., p. 208; cf. also p. 238. See also Tuori, *Critical Legal Positivism* cit., pp. 166-183.

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

[14] Tuori, *Towards a Multi-Layered View* cit., p. 434. See also Tuori, *Critical Legal Positivism* cit., pp. 183-191.

[15] Tuori, *Towards a Multi-Layered View* cit., p. 437. See also Tuori, *Critical Legal Positivism* cit., pp. 197-209.

[16] Tuori, *Critical Legal Positivism* cit., p. 237; see also pp. 217-241.

[17] Ivi, pp. 229-234.

[18] X. Groussot, *General Principles of Community Law*, Groningen, Europa Law, 2006.

[19] Judgment of 14 May 1974 in case C-4/73, *Nold*, ECLI:EU:C:1974:51.

[20] M. Sunnqvist, *Impartiality and Independence of Judges. The Development in European Case Law*, in «Nordic Journal of European Law», vol. 5, n. 1, pp. 67-95. See also Section 3 of this article.

[21] H. J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge, Mass., Harvard University Press, 1983.

[22] Ivi, p. 9.

[23] Ivi, pp. 9-10.

[24] Tuori, *Ratio and Voluntas* cit., pp. 28-29.

[25] See M. Sunnqvist, *The Rechtsstaat in a Substantive and a Formal Sense* cit.

[26] K. Tuori, *Four Models of the Rechtsstaat*, in *Öffentliche oder private Moral? Vom Geltungsgrunde und der Legitimität des Rechts. Festschrift für Ernesto Garzón Valdés*, Berlin, Duncker & Humblot, 1992, pp. 451-464. Cf. Tuori, *Critical legal positivism* cit., pp. 21-24.

[27] Tuori, *Four models* cit., p. 454.

[28] *Ibidem*.

[29] Ivi, p. 458.

[30] Ivi, pp. 459-460.

[31] Ivi, pp. 462-463.

[32] Ivi, p. 461.

[33] Tuori, *Towards a Multi-Layered View* cit., p. 433 (italics in the original). See also Tuori, *Critical Legal Positivism* cit., pp. 161-166.

[34] Tuori, *Towards a Multi-Layered View* cit., p. 433.

[35] Ivi, p. 433.

[36] Tuori, *Four models* cit., p. 458.

[37] H.-G. Axberger, *"Det allmänna rättsmedvetandet"*, BRÅ-rapport 1996:1, pp. 10-11, and A. Anderberg, *Det allmänna rättsmedvetandet och några svenska förarbeten på straffrättens område 2008-2018*, in «Nordisk Tidsskrift for Kriminalvidenskab», vol. 107, 2020, pp. 251-267.

[38] Axberger, *"Det allmänna rättsmedvetandet"* cit., pp. 22, 98, and S. Strömholm, L. Freivalds, S. Nycander, *Skall lagreglerna spegla eller påverka den allmänna rättsuppfattningen?*, in «Svensk Juristtidning», 2001, pp. 101-120.

[39] Tuori, *Towards a Multi-Layered View* cit., p. 437.

[40] Ivi, p. 441.

[41] See, e.g., Zabłudowska, *The Battle for Judicial Independence in Poland* cit.

[42] Tuori, *Towards a Multi-Layered View* cit., p. 427.

[43] Ivi, p. 427; Tuori, *Critical Legal Positivism* cit., pp. 5-8.

[44] N. Duxbury, *Lord Wright and innovative traditionalism*, in «University of Toronto Law Journal», vol. 59, 2009, p. 339; cf. Lord Wright, *«Natural law and international law»*, in P. Sayre (edited by), *Interpretations of modern legal philosophies. Essays in honor of Roscoe Pound*, New York, Oxford University Press, 1947, pp. 794-807.

[45] E. H. Kantorowicz, *The King's Two Bodies. A Study in Medieval Political Theology (1957)*, Princeton, Princeton University Press, 2016.

[46] Ivi, pp. 150-152.

[47] Ivi, p. 152.

[48] B. Tierney, *«The Prince is Not Bound by the Laws.» Accursius and the Origins of the Modern State*, in «Comparative Studies in Society and History», vol. 5, n. 4, July 1963, pp. 378-400.

