THE USE OF CRYPTOTYPE IN THE COMPARISON BY SUPRANATIONAL COURTS: BRIEF REMARKS FROM THE ECJ'S JUDGEMENT ON THE EARLY RETIREMENT AGE FOR POLISH SUPREME JUDGES[*].

di Ignazio Spadaro[**]

1. Introduction.

In June 2019 The Grand Chamber of the Court of Justice upheld the European Union censures on the new laws on the retirement of the judges of the Polish Supreme Court (*Sąd Najwyższy*), passed in 2017, and in force for just nine months, from April to December 2018. The judgement[1], delivered at the end of an accelerated procedure and preceded by a preliminary suspension order, marked a turning point in the fight against the well-known democratic backsliding occurring in some Member States[2]. In fact, in 2012, for a Hungarian

[*] A draft of this paper was presented in the Joint Young Comparatists Conference AIDC/SIRD, titled "*Comparative Law in the Practice of European Supranational Courts*", held at the University of Luxembourg on 16-17 June 2022.

[**] Research fellow in Comparative Public Law – University of Catania.

[1] ECJ, 24 June 2019, case C-619/18, *Independence of the Supreme Court*, on which see now P. Bárd and A. Sledzinska-Simon, *On the principle of irremovability of judges beyond age discrimination:* Commission *v.* Poland, in *Common Market Law Review*, no. 6/2020, p. 1560 ff.; for a comprehensive perspective, C. Curti Gialdino, *In cammino verso la* Polexit*? Prime considerazioni sulla sentenza del Tribunale costituzionale polacco del 7 ottobre 2021*, in *Federalismi.it*, no. 24/2021, p. VIII ff.

[2] On this topic, amid an already quite substantial literature, see T. Drinoczi and A. Bien-Kacala, *Illiberal Constitutionalism: The Case of Hungary and Poland*, in *German Law Journal*, no. 8/2019, p. 1141 ff.; D. Čepo, *Structural weaknesses and the role of the dominant political party: democratic backsliding in Croatia since EU accession*, in *Southeast European and Black Sea Studies*, no. 1/2020, p. 142 ff.; D. Rohac, *Transitions, populism, and democratic decline: evidence from Hungary and the Czech Republic*, in *European*

law with very similar contents, first the European Commission and then the European Court of Justice had opted to remain low on the level of the conflict, by only pointing out a violation of the principle of non-discrimination on the basis of age[3]. In the present case, on the other hand, the Court clearly stated that the examined provisions undetermined the independence of the judiciary and, therefore, the stability of the rule of law in the Polish legal system. The subsequent decisions adhered to this line, complementing the increasing political and financial pressures exerted by the EU Institutions[4].

This escalation has determined a deterioration of the relations between the European Union and Poland[5]. The breaking point was reached in October 2021 when the Constitutional Tribunal of Warsaw, on an appeal by the Prime Minister, ruled that several provisions of the Treaty on European Union were unconstitutional, and, implicitly, also declared the unenforceability of all the judgements of the Court of Justice that had censored the recent reforms of the judicial system[6]. Only a few months earlier, the same Tribunal had denied the efficacy of ECJ's order requiring the suspension of the new rules on the disciplinary liability of judiciary[7]. In the second decision, however, the Tribunal was even more resolute, as it articulated the need to save the Polish sovereignty and democracy from the «new stage» to which European jurisprudence, by allowing the Union to act «outside the scope of the competences conferred upon them […] in the Treaties», would force the

Politics & Society, 2021, p. 2 ff., who also highlights the greater resilience demonstrated by Czech constitutionalism instead.

[3] ECJ, 6 November 2012, case C-286/12, on which one can see at least T. Gyulavari and N. Hos, *Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts*, in *Industrial Law Journal*, no. 3/2013, p. 292 ff.

[4] For an overview of the so-called "EU rule of law toolbox" see A. von Bogdandy, *Principles of a systemic deficiencies doctrine: how to protect checks and balances in the Member States*, in *Common Market Law Review*, no. 3/2020, p. 720 ff., and, if wished, I. Spadaro, *La crisi dello Stato di diritto in Ungheria, Polonia e Romania ed i possibili rimedi a livello europeo*, in *Federalismi.it*, no. 14/2021, p. 195 ff.

[5] See C. Curti Gialdino, *In cammino verso la* Polexit*?*, cited above, p. x ff.

[6] Case K 3/21, judged on 7 October 2021, then «deeply deplore[d]» by the European Parliament by the resolution P9_TA(2021)0439, § 1, of 21 October 2021. See W. Brzozowski, *C'è del marcio in Polonia? Il significato autentico della sentenza costituzionale 7 ottobre 2021*, in *Quaderni costituzionali*, no. 4/2021, p. 471 ff., and N. Maffei, *La sentenza K 3/21 del 7 ottobre 2021 del* Trybunał Konstytucyjny*: l'infausto esito di due crisi dagli sviluppi ancora da definire?*, in *Diritto Pubblico Europeo Rassegna Online*, no. 1/2022, p. 162 ff.

[7] Reference is made to ECJ, 8 April 2020, case C-791/19, *Régime disciplinaire des juges* (then decided by the Grand Chamber, against Poland, on 15 July 2021), and to the judgement delivered by the *Trybunał Konstytucyjny* on 14 July 2021, P 7/20, the latter commented by A. Circolo, Ultra vires *e* Rule of Law*: a proposito della recente sentenza del Tribunale costituzionale polacco sul regime disciplinare dei giudici*, in *www.aisdue.eu*, July 2021. For further reading on the entire case, please refer to *Clear and present danger: Poland, the rule of law & primacy* (editorial comment), in *Common Market Law Review*, no. 6/2021, p. 1635 ff., and L. Pech, *Protecting Polish judges from Poland's Disciplinary 'Star Chamber'*, *ibid*., no. 1/2021, p. 137 ff.

integration process (§ 1, let. a). Actually, the decision made an abrupt reversal of previous Polish jurisprudence, which was tendentially "eurofriendly"[8], and then received open criticism, even from several former Polish constitutional judges[9]. Some commented on it critically and identified it as a kind of judicial "Polexit"[10], although, at least for the time being, it remained without political follow-up.

The serious nature of the allegations just mentioned makes it appropriate to question their basis. More particularly, the 2019 ruling seems to offer extremely interesting insights, especially by analysing at the use of the comparative tool in it.

2. Content of the judgement.

As previously stated, the subject matter of the case is the infringement of European law for which, according to the Commission, Poland was responsible due to the provisions contained in the new *Supreme Court Act* (SCA). In fact, when the Judges retire to chambers, the contested rules have already been repealed, following a preliminary order by the Vice-President of the Court. However, this circumstance does not prevent the EU Judges from ruling, since – it is stated in the grounds, in accordance with the established case law on the subject – under Article 258 TFEU infringement proceedings must be assessed «on the basis of the position in which the Member State at issue found itself at the end of the period laid down in the reasoned opinion» notified by the Commission in the pre-litigation phase (§ 30).

The first of the censored provision is Article 37 SCA, according to which «[a] judge of the

[8] Cf. on this topic K. Witowska - P. Chrzczonowicz, *I rapporti tra l'ordinamento interno e quello comunitario nella ricostruzione della giurisprudenza costituzionale polacca: profili ricostruttivi e spunti problematici*, in *Poloniaeuropae*, no. 3/2012, p. 5 ff., and M. Donnarumma, *La sentenza del Tribunale costituzionale polacco, il primato del diritto comunitario, il limite dei principi supremi*, in *Diritto Penale e Uomo*, December 2021, p. 4 ff.

[9] See the manifesto published by twenty-seven former judges already on 11 October 2021, available in English at *www.verfassungsblog.de* (*VerfBlog*) together with the comment by S. Biernat and E. Łętowska, *Commentary to the statement of retired judges of the Constitutional Tribunal* (2021).

