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Current Challenges for the Rule of Law and the Role of the Judiciary in Europe

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Il presente contributo analizza le concezioni, le componenti e gli elementi contingenti che hanno definito quella evoluzione dello stato di diritto che ha dominato la pratica giuridica e giudiziaria per oltre un decennio, soprattutto in Europa. Naturalmente, in un'impresa di questo tipo, la selezione degli elementi pertinenti e, soprattutto, le considerazioni che ne derivano non sono immuni a una prospettiva strettamente in linea con le funzioni di un giudice della Corte di giustizia dell'Unione europea. Data la particolare rilevanza dei recenti sviluppi relativi allo stato di diritto in paesi terzi, e più precisamente negli Stati Uniti e in Israele, è parso opportuno includere anch'essi nell'analisi.

In the following paper I will focus on the understanding, components, and contingent elements that have defined the evolution of the rule of law that has dominated legal and judicial practice for the better part of a decade now, especially in Europe. It goes without saying that in an undertaking of this nature, the selection of relevant aspects and, more importantly, the considerations associated with them are not immune to a perspective that is closely aligned with the duties of a judge at the Court of Justice of the European Union. In view of the particular relevance of recent developments in the rule of law in third countries, namely in the USA and Israel, it seems appropriate to also include these in the analysis.

1. The Rule of law between self-evidence and carelessness[1]

The obligation of the European Union and its member states to respect the rule of law has always been one of the foundations of European integration. This is because the designation of the Union as a "community under the rule of law", which goes back to the first President of the European Commission, *Walter Hallstein*, has a meaning that goes beyond the domestic development of the concept of the rule of law, in that it makes the "rule of law" the basic condition for compliance with the European peace order of the Union treaties and at the same time the measure of "integration through law"[2]. The Court of Justice emphasised this connection in its landmark ruling *Les Verts*, according to which «*the European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty*»[3].

In full accordance with this claim, the Union's current treaty law also leaves no doubt about the constitutive importance of the rule of law for the Union and its member states. Indeed, the preamble to the Charter of Fundamental Rights expressly emphasises the fundamental importance of the rule of law in its second paragraph[4] and, above all, the Treaty on European Union (TEU) recognises the rule of law as a universal value[5]. According to Article 2 TEU, the rule of law is also one of the values on which the Union is founded and which «*are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*». Article 49 TEU also makes it clear that respect for and commitment to promoting the values set out in Article 2 are central to the membership of the European Union, that it must avoid any regression and that it must not legislate in a way that undermines the protection of the value of the rule of law[6]. Articles 6 and 7 and Article 19(1) TEU as well as the general provisions of the Charter make this finding clear.

The established case law of the Court of Justice reflects this foundation in primary law[7], which has been ratified by all member states in accordance with their constitutional requirements. Above all, the obligation of member states and the Union to respect the rule of law is based on a well-established historical tradition dating back to the late Middle Ages[8] and is one of the legal principles

that have developed from Europe's cultural, religious and humanist heritage, so that it is unquestionably part of the «*constitutional traditions common to the member states*»[9].

However, it is precisely this initial finding and the corresponding experience that the values underlying the Treaty on European Union and the Charter of Fundamental Rights were considered undisputed and indisputable for decades[10] that make it so difficult to explain the many challenges and hostilities that have recently been levelled against the rule of law and, in particular, the case law of the Court of Justice on compliance with the principles of the rule of law. Against this background, I would like to venture the hypothesis that the "self-evident" adherence to the principles of the rule of law in the decades since the end of the Second World War in the Western European states, which soon joined together to form the European Community, was in many respects an expression of this historical and geopolitical situation. The rule of law as a constitutional element of a free society had a central function in distinguishing itself from the regimes of National Socialism and Fascism, which had been defeated with great sacrifice, and above all in the competition between systems against the really existing socialism of the Soviet Union and the states of the Warsaw Pact that were subjected to it. In particular, the civil rights movement and the increased development of fundamental rights by the US Supreme Court in the 1950s and 1960s took place in the context of this systemic conflict, in which Soviet propaganda ubiquitously denounced, among other things, the history of oppression and suffering of the African-American population[11]. The rule of law and individual fundamental rights became the distinguishing feature and seal of quality of Western democracies.

