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# FOR A NEW PUBLIC LAW - ENHANCEMENT OF COMMON VALUES IN EUROPE: THE ROLE OF JUDGES

Susana de la Sierra

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*Susana de la Sierra*
Professor of Administrative Law
Universidad de Castilla-La Mancha
Susana.Sierra@uclm.es

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**FOR A NEW PUBLIC LAW**

# ENHANCEMENT OF COMMON VALUES - COMMON CONSTITUTIONAL TRADITIONS IN EUROPE: THE JURISPRUDENCE OF SUPRANATIONAL COURTS

## Enhancement of Common Values in Europe: The role of judges

**Susana de la Sierra**
Associate Professor of Administrative Law
LL.M. (Bayreuth), Ph.D. (EUI, Florence)
University of Castilla-La Mancha (Toledo)
Legal Advisor to the Spanish Supreme Court (2016-2019)



**Abstract:** The EU is the result of a historical evolution. It is a political entity that has grown over time, has assumed more competences and now performs functions which are far from being limited to the economic realm. Common values were hinted at in the Schuman Declaration as well as in other political documents, such as the Copenhagen Declaration on European Identity. They are now contained in article 2 TEU and have been developed by norms and soft law instruments. Here, the role of courts in interpreting and applying the law, so as to make those values effective, is paramount. Besides human rights, the rule of law is one of the common values that need to be addressed. Recent events in certain Member States jeorpardise the rule of law. Thus, a common framework and clear judicial guidelines that are effectively applied are necessary. In this context, the role of national high courts, as key actors between lower and supranational courts, is relevant. Therefore, it is argued here that recent reforms of high courts' competences redefine their role and place them in a co-regulatory position that may well contribute to the effectiveness of EU law and of effective judicial protection.

## 1. Towards a New Public Law. The role of judges

Legal orders evolve alongside societies. European Union [EU] law is, as other legal orders, the result of history and power inputs. The reduced scope of the norms applicable to the original European Communities slowly broadened up as new competences were conferred by the States and new public policies made appearance in the European agenda. As institutional power increased, also did the need to set adequate control mechanisms as well as guarantees of citizens' rights. A milestone in this process was the Treaty of Lisbon, where common values were pushed forward and where the Charter of Fundamental Rights was officially provided with legal force at the same level as the Treaties.

The growth of the EU and of EU law evolved at the same time as States underwent relevant changes. State functions in the second half of the 20th century – not to mention the first two decades of the 21st century – have increased exponentially. On the one hand, this may be due to the fulfilment of constitutional mandates more ambitious than the previous ones. Constitutions adopted after the Second World War include in general terms richer catalogues of constitutional rights as well as more heightened obligations addressed to public powers. On the other hand, reality has become more complex, and so has done the institutional setting to deal with the increasing public functions.[1]

The previous idea will be developed in this article and emphasis will be put in the role of courts and judges in this framework. New public law may be defined, among other features, by new competences and new institutions. This all may lead to higher degrees of legal controversy, thus placing courts in a complicated scenario: on the one hand their workload increases, and this may be also due to citizens' trust in the judiciary as opposed to trust in other powers of the State. Yet on the other hand, if they are not provided with the means to properly conduct their function in time then effective judicial protection perishes. Therefore, the whole system may be at risk as a result of the exhaustion of guarantee mechanisms.

Courts are therefore essential to make rights effective. They are indeed a key element of the rule of law[2], which is, according to article 2 of the Treaty on European Union [TEU], one of the common values of the Union and is also a value promoted and protected by the Council of Europe through various instruments[3]. Both the Court of Justice of the European Union [CJEU] and the European Court of Human Rights [ECtHR]

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[1] From a European Administrative Law perspective this was thouroghly and early addressed by Mario P. Chiti, *Diritto amministrativo europeo*, Giuffrè (first edition in 1999) and Paul Craig in *EU Administrative Law*, Oxford University Press, 3rd ed., 2019 (first edition in 2006) .

[2] For a recent account of the rule of law in the EU see Laurent Pech, *The Rule of Law in the EU: the Evolution of the Treaty Framework and Rule of Law Toolbox,* RECONNECT Working Paper n. 7, March 2020, to be published (in a revised and updated version) in Paul Craig and Gráinne de Búrca (eds.), "The Evolution of EU Law", Oxford University Press, 3rd edition.