[10] See, especially, H. Hofmann, *The Publication of the Polish Constitutional Court's Judgment on EU Law Primacy as Notification of Intent to Withdraw under Art. 50 TEU?*, in *VerfBlog*, 2021, *passim*. More prudent J. Jaraczewski, *CJEU and Polish Constitutional Tribunal in July 2021*, *ibid*., p. 1 ff., and cf. the clear opposition expressed, on the basis of a more formalistic approach, by C. Curti Gialdino, *In cammino verso la* Polexit*?*, cited above, p. V, and by N. Maffei, *La sentenza K 3/21 del 7 ottobre 2021 del* Trybunał Konstytucyjny*: l'infausto esito di due crisi dagli sviluppi ancora da definire?*, in *Diritto Pubblico Europeo Rassegna Online*, no. 1/2022, p. 178 ff.

Supreme Court shall retire on the day of his 65th birthday» (paragraph 1), unless, upon personal request and the First President of the Court and the National Council of the Judiciary, the President of the Republic decides to extend the term of his or her office for a maximum of two three-year periods. The Council's opinion, subject to a silent-assent mechanism, must take into account the «interest of the system of justice» or an «important social interest», with particular regard – specified in paragraph 1b – for the «rational use of the staff» and for the «needs arising from the workload of individual chambers». In contrast, retirement was previously triggered upon reaching the age of seventy, and any extension, lasting two years, was ordered directly by the First President, upon presentation of a simple certificate of psychophysical fitness.

The second provision is Article 111 SCA, which provides (*rectius*, provided) for the retroactivity of the new discipline, although with some corrections. For judges in post who have already exceeded the new retirement threshold or who will reach it in the three months after the entry in force of the law, it grants them a three-month grace period, with the possibility to apply for an extension of their functions during the first 30 days. On the other hand, for judges who turn sixty-five years of age three to twelve months later, a full year's service is envisaged (subject, again, to any presidential order).

The Court examines both provisions under the light of the obligation, incumbent on the Member States under Article 19(1) TEU, to «provide remedies sufficient to ensure effective legal protection in the fields covered by Union law». In particular, it asserts that the corresponding individual right to dispose of such protection not only constitutes a general principle of the European legal system «result[ing] from the constitutional traditions common to the Member States» (Article 6(3) TEU), but is textually reflected in Articles 6 and 13 ECHR, and Art. 47 CFREU[11]. It is also a direct expression of the «rule of law», which is a fundamental «value» of the European legal system (Article 2 TEU)[12] and is linked to «mutual trust» that must exist between all countries participating in the integration

[11] *Independence of the Supreme Court*, cited above, § 49. On this topic see at least M. Fichera and O. Pollicino, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, in *German Law Journal*, no. 8/2019, p. 1102 ff., while on the concept of "Independent and Impartial Tribunal", as involved in Polish case-laws, see deeply A. Ward, *Article 47*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, Hart, 2021[2], p. 1339 ff.

[12] *Independence of the Supreme Court*, cited above, § 47. However, on the legal enforcement of these «values» see, problematically, L. Spieker, *Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis*, in *German Law Journal*, no. 8/2019, p. 1199 ff.

process[13].

On the basis of all those considerations, the Grand Chamber rejects Poland's objection that, since the organisation of the national judicial systems does not fall within EU competence, the relevant institutions (including the Court of Justice) are not entitled to review the choices made by national lawmakers in that regard[14]. Indeed, the Court does not contest this observation directly, but points out that the Polish provisions affect the functioning of a body, the *Sąd Najwyższy*, which anyway «may be called upon to rule on questions concerning the application or interpretation of EU law», so that the Treaties implicitly require that its independence from political power be preserved, as a *condicio sine qua non* of its jurisdictional nature[15].

Next, going into the substance of the issues, the Court states that the application of the new age limit also to judges already in post clashes with the principle of unremovability of judges[16] and thus undermines the «imperviousness» from «all external intervention or pressure»[17] that is the very purpose it must ensure. Such regulatory treatment would only be permissible if it was necessary and proportionate in relation to the achievement of a «legitimate objective»[18]. In contrast, the explanation put forward in the present case, that the Polish legislator simply wanted to «modernise» the roles of the judiciary and encourage youth employment, would not be credible. The drafting work, and in particular the memorandum attached to the bill at the time, insisted, in fact, on the urgency of «decommunizing» the Supreme Court[19], by removing those older judges who, having served in pro-Soviet circles during the Cold War, would today undermine public confidence in the judiciary. According to the Grand Chamber, such a statement would generate the «impression» that the new law, although formally general and abstract in scope, is in reality driven by a persecutory intent against specific magistrates[20] on purely political grounds.

[13] *Independence of the Supreme Court*, cited above, § 43.
[14] *Ibid*., § 38. Indeed, it is surprising Poland's failure to invoke the intangibility of the «constitutional identity» of the State Members, provided in art. 4(2) TEU, perhaps because it is now even overused in this type of debate: cf. J. Scholtes, *Abusing Constitutional Identity*, in *German Law Journal*, no. 4/2021, p. 534 ff.
[15] *Independence of the Supreme Court*, cited above, §§ 56-58.
[16] *Ibid*., respectively § 78 and § 76.
[17] *Ibid*., §§ 74-75.
[18] *Ibid*., § 79.
[19] See verbatim what the Venice Commission referred to in its opinion of 11 December 2017, no. 904/2017, CDL-AD(2017)031, § 33 (referred, in turn, by the Court of Justice at § 82).
[20] *Independence of the Supreme Court*, cited above, respectively § 85 e § 82.

The simultaneous attribution of the power of extension to a political body such as the Head of State in Poland would also move in this direction[21]. That power, in fact, would also be detrimental to the Supreme Court's autonomy, because of the high degree of discretion that characterises its exercise. Presidential measures cannot be challenged, nor are they subject to a duty to give reasons. As a consequence, the compulsory consultation of the National Council of the Judiciary, as it is constitutionally deputed to «safeguard the independence of courts and judges» (Article 186, § 1 Const.), would not be sufficient to exclude the risk of abuse. Not to mention that – the Judges observe – in practice the Council renders opinions stating «purely formal reasons» or, indeed, «no reasons at all»[22], thus making it impossible to examine its adherence to legislative criteria.

3. *Continuing*. References to *ASJP* and *Fuchs and Köhler*.

The 2019 ruling mentions two precedents concerning other state legislation which had changed *in pejus* the regime applicable to certain categories of legal practitioners. This is about the case *Associação Sindical dos Juízes Portugueses* (*ASJP*), to the distinguishing of which two paragraphs are dedicated, and the case *Fuchs and Köhler*. Although the first reference is, apparently, not decisive in the economy of the grounds and the second is even lapidary, both provide useful elements to reconstruct the rationale operated by the Judges, well beyond – we can already anticipate – what has been expressly reasoned.

In *ASJP*[23], the Portuguese *Supremo Tribunal Administrativo* asked the Court to assess the compatibility with Article 19 TEU of a 2014 law which, in order to reduce the state budget deficit, and enable the receipt of certain European funding, had reduced the salaries of certain categories of public employees. The magistrates of the *Tribunal de Contas*, who were among the most penalised, had challenged the implementing measures of that reform, arguing that it

[21] *Ibid*., § 85.
[22] *Ibid*., § 117.
[23] Decided by the Grand Chamber in the judgment of 27 February 2018, case C-64/16. For commentary see L. Pech and S. Platon, *Judicial independence under threat: The Court of Justice to the rescue in the* ASJP *case*, in *Common Market Law Review*, no. 6/2018, p. 1829 ff.; S. Menzione, *Case Note: Anything New under the Sun?*, in *Review of European Administrative Law*, no. 2/2019, p. 220 ff.; M. Bonelli and M. Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary*, in *European Constitutional Law Review*, no. 3/2018, p. 624 ff.; from a broader perspective, A. Torrez Pérez, *From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence*, in *Maastricht Journal of European and Comparative Law*, no. 1/2020, p. 106 ff.

undermined their economic serenity and then, exposing them to the risk of undue influence in the exercise of their duties. Pending this, the Portuguese Parliament had phased out the reductions, restoring ordinary salary levels as of 1st October 2016. The European Court of Justice did not see any infringement of the rule of law, both because the lowering of salaries had affected a generally broad group of people, and because it had remained limited in time and quantity[24].