As much as the commitment to the rule of law was part of the established ritual of the representatives of Western European states and their institutions, it was rarely questioned domestically. Whether and to what extent the silent acceptance of the rule of law in post-war Western Europe was a firm expression of a resolute "never again" cannot be answered with certainty and without question not in the same way for all states. The extent to which a state was affected by dictatorship, the traditional orientation of the respective national legal systems and in particular the question whether the system of judicial review in administrative law follows the ideal of implementing objective standards of lawfulness or is

conceived as a guarantee to individual legal protection for citizens[12] as well as the self-image of the third power in dealing with the primacy of politics[13], are still the source of many disparities. The openness of the concept of the rule of law not only allowed for the diversity of concepts, but also meant that difficult individual questions about the nature, extent and quality of the realisation of the idea of the rule of law in a particular legal system did not have to be answered and could not cast doubt on the general commitment to the rule of law in the West.

The observation that the European Union and the member states take the rule of law for granted goes hand in hand with the observation that the question of responsibility for guaranteeing the conditions that specifically require compliance with the rule of law was regarded as politically subordinate. In Germany, for example, the importance of the rule of law in terms of ensuring that the judiciary is adequately resourced and staffed and that the salaries of judges are commensurate with their duties was for a long time a topic that received little political attention, and has at best attracted attention in judicial circles. Against this backdrop – I would cautiously say – a certain carelessness in dealing with the responsibility for guaranteeing the rule of law and its material foundations developed over time.

However, more significant for the current state of the discussion on guaranteeing the rule of law is probably the debate that has been going on for some time in constitutional law and constitutional policy forums on reducing legal protection to a constitutionally required minimum[14], on the necessity of limiting legal protection in the context of complex planning and authorisation procedures[15], on the restriction of the Federal Constitutional Court's rejection competence by introducing qualified majority quorums for decisions rejecting norms[16] and, in general, on the call for a strengthening of the executive's powers in relation to the judiciary's powers of control[17] as well as the demand for stricter compliance with judicial self-restraint[18].

For some time, these discussions could give the impression that a "dismantling" of judicial powers of control was the means of choice for increasing the effectiveness and efficiency of state powers of action and optimising economic freedom without endangering the constitutional framework based on the rule of law. Not so long ago, the impression prevailed in many a conversation that Germany was simply "in no way affected" by questions and problems that arose

in connection with the responsibility for guaranteeing the rule of law in other member states of the European Union.

In fact, it was only with the "great" enlargement of the European Union 20 years ago that the responsibility for guaranteeing the rule of law was given an accentuated significance compared to the commitment of the Union and its member states to the rule of law contained in Article 6(1) TEU through the inclusion of the provisions in Articles 2 and 19(1) and (2) TEU. The specific provisions in the Acts of Accession of Romania and Bulgaria on the importance of compliance with the rule of law and the adoption of Decision 2006/928 establishing a procedure for cooperation and verification in the areas of judicial reform and the fight against corruption[19] highlight the links between the functioning of the internal market and the area of freedom, security and justice, in particular with regard to mutual recognition in the area of civil law and in the context of the execution of the European arrest warrant. These connections gave rise to the call to take appropriate measures, where necessary, to guarantee the rule of law[20].

It is obvious, however, that a view which sees the responsibility for the necessity of complying with the rule of law standards from the outset as a problem limited to the member states that have joined the EU since 2004 is not only open to the justified accusation of practising a "double standard". Rather, this view contradicts the comprehensive claim to validity of the aforementioned provisions of the Treaty and, moreover, fails to recognise the practical legal significance of the requirement of equality of the member states before the Treaties in accordance with Article 4(2) TEU, which is so fundamental to the entire integration process.

Finally, a look at the established case law of the Court of Justice on the obligation of the Union and the member states to guarantee effective legal protection in the areas covered by Union law provides further facets of this problem. The case law of the Court of Justice in this area has always been very rich and characterised by a clear tendency to guarantee effective individual legal protection for Union citizens[21]. These deep roots sometimes seem to be forgotten in the current debate on more recent case law developments. In any case, the Court of Justice has repeatedly placed limits on the so-called procedural autonomy of the member states when the application of provisions of national procedural law would have

led to the practical effectiveness of the rights that EU citizens can assert on the basis of EU law being called into question[22].

Although this case law has not always allowed member states to be certified as having a spotless record on the rule of law, one of the lessons learnt from this development is that the member states have generally complied with the requirements of Union law, some of which are new to them, without casting doubt on the rule of law of the European Union and compliance with the standards of this case law.

