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Domestic Infringements of the Rule of Law as a European Union Problem

> Given that the EU is a 'Union of democracies, justice and law', independent national courts are important not only at the national, but also at the European level. I would go as far as to say that independent national judiciaries are co-substantial to the survival of the European integration project since that project has been built on the rule of law.[1]

I. Introduction

In some countries of central Europe the rule of law is directly threatened by a new type of legislation based on the zeal of the political majority to establish a completely different political system than the one that was built after the collapse of the communist system. This new ideology aims at the subordination of all segments of power to the governmental majority or, rather, to a specific political party. From that perspective, there is little place for the principle of separation of powers and the independence of the judiciary is threatened.

The First President of the Supreme Court of Poland, Prof. *Małgorzata Gersdorf*, openly labelled the Polish judicial reforms as "revolutionary acts" designed to abolish the historical changes which have been introduced after 1989 in our part of Europe. This perfectly illustrates what is at stake for the constitutional system in Poland:

> A coup d'état against the structure of one of the most important institutions of the State is taking place: to be sure, not by the armed forces or paramilitary troops but 'only' by way of misusing legal institutions which, according to a famous formula by Gustav Radbruch constitutes 'a statutory lawlessness'. The Rubicon has been crossed.[2]

What is more, a few weeks after Prof. *Gersdorf's* statement, *Mr. Zawistowski*, the President of the Polish National Council of the Judiciary resigned from his position at the very moment of entry into force of the new Act of 8 December 2017 on the National Council of Judiciary. He thereby demonstrated his and the other Council members' opposition to the amendments which, according to them, were clearly incompatible with the Constitution of the Republic of Poland. The judicial reforms in Poland have been criticized by numerous resolutions adopted by many European judicial organiza-

1 *Koen Lenaerts*, speech on the occasion of the Congress of Polish Lawyers in Katowice in May 2017.

2 Open letter addressed by prof. *Małgorzata Gersdorf*, the First President of the Supreme Court of Poland, Warsaw, 22 December, 2017.

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tions including the Consultative Council of European Judges (CCJE)[3] and the European Association of Judges.[4]

Paradoxically, in the Member States whose non-democratic reforms attract ever stronger internal and external criticism, representatives of the governmental majority frequently opine that issues related to the internal organisation of the judiciary and to the methods of appointment of judges exclusively belong to the "internal national sphere", outside the scope of EU law. As a result, all political steps taken by European institutions against these Member States would constitute themselves a violation of the European treaties.

This article tries to counter these arguments. It focuses on the following question: Does the breach of the rule of law in some EU Members States constitute a threat only to these States or **does it also endanger the entire European legal space**? In other words: Does the recent "evolution" or, rather, "revolution" of the political and constitutional system in these countries constitute an isolated phenomenon which does not impact the rest of Europe or, rather, are we faced with **a kind of "general damage"** that concerns the functioning of the democratic mechanisms all over the European space? Is it really outside the competences of the European institutions to react to dramatic changes affecting the status and organisation of national judicial bodies?

The view presented in this article sides with those scholars who recently commented on the Polish situation as follows:

> Polish courts are our courts … if the legal system in a Member State is broken, the legal system in the whole of the EU is broken.[5]

II. Charting the multilevel dimension of the rule of law principle in the EU

One may have an impression is that the values mentioned in **Article 2 of the Treaty on European Union (TEU),** including the rule of law, are too often presented as purely symbolic values imparting the axiological foundations of the EU, while their real significance and impact on the European legal space and on the functioning of EU law remain unsure and uncertain. Insofar, their status would be comparable to the preamble or recitals of legal acts, whose normative status may be questioned.

However, the importance of the rule of law principle is by no means purely symbolic. It is, indeed, crucial for the existence of the EU legal order and exerts a decisive role in the proper functioning of all its legal mechanisms. What follows, the collapse of the rule of law in one Member State directly impairs the whole European system in its core mechanisms and, at the end of the day, can deprive all European citizens of

3 See the Report on judicial independence and impartiality in the Council of Europe Member States in 2017, Strasbourg, 7 February, 2018.

4 See the open letter addressed by the European Association of Judges, Rome, January 2018, https://www.aeaj.org/media/files/2018-01-15-49-EAJ%20Open%20Letter%20Poland_Jan%202018.pdf.

5 *Maximilian Steinbeis* quoted by *D. Kochenov* and *L. Pech* in the Department of Law Working Paper, The European Commission Activation of Article 7: Better Late than never?, December 2017.

the guarantees provided by EU law for the protection of their fundamental rights and legal interests.

