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THICKENING UP THE RULE OF LAW IN THE EU: THE POLISH CASE AND JUDGMENT C-618/19

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Introduction

The principle of the rule of law is a highly evasive concept. Multiple international treaties, statues and constitutions worldwide mention its crucial role as the society's backbone, but yet, no one seems to agree upon its content. The European Union, for whom the rule of law is a fundamental value, mentioned it, along with the principle of democracy and the respect of fundamental rights, in Art. 2 of Treaty on the European Union. The values mentioned in Art. 2 TEU are those considered part of the common constitutional tradition of the Member States who are called to uphold and respect them in the exercise of their powers. Despite this obligation, various Member States, over the years, have violated these values, some of them more severely than others, with a specifically reiteration with regard the constitutive elements of the principle of the rule of law. In order to protect its very ideological foundations, the Union has equipped itself with multiple instruments to sanction violations of the rule of law and monitor its respect by Member States. Some instruments, such as the EU Anti-Corruption report and the Dialogue of the Council, have been proved to be unsuitable for this purpose, others, such as the Commission's Framework and Art. 7 TEU, have shown a certain degree of success but only when paired up with the judicial activity of the Court.

Judicial activity which has already proved to be effective alone in the protection of the rule of law but that has demonstrated its incisiveness, when in support of the political activity, only in the last year in the infamous case concerning the constitutional reforms of the judiciary operated by the Polish executive since 2015. The Polish case, which embrace roughly all the judicial bodies of the country, was partially resolved on 29 June 2019 when the Court of Justice of the European Union, after a strict collaboration with the political organs of the Union, published judgment C-619/18, object of analysis of this dissertation, putting an end to the unlawful takeover of the Supreme Court of Poland. Before facing the judgment of the Court, the matter was largely discussed through the political channels of the EU and even caused the simultaneous activation, for the very first time, of the Commission's Framework and of Art. 7 TEU.

The peculiar situation the Union has been facing with regard to Poland offers the opportunity to conduct an interesting analysis of the effectiveness of the abovementioned instruments protecting the rule of law through the lens of a special variation of the game theory: the deterrence theory. Through the comparative analysis of the efforts put in place by the Union to address the validity of two constitutional reforms approved by the Polish executive, one concerning the Constitutional Tribunal and one regarding the Supreme Court, I will try to demonstrate, via the application of the deterrence theory, that judicial bodies are more apt than political bodies, in the current situation, to address violations of the rule of law my Member States.

This dissertation is divided into three main parts. Chapter I will focus on the principle of the rule of law, its understandings, its constitutive elements and its role in the Treaties of the European Union. Chapter II will analyse the instrument which currently available to the Union, with a specific focus on the Commission's Framework and on Art. 7 TEU. Regarding Art. 7 TEU, I will also discuss the reasons behind its assimilation to a "nuclear bomb" and why such definition is erroneous. Finally Chapter III will be dedicated to comparative analysis of the actions taken by the Union with regard the two constitutional reforms of the Polish judiciary with a more-in-depth analysis of

the rationale behind judgment C-619/18 and its, potentially, limitless consequences on Art. 19 TEU.

1. The rule of law: the meaning beyond the concept

The principle of the rule of law is mentioned in the statue of the CoE (Council of Europe), in the preambles of the UN (United Nation) Universal Declaration of Human Rights and the ECHR (European Convention on Human Rights), is black-letter printed on multiple constitutions around the globe and it a largely-used terms brandished by politicians in their speeches. Despite its diffusion, however, a widely accepted definition of its content and significance is yet to be found. The notion of the rule of law is perhaps one of the most elusive political concept, not only of our times, and a definition has proven to be difficult to put down, but this did not prevent its universal appeal. Legal theorists have described it as an "essentially contested concept"[1] or "as a concept so elusive that this made it in fact so universally and globally accepted"[2]. The concept is so elusive that it is in the disagreement on its meaning that the high degree of consensus experienced worldwide finds its roots. The difficulties behind the conceptualization of the principle of the rule of law lie in its polysemic nature and its consequent susceptibility to conceptual stretching. This ambiguity made it possible for the term to be brandished indistinguishably by lawyers, constitutionalists, politicians, judges and scholars in implying at least six distinct concepts: (1) public power respectful of fundamental rights, (2) equality before the law, (3) state authority bound by law, (4) respect for property rights, (5) law, order and human security and (6) predictable, accessible and efficient justice. However, all the meanings formulated under the umbrella of the rule of law, do cross at one point common to all false lines: that the rule of law is good for everyone[3]. From this six implying meanings, a basic, yet inclusive, definition of the rule of law can formulated: "The rule of law means that the government officials and citizens are bound by and abide by the law"[4]. This formulation allows the introduction of a fundamental distinction that has been made between a "thin" or "formal" and a "thick" or "substantive" understanding of the notion.

The above-mentioned definition sums up the basic elements of the thin understanding, underlining the power of law to restrict total arbitrariness in the exercise of power by both citizens and state's institutions. It is therefore defined as the "rule by law"[5] conception. The thin understanding requires: a system of laws, set forth in advance and in general terms; laws publicly known and understandable and never with a retroactive effect; the requirements imposed should not be impossible to meet; there should exists a mechanism and institutions that enforce the legal system whenever it is breached and its application should be equally applied regardless of the nature of the actor. Despite these objective starting points, a thin approach to the rule of law is totally insensible to any form of socio-political morality or the political regime applying them. Thus, as stated by the main contemporary supporter of this understanding, Joseph Raz:

> "A nondemocratic legal system, based on the denial human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform the requirements of the rule-of-law better than any of the legal systems of the more enlightened Western democracies"[6].

[1] WALDRON (2002).
[2] TAMANAHA (2003).
[3] Ibid.
[4] TAMANAHA (2012: 233).
[5] DEN HERTOG (2012).
[6] RAZ (1979: 214).

It should be noted than in a thin definition any reference to the values of democracy and human rights is missing. The requirements that citizens and State's authorities must abide by the law says nothing about the nature of the legal procedures to be followed when legislating and what type of standards have to be respected in their creation. Thus, the rule of law is only linked to the notion of legality, while democracy is solely understood as a system of governance and human rights as universal norms and standards. They are different elements whose coexistence is by no mean indissoluble and that can survive alone in various socio-political legal system.

A thicker understanding of the rule of law moves from formality to substance. The thick version of the notion claims that legality of the outcomes alone is not sufficient since the substance of these outcomes matters, if not more, as much as the legislative process behind their creation. The substantive approach considers laws enshrined with the protection of socio-political freedoms and procedural guarantees. Under this interpretation, being the public power embedded in a strict, yet comprehensive, legal system, the individuals are granted with the possibility of enforcing their rights before courts against the State as a public actor itself. As put by Dworkin: "It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole"[7]. From this starting point the necessity for State and judicial institutions to be fair, competent, and efficient and to enjoy a discrete degree of administrative capacity, independence and impartiality. Trying to list those characteristics, eight attributes can be identified of a thick understating of the rule of law:

1. Constitutional order: everything is ruled by rules, from the legal hierarchy to the relationship among institutional actors;
2. Supremacy of the constitutional order so interpreted by a constitutional court;
3. Equal applicability of the law;
4. Illegal action are discouraged, detected and sanctioned;
5. Guarantees of fundamental socio-political rights;
6. All security forces are subservient to civilian government (i.e. treatment of detainee);
7. Independence of the judiciary;
8. Free and fair access to justice.

Regardless of the approach, there are three basic implications which has been embraced by the majority of scholars, independently from their positions and which are worth discussing: (1) the notion that government is limited by law; (2) the notion of formal legality; (3) the expression "the rule of law, not man"[8].

1.1.1 Government limited by law

A vary basic understanding of the rule of law is that the State and its institutions should be subject to the law. The State can amend the laws through an established procedure, yet, it should always abide by the laws in force. In addition, when the State decides to change the law, its law-making power is bounded by multiple restraints such as constitutional rights, international standards and legal limitations. Despite these premises, in the words of Thomas Hobbes "He that is bound to himself only, is not bound"[9] hence, how

[7] DWORKING (1978).
[8] TAMANAHA (2012: 236).
[9] HOBBES (1996: 176-177).

can the State, that creates and enforces the law, be limited by its own actions? Modern societies provided a solution to this problem by both creating, within the government, separate institutions dedicated to solely law-related questions and by introducing the widely institutionalized separation of powers. In some political regimes, especially democratic ones, there exists the role of the Attorney General or prosecutor[10]. This figure in under the direct authority of the Executive but retain a large institutional separation from it while being abide by the law. In addition, in many societies, a judicial branch is present which is responsible for the application of the law and which is granted with total independence from other State's powers and institutions. The modern response to Hobbes' dilemma is thus the creation of separated parts of the government invested with the duty to bind other parts to the law.

1.1.2. Formal legality

The main aspect of formal legality is that it enhances people to act freely as long as they are aware of the permissible range of action. To put it in simpler terms: formal legality provides predictability to law[11] or, as stated by Hayek, it makes "possible to foresee with fair certainty how the authority will use its coercive power in given circumstances and to plan one's individual affairs on the basis of this knowledge"[12]. Formal legality hence sums up the already mentioned core of the rule of law, that laws should be general in their content, equal in their application and certain in their outcomes. According to Tamanaha, however, formal legality does present three important limitations. Firstly, in a given legal system, situations may arise that do not conform to the rationale behind the rules in place. Rules are, by nature, both under-inclusive, in the sense that they miss to include situations that would have enhanced the purpose of the rule, and over-inclusive, since their results may be inconsistent with the aim of the provision. Secondly, a critique that has been moved against the thin understanding of the rule of law, is that formal legality is theoretically compatible with authoritarian and non-democratic regimes[13]. Thirdly, there are circumstances in which formal legality will not produce the more socially-beneficial outcomes and where discretionary or compromise are necessary. An example may be the work of administrative officials in gathering information, making judgements and exercising discretion while planning a social policy. These three limitations demonstrates that the blind application to formal legality in the context of the rule of law may, sometimes, produce undesirable results.

1.1.3. The rule of law, not man

The third implication derives from the conceptual contrast between the rule of law (general, fair and predictable) and the rule of man, which is likely to be subject to the unpredictable passions of man. In this sense, the rule of law, is thought to provide a shield from the injustices that may arise from human biases while being built on distrust of others. However, despite this theoretical

[10] In the Watergate Affair (1972) in the United States, officials from the Department of Justice conducted an investigation into whether President Nixon had violated federal law.
[11] TAMANAHA (2012: 240).
[12] HAYEK (1994).
[13] On this point, consider the struggle for civil rights in the United States and the apartheid in South Africa.

premises, the "rule of law, not man" has a structural problem in it: the assumption that laws are self-interpreting and self-applying. In all types of societies, human intervention in the interpretation and application of the law is inevitable and this poses the risk to bring back human biases when resorting to law. A solution to this problem is to identify, in the judiciary branch, the sole guardian of the law and the justification is that the judges are the only ones who undergo a specific training that makes them loyal exclusively to the law. It comes without saying that to reach the presented solution the only way is to grant total independence and protection from interferences to the judiciary through: (1) the selection of judges on the base objective criteria, mostly their legal expertise; (2) their long-term appointment in office; (3) the certainty that judges will not be removed from office on the base of their lawful operate; (4) a reasonable salary. Another important requisite is the external support the judiciary must receive from government officials and citizens in thinking any interference with their work will undermine the nature of law itself and that their judgments are binding, despite their objectionableness. The "rule by law, not man" is no exempt from dangers. The rule of law might become rule by judges, which will lead eventually to the judicialization of politics, whenever the judiciary tries to interfere with the operate of other institutions, or to the politicization of the judiciary whenever members of society try to elect judges that will work to advance precise political ambitions.

These three implications on the rule of law can converge in a single proposition elaborated by Tamanaha:

> "When the government exercises coercion against a citizen, it must do so in accordance with legal rules stated in advance, in a manner consistent with the dictates of formal legality. Legal rules must affirmatively authorize the government action. The government action cannot transgress any standing legal restrictions. At some point there must be recourse to an independent court dedicated to upholding the law that will make a determination of the legality of the government's action. And the ruling of the court must be respected by government officials"[14].

While the rhetorical discussion around whether or not applying a thinner or thicker understanding of the rule of law respects a clear dichotomy between form and substance, the practical application of one approach over the other is a far more difficult matter. The 2017 World Development Report[15] claims that, if the thin version of the rule of law is losing ground in favor of a thicker version, this is the case only with regards to the outcomes – i.e. thin approaches for thick objectives. Many political actors may be claiming their embracement to a "thick" version of the rule of law but some institutional constraints, such as the political order or the state of justice, stop them from moving completely towards a substantive approach[16]. Finally, the rule of law does reside upon one, and one only, essential element, without which all discussion above would be null: people must believe and must be committed to the rule of law. Only when the acceptance is pervasive, the rule of law can be enforced.

[14] TAMANAHA (2012: 246).
[15] World Bank, 2017.
[16] VAN VEEN (2017).

1.2 The principle of the rule of law in the EU Treaties

In a famous speech delivered on March 1962, the first President of the European Commission, Walter Hallstein (1958-1967), referred to the then European Economic Community (EEC) as a Community that:

> "[…] was not created by military power or political pressure but owes its existence to a constitutive legal act. It also lives in accordance with fixed rules of law and its institutions are subject to judicial review. In place of power and its manipulation, the balance of powers, the striving for hegemony and the play of alliance we have for the first time the rule of law. The European Economic Community is a community of law, because it serves to realize the idea of law"[17].

Despite the wording, this remark was far from introducing the concept of the rule of law as expressed in the previous paragraphs. Hallstein did not refer to the Member States as all governed by and respectful of the rule or law, nor did he want to imply that the Community was based on certain institutions or principles commonly associated with the notion of the rule of law, i.e. fundamental rights, legal protection and separation of power. What the first President of the Commission wanted to underline was that the Community's powers were based on the sole respect for the law. In fact, the original objectives agreed upon by the Member States were those at the core of the "Common Market", of economic and socio-political nature, and there were no elements linking the Community to any interpretation of the rule of law. Member States, however, did recognize implicitly certain elements of the rule of law in the Treaties, without which the very foundations of the Union could have not been laid, but the transformation commenced only with the juridification of the concept in the 1980s by the European Court of Justice, that transformed the Economic Community into a community of law.

It has to be noted that, in a very implicit way, the notion of rule of law was already contained in the Treaties, especially in former Art. 164 of the Treaty of European Community (TEC), which embedded the Court with the function of ensuring that, in the application and the interpretation of the treaty, the law was observed. However, it was not until the middle of the 1980s that the idea of a community of law was re-endorsed by the European Court of Justice (hereinafter CJEU). In a landmark judgement of 1986[18], the Court held that:

> "[…] the European Economic Community is a Community based on the rule of law, inasmuch 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 character of the Treaty (…) which established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions"[19].

In this judgment, the Court introduced the principle to extent is own jurisdiction, promoting itself at the peak of the European judicial system, and to affirm the *sui generis* nature of the Community with regards to other international agreements. What can be derived from Les Verts is that, according to the Court: the principle of the rule of law should be understood primarily at a Union's level and that this level regards exclusively questions of legal protection[20]. Hence, because of the wording, the very first

[17] HALLSTEIN (1979: 343-344).
[18] ECJ, 23 April 1986, Case 294/83, *Les Verts v. Parliament*. Here the Court had to decide on whether acts of the European Parliament could have also be annulled under Art. 173 TEC (now Art. 263 TFEU).
[19] *Les Verts*, paras 23-24.
[20] SCHROEDER (2016).

understating of a "community based on the rule of law", could be defined as a thin or formal approach to the principle of the rule of law with a focus on the importance of the function of judicial review. Such function was later stressed in the words of Advocate General Mischo with regard to the 1990 Busseni case[21]:

> "[…] the Court has on a number of occasions relied on Art. 164 TEC and the principles deriving from it for the purpose of giving broad and coherent interpretation to those provisions of the Treaty which deal with the various means of redress, even going so far, when the need arises, as to remedy omissions and lacunae within it"[22].

Here, the understandings of the Court on the role of the rule of law is merely on procedural terms of judicial remedies. This role, other than assuring effective legal protection to individuals against unlawful procedures, serves to check the validity of measures taken on the available legal basis so to preserve the institutional balance of the Union.

With the progression of the constitutional interpretation of the Treaties and the judicial efforts made by the Court with regard to the introduction and the extension of the principle of the rule of law in the European legal system, Member States decided to constitutionalize it, together with principles of democracy and fundamental human rights. Despite many scholars will identify the Maastricht Treaty (entered into force in 1993), and Art. F (1) in particular, as the watershed in the constitutionalization of the rule of law, there is no explicit mention of the principle in the cited article nor in subsequent provisions of the Treaty[23]. The rule of law is explicitly mentioned for the first time in the Conclusions of the European Council of Copenhagen in 1993, where, in the framework of the relations between the Community and the Countries of Central and Eastern Europe, the institutions of said countries, in their desire to become members of the Union, should be able to guarantee, inter alia, the respect of the rule of law. Finally, the Amsterdam Treaty of 1997 took a step forward adopting the principles of liberty, democracy, respect for human rights and fundamental freedoms and rule of law as founding principles of the Union, common to the Member States.

1.2.1. From principle to value

With regard to the rule of law, the Lisbon Treaty (2009) is said to have done nothing more than moving the concepts from former Art. 6 to Art. 2 TEU, while changing "principles" into "values". Despite its insignificant relevance in academic analysis[24], this change in wording reflects, once again, a precursory activity of the CJEU in moving from a mere procedural understanding of the rule of law (dominated by judicial protection) to a more substantive approach linked with fundamental human rights protection. A first

[21] ECJ, Case C-221/88, 22 February 1990 *European Coal and Steel Community v. Acciaierie e ferriere Busseni SpA (in liquidation)*. Judicial preliminary rulings on the interpretation of Commission Recommendation 86/198/ECSC of 13 May 1986 on the establishment of preferential treatment for debts in respect of levies on the production of coal and steel.
[22] Opinion of AG Mischio, 28 November 1989, Case 221/88 *European Coal and Steal Community v Acciaierie e ferriere Busseni SpA (in liquidation*), para. 20.
[23] Art. F par. 1 merely acknowledged that the governmental systems of the Member States are founded on democratic principles: "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy."
[24] PECH (2012).

case law worth mentioning is the *UPA* case (2002) in which the Court held that:

> "The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order […]"[25].

Here the link between the function of judicial review (formal) and the protection of fundamental rights (substantive) is more than evident. However, the most illustrative judgement that testifies the connecting tissue of the CJEU between a substantive and formal understanding of the rule of law is the controversial *Kadi* case (2008)[26]. While the (then) Court of First Instance claimed that no judicial remedy existed within EU legal order capable of remedying a damage caused by a Regulation[27], whose origin had to be found in a UN Security Council resolution, the Court held that:

> "[…] the obligation imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which is for the Court to review in the framework of the complete system of legal remedies established by the Treaty. […] Review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a *Community based on the rule of law* [emphasis added], of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system"[28].