Against this background, the current discussion about the Union-based obligation to comply with guarantees under the rule of law, which has repeatedly engaged the action of the Union and the member states for a good decade now, as evidenced by the case law of the Court of Justice, can be described more precisely in the sense that it is not a new form of the already familiar debate about the "how" of compliance with Union law requirements in individual cases. Rather, the subject of the dispute is the fundamental question of "whether" there is an obligation under EU law to comply with the principles of the rule of law and, in particular, to guarantee effective legal protection.

2. Turn of an era: Challenges and dangers

The empirical data described above, which can be taken from the case law of the Court of Justice on compliance with the rule of law, makes it appear particularly understandable that the Court of Justice favoured a "secondary law point-by-point" approach over a fundamental review of the rule of law problem in the first proceedings[23], an approach that it has also pursued in more recent proceedings[24].

As understandable as the criticism of this approach may be in view of the importance and legally binding nature of the values of the Union enshrined in Article 2 TEU, it seems understandable that the Court of Justice feels first and foremost committed to its task of ensuring compliance with secondary Union law, as the member states are directly involved in its adoption and their actions in the judicial proceedings before the Court of Justice generally appear to be a violation of the standards they have set themselves.

This might also be linked to the hope that an interpretation of the Union's secondary law will be perceived as less "invasive" by the member states

concerned, even if this matter is sometimes largely based on fundamental rights or the rule of law principles and commandments. Finally, this approach leaves the Union legislator with certain possibilities to react in order to make certain adjustments to the existing legal situation in compliance with the relevant primary law. Notwithstanding this, the Court of Justice executed its judicial duties without hesitation in the proceedings in which legal questions were referred to it regarding the interpretation of basic Treaty provisions pertaining to the rule of law and the guarantee of effective legal protection[25] and repeatedly gave legally binding interpretations of the relevant Treaty provisions that are entirely in line with its long-standing case law[26].

For some years now, however, the debate about the rule of law and the binding nature of judgements issued by competent courts to uphold it has increasingly been "condensed" into a fundamental question of democracy based on the separation of powers, with the legitimacy of the third power to exercise such jurisdiction being openly questioned. In the European Union, this discussion relates in particular to the powers and jurisdiction of the Court of Justice vis-à-vis the member states, in contrast to the exercise of judicial powers by the Member State courts themselves. The fact that the Court of Justice favours an interpretation and application of Union law, in particular with recourse to fundamental rights and the rule of law, which runs counter to the tradition of common law and, at least in sum, reduces the government's legitimate scope for decision-making, was already cited in the BREXIT debate[27]. In this matter, a return of the third branch of government in the European Union to the observance of parliamentary sovereignty as broadly understood in common law and the corresponding restriction of judicial power to monitor compliance with the rule of law and fundamental rights requirements[28] has already been called for. There have also been increasing calls from other member states for a reduction in the jurisdiction of the Court of Justice at the expense of its control over compliance with fundamental rights and rule of law standards, ultimately in order to reduce the obligations resulting from Union law and to open up additional options for the governments of the member states to act independently, particularly in connection with prohibitions on discrimination, restrictions on fundamental rights to the protection of private life and restrictions on asylum and residence rights[29].

If Germany criticises the Court of Justice's case law to date in this sense, it complains of an inadmissible extension of Union law at the expense of the competences reserved to the member states[30]. Whether such an extension exists, however, is usually more postulated than proven. In contrast, this criticism seems to accept the deficits in terms of fundamental rights or even the rule of law that go hand in hand with the inadequate enforcement of the substantive rights granted to citizens by Union law. If, on the other hand, national courts are considered to be authorised[31] to act independently to uphold the limits of the rule of law, this criticism fails to recognise the need for the uniform application of Union law, especially with regard to the rule of law and fundamental rights standards. The state of the debate can be summarised with the question of whether the lowering of constitutional and fundamental rights standards in the case law of the Court of Justice or even a distinctive recognition of the "political questions doctrine" for Union law should be the imperative of the hour, the calling of our time.