At the outset, it is important to recall that the rule of law has been recognised long ago as a constitutional principle of EU law[6] and that it is not without reasons that the EU is said to **be a Union of law**. The general concept of the rule of law is regularly referred to by the Court of Justice of the European Union (CJEU):

> Further, the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights.[7]

Among the crucial elements of the rule of law principle features the effectiveness of judicial protection which must be guaranteed at the European and the national levels. The complex allocation[8] of judicial protection in the EU would be profoundly affected if one of these segments of judicial protection – either European or national – loses the capacity to realize its role. That the two are closely and necessarily intertwined has repeatedly been highlighted by the European Court of Justice:

> […] judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, not only by the Court of Justice but also by the courts and tribunals of the Member States.[9]
> […] in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law.[10]

This is not a purely decorative statement as it reflects the logic of judicial protection in the EU, founded on the clear division of competences between the national courts and tribunals and the CJEU. There is no doubt that without a narrow cooperation of the two segments of judicial protection, the effective application of European law would be hampered. It is unnecessary to stress that within that division of competences the last and final judicial decisions on individual cases concerning the application of EU law belong, in the vast majority of cases to the national judges, even if the validity and the interpretation of European rules are overseen by the CJEU.

The application of EU law gives rise to numerous instances of necessary cooperation between the CJEU and national courts or between different national judiciaries in the context of the applications of EU law.

Firstly, there is the cooperation within the **preliminary ruling** mechanism which is in the heart of the EU legal system. Without this mechanism, the effective and uni-

6 Judgment of the ECJ (Grand Chamber) of 23 April 1986, *Les Verts v Parliament*, Case 294/83, EU:C:1986:166.

7 Judgment of the CJEU (Grand Chamber) of 3rd October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C 583/11 P, EU:C:2013:625, paragraph 91.

8 See further *Marek Safjan* and *Dominik Düsterhaus*, A Union of Effective Judicial Protection: Addressing a Multilevel Challenge through the Lens of Article 47 CFREU. Oxford Yearbook of European Law. 2014. Vol. 33 (1). pp. 3-40.

9 Judgment of the CJEU (Grand Chamber) of 28 April 2015, *T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v European Commission*, C-456/13 P, EU:C:2015:284, paragraph 45.

10 Judgment of the CJEU (Grand Chamber) of6 March 2018, *Slowakische Republik v Achmea BV*, C-284/16, EU:C:2018:158.

form application of EU rules would remain a pure dream. Preliminary references are the source of most (533 of 739 new cases in 2017) and all major decisions of the European Court of Justice. They guarantee the functioning of the EU legal space in practice.

In this context, it seems to be obvious that only independent national judicial bodies can be partners of the CJEU in the judicial cooperation mechanism provided by Article 267 of the Treaty on the Functioning of the European Union (TFEU). This is because only an independent judge can guarantee an objective – notably not politically motivated -reasoning and only an independent judge can ensure the effective enforcement of EU law as interpreted by the CJEU:

> The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.[11]
> The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.[12]

The requirement for judicial bodies to be independent in order to validly make preliminary ruling references has long been clarified by the CJEU:

> In that regard, it should be recalled that the requirement for a body making a reference to be independent is comprised of two aspects. The first, external, aspect presumes that the court exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source […].[13]
> The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision.[14]

The collapse of judicial independence in one Member State creates a real risk for this mechanism of judicial cooperation and may thus seriously undermine the universal and uniform application of EU law throughout the European legal space. This would entail negative consequences

- **for the equal status** (from an EU law perspective) of each Member State,
- **for the application of the fundamental freedoms of the TFEU**,
- for the **functioning of the common market** and **for the coherent protection of the fundamental rights** guaranteed by the Charter.

11 Judgment of the CJEU (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16, EU:C:2018:117, paragraph 43.
12 Judgment of the CJEU (Grand Chamber) of 25 July 2018, LM, C-216/18 PPU, EU:C:2018:586, paragraph 67.
13 Judgment of the CJEU (Fifth Chamber) of 16 February 2017, *Ramón Margarit Panicello v Pilar Hernández Martínez*, C-503/15, EU:C:2017:126, paragraph 37.
14 Judgment of the CJEU (Grand Chamber) of 19 September 2006, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, C-506/04, EU:C:2006:587, paragraph 49.

Secondly, there is the horizontal cooperation between the national judiciaries of the Member States, which is founded on **the mutual trust principle**, a prime expression of the common legal axiology among all Member States:

> This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[15]
>
> As regards the role of the national courts and tribunals, […] it must be recalled that the national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed.[16]

EU judicial cooperation, particularly in civil and criminal matters, depends directly on the mutual trust principle, which finds its expression and confirmation in the mutual recognition of judicial decisions.