The picture that emerges from these two judgments is a clear shift of the Court towards a more inclusive notion of the rule of law, not its full adherence to a substantive meaning. The rule of law is used by the Court to justify the application of specific legal remedies, which sometimes may serve the protection of fundamental rights but by no means should those rights be considered an inherent part of the rule of law[29]. This inextricable connection between those notions is also clear from the wording of Art. 2 TEU, in which, the rule of law, fundamental rights and democracy are mentioned separately.
Apart from the legal transformation, the term "value" is an interesting starting point to analyse the new constitutional role Art. 2 TEU is intended to have for the Union. For starter, as listed in the Treaty, those values represent some principles that has to be followed and implemented through specific legal rules and institutions in the Union decision-making procedure. In its judicial function, the CJEU understands these values in a pragmatic manner, that is, as self-standing standards of legality from which other principles can be derived[30], i.e. the principle of legal certainty[31]. Secondly, these values are considered as having an ethical and ordering function in the Union legal system that embraces both the internal identity-building and the external

[25] ECJ, 25 July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union*, paras. 38-39.
[26] The case concerned a blacklisted individual (i.e. under anti-terrorist policies) whose assets had been frozen following the Council Regulation No 467/2001 of March 6 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds in respect of the Taliban of Afghanistan.
[27] Council Regulation (EC) No 467/2001.
[28] ECJ, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, paras 258 and 316.
[29] DEN HERTOG (2012).
[30] SCHROEDER (2016).
[31] ECJ, 16 March 2006, Case C-234/04 *Rosmarie Kapferer vs Schlank & Schick GmbH*, paras 20 ff.

legitimacy-creating function of the Union[32]. This double function was clearly mentioned by First Vice-President of the European Commission, Frans Timmermans in a 2015 speech in which he held that "the rule of law is not just an inspiration, it is also an aspiration; a principle that guides both our internal and external actions; it is what we are and what we want to be". By developing this internal-external dimension, Timmermans stressed the role the rule of law has in portraying Europe's self-image and linked the Union's internal commitment to the value to its ability in operating in an international system[33]. Finally, values mentioned in the first period of Art. 2 have a constitutional nature for the Union since it is "founded" on them, while values mentioned in second period are presupposed as being part of the societal model of Member States. Thus, a hierarchy has been established between values by the Treaty, and while the first are transformed into the legal system through legal norms, the second remain in the implicit social system of the States[34].

The internal identity-building and the external legitimacy-creating functions are only two aspects the rule of law acquired when promoted to value. Another one worth mentioning is its normative effect in the Union's legal system.
In fact, being the rule of law enlisted in a provision contained in a Treaty, i.e. a legal text, it has a normative character, that is the rule of law is itself of legal nature. Both the Union and the Member States, in accordance to Art. 3(1) and Art. 4(3) TEU, are bound to the respect and the promotion of the values enshrined in the Treaty. Values whose respect is defined as necessary membership requirement in Art. 49 TEU, and whose violation is sanctioned accordingly to the provisions of Art. 7 TEU. However, as seen, the CJEU, by deriving judgments on the basis of principles, had already conferred the normative character to these principles back in the mid-1980s and their mention in a Treaty provision "only constitutes their black-letter law manifestation"[35].

1.2.2. The homogeneity clause

Art. 2 is often defined as the "homogeneity clause" in the sense that the principles mentioned, and the rule of law standards in particular, applies both in vertical relations between the Union and Member States and horizontally among Member States themselves. However, Art. 2 TEU does not call on the European Union for the interpretation of rule of law in light of the constitutional traditions of Member States, nor does the Art. call for a "strict separation" between the definitions to be given at national and communitarian level. So, despite the liberty the lack of definition may be given on its possible application, if there is no shared notion on what the rule of law is, then what is that the Union is devoted to safeguard?

The idea of total adherence to the standards set down by Art. 2 is often analyzed in light of federal systems. Nonetheless, the famous *sui generis* nature of the Union, poses some problem in sustaining this approach. First of all, that the relation between the Union and Member States is not comparable

[32] See the provisions contained in Art. 3 (1) (5) TEU, Art. 8 TEU, Art. 21 (2), Art. 32 and Art. 42 (5) TEU with regards to the Common Foreign and Security Policy.
[33] MAGEN (2016).
[34] SCHROEDER (2016).
[35] Ibid.

to the relation between State's and federal's institutions has been made clear in various case law[36], and, additionally, the constitutional nature of the Union, even if "founded" on some principles common to the Member States, does present its own peculiarities. Hence, this idea of total simultaneous adherence by the Union and Member States, in the understandings of the values of Art. 2, is to be rejected. In the horizontal relations between Member States, in light of their constitutional traditions, there exists no such thing as rule of law homogeneity, and no common conception with regard to the rule of law and fundamental rights can be found[37]. In conclusion, understanding Art. 2 as a homogeneity clause would be an over-stretching exercise of constitutional interpretation. It is the Union itself that, in Art. 4 (2) TEU, recognizes that the constitutional values common to the Member States mentioned in Art. 2, should, by no mean, level the structural, constitutional differences between the Union and Member States. Dismantled the idea of a homogeneous understanding, what is left to the rule of law in the vertical and horizontal relation of the Union and the Member States, is the creation of a common, European minimum standard that has to be observed.

This minimum standard serves also the basis for one of the fundamental principle of the Union legal order, which is the principle of mutual recognition. The principle is quite self-explaining: the authorities of a Member State have to accept the legal acts of another Member State as binding and treating them as if these factual circumstances had been decided upon by the Member State's own legal system. There are no procedural standards explicitly mentioned that has to be followed, which means the only mutual recognition applicable by Member States is to be understood on the basis of the values contained in Art. 2 TEU. However, whenever the minimum standards related to judicial and administrative procedures implied by the principle of the rule of law are not respected, the CJEU has obliged Member States to suspend any legal recognition and cooperation whit wrong-doing Member States[38]. The disregard of the standards of the rule of law are not be understood solely in the scope of application of Union law by Member States. In fact, Art. 2 TEU is quite precise in stating that Member State and the Union have the duty to respect such values in the exercise of their public authority. In addition, Art. 7 TEU requires that Member States organizes their legal systems so that any violation of the values referred to in Art. 2 TEU does not occur[39]. Therefore, the minimum standards derived from the provision of Art. 2 TEU are to be respected both at the Union level and in the autonomous actions of Member States in the exercise of their sovereign authority.

[36] ECJ, 9 August 1994, Case C-359/92, *Germany v Council* and ECHR, 18 February 1999, *Matthews v UK*, para 48.

[37] ECJ, 14 October 2004, Case C-36/02 *Omega Spielhallen – und Automatenaufstellungs-GmbH vs Oberburgermeistrerin der Bundesstadt Bonn*, para 37. Also, regarding the difference of the rule of law and continental legal systems, AV Dicey, *Introduction to the Study of the Law of Constitutional*, (1961) 10th edn, London, Macmillan.

[38] ECJ, 21 December 2011, Joined Cases C-411/10 and C-493/10, *N S and Others*, para 86, regarding Reg (EC) No 343/2003 (Dublin II).

[39] Commission "Communication on Art. 7 of the Treaty on the European Union" COM (2003) 606 final (n 55) para 1.1.

1.3. The rule of law turn

Despite the efforts of the Court and the codification in the Treaties, what remains of the rule of law is a "conceptual puzzle" that, a part from some interlocking features, is missing a clear frame of reference. A reference that, to be fair, has been provided by the Commission in 2014 that, when presenting the new "EU Framework to strengthen the Rule of Law", stated:

> "The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union and of the European Court of Human Rights (…) provide a non-exhaustive list of the principle and hence define the core meaning of the rule of law as a common value of the EU in accordance with Art. 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights: and equality before the law"[40].

A definition that was long needed in the Union legal framework and which does not come in anonymous time. Since 2010, in fact, governments in Hungary and Poland have been implementing illiberal policies undermining the principle of judicial independence and the checks and balances role of other State's institutions, i.e. supreme courts and constitutional courts, posing more than a simple threat to the survival of the rule of law in their countries. The ongoing crisis has been addressed particularly, but not exclusively, by the Commission who chose to frame it primarily on the basis of the rule of law, rather than other values contained in Art. 2, marking a clear "rule of law turn" in the working of EU policy-elites[41].

The measures adopted in Hungary and Poland, which includes "the obliteration of parliamentary checks on executive power, purging of the bureaucracy and their replacement with party cronies, overhaul of electoral systems so to favor the ruling party, censoring of public media, and crackdown on oppositional church and civil society organization"[42], are, in reality, part of a broader attack against what Krastev (2007) defined as "liberal consensus"[43]. This democratic backsliding (worryingly common in Central Europe), which has been described by the Hungarian Prime Minister, Viktor Orban, as a step towards "an illiberal nation-state"[44], constitutes a true U-turn at the very core of the European Union posing a threat to all the values contained in Art. 2 TEU, from fundamental rights, to the protection of minorities and the notion of democracy itself. Hence, given this contextualization, why did the Commission decide to proceed exclusively in terms of the rule of law?

For start, as already amply discussed, because of the elasticity of the concept, the rule of law can easily incorporate, simultaneously, notions derivable from other values, such human rights and democracy. Secondly, the framework adopted by EU's institutions underlines that what is believed to be missing are not democratic institutions nor procedures, rather the clear willingness to maintain and apply those prerogatives. Thirdly, the decision could be said to

[40] Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law, (2014) p. 4.
[41] MAGEN (2016).
[42] Ibid.
[43] KRASTEV (2007).
[44] DAWSON (2016: 21).

be largely related to questions of inter-institutions power dynamics, since it is the Commission, and the Commission only, who is the guardian of the Treaties and hence responsible for the Member State's compliance to the values enumerated in Art. 2 TEU. Finally, to frame the situation in term of a rule of law crisis, could be seen as a complex bureaucratic procedure aimed at depoliticizing the issue an increase the technocratic role of the Commission in communitarian matters.

2. Violation of the rule of law

It has been noted that the principle of the rule of law was not part of the black letter of the Community for a long time, despite having been used as an unwritten legal principle by the CJEU since the mid-'80s. It was codified for the first time with the pre-accession strategy, developed with the "Conclusion of the European Council of Copenhagen" of 1997, in preparation of the big-bang enlargement to the East. The so-called "Copenhagen criteria", ensure that potential new Member States are able to guarantee the respect of the Union's common principles, included the rule of law, before ratifying their accession. Currently, rule of law examinations are particularly important in two of the chapters of the *acquis* that form the basis of the accession negotiation for each candidate country, namely Chapter 23 and Chapter 24[45]. Unfortunately, no such function of internal compliance with the rule of law was added together with Copenhagen Criteria.

The absence of such mechanisms should not be solely attributed to a lack of will during the European Council of Copenhagen, rather it is something Member States seemed to have overlook since 1952. The European Coal and Steal Community and the later European Economic Community were thought and developed as economic organisations with little interest to values such as rule of law and fundamental human rights. This should not come as a surprise since the six original Member States were all thought to be "like-minded nations" that already had in place systems of protection of fundamental values. The debate around the protection of the rule of law, internally to Member States, did not became of political importance until the enlargement towards the new democracies of Eastern Europe in early 2000s. While the Copenhagen Criteria were of significant importance in assuring the enlargement was successful in term of respect of the funding values, no mechanism to supervise the internal respect of the funding values was deemed necessary, something which has been referred to by Vice-President of the European Commission Viviane Reding as the "Copenhagen dilemma"[46]. Following the reasoning of the "Copenhagen Dilemma", Member States would be able to abuse the one-way-street nature of the EU membership, not comply with the values contained in Art. 2 TEU and jeopardise the entire system of principles of the Union. At the basis of the dilemma some profound sovereignty struggles lie between European institutions and Member States[47]. Whenever the European Union intervenes in the intersection of fundamental rights, democracy and the rule of law, it pushes for the primacy of EU law while calling upon Member States to loyally cooperate in light of the Treaties and Art. 2 in particular. On

[45] Chapter 23 on the Judiciary and Fundamental Rights and Chapter 24 on Justice, Freedom and Security.
[46]European Parliament (2012), *Plenary debate on the political situation in Romania*, statement by V. Reding, 12 Sept. 2012.
[47] CARRERA, GUILD (2013).

the other hand, Member States counter this position on the basis of the principle of subsidiarity[48] and national sovereignty.

The gap between proclamation and enforcement would not be a problem if Member States were to adhere blindly to the EU's legal founding principles in the exercise of their domestic authority but, contrary to James Madison's desires[49], being governments composed of human beings, this is not always the case. Member States did violate foundational principles multiple times, and they did so through: (1) sticking to their old jurisprudence without responding to the changed communitarian circumstances and (2) explicitly turning against their own once respected principles. This can be done with regards to fundamental rights - as in the case of the Roma crises in France (2010-2013)[50] and the mass surveillance programmes of EU citizens by the British Government Communication Headquarters (GCHQ) intelligence service[51] - or by a direct violation of the principle of the rule of law with a systematic elimination and rearrangement of state institutions so to reduce the checks and balance function of the separation of power - as in the case of the constitutional reforms in Hungary[52] and Poland. Being the rule of law and fundamental rights co-constitutive elements, it should not come as a surprise that the violation of the former will quite surely trigger the violation of the latter. The crisis of Roma people, in fact, was followed by an unjustified determination of a state of emergency and the unlimited electronic surveillance by the GCHQ was only possible because of a lack of judicial accountability of intelligence's practices.

Before moving to discuss some of the existing (and inefficient) instruments the Union has equipped itself with over the years, two situations must be drawn. Whenever a Member State acts within the scope of EU law, i.e. implementing EU law, it is bound to comply with all obligations directly and indirectly deriving from the Treaties. In order to guarantee the respect of such obligations and sanction their violation a judicial mechanism is available: the infringement procedure under Art. 258 TFEU. However, this article, which gives the Commission the power to bring a Member State before the CJEU for specific violation of concrete EU law obligations[53], has not proved itself useful to challenge systemic deficiencies of the rule of law in a Member State. Hence, whenever a Member State is formally acting outside the scope of EU law, the Union legal system is not equally equipped with a specific sanctioning provision, which makes a potential deteriorating situation of the rule of law a critical issue.

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[48] Art. 5 TEU.

[49] Former US President, James Madison (1751-1836), in *The Federalist No 51* wrote: "If angels were to govern men, neither external nor internal control on government would be necessary".

[50] In July 2010, French government initiated a program to repatriate thousands of Romanian Romani that lasted until 2013. Although those people have the rights to enter France as European Citizens, under French immigration rules, they must work or obtain a residence permits to reside longer than three months. The deportation fuelled an intense political debate both in France and in the Union where they were addressed as "a disgrace" by former European Commissioner for Justice, Fundamental Rights and Citizenship, who even called for the Union to enforce legal consequence on France.

[51] For about 7 years, from 2007 to 2014, the US National Security Agency (NSA) granted access to Britain's GCHQ to emails and phone records of European citizens intercepted in the framework of the Prism intercept program.

[52] New Fundamental Law of 2011.

[53] Following the New Fundamental Law of 2011 adopted in Hungary, the Commission sought clarification, under Art. 258 TFEU, about the independence of the country's judiciary claiming that, when applying EU rules, national courts act as "Union courts" and, as such, they need to satisfy minimum standards of independence.

In these cases, an exceptional role can be played by Art. 2 TEU which, as already discussed, is to be applied in general by Member States, even when their acting outside the scope of EU law. However, actions under Art. 258 TFEU cannot be trigger to enforce Art. 2 TEU who comes as *lex generalis* of another provision, Art. 7 TEU. Despite being the only way to enforce Art. 2 TEU, Art. 7 TEU does present some important limitations, both procedural in its application – it requires rather high thresholds – and substantive – it can only be applied when there is a "serious and persistent breach"[54] of the values of Art. 2 TEU. Moreover, the procedure totally exclude the intervention of the Court of Justice, a body that in multiple occasion showed its crucial role in the protection of EU principles. It is no surprise, then, that current mechanisms, and Art. 7 TEU in particular, have been considered insufficient to tackle all the possible situations that may threaten the rule of law or other fundamental values in Member States. That is why several reforms proposal have been advanced, together with a limited number of diplomatic mechanisms with political pressure, by different European institutions.

2.2 Existing instruments and their limits

Numerous calls have been made for the creation of new mechanisms to supervise the rule of law and the other fundamental values of Art. 2 TEU, but two issues were to be addressed first: whether a new mechanism was to be implemented and which EU institution was to be considered responsible for it. As of today, the EU can count on a plurality of tools to monitor, in different ways, Member States' adherence to Art. 2 TEU's relevant legal principles. For the sake of simplicity, these instruments can be grouped according to their scope, normative nature and degree of enforcement[55]: evaluation and benchmarking, discussion and dialogue, monitoring and supervision. For the purpose of this dissertation, the first two groups of instruments will be described in their generalities, while the latter will be discussed more in details.

2.2.1. Evaluation instruments: the EU Anti-Corruption Report the EU Justice Scoreboard

Evaluation instruments lack of coercive arm. Their scope is to analyse comparable situations in different Member States and provide non-binding recommendations to address eventual deficits. The analysis are conducted both in a qualitative and quantitative level, in specific subject areas and on the basis of well-established communitarian standards. The aim is to incentive Member States to adhere with international and, mostly, European structural and substantial models. Surprisingly, these incentives are supported only by some legally weak follow ups to ensure the effective implementation of recommendations. Among the evaluation instruments, there exists a special category, the so-called "benchmarking" evaluation methods. These methods are different from evaluation instruments since they identify common principles and select the good/bad practices of Member States in their respect. In other terms, benchmarking methods compare EU Member States and,

[54] Art. 7 (2) TEU.
[55] BARD, CARRERA, GUILD, KOCHENOV (2016: 5).

through specific indicators of their performances, select the "best practises". There are several practical examples of benchmarking evaluation methods currently implemented at the European level, two of them are the EU Anti-Corruption Report and the EU Justice Scoreboard.

Adopted in June 2011 by the European Commission[56], the EU Anti-Corruption Report is a comprehensive mechanism tracking all the efforts made by Member States to fight corruption in the Union. This anti-corruption package comes after data collected by the Eurobarometer 2011 on perception of corruption suggested that the phenomenon remain a major problem for citizens in all Member States. According to the first EU Anti-Corruption Report of 2014, the mechanism:

> "[…] describes good practices as well as weaknesses, and identifies steps which will allow Member States to address corruption more effectively. (...) It is (…) the Union's common interest to ensure that all Member States have efficient anti-corruption policies and that the EU supports the Member States in pursuing this work. The report therefore seeks to promote high anti-corruption standards across the EU. By highlighting problems – as well as good practices – found inside the EU […]"[57].

A report is produced and published every two years with the scope to fuel political discussion around fighting corruption and coordinate anti-corruption policies taken by Member States. Data are collected from multiple sources, included some existing anti-corruption mechanisms adopted at the international level, such as the Council of Europe's Group of States against Corruption (GRECO)[58], the Organisation for Economic Co-operation and Development (OECD) and the United Nations Convention against Corruption (UNCAC)[59]. Moreover, the Report can count on the contribution from Member State's public authorities, civil society, academic and a group of experts on corruption which has been designated as an advisory body to the Commission. The Report was originally thought to be generally applicable to all Member States indistinctively but, given the substantial differences among Member States, indicators such as perception and the evaluation of existing anti-corruption measures were later adapted so to be used in a more country-by-country methodology. Generally an EU-Anti Corruption report, whose final aim is to produce recommendations for a more efficient application of EU policy, is structured with an introduction (presenting the policy setting and background), the result of Eurobarometer on perception and experience of corruption, a corruption-related trend at Union's level and a Country Chapters which is more country-oriented with the analysis of key issues and specific resolutions for how to step up efforts against corruption.