[3] See among others on the Venice Commission Wolfgang Hoffmann-Riem, *The Venice Commission of the Council of Europe – Standards and Impact*, The European Journal of International Law, vol. 25/2, 2014, p. 579 – 597. With some critical insights, see Bogdan Iancu, Quod licet Jovi non licet bovi?: *The Venice Commission as Norm Entrepreneur*, Hague Journal on the Rule of Law (2019) 11, p. 189 – 221. See also Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford University Press, 2013.

have been relevant actors in the consolidation of a European space of fundamental rights[4], which are also a core element of article 2 TEU. Indeed, not only are human rights in general covered by this article, but some of them, such as human dignity and equality, are expressly and individually mentioned.

Together with supranational courts, national judges have been proven to be meaningful actors in making European law effective and thus in shaping common values. Judicial dialogue[5] has been and is therefore the "oil that makes the machinery function", and judges are guardians of common values in their daily work. Yet the profiles of judicial dialogue have also evolved since the European Court of Justice [ECJ] and the European Court of Human Rights were created. On the one hand, in the framework of EU law national high courts have redefined their role as they control the activity of lower courts, which sometimes have been very active in defying national institutions – including higher courts - potentially not compliant with EU law. On the other hand, the ECJ and the ECtHR have gone through an evolution as well. They have defined their role and their relationship with national judges through the enactment of norms of procedure and internal guidelines of judicial practice, as well as through their case-law.

Much literature has been devoted to the role of Constitutional Courts in the European judicial dialogue, a role which is not to be underestimated. Yet common values in the EU are not solely referred to as fundamental rights, which are usually the realm of Constitutional Courts. Other matters linked to the rule of law are of the competence of ordinary judges. On the other hand, despite the fact that Constitutional Courts are granted the last word, fundamental rights are also protected by ordinary judges[6]

In the following lines the previous issues will be further developed. Firstly, the notion of common values will be addressed. Even though it is a well-known issue, an overview based on recent literature will be provided, including some insights on the discussion about the legal sources of these values. Here, the role of the European Convention on Human Rights and of the case-law of the ECtHR is also to be addressed. This is so because the notion of common values connects directly with article 2 TEU, yet it has a long tradition in EU law also linked to the European Convention on Human Rights.

Secondly, the focus will be put in the rule of law as one of the common values. Here, the role of judges is essential, and mention will be made of recent institutional changes concerning the judiciary and in particular, the role of high courts, including some supranational courts. Furthermore, the way legal reforms have redefined the role of high courts in some jurisdictions will be discussed. High courts have been granted discretionary powers to decide what to decide, i.e. to decide which cases are admissible and thus which ones will be subjected to a judicial decision. Thus, they have been placed

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[4] Ana Carmona Contreras, *El espacio europeo de los derechos fundamentales: de la Carta a las Constituciones Nacionales*, Revista Española de Derecho Constitucional (2016) 17, p. 13 – 40.

[5] On the constitutional protection regarding the duty to ask a preliminary ruling to the Court of Justice, see recently Xabier Arzoz Santisteban, *La garantía constitutional del deber de reenvío prejudicial*, Centro de Estudios Políticos y Constitucionales, Madrid, 2020.

[6] Susana de la Sierra, *Die Rolle der ordentlichen Gerichtsbarkeit im Grundrechtsschutz und die Kultur aus verfassungsrechtlicher Sicht*, in Hermann-Josef Blanke, Siegfried Magiera, Johann-Christian Pielow, Albrecht Weber (eds.), "Verfassungsentwicklungen im Vergleich. Italien 1947 - Deutschland 1949 - Spanien 1978" (Herausgegeben von), Duncker & Humblot, Berlin, forthcoming in 2021.

in a position which is not merely *la bouche de la loi*, if it has ever been, but which very much reminds us of a co-legislator. In this sense, classical notions on the separation of powers may be revisited, even if this is not included in the scope of this article.