The observance of mutual trust must however be coupled with effective judicial protection. In many judicial decisions the CJEU judged that the confidence in the means of judicial protection existing in a given national system facilitates the recognition and execution of decisions issued by another Member State's judicial bodies even in cases in which these decisions could provoke hesitation.[17]

The equivalence of fundamental rights protection in the Member States of the EU, which is the main reason for mutual trust to exist, has been clearly recognized by the European Court of Human Rights (ECtHR).

> The Court is mindful of the importance of the mutual recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. As stated in Articles 81(1) and 82(1) of the TFEU, the mutual recognition of judgments is designed in particular to facilitate effective judicial cooperation in civil and criminal matters.[18]

However, for **mutual trust** to apply, the independence of the judicial bodies involved must be guaranteed. Where that is not the case and effective judicial protection in the Member States concerned becomes uncertain, the whole EU system of mutual recognition and execution of judicial decisions would be paralysed.

Thirdly, it would be a purely rhetoric question to ask whether the system of justice deprived of independence could ensure the **protection of fundamental rights**.

No doubt, a breach of the rule of law such as **the political subordination of the judicial bodies** impairs the effectiveness of fundamental rights protection. Where

15 Opinion 2/13 of the CJEU (Full Court) of 18 December 2014, EU:C:2014:2454, paragraph 168.

16 Judgment of the CJEU (Grand Chamber) of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C 583/11 P, EU:C:2013:625, paragraph 99.

17 Judgment of the CJEU (Grand Chamber) of 29 January 2013, *Ciprian Vasile Radu*, C-396/11, EU:C:2013:39. Judgment of the CJEU (First Chamber) of 22 December 2010, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, C-491/10 PPU, EU:C:2010:828.

18 Judgment of the ECtHR (Grand Chamber) of 23 May 2016, *Avotiņš v Latvia*, no. 17502/07, paragraph 113.

judges cease to be objective and impartial arbiters and succumb to pressures in order to realize political interests in sensitive cases rather than abide by the rule of law, an individual cannot obtain the necessary guarantees for his protection, **not only in matters related to national rules,** but also in the application of European rules, including the Charter. The clear mandate under the Charter to ensure an effective judicial protection in this regard has been underlined by the CJEU:

> It may be added that Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. It must be recalled that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law […][19]

What is more, deficiencies of fundamental rights protection in one Member State are a blow to the entire EU system of fundamental rights protection.

If such a deficiency of the system is tolerated and does not meet a reaction at the European level which is sufficient to re-establish the requisite standard of protection, the idea of **the universality of the protection of human rights is** deprived of any real content. Blocking the effective protection in some countries leads inevitably to the collapse of the common legal space according to the logic of "*pars pro toto*". The attribution of the adjective "universal" to the concept of the protection of fundamental rights obliges all participants in a system of protection, such as the multi-level judicial architecture of the European Union, to guard its realization. The absence of effective structural guarantees of fundamental rights affects all fields of EU law. In this regard, the most important lesson to be drawn from the recent judgment in ASJP is that the judicial protection mandate in Article 19(1)(2) TUE allows and requires scrutiny of national judiciaries beyond the Charter's narrow scope of application. We may thus say that the rule of law principle under EU law does have teeth.

III. Disrespect for the rule of law as a case of systemic deficiencies

It appears that maintaining the so-called "*revolutionary legislation*" re-arranging the judicial system in breach of the rule of law qualifies as an example of ***systemic deficiencies***.

This qualification obviously refers to the line that both the ECtHR and the CJEU have drawn between sufficient and insufficient fundamental rights protection in the EU.

Indeed, for the ECtHR, the so-called *Bosphorous* presumption[20] of Convention-equivalent protection in the EU can be rebutted

> […] if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international

19 Judgment of the CJEU (Grand Chamber) of 28 March 2017, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, C-72/15, EU:C:2017:236, paragraph 73.

20 Judgment of ECtHR (Grand Chamber) of 30 June 2005, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland*, no. 45036/98, paragraph 165.

> cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[21]
> However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.[22]

The CJEU, in turn, has coined **the analogous concept of systemic deficiencies** in the Member States. In view of such deficiencies, mutual trust ceases to apply. Examples include the *NS* (related to systemic deficiencies in the Greek asylum system) and *Aranyosi and Căldăraru* cases (related to systemic deficiencies in the penitentiary system in Romania and Hungary):

> By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, […] the transfer would be incompatible with that provision."[23]
> […] where there is objective, reliable, specific and properly updated evidence […] that there are deficiencies, which may be systemic or generalised, […] the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned […] will be exposed, […] to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State.[24]

It seems to be yet another purely rhetorical question to ask whether the concept of systemic deficiencies applies to situations in which **judicial independence** and respect for the rule of law are lost. It might even seem that there is no better illustration of truly systemic deficiencies. Firstly, the collapse of the rule of law automatically concerns all fields of judicial protection. Secondly, such a situation could reverse the **general presumption** of equivalent fundamental rights protection among the Member States into a negative presumption of non-equivalent protection in the Member State(s) concerned, which would profoundly impair the functioning of, for example, the common European asylum policy, the European Arrest Warrant and the mechanisms for the recognition and enforcement of judicial decisions. Things would be as if these Member States were not taking part in the Area of Freedom, Security and Justice. Thirdly, from the ECtHR perspective, the *Bosphorus* presumption would be effectively rebutted.

What needs to be carefully examined, however, is by whom and how the existence of systemic deficiencies is to be assessed.

In the *LM* case[25] the CJEU has interpreted Article 1(3) of the European Arrest Warrant (EAW) Framework Decision 2002/584 as meaning that, where the executing

21 Ibid., paragraph 156.

22 Judgment of ECtHR (Grand Chamber) of 23 May 2016, *Avotiņš v Latvia*, no. 17502/07, paragraph 116.

23 Judgment of the CJEU (Grand Chamber) of 21 October 2011, N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, paragraph 86.

24 Judgment of the CJEU (Grand Chamber) of 5 April 2016, *Pál Aranyosi and Robert Căldăraru*, C-404/15 and C-659/15 PPU, paragraph 104.

25 Judgment of the CJEU (Grand Chamber) of 25 July 2018, LM, C-216/18 PPU, EU:C:2018:586, paragraph 67.

judicial authority has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

Granted, this viable approach specifically concerned the EAW framework decision and Article 47 of the Charter. In order to prevent the dire consequences which systemic deficiencies of judicial protection would have for the European legal space beyond the scope of these texts, one would have to turn again to Article 19(1)(2) TEU. For its judicial protection requirement to be duly respected, the Commission and/or Member States may ultimately have to initiate an infringement procedure in order to tackle these systemic deficiencies.

IV. Copenhagen criteria for accession as a mandatory minimum standard

Beyond the black letter law of the Treaties, one should not forget either that, among the so-called Copenhagen criteria,[26] respect for the rule of law has been laid down as a mandatory requirement for the membership in the European Union. However, even after a country's accession, these criteria do not lose their importance as a catalogue of values to be universally observed in this exclusive club, which is the European Union. While this obligation does not stem from any current normative value of the Copenhagen criteria, they nevertheless convey the unequivocal message that there is a mandatory minimum standard to be observed by all Member States, notably as regards democracy and the rule of law. At the present stage of the integration process, the spirit of this document can be treated as **a significant point of reference for the interpretation** and application of the rules, principles and values normatively expressed in the European Treaties.

V. Conclusion

It should strongly be stressed that the rule of law principle as recognised under EU law is by no means of a merely symbolic nature. It is indeed crucial for the existence of the EU legal order and exerts a decisive role in the proper functioning of all its legal mechanisms. The collapse of the rule of law in one Member State directly impairs

26 The criteria require that a state has the institutions to preserve democratic governance and human rights, has a functioning market economy, and accepts the obligations and intent of the EU.

the whole European system in its core mechanisms and, at the end of the day, can deprive all European citizens of the guarantees provided by EU law for the protection of their fundamental rights and legal interests. Domestic legislation abolishing key safeguards of the rule of law, such as the guarantees of judicial independence, a precondition for effective judicial protection, can be scrutinized not only under Article 47 of the EU Charter of fundamental rights, where applicable, but also under Article 19(1)(2) TEU. EU law thus has a direct bearing on the matter.

Respect for the rule of law is fundamental for the existence of the European Union. For this reason, **it is unimaginable that any concessions could be made for the Member State in this field in order to achieve political goals**. The EU is at a crucial stage in its history and only two scenarios are imaginable: either the EU institutions will be able to ensure the return to and the respect for the idea of rule of law in all Member States, or the EU will lose its significance, both as a symbolic sphere of freedom and a thriving common market.

On the basis of recent experiences stemming from the numerous torments survived over the last centuries on our continent, a clear message should be addressed to all Europeans: the Europe Union is here for our common good and we all share an undivided responsibility for its success. Without the solidarity of all Europeans, the preservation of our basic values and the future of the EU are in serious danger.