[49] Kantorowicz's translation in *King's Two Bodies* cit., p. 152 (italics in the original). See also W. Ullmann, *Principles of Government and Politics in the Middle Ages*, London, Methuen, 1966², pp. 176-178.

[50] Kantorowicz, *King's Two Bodies* cit., p. 152.

[51] Ivi, p. 152 (italics in the original).

[52] Tierney, *The Prince is Not Bound* cit., p. 400.

[53] Berman, *Law and Revolution* cit., p. 9.

[54] Ivi, pp. 292-294, and R. C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge, Cambridge Universi-

ty Press, 1995, pp. 88-90.

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57 L. Heuschling, *État de droit, Rechtsstaat, Rule of Law*, Paris, Dalloz, 2002, pp. 40-42, 171-175.

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59 Berman, *Law and Revolution* cit., p. 294.

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64 Pech, *The Rule of Law* cit., pp. 313-318, A. Zemskova, *The Rule of Law in Economic Emergency in the European Union*, Lund, Lund University, 2023, pp. 48-55.

65 X. Groussot, A. Zemskova, *The Manifestations of the EU Rule of Law and its Contestability: Historical and Constitutional Foundations*, in «Journal of Constitutional History», vol. 44, n. 2/2022, pp. 95-96.

66 Judgment of 13 February 1979 in case 101/78, *Granaria BV*, ECLI:EU:C:1979:38, p. 5. Cf. L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09. </jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf> (last visited on 8 May 2023).

67 Groussot, Zemskova, *The Manifestations of the EU Rule of Law* cit., p. 96.

68 Cf. Sunnqvist, *The Rechtsstaat in a Substantive and a Formal Sense* cit., pp. 81-82.

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70 *Les Verts* cit.

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72 *Les Verts* cit., p. 23.

73 R. Schütze, *An Introduction to European Law*, Cambridge, Cambridge University Press, 2012, pp. 83-84. While this exact phrase is not present in R. Schütze, *An Introduction to European Law*, Cambridge, Cambridge University Press, 2021[3], the author does not seem to have changed his view on the interpretation of the case.

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75 Regarding this concept, see M. L. Fernandez Esteban, *The Rule of Law in the European Constitution*, London, Kluwer, 1999, pp. 1-4, 108-109 and 153-160.

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77 Judgment of 21 February 1975, *Golder v. The United Kingdom*, ECLI:CE:ECHR:1975:0221JUD 000445170.

78 *Golder* cit., § 34.

79 *Ibidem.*

80 *Golder* cit., § 35.

81 *Golder* cit., § 36.

82 Zemskova, *The Rule of Law* cit., p. 55.

83 Reference is made to the judgment of 29 April 2004 in case C-496/99 P, *CAS Succhi di Frutta*, ECLI:EU:C:2004:236, p. 63.

84 Reference is made to the judgment of 12 November 1981 in joined cases 212/80 to 217/80, *Amministrazione delle finanze dello Stato v. Srl Meridionale Industria Salumi and Others* and *Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v. Amministrazione delle finanze dello Stato*, ECLI:EU:C:1981:270, p. 10.

85 Reference is made to the judgment of 21 September 1989 in joined cases C-46/87 and C-227/88, *Hoechst*, ECLI:EU:C:1989:337, p. 19.

86 Reference is made to the judgment of 27 February 2018 in case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, pp. 31, 40-41, and to the judgment of 25 July 2018 in case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, pp. 63-67.

87 Reference is made to the judgment of 10 November 2016 in case C-477/16, *Kovalkovas*, ECLI:EU:C:2016:861, p. 36, to the judgment of 10 November 2016 in case C-452/16 PPU, *Poltorak*, ECLI:EU:C:2016:858, p. 35, and to the judgment of 22 December 2010 in case C-279/09, *DEB*, ECLI:EU:C:2010:811, p. 58.