Indeed, there is a basic similarity between the law just mentioned and the Polish one. In fact, both have retroactive effect, since they also affect magistrates already in service, and both place the latter in a precarious condition and dependent on a new exercise of political discretion. In fact, it is important to consider that the Portuguese law, while stating in its title that the *cuts* would only be temporary, did not actually provide for any time limit, so that a separate and additional regulatory intervention would have been necessary to terminate them – as indeed happened *after* the commencement of proceedings before the ECJ. On the other hand, the disputed amendments to the Law on the *Sąd Najwyższy* did have a chronologically limited validity: only eight months, compared to more than two years between the introduction and the final elimination of the above-mentioned Portuguese pay reduction. Nor is it worth objecting, in this regard, that in the Polish case, the temporary nature of the novelty was, so to speak, accidental – that is to say, resulting only by the need to comply with an order of the Court. In facts, however plausible that may be, EU judges themselves cannot affirm that with certainty; all the more so since their order had sought merely the suspension but not also the repeal of the provisions censured.

As for the greater burden of early retirement as compared to a mere salary reduction, which the 2019 ruling seems to hold to be decisive, it would, perhaps, have earned a broader grounding, demonstrating the continued adequacy of magistrates' residual income to the so-called cost of living. Besides, while in Portugal the new discipline applied immediately, in Poland it established a transition period, sufficient for those concerned to prepare to their new condition. And finally, as far as the different number of people penalised by each law is concerned, it cannot be truly asserted in general – nor does the Court – that lawmakers cannot reform individual judicial bodies.

A reference for a preliminary ruling was also at the origin of the second case, *Fuchs and Köhler*. It was about a law, the *Hessisches Beamtengesetz* (still in force), by which the Hessian

[24] *ASJP*, cited above, respectively § 48 and § 50.

Parliament, in accordance with the Federal Law, put an end to the life tenure of certain offices, and set a retirement date for each category of workers. The applicants, both State prosecutors, had a threshold of sixty-five years, repeatedly extendable by the Land Minister of Justice basing on «the interest of the service» (art. 50(3) *HGB*). The stated aim of the new law is to increase youth employment.

Note that in that case the principle of independence of the judiciary had not been invoked as a parameter, but the ban on age discrimination, just like in the Hungarian case mentioned above[25]. As such, this appears consistent with the European jurisprudence circumscribing the application of Article 19 TEU to judges only, and which a few years later would expressly deny German prosecutors the status of judicial bodies, on the grounds that they are subordinate to the executive[26]. What is relevant here, however, is that on that occasion the Court considered that it was legitimate (not discriminatory) that decisions on the continued employment of civil servants to be taken discretionally by a political body and to be based on a criterion, the «exigencies of the service», which is very vague, as to frustrate any possible appeal. Here too, the parallelism with the Polish law appears clear.

The question then arises as to why, in 2019, the Court of Justice has found incompatible with the European law a regulatory scheme that, in its essence, had been found free of criticism, at least in two different occasions. Since, in the present case, the *ASJP* and *Fuchs and Köhler* cases were repeatedly referred to in both the Polish and Hungarian pleadings and in the Advocate General's Opinion, and, above all, since they are expressly mentioned in the ruling, it would be assumed that the Judges compared the laws which were subject of each case and found differences which were such to bring the proceeding to different outcome.

Nevertheless, the reasons for this divergence do not clearly emerge from the text. As demonstrated above, apart from specific aspects on which Poland even seemed to dictate the most guaranteeing discipline, the distinguishing made by the Court is not without objections. The impression one gets is that in comparing national laws the Court has taken into account a

[25] See *supra*, § 1, note 3.

[26] ECJ, 27 May 2019, § 84, cases C-508/18 and C-82/19 PPU, *OG and PI*, which inferred from this fact that German public prosecutors' offices were not jurisdictional authorities for the purpose of issuing European arrest warrants. See, however, the partial guarantees of independence these bodies also enjoyed according to A. Falcone, *Indipendenza del pubblico ministero e cooperazione internazionale in materia penale nello scenario giuridico europeo*, in *Eurojus*, no. 3/2021, p. 71; and more, Articles 160(2) and 296(2) of the Code of Criminal Procedure, which oblige prosecutors, respectively, to also seek exculpatory evidence and to be impartial, similarly to judges.

further element not fully explained in its wording – that is, the political and ideological framework.

4. The political and ideological framework as cryptotype in ECJ's case-law.

According to Rodolfo Sacco's systematisation, comparisons between legal systems cannot disregard formants that he calls "crypto-types", namely "implicit models" of discipline, "non-verbalised" rules that legal practitioners apply even in the absence of every express legal stipulation[27]. Indeed, ECJ's 2019 judgement seems to adhere precisely to this approach, insofar as it gives decisive weight to the political-ideological context in which the contested provisions were drafted, and by which their application is likely to be conditioned. Two sections of the grounding show signs to this effect.

The first one, although not decisive per se, is where the Court argues a difference to exist between the Portuguese and the Polish law by stressing the different number of persons affected, which in the second case was much smaller than in the first. It goes without saying that, purely from a legal point of view, this circumstance is irrelevant, for the obvious consideration that the extent of the prejudice caused to each judge does not depend on the total number of potential addressees. In fact, for the Court, the fact that only few magistrates are affected in Polish case is relevant for a different reason, namely that it creates in society the impression that legislative intervention moves «against» members of a certain judicial body[28]. But if this is true, then the focus of the argument shifts from the regulatory dimension to that of political intent.

The second interesting section is where the Court comes out, so to speak, in the open and admits that the early retirement of judges may in theory pursue legitimate employment turnover purposes, as Poland argued in the hearing and it had already stated in *Fuchs and Köhler*, but it is not that case, because of a persecutory intent inferable from certain statements made by the presenters of the bill[29].

[27] On this topic see now R. Sacco and P. Rossi, *Introduzione al diritto comparato*, Milan, Utet Giuridica, 2019[7], p. 117 ff., and I. Biglino, *Formants and Institutions: Intellectual Meeting Points between Rodolfo Sacco and Douglass North*, in *Global Jurist*, no. 2/2011, p. 7 ff. (tha latter also for references to other contributions by the Master and for comparisons with the foreign doctrinal overview).
[28] *Independence of the Supreme Court*, cited above, § 74.
[29] *Ibid*., § 82.

Indeed, as to merit, EU Judges' conclusions are acceptable. It is well known that, in 2015, the political party *Law and Justice* (PiS) won an absolute majority of seats in the Polish Parliament thanks to a populist rhetoric based on class struggle, portraying itself as the only possible defender of ordinary people, victims of exploitation by the "*élites*"[30]. PiS has never explicitly revealed which figures would be responsible for such harassment, but it is a fact that it has always regarded the category of jurists with open distrust. According to the theories of Prof. Stanisław Ehrlich, historical mentor of the current secretary Jarosław Kaczyński, jurists have introduced the very notion *rule of law*, as a source of limitation to political power, with the specific aim of hindering renewals and thus allowing the previous pro-Soviet ruling class to maintain its hegemony[31]. Not by chance, the first Government led by Law and Justice immediately engaged in a clash with the Constitutional Tribunal, precisely because of its function as anti-majoritarian and therefore, allegedly anti-democratic[32]. After replacing the relevant members with constitutional judges elected by members of the new majority (including the current President)[33], the focus shifted to the judiciary[34]. In particular, heavy criticism was levelled towards the Supreme Court when it opposed the reform of the judiciary and the National Council of the Judiciary, to the point to disregard the deliberations of the latter in its new composition, deemed politicised.

That fuelled perplexities among legal scholars and the EU ruling bodies. In 2017, the European Commission asked the Council to formally declare the existence of an «obvious risk of a serious breach [...] of the values referred to in Article 2 [TEU]», thus starting the procedure that could lead to the suspension of Poland's treaty rights under Article 7(1) of the same Treaty[35].

---

[30] Cf. A. Sulikowski, *The Return of Forgotten Critique: Some Remarks on the Intellectual Sources of the Polish Populist Revolution*, in *Review of Central and East European Law*, no. 45 (2020), p. 381.

[31] *Ibid.*, p. 384 ff.