Active since 2012, the EU Justice Scoreboard aims at identifying all the parameters that would ameliorate every Member States' judicial system. In the words of the European Commission, the Scoreboard operates:

> "[…] by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States. Quality, independence and efficiency are the key components of an "effective justice system". Providing information on these components in all Member States contributes to

[56] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 6 June 2011, COM(2011) 308 final, *Fighting Corruption in the EU.*

[57] Report from the Commission to the Council and the European Parliament, 3 February 2014, COM(2014) 38 final, *EU Anti-Corruption Report.*

[58] The Group of State against Corruption (GRECO) was formed in 1999 by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards.

[59] Adopted on December 2003, UNCAC is the only binding international anti-corruption multilateral treaty currently in force.

> identifying potential shortcomings and good examples and supports the development of justice policies at national and at EU level"[60].

Namely, those components are related to multiple aspects of the judicial system: the overall quality (i.e. courts' technological advancement, legal support for judges and judicial operator, equal share of female judges); the independence of judiciary (substantive, procedural and perceived) and the overall structural efficiency (length of proceedings, pending cases, etc.). Data are collected through a multitude of instruments, mainly the Council of Europe's Commission for the Evaluation of the Efficiency of Justice (CEPEJ) that, despite not being a communitarian instrument, functions as essential body providing statistics and procedural reviews of national judicial systems. The CEPEJ, which uses a range of both legal and social indicators, aims at identifying, on an annual report, "areas of possible improvement" and "problems", through benchmarking methods such as the delineation of best practices, guidelines and opinion on the operate of Member States' judicial apparatus. Other instruments function as data sources and, apart from information collected through national justice systems on voluntarily base, the Commission cooperates with the European Network of Councils for the Judiciary (ENCJ), the Network of the Presidents of the Supreme Judicial Courts of the EU, Association of the Councils of State and Supreme Administrative Jurisdiction of the EU (ACA), the European Judicial Training Network (EJTN) and the World Economic Forum. The use of the CEPEJ, based on the voluntarily disclosure of data, of others international institutions, and the overall results of the EU Justice Scoreboard have received, over the years, negative comments from EU Member States. This evaluation instrument has been criticized for providing results only on individual elements, while ignoring the holistic function of the judicial system, and for not foreseeing penalties for poorly performing Member States.

2.2.2 Discussion and dialogue instrument

Discussion and dialogue instruments are the newest introduction aimed at safeguarding the respect of the rule of law. The sole example of such instruments is the Rule of Law Dialogue (hereinafter the Dialogue), conceived by the General Affairs Council and adopted in 2014 under the Italian Presidency. The Dialogue relies upon the recognition of the rule of law as one of the founding principles of the Union and the important role of the procedure described in Art. 7 TEU for its preservation.

Due to its already sketched limits, on 6 March 2013, the Minister of Foreign Affairs of Denmark, Finland, Germany and the Netherlands expressed their doubts on the efficiency of Art. 7 TEU and called upon the European Commission for the creation of a mechanism to better tackle intermediate situations of threat to the rule of law. The Commission responded promptly to the request with the Communication on the new EU Framework to strengthen the Rule of Law on March 2014, a mechanism that has raised multiple doubts among EU institutions, especially from the Council. On 27 May 2014, the Council Legal Service (CLS) issued a negative legal opinion[61], claiming the

[60] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Region, 27 March 2013, COM(2013) 160 final, *The EU Justice Scoreboard. A tool to promote effective justice and growth.*
[61] Doc. 10296/14.

lack of legal basis in the Treaties to empower any EU institutions to create a new supervision mechanism outside the procedure stemming from Art. 7 TEU.

On this basis, on December 2014, the General Affair Council announced the establishment of the Dialogue. A mechanism that, according to a document prepared by the Italian presidency in November 2014:

> "[…] aims to encourage the culture of "respect for rule of law" through a constructive dialogue among the Member States. This could be done by promoting the political dialogue within the Council in respect of the principles of objectivity, non-discrimination, equal treatment, on a non-partisan and evidence-based approach. The political dialogue should be developed in a synergic way, taking into account existing instruments and expertise in this field"[62].

The Dialogue is held once a year in the General Affair Council configuration and documents are prepared by the Committee of Permanent Representatives (COREPER) on thematic subjects. No role has been assigned to the Commission nor to the European Parliament in this soft dialogue mechanism. However, the Commission is invited in participating, often to expose the results of its annual colloquium on fundamental rights[63]. Differently from every other type of instrument introduced by EU institution, the Dialogue established by the Council does not provide for a new forum nor new mechanisms through which political actors and Member States can operate. This weakness has been widely criticized by some Member States and the Commission that claimed the "soft political dialogue" would not be able to properly address, nor fix, the gaps in the existing national systems, especially since the Council did not provide reliable sources of data, defined principles of evaluation and a system of peer review. The adoption of such a soft instrument by the Council is not surprising at all considering the reluctance of some Member States to allow the Commission to look into rule of law matters on area formerly outside EU law. Given the criticisms and the widespread reluctance of governments, one interpretation is that the Council is only looking for a "façade of action"[64]. Some believe this façade is based upon two potential explanations: the Council is in denial about the internal challenges and the Dialogue was the only instrument upon which, even governments with highly questionable rule of law records, were able to agree upon[65].

2.3 Supervision instrument: Art. 7 TEU

Supervision instruments have a monitoring function in cases where the values contained in Art. 2 TEU are threatened by the risk of a serious breach, or the actual presence of a persistent breaches, deriving from the behaviour of an EU Member State. Given this special function, supervision instruments are the only one with a preventive application and a subsequent coercive arm. In the current EU legal system, such function is served exclusively by Art. 7 TEU. Despite its uniqueness, Art. 7 has never been applied, even if persistent and

[62] Note from the Presidency to Council, 14 November 2014, Doc 15206/14, *Ensuring respect for the rule of law in the European Union.*
[63] The Commission's Annual Colloquia on fundamental rights are held once a year since 2015 and are focused on strengthening engagement for the protection of fundamental rights in Europe.
[64] ROTH (2011: 1).
[65] KOCHENOV, PECH (2015: 14).

serious breaches of EU fundamental values are becoming a widespread malpractice in Europe. Doubts on the possibility to activate Art. 7 TEU revolve around its nearly unattainable procedural requirements and its unforeseeable consequences which, for a long time, contributed to fuel its assimilation with the form "nuclear option". However, before siding with this interpretation of the provision and jump to conclusions, an attentive analysis of Art. 7 is worth developing.

2.3.1 The game theory's approach

The prospective punishment, whether it be legal or financial, has always been thought to be a sufficient deterrent for perspective criminals who, in the evaluation of their actions, may discover the consequences more disastrous than the gains. However, this has never been proved and that was because a variable has long been ignored: the probability of the execution of the punishment. If one has to put all this variables together, the utility deriving from committing the crime, the probability of a successful investigation and the degree of punishment, they would resolve in the so-called deterrence theory[66]. The theory claims that: as long as the (*u*)tility coming from the (*c*)rime is higher than the decrease in (u)tility in accordance with the degree of (*p*)unishment times the (*p*)robability of being condemned, the criminal will not be discouraged. In more linear terms: whenever Uc > p*Up the criminal will commit the crime. So, even if with a ridiculous fine all criminals are punished, even the most adventurous among them will reconsider committing the crime. On the contrary, if the probability of condemnation is close to zero, no matter how high the fine is, no criminal will be scared of legal consequences.

In light of EU law, the deterrence theory can be useful to explain why, despite the obligations deriving from the Treaties, violations of the rule of law are steadily growing. In the specific case, the right side of the formula (p*Up) is composed of the probability of holding a wrong-doing State accountable for its actions and the prospective of legal consequences. With regard to the multitude of EU actors who have devoted their efforts in supervising the compliance with fundamental values, it has been proved that, whenever a judicial body (the CJEU) takes position against a wrongful party, the probability of sanctioning the infringements is higher that when a political actor (the Commission or the Council) decides to do so. This is further sustained by the fact that no legal consequences are generally envisaged by the majority of existing European instruments (EU Justice Scoreboard, the EU Anti-Corruption Report and the Dialogue) while, legal instruments such as Art. 258 TFEU, who are successfully activated in specific cases, are way more effective in preventing a violation of fundamental values. Art. 7 TEU founds itself quite in the middle of the extremes although pending dangerously towards inefficiency, not because it has no consequences, but because of the highly political procedure needed to activate it.

[66] ORBAN (2016: 120).

2.3.2 The genesis of Art. 7 TEU

To address the gap between the respect of the rule law as a necessary condition for accession of new member States and the absence of an internal mechanism to sanction a breach of such value by its own members, the Union introduced Art. 7 with the ratification of the Treaty of Amsterdam in 1997. The provision, originally constituted of only one option – to assess the presence of a serious and persistent breach – covered cases regarding the principles mentioned in ex-Art. 6 TEU (now Art. 2). According to its first wording, Art. 7 empowered the Council, acting by a qualified majority and after having determined the existence of a serious and persistent breach of former Art. 6 TEU, to suspend certain rights stemming from the Treaties to the wrongdoing Member State, including its voting rights. Not surprisingly, the adoption of such sanctioning mechanism came about at the same time the enlargement of EU towards the new-born democracies of Eastern Europe became a reality. After five years from the adoption of the "Copenhagen Criteria", who assured the respect of fundamental rights and the rule of law on behalf of candidate Member States, Art. 7 TEU then constituted the very first form of supervision and sanctioning, internal to the Union, of said principles.

Despite these premises, facts are that the very first debate on Art. 7 TEU did not revolve around its application on an ex-communist State, but on a liberal one, Austria. Following the 1999 parliamentary elections, a government coalition, made of representatives from the Social Democratic Party and the Freedom Party, gain power in Austria. For the first time after World War II, an extreme radical party was taking position in the cabinet of a Member State. However, even if threats to Union's values were more than evident, nor the European Commission nor other EU institutions firmly condemned the situation. Rather, the electoral results caused the adoption of 14 illegal ad hoc bilateral sanctions imposed on Austria by other Member States under the guidance of the European Council[67], formally acting outside the scope of EU law. This first challenge had two important turn ups for the future development of Art. 7 TEU. Firstly, having impeded the effective deployment of the provision with regard to a manifest violation of EU's values, it had a dissuasive effect on future application. Secondly, it pushed for an upgrade of Art. 7 by the Treaty of Nice. The original mechanism of Art. 7 did not provide any type of warning to Member States and thus, could only be activated as a last resort. This is why the Nice Treaty, having considered the need of an earlier and lesser intervention, introduced the "preventive mechanism" in Art. 7 (1), i.e. the determination of the existence of a "clear risk of a serious breach" of the values referred to in former Art. 6 (1) TEU. Finally, the Treaty of Lisbon brought little changes in the wording of the provision but modified Art. 7 (5), consisting of voting procedures in the Council.

2.3.3 The scope of application of Art. 7 TEU

Art. 7 TEU is meant to address systemic violations of EU's fundamental values but it could not be considered a remedy for citizens nor could it be used to resolve individual violations of such values. Given its direct reference to

[67] EU Council Presidency of 31 January 2010 formally launched the sanctions against Austria on behalf of all the other Member States.

Art. 2 TEU, which has been noted, has to be applied by Member States also when acting outside the scope of EU law, Art. 7 TEU addresses also violations stemming from the implementation of national regulation acting outside the scope of the Union. Hence, the scope of application of Art. 7 TEU goes further than the principle of conferral. In the words of the European Commission, the provision:

> "[…] seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Art. 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occur"[68].

As of today, Art. 7 is structured in five different provisions. Paragraph 1 is the preventive version of the procedure. Paragraph 2 determines the circumstances in which a serious breach of the values referred to in Art. 2 can be declared. Paragraph 3 explains the nature of the applicable sanctions. Paragraph 4 regulates the possible changes and revocation of sanctions and paragraph 5 clarifies the voting procedure to be applied by the Council. This dissertation will look at the first three in a more detailed way.

2.3.3.1 Procedure No. 1: the preventive procedure

Paragraph 1 of the provision states:

> "On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members 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 Art. 2. Before making suck a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
>
> The Council shall regularly verify that the grounds on which such a determination was made continue to apply"[69].

It is clear that, from the wording of this paragraph, the opinion of Art. 7 "nuclear" nature is exaggerated. With multiple actors able to initiate the procedure – the Commission, the European Parliament and 1/3 of the Member States – the provision seems to be relatively easy to use but still protected from an over-stretching or an under-enforcement of Art. 2. As anticipated before, para. 1 introduced the preventive mechanism in pushing the Council, through the possibility of issuing recommendations, to establish a dialogue with the Member State before any kind of breach can occur, all in accordance to the basic requirements of the rule of law. Moreover, the provision does not address any kind of risk to Art. 2. The risk should be: (1) clear, that is it should put no doubt that, in the long run, the situation in the Member State would resolve into a violation of Art. 2; (2) serious, in the sense that the violation would be as severe as to doubt the very adherence of the Member State in question to fundamental values. A controversy related to the last sentence of the paragraph has become whether or not the Council has to power to monitor the situation in a Member State solely after having determined the existence

[68] Communication from the Commission to the Council and the European Parliament, 15 October 2003, COM(2003) 606 final, on Art. 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based.
[69] Art. 7 (1) TEU.

of a serious breach or also prior to this determination. Anyway, having Art. 7 never been used, this controversy never resulted in a concrete resolution.

2.3.3.2 Procedure No. 2: Determination of the existence of a serious and persistent breach

Art. 7 (2) TEU states:

> "The European Council, acting by unanimity on a proposal by one third of the Member State 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 Art. 2, after inviting the Member State in question to submit its observations".

To begin with, it has to be noted that, by no mean, the activation of Art. 7(2) should be made only after Art. 7 (1) has been triggered. The two provisions stand alone and independently. As highlighted by its wording, the activation of Art. 7 (2) is way more difficult than the activation of the previous provision. In fact, the thresholds needed to trigger the provision are sensibly higher – unanimity of the European Council[70] and the consent of the European Parliament – and the actors who can activate the procedure are reduced to only other Member States or the Commission[71]. This higher standards of activation are justified by an important difference introduced by Art. 7 (2): the persistent nature of the breach.

The mechanism of Art. 7 (2) cannot be triggered by any deviation from the rule of law or other fundamental values, it needs to be activated by a persistent breach that is, a breach that had gained regularity and had remained unsanctioned in the Member State. Isolated infringements do not threat general observance, rather they can cause the birth of social and institutional responses aimed at developing the legal system. In this sense, it could be said that isolated infringement serve the law, they do not mine its observance[72]. However, if said infringements are perpetrated and not repressed, the legislative impetus created would eventually backfire and pose serious threats to the stability of the system. When a systemic threat to fundamental values is present, it is likely that Member State's institutions are unwilling or incapable to address the issue and, since the violation of such values in a Member State poses a threat to the entire Union, the intervention of the European Council – the higher political authority of the EU – is required. The perpetuation of the threat is what distinguishes the situation in Berlusconi's Italy and Sarkozy's France from the more serious ones of Poland and Hungary. In the Italian and French cases[73], despite assaults on EU values were evident, the institutions were willing and able to auto-correct and successfully deal with the concern raised by their policies. On the other hand, in Hungary and Poland, the sets of government's reforms on State's organs made impossible, for such

[70] Unanimity in the European Council is required not taking into consideration the representatives of the accused Member State(s). Moreover, Art. 7 does not limit its activation to one MS per time, which means that multiple Member States can be deprived of their rights to vote during this procedure.

[71] The European Parliament cannot issue a reasoned opinion on the matter but can, through its own Rule of Procedure, call on other institutions to act in this sense.

[72] VON BOGDANDY, IOANNIDIS (2014: 72).

[73] Italy's media pluralism recorded a terrible track-record under the Presidency of Berlusconi and French citizens with Romani heritage were illegally deported under the government of Sarkozy in 2011.

institutions, to redeem themselves and adhere to the values of Art. 2 TEU. The very incapability of the Member State to correct its anti-communitarian position is what was considered sufficient to start the debate around the possible application of Art. 7 (2).

One of the main consequence of Art. 7 (2) is the shame it sheds over the Member State(s) subjected to its application. However, even if the shaming could be enough to trigger the change, an effective deployment of Art. 7 (2) could only exist if backed by possible sanctions. That is why the core significance of Art. 7 (2), other than assessing the existence of a threat, is the opening of a way for the application of Art. 7 (3).

2.3.3.3 Procedure No. 3: Sanctioning mechanism

Art. 7 (3) states:

> "Where a determination under paragraph 2 has been made, 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. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligation of natural and legal person. The obligation of the Member States in question under the Treaties shall in any case continue to be binding on that State".

As it is clear, the procedural threshold for the activation of Art. 7 (3) is very high since it must be initiated by the Council – acting by a qualified majority and following the voting procedures established by Art. 354 TFEU[74] and 238 (3) (b) TFEU[75] - and it cannot be activated without a previously successfully deployment of Art. 7 (2).

The provision remains quite vague in identifying the exact nature of the applicable sanctions. The expression "certain rights" implies that there exists some rights the Council can suspend and some rights which, simply, cannot be denied. For example, while Art. 7 (3) can allow the suspension of voting rights in the Council, it cannot, under any circumstances, suspend or cease the membership of Member State. It remains to the MS who is target of sanction to decide whether or not trigger the procedures of Art. 50 TEU and leave the Union. In general, the provision refers to "rights deriving from the application of the Treaties to the Member State", which means that only rights under secondary law (i.e. stemming from the application of the Treaties) can be suspended such as the mechanism of the European arrest warrant and the access to European funding under any of the relevant instruments of secondary law.

The provision expresses only one limitation in the application of the sanctions by the Council: it should "take into account the possible consequences of such suspension on the rights and obligation of natural and legal persons". A part from implying that not only the government of the Member State can suffer the consequences of sanctions, paragraph 3 suggests that the sanctions must conform to the principle of proportionality which, however, can be stretched in serious situation. Such "exemptions" on the principle of proportionality

[74] Art. 354 TFEU: "Where, following a decision to suspend voting rights adopted pursuant to paragraph 3 of Art. 7 TEU, the Council acts by a qualified majority on the basis of a provision of the Treaties, that the qualified majority shall be defined in accordance with Art. 238(3)(b).
[75] Art. 238(3)(b): "[…]in cases where, under the Treaties, not all members of the Council participate in voting, a qualified majority shall be defined as follows: (b) […]the qualified majority shall be defined as at least 72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States".

with regard to sanctions imposed by the EU was confirmed by the CJEU in Bosphorus. In this judgment, the Court of Justice found that proportionality of an EU sanction, and its consequences on a natural or legal person's fundamental rights, could not constitute an obstacle if the aim of such function is to put to an end to a massive violation of human rights. If human rights and the rule of law have been both inserted in Art. 2 TEU such as fundamental values, it is clear that, if a serious and persistent breach is to occur, this would justify, under Art. 7(3) TEU, the application of possibly far-reaching sanctions.

2.3.4 The (not so) nuclear bomb

Coming back to the assimilation of Art. 7 TEU to a nuclear bomb, after having examined part of its content, it is clear that the metaphor, if not completely wrong, is, at least, a discursive overstretching. The term "nuclear" reminds of fears experienced during the Cold War, an era in which the threat of such a weapon would have meant the end of any civilized nation[76]. Clearly, the consequences, be them legal, financial or political, deriving from a sanction adopted under Art. 7 (3) procedure would never cause such disastrous turn-out. Art. 7 TEU is not avoided for its unimaginable consequences (something which is yet to be assessed since it has never been trigger in reality) but because the procedures put in place for its activation make it inapplicable.