88 European Commission for Democracy Through Law (Venice Commission), *Report on the Rule of Law*, adopted by the Venice Commission at its 86th plenary session, Venice, 25-26 March 2011, Strasbourg, 4 April 2011, Study No. 512/2009, CDL-AD(2011)003rev, pp. 41, 42-65; in paragraph 41 of its report, the Venice Commission concludes that «it seems that a consensus

can now be found for the necessary elements of the rule of law» (in its substantive version) and goes on to list those elements as «(1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; (6) Non-discrimination and equality before the law». See, as regards the connection between the report of the Venice commission, the case-law of the CJEU and the regulation, *Communication from the Commission* «A new EU Framework to strengthen the Rule of Law», COM(2014)0158 final, Annex I. See also J. Raitio, *The Concept of the Rule of Law – Just a Political Ideal, or a Binding Principle?*, Section 3, in this issue, P. Van Elsuwege and F. Gemmelprez, *Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice*, in «European Constitutional Law Review», vol. 16, n. 1, 2020, pp. 8-32, and Wohlwend, *The International Rule of Law* cit., p. 124.

[89] Judgment of 16 February 2022 in case C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97, p. 236, and judgment of 16 February 2022 in case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, p. 290. See X. Groussot, A. Zemskova, K. Bungerfeldt, *Foundational Principles and the Rule of Law in the European Union. How to Adjudicate in a Rule-of-Law Crisis, and why Solidarity Is Essential*, in «Nordic Journal of European Law», vol. 5, n. 1, 2022, pp. 1-19.

[90] *Hungary v. Parliament and Council* cit., p. 237, and *Poland v. Parliament and Council* cit., p. 291.

[91] W. Schroeder, *The Rule of Law as a Constitutional Mandate for the EU*, in «Hague Journal on the Rule of Law», vol. 15, 2023, p. 3.

[92] *CAS Succhi di Frutta* cit., p. 63.

[93] Judgment of 6 March 1979 in case C-92/78, *Simmenthal v. Commission*, ECLI:EU:C:1979:53, p. 32. Note that this is not the famous *Simmenthal* judgment from the year before (judgment of 9 March 1978 in case C-106/77, *Amministrazione delle Finanze v. Simmenthal SpA*, ECLI:EU:C:1978:49), where the CJEU made it clear that all national courts have to apply European law and must disregard any national constitutional rules preventing them from doing so (see W. Phelan, *Great Judgments of the European Court of Justice. Rethinking the Landmark Decisions of the Foundational Period*, Cambridge, Cambridge University Press, 2019, pp. 171-184).

[94] *Amministrazione delle finanze dello Stato v. Srl Meridionale Industria Salumi and Others* cit., p. 10.

[95] *Ibidem.*

[96] Judgment of 25 January 1979 in case C-98/78, *Racke v. Hauptzollamt Mainz*, ECLI:EU:C:1979:14, p. 15, and judgment of 25 January 1979 in case C-99/78, *Decker v. Hauptzollamt Landau*, ECLI:EU:C:1979:15, p. 3.

[97] *Racke cit.*, p. 20; Decker cit., p. 8.

[98] Groussot, *General Principles of Community Law* cit., pp. 197-202.

[99] *Hoechst* cit. p. 19.

[100] Ivi, p. 19.

[101] Judgment of 14 December 1962 in joined cases 5/62 to 11/62 and 13/62 to 15/62, *San Michele and Others v. Commission*, ECLI:EU:C:1962:46, p. 462.

[102] Judgment of 11 September 2008 in joined cases C-428/06 to 434/06, *Unión General de Trabajadores de La Rioja and Others*,

[103] *Associação Sindical dos Juízes Portugueses* cit., pp. 31, 40-41.

[104] *LM* cit., pp. 63-67.

[105] *Associação Sindical dos Juízes Portugueses* cit., p. 30.

[106] Ivi, p. 31.

[107] Ivi, p. 32.

[108] Judgment of 3 October 2013 in case C-583/11 P, *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, ECLI:EU:C:2013:625 (reference in *Portuguese Judges* is made to pp. 91 and 94 in that judgment).

[109] Ivi, p. 91.

[110] Judgment of 29 June 2010 in case C-550/09, *E and F*, ECLI:EU:C:2010:382 (reference is made to p. 44 in that judgment).

[111] Judgment of 25 July 2002 in case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, ECLI:EU:C:2002:462 (reference is made to pp. 38 and 40 in that judgment).

[112] Judgment of 3 September 2008 in joint cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461.

[113] *Unión de Pequeños Agricultores* cit., p. 40.