A closer look at the European Commission's annual reports on the rule of law, on the other hand, reveals a very colourful picture: in addition to very positive impressions, it also includes some diplomatically formulated but clearly recognisable criticism of compliance with the principles of the rule of law and in the context of which concrete needs for action, for example in the fight against corruption or media control, that are discussed in depth, even beyond the cases and countries that are on everyone's lips[32]. A look at the discussions about the role of the third branch of government in the constitutional structure, which have been taking place for some time in the USA and currently in Israel in particular, reveals a structurally comparable debate about the scope of executive final decision-making rights, the independence or at least the publicly perceived politicisation of the judiciary, as well as the nature and extent of judicial powers of control and objection. Beyond some of the particularities that characterise these processes, it is always about fundamental and core questions of the separation of powers and the legal and constitutional commitment of the legislature and executive in a democratic state governed by the rule of law[33].

In particular, the dispute over the Israeli Supreme Court's power to review the *reasonableness of* a law, when placed in the context of European discussions, is the functional equivalent of the (constitutional) court's power to review the legality

and constitutionality of sovereign action on the basis of proportionality. The fact that this is the gold standard of constitutional jurisdiction[34] not only in Israel, but also in Germany and the European Union, makes it immediately clear how vulnerable the balance between power and law that has grown in Europe over the past 70 years. In the USA, the discussion about the nature and extent of federal judges' powers of review also demonstrates the direct link to a federal context of this debate. As a practical consequence, the renunciation of federal judicial review does not lead to the exercise of materially equivalent review powers by state courts, but rather to the opening of political leeway in favour of the legislative and executive powers, which can very well be used at the level of the individual states[35]. The legal containment of politics, which is precisely the core of the constitutional mandate of the judiciary[36], is thus noticeably pushed back as a result of this case law.

Even this cursory glance beyond the European horizon shows that the issue of guaranteeing the rule of law and, in particular, the role of the third branch of government in the European Union and its member states is by no means a supposedly harmless zero-sum game of the "mere" allocation of judicial powers and their legitimate exercise in the Union's multi-level system. The experiences with the economic and legal consequences of BREXIT that have become apparent in the meantime also point beyond the loss of prosperity to the lasting restriction of the rights conferred on citizens by Union law. In the European context, it is therefore a question of the fundamental issue of the effective enforcement of the rights of EU citizens and their uniform application in a functioning internal market and the area of freedom, security and justice, as they arise from the treaties and, above all, the Charter of Fundamental Rights and the many provisions of the Union's secondary legislation.

3. Perspectives

The debate about the responsibility for respecting the rule of law in the European Union and its member states is therefore about much more than the question of whether Europe will be able to claim the quality seal of the rule of law for itself *vis-à-vis* other parts of the world in the future, whether it will remain true to the European idea in the 21st century and remain permanently

committed to the constitutional narrative of the community of values[37]. Without wishing to relegate the great importance of these aspects, particularly for the credibility of the Union and its actions, to second place, it is nevertheless a priority, in view of the practical prospects that are emerging for the rule of law in Europe and its development, to point out first and foremost the destructive potential of a lack of rule of law safeguards for the whole project of European integration.

The European internal market will not be able to function and undistorted competition will not be guaranteed if, for example, public procurement is subject to rampant corruption, compliance with competition rules cannot be monitored and sanctioned by the courts and compliance with EU law and its provisions in favour of consumers and companies in general cannot be guaranteed or can only be guaranteed to a very limited extent. The same applies in particular to mutual trust, which is a prerequisite for instruments such as the European Arrest Warrant, the European Evidence Warrant or the e-Evidence Regulation, which realise the area of freedom, security and justice. Guaranteeing the rule of law is not just "nice to have" for the European Union and the relationship between the member states, but essential for their peaceful coexistence.

But where will the journey take us? Of course, with the Regulation on the so-called conditionality mechanism[38], the Union has created an important instrument whose enforcement power goes far beyond the initial steps[39]. It is to be hoped and also expected that a considerable proportion of the potential for conflict that has been brought before the Court of Justice in recent years, unfiltered as it were, will become the subject of this conflict resolution mechanism under the application of this regulation and especially after the recent elections in Poland. For the time being, it remains to be seen what role the Court of Justice will play in the follow-up or review of the agreements reached within this framework.

Irrespective of this development, however, the Court of Justice continues to have a special and perhaps even increased responsibility for the entire spectrum of the application of Union law when it comes to compliance with the rule of law and respect for fundamental rights in the action of the European Union and its member states. Therefore, all those involved in the "legal life" of the Union should carefully consider what they wish for. The task of the Court of Justice, on

the other hand, is clear: the preamble to the Charter of Fundamental Rights proclaims that the Union «*places the individual at the heart of its activities*»[40], obliging therefore the Court of Justice to place its judicial task "at the service of the individual".