Since the major difficulty is the achievement of unanimity in the European Council in the procedure of Art. 7 (2), the whole process can remind a classical prisoners' dilemma. Member States are required to cooperate for the activation of Art. 7 (2), but they can do so only at the expenses of their bilateral relations with the Member State(s) under scrutiny. Even the decision of one Member State to value its separately developed relation with the accused country more than the protection of EU fundamental values would jeopardize the entire procedure. Since every Member State is aware of this possibility and of its advantages (in economics or political terms), to avoid other Member States enjoy such advantages, it will not be a part of the "sanctioning team" either.

What is deductible form this analysis is that Art. 7, far from being the effective internal sanctioning instrument envisaged during the Treaty of Amsterdam, is a mechanism that, despite the opportunities, is very unlikely to occur and remains on a rhetorical level only. Applying the above described deterrence theory, given that the probability of activation of Art. 7 converges to zero, all the right side of the formula tends to zero, which makes Art. 7 TEU of no utility in the deterrence of actions violating fundamental values. As mentioned before, the probability of the execution of the punishment, whenever exercised by a political body (i.e. the Council), is very low. This feature is further stressed by the fact that the most important judicial body of the Union, the Court of Justice, does not even have a right to give its opinion on, what has been envisaged, the most reliable procedure against breaches of fundamental values. Certainly, under Art. 269 TFEU, the CJEU has the power of judicial review over act specifically adopted by the Council pursuant Art. 7 TEU, but this can be done exclusively at the request of the Member State(s) concerned by Art. 7 and only with regard to the validity of the procedural rules. The

[76] ORBAN (2016: 124).

Court, under any circumstances, can review the merits of the decision, a feature that make the judicial review of purely ancillary function.

2.4. Monitoring instrument: The EU rule of law framework

The last instrument in the hands of EU institutions worth mentioning is a monitoring mechanism: the Commission EU Rule of Law Framework (hereinafter the Framework). However, before moving to its content, a little introduction on what pushed the Commission to adopt such monitoring instrument needs to be presented.

On 18 April 2011, the Hungarian Parliament approved a new constitution. The document, despite having being drafted by an apparently cross-party committee, received great criticisms, both internally and externally. The Venice Commission, Amnesty International, the Hungarian Helsinki Committee[77], left-wing and liberal MEPs, UN Secretary-General Ban Ki-moon and neighbouring countries such as Slovakia, all expressed their concerns with regard the new Constitution accused of violating human rights and threating the respect of the rule of law. The European Union remained silent until 2013, when the Hungarian Parliament adopted the Fourth Amendment to the Fundamental Law. The Act, by annulling all Hungarian Constitutional Court decisions prior to its entry into force, finally dismantled the Hungarian constitutional system, leaving governmental power without any check and balance. Following its introduction, the Fourth Amendment pushed the Ministers of Foreign Affairs of Denmark, Finland, Germany and the Netherlands to write a letter addressed to the Commission asking for a new mechanism to safeguard the rule of law. At the same time, the Committee on Civil Liberties, Justice and Home Affairs was requested by the EP to produce a report on the constitutional situation in Hungary, specifically focusing on the impact of the Fourth Amendment to the Fundamental Law. The report, which became famous as the "Tavares Report"[78], was adopted by the EP on 3 July 2013, and formally called on the European Commission to institutionalize a new monitoring system. Finally, encouraged by the Tavares Report and convinced by the inadequacy of the existing instruments – obvious in the Hungarian case – the Commission, on 11 March 2014, adopted the Rule of Law Framework[79].

The Framework is of particular importance since it was thought to address systemic threats to the rule of law in Member States which cannot be properly sanctioned through infringement proceedings, since outside the scope of application of EU law, and against whom, the resort to Art. 7 EU, would have been excessive. Hence, working as a complementary procedure to the already existing communitarian instruments, the Framework was thought to establish a dialogue between the Commission and a Member State in which a systemic threat to the rule of is emerging, so to avoid such escalation to trigger the activation of Art. 7 TEU. Furthermore, the Framework is the only instrument, in the supervision of the rule of law, to operate upon a clear definition of such value, which includes:

> "[…] legality, which implies a transparent, accountable, democratic and pluralist process for enacting laws, legal certainty: prohibition of arbitrariness

[77] A non-governmental organization on human rights founded in 1989 and based in Budapest.
[78] Named after the Portuguese MEP, Rui Tavares, the rapporteur of the report.
[79] Communication from the Commission to the European Parliament and the Council, 19 March 2014, COM(2014) 158 final/2, *A new EU Framework to strengthen the Rule of Law.*

> of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law".

The Framework is based on the idea that, as Guardian of the Treaties, the Commission has the duty of ensuring the respect of the values upon which the EU is founded and which are listed in Art. 2 TEU. The exclusive reference to the rule of law, has, by no mean, the intention of belittling fundamental values such as democracy and human rights. They cannot exists without the former and, vice versa, their absence would pose a threat to the very existence of the concept of rule of law. The rule of law, as an umbrella, is the "guarantee of the guarantees"[80] and its protection enables the Commission to safeguard all the values contained in Art. 2 TEU. Another important assumption is that the Framework operates through a supportive action to Member States' national systems. Member States are, in fact, believed to have already in place specific institutions and mechanisms to ensure the respect of the rule of law (i.e. an independent and effective justice system, a constitutional court). However, whenever these mechanisms fail to operate in a Member State, the rule of law is threatened, not only on a national level, but on a communitarian one. For this specific reason, the Framework will act as the "safeguard for the safeguards" and will be activated:

> "[…]in situation where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper function of the institutions and the safeguard mechanism established at national level to secure the rule of law"[81].

The Framework cannot be used as a remedy to individual breaches of fundamental rights which need to be dealt with by national judicial systems. On the contrary, the Framework addresses exclusively systemic threats to the rule of law which can occur whenever the constitutional structure of a Member State is endangered by specific and long – lasting measures adopted by public authorities. However, this very notion of "systemic breaches" arose multiple doubts. Firstly, the term "systemic" lacks of a clear definition in the Framework and the Communication's references to the case of law of the CJEU and the ECHR are simply unhelpful in this sense. Secondly, if the Framework is to be the "pre-Art. 7 TEU" procedure, the lack of a clear distinction between the notion of "systemic threat" and "serious breach" (mentioned in Art. 7 TEU) is quite confusing. It is difficult to understand whether the nature of the threat is substantially different between the two instruments or the two notions should be understood as a broadly synonymous[82]. An understating, the latter, discouraged by the absence of "serious" as a criterion to trigger the activation of the Framework.

2.4.1 The Framework's procedure

The Framework established a three-stage procedure: (i) the Commission's assessment, (ii) recommendation and (iii) follow-up. All three steps have the scope to establish a dialogue between the Member State and the Commission to find a solution and avoid, where possible, the recourse to Art. 7. In this sense, the procedure is an entirely political process, not a legal one.

(i) In the assessment, the Commission will gather and analyse all the relevant information with regard to a specific situation in a Member State and

[80] CRABIT, BEL (2016: 203).
[81] S 4.1 of the Communication.
[82] KOCHENOV, PECH (2015: 15).

determine whether a systemic threat to the rule of law is present. Such analysis is conducted on the basis of information collected also by external and recognised expertise, such as the Venice Commission and the Council of Europe, the EU Agency for Fundamental Rights or the various Judicial Networks of the EU, and assures that all Member States are treated equally with respect to their peculiar conditions. If the Commission is to produce a positive answer (i.e. the presence of a systemic threat), it will start a dialogue with the Member State by issuing a "rule of law opinion". The Member State, under Art. 4(3) TEU and the duty of sincere cooperation, is expected to be highly co-operative all along the process. While the issuing of the rule of law opinion is entirely public, the dialogue between the Commission and the Member State, remains extremely confidential[83].

(ii) In the recommendation stage, unless the matter has been already resolved by Member State institutions, the Commission will issue a "rule of law recommendation". The recommendation will indicate the clear presence of a systemic threat to the rule of law and the unwillingness of the national authorities to address such threat. The Commission will fix a time limit for the Member State to address and solve the issue through the application of adequate measures. These measures may be taken independently by national authorities or they can be suggested by the Commission itself and the Member State must continuously communicate the step undertaken in such direction. The "rule of law recommendation" and the eventually suggested measures are made public[84].

(iii) In the follow-up stage, the Commission will monitor and evaluate the results communicated by the Member States. If such evaluation results in a negative opinion, the Commission may start considering the activation of Art. 7 TEU[85].

2.4.2 A critical overview

In a nutshell, it could be said that, as wished by former President of the European Commission Barroso, the Framework did develop a bridge between the overly specific infringement proceedings laid down in Art.s 258 – 260 TFEU and the deterrent mechanism of Art. 7 TEU. A role, that of the Framework, which is strengthen by the fact that it is a complementary instrument and does not preclude the simultaneous activation of the other mechanisms.

The Framework is fundamentally based on the idea that the EU's current "toolbox" is simply inadequate to address the rule of law crisis who has gained both on intensity and regularity during the past decades. The limits of Art. 7 TEU have been already presented above and, essentially they are of procedural nature: the thresholds for the activation – of both Art. 7 (1) and 7 (2) – are simply too difficult to satisfy and the fully-political decision is widely understood as counterproductive. However, also infringements proceedings of Art.s 258 – 260 TFEU have their limits when it comes to safeguard the values of Art. 2 TEU. Under Art. 258 TFEU, the Commission may initiate, before the CJEU, an infringement procedure against a Member State which, after having failed to comply with EU obligations, is unwilling to comply with the

[83] European Commission, fn. 9, p. 7-8.
[84] European Commission, fn 9, p. 8.
[85] European Commission, fn 9, p. 8.

Commission's recommendations. This power has enabled the Commission to bring to an end multiple situations (i.e. French deportation of Roma people and Hungary constitutional review, to name a couple) but has demonstrated of being of little utility in the sanctioning of Member States which, intentionally, decide to undermine Art. 2 TEU. The fact is that Commission can only operate whenever a Member State is violating a specific EU law and, while Art. 2 TEU is understood as a legally binding provision, it cannot be used to trigger a judicial action against a wrong-doing Member State whenever it is operating in areas not formally governed by EU law. This analysis given, it is clear that the Commission, before the introduction of the Framework, was left with little powers to address potentially disastrous violation of EU values at a national level and that, as Guardian of the Treaties, was simply unacceptable.

2.4.2.1 Positive aspects

The Commission's proposal should be commended for adopting a mechanism such as the Framework that, despite being a timid step towards the right direction, introduced some important guidelines. First of all, the Framework sketched the very first (at EU level) meaning of the rule of law, not an easy task if the polysemic nature of the concept is to be taken into consideration. Secondly, the Commission's proposal is the very first initiative to be put in practice by an EU institution. Since the Framework did not introduced any new competence nor attributed to the Commission any binding power, it is hard to understand the criticism whereby the instrument would operate outside the competences stemming from the Treaties. Far from violating the principle of conferral, as stated by the Council[86], the Framework simply require a suspected Member State to initiate a dialogue with the Commission, with no legal consequences, on the basis of its own rights. In fact, as mentioned both in Art. 7(1) and 7(2), the Commission is empowered to trigger the activation of the "nuclear bomb" via a reasoned opinion. It could be said that it is implicit in this function that Commission investigate over any potential risk in a Member State and, the fact that the Framework established clear guidelines on how this investigation should be conducted, makes the procedure more crystal clear and it is only to be commended. Finally, the Framework is designed so to not force Member States go through an extremely time consuming, and potentially deterrent, discussion over the possibility to amend the Treaties.

2.4.2.2 Negative aspects

A part for the harsh criticisms received by the Council, if well examined, the Framework does present some additional shortcomings. First of all, the Framework is based upon a very weak and presumptuous assumption – that the dialogue between the Commission and the Member State will be productive and conducted in the respect of sincere co-operation. If the

[86] Opinion of the Legal Service 10296/14, 14 May 2014, para. 28. According to the principle of conferral powers, which is laid down in Art. 5(2) TEU, "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

authorities of a Member State have consciously chosen not to comply with EU values, the dialogue will likely fall short from producing meaningful changes or desirable results. Secondly, as anticipated, the Commission has failed to clarify what the nature of a "systemic threat" is, something of rather importance since on its presence depends the activation of the Framework. Also missing in the Commission's Communication is a clear distinction between a systemic threat and a systemic violation. The latter would be easier to identify than the former, since it is rarer and more quantifiable, however, given the absence of predefined benchmarks, this distinction is what blocks more the activation of the Framework. More importantly, taking into consideration, the subsequent nature of the two provisions – (pre-)Art. 7 and Art. 7 TEU – it would be essential to establish a relation between the definition of a "clear indication of systemic threat" in the Commission's Framework and the finding of a "clear risk of a serious breach" under Art. 7(1) TEU. If a clear definition is not given soon, and the two concepts are to define a very similar situation, then the Framework would be an alternative instrument to Art. 7(1), not a complementary one. Finally, the exclusivity of the Commission to trigger the launch of the Framework and not allow other EU institutions or Member State the possibility to compel it to do so, sheds a light over the intention of the Commission itself to maintain a huge level of political discretion over matters regarding the safeguard of the rule of law in the Union.

3. The rule of law in Poland

As anticipated before, the Tavares report was adopted in 2013 and fuelled a discussion, specifically within the Commission, that resulted in the adoption of the Framework. Under the report, Hungary was found to have adopted a serious of constitutional modifications, introduced by the Fundamental Law of 2011, which were in contrast with the values referred to in Art. 2 TEU. It was the first time, since the Austrian case, that the Union faced a systematic threat to the principle of the rule of law and the protection of human rights. European institutions responded, but sadly not strongly enough. While the situation of the rule of law in Hungary is deteriorating, with alarming new violations of human rights justified by the threat posed by the Covid-19 pandemic, the lights moved upon another country: Poland.

Since 2015, in fact, the newly elected Parliament has tried to take over the organs of the judicial branch via the introduction of multiple laws amending both its procedural and structural aspects. Despite affecting the entire system as such, this dissertation will analyse only two of the many amendments to the judiciary that were introduced over the years: the one related to the Polish Constitutional Tribunal and the one addressed to the Supreme Court of Poland. Both amendments were found to have endangered the rule of law by violating some of its principle, but the Union decided to try solve them in two distinct ways. While the protection of the rule of law in the case of the Constitutional Tribunal was entrusted to the political procedure under Art. 7 TEU, the systemic threat to the rule of law, posed by the New Law on the Supreme Court, had been addressed by the judicial mechanism of the infringement procedure under Art. 258 TFEU. This analysis, even if not exhaustive since the situation is constantly developing, will try to demonstrate, under a unique circumstance, if, as suggested by the game theory's approach, judicial institutions are more efficient in addressing violation of the rule of law or, on

the other hand, if political bodies, such as the Council, are apt to this specific task considered the peculiar nature of the Union. However, before moving to the analysis a brief introduction on the major political and constitutional developments that subverted the rule of law in Poland is worth sketching, starting from the presidential and the political elections that took place in the country in 2015.

3.1 The first attempt over the Constitutional Tribunal

Following the sixth presidential elections of the III Republic of Poland, on 24 May 2015, the Polish MEP and candidate of the conservative party Law and Justice (Prawo i Sprawiedliwość, PiS), Andrzej Duda became the President of the Republic of Poland. The Law and Justice party repeated its success at the parliamentary elections held on 25 October 2015, where it gained absolute majority in both the lower chamber of the Parliament (the Sejm) and the Senate, causing the total defeat of the outgoing majority, which had been in power for the previous eight years and had expressed Donald Tusk as Prime Minister, until his appointment as President of the European Council in 2014. This decisive change in Polish leadership has triggered a serious constitutional crisis that, as of today, is yet to be resolved.

The roots of the crisis are to be traced back to 25 June 2015, when the seventh legislature, dominated by the liberal party Civic Platform (Plataforma Obywatelska), passed the Act on the Constitutional Tribunal, who entered into force on 30 August 2015 and against whom a question of constitutional review was presented on 17 November 2015. Among the final and transitory provisions, Art. 137 of the Act on the Constitutional Tribunal provided for the election, by the outgoing Sejm, of the successors of all judges whose mandate would have ended in 2015, including those whose mandate would have terminated after the end of the 7th term of the Sejm and formally under the 8th term of the Sejm. Simply put, it is likely that the 7th Sejm wanted to be sure of electing judges whose mandate would have affected the work of the 8th Sejm. Not surprisingly then, during its last parliamentary session, on 8 October 2015, the 7th term Sejm elected five judges to the Constitutional Tribunal, the so-called October's judges. Three of those judges were to replace judges whose mandate was to finish on 6 November 2015 (under the 7th Sejm), while two of them were to replace judges whose mandate would have expired the 2 and 8 December 2015 respectively (under the 8th Sejm). Given this circumstances, the President of the Republic Duda, refused to accept the oath of the newly appointed judges.

After five days from its first parliamentary session, held on 12 November 2015, the 8th term Sejm, on 19 November 2015, amended the Act on the Constitutional Tribunal. The Act, with retroactive effect, introduced: the reduction to a three-years tenure of office for the President of the Constitutional Tribunal, with only one possible renewal; the termination of the tenure of the incumbent President and Vice-President of the Constitutional Tribunal; and an amendment providing for the term of office of newly elected constitutional judges to start only from the moment of taking the oath before the President of the Republic. On these basis, on 25 November 2015, the Sejm adopted five resolutions invalidating the election of the five constitutional judges appointed on 8 October 2015 by the 7th Sejm. Additionally, on 30 November 2015, the Constitutional Tribunal, having taken note of the request for a constitutional review of the act of 19 November 2019, requested the Sejm to abstain from electing new judges until the constitutional review over said

Act was rendered. Despite the explicit request of the Constitutional Tribunal, on 2 December 2015, the Sejm elected five new judges whose oath was taken before President Duda. The five new judges were only recognized as employee of the Tribunal by the President of the Constitutional Tribunal who refused to confer to them judicial capacity.

On 3 December 2015, the Constitutional Tribunal delivered its opinion on the constitutionality of the act adopted by 7th Sejm on 25 June 2015[87]. Judgement K 34/15 underlined that, under the principle of judicial independence, the judges of the Constitutional Tribunal where subjects only to the Polish Constitution and no other body, be it the legislative or the executive, was allowed any interference. The judgement declared the unconstitutionality of Art. 137 of the Act as in contrast with Art. 194(1) of the Polish Constitution[88]. The nomination of the five "October judges" under Art. 137 was to be considered valid only for the three judges whose mandate was to start on 6 November 2015 under the 7th term Sejm, the one who nominated them. With regard to the two other judges, whose mandate was to start on 6 December 2015, under the 8th term Sejm, their election was to be consider invalid since unconstitutional. The Constitutional Tribunal ruled also over the denial by the President of the Republic to accept the oath of the three judges, stating that this very function of the President is more a procedural formality and does not entail any discretionary power which, otherwise, would have interfered with the composition of the Tribunal and with its independence.

With regard to the request of constitutional review over the Act of 19 November 2015 the Constitutional Tribunal ruled judgment K 35/15 declaring the unconstitutionality of: a) the discretionary power of the President of the Republic to choose the President and Vice-President of the Constitutional Tribunal; b) the possibility, even if for one renewal only, for such persons to be re-elected at the same office; c) the termination of office of the President and of the Vice-President of the Tribunal prior to the end of their mandates. In response, the Sejm approved a new Act on the Constitutional Tribunal on 22 December 2015 regarding its adjudicative composition. The quorum of the body in plenary session was modified so to reach the two third and the President of the Republic together with the Minister of Justice were given disciplinary power over the Constitutional Judges. With Judgement 47/15 of 9 March 206, the relevant provisions of the Act of 22 December were found unconstitutional[89] since severely in violation of the separation of power and the rule of law. Finally, the conflict between the President of the Republic, the Sejm and the Constitutional Tribunal was exacerbated by the decision of the President of the Republic to not publish judgment 47/15 on the Official Gazette, an act of clear unconstitutional nature[90].