[114] *Kadi and Al Barakaat* cit., p. 281.

[115] Judgment of 22 October 1987 in case C-314/85, *Foto-Frost*, ECLI:EU:C:1987:452.

[116] Ivi, p. 16.

[117] *Associação Sindical dos Juízes Portugueses* cit., p. 36.

[118] Judgment of 28 March 2017 in case C-72/15, *Rosneft*, ECLI:EU:C:2017:236 (reference is made to p. 73 in that judgment).

[119] Judgment of 6 October 2015 in case C-362/14, *Schrems*, ECLI:EU:C:2015:650 (reference is made to p. 95 in that judgment).

[120] *Associação Sindical dos Juízes Portugueses* cit., p. 42.

[121] Ivi, pp. 40-41.

[122] Ivi, p. 44.

[123] Judgment of 19 September 2006 in case C-506/04, *Wilson*, ECLI:EU:C:2006:587 (reference is made to p. 51 in that judgment).

[124] Judgment of 16 February 2017 in case C-503/15, *Margarit Panicello*, ECLI:EU:C:2017:126 (reference is made to p. 37 in that judgment).

[125] *Wilson* cit.

[126] *LM* cit., p. 63.

[127] *Associação Sindical dos Juízes Portugueses* cit. (reference is made to p. 44 in that judgment).

[128] *LM* cit., p. 64 (reference is made to *Wilson* cit., p. 51).