## 2. Common values in Europe

The European Union was and is an organisation based on common values. Already the seminal Schuman Declaration of 9 May 1950 placed solidarity and common action subject to law and to a common institutional setting as key elements of the European project. Articles 2 and 3 of the Treaty establishing the European Economic Community signed in Rome in 1957 set some goals and policies that were to be pursued by that Community, many of them of economic nature but other transcending that nature. Examples thereof are the improvement of standards of living and social development. Throughout the years those goals and policies have been enormously broadened up.

Furthermore in 1973 the nine Member States at the time issued a political declaration to define the European identity mainly vis-à-vis third countries in the framework of international relations. Having the notion of unity as the starting point of progress in Europe, the Declaration stated that "[t]he Nine wish[ed] to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures".[7] In accordance with this goal, Member States were committed to defend the principles of representative democracy, the rule of law, social justice and respect for human rights. All these tenets were then considered to be fundamental elements of the European identity.

The Treaty of Maastricht of 1992 pushed forward a new dimension of the European project, where rights and interests of citizens were placed at the core of the system. Yet it was the Treaty of Lisbon of 2007 that which expressly recognised the existence of common and shared values in the EU and the consequences of a breach thereof.

Today, article 2 TEU indicates that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidary and equality between women and men prevail". It could be stated that these are the constitutional foundations of the EU, a result of a shared understanding of the structural basis of the European society; of one that sets the framework of any public action and the one that ultimately legitimises the European project.[8] These are the lenses through which the Treaties and the legal order altogether need to be read and applied by the public institutions concerned. They shall thus inspire law-making and its interpretation.

Article 2 TEU is to be read together with other articles, but article 3 TEU is particularly relevant, as it indicates the goals that are to be pursued by the Union. These

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[7] https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf [all digital sources in this article have been last accessed on 10 January 2021].

[8] On the constitutional implications of common values see Oliver Mader, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, Hague Journal on the Rule of Law (2019) 11, p. 133 – 170.

goals have values embedded in them and develop the ones mentioned in the previous article, such as social justice, cultural diversity and sustainable development. All these can also be regarded as core elements of the constitutional framework of the EU, those that lay at the basis of public action.

### A. Values, fundamental rights and membership of the EU

The notion of common values in EU law has been addressed from many angles and its relevance was apparent at a very early stage, as it has been stated above. Fundamental rights are one of the key elements of shared values and they were handled very soon by the European Court of Justice. Here, national constitutional traditions[9] and the European Convention on Human Rights played a decisive role until the Charter of Fundamental Rights was adopted. The Charter was conferred legal value at the same level as the Treaties by article 6.1 TEU, even though it had already been used by European institutions as an inspiration and as an interpretative instrument.[10] Moreover, following previous case-law of the Court of Justice, article 6.3 TEU states today that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The establishment of the European Union Agency for Fundamental Rights [FRA] is also linked to the guarantee of values cited by article 2 TEU. In particular, it has been argued that the Agency may play an important advisory role in the implementation of the mechanism foreseen in article 7 TEU.[11] This article, meant to react against violations of the values contained in article 2 TEU (once determined *the existence of a serious and persistent breach*), grants the possibility of suspending rights of the State concerned, including the voting rights of the representative of the government of that Member State in the Council.

As a complement to this article, the European Commission addressed a Communication to the European Parliament and the Council containing "A new EU Framework to Strengthen the Rule of Law",[12] mainly to face various compromising developments in the EU arena (notably, in Hungary and Poland) and with the following purpose: "The framework seeks to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met. It is therefore meant to fill a gap. It is not an alternative to but rather precedes and complements Article 7 TEU mechanisms. It is also without prejudice to the Commission's powers to address specific situations falling within the scope of EU law by

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[9] See recently Luis I. Gordillo Pérez, *Las tradiciones constitucionales comunes como principios generales del derecho: evolución y perspectivas tras la constitucionalización de la Carta*, in Ana Carmona Contreras (ed.), "Las cláusulas horizontales de la Carta de Derechos Fundamentales de la Unión Europea: Manual de uso", Thomson Reuters-Aranzadi, 2020, p. 121 – 149.

[10] See among other references Agustín José Menéndez Arena, *Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union*. Journal of Common Market Studies (2002) vol. 40, issue 3, p. 471 – 490.