[87] Under Art. 137, the Act allowed the Sejm to replace all judges whose mandate would have terminated in 2015, including those whose mandate would have terminated under the 8th term Sejm.

[88] Art. 194(1): "The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for the term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office". According to the Constitutional Tribunal in judgement K 34/15 the provision shall be interpreted as referring to the Sejm operating at the moment of the conclusion of the judge's mandate.

[89] Polish Constitution, Art. 190(5): "Judgments of the Constitutional Tribunal shall be made by a majority of votes". Art. 195 (1): "Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution".

[90] Art. 190 (2): "Judgments of the Constitutional Tribunal (…) shall be required to be immediately published (…) in the Official Gazette of the Republic of Poland, *Monitor Polski*".

3.1.1 The role of the European Commission

For the first couple of months of the Polish constitutional crisis regarding the amendment of the Constitutional Tribunal, the European Commission remained strangely silent, watching the dialogue between the Polish authorities intensifying. Finally, on 23 December 2015, first Vice-President of the Commission, Frans Timmermans signed a letter addressed to the Polish Ministers of Foreign Affairs and Justice requesting them to submit clarifications regarding: a) the nomination of the five constitutional judges elected on 2 December 2015; b) the execution of judgments K 34/15 and K 35/15 and c) the amendments on the Constitutional Tribunal adopted by the 8th term Sejm on 22 December 2015. Specifically regarding this last request, the Commission suggested the polish government to ask the Venice Commission for an opinion. On 13 January 2016, the Commission, during its first College Meeting, activated, for the very first time since its adoption, the rule of Law Framework with respect to the deteriorating situation in Poland. The decision was communicated by Frans Timmermans who stated:

> "[…] the Commission will carry out a preliminary assessment (…) under the Rule of Law Framework. (…) The purpose of the process we have launched is to clarify the facts in an objective way, assess the situation in more depth and start a dialogue with Polish authorities (…). This aims at preventing any situation where the rule of law might be called into question. (…) Let me stress very clearly: this is a cooperative approach by the European Commission. This is how we see our role as guardians of the Treaty – to have a dialogue with the Member State if there is something that needs to be discussed. Our aim is to solve these issues; our aim is not to accuse, to go into a polemic. Our aim is to solve the issues in a rational way based on out legal obligation"[91].

The Venice Commission issued its opinion[92] on 12 March 2016 not-surprisingly backing the founding of the Polish Constitutional Tribunal on the matter. The act, approved on 25 June 2015 by the 7th term Sejm, was found to have "endangered not only the rule of law, but also the functioning of the democratic system", a system further weakened by the decision of the President of the Republic not to publish the judgements of the Court with the regard to the subsequent acts approved by the 8th term Sejm. Given the refusal of Polish authorities to recognize and follow the recommendations of the Venice Commission, the EP voted a resolution on 13 April 2016 calling the Polish government to resolve the dispute with the Constitutional Tribunal, and if that did not happen, for the European Commission to activate the second stage of the Framework. During the following four months, the dialogue between Polish authorities and EU institutions, especially the Commission, intensified with multiple visits to Warsaw made by the First Vice-President Timmermans. However, despite the efforts, the Polish government did not implement the necessary measures to efficaciously tackle the situation which resolved, on 1 June 2016, in the issuing of a "rule of law Opinion" by the Commission, formally terminating the first stage of the Framework[93].

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[91] Speech of the First Vice-President Timmermans, 13 January 2016, SPEECH/16/71, *Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016*.

[92] Opinion, European Commission for Democracy through law (Venice Commission), 11 March 2016, no 833/2015, *on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland.*

[93] As mentioned in the Communication from the Commission of 11 March 2014, *A new EU Framework to strengthen the Rule of law*, the "rule of law opinion", differently from the dialogue between the Member State and the Commission, has to be made entirely public since its approval. However, the Commission denied the disclosure of the rule of law opinion with regard to Poland, issued on 1 June 2016, upon request of Laurent Pech, professor of Middlesex

Far from being receptive of the content of the Commission's Opinion, the Sejm responded, on 7 July 2016, by approving a new law on the Constitutional Tribunal formally restoring all the provisions declared unconstitutional by the Court and, against whom, the Venice Commission expressed negative opinion. On 27 July 2016, the European Commission, having considered the latest developments in the Polish constitutional system, officially opened the second stage of the Framework by publishing its first Recommendation[94]. The Recommendation traced the concerns already expressed in the Opinion while focusing particularly on the effective functioning of the Constitutional Tribunal. The document stated that:

> "[…] the Commission is of the opinion that there is a situation of a systemic threat to the rule of law in Poland. The fact that the Constitutional Tribunal is preventing from fully ensuring an effective constitutional review adversely its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law in Poland. Where a constitutional justice system has been established, its effectiveness is a key component of the rule of law"[95].

The Commission established a three-month limit for Poland to solve the problems identified by the Recommendation and invited Polish authorities to constantly inform the Commission of the steps taken in such direction. Those directives were largely ignored and, the day after the expiration of the deadline, on 27 October, Polish Prime Minister Beata Szydlo sent a letter to the European Commission claiming that:

> "In our dialogue with the European Commission, we have assumed that our co-operation will be based on such principles as objectivism, or respect for sovereignty, subsidiarity, and national identity (…) We have gradually come to realize that interferences into Poland's internal affairs are not characterized by adherence to such principles. On top of that, such actions are largely based on incorrect assumptions which led to unwarranted conclusion"[96].

With the worsening of the situation, mainly caused by the adoption of three additional laws – one of which allowed the President of the Republic to elect a temporary President of the Constitutional Tribunal – the European Commission adopted a second Recommendation[97] with regard to the rule of law in Poland on 21 December 2016. The Recommendation, far from highlighting new concerns, introduced a not-so veiled warrant on the possible activation of Art. 7(1) TEU stating:

> "The Commission also recalls that Recommendations adopted under the rule of Law Framework do not prevent the mechanism set out in Art. 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU"[98].

After the adoption of four new legislative acts on July 2017, this time not focused solely on the Constitutional Tribunal but against the entire Polish judicial system – i.e. the Supreme Court, the National Council of the Judiciary, the Ordinary Courts' Organization and the National School of Judiciary - the

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University, on the basis that it "would undermine the protection of the purpose of the ongoing investigation (…) at this point in time would affect the climate of mutual trust between the authorities of the Member State and the Commission, which is required to enable them to find a solution and prevent the emergence of a systemic threat to the rule of law". After the decision of the Commission to publish a Rule of Law Recommendation on 27 July 2016, the Commission finally decided to disclose the full text of the Opinion.

[94] Commission Recommendation (EU) 2016/1374, 27 July 2016, on the rule of law in Poland.

[95] Ibid. para 72.

[96] HALMAI (2018: 9).

[97] Commission Recommendation (EU) 2017/146, 21 December 2016, regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374.

[98] Ibid para. 69.

European Commission issued a third Rule of Law Recommendation on 26 July 2017[99]. This time however, the Commission unveiled the threat to immediately trigger Art. 7 by stating: "Should the Polish authorities take any measure of this kind, the Commission stands ready to immediately activate Art. 7(1) TEU". Additionally, the Commission decided to launch an infringement procedure against Poland whenever the law on the Ordinary Courts' Organization would have been published or, otherwise, whenever the law on the Supreme Court would have been signed and published, both on the base of infringements of Art. 19(1) TEU and Art. 47 of the Charter of Fundamental Rights. Finally, on 20 December 2017, not having witnessed any positive change in the Polish constitutional crisis, the European Commission decided to launch a fourth and last law Rule of Law Recommendation[100], but this time backed by a Reasoned Proposal for a Decision of the Council[101] on the determination of the clear risk of a serious breach of the rule of law by Poland under Art. 7(1) TEU.

In both its fourth recommendation and its reasoned proposal, the Commission simply restated its concerns regarding the threat to the rule of law linked to the lack of judicial independence and a legitimate constitutional review in Poland. The Council, having reviewed the Commission's reasoned opinion, issued its decision on 22 December 2017[102]. The Council based its conclusions, a part from the Commission's opinion, on the idea, already largely expressed, that:

> "Whatever the model of the justice system chosen in a Member State, the rule of law enshrined in Art. 2 TEU implies requirements relating to the independence of the judiciary, the separation of powers and legal certainty"[103].

Moreover, the Council uphold the principle of mutual judicial trust between Member States by affirming that:

> "Respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Art. 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing mutual trust of citizens, businesses and national authorities in the legal system of all other Member States"[104].

Hence, given these findings, it should come with no surprise that the Council finally decided to activate Art. 7(1) by concluding that: "There is a clear risk of serious breach by the Republic of Poland of the rule of law"[105].

3.1.2 The role of the Council of the European Union

Despite an encouraging, even if rather slow, beginning with regard to the activation of Art. 7(1) in the Polish case, what followed demonstrated the lack of serious will by the Council to confront a Member State on the rule of law ground. This unwillingness sadly confirms what has been noted before about

[99] Commission Recommendation (EU) 2017/1520, 26 July 2017, regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146.
[100] Commission Recommendation (EU) 2018/103, 20 December 2017, regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.
[101] Reasoned Proposal, 2017/0360, 20 December 2017, in accordance with Art. 7(1) of the Treaty on European Union regarding the rule of law in Poland.
[102] Council decision, 22 December 2017, Art. 1.
[103] Ibid. para 9.
[104] Ibid. para 11.
[105] Ibid. Art.1.

the ineffectiveness of political bodies in the game theory's approach over the matter. Following the issuing of the Decision in fact, the Council simply repeated *ad nauseam*[106] the importance of a good dialogue between the EU and polish authorities. As of today, only three formal hearings were organized between Poland and the representatives of the other Member States: 26 June 2018[107], 18 September 2018[108] and 11 December 2018[109]. Those hearings, far from producing tangible results, have been largely criticized both with regard their procedural modalities and their content.

First of all, the interpretation the Council gave to Art.7 (1) at the time of the first hearing of Poland is quite interesting. It has been noted before that the provision has been for a long time assimilated to a "nuclear bomb" and this very assimilation is, partially, what kept EU institutions away from its activation. Hence, by framing Art.7 (1) in the form of "a peer review exercise"[110] the Council can be commended for trying to introduce a softer terminology around the provision, making it less terrifying in the eyes of Member States. An interpretation, the latter, that could not be more distant from reality, as the following actions of the Council demonstrated. To reduce Art.7 (1), the only Treaty provision that stands alone in the safeguard of the founding values of the EU, to a mere peer review exercise means to downplay its very scope and the risk, more a reality than a possibility, is that the wrong-doing Member State will not take the proceedings against him with the seriousness they are supposed to be recognized of.

Secondly, the Council has been criticized for openly favoring the government in the dock. Firstly, Poland had been granted with the possibility, at the end of each hearing, to deliver its final remarks without being subject to any time limit. Furthermore, when the Polish delegation was given the floor to present the country's considerations, each national delegation was given a maximum of two questions of two minutes each while Polish government's representatives were given up to ten minutes to respond. It is no surprise then, that which such a recipe, national delegations were discouraged from posing questions on the merit. This situation allowed Polish authorities to easily get away with misleading and absurd information more than once[111].

Last, but not least, if a map has to been drawn representing those Member States willing to use the two minutes to pose questions and then listen for ten minutes to what the Polish delegation had to say and those Member States willing not to do so, a rather discouraging picture will be the result. Out of the post-2004 accession states, only Cyprus and Estonia asked questions in respect of the rule of law situation in Poland making it seemed like the iron curtain did not dissolved in 1989. Furthermore, it is sad to remark that a country that has always been at the forefront in the defense of the rule of law abroad, such as the UK, decided not to question polish representatives hence putting aside its values probably in exchange for support in Brexit's negotiations.

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[106] PECH, WACHOWIEC (2019: 3).

[107] Hearing held by the Council, 26 June 2018, 10354/18, *Rule of Law in Poland/Art. 7(1) TEU Reasoned Proposal*

[108] Hearing held by the Council, 18 September 2018, 11458/18, *Rule of Law in Poland/Art. 7(1) TEU Reasoned Proposal*

[109] Hearing held by the Council, 11 December 2018, 14621/18, *Rule of Law in Poland/Art. 7(1) TEU Reasoned Proposal.*

[110] Hearing held by the Council, 26 June 2018, 10354/18, *Rule of Law in Poland/Art. 7(1) TEU Reasoned Proposal* para. 8

[111] To give an example, the Polish government claimed that it was legally unobjectionable to replace the sitting Frist President of the Polish Supreme Court because the previous First President was replaced when "his six-year term ended prematurely with his death in 2014".

Since the last Art.7 (1) hearing, held on 11 December 2018, the Council was not able to organize any subsequent hearing with Polish authorities. This should not understood as a sign that Poland finally decided to comply with the concerns raised by the Commission's reasoned opinion, on the contrary, not a single one of them has been fully addressed nor implemented by Polish authorities. The inertia of the Council can be explained, if explanations are really necessary for the highest political of the Union, by two factors. On the one hand the issue of the rotating presidencies of the Council, may have slowed down the process. While the Romanian presidency[112] was accused of being too busy undermining the rule of law in Romania to keep an eye on the deteriorating situation of Poland, the Finnish presidency[113] decided to wait for after the Polish parliamentary elections of October 2019. On the other hand, the entry into play of the CJEU has turned the tables and the Council is simply waiting to see how Polish authorities will consequently adapt.

3.2 The hostile takeover of the Supreme Court

On 20 December 2017, while the Polish constitutional crisis was at its peak with the European Commission busy activating Art.7 (1) by sending its Reasoned Opinion to the Council, the President of the Republic of Poland, Andrzej Duda, signed the new ustawa o Sądzie Najwyższym (New Law on the Supreme Court) which entered into force on 3 April 2018 and was later amended on 10 May 2018 by "the Amending Law of 10 May 2018". The New Law on the Supreme Court marked the beginning of a new attempt of the Polish government to take over the judicial branch. The amendments to the structure and functioning of the Supreme Court raised multiple concerns regarding the, already severely compromised, independence of the polish judicial system and the very existence of the rule of law in the country. However, having taken note of the failure of resolving systemic threats to the rule of law by recourse to Art.7 procedures, the Commission decided to walk an old, yet effective, road by launching an infringement procedure under Art. 258 TFEU against the Republic of Poland, which culminated, on 24 June 2019, with a judgment[114] marking a true constitutional momentum for European rule of law.

Under Art. 258 TFEU the Commission, acting as Guardian of Treaties, is empowered to take legal actions against a Member State suspected of having violated EU law. The infringement procedure starts with the Commission delivering of a Letter of Formal Notice to the suspected Member State which needs to be answered within a specific time limits – usually one to two months. In the Letter, the Commission asks the Member State information regarding the suspected violations and, if not satisfied with the delivered materials, it may issue a Reasoned Opinion. The Opinion constitutes a formal request for the Member State to comply with EU law and to inform the Commission of the measures adopted to solve the situation within a given time period. If the Member State does not comply with the Opinion or the measures put in place are deemed insufficient by the Commission, the latter may bring the matter before the CJEU. In 95% of the cases, Member States are able to comply with the Commission's Opinion and the infringement procedure stops before passing in the hands of the European Court of Justice. Unfortunately, the

[112] 1 January 2019 – 30 June 2019.
[113] 1 July 2019 – 30 December 2019.
[114] ECJ, 24 June 2019, C-618/19, *European Commission v. Republic of Poland.*

Polish case falls in the remaining 5% who has to face the scrutiny of Strasburg. However, as mentioned earlier, since the majority of the breaches of rule of law are committed by a Member State formerly acting outside the scope of EU law, framing a violation of the rule of law *sensu lato* in terms of a violation of a European provision is not an easy task and the framing of the Commission with the regard to Poland was no exception.

A part from the standards stemming from the principle of the rule of law, there is no EU provision with regard both the functioning and the structuring of the judicial system in each Member State. Strictly speaking, as long as those principles are respected, the organization of the national judicial branch remains a prerogative of national authorities embedded in the concept of national sovereignty. Hence, when the Polish President was signing the New Law on the Supreme Court, no European law was being violated nor was the President exercising a function outside its competences. However, despite the apparent difficulties, the Commission did succeed in framing the Polish crisis in term of a breach of EU law and it did so thanks to a previous CJEU's judgment: *Associação Sindical dos Juízes Portugueses*[115] (hereinafter ASJP).

It was not the first time the CJEU came to the rescue of the rule of law in Europe, solving crisis in front of which EU political institutions simply did not know where to start and how to operate. The CJEU, over the years, has in fact protected multiple elements constituting the rule of law within the meaning of Art.2 TEU, such as the principle of separation of powers[116], the principle of effective judicial protection[117] and the effective application of EU law[118], but ASJP really marked a constitutional momentum for the entire Union. For the first time, with this judgement, the CJEU showed that it has full competence to evaluate judicial systems in EU Member States and it did so by relying entirely on Art.19 TEU. The Court justified its possible intervention claiming that, under certain circumstances – that were present in ASJP – the principle of effective judicial protection enshrined in Art.19 (1) TEU was sufficient to justify a review of national legislation concerning the independence of national judges. Furthermore, since the judges in question, as judges of the Portuguese Court of Auditors, had the competence to apply and interpret EU law, their guarantees of independence were covered by EU law and hence their protection assured in light of Art.2 TEU. If, at a first sight, this judgment seems anything but revolutionary, it is worth remembering that EU law can be enforced by any Court regardless of its position in the hierarchy of the judicial system of a Member State and every single judge is called to apply and interpret EU law. Simply put, ASJP finally gave the possibility to the Court of Justice to oversee the judicial organization of Member States. Hence, following this reasoning, even if the organization and functioning of the judiciary fully resides in the domestic competences of each Member State, the courts' structure should be prepared in advance for situation in which it is called to adjudicate cases concerning EU law[119]. This means that the entire judicial system, regardless from the nature of each adjudication, should meet

[115] ECJ, 27 February 2018, C-65/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas.* Here, the Portuguese Supreme Administrative Court referred to the CJEU regarding the decision of the Portuguese legislative to temporarily reduce the remuneration of certain categories of civil servants, such as the judges of the Court of Auditors. The ASJP acting on their behalf, brought an action for annulment against the implementing measures to the Supreme Administrative Court claiming a breach of the principle of judicial independence enshrined in Art.19 TEU and Art.47 of the Charter.
[116] ECJ. 10 November 2016, C-477/16, *Kovalkovas.*
[117] ECJ, 28 March 2017, C-72/15, *Rosneft.*
[118] ECJ, 17 April 2018, C-441/17, *European Commission v. Republic of Poland*.
[119] TABOROWSKI (2018: 2).

the standards of independence required under Art.19 (1) TEU. The revolutionary judgment of ASJP opened a new prospect for the European Commission in its fight to preserve the rule of law in Poland. Via Art.19 TEU, the Commission could finally approach the relation between the polish judiciary and Warsaw in a more comprehensive way and it was able to specifically address the concerns arose by the entry into force of the New Law on the Supreme Court. And this is exactly what it did.

3.2.1 The infringement procedure

The European Commission expressed its concerns specifically with regard to two provisions of the New Law on the Supreme Court: Art. 37 and 111.