[32] See also *ibid*., p. 394 ff. The "counter-majoritarian difficulty" was highlighted firstly by A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, New Haven, Bobbs-Merrill, 1962, p. 3 ff. On the relevant scholarly debate see O. Chessa, *I giudici del diritto. Problemi teorici della giustizia costituzionale*, Milan, Franco Angeli, p. 103 ff.

[33] Cf. J. Atik and X. Groussot, *Constitutional attack of political feint? - Poland's resort to lawfare in Case K 3/21*, in *EU Law Live*, 2021, p. 3, who bluntly writes that "The Polish Constitutional Court is [now] an organ of the Polish government".

[34] See the extensive reconstruction by F. Zoll and L. Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, in *Fordham International Law Journal*, no. 3/2019, p. 899 ff.; more succinctly, P. Bárd and A. Sledzinska-Simon, *On the principle of irremovability*, cited above, p. 1557 ff., and M. Hoffman, *[PiS]sig off the Courts: the PiS Party's Effect on Judicial Independence in Poland*, in *Vanderbilt Journal of Transnational Law*, no. 4/2018, p. 1154 ff.

[35] Communication COM(2017) 835 final of 20 December 2017. Even though it was at the time presented by President Barroso as a "nuclear option" (SPEECH/12/596 dated 12 September 2012, p. 10), the procedure then remained a dead letter, due to the difficulty encountered in achieving the unanimity required for the deliberations envisaged therein: cf. L. Spieker, *Breathing Life*, cited above, p. 1184-1185, who pragmatically notes that "Since

Well, the Court of Justice has been a privileged observer of such dynamics from the outset, and this may have induced it to develop a particular awareness in this regard. In the year preceding the 2019 judgment, it had been called upon to rule on these reforms as many as five times. First the Commission, within the framework of an infringement procedure[36], and then, also the Labour Law Chamber of the Polish Supreme Court[37] in three separate cases for preliminary rulings, had doubts about the compatibility with the European law of certain reforms concerning early retirement of ordinary judges and the establishment of a new Disciplinary Chamber of the Supreme Court itself. Besides, in March 2018, the Court of Justice had already received the strong concerns of the Irish High Court with regard to the execution of European arrest warrants issued by Polish judges, on the grounds, on one hand, of their now dubious independence from the political power and, on the other, of the fear that in the State of destination the arrested persons would see infringed the rights to a fair trial, as set out in Article 47 CFREU[38].

All these cases were dealt with in parallel and were ruled on within a few months from each other. Thus, it is at least safe to assume that in the 2019 Polish case the judges drew elements from them for an overall judgement on the upheavals taking place in the Country.

Similar troubles did not affect either Portugal or Germany, given their firm membership in the group of countries which political scientists qualify as "longstanding, stable, and prosperous democracies" (LSPDs)[39]. This explains why the Grand Chamber finds that the Polish President cannot be empowered to extend public functions at his own discretion, while the Minister of Justice of a German Land may do so, and why a retroactive compression of the safeguards of independence of judges does not give rise to particular care in Lisbon, but at the same time may be a cause for concern for the rule of law if passed in Warsaw. After all, no reasonable observer could claim – and at the time it was in fact not claimed, not even by the plaintiffs – that the lowering of the salaries of Portuguese *conselheiros de contas* or the forced retirement of

Poland and Hungary are watching each other's backs, the Council finds itself in a deadlock". On this subject see also N. Daminova, *Rule of Law vs. Poland and Hungary – an Inconsistent Approach?*, in *Hungarian Journal of Legal Studies*, no. 3/2019, p. 243 ff.

[36] Case C-192/18, decided by the Grand Chamber on 5 November 2019.

[37] Cases C-585/18, *A.K.*, C-625/18, *CP*, and C-625/18, *DO*, then consolidated and decided by the Grand Chamber on 19 November 2019.

[38] Case C-216/18 PPU, *LM*, decided on 25 July 2018. For remarks, see S. Bartole, *La crisi della giustizia polacca davanti alla Corte di giustizia: il caso Celmer*, in *Quaderni costituzionali*, no. 4/2018, p. 921 ff.

[39] This qualification is proposed by E. Heinze, *Hate Speech and Democratic Citizenship*, Oxford, OUP, 2016, p. 70.

Hessian State prosecutors was intended to implement a "purge", whereas that term has been used authoritatively, in 2018, to describe just the Polish case[40].

5. The importance of the political context in some judgements recently delivered by the European Court of Human Rights.

Indeed, the opportunity of reconstructing the rationale and effects of each provision in the light of the political and regulatory context has also been upheld by recent Court of Strasbourg's rulings censoring, once more, the reform of the Polish judiciary.

The first one was delivered by the Grand Chamber in March 2022[41]. It found a violation of appellant's right to a fair trial (Article 6 ECHR) where the law, in transferring the competence to elect the members of the National Council of the Judiciary by the judges themselves to the Lower House of Parliament (*Sejm*), terminated prematurely the office of those magistrates who had been elected under the previous regulations, without providing any judicial remedy against early removal. After showing the lack of conditions required to make such a provision compatible with the Convention[42], the ECtHR makes a detailed reconstruction of the democratic backsliding process to which the new law allegedly belongs. According to the judges, precisely «the whole sequence of events in Poland […] vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence», and the judiciary «has been exposed to interference by the executive and legislative powers and thus substantially weakened», while «[t]he applicant's case is one exemplification of this general trend» (§ 348).

Moreover, already the year before, the Court, called upon to rule on a new Polish law which had temporary vested the Minister of Justice with the power to dismiss the heads of judicial offices at his own discretion, had not limited its reasoning to Article 6 ECHR, as invoked

[40] See the press statements made by the then President of the Supreme Court, Małgorzata Gersdorf (*Polonia, la presidente della Corte suprema si ribella: "Non mi dimetto, è una purga"*, in *Il Sole 24 ore* - digital edition, 3 July 2018), and cf., with reference to the similar Hungarian reforms, the allegation of a "disguised purge" raised in doctrine by S. Benvenuti, *La riforma del sistema giudiziario ungherese tra recrudescenze autoritarie e governance europea*, in *Nomos*, no. 3/2012, p. 13.

[41] ECtHR (GC), 15 March 2022, application no. 43572/18, *Grzęda*.

[42] I.e. not-impairment of «the very essence of the right», pursuit of a «legitimate aim», and «proportionality between the means employed and the aim sought to be achieved» (see *ibid*., § 343, and further case-law cited there).

by the appellant, but had taken into consideration the whole legal framework ruling judges' career, which was found to collect «*entre les mains du seul représentant du pouvoir exécutif*» the «*quasi-totalité des pouvoirs en la matière*», also by excluding judicial self-governing bodies[43].

Finally, in the *Żurek* affaire, ruled in June 2022[44], the Court observed that the release of the appellant from his office as spokesman of the National Council of the Judiciary and other provisions affecting him in the same period, despite being formally unbound, if regarded «in their entirety» they betray the appurtenance to a precise «strategy aimed at intimidating (or even silencing)» the magistrate in question, because of his critics to the justice reform promoted by the Government[45].

The question generally arises now as to what extent a court – namely, now, the Court of Justice – is well equipped to reconstruct the political-ideological legal formant, and then, weather this effort might have an impact on the "materially constitutional" guarantee function[46] which is assigned for it by the Treaties.

6. Harshness in the reconstruction of the political-ideological framework of the laws. The statutory original intent.

In order to answer the questions above, one has to start from which elements need to be taken into consideration to reconstruct such political *climate* of regulatory interventions. The first one, as shown by the ECJ, is the so-called statutory original intent.

Indeed, while the practice of accompanying explanatory memoranda to new bills asks signatories to reveal their objectives, it is even obvious that these declarations may, at times,

[43] ECtHR, 29 June 2021, application nos. 26691/18 and 27367/18, *Broda and Bojara*, § 147. More precisely, the transitional rule at issue had been introduced by an amendment of 12 July 2017 to the Pusp Act, in force since 12 August 2017, which had rewritten the general rules on appointments, as summarised in the same ruling at § 27.

[44] ECtHR, 16 June 2022, application no. 39650/18.

[45] *Ibid*., respectively at § 211 and § 227. This results in the violation of Articles 6(1) and 10 ECHR, of the so called right of the judge and of the freedom of expression.