[11] Gabriel N. Toggenburg/Jonas Grimheden, *Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?*, Journal of Common Market Studies (2016), vol. 54, issue 5, p. 1093 – 1104.

[12] 11 March 2014, COM (2014) 158 final. On its role see case C-619/18 R, *Commission v Poland*, order of 17 December 2018

means of infringement procedures under Article 258 of the Treaty on the Functioning of the European Union (TFEU). From a broader European perspective, the framework is meant to contribute to reaching the objectives of the Council of Europe, also on the basis of the expertise of the European Commission for Democracy through Law (Venice Commission)".[13] Apart from the internal perspective, common values are one of the defining elements of the Union's foreign policies. As previously mentioned, European identity is linked to values and policy documents such as the Copenhagen Declaration on European Identity, adopted in 1973, that have been used in enlargement processes to define the "us" vis-à-vis the "others".[14] It has indeed been used to place the European Union in the international arena and may help set standards outwards.[15]

For the abovementioned reasons it is not surprising that respect of values referred to in article 2 TEU and the commitment to promote them are conditions to become a member of the Union, according to article 49 TEU. And these values are also relevant when one Member State intends to leave the EU, also concerning the doubts that may arise in the process.

EU Treaties and some Constitutions of federal States include the possibility to freely join the political entity they set the bases of. Moreover, they include norms regulating their potential reform. One of the differences between both categories, EU Treaties and Constitutions, consists since recently in the possibility to cease being a member of the political entity. Withdrawal of a territory within the State is in principle not recognised in national Constitutions and was not recognised for a long time in EU Treaties. Yet the Lisbon Treaty included article 50 TEU, providing the basis for a unilateral withdrawal in accordance with the State's constitutional norms.

In the framework of Brexit, the Court of Justice was called to deal with some questions concerning the interpretation of article 50 TEU. Thus, in the judgement issued on 10 December 2018[16], the Court gave a response to a preliminary ruling sent by the Court of Session, Inner House, First Division (Scotland). As it is well-known, the case was initiated by various British citizens, some of them Scottish members of Parliament. They pursued a clarification on whether the notification established in article 50 TEU could be revoked unilaterally and, if yes, at what moment and how could it be done.

The Court thoroughly followed the Opinion of the Advocate General in interpreting article 50 TEU, concluding that the State is free to revoke unilaterally a notification of intention to withdraw from the EU. It takes into consideration the preparatory works of the Treaty of Lisbon, as well as the failed Treaty Establishing a Constitution for Europe. To reach that conclusion, the Court sets out relevant constitutional questions.

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[13] See section n. 1 of the Communication.

[14] On the role of culture and cultural policies to help define European identity see Rachael Craufurd Smith (ed.), *Culture and European Union Law*, Oxford University Press, 2004. Critically on this, arguing that common values in the EU may not be as common today as pretended, Plamen Akaliyski/Christian Welzel/Josef Hien, *A Community of Shared Values? Dimensions and Dynamics of Cultural Integration in the European Union*, 24 October 2020, Preprint (doi:10.31235/osf.io/u3hsk).

[15] See for instance Pälvi Leino/Roman Petrov, *Between "Common Values" and Competing Universals – The Promotion of the EU's Common Values through the European Neighbourhood Policy*, European Law Journal (2009) vol. 15, issue 5, p. 654 – 671.

[16] (C-621/18), *Wightman*.

The Court is aware of the risks linked to accepting the revocation. One of them is its potential misuse and how the concerned State may try to alter the ordinary course of negotiations. It could then revoke the notification and present another one, activating once again the deadline of two years set in article 50.3 TEU. In this sense, the revocation could be used as a mechanism to put pressure on negotiations.

Notwithstanding the former risk, from a constitutional perspective it is considered that the revocation of the notification is in conformity with the Treaties. Thus, against the background that was previously mentioned, the Court understands that the notification of the State's intention of withdrawing from the EU reflects the State's sovereign decision of keeping the status of Member State of the EU, a status that is neither interrupted nor altered by the notification.