[129] *Ibidem* (reference is made to *Portuguese Judges*, p. 45).
[130] Sunnqvist, *Impartiality and Independence of Judges* cit., p. 84.
[131] Judgment of 28 June 1984, *Campbell and Fell v. The United Kingdom*, ECLI:CE:ECHR:1984:-0628JUD000781977, § 78.
[132] Judgment of 29 April 1988, *Belilos v. Switzerland*, ECLI:CE:ECHR:1988:0429JUD001032883, § 64 («[A] "tribunal" […] must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; […]»).
[133] *LM* cit., p. 65 (reference is made to *Wilson* cit., p. 52).
[134] Ivi, p. 66.
[135] Judgment of 9 October 2014 in case C-222/13, *TDC*, ECLI:EU:C:2014:2265.
[136] *LM* cit., p. 67.
[137] Judgment of 10 November 2016 in case C-477/16, *Kovalkovas*, ECLI:EU:C:2016:861.
[138] Judgment of 10 November 2016 in case C-452/16 PPU, *Poltorak*, ECLI:EU:C:2016:858.
[139] Judgment of 22 December 2010 in case C-279/09, *DEB*, ECLI:EU:C:2010:811.
[140] *Kovalkovas* cit., p. 36.
[141] *Ibidem*.
[142] *Ibidem*.
[143] *Poltorak* cit., p. 35.
[144] *DEB* cit., p. 58.
[145] Pech, *The Rule of Law as Well-Established and Well-Defined Principle* cit., p. 119, and Sunnqvist, *Impartiality and Independence of Judges* cit., pp. 88-91.
[146] R. Schütze, *An Introduction to European Law* cit., pp. 83-84.
[147] Judgment of 12 November 1969 in case C-29/69, *Stauder*, ECLI:EU:C:1969:57.
[148] Judgment of 17 December 1970 in case C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.
[149] Judgment of 14 May 1974 in case C-4/73, *Nold*, ECLI:EU:C:1974:51.
[150] G. De Búrca, *The Evolution of EU Human Rights Law*, in P. Craig, G. De Búrca (edited by), *The Evolution of EU Law*, Oxford, Oxford University Press, 2021, p. 489.
[151] See, e.g., judgment of 12 June 2003 in case C-112/00, *Schmidberger*, ECLI:EU:C:2003:333, p. 73, and *Kadi and Al Barakaat v. Council* cit., p. 284.
[152] *Hungary v. Parliament and Council* cit., p. 236, and *Poland v. Parliament and Council* cit., p. 290.
[153] Namely, judgment of 3 June 2021 in case C-650/18, *Hungary v. Parliament*, EU:C:2021:426, pp. 94, 98, and judgment of 2 September 2021 in case C-930/19, *État belge*, EU:C:2021:657, pp. 57-58.
[154] Judgment of 13 December 1984 in case C-106/83, *Sermide*, ECLI:EU:C:1984:394, p. 28.
[155] Groussot, *General Principles of Community Law* cit., pp. 160-189.
[156] M. Stolleis (edited by), *Juristische Zeitgeschichte – Ein neues Fach?*, Baden-Baden, Nomos Verlagsgesellschaft, 1993.
[157] Stolleis, *Juristische Zeitgeschichte* cit., p. 7.
[158] Berman, *Law and Revolution* cit., p. 9.
[159] D. Harvey, *The Role of the Constitutional Scholar in Relation to the Rule-of-Law Crisis*, in this issue.
[160] <https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html>, 24 March 2023; Wennerström, *The Rule of Law* cit., pp. 161-169.
[161] Except that some were of the view that the Rechtsstaat might make it more difficult to deal effectively with old regimes as part of a "Bewältigung der Vergangenheit"; see Mohnhaupt, *Zur Geschichte des Rechtsstaats* cit., pp. 39-42.
[162] See, e.g., F. Fukuyama, *The End of History and the Last Man*, New York, Free Press, 1992.
[163] E. Guffey, K. Lemay, *Retrofuturism and Steampunk*, in R. Latham (edited by), *The Oxford Handbook of Science Fiction*, Oxford, Oxford University Press, 2014, p. 434.
[164] <https://www.corriere.it/cronache/20_maggio_18/citta-gireremo-cosi-copertina-domenica-corriere-1962-che-anticipa-mobilita-oggi-03dac9be-98f1-11ea-8e5b-51a0b6bd4de9.shtml> (last visited on 8 May 2023) and <https://twitter.com/historyinmemes/status/1582687935488356352> (last visited on 8 May 2023).
[165] Judgment of 20 April 2021 in case C-896/19, *Repubblika*, ECLI:EU:C:2021:311.
[166] Ivi, p. 63.
[167] M. Leloup, D. Kochenov, A. Dimitrovs, *Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Case C-896/19 Repubblika v Il-Prim Ministru*, in «European Law Review», vol. 46, n. 5, 2021, pp. 692-703.
[168] Pech, Kochenov, *Respect for the Rule of Law* cit., p. 216.
[169] Wennerström, *The Rule of Law* cit., p. 162.
[170] Pech, *The Rule of Law as a Well-Established and Well-Defined Principle* cit., pp. 107-138, and L. Maunsbach, *Procedural Aspects on Impartial and Independent Judging*, in «Journal of Constitutional History», vol. 44, n. 2/2022, pp. 131-153.
[171] Pech, *The Rule of Law as a Well-Established and Well-Defined Principle* cit., p. 115. Cf. also Pech, Kochenov, *Respect for the Rule of Law* cit., pp. 16-21.
[172] Raitio, *The Concept of Rule of Law* cit.; cf. Å. Frändberg, *Begreppet Rättsstat*, in F. Sterzel (edited by), *Rättsstaten – rätt, politik och moral*, Uppsala, Iustus, 1996, pp. 21-41, and Tuori, *Ratio and Voluntas* cit., pp. 210-217.
[173] Đ. Sessa, F. Marques, J. Morijn, *The Action Brought by European Organisations of Judges against the Council of the European Union over the release of EU Recovery and Resilience Funds to Poland*, in this issue.
[174] C. Teleki, *Advancing the Rule of Law through Competition Law in the EU*, in this issue, and A. Engel, *Rule of Law and the Digital Single Market*, in this issue.
[175] B. Aasa, *Mutual Trust and the Rule of Law in the EU – An Uneasy Relationship*, in «Journal of Constitutional History», vol. 44, n.

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176 L. Maunsbach, *Obtaining and Assessing Information about Rule-of-Law Compliance in Member State Courts. Using the European Arrest Warrant as an Illustration*, in this issue.

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180 <https://europa.eu/eurobarometer/surveys/detail/2235> (last visited on 8 May 2023).

181 Pech, *The Rule of Law as a Well-Established and Well-Defined Principle* cit., p. 134.

182 Z. Enyedi, *Paternalist populism and illiberal elitism in Central Europe*, in «Journal of Political Ideologies», vol. 21, 2016, p. 21.