[46] See verbatim A. Ruggeri, *La CEDU e il gioco degli specchi deformanti alla Consulta*, in *Id.*, *"Itinerari" di una ricerca sul sistema delle fonti*, XXV, Turin, Giappichelli, 2022, p. 332 ff., e M. Carta, *La recente giurisprudenza della Corte di giustizia dell'Unione europea in merito all'inadempimento agli obblighi previsti dagli articoli 2 e 19 TUE:* evolutionary or revolutionary road *per la tutela dello Stato di diritto nell'Unione europea?*, in *Eurojus*, no. 1/2020, p. 13 ff., cf. already A. Ciancio, *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa. Relazione introduttiva*, in *Rivista AIC*, no. 3/2014, p. 14 ff.

diverge from the content of the provisions, as well as from the effects they will produce due to the interaction with the laws already in force. This may be caused by simple carelessness in the drafting of texts, as recently emerged in a sensational Quebec court case[47], but may also be motivated by the desire to conceal political negotiation strategies, conflicts of interest[48], and besides, conscious conflicts with the Constitution, the International Charters of Rights and, indeed, with the European legal system.

Even assuming that all members of a Parliament are always competent and truthful, it still remains the case that each document expresses the sole viewpoint of its author(s)[49]. In fact, it is the bills that are voted on, not the annexes. Therefore, to let memoranda to be diriment for the grounds of a judgement would be inconsistent with the democratic principle itself, and would end up attributing to the legislature purposes, on which it has never formally deliberated[50].

Even statements by the leaders of the parliamentary groups may not be matched by an *idem sentire* of their members. Considerations of expediency linked to the so-called party (or group) discipline[51], may, in fact, induce possible internal minorities not to express their opinions, especially when the provisions to be passed may pursue partially different, but still compatible objectives. For example, a bill to simplify the issuing of building permits, supported by the leadership of a certain party with the declared objective of speeding up the administrative process, could also be approved by parliamentarians who are sensitive to the economic effects of the new rules, although no trace of such different intention emerges in the relevant debate.

Opposing parliamentary groups may, at times, converge with the ruling one on the approval of the same text only to lower the political conflict, or to avoid a government crisis in particularly delicate circumstances (an epidemic, a period of economic instability *etc.*)[52].

---

[47] *Tribunal des professions*, 28 September 2021, 2021 QCTP 79, *Paquet c. Infirmières et infirmiers du Québec (Ordre des)*, commented by Ou. Younes, *Une incohérence entre l'intention du législateur et le texte de la loi dépouille le Tribunal des professions d'une partie importante de sa compétence d'appel à l'égard des décisions du conseil de discipline!*, in *BlogueduCRL.com*, November 2021, *passim*.

[48] See, also for further references, J. Jeanneney, *Le recours à l'intention du législateur face aux énoncés normatifs ambigus*, in *Droit & Philosophie*, no. 9-1/2018, p. 102.

[49] P. Trimarchi, *Istituzioni di diritto privato*, Milan, Giuffrè, 2020[23], p. 11.

[50] In this regard J. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, in *Stanford Law Review*, no. 1/1998, p. 8- 9.

[51] On this topic see the recent A. Ciancio, *La garanzia del libero mandato parlamentare tra disciplina di gruppo e trasformazioni dei partiti*, in *Dirittifondamentali.it*, no. 1/2021, p. 13 ff.

[52] Cf. J. Schacter, *The Confounding Common Law Originalism*, cited above, p. 28.

This brings us back to the *vexata quaestio* of whether a unitary *will*, intended as a psychic drive, can actually be configured in entities other than natural persons, especially if they are Parliaments made up of a great number of individuals[53]. Indeed, in many countries this is rendered even more burdensome by factors such as bicameralism, proxy voting, partially variable composition of the Assembly for each session, the possibility for each parliamentarian to freely choose which debates and votes to take part in or not, and finally, the intervention in the legislative process of further bodies (government, Head of State)[54].

To make it more complicated is that a certain rule can be introduced for one purpose but then kept in force for the achievement of different goals. Changes in the factual or regulatory context, as well as the emergence of new jurisprudential orientations, can distort the meaning and effects of a given provision. For example, a law expanding Government's powers, passed during a military aggression, will presumably be motivated by the intention to preserve the physical and patrimonial integrity of citizens, and even national independence. However, its non-repeal at the end of the hostilities could point to something else, such as the attempt to install an authoritarian government.

Indeed, the subject is still largely debated among jurists[55]. However, the considerations made so far seem enough to assert, on the one hand, the unsuitability of preparatory documents to express the intention of the legislator, especially when they come from early stages of the legislative process, and precede the parliamentary debate. On the other hand, and consequently, the complexity involved in ascertaining that intention, at least in the literal sense that the Court of Justice seems to adopt in its recent cases. It is no coincidence that the numerous scholars

[53] J. Jeanneney, *Le recours à l'intention du législateur*, cited above, p. 100, firmly observes that "*les institutions n'ont pas de psyche*". Similarly, for K. Shepsle, *Congress is a "They," Not an "It"*, in *International Review of Law and Economics*, no. 2/1992, p. 239, "legislative intent is an oxymoron". In contrast, but based on very distant and, perhaps, not entirely persuasive reconstructions, Ch. List - Ph. Pettit, *Group Agency. The Possibility, Design and Status of Corporate Agents*, Oxford, OUP, 2011, p. 33 ff., and V. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, in *Boston College Law Review*, no. 5/2014, p. 1618.

[54] Cf. again J. Jeanneney, *op. cit.*, p. 101.

[55] Scholars have always debated on the actual knowability and interpretative usefulness of statutory original intent, especially the American ones: cf., including for further referrals, M. Redish and T. Chung, *Democratic theory and the legislative process: mourning the death of originalism in statutory interpretation*, in *Tulane Law Review*, no. 4/1993-1994, p. 814 ff.; J. McGinnis and M. Rappaport, *Original methods originalism: a new theory of interpretation and the case against construction*, in *Northwestern University Law Review*, no. 2/2009, p. 758 ff.; P. Bianchi, *Le trappole dell'originalismo*, in AA.VV., *Studi in onore di Franco Modugno*, I, Naples, Editoriale Scientifica, 2011, p. 284, note 2. As for Italy, see furtherly P. Bianchi, *op. ult. cit.*, pg 302, note 56. Finally, a reasoned synthesis of the main problems from the right-philosophical point of view is made by S. Bernatchez, *De la représentativité du pouvoir législatif à la recherche de l'intention du législateur: les fondaments et les limites de la démocratie représentative*, in *Cahiers de Droit*, no. 3/2007, p. 467 ff.

belonging to the so-called "neo-originalist" strand[56] argue the need to reinterpret the very concept of *intentio legislatoris*, by disengaging it from any actual psychological investigation, considered unfeasible, and focusing on the text. Under this light, the notion of "legislator" becomes just the hermeneutic "personification of a principle of rationality"[57]. Otherwise, they say, it would end up enabling judge to do "cherry-picking", i.e. to select, from among the conspicuous quantity of preliminary documents produced during each legislative procedure, those that are more functional to his or her own theses[58], or simply easier to retrieve[59].

The difficulties just outlined are confirmed by the practice in various countries. For example, in the United Kingdom, common law places a strict prohibition on judges looking to the original intent, with the sole exception, since 1992, of cases where the obscurity of the provisions is such as to make it absolutely indispensable[60]. In Canada, the Supreme Court's setting aside of such foreclosure six years later coincided with the need to meet expectations of justice in a particular case, under pressure from both the mass-media and public opinion[61].

And again, it is at least interesting that many scholars see in US federal judges' renewed tendency towards literal interpretation precisely the fruit, albeit belated, of Justice Antonin

---

[56] Per approfondimenti si rinvia a J. Farinacci-Fernos, *'New originalism' and statutory interpretation*, in *Revista Jurídica de la Universidad Interamericana de Puerto Rico*, no. 3/2020, p. 694 ff.