The Court then evokes the importance of the values of freedom and democracy in EU law and links this question to the status of citizen of the Union, indicating that it may become the fundamental status of nationals of Member States. In this sense, <<any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, inter alia, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States>>[17]. And it concludes that it would be <<inconsistent with the Treaties' purpose of creating an ever closer union among the peoples of Europe to force the withdrawal of a Member State which, having notified its intention to withdraw from the European Union in accordance with its constitutional requirements and following a democratic process, decides to revoke the notification of that intention through a democratic process.>>

### B. Constitution, constitutionalism and common values

The EU is neither a State nor an international organisation as the previously existing ones. The notions of Constitution and constitutionalism were at first not used in this context, or if they were, their use was timid. One of the first constitutional explicit approaches was the one initiated by the Court of Justice in its case-law on fundamental rights. To make a long and well-known story short, the Court stated in 1969 (*Stauder*)[18] that fundamental rights in European Community law were also to be respected. In further judgments it specified the sources of fundamental rights protection, concluding that both constitutional traditions of Member States and the European Convention on Human Rights were inspiring sources. Finally, this was included in the Treaties and is today established in article 6 TEU.[19]

Fundamental rights are, on the one hand, core elements of constitutional principles of EU law.[20] And, on the other hand, they are inspired by constitutional traditions of Member States acting as principles of EU law. Here, the role of the Court of Justice has been and is essential, and it has assumed a role of guardian of the constitutionality of the

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[17] At 64.

[18] Erich Stauder v. City of Ulm, Sozialamt, case 29/69, 12 November.

[19] Lucia Serena Rossi, *How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon*, Yearbook of European Law (2008) vol. 27 (issue 1), p. 65 – 87.

[20] Koen Lenaerts, *Respect for Fundamental Rights as a Constitutional Principle of the European Union*, 6 Colum. J. Eur. L. 1 (2000).

EU legal order.[21] Even if some see a decay in the applicability of common constitutional traditions once fundamental rights have been codified in the Charter, their role is still one which is worthy of mention, as they may be used by the Court of Justice to promote a stronger protection of rights.[22]

Contemporary law is characterised, among other features, by the omnipresence of the Constitution. Interpretation in any legal area needs to take the constitutional framework into consideration, and both evolve along time. There are new challenges for the law, such as for instance the increasing role of the concept of security to face old and new risks. Also, from an economic point of view, the potential market manipulation, including prices and stock markets, may even affect democratic Governenments, and more specifically concerning public goods as relevant as health or welfare. Here, the classical dichotomy security vs freedom acquires importance, as does the fundamental protection of rights. This debate is one that has been intensified in these pandemic times we are living through.[23]

The constitutionalisation of law (not only public law) is a phenomenon that has been discussed in literature[24] and it can be brought to EU law to understand some of its features. If in the past it might have been problematic to refer to the EU in constitutional terms, this reluctance is over. Nowadays, debates concern on the one hand what type of constitutionalism may apply in this framework, and theories such as constitutional pluralism are particulary useful for this. Moreover, those debates refer to the identification of constitutional principles that influence interpretation and implementation of EU law both by European and by national authorities, including of course judges. Constitutional principles of that nature are those that limit the exercise of power and those that guarantee an adequate fulfilment of public policies in conformity with goals that according to the Treaties need to be achieved.

Against this background, the question is now how those principles are to be identified. According to constitutional pluralism, the sources of these principles are manifold.

On the one hand, the foundations of European Constitutional law are to be found, in essence, in the Treaties and in national Constitutions. On the other hand, considering the importance of interpretation in constitutional theory, these texts need to be completed with the case-law of European and national courts (mainly, but not only Constitutional Courts). Furthermore, constitutional traditions and case-law referring to them are also part of this framework.

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[21] See Gordillo Pérez, quoted, at 122.

[22] Oreste Pollicino, *Common constitutional traditions in the age of the European bill(s) of rights: Chronicle of a (somewhat prematurely) death foretold*, in Lorenza Violini/Antonia Baraggia (eds.), "The Fragmented Landscape of Fundamental Rights Protection in Europe. The Role of Judicial and Non-Judicial Actors", Edward Elgar Publishing, 2018, p. 42 – 71.