Under *Art. 37* of the New Law on the Supreme Court in fact:

> " (1) A judge of the Sąd Najwyższy (Supreme Court) shall retire on the day of its 65th birthday, unless, not later than 6 months before that day and not earlier than 12 months before that day, he submits a declaration that he is willing to continue to carry on his duties and presents a certificate confirming that his health is no impediment to carrying out the duties of a judge (…) the President of the Republic of Poland grants authorization for him to carry out his duties at the Sąd Najwyższy.
>
> (1a) Prior to granting the authorization (…) the President of the Republic of Poland shall consult the National Council of the Judiciary (…) [which] shall provide the President of the Republic of Poland with an opinion within 30 days (…). If the opinion is not submitted with the period referred to (…) the National Council of the Judiciary shall be deemed to have submitted a positive opinion.
>
> (3) The President of the Republic of Poland may grant authorization for a judge of the Sąd Najwyższy to continue to carry out his duties within 3 months of the date of receipt of the opinion of the National Council of the Judiciary (…) or within 3 months of the expiry of the period for the submission of that opinion. Failure to grant authorization within the period referred to (…) shall be tantamount to the judge retiring on the day of his 65th birthday.
>
> (4) The authorization (…) shall be granted for a period of 3 years, no more than twice (…)".

The provision amended Art. 30 of the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 23 November 2002 which had set the retirement age for judges at 70. Under that provision, judges had the possibility to present, no later than 6 months before reaching the age limit, together with a certificate confirming their health status, a declaration to the First President of the Supreme Court indicating their wish to continue to carry on their judicial duties. The judges, submitted the required documentation, were *legally* entitled to carry out their duties until the age of 72.

Art. 111 of the New Law on the Supreme Court stated:

> "(1) A judge of the Sąd Najwyższy who by the date of entry into force of this Law [3 April 2018] have reached the age of 65 or who will have reached the age of 65 within three months [3 July 2018] of this Law shall retire on the day following the expiry 3 months from the date of entry into force of this Law, unless they submit the declaration and certificate referred to in Art. 37 (1) within 1 month of the date of entry into force of this Law and the President of the Republic of Poland grants authorization for the judge (…) to continue to carry out his duties.
>
> (1a) Judges (…) who reach the age of 65 between 3 and 12 months after the date of entry into force of this Law shall retire 12 months from the date of entry

> into force of this Law, unless they submit the declaration and certificate referred to in Art. 37 (1) within that period and the President of the Republic of Poland grants authorization for the judge (…) to continue to carry out his duties."

The Commission was of the opinion that these measures were threating the principle of judicial independence, including the irremovability of judges, and thus Poland was failing to fulfill its obligations under Art. 19(1) TEU read in connection with Art. 47 of the CFR. For these reasons the European Commission decided to launch the infringement procedure by sending a Letter of Formal Notice to Poland on 2 July 2018. The date was not picked randomly, in fact according to Art. 37, on July 3 2018, 27 out of 72 Supreme Court judges – roughly the 40% – were facing the risk of being forced to retire, among which figured the First President of the Supreme Court, whose 6-year term would have been terminated prematurely[120]. Art. 37 allowed judges to submit a request to pursue their judicial activity, within a specific time frame, to the President of the Republic which would have *discretionally* decided over the matter. The Commission pointed out that Art. 37 provided no criteria for how the President's decision should have been made and no possibility for review was allowed.

The Republic of Poland replied to the Letter of Formal Notice on 2 August 2018 disputing all the allegations of infringement of EU law. The response did not alleviate the concerns raised by the Commission which, on 14 August 2018, moving to the next stage of the infringement procedure, issued a Reasoned Opinion. The European Commission simply maintained its positions that the Polish Law on the Supreme Court was incompatible with EU law under Art. 19 (1) TEU read in connection with Art. 47 of the Charter of Fundamental Rights of the European Union. The Polish authorities were invited to take all the necessary measures to comply with the content of the Reasoned Opinion within one month of receiving it. Poland replied to the Reasoned Opinion on 14 September 2018 denying all the alleged infringements. Given the circumstances, the European Commission decided to complete its role under Art. 258 TFEU and brought action against the Republic of Poland before the CJEU on 2 October 2018.

3.3. The entrée en piste of the European Court of Justice: Case C-619-18

In its action to CJEU, the European Commission requested that the Court adjudicate that, by means of Art. 37 and 111 of the New Law on the Supreme Court, the Republic of Poland had failed to fulfil its obligations under the combined provisions of the second subparagraph of Art. 19 (1)[121] and Art. 47 CFR[122]. Moreover, by a separate document also lodged on 2 October 2018, the European Commission requested the application of interim measures,

[120] Polish Constitution, Art. 183 (3): "The First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office amongst candidates proposed by the General Assembly of the Judges of the Supreme Court".
[121] Art. 19 (1) TEU, second subparagraph: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".
[122] Art. 47 CFR: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law".

granted on 17 December 2018, under Art. 279 TFEU[123] and Art. 160 (2) of the Rule of Procedure of the Court of Justice[124], demanding that the Republic of Poland was requested by the Court to:

- suspend application of both Art. 34 (1) to (4) and Art. 111 (1) and (1a) of the New Law on the Supreme Court;
- adopt all the necessary measures to ensure that all judges of the Sąd Najwyższy, whose judicial duties were terminated prematurely because of the above mentioned provisions, may continue to carry out their duties;
- refrain from any measure appointing judges in the place of those affected by those provisions;
- communicate to the Commission, at the latest 1 month after service of the order of the Court granting the interim measures, on a monthly basis details of all the measures which it has adopted to comply with said order.

The Commission lodged two distinct complaints to the CJEU. By the first one, the Republic of Poland was accused of having violated both Art. 19 (1) TEU and Art. 47 CFR since the two provisions of New Law on the Supreme Court under scrutiny, by lowering the retirement age of judges appointed to the Sąd Najwyższy before the entry into force of the act on 3 April 2018, were in breach of the principle of judicial independence and of irremovability of judges. By its second complaint, the Commission accused the Member State of having failed to fulfil its obligations by granting a discretionary power to the President of the Republic with regard the extension of the period of judicial activity of the judges of the Sąd Najwyższy.

During the hearing, the Republic of Poland claimed that all national legislations challenged by the Commission had been repealed by means of the ustawa o zmianie ustawy o Sądzie Najwyższym (Law amending the New Law on the Supreme Court), of 21 November 2018, and that, all the judges affected by the previous piece of legislation, were, in fact, reinstated in court. Consequently, since the provisions allowing the President of the Republic to authorise the extension of judges' judicial capacity was also repealed, the infringement proceeding under Art. 258 TFEU, as formulated by the Commission, had become devoid of purposes. However, as pointed by the settled-case law[125], questions whether there had been a failure to fulfil an obligation stemming from EU law must have been examined on the basis of the legislation in force in the Member State at the time of the expiration of the Reason Opinion issued by the Commission. Hence, since at the time of expiration of the Reasoned Opinion with regard to Poland, on 14 September 2018, the New Law on the Supreme Court was still in force, the Court declared its impossibility to take account of any subsequent changes, even those introduced by the amending Law of 21 November 2018.

[123] Art. 279 TFEU: "The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures".
[124] Art. 160 (2) of the Rules of Procedure of the Court of Justice: "An application for the adoption of one of the other interim measures referred to in Article 279 TFEU shall be admissible only if it is made by a party to a case before the Court and relates to that case".
[125] ECJ, 6 November 2012, C-286/12, *Commission v Hungary*, para. 41.

3.3.1 Arguments of the parties

As anticipated before, the two complaints lodged before the CJEU by the Commission relied on the infringement, by the entry into force of the New Law on the Supreme Court, of Art. 19 (1) TEU read in light of Art. 47 CFR.

The Commission, relying almost exclusively on the revolutionary judgement of *ASJP*, sustained that: in order to ensure a system of legal remedies sufficient to provide effective legal protection as stemming from Art. 19 (1) TEU, Member States are under the obligation to guarantee that all national bodies ruling in fields covered by Union law[126] meet the requirements of judicial independence. Those requirements, other than being part of the substantive conception of the rule of law preferred by the Union, constitute a key part of the fundamental right to a fair trial as protected by the second subparagraph of Art. 47 CFR. Moreover, in order for the judicial independence to be respected, these requirements should be applied, *inter alia*, to the way in which the judiciary is organised. Hence, since the Polish Supreme Court constituted a body competent in the application and interpretation of EU law and the introduction of a national measure, such as the New Law, prevented said body from meeting the above mentioned requirements of independence, the Republic of Poland was failing to fulfil its obligations under Art. 19 (1).

On the other hand, the Republic of Poland submitted that the national legislation under scrutiny could not be challenged by the Commission as the object of a review of Art. 19 (1) for two main reasons. Firstly, the organisation of the national judicial branch was part of the exclusive competences of each Member State and, according to the principle of conferral, the EU could not arrogate competences in said domain. Secondly, Art. 19 (1) (and, consequently, Art. 47 CFR) was applicable exclusively in situation governed under EU law. Hence, since the national rules under examination had no link with EU law, the findings of the Commission were void of purposes.

Finally, the Court not surprisingly backed the Commission's position. It was of the idea that, under to Art. 49 TEU, Member States had freely and voluntarily committed themselves to the common values referred to in Art. 2 TEU, among which, the role of "guarantee of the guarantees" is exercised by the rule of law. The very commonality of these values is what justified the existence of mutual trust between the Member States and their courts that said values are respected while applying EU law. In this context, Art. 19 (1) entrusted the responsibility for ensuring a consistent application and interpretation of EU law to national courts and tribunals, recognized as such within the meaning of EU law. To carry on their duties and sustain the communitarian system of trust, Member States, while independent in the organization of the judicial branch, had the responsibility to guarantee a system of legal remedies in compliance with the principle of judicial independence and effective legal protection of individuals' rights stemming from the second subparagraph of Art. 19 (1). In the case of Poland, it was common ground that the Sąd Najwyższy was a court within the meaning of EU law and, as such, it needed to meet the requirement of effective judicial protection[127]. In order for the Supreme Court to meet such requirement, the protection of its independence was deemed necessary to the survival of the principle of the rule of law in Poland. On this considerations, the CJEU concluded that the question brought by the Commission in its action to review

[126] *ASJP*, para. 29. Here, the notion of "fields covered by Union law" is irrespective of whether or not Member States are implementing Union law.
[127] ECJ. 24 June 2019, C-619/18, *European Commission v Republic of Poland*, para. 52.

the New Law on the Supreme Court in light of the second subparagraph of Art. 19 (1), was necessary to determine the existence of an infringement of EU law by the Republic of Poland.

3.3.2 The opinion of Advocate General Tanchev

On 11 April 2019, following the hearing before the CJEU of the delegation of Poland and the Commission, Advocate General (AG) Tanchev delivered its opinion on Case C-619/18. According to the AG, the infringement proceedings against the Republic of Poland for failing to fulfil its obligations under the combined provisions of the second subparagraph of Art. 19 (1) TEU and Art. 47 CFR, raised some important questions concerning both the relationship between Art. 258 TFEU and Art. 7 TEU and the material scope of Art. 19 (1) TEU in relation to Art. 47 CFR[128].

Regarding the relation between Art. 7 TEU and Art. 258 TFEU, AG was of the opinion that there were sufficiently firm grounds to conclude that the two provisions were separate and of simultaneous applicability. In the wording of 258 TFEU, the reference to "an obligation under the Treaties" covered all rules of non-CFSP Union Law and it did not rule out the possibility of a parallel recourse to Art. 7 TEU for a violation that, other than being limited to an express provision of the Treaties, was also of systematic nature against the values of Art. 2 TEU. While Art. 7 TEU is the political instrument at the defence of the Union rule of law, Art. 258 TFEU is simply the legal route for ensuring the enforcement of EU law. If, by any chances, the failing of a Member State to fulfil its obligations under the Treaties had to coincide with the defence of the rule of law against a threat posed by the same Member State in its failure of action, nothing suggested the impossibility of a complementary recourse to Art. 7 TEU and Art. 258 TFEU[129].

Surprisingly, in assessing the material scope of the second subparagraph of Art. 19 (1) TEU in relation to Art. 47 CFR, AG Tanchev agreed with Poland in sustaining that a separate assessment of the two was needed. However, the position of the Commission, that the two provisions had be considered together, was not without precedents. According to the AG, this interpretation was based on an erroneous understandings of the judgement in ASJP made by the Commission. It was true that in the Portuguese case the Court acknowledged the relation between the second subparagraph of Art. 19 (1) TEU and Art. 47 CFR in giving expression to the principle of judicial protection and the requirements of judicial independence (as implied by the rule of law in Art. 2 TEU) but it was also true that the Court ruled that the second subparagraph of Art. 19 (1) TEU related to "the fields covered by Union law", irrespective of whether the Member State was implementing Union law within the meaning of Art. 51 of the CFR[130]. In ASJP, the Court simply referred to Art. 47 CFR only to confirm the findings made exclusively on the basis of Art. 19 (1) TEU. Consequently, what could have been inferred by ASJP was that a combined application of Art. 19 (1) TEU and Art. 47 CFR was not possible in absence of a reference to Art. 51 CFR and that the second

[128] Opinion of Advocate General Tanchev, 11 April 2019, Case *C-619/18*, para. 2.
[129] Ibid paras 48-51.
[130] Art. 51 CFR: "The provisions of the this Charter are addressed to the institutions and bodies of the Union with regard for the principle of subsidiarity and to the Member States only when they are implementing Union law, They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers".

subparagraph of Art. 19 (1) TEU and Art. 47 CFR had different material scopes[131].

With regard to Art. 19 (1) TEU, the CJEU already stated in ASJP the declaratory role of the provision in giving expression to the value of the rule of law in Art. 2 TEU. Following the second subparagraph of Art. 19 (1) TEU every Member State was to ensure effective judicial protection and independence to the bodies falling within the definition of "courts and tribunals" given by EU law. It was disputed then, since the measures under scrutiny (the New Law on the Supreme Court) were in breach of the rule of law since impairing the independence of a court within the meaning of EU law, the Commission was right in presenting a proceedings under Art. 258 TFEU against Poland in violation of the second subparagraph of Art. 19 (1) TEU.

On the other hands, with regard to Art. 47 CFR, AG was of the idea that the Commission failed to provide all the required legal particulars for how the contested measures implemented EU law within the meaning of Art. 51 CFR. The legal particulars should have provided detailed complaints on which the Court was asked to rule and, since the Commission provided only general particulars and only in connection to Art. 19 (1) TEU, AG concluded that the complaints should have been rejected as far as solely based on Art. 47 CFR.

3.3.3 The first complaint

By its first complaint the Commission:

> "(…) alleges that the Republic of Poland infringed the second subparagraph of Article 19 (1) TEU by reason of the fact that the New Law on the Supreme Court provided that the measure lowering the retirement age of judges of the Sąd Najwyższy (Supreme Court) was to apply to judges in post who were appointed to that court before 3 April 2018, the date on which that Law entered into force. In doing so, it claims, that Member State infringed the principle of judicial independence and, in particular, the principle of irremovability of judges"[132].

The European Commission sustained that, as a result of Art. 37 (1) and Art. 111 (1) and (1a) introduced by the New Law on the Supreme Court, the forced retirement of 27 judges of the Sąd Najwyższy[133] rendered possible, for the Polish executive, a profound and immediate change of the court's composition[134]. In doing so, the New Law infringed the principle of irremovability of judges as a guarantee essential for their independence (and subsequently of those of the Court) so violating the second subparagraph of Art. 19 (1) TEU. The Commission clarified that, while lowering the retirement age itself could not be seen as a violation of Art. 19 (1), the absence of appropriate measures, such as a transitional period, suggested that the true intention of the government of Poland, since the beginning, was to interfere with the composition of the Supreme Court[135].

According to Poland, the absence of the necessity, in the wording of Art. 19 (1), to provide for a transitional period when introducing a modification in

[131] Opinion of Advocate General Tanchev, 11 April 2019, Case *C-619/18*, paras 52-60.
[132] ECJ. 24 June 2019, C-619/18, *European Commission v Republic of Poland*, para. 60.
[133] Among which the First President of the Supreme Court whose mandate would have terminated on 30 April 2020 in accordance with Art. 183 (3) of the Polish constitution.
[134] ECJ. 24 June 2019, C-619/18, *European Commission v. Republic of Poland*, para. 63.
[135] Ibid para 64.

retirement age was a sufficient argument to dismantle the Commission's first complaint. Additionally, the requirement, suggested by the Commission, that the retirement age for a judge must depend on the law in force at the date of its oath, was to be discarded. In fact, following said reasoning, 17 of the 27 judges affected by the New Law on the Supreme Court, who were elected before the introduction of the 2002 reform, which re-established the retirement age at 70 after it had been fixed at 65, were in fact not suffering from any kind of shortening of their judicial activity. Furthermore, this rationale, if applied, would have discriminated those judges who were appointed *after* the entry into force of the New Law on the Supreme Court with regard to those appointed before its entry into force, since they would have been asked to retire earlier than their peers[136].

According to the Court of Justice, the guarantee of independence, as stemming from the second subparagraph of Art. 19 (1) TEU, implied the existence of two dimensions to it. The first one, of *external* nature, requires that courts are free to operate fully autonomously from any other body and that protection against external interventions is assured. The second one, of *internal* nature, is linked to the impartiality of the courts with regard the parties to the proceedings. These two aspects of independence relies upon an effective system of rules, not only procedural but also with regard to the composition of the body and the methods of appointment. Furthermore, the requirement of independence implies that the rules governing the disciplinary regime of judges appointed to courts must provide the guarantee of irremovability from office, unless legitimate reasons justify otherwise. In the present case, even if the Republic of Poland claimed that the decision to lower to 65 the retirement age of judges appointed to the Sąd Najwyższy was part of a broader national policy to standardize retirement ages of all workers, the introduction of the possibility for the President of the Republic to exercise a discretionary power raised considerable doubts that the aim of the reform was to exclude a pre-determined group of judges and impact on the composition and the very functioning of the Sąd Najwyższy[137]. Additionally, even if considered as a legitimate part of the national standardization of retirement ages, as confirmed by the Republic of Poland during the hearing, the fact that the New Law entailed the *automatic retirement* of the affected judges, constituted a form of discrimination with regard to the other workers, which were granted with the *possibility*, not the obligation, to retire under the new regime.

Having regarded these considerations, the CJEU, not surprisingly, upheld the Commission's first complaint. It declared that the application of the New Law on the Supreme Court lowering the retirement age of judges since undermining the principle of irremovability of judges as an essential perquisite for the independence of the judiciary, was in breach of Art. 19 (1) TEU

3.3.4 The second complaint

By its second complaint, the Commission:

> "(…) alleges that the Republic of Poland infringed the second subparagraph of Article 19 (1) TEU by granting, under the New Law on the Supreme Court, to

[136] Ibid paras. 65 – 69.
[137] ECJ. 24 June 2019, C-619/18, *European Commission v Republic of Poland*, C-619/18, paras. 71 – 86.

> the President of the Republic, the discretion to extent, twice, each time for a 3-year term, the period of judicial activity of judges of the Sąd Najwyższy (Supreme Court) beyond the new retirement age fixed in that law"[138].

The Commission sustained that, the completely discretionary power given to the President of the Republic of Poland, not governed by any binding criteria nor by the obligation to deliver reason for his decision over the extension to judicial activity, put the judges of the Sąd Najwyższy in a subordinated position possibly leading them to comply with any requests of the President. Moreover, the fact that the content of the opinion the PoR was required to ask the National Council of the Judiciary was not governed by precise criteria, nor was the opinion itself of binding nature, raised doubts with regard the utility of such instrument. In addition to that, given the parallel amendments to the National Council of the Judiciary (NCJ)[139], and the subsequent doubts regarding the independence of said body, the opinion itself would have been of dubious constitutionality.