[57] See recently P. Trimarchi, *Istituzioni di diritto privato*, cited above, p. 11, according to whom all that can be asked of the interpreter is "to assume" that he is "coherent", "respectful of the Constitution" and international obligations, "efficient", "rational", "just" etc., as attributes of a legislator that is, to the evidence, only abstract and idealized. Cf. P.-A. Côté, *Interprétation des lois*, Montreal, Thémis, 2009[4], p. 7, as well as the notion "*intention conventionnelle*" elaborated by J. Jeanneney, *Le recours à l'intention du législateur*, cited above, p. 113. Similar ideas were already outlined in the well-known essay written by H. Hart and A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Cambridge, 1958 (unpublished, now on *www.heinonline.org*), p. 1410 ff.

[58] Authoritatively warning against this possibility, A. Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton, Princeton University Press, 1997, p. 35. Cf. already T. Aleinikoff, *Updating Statutory Interpretation*, in *Michigan Law Review*, no. 1/1988, p. 28, and further deferrals.

[59] See, again with reference to the interpretation problem, J. Jeanneney, *op. cit*., p. 108.

[60] Cf. *Pepper (Inspector of Taxes) v Hart* [1992] UKHL, on which see different opinions expressed by di T. Bates, *Parliamentary material and statutory construction: aspects of the practical application of* Pepper v. Hart, in *Statute Law Review*, no. 1/1993, p. 47 ff., and L. Lester of Herne Hill, Pepper v. Hart *Revisited*, *ibid.*, no. 1/1994, p. 10 ff. In comparative perspective, see also M. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of* Pepper V Hart, in *Stanford Journal of International Law*, no. 2/1999, p. 231 ff., and K. Krishnaprasad, Pepper v. Hart*: Its Continuing Implications in the United Kingdom and in India*, in *Statute Law Review*, no. 3/2011, p. 227 ff.

[61] Judgement *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, in which the accreditation of the legislator's intention as a hermeneutic rule allowed the Supreme Court to grant numerous workers, who had suddenly become without income due to the bankruptcy of the chain of shops they worked for, access to the same allowance that the *Loi sur les normes d'emploi* reserved, textually, only for those who had lost their jobs due to «termination of employment»: see. S. Barker and E. Anderson, *Cendrillon au bal: L'intention du législateur dans les tribunaux canadiens*, in *Revue parlamentaire canadienne*, no. 2/2015, p. 17 ff., and cf. the fluctuations noted in subsequent case law, S. Beaulac, *Précis d'interprétation législative: métodologie générale, Charte canadienne et droit international*, Montreal, LexisNexis, 2008, p. 39.

Scalia's long-standing polemic against the consideration of statutory history in the grounds of judgments[62].

Even the French *Conseil constitutionnel*, which is traditionally inclined to take the original intent into account, is rather "parsimonious"[63] when it comes to justify its decisions on the basis of the *travaux parlamentaires*, despite the fact that the relevant *Service de documentation* regularly includes them in the case files and then, also in the *dossiers* attached to each decision.

7. *Continuing*. Political and electoral statements, regulatory framework, living law.

The foregoing considerations lead to a distrustful view of the possibility that the objectives pursued by a given legislative measure can be discerned by merely reading the relevant preparatory documents. The latter appear to provide, at most, mere "clues" which are insufficient, even more so for the reconstruction of the entire political formant, which is here envisaged.

Hence, further elements must be examined. These include, first of all, statements made in non-institutional contexts by members of the parliamentary majority, the Government or, in any case, the political parties that support them. Suffice to consider the printing of political and electoral propaganda leaflets, speaking at public events, giving interviews and, last but not least, disseminating messages on social platforms, which current politicians tend to use with increasing intensity[64]. The informal tone and communicative disintermediation that are typical of these channels (partially excepting the press) greatly

[62] See especially V. Nourse, *Textualism 3.0: statutory interpretation after Justice Scalia*, in *Alabama Law Review*, no. 3/2019, p. 668 ff., and S. Katz, *The Supreme Court embraces statutory originalism. Everything old is new again*, in *www.americanbar.org*, May 2019, p. 3, which focuses in particular on the cases *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. ___ (2019), and *New Prime Inc. v. Oliveira*, 586 U.S. ___ (2019). This approach has not, however, been matched by a clear-cut conservatism in the substance of the rulings: see *Bostock v. Clayton County*, 590 U.S. ___ (2020), which effectively ignored the original rationale of the *Civil Rights Act* (1964) when extended the ban on «sex based discrimination» therein provided for LGBT people at *Title VII*.

[63] See *verbatim* A. Rosa, *La référence aux travaux parlamentaires dans la jurisprudence du Conseil constitutionnel: un instrument de renforcement de la légitimité du juge et du législateur*, in *Revue française de droit constitutionnel*, no. 3/2014, p. 644 ff., to which reference may also be made for further details on that topic.

[64] On this topic, if wished, one may see I. Spadaro, *Comunicazione politica e democrazia digitale*, in *Diritto Pubblico Europeo Rassegna Online*, no. 1/2020, p. 66 ff., and further references.

reduce the possibility of reticence and dissimulation. For example, back to the Polish case, it may be assumed that, even if PiS deputees had stated in their memorandum on the bill what they successively asserted before the ECJ (i.e. that the goal of the reform was merely to increase youth employment), once out of the chamber, they would have hardly abandoned the usual rhetoric of the "necessary forced de-communization", which allowed the party to obtain (and still retain) a large part of its electoral support.

The regulatory context is another element to be considered. In general, the granting of discretionary powers to a certain body is not, as such, a symptom of an *attack* on the rule of law, provided it is accompanied by the establishment (or maintenance) of an adequate system of checks and balances. This explains the attention the Court of Justice paid to the previous political packaging of the National Council of the Judiciary[65] and its poor influence on the presidential decisions on supreme judges' retirement. In addition to acts that are already in force, it is also necessary to look at those that are not, because they are subject to a standstill period or simply because they have not yet been adopted. The first ones, once their passing procedure was completed, may be retained as expressions of the political orientation of the majority, while the second ones can help to reconstruct the rationale of the rules object of the case.

At last, it is useful to look at how other provisions on the same subject are read and applied, both by judges and, above all, by the administrative bodies. This is not only for the obvious reason that every legal provision *lives* through the interpretation that citizens and, in particular, legal practitioners make of it; but also because the consolidation of interpretations that are un-literal or systematically favourable to the State, in cases where this appears to be anything but self-evident, can be indicative of undue pressure from those who exercise political powers. The same applies, of course, when such constraints are explicit, because they are officialised in circulars, directives, service orders, resolutions etc.

[65] To examine it in depth see M. Mastracci, *Judiciary Saga in Poland: An Affair Torn between European Standards and ECtHR Criteria*, in *Review of International and European Law*, no. 2/2020, p. 65 ff., and cf. more broadly the "strategies" outlined by D. Kosar and K. Sipulova, *How to Fight Court-Packing?*, in *Constitutional Studies*, no. 6/2020, p. 137 ff.

8. The risk of distortion and lateness of the jurisdictional protection.

Ultimately, the elements to be investigated in order to ascertain the political-ideological formant are multiple and each of them implies in turn the consultation of a large number of sources. Moreover, some have meta-juridical nature and one of these, the *intention of the lawmaker*, implies the judgement on the credibility of statements made by institutional or political representatives.

Then, there are at least three reasons for which guarantee bodies, such as the Court of Justice, should refrain from such an investigation. The first one concerns procedural matters and relates to the complexity of inserting such an extensive and in-depth evidential investigation into proceedings which usually do not involve such an investigation at all: see Article 63 of ECJ's *Rules of Procedure*, stating that, at the beginning of each proceedings, the panel decides «*whether* a measure of inquiry is necessary». Anyway, this would lead to a significant delay in the proceedings, pending which the alleged violations of the rule of law would even consolidate. In case of preliminary ruling procedures under Article 267 TFEU, such a delay would fall on the national proceedings in turn, so that the very principle of judicial effective protection under Article 19 TEU could be violated. The experience of the Strasbourg Court seems to confirm these fears. Judgments delivered in *Grzęda* and *Żurek*, recalled above, while they succeed in demonstrating the unfounded nature of the arguments put forward by Poland by means of an extensive and detailed reconstruction of the relevant political and ideological climate, they were published four years after the lodging of the complaint and five years after the occurrence of the infringements established therein.