[23] Among the numerous accounts of this, I would like to refer to the series published online in The Regulatory Review. In the piece concerning Spain, I discuss some of the general questions that have affected other countries as well: *Old Norms and New Challenges in Spain's Response to COVID-19* (*https://www.theregreview.org/2020/05/20/de-la-sierra-old-norms-new-challenges-spain-response-covid-19/*).

[24] See among other references by the same author Sabino Cassese, *New paths for administrative law: A manifesto*, International Journal of Constitutional Law, vol. 10, issue 3, 2012, p. 603 – 613.

Today, then, constitutionalism in the EU is an *acquis* in the scholarship. Constitutional principles in the EU include fundamental rights, structural principles[25] and principles linked to the rule of law.[26] Recent challenges to EU values by some Member States have placed the rule of law and democracy at the core of public and legal debate. It has then been argued that the nature of these principles contained in article 2 TEU needs to be redefined and enhanced. Therefore an enforcement approach has been proposed, so that compliance may be guaranteed.[27]

National judges are key players in this structure, as their daily work contributes to the improvement of this complex system. Ultimately, the adequate functioning of the machinery depends on national judges acting with knowledge and reasonableness concerning EU law in each legal area. They should thus not only verify that EU law is not violated, but they should also point at potential discrepancies, evaluating in each case the possibility of asking a preliminary ruling before the Court of Justice, in an exercise of cooperation represented by judicial dialogue.

## 3. The rule of law as a common value

Article 2 TEU refers to human rights as common values of the EU and several rights are expressly mentioned, as it was highlighted above. But article 2 TEU also includes democracy and the rule of law as shared values of a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Much attention has been paid in the past to all these concepts, yet they have gained importance in recent times, as they have been jeopardised in certain Member States.[28]

The concept of the rule of law has been widely discussed in the legal scholarship[29]. *État de droit*, *Rechtsstaalichkeit*, *Stato di diritto*, *Estado de Derecho*, all are wide expressions that cover various principles and legal institutions which are in most cases embedded in national Constitutions and have been addressed by courts. In the first place, the rule of law requires all authorities to act in conformity with the laws and prohibits violations of the law by these authorities. Indeed, one of the mottos put forward by

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[25] See Stefan Vogenauer/Stephen Weatherill (ed.), *General Principles of Law. European and Comparative Perspectives*, Hart, 2017, where the principle of proportionality (among others) is discussed.

[26] See Gordillo Pérez, quoted, at 125.

[27] Dimitry Kochenov, *The Acquis and Its Principles: The Enforcement of the 'Law' versus the Enforcement of 'Values' in the European Union*, András Jakab/Dimitry Kochenov (eds.) "The Enforcement of EU Law and Values. Ensuring Member States Compliance", Oxford University Press, 2017, p. 9-27.

[28] Bojan Bugaric/Alenka Kuhelj, *Varieties of Populism in Europe: Is the Rule of Law in Danger?*, Hague Journal on the Rule of Law (2018), vol. 10, p. 21 – 33. Critical in this context with the use of concepts such as constitutional pluralism and constitutional identity, and proposing new approaches on the basis of the primacy of EU law, in R. Daniel Kelemen/Laurent Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, Cambridge Yearbook of European Legal Studies (2019), vol. 21, p. 59 – 74. See also the series *We need to talk about the Rule of Law* in Verfassungsblog: https://verfassungsblog.de/.

[29] In the UK context see Paul Craig, *Formal and Substantive Conceptions of the Rule of Law*: *An Analytical Framework*, Public Law (1997), p. 467 – 487.

populisms is that "the people" through their representatives may not be subject to the laws if they deem them unfair, an argument as old as democracy and opposed to it.[30]

Procedures set in the norms are to be followed and citizens' rights are to be protected. Also, transparency and open government have been more recently included in the concept[31], as well as accountability[32]. The separation of powers may be one of the manifestations of the rule of law, as a system of checks and balances helps public authorities exercise their competences within the boundaries of law.[33]

In this framework, the role of judges as guardians of the rule of law is a key element and will be here discussed. The focus here is administrative justice, i.e. the set of judges and courts exercising judicial review, thus controlling the activity of public administrations. Enforcement of EU law takes place mainly through national public bodies. Therefore, it is in this kind of conflicts where competences of the executive and of the judiciary may collide and where debates arise as to the extent of control and margin of appreciation or discretion public administrations (and courts) have.[34]

Judicial protection has clear goals, yet it has undergone changes in recent times.