With regard the doubts, expressed by the Commission, that the judges of the Sąd Najwyższy would have been in a subordinated position, the Republic of Poland responded that the power given to the PoR to authorise the judges of the Supreme Court to carry out their judicial activity, constituted a power deriving from the Polish Constitution. Moreover, it settled case law in Poland, that the decisions of the PoR were not subject of judicial proceedings. If allowed otherwise, the constitutional rules and principles governing the role of the PoR would have been endangered[140]. Finally, the Republic of Poland was of the idea that judges of the Sąd Najwyższy would have not been influenced by the decision of the PoR since the latter, not having the possibility to know exactly how each judge carried out his judicial activity, would have decided over the possible extension free from prejudice[141]. Answering the second complaint, regarding the nature of the opinion, Poland upheld that if said opinion was to become binding, it would have underestimated the constitutional prerogatives of the PoR. Lastly, the question over the independence of the NCJ, raised by the Commission, since not related anyhow to the proceedings, was to be declared irrelevant[142].

Having heard the arguments of the parties, the Court of Justice sustained, for the second time, that of the Commission. It claimed that, despite the decision to whether or not grant an extension to the judicial activity of judges resided fully in the domestic competence of a Member State, such decision is required not to undermine the principle of judicial independence in the meaning of the second subparagraph of Art. 19 (1) TEU. In the case of Poland, the decision regarding the potential extension of the judicial activity did not satisfy such requirement. And it did not so for two main reasons. First of all, backing the Commission, the fact that the power of the PoR was free from any objective criterion was a sufficient element to raise doubts regarding the impartiality of the decision. Secondly, the condition of independence and impartiality had to be met also by the other body participating in the procedure, the National Council of the Judiciary. Given that, following the introduction of the New

[138] Ibid, para 98.
[139] Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other Laws) of 8 December 2017.
[140] ECJ. 24 June 2019, C-619/18, *European Commission v Republic of Poland*, Case C-619/18, para. 103.
[141] Ibid, para. 106.
[142] Ibid, paras. 104 -105.

Law on the Supreme Court, under Art. 37 (1b)[143], no objective criteria were described for the National Council of the Judiciary to use, the issued opinion would raise additional doubts regarding its constitutional validity.

Having regarded these considerations, the CJEU declared the second complaint of the Commission valid under the second subparagraph of Art. 19 (1).

On those grounds, in its final judgment, the Court of Justice of the European Union:

> "Declares that, first, by providing that the measure consisting in lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) is to apply to judges in post who were appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Art. 19 (1) TEU".

3.4 Thickening up judicial independence via Art. 19 TEU.

If in *ASJP* the Court of Justice loaded the gun, in *Commission v. Poland (C-619/18)* it pulled the trigger. For the first time the CJEU ruled over a national provision declaring its incompatibility with Art. 19 TEU, something which could be interpreted as the offspring of those principles set out in *ASJP*. The Court posed the principle of judicial independence as a quasi-absolute value at the basis of the judicial system of a Member State, but the judgement also allowed the Court to clarify the contours of Art. 19 TEU scope of applicability which were let blurred in *ASJP*[144].

In the judgment, the Court affirmed that by lowering the retirement age of the judges of the Supreme Court, while giving the PoR the discretionary to extend their mandates, the New Law on the Supreme Court violated the second subparagraph of Art. 19 (1) TEU as in breach of the principle of independence and the principle of irremovability of judges. In condemning the Republic of Poland, the Court adopted a way broader approach to Art. 19 (1) TEU, which made the scope of application of this provision potentially limitless[145]. This broad interpretation was possible through two legal elements applied by the Court, namely the ideal holist approach to judicial independence and the enlargement of the material scope of Art. 19 TEU.

3.4.1 The ideal holistic approach

To better understand the notion of the ideal holistic approach, the term *ideal* and *holistic* are worth contextualizing.

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[143] New Law on the Supreme Court, Art. 37 (1b): "When drafting the opinion referred to in paragraph 1a, the National Council of the Judiciary shall take into account the interest of the system of justice or an important social interest, in particular the rational use of the staff of the [Sąd Najwyższy (Supreme Court)] or the needs arising from the workload of individual chambers of the [Sąd Najwyższy (Supreme Court)]".
[144] SIMONELLI (2019: 1).
[145] RODRÍGUEZ (2020: 3).

The approach adopted by the Court is ideal since it implied the adoption of a theoretical bar with regard the principle of independence. The question is not anymore whether or not the independence of judges is actually endangered by a precise provision, rather if the judicial system is set up in such way "as to dispel any reasonable doubt in the minds of individuals"[146] of its independence. For such doubt to be excluded, the Court pointed out the aspects, stemming from the principle of independence, that needed to be assured, such as the composition of the judiciary, the appointing methods of judges as well as the length of service and the guarantees of irremovability. But the approach is also holistic, in the literal meaning of the word, since the Court decided to consider the entirety of the rules concerning the above mentioned aspects so to determine a possible violation of judicial independence. On multiple occasions the Court insisted that a single rule could not be considered, *per se*, an infringement nor that the existence of an isolated measure can sustain alone the independence of the entire judicial system[147]. With this broad, ideal holistic approach, the Court achieved two objectives, which contributed in making this judgement of constitutional importance: following the holistic aspect, executing the ruling means dismantling the entire system, not change just a provision; adopting the ideal aspect allowed the Court to retail the possibility of a future intervention with regard to Polish rule of law

3.4.2 The enlargement of the material scope of Art. 19 TEU

In the Court's opinion, the second subparagraph of Art. 19 (1) TEU, entailed that Member States are obliged to establish a system of legal remedies and procedures ensuring compliance with effective judicial protection in fields covered by Union law. The fact that the Court specified "fields covered by Union law" rather than "while applying Union law", suggests that any judicial body should meet the requirements of judicial independence also outside the scope of action defined under Art. 51 CFR. As long as a judicial body is entitled to apply and interpret EU law, it is required to meet the standards of an effective judicial protection. This is so not by virtue of the scope of action of a precise ruling, but because of the membership that ties each Member State to the Union. This is where the true revolution can be found, the Court of Justice finally gave a practical meaning to the rule of law as affirmed in Art. 2 TEU by bridging it with Art. 19 (1) TEU. The Court (and probably also the AG Tanchev) did not simply dismantle the Commission's action under Art. 47 TEU, it used the mere complementary function of the Charter to expand the applicability not only of Art. 19 (1) TEU (which is a mean to a goal) but also of Art. 2 TEU without calling into question the principle of conferral and arrogate new competences for the Union.

If the reasoning of the Court is religiously followed, Art. 19 TEU would become the guarantee of the judicial dimension of the rule of law. The provision would be able to cover every single national act regulating any national judicial body within the meaning of EU law. Since the Court found that there is no need for an actual application of an act and the no specific legal context in which the Member State is applying the judgement is required, any national judge is theoretically allowed to use EU law to challenge every legal

[146] ECJ. 24 June 2019, C-619/18, *European Commission v Republic of Poland*, paras 74 and 108.
[147] Ibid, paras 111 and 115.

measure, any single disciplinary rule or decision that he or she considers an impediment to judicial independence.

4. Final remarks

Over the years, the Polish executive has tried (and even succeeded in some cases) to take over organs of the judicial branch. Reforms, implemented by the Sejm, were meant to refurbish the composition of the Supreme Court, together with the retirement age of its components, the appointment methods of members of the National Council of the Judiciary – which are now in the hands of the Sejm (the ruling party) following the 2017 law – the composition of the ordinary courts (via the introduction of a different retirement age for men and women) and the composition of the Constitutional Tribunal. The Constitutional Tribunal, whose survival is still in the hands of the political bodies of the EU, is still operating despite the widespread doubts regarding its independence[148] and the National Council of the Judiciary, whose constitutional role was already doubted in Case C-619/18, was declared not sufficiently independent from legislative and executive authorities by a ruling of the Supreme Court of Poland of 5 December 2019. Everything has been brought to the attention of the Council by the Reasoned Opinion of the Commission for the activation of Art. 7 (1) TEU but, as largely pointed before, the dialogue under the "nuclear bomb" is a (slowly) work in progress. However, thanks to the Court of Justice, the rule of law can see a light at the end of the tunnel.

As of today, two judgements – Case C-619/18 (Independence of the Supreme Court) and Case-192/18 (Law on Ordinary Courts)[149]– and a preliminary ruling – join Cases C-585/18, C-624/18 and C-625/18 – were delivered by the Court of Justice under the infringement procedure of Art. 258 TFEU and a case (also under Art. 258 TFEU) regarding the disciplinary regime for judges, Case C-791/19, is pending.

Despite having addressed only one of the multiple serious rule of law problems raised by the European Commission in its Reasoned Opinion for the activation of Art. 7 TEU with regard the growing systemic threat posed the entire Polish judiciary, the judgement of the CJEU over the independence of the Supreme Court has far reaching effects, even outside the guarantee of the principle of judicial independence. First of all, the Court has established a solid legal precedent with respect to any future attempt in Poland, or in any other Member State, to take control over a court by means of introduction of a standardizing measure for retirement age with retroactive effect. A precedent immediately handy in backing up the final judgement delivered with regard the differentiated retirement ages in Case C-192/18. Secondly, the Court's ruling, even if not so explicitly, by tackling the issue of the independence of

[148] Even acting as a European court by declaring a statue incompatible with the TFEU(case P 1/18)

[149] Issued on 5 November 2019, the Court was called to verify whether the Republic of Poland, by means of application of the *Law on Ordinary Court*, adopted on 12 July 2017, was failing to fulfil its obligations under Art. 19 (1) TEU. The two aspect of the provision raising concern over the respect of the principle of judicial independence were: first, the introduction of a different retirement ages for men and women and, second, the granting to the Minister of Justice of the power to discretionally extend the period of judicial activity. The Republic of Poland, not surprisingly, lost the case.

the ENCJ-suspended NCJ[150], constituted the legal backbone allowing the Supreme Court of Poland to declare such body not independent. Lastly, and most importantly, the Court was able to make the material scope of application of Art. 19 TEU potentially boundless and, together with it, the principle of judicial independence has acquired the status of a "meta-norm of the EU judicial architecture"[151], capable of shaping the organisation of each Member State's judiciary.

It is clear, from the comparison of how the unlawful constitutional capture has been dealt differently in the case of the Constitutional Tribunal and of the Supreme Court, that what the game theory suggested, that judicial actions are usually more effective than political ones, is not completely reasonless. What is deductible form Case C-619/18 is that any dialogue, be it conducted under the pre-Article 7 procedure, Art. 7 TEU or the Council's Rule of Law Dialogue, should always be accompanied by a legal action, possibly under the infringement procedure of Art. 258 TFEU. Moreover, to maximize the effectiveness of such of said actions, under Art. 23a of the Statue of the Court of Justice of the European Union and under Art. 133 of the Rules of Procedure, an expedited procedure can be required by the parties for systemic threat in the area of freedom, security and justice. This accelerated procedure, required by the Commission in both Case C-619/18 and Case C-192/18, would avoid the worsening of the violation before any eventual ruling of the Court of Justice.

Case C-619/18, together with the efforts infused by the Commission in fighting the backsliding of the rule of law in the Polish case, may constitute a new template to follow[152] for the Union in the protection of Art. 2 TEU and the rule of law in particular.

[150] The European Networks of Council for the Judiciary already suspended the Polish National Council of the Judiciary in August 2018 by claiming that said body did not respect the requirement of independence from the executive and the legislative necessary for participating in the working of the organization.
[151] SIMONELLI (2019: 4).
[152] PECH, PLATON (2019: 5).

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Abstract

1. Lo stato di diritto: il significato dietro il concetto

Quello dello stato di diritto è uno dei concetti politici più elusivi del nostro tempo. La sua natura polisemantica ne ha consentito l'impiego in molteplici campi e ha reso, per molto tempo, quasi impossibile delinearne una definizione universalmente condivisa. L'ambiguità derivante dall'assenza di un'interpretazione globalmente accettata ha fatto sì che il principio di "stato di diritto" venisse utilizzato per indicare una quantità di nozioni chiare e distinte che, ad attenta analisi, si intersecano in un solo punto: l'idea, alla base, che lo stato di diritto sia positivo per tutti. Da questo punto comune è possibile estrapolare una definizione che, seppur basica, ha in se tutti gli aspetti fondamentali del suddetto principio: "Lo stato di diritto prevede che le autorità statali e i cittadini rispettino e siano vincolati alla legge". Questa prima definizione permette l'introduzione di una distinzione, molto discussa, tra un'interpretazione "formale" e un'interpretazione "sostanziale" del principio dello stato di diritto.

Alla base dell'approccio "formale" risiede l'idea che la legge possa, e debba, limitare qualsiasi abuso di potere da parte dei cittadini e delle istituzioni. Tale compito può essere assolto solo in presenza di determinati elementi quali: un sistema legislativo posto in essere in modo da essere facilmente interpretabile e applicabile, indistintamente, qualora i diritti da esso protetto venissero violati. Nonostante l'indubbia oggettività, l'approccio formale presenta un limite rilevante: esso è totalmente insensibile alla natura del regime politico che lo applica. Paradossalmente, uno stato autoritario e non rispettoso dei diritti umani potrebbe rispettare i canoni dell'approccio formale in maniera decisamente più soddisfacente di uno stato democratico. Questo perché, il presupposto che i cittadini e le istituzioni debbano rispettare la legge, non prevede nessun obbligo riguardo al contenuto di quest'ultima. Seguendo questa interpretazione quindi, il concetto di "stato di diritto", lontano dall'essere applicabile esclusivamente da regimi democratici, è inteso come solamente legato al concetto di "legalità".

Alla base dell'approccio sostanziale risiede, invece, la convinzione che la sostanza delle leggi sia importante tanto quanto il sistema posto in atto per la loro applicazione. Il sistema legislativo quindi, deve contenere in sé, oltre alle garanzie procedurali – proprie dell'interpretazione formale – anche le garanzie di protezione delle libertà e dei diritti socio-politici dei cittadini. Sempre attenendosi a questa interpretazione, i cittadini possono reclamare i propri diritti davanti ad una corte anche nei confronti dello Stato, inteso come attore pubblico. Da questa base concettuale deriva la necessità che, sia lo Stato, sia i membri degli organi giudiziari siano competenti e che godano di una determinata indipendenza amministrativa e operazionale.

Indipendentemente dall'interpretazione adottata, tre aspetti dello stato di diritto hanno raccolto l'accordo unanime degli esponenti di entrambe le parti. In primo luogo, l'azione dello Stato, in ogni sua forma, è limitata dalla legge. Per ovviare al problema legato alla supervisione del rispetto della legge da parte dello Stato, molte società hanno introdotto la separazione dei poteri. In queste società, prevalentemente democratiche, il potere giudiziario ha l'obbligo di interpretare e applicare le leggi e la garanzia di poterlo fare in piena indipendenza dagli altri organi dello Stato. Secondariamente, il concetto di legalità formale è alla base di ogni società rispettosa dello stato di dritto. Tale concetto implica che i cittadini possono agire liberamente se sono a

conoscenza dell'ammissibilità o meno di una determinata azione. Affinché ciò sia possibile, il contenuto delle leggi deve essere chiaro e generale, cosi come chiari devono essere gli strumenti a disposizione dello Stato per intervenire contro una qualsiasi violazione. Infine come terzo aspetto, l'idea che il potere esercitato dallo Stato e dagli organi istituzionali sia soggetto solo ai limiti posti in essere dalla legge e non sia dipendente dalla volubilità dell'animo umano.

Se il concetto di "stato di diritto" è presente nelle costituzioni di alcuni paesi membri (i.e. Francia e Germania) fin dalla loro prima stesura, il suo ingresso nei Trattati dell'Unione è relativamente recente. Nonostante l'idea di una Comunità basata sullo stato di diritto fosse già stata largamente espressa dalla Corte di Giustizia Europea fin dal 1986 nel famoso caso *Les Verts v Parlamento,* è solo con il Trattato di Amsterdam che la nozione di "stato di diritto" viene introdotta nell'ex Art. 6 TUE e elevata a principio fondamentale dell'Unione. Con il Trattato di Lisbona (2009) la nozione di stato di diritto compie un ulteriore passo in avanti nella scala gerarchica dei Trattati e diventa valore fondante dell'Unione. Un'elevazione, quest'ultima, frutto, ancora una volta, di un'attiva precorritrice della Corte nel tentativo di abbracciare un'interpretazione più sostanziale dello stato di diritto, iniziata con il cosiddetto caso *UPA* (2002) e conclusasi con la sentenza nel caso *Kadi* (2008). Il Trattato di Lisbona ha dunque elevato lo stato di diritto ad un valore dal quale altri principi devono e possono essere dedotti. Un valore che svolge una funzione ordinatrice ed etica del sistema giuridico dell'Unione sia nella sua funzione interna di formazione identitaria, sia nella funzione esterna nel tentativo di legittimare l'azione comunitaria.

Lo stato di diritto è ora individuabile, come valore fondante dell'Unione, nell'Art. 2 del Tratto dell'Unione Europea. Articolo che erroneamente viene spesso identificato come una sorta di clausola di omogeneità, applicabile sia verticalmente, nelle relazioni tra l'Unione e i singoli Stati membri, sia orizzontalmente nelle relazioni tra gli Stati membri. Tuttavia, l'Art. 2 TUE non prevede nessun obbligo da parte dell'Unione di interpretare la nozione di stato di diritto in luce delle tradizioni costituzionali comuni degli Stati membri, ne l'Art. prevede una netta separazione tra l'interpretazione da dare al livello comunitario e nazionale. Il solo compito dell'Art. 2 TUE e della nozione di stato di diritto è esclusivamente quello di fornire un parametro minimo comune al fine di garantire uno dei principi cardine dell'Unione: il principio di mutuo riconoscimento. Non esistendo parametri procedurali esplicitamente menzionati al fine di riconoscere l'operato dell'attività di uno Stato membro da parte di un altro, il rispetto dei valori menzionati nell'Art. 2 TUE, tra cui lo stato di diritto, svolge un ruolo equiparante delle azioni dei singoli Stati nell'esercizio dei loro poteri.

Nonostante la libertà interpretativa legata alla natura propria della nozione e nonostante gli sforzi dei vari organi dell'Unione nel tentare di dare a questo valore fondante un profilo ben definito nei Trattati che fungesse da linea guida per la sua applicazione, lo stato di diritto si configura ancora oggi come un puzzle concettuale. Puzzle parzialmente risolto dall'introduzione, nel 2014, di una definizione da parte della Commissione Europea per contrastare la deriva, sempre più evidente, dello stato di diritto nei paesi dell'Europa dell'Est, specialmente nel caso di Ungheria e Polonia. Proprio per far fronte ad un rischio sempre più concreto, l'Unione, nel corso degli anni, si è dotata di molteplici strumenti per arginare e sanzionare potenziali comportamenti in netta violazione dello Stato di diritto. Strumenti che, seppur numerosi, hanno quasi sempre dimostrato un'elevata inefficacia.