On the other hand, the precautionary suspension of the contested rules should not be presumed as an option for ECJ, since the very implicit nature of the crypto- formant would hardly allow the Court to recognise it during summary examination on *fumus boni iuris* (Article 160 of the *Rules of Procedure*). Besides, even if such a suspension were granted, the order would in fact lose its character as an interim measure, because its effects could be prolonged for a long time, in parallel with the duration of the proceedings. It would end up to be perceived by the parties themselves as a sort of anticipation of the judgment, which

should be not.

Once more from a procedural point of view, one may notice that time needed for investigation could perhaps be shortened through by the acquisition of some documents, among which, in particular, relevant decisions of the Court of Strasbourg, reports of the Commission of Venice and reports of the European institutions on the rule of law[66]. Nevertheless, apart from the fact that they are not always available, they could be challenged before the Court of Justice, both with regard to the criteria and manner of selection of the data collected there, and the subsequent interpretation by their authors. Further, it should be avoided that such readings end up circumventing *de facto* the restrictions placed on third party intervention by Article 40 of the Statute of the Court of Justice – and not, on the contrary, by the ECHR and the Rules of Procedure of the ECHR, which are indeed open to «any» intervention can contribute to «the proper administration of justice»[67].

Third, from a systematic point of you we have to look at the very role of the Court of Justice within the European institutional framework, as well as the relations between the Union and the individual Member States. In fact, the reconstruction of the direction pursued by a certain ruling majority could result in a covert politicisation of the hearings, the discussion of which would move away from the content of the contested national provisions. In other words, they would end up being monopolised by the ascertainment of facts and, since it would imply assessments of the degree of stability and democratic effectiveness of the Member State, it could expose the Judges to excessive media pressure. Judgments, in fact, could be instrumentalised for political propaganda purposes, as was already the case with PiS, in the wake of the two decisions in which the Court of Justice confirmed the continued executability of Polish European arrest warrants[68].

---

[66] The reference is, in particular, to the annual report published by the European Commission, starting in 2020, within the framework of the European Rule of Law Mechanism (most recently, quote COM(2021) 700 final of 20 July 2021), as well as the various documents published by the EU Agency for Fundamental Rights.

[67] Article 40 St. ECJ states that «Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union». On the contrary, the President of the ECthHR may «invite» (Article 36, § 2 ECHR) or «grant leave to» (ECtHR Rule 44, § 3) any person concerned to submit written comments or even take part in hearings. Indeed, this is a power that the Court, even in the cases referred to in the text, tends to make extensive use: see G. Battaglia, *L'intervento di "terzi" di fronte alla Corte europea dei diritti dell'uomo e la recente "apertura" del processo costituzionale: spunti di riflessione retrospettivi e prospettici* (draft version), p. 10 ff., 2021, in *www.gruppodipisa.it*.

[68] Cf. the emphasis lastly put by the Polish Ministry of Justice on the ECJ's judgement on the case *TR* (17 December 2020, C-416/20 PPU): *An important win for Poland in the Court of Justice of the EU*, official

On the other hand, the Polish case shows that ECJ's rulings using "strong words"[69] by expressing open distrust in the national legislators' good faith, can give rise to an escalation of the conflict between EU's Institutions and the Member States. National Governments are then induced to adopt sovereignist and anti-European rhetoric, up to open rebellion against EU law[70], sometimes even supported by national Courts[71] – just think the aforementioned judgement where Polish Constitutional Tribunal declared some TFEU provisions to be unconstitutional, and, *mutatis mutandis*, the actions furtherly brought by the Polish Minister of Justice against some ECtHR's judgements too[72].

What is important to notice the most is that, in ascertaining and declaring, albeit incidentally, the existence of a danger of violation of the rule of law in certain Member States, the Court would essentially exercise a prerogative that Article 7 TEU confers on the Council. It would also see its properly jurisdictional function diminished, since it would become an arbiter of conflicts for the settlement of which the Treaties provide for political forums (European Parliament, Council, European Council).

statement published on the Government's website both on that day and again, just after the judgement delivered by the Grand Chamber on 22 February 2022 (case C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie*).

[69] P. Bogdanowicz and M. Taborowski, *How to Save a Supreme Court in a Rule of LawCrisis: the Polish Experience*, in *European Constitutional Law Review*, no. 2/2020, p. 320.

[70] Consider, in addition to the failure to enforce the order on the suspension of the law on the early retirement of Supreme Judges, Polish Government's initial refusal to suspend certain mining activities on the border with the Czech Republic, ordered as a precautionary measure by the Vice-President of the Court in the case C-121/21, *Mine de Turów*, order of 20 September 2021.

[71] See M. Lasek-Markey, *Poland's Constitutional Tribunal on the status of EU law*, in *www.europeanlawblog.eu*, 2021, p. 1: "The Polish government got all the answers it needed from a court it controls". This opinion has been shared by J. Jaraczewski, *Gazing into the Abyss*, cited above, who writes about a "politically controlled Court".

[72] See *supra*, § 1, note 6. As for ECtHR, see the judgment delivered by the Polish Constitutional Court on 24 November 2021, no. K 6/21, which declared unconstitutional Article 6 ECHR in so far it had allowed ECtHR to criticize the new Polish Law on the Constitutional Court itself (7 May 2021, application no. 4907/18, *Xero Flor w Polsce sp. z.o.o.*), and cf. the pending case no. K 7/21, analogously started by Polish Ministry of Justice - Prosecutor General just after the adverse outcome of ECtHR's cases *Broda and Bojara* (cited above) and *Reczkowicz* (22 July 2021, application no. 43447/19). See A. Ploszka, *It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, in *Hague Journal on the Rule of Law*, no. 2/2022, p. 6 ff., and E. Łętowska, *The Honest (though Embarassing) Coming-out of the Polish Constitutional Tribunal*, in *VerfBlog*, 2021, *passim*.

9. A matter of roles.

Indeed, it is likely that in the 2019 case on supreme judges' early retirement, it was precisely the desire to avoid the numerous inconveniences outlined above that induced the Court of Justice not to dwell analytically on the meta-juridical elements, but rather to emphasise the regulatory context. In particular, it seems significant that the content of the parliamentary memorandum was referred to only *per relationem*, i.e. with reference to an opinion issued by the Venice Commission.

As observed, however, the results do not seem entirely satisfactory. In general, such self-restraint ends up overshadowing a significant part of the reasoning carried out by the judges, undermining not only its clarity and line of reasoning[73], but also, potentially, the coherence with precedents. This, in turn, can affect the uniformity and predictability of judgements[74] and then, its authority in citizens' eyes especially when they are delivered by the Grand Chamber and, therefore, not susceptible to review at a subsequent instance[75].

On the other hand, it should not be forgotten that in the European system, as well as at the national level, it is precisely the obligation to state reasons for court decisions that makes democratic control over the courts possible, albeit only in the form of a "widespread political responsibility"[76], thus compensating for the immunity that judges enjoy in law (Article 3 St. ECJ).

To conclude, the Court of Justice should abstain from including in its considerations the political and ideological framework. In fact, although it is one of the technically comparable elements for the purposes of a possible distinguishing criterion, and although in theory it is

[73] See, by contrast, P. Curzio, *Il giudice ed il precedente*, in *Questione Giustizia*, no. 4/2018, § 4, according to which they are "intrinsic" indicators of the "quality of the grounds" of any court decision.
[74] See the emphasis placed on this requirement by R. Rordorf, *Editoriale*, in *Questione Giustizia*, no. 4/2018, *passim*.
[75] In this regard, referring to the decisions of another single-instance judge such as the Italian Constitutional Court, A. Ciancio, *A proposito dell'ammissibilità del referendum abrogativo in materia elettorale*, in AA.VV., *Studi in onore di Luigi Arcidiacono*, II, Turin, Giappichelli, 2010, p. 741.
[76] On this specific topic, see the authoritative C. Mezzanotte, *Corte costituzionale e legittimazione politica*, Rome, Tipografia Veneziana, 1984, p. 140 ff., and S. Rodotà, *La Corte, la politica, l'organizzazione sociale*, in AA.VV., *Corte costituzionale e sviluppo della forma di governo in Italia*, Bologna, Il Mulino, 1982, p. 491 ff, where you can find also references to other contributions by the Master and comparative remarks with the foreign doctrinal overview.

susceptible to procedural ascertainment, in practice it poses questions that are difficult to overcome, both in terms of expediency (risks of excessive media pressure, political exploitation, and souring of inter-institutional relations) and in terms of respect for the rule of law, already at European level (think of what has just been observed on the function played by the Court, on one hand, and Parliament and the Councils, on the other). At the most, the Court remains free to issue *warnings* to national legislators, by taking into consideration the objective meaning of provisions already in force, like in the *Miasto Łowicz* case[77], or even by selecting the grounds for infringement of European law to deal with, as it did in the *ASJP* case[78].