Complexity may be one of the terms that best defines the new scenario and this is due to various factors. Law covers today more aspects of reality than it did in the past and it does so more intensely. Consequently, the number of public bodies conducting public policies and enforcing law has increased.[35] Against this background, conflicts have also increased and so has the workload of courts. This has generated reforms both at a national and at a supranational level, reforms aimed at strengthening effective judicial protection and thus enhancing rights, freedoms, and common values.

In what follows a brief account of recent actions regarding the rule of law in the EU will be provided, as well as an explanation of the new role of the judiciary, as indicated above.

### A. A European strategy for the rule of law and judicial protection

The rule of law in the European Union has acquired a new profile in recent years, as it has been jeopardised in some countries. Besides other previous actions, mainly the already mentioned Rule of Law Framework set out in 2014, the European Commission

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[30] See among other references Stefan Rummens, *Populism as a Threat to Liberal Democracy*, in Cristóbal Rovira Kaltwasser/Paul Taggart/Paulina Ochoa Espejo/Pierre Ostiguy (eds.), "The Oxford Handbook of Populism", Oxford University Press, 2017.

[31] See for instance the approach of the World Justice Project: https://worldjusticeproject.org/about-us/overview/what-rule-law.

[32] Carol Harlow was one of the authors that first addressed the notion of accountability in constitutional terms. See *Accountability and Constitutional Law*, in Mark Bovens/Robert E. Goodin/Thomas Schillemans (eds.), "The Oxford Handbook of Public Accountability", Oxford University Press, 2014.

[33] Richard Bellamy (ed.), *The Rule of Law and the Separation of Powers*, Routledge, 2016.

[34] See further on this Jeremy Waldron, *Separation of Powers in Thought and in Practice?*, Boston College Law Review (2013), vol. 54, p. 433 – 468.

[35] In general, on common features of administrative laws in Europe see Giacinto della Cananea, *Il nucleo commune dei diritti amministrativi in Europa*, Editoriale Scientifica, 2019.

launched a Communication on 3 April 2019 entitled *Further Strengthening the Rule of Law within the Union.*[36] This document defines the rule of law as follows:

> "The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the founding values of the Union. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. These principles have been recognised by the European Court of Justice and the European Court of Human Rights."

It is acknowledged that various instruments are required to deal with potential violations of the rule of law, instruments ranging from the existing article 7 TEU – already discussed – to other instruments proposed in this Communication[37], making also possible the establishment of a European Public Prosecutor's Office that aims at promoting a coordinated judicial response to such risks across Member States.[38]

Effective judicial protection by the Court of Justice and by national courts is one of the instruments in accordance with article 19.1 TEU and as referred to in the Communication *Further Strengthening*. Independent courts are an essential part of the rule of law. The concept of "judicial independence" requires that judges be protected against any external intervention[39], bearing in mind that external intervention may present many faces: budget control, appointment of judges by the Government, disciplinary procedures undertaken by the Government, among others. Independence and impartiality of courts and judges is also vital for the adequate functioning of judicial cooperation.

The Communication concludes with "possible avenues for the future" on the basis of three key-words: promotion, prevention and response. Promotion in this context stands for "building knowledge and a common Rule of Law culture". The Commission proposes several issues for the debate on the rule of law and some of them concern or may concern

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[36] COM(2019) 163 final.

[37] An instrument which has gained actuality at the time of writing is the possibility of linking the grant of EU funds to the compliance with rule of law standards. In this context, it should be mentioned the Proposal of a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States – COM(2018) 324.

[38] Its existence is legally founded by Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law transposed into their national laws ('PIF Directive') and was supposed to start its activity at the end of 2020.

[39] Case C-506/04, *Wilson*. Further case-law relevant here are Case C-64/16, *Associação Sindical dos Juízes Portugueses*; Case C-49/18, *Escribano Vindel*; Case C-216/18 PPU *Ireland v. LM* and Case C-8/19 PPU, *RH*.

the role of judges. Under promotion, for instance, the question that best links to the following section, in which the role of high courts will be discussed, is the following: "Can Member States do more to promote discussions on the rule of law at the national level, including for example through debates in national parliaments, professional fora and awareness raising activities addressed to the general public?" It could be argued that high courts may indeed engage in these public debates not only through their case-law, as it will be discussed, but also leading discussions with other legal actors and with the citizenry, in order to foster rule of law literacy in the country.