1. The text was translated from German into English (with all necessary and unavoidable adaptations) by Prof. Diana-Urania Galetta. The German version of this contribution will be published in the *Festschrift* in honour of Prof. Dr. Rainer Schlegel, *Die Zukunft des Rechts- und Sozialstaats*, 2024.
2. W. Hallstein, *Die EWG - Eine Rechtsgemeinschaft. Speech on the occasion of his honorary doctorate. University of Padua, 12 March 1962*, in *Europäische Reden*, 1979, p. 341 ff. (343 f.).
3. Court of Justice, judgement 23 April 1986, C-294/83, *Les Verts*, ECLI:EU:C:1986:166, para. 23.
4. It states that the Union «*is based on the principles of democracy and the rule of law*».
5. In the second paragraph of the preamble, the Member States acknowledge the creation of the EU «*from the cultural, religious and humanist heritage of Europe, from which the inviolable and inalienable rights of the human person, as well as freedom, democracy, equality and the rule of law have developed as universal values*».
6. Court of Justice, judgement 20 April 2021, C-896/19, *Repubblika*, ECLI:EU:C:2021:311, para. 61, 63 and 64.
7. See for example: Court of Justice, judgment 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 30 ff.; Court of Justice, judgment 19 November 2019, Joined cases C-585/18, C-624/18 and C-625/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, ECLI:EU:C:2019:982, para. 72 ff.; Court of Justice, judgement 18 May 2021, Joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația "Forumul Judecătorilor din România"*, ECLI:EU:C:2021:393, para. 179 ff., 186 ff., 208 ff., 224 ff., 242 ff.; Court of Justice, judgement 21 December 2021, Joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion*, ECLI:EU:C:2021:1034, para. 155 ff., 215 ff.; Court of Justice, judgement 5 June 2023, C-204/21, *Commission v Poland*, ECLI:EU:C:2023:442, para. 60 ff.
8. E. Schmidt-Aßmann, *Der Rechtsstaat (§ 26)*, in J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. II., III Ed., Heidelberg, 2004, p. 541 ff. (para. 10 ff.).
9. This is the wording used in Article 6(3) TEU for fundamental rights.
10. T. von Danwitz, *Values and the Rule of Law: Foundations of the European Union – An Inside Perspective From the ECJ*, in *Potchefstroom Electronic Law Journal*, vol. 21, 2018, p. 1 ff.
11. Cf. M. L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy*,

Princeton University Press, Princeton, Oxford, 2011.