2. Violazioni dello stato di diritto

Prima di procedere ad introdurre i principali strumenti ad uso dell'Unione per contrastare le violazioni dello stato di diritto, è necessario delineare due situazioni nelle quali tali violazioni possono essere commesse da parte di uno Stato membro. Quando uno Stato membro agisce formalmente all'interno della giurisprudenza europea è tenuto ad osservare tutte le obbligazioni derivanti dai Trattati, valori inclusi. Se una violazione dello stato di diritto dovesse aver luogo all'interno della sfera di competenza dell'Unione, l'Art. 258 TFUE può essere attivato dalla Commissione Europea nei confronti dello Stato sospettato di aver commesso tale violazione. Tuttavia, la maggior parte delle violazioni dello stato di diritto vengono commesse dagli Stati che agiscono formalmente all'esterno delle aree di competenza dell'Unione. L'unico modo per sanzionare queste violazioni è il ricorso all'Art. 2 TUE, i quali valori devono essere osservati e rispettati dagli Stati membri indipendentemente dalla sfera di competenza nella quale agiscono.

Ad oggi, l'Unione Europea può contare su una serie di strumenti da utilizzare per assicurare il rispetto dei valori contenuti nell'Art.2 TUE che, in relazione alla propria natura normativa e possibilità di utilizzo, possono essere raggruppati in quattro categorie: strumenti di valutazione di riferimento, strumenti di discussione e dialogo, strumenti di monitoraggio e strumenti di supervisione.

Gli strumenti di valutazione di riferimento e quelli di dialogo e discussione, dalla loro entrata in vigore, rispettivamente nel 2011 e nel 2014, non hanno prodotto risultati tangibili e sono stati spesso accusati di essere inadeguati. I primi, orientati verso problematiche riguardati corruzione e efficienza del sistema giudiziario dei vari Stati membri, hanno lo scopo di produrre delle raccomandazioni, sulla base di dati forniti da autorità locali e attori internazionali per invitare un determinato Stato membro ad aderire agli standard europei e internazionali. I secondi, il cui unico esempio è costituto dal Dialogo sullo stato di diritto promosso dal Consiglio Europeo, seppur focalizzato esclusivamente sul valore menzionato dall'Art. 2 TUE e protetto dall'Art. 7 TUE, non è altro che un vero e proprio dialogo tra il Consiglio e i rappresentati dello Stato membro sospettato di aver agito in violazione dello stato di diritto. Entrambi gli strumenti, non essendo accompagnati da azioni legali vincolanti, si sono spesso rivelati meri palliativi, incapaci di risolvere definitivamente i problemi dell'Unione.

Al contrario, caratterizzati da un maggior grado di efficacia, sono gli strumenti di monitoraggio e supervisione. Adottati, entrambi, per la prima volta a carico della Repubblica di Polonia in seguito ad una serie di riforme costituzionali che, a partire dal 2015, hanno progressivamente e inesorabilmente indebolito gli organi giudiziari del paese, hanno dimostrato, seppur con un'iniziale lentezza, una volontà, soprattutto da parte della Commissione Europea, di intraprendere un'azione più incisiva nei confronti delle violazioni dello stato di diritto.

Lo strumento di supervisione per eccellenza è l'Art. 7 TUE, tristemente conosciuto sotto l'epiteto "bomba nucleare". L'Art. 7 TUE, introdotto nel 1997 dal trattato di Amsterdam con l'importante compito di fornire un strumento punitivo al Consiglio nei confronti di uno Stato membro accusato di aver violato sistematicamente i valori dello stato di diritto, prevede, tuttavia, un meccanismo di attivazione particolarmente esigente – caratteristica forse più adatta a giustificare la sua natura nucleare. La procedura può essere azionata da una proposta motivata di un terzo degli Stati membri, del Parlamento europeo o della Commissione europea diretta al Consiglio, il quale

può constatare l'esistenza di un rischio evidente di grave violazione dei valori dell'Art. 2 TUE. Viene così stabilito un dialogo tra lo Stato membro e il Consiglio per prevenire che tale rischio si concretizzi in violazione. Se tale dialogo dovesse fallire, il Consiglio – agendo all'unanimità – può determinare l'esistenza di una grave e persistente violazione dei principi di cui l'Art. 2 TUE. L'attivazione di questa seconda parte dell'Art. 7 TUE è sicuramente quella che ha reso pressoché impossibile il suo utilizzo nel corso degli anni. Infatti, nonostante i rappresentati dello Stato membro sotto accusa vengano temporaneamente sospesi dalle operazioni di voto, l'unanimità è un requisito oggettivamente impegnativo da raggiungere anche perché alcuni Stati potrebbero trovare nell'astensione o, addirittura nel voto contrario, un'opportunità economica per le loro relazioni bilaterali con lo Stato in questione. Il requisito di unanimità è pero giustificato da un'importante distinzione introdotta dal secondo comma dell'Art. 7 ovvero la natura sistematica della violazione. Una violazione isolata, seppur grave, non è sufficiente a mettere a rischio l'integrità dei valori dell'Art. 2 TUE, né può tanto meno mettere in dubbio l'aderenza dello Stato membro in questione a tali valori. La sistematicità della violazione è molto spesso un sintomo, un campanello dall'allarme per l'Unione che le istituzioni nazionali siano impossibilitate o, semplicemente, prive di volontà nel rimediare al danno. La sistematicità è anche il requisito la cui mancanza è stata responsabile per la non attivazione dell'Art. 7 TUE in recenti casi di violazioni gravi dei valori dell'Art. 2 TUE – Italia e Francia nel 2011 – e la cui presenza ha giustificato la tanto auspicata attivazione nei confronti della Polonia e dell'Ungheria. Ovviamente, il secondo comma dell'Art. 7 TUE sarebbe insufficiente se non accompagnato da sanzioni nei confronti dello Stato membro, sanzioni la cui natura è specificata nel terzo comma della "bomba nucleare". Il Consiglio può votare la sospensione di alcuni diritti dello Stato trovato colpevole, come l'accesso ai fondi comunitari o il diritto di voto. Non esiste un elenco chiaro di quali siano i diritti negabili ad uno Stato membro, quello che è sicuro è che in nessun caso il Consiglio può decidere l'espulsione dello Stato dall'Unione.

Lo strumento di monitoraggio più recente è il Quadro sullo stato di diritto della Commissione europea, adottato nel 2014 in seguito all'approvazione, da parte del Parlamento, del rapporto Tavares. Come espresso dall'allora Presidente della Commissione, José Barroso, il Quadro svolge una funzione intermedia tra i meccanismi legali (Art. 258 TFUE) e quelli politici (Art. 7 TUE) di cui l'Unione è fornita. Focalizzandosi quasi esclusivamente su quelle violazioni la cui natura rende molto difficile la loro analisi da parte della Corte e contro le quali l'attivazione della bomba nucleare risulterebbe eccessiva, lo scopo del Quadro è quello di instaurare un dialogo tra la Commissione e lo Stato membro sospettato di grave violazione dei principi dello stato di diritto. Il Quadro prevede una procedura in tre tempi, durante i quali il dialogo e lo scambio di informazioni tra la Commissione e lo Stato membro si intensifica progressivamente. Nel primo step, la Commissione accerta l'esistenza di un pericolo sistematico dello stato di diritto sulla base delle informazioni fornitele da organismi internazionali. Se tale rischio viene riscontrato, la Commissione emette un'Opinione sullo stato di diritto che lo Stato membro, in accordo con l'Art. 43 TUE, è tenuto a prendere in considerazione. Se lo Stato membro non è in grado di risolvere il problema riscontrato nella prima fase di dialogo, la Commissione può adottare una Raccomandazione sullo stato di diritto. Tale Raccomandazione contiene una serie di suggerimenti sulle misure che lo Stato membro è chiamato ad adottare per ovviare alla presenza di un chiaro pericolo di violazione in un determinato lasso temporale. La Commissione può adottare fino a quattro Raccomandazioni, successivamente, se lo Stato membro non è stato in grado di rimediare ai dubbi

sollevati dalla Commissione nell'Opinione sullo stato di diritto, la Commissione può decidere sull'attivazione dell'Art. 7 TUE tramite l'adozione una proposta motivata.

3. Lo stato di diritto nella Repubblica di Polonia

Nonostante la pandemia di Covid-19 abbia riacceso la discussione introno al progressivo deterioramento dello stato di diritto in Ungheria, un altro Stato membro, a partire dal 2015, ha attirato l'attenzione delle istituzioni europee preoccupate per l'inesorabile deriva anti-democratica messa in atto dall'esecutivo: la Polonia. In seguito alle elezioni presidenziali e politiche tenutesi in Polonia rispettivamente il 24 Maggio e il 25 Ottobre 2015, il sistema giudiziario è stato l'oggetto di una serie di riforme strutturali che hanno posto seri dubbi riguardo la sua indipendenza dagli altri organi dello Stato. Le riforme hanno alterato il sistema nella sua quasi totale integrità, ma due riforme in particolare hanno dato la possibilità all'Unione di agire con vigore in nome della protezione dei principi costitutivi dello stato di diritto. La prima riforma, riguardante le procedure elettive dei giudici del Tribunale Costituzionale polacco è stata analizzata al livello politico ed è attualmente affidata alla procedura dell'Art. 7 TUE (la Polonia è il primo paese verso il quale il Consiglio ha deciso di procedere con l'attivazione della "bomba nucleare"); la seconda, varata nei confronti della Corte Suprema di Polonia è invece stata dibattuta difronte la Corte di Giustizia Europea. Dibattimento conclusosi nel Giungo 2019 con una sentenza rivoluzionaria di grande importanza per l'Unione.

La decisione, da parte della Commissione, di procedere nei confronti di queste due riforme costituzionali ricorrendo a due procedure diametralmente opposte offre la possibilità di mettere in pratica un'interessante versione della teoria dei giochi che, potenzialmente, permette di determinare quale organo, politico o giudiziario, sia il più adatto a risolvere le crisi relative allo stato di diritto. In linea generale la prospettiva di una punizione è sempre stata considerata come un deterrente efficace contro i criminali che, mettendo a confronto l'utilità derivante dal loro crimine con le conseguenze scaturite dalla punizione, avrebbero giudicato il risultato finale complessivamente negativo. Per molto tempo però, questo approccio non ha tenuto conto di una terza variabile decisiva per determinare il risultato dell'equazione: la probabilità che la punizione venga eseguita. Inserendo questo terzo parametro infatti il risultato finale può cambiare radicalmente. Per quanto disastrose le conseguenze di una punizione possano essere per il criminale, se la probabilità che il comportamento venga effettivamente sanzionato e che le conseguenze vengano realmente applicate risultasse relativamente bassa, nessun criminale sarebbe dissuaso dal commettere un crimine. Questo approccio, se applicato alle dinamiche dell'Unione, permette di comprendere perché, nonostante i molteplici strumenti e i ripetuti richiami riguardo la sua importanza, lo stato di diritto venga continuamente calpestato da alcuni Stati membri. Gli strumenti sopraelencati sono tutti di natura tecnico/politica. Se per i primi non è prevista nessun tipo di punizione, per i secondi la probabilità che lo Stato membro sotto accusa sia effettivamente sanzionato sono così prossime allo zero da rendere la loro efficacia praticamente nulla. Il caso della Polonia ha permesso di traslare questa teoria alla pratica e, i recenti sviluppi, non hanno che confermato l'inefficacia delle azioni politiche.

Nei riguardi dell'Atto sul Tribunale Costituzionale, la Commissione europea, dopo un primo momento di passiva osservazione, ha attivato il Quadro dello stato di diritto il 13 gennaio 2016. Il dialogo tra la Commissione e la

Repubblica di Polonia, che ha visto la partecipazione dell'Ungheria in veste di difensore di quest'ultima, si è concluso nel dicembre 2017 dopo quattro Raccomandazioni, l'ultima della quali accompagnata da una proposta motivata per il Consiglio riguardo l'attivazione dell'Art. 7 TUE.

Nonostante l'attivazione del primo comma dell'Art. 7 TUE abbia dimostrato la volontà del Consiglio di agire con fermezza nei confronti della Polonia, le successive dinamiche sviluppatesi durante i vari incontri con i rappresentati della repubblica di Polonia hanno portato ad uno stallo che ha frenato l'impeto inziale. Il Consiglio è stato criticato per aver più volte indicato il lavoro svolto durante i vari incontri come un semplice esercizio di revisione tra pari. Questa interpretazione, che non potrebbe essere più lontana dalla natura dell'Art. 7 (1), ha fatto sì che la Repubblica di Polonia non considerasse la questione con la necessaria serietà e utilizzasse le varie sedute per guadagnare tempo e adempiere, parzialmente, ai propri doveri in ambito comunitario. Comportamento, quest'ultimo, facilitato dalla modalità stessa con la quale gli incontri, tre nel arco di due anni, sono stati svolti. I rappresentati polacchi avevano a disposizione un limite di tempo relativamente lungo, circa un'ora, per esporre la posizione del paese e non avevano limiti di tempo per rispondere alle domande dei rappresentati degli altri Stati membri. Le modalità degli incontri hanno scoraggiato la partecipazione attiva di molte delegazioni e il quadro finale delineatosi ha riproposto una triste copia di una cartina realizzata durante la Guerra Fredda, con una cortina di ferro ancora integra. Dopo l'ultimo incontro tenutosi nel dicembre 2018, il Consiglio ha cessato ogni attività sostenendo di voler attendere i riscontri dell'intervento della Corte di Giustizia Europea nel caso riguardate la riforma sulla Corte Suprema Polacca.

La questione relativa la Corte Suprema di Polonia si è delineata fin da subito in maniera più complicata. La riforma, il cui scopo era quello di ristrutturare l'intera composizione della Corte Suprema, aveva sollevato le preoccupazioni della Commissione Europea specialmente nei confronti di due articoli: Art. 37 e Art. 111. L'Art. 37 introduceva, con effetto retroattivo, l'abbassamento dell'età pensionabile dei giudici della Corte Suprema da 70 a 65 anni, così da equiparala a quella delle altre categorie di lavoratori; l'Art. 111 introduceva la possibilità, da parte dei giudici in via di pensionamento, di fare richiesta di continuità per svolgere le proprie funzioni giudicanti. Tale domanda doveva essere presentata al Presidente della Repubblica il quale, in modo del tutto discrezionale, aveva facoltà di decidere se accordare o meno tale richiesta.

La Commissione Europea, nella sua azione presentata il 2 Ottobre 2018, chiedeva alla Corte di Giustizia Europea che entrambi gli articoli sopracitati, in quanto contrari al principio di indipendenza giudiziaria, venissero dichiarati contrari all'Art. 19 TUE letto in relazione all'Art. 47 della Carta dei Diritti Fondamentali. La Commissione, basandosi quasi interamente sul caso ASJP (2018) sosteneva che: al fine di garantire i principi di cui l'Art. 19 TUE, gli Stati membri sono tenuti a garantire l'indipendenza di tutti gli organi statali aventi funzione nei campi di competenza del diritto dell'Unione. Tra questi organi i più rilevanti sono quelli costitutivi del sistema giudiziario il quale è chiamato, in ogni Stato membro, ad interpretare e applicare il diritto europeo. In questo contesto si può evidenziare come la Corte Suprema di Polonia, che senza dubbio alcuno rientra in tale categoria, successivamente all'entrata in vigore della riforma varata nel 2015, non poteva più considerarsi un organo indipendente ai sensi degli Art. 19 TUE e 47 CFR.

Nella sua prima richiesta, la Commissione Europea sosteneva che, come risultato dell'adozione degli Art. 37 e 111, il pensionamento forzato, e con effetto retroattivo, di 27 giudici, ivi compreso il Presidente, della Corte

Suprema aveva reso possibile, per l'esecutivo polacco, il completamento di una cambio radicale della composizione di tale organo. Così facendo, la Nuova Legge aveva infranto il principio di irremovibilità dei giudici, considerato come aspetto necessario per garantire la loro indipendenza. Nella seconda richiesta, la Commissione riteneva che l'attribuzione di un potere totalmente discrezionale, e non soggetto a limiti ne revisioni di nessun genere, al Presidente della Repubblica polacca nell'accordare il proseguimento dell'attività giudiziaria ai facenti richiesta, aveva posto i giudici della Corte Suprema in una posizione subordinata rispetto al capo dello Stato. Tale posizione avrebbe potuto indurre i giudici ad operare secondo quelle che essi avrebbe potuto considerare misure gradite al Presidente della Repubblica, ponendo così seri dubbi sull'oggettività ed indipendenza del loro operato giuridico.

In entrambi i casi la Corte di Giustizia ha supportato le dichiarazioni della Commissione Europea e ha dichiarato entrambi gli articoli contrari al secondo sotto paragrafo del primo comma dell'Art. 19 TUE. Nonostante a prima vista la sentenza possa non sembrare rivoluzionaria, ad una più attenta analisi, quello svolto dalla Corte, può considerarsi un esercizio giuridico di notevole importanza con possibili importanti applicazioni future.

Come precedentemente menzionato, la maggior parte delle violazioni dello stato di diritto vengono commesse dagli Stati membri al di fuori delle aree di competenza dell'Unione, fatto che garantirebbe loro la possibilità di non rispettare i vincoli imposti nei Trattati. La Polonia, con l'adozione della Nuova Legge sulla Corte Suprema, ha semplicemente esercitato il proprio potere su un'area di competenza, quella dell'organizzazione del sistema giudiziario, che è esclusiva di ogni Stato membro e, proprio in virtù di ciò, ha sostenuto per tutto il processo che le problematiche sollevate dalla Commissione fossero nulle poiché non riguardanti area di competenze della UE. Esattamente su questa questione il lavoro magistrale della Corte ha dato i suoi migliori frutti. Applicando un'interpretazione molto ampia dell'Art. 19 TUE infatti la Corte ha affermato che: nonostante l'organizzazione del sistema giudiziario sia a tutti gli effetti una competenza esclusiva degli Stati membri, il fatto che gli organi costitutivi di tale sistema siano chiamati ad interpretare e applicare il diritto dell'Unione, obbliga gli Stati membri a garantire che il principio di indipendenza venga sempre rispettato, indipendentemente dalla sfera di applicazione del diritto nei singoli casi. La Corte di Giustizia ha espressamente ampliato la ratio e l'ambito di applicazione dell'Art. 19 TUE, affidandogli un ruolo molto importante nel quadro del *acquis* comunitario: una meta-norma dell'architettura del sistema giudiziario dell'Unione.

4. Considerazioni finali

Nonostante l'esecutivo polacco sia riuscito, nel corso degli ultimi cinque anni, a catturare alcuni organi del sistema giudiziario, l'intervento delle Corte di Giustizia nel caso della Corte Suprema ha gettato una nuova base giuridica dalla quale partire per far fronte alla deriva che lo Stato ha intrapreso a partire dal 2015.

Inoltre, il quesito sollevato dalla teoria dei giochi nei confronti del diritto dell'Unione, trova una risposta alquanto evidente se si considera il caso polacco. Se, da una parte, la discussione circa il Tribunale Costituzionale ha raggiunto una sorta di stallo politico in sede di Consiglio che ha permesso al Tribunale stesso di continuare ad operare nonostante i dubbi sulla sua indipendenza, l'intervento risolutivo della Corte di Giustizia nel caso della

Corte Suprema ha permesso all'Unione di porre un freno ad una violazione sistematica dello stato di diritto. Tale situazione suggerisce che, forse, gli organi giudiziari siano più adatti, rispetto a quelli politici, ad affrontare crisi relative alle violazioni dei valori di cui l'Art. 2 TUE o, che comunque, qualsiasi azione politica intrapresa debba sempre essere sostenuta da un'azione legale parallela, con caratteristiche coercitive, al fine di garantire il rispetto di quelli che sono i valori costituzionali sui quali si regge l'intero operato dell'Unione.