Secondly, prevention stands for cooperation and support to strengthen the rule of law at the national level. Here, one of the most relevant questions included in the Communication and relevant for this paper is the following one: "How can the EU enhance its capacity to build a deeper and comparative knowledge based on the rule of law situation in Member States, in order to make dialogue more productive, and to allow potential problems to be acknowledged at an early stage? How can existing tools be further developed to assess the rule of law situation?". In terms of dialogue, judicial dialogue is here a powerful instrument and the role of high courts is again essential in the process.

Finally, the Commission is concerned with potential mechanisms to react once promotion and prevention have failed, that is, once a breach or a serious risk of breach of the rule of law has appeared. It should also be kept in mind that the rule of law applies not only internally but also in the external relations of the EU: According to article 21.1 TEU, the EU is an agent that promotes the rule of law and human rights in the world. In relation to this the recent adoption of Council Regulation (EU) 2020/1998, 7 December 2020, concerning restrictive measures against serious human rights violations and abuses, should be noted.

### B. The role of high courts as policy actors in complex societies

Effective judicial protection is one of the core elements of the rule of law. It is also relevant for the effective implementation of EU law. That is why the system of preliminary rulings and of judicial dialogue has proved to be crucial for the construction of a Community based on law.

Judges are a key instrument in Constitutional States, where the principle of separation of powers presides over the institutional setting. Reality, politics, public policies and the law have evolved much since the Declaration of Rights of Man and of the Citizen. Article 16 of this Declaration recognised the separation of powers as one of the elements of a Constitution, together with the protection of rights. The separation of powers and judicial protection of rights are still today core elements of a Constitutional State and of the rule of law. Yet in this context some changes need to be noted.

Reality has become more complex: there are new public goals embedded in constitutions, new public bodies have been conferred competences to pursue those goals and hence new policies require new laws to be drafted. Public law has slowly dealt with new realities in various forms: theories of regulation transcending the boundaries of classical administrative law have been developed; contracting-out has become an ordinary way of performing certain public activities; and the State as a reference point has seen its importance reduced both outwards and inwards. In this context, the judiciary has also evolved, judicial review has broadened up its contents and the relationship

between courts as well as the one between the courts and the executive has also been altered.

Judges and courts are increasingly overloaded. This compromises effective judicial protection, as judges may have less time to analyse each case and because late justice is in many cases delayed justice or no justice at all. Specialisation in law has also become more refined, thus leading to the creation of specialised judges and courts in areas that range from particular sections of family law, business law or administrative law. Indeed, focusing on the latter, some countries have for long counted on specialised courts for tax law, whereas other countries include these matters under the competence of general administrative courts.

Administrative law has grown over time as State functions have increased. In some areas administrative tribunals, regulators, or other types of administrative bodies – with various degrees of independence from Governments – deal with specialised areas of law, such as regulated sectors, public procurements, transparency, data protection, the media or digital services. Their decisions are in some cases not challenged before courts, and litigants may find advantages in using this type of remedies: they are usually much less expensive than judicial protection, and board members are specialists of the matters they are competent at. In those cases in which their decisions are challenged in court, they provide judges, in general, with thorough analyses of the cases and well-founded arguments, which one may agree with or not, but which are well constructed.

The increasing number of cases, of actors and of public bodies, together with the increasing complexity of law, has reached higher courts. Spain is, among other examples, a country where this situation has led public powers to try and take measures to make judicial review more effective and efficient. In 2013 a Committee was created within the framework of the General Codification Commission in order to propose reforms aimed at a more efficient judicial review.[40] Various possibilities where discussed (the reinforcement of control by the administration or by other independent bodies, for instance) and a reform of the revision system of administrative courts' decisions by the Spanish Supreme Court[41] was among those possibilities.

The Organic Statute 7/2015, 21 July, which modifies the Organic Statute