For many years, European jurisprudence was responsible for promoting the integration process, consolidating its developments and anticipating, more than once, the action of the Governments themselves. Suffice it to think of the guarantee of fundamental rights, intimately connected to the rule of law, or of the *primauté* of (at the time) Community law[79]. It is a race that now appears to have reached its extreme limit, whose overcoming would lead it into the terrain of politics and diplomatic relations, to the point of clashing – as the 2021 ruling of the Polish Constitutional Tribunal is a reminder – with the continued sovereignty of the Member States. Of course, it cannot be ruled out that in the future an amendment to the Treaties will give the Court more room to intervene; although, at the present juncture, this is an unlikely scenario.

These conclusions, far from certifying a definitive failure of the European integration, point, rather, to the urgent need for political actors, including European ones, to assume their own responsibilities so that they do not leave the Court of Justice alone in its efforts to contrast the

[77] ECJ (GC), 26 March 2020, cases C-558/18 and C-563/18. Even though it declared inadmissible the requests for a preliminary ruling made by two Polish Regional Courts, dealing with the excessive use of disciplinary proceedings against judges, because they were not referred to concrete disputes (§ 53), ECJ took the opportunity to affirm that "«Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted» (§ 58). See S. Platon, *Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence on national courts:* Miasto Łowicz, in *Common Market Law Review*, no. 6/2020, p. 1844 ff.

[78] As already stressed, that case was decided in the light of the rule of law principle instead of non-discrimination: see Ch. Reyns, *Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?*, in *European Constitutional Law Review*, no. 1/2021, p. 33, highlighting precisely "the desire of the Court to find a foothold in the Polish discussion", and analogously L. Pech and S. Platon, *Judicial independence*, cited above, p. 1828, and W. Brzozowski, *C'è del marcio in Polonia?*, cited above, p. 472.

[79] See for all G. Tesauro, *I diritti fondamentali nella giurisprudenza della Corte di Giustizia*, in *Rivista internazionale dei diritti dell'Uomo*, 1992, p. 427 ff.; more recently, A. Ciancio, *A margine dell'evoluzione della tutela dei diritti fondamentali in ambito europeo, tra luci ed ombre*, in *Federalismi.it*, no. 21/2012, p. 2 ff., who highlights exactly that the protection of fundamental rights in the European legal system has a "pretoria" origin, and G. A. Ferro, *Riflessioni sul cammino "costituzionale" della Corte di giustizia dell'Unione europea*, in *AmbienteDiritto.it*, 2014, §§ 3-4.

ongoing democratic backsliding phenomena – possibly by making more incisive use of already available non-judicial tools.

In this perspective, the substantial dismissal of the two Article 7 TEU cases against Hungary and Poland cannot but give race to concerns, all the more so because continued Commission's hesitations to apply the democratic-financial conditionality mechanism set in 2020[80], even after its legitimacy has been confirmed by ECJ[81] and relevant *Application Guidelines* have been published[82]. From this point of view, it is significant that in June 2022 the Council, on a proposal from the Commission, approved the Polish Recovery and Resilience Plan, despite a few days earlier the European Parliament had «regretted» that the measures provided there to guarantee the restoration of the rule of law in that Country were insufficient[83].

Abstract: Nella sentenza sulla causa *Commissione vs. Polonia* (C-619/18), del 24 giugno 2019, la Corte di giustizia dell'Unione europea ha criticato la nuova Legge polacca sulla Corte suprema (poi abrogata), giudicando che la riduzione retroattiva dell'età pensionabile dei giudici e la prorogabilità discrezionale del relativo mandato, ivi previste, avrebbero potuto compromettere l'indipendenza dell'organo dal potere politico, in violazione dell'articolo 19, § 1 del TUE. In motivazione, i Giudici europei hanno richiamato le proprie sentenze *ASJP* (C-64/16) e *Fuchs and Köhler* (C-159/10, C-160/10), nel quadro di alcune considerazioni di carattere comparato.

Il saggio muove da una breve ricostruzione della pronuncia del 2019, per poi vagliare la condivisibilità del *distinguishing* da essa operato tra la legge polacca e le disposizioni

[80] Cf. the sharp criticisms expressed by the European Parliament on the current «inaction» and «lax approach», in the text of the resolution P9_TA(2022)0074, 10 March 2022 referring to the enforcement of Regulation (EU, Euratom) 2020/2092. Recently on this subject, C. Ciaralli, *Condizionalità finanziaria, rule of law e dimensione (sovra)nazionale del conflitto*, in *Federalismi.it*, no. 16/2022, p. 86 ff.

[81] ECJ, 16 February 2022, C-156/21, *Hungary v European Parliament and Council*, and 16 February 2022, C-157/21, *Republic of Poland v European Parliament and Council*. Nevertheless, some scholars had been quite critical: see E. Castorina, *Stato di diritto e "condizionalità economica": quando il rispetto del principio di legalità deve valere anche per l'Unione europea (a margine delle Conclusioni del Consiglio europeo del 21 luglio 2020)*, in *Federalismi.it*, n. 29/2020, p. 43 ff., and lastly R. Mavrouli, *The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation*, in *European Papers*, no. 1/2022, p. 281 ff.

[82] See Commission's communication C(2022) 1382 final of 2 March 2022 commented by G. Gioia, *Le Linee guida della Commissione europea sul meccanismo di condizionalità a protezione del bilancio UE: effettività della tutela dello Stato di diritto e valorizzazione dello spazio pubblico europeo*, in *www.dirittocomparati.it*, March 2022, p. 5-6.

[83] See European Parliament resolution P9_TA(2022)0240, of 9 June 2022, § N(2), and cf. Council's decision passed on 17 June 2022, in accordance with Commission's communication COM(2022) 268 final of 1 June 2022. They have been commented by A. Grimaldi and G. Gioia, *Il senso dello Stato di diritto per l'Unione: l'approvazione del PNRR polacco nelle urgenze della Guerra*, in *www.dirittocomparati.it*, June 2022, p. 1 ff.

esaminate, invece, nei due casi precedenti. Infine, esso evidenzia il ruolo implicitamente svolto dal contesto politico e ideologico quale effettivo termine di raffronto e ne indaga le possibili ricadute sulla funzione di garanzia affidata alla Corte.

Abstract: In the case *Commission v. Poland*, C-619/18, delivered on 24th June 2019, the ECJ criticized Polish new Supreme Court Act (then repealed), by alleging that retroactive lowering of retirement age of the judges, and single discretionary extensions granted by the President of the Republic, could have jeopardized the independence of that body from the political power, in violation of Article 19(1) TEU. In the grounding, the European Judges recalled the rulings on the cases *ASJP* (C-64/16) and *Fuchs and Köhler* (C-159/10, C-160/10), which they should have taken into account in terms of comparison.
The paper starts from a short reconstruction of the ruling, then it determines if the distinguishing that it does between the Polish law and the national provisions of the cases mentioned above is fully embraceable. Finally, it stresses the key-role played by the political and ideological framework, as implicit but *true* term in the comparison made by the Court, and shows the possible impact on the guarantee function played by the ECJ.

Parole chiave: Stato di diritto – comparazione – criptotipo – Corte di giustizia dell'Unione europea – Corte europea dei diritti dell'uomo.

Key words: Rule of law – comparison – cryptotype – Court of Justice of the European Union – European Court of Human Rights.