12. T. von Danwitz, *Europäisches Verwaltungsrecht*, Springer, Berlin, 2008, p. 124 ff.
13. See the example of the jurisdiction of the French Council of State: A. Mestre, *Le Conseil d'Etat protecteur des prérogatives de l'administration (études sur le recours pour excès de pouvoir*), in *Revue internationale de droit comparé*, 1976, p. 192 ff. ; L. Fovoreu, *Le Conseil d'État défenseur de l'Executif*, in *Mélanges en hommage à Jean Boulouis*, Dalloz, Paris, 1991, p. 237 ff.
14. Cf. R. Pitschas, *Der Kampf um Art. 19 IV GG*, in *Zeitschrift für Rechtspolitik*, 1998, p. 96 ff.
15. See e.g. on the discussion about the law to speed up administrative court proceedings in the infrastructure sector: W. Bier, U. Bick, *Gesetz zur Beschleunigung von verwaltungsgerichtlichen Verfahren im Infrastrukturbereich*, in *Neue Zeitschrift für Verwaltungsrecht*, 7, 2023, p. 457 ff.; F. Scheffczyk, *Das Gesetz zur Beschleunigung von verwaltungsgerichtlichen Verfahren im Infrastrukturbereich*, in *Zeitschrift für Öffentliches Recht in Norddeutschland*, 4, 2023, p. 177 ff.
16. T. von Danwitz, *Qualifizierte Mehrheiten für normverwerfende Entscheidungen des BVerfG? Thesen zur Gewährleistung des judicial self-restraint*, in *Juristen Zeitung*, 10, 1996, p. 481 ff.
17. H. Peters, *Die Verwaltung als eigenständige Staatsgewalt*, Scherpe, Krefeld, 1965; F. Ossenbühl, *Die gerichtliche Uberprüfung der Beurteilung technischer und wirtschaftlicher Fragen in Genehmigungen des Baus von Kraftwerken*, in *Deutsches Verwaltungsblatt*, 1978, p. 1 ff.; Id., *Gedanken zur Kontrolldichte in der verwaltungsgerichtlichen Rechtsprechung*, in *Rechtsstaat zwischen Sozialgestaltung und Rechtsschutz : Festschrift für Konrad Redeker zum 70. Geburtstag*, C.H.Beck, Munich, 1993, p. 55 ff.
18. Balanced on the German debate: J. Masing, *Das Bundesverfassungsgericht (§ 15)*, in M. Herdegen, J. Masing, R. Poscher, K.F. Gärditz (eds.), *Handbuch des Verfassungsrechts. Darstellung in transnationaler Perspektive*, C.H.Beck, Munich, 2021, p. 91 ff., para. 146 ff., 163 ff.
19. Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ L 354, 14.12.2006, p. 56 ff.
20. See, for example, Article 37 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, OJ L 157, 21.6.2005, p. 203 ff.
21. See T. von Danwitz, *Europäisches Verwaltungsrecht*, cit., p. 273 ff., 281 ff., 579 ff.
22. See D.U. Galetta, *Procedural Autonomy of EU Member States. Paradise Lost?*, Springer, Heidelberg-Dordrecht-London-New York, 2010
23. Court of Justice, judgement 6 November 2012, C-286/12, *Commission v Hungary*, ECLI:EU:2012:687; Court of Justice, judgement 8 April 2014, *Commission v Hungary*, C-288/121, ECLI:EU:C:2014:237.
24. Court of Justice, judgement 18 June 2020, C-78/18, *Commission v Hungary*,

ECLI:EU:C:2020:476; Court of Justice, judgement 6 October 2020, C-66/18, *Commission v Hungary*, ECLI:EU:C:2020:792; Court of Justice, judgement 16 November 2021, C-821/19, *Commission v Hungary*, ECLI:EU:2021:930.

25. See K. Lenaerts, *New Horizons for the Rule of Law Within the EU*, in *German Law Journal* , Vol. 21, Special Issue 1: 20 Challenges in the EU in 2020, 2020 , p. 29 ff.
26. Court of Justice, judgment 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 30 ff.; Court of Justice, 7 February 2019, C-49/18, *Escribano Vindel*, ECLI:EU:C:2019:106, para. 61 ff.; Court of Justice, judgement 24 June 2018, C-619/18, *Commission v Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, para. 42 ff., 71 ff., 108 ff.; Court of Justice, judgment 19 November 2019, Joined cases C-585/18, C-624/18 and C-625/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, ECLI:EU:C:2019:982, para. 72 ff.; Court of Justice, judgement 21 December 2021, Joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion*, ECLI:EU:C:2021:1034, para. 155 ff., 215 ff.; Court of Justice, judgement 22 February 2022, C-430/21, *RS*, ECLI:EU:C:2022:99, para. 37 ff., 81 ff.
27. Cf. on this: J. Zenthöfer, *Ein Grund für den Brexit. Kritik am Europäischen Gerichtshof*, in *Frankfurter Allgemeine Zeitung,* 4 May 2020, p. 16, see also: UK Supreme Court, judgment 22 January 2014, R (on the application of HS2 Action Alliance Limited) v. The Secretary of State for Transport, UKSC 3, para. 79, 207; UK Supreme Court, judgment 25 March 2015, Pham v. Secretary of State for the Home Department, UKSC 19, para. 54, 58, 72 ff.
28. See T. von Danwitz, *Europäisches Verwaltungsrecht*, cit., p. 31 ff., 124 ff.; G. Sydow, *Parlamentssupremat*ie *und Rule of Law. Britische Verfassungsreformen im Spannungsfeld von Westminster Parliament, Common-Law-Gerichten und europäischen Einflüssen*, Mohr Siebeck, Tübingen, 2005, p. 55 ff.; M. Fromont, *Droit administratif des États européens*, PUF, Paris, 2006, p. 60 ss.; P. Birkinshaw, *Le droits administratif anglais dans le creuset européen*, in J.B. Auby, J. Dutheil de la Rochère (Eds.), *Droit Administratif Européen*, Bruylant, Bruxelles, 2007, p. 559, 565 ff.
29. Cf. N. Lenoir, *La justice française est-elle sous la tutelle des justices européennes?*, in *Servir*, 3, n. 521, 2023/3, p. 25 ff.
30. Cf. already: R. Scholz, *Zum Verhältnis von europäischem Gemeinschaftsrecht und nationalem Verwal- tungsverfahrensrecht*, in *Die Öffentliche Verwaltung*, 1998, p. 261 ff.; from the current debate: M. Nettesheim, *Kompetenzkonflikte zwischen EuGH und Mitgliedstaaten*, in *Zeitschrift für Rechtspolitik*, 8, 2021, p. 222 (223); Id., *Die „Werte der Union": Legitimitätsstiftung, Einheitsbildung, Föderalisierung*, in *Europarecht*, 5, 2022, p. 525 ff (533 ff.); P.M. Huber, *Der Gerichtshof der Europäischen Union und das Bundesverfassungsgericht als Hüter der unionalen Kompetenzordnung*, Dunker & Humblot, Berlin, 2023, p. 9 ff.
31. P.M. Huber, *Rechtsstaat (§ 6)*, in M. Herdegen, J. Masing, R. Poscher, K.F. Gärditz (eds.), *Handbuch des Verfassungsrechts* cit., p. 383 ff., para. 86 ff.

32. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions. 2023 Rule of Law Report The rule of law situation in the European Union, COM (2023) 800 final.
33. Cf. H. Wefing, *Macht gegen Recht. Anklage gegen Donald Trump, Kampf um die Justiz in Israel: In wichtigen Staaten des Westens wankt die Verfassungsordnung*, in *Die Zeit*, 11 August 2023, p. 4.
34. Cf. H. Wefing, *Macht gegen Recht. Anklage gegen Donald Trump, Kampf um die Justiz in Israel: In wichtigen Staaten des Westens wankt die Verfassungsordnung*, cit.
35. See, for example, after the abolition of a fundamental right to access to abortion guaranteed by the Federal Constitution in US Supreme Court, Decision of 24 June 2022, Dobbs v. Jackson Women's Health Organization, 597 U.S. (2022), the "Fetal Heartbeat and Protection from Abortion Act" from South Carolina, which the South Carolina Supreme Court deemed constitutional in August 2023, abandoning its established case law on the existence of a right to abortion under the South Carolina Constitution, which was reaffirmed in January 2023, albeit in a different line-up: South Carolina Supreme Court, judgment v. 23 August 2023, Planned Parenthood South Atlantic v. State of South Carolina, Opinion No. 28174.
36. See P.M. Huber, *Rechtsstaat (§ 6)*, cit., 88: «*Je intensiver die gerichtliche Kontrolle ausfällt, je besser die rechtliche Einhegung der Politik gelingt, umso stärker ist auch der Rechtsstaat*» (The more intensive the judicial control is, the better the legal containment of politics succeeds, the stronger the rule of law is).
37. Cf. R. Coudenhove-Kalergi, *Das Paneuropäische Manifest*, 1923, p. 16; P. Renouvin, *Les idées et les projets d'Union européenne au 19ième siècle*, in H. Holborn, *La formation de la Constitution de Weimar problème de politique extérieure*, 1931; J. Monnet, *Mémoires*, Fayard, Paris, 1976; P.H. Spaak, *Memoiren eines Europäers*, Hoffmann und Campe, Hamburg, 1969; W. Hallstein, *Der unvollendetete Bundesstaat: Europäische Erfahrungen und Erkenntnisse*, Econ, Düsseldorf, 1969; K. Stüwe, *Einigung als Idee – William Penn und das Projekt der EU*, in *Der Staat*, vol. 38, no. 3, 1999, p. 359 ff.
38. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union, OJ L 433I , 22.12.2020, p 1 ff..; see C. Neumeier, R. Sangi, *Fiskalische Verfassungsdurchsetzung im Unionsrecht*, in *JuristenZeitung*, 6, 2022, p. 282 ff.
39. See e.g. Communication from the Commission to the European Parliament and the Council, "*A new EU framework to strengthen the rule of law*", COM (2014), 0158 final.
40. Second recital of the preamble to the Charter of Fundamental Rights of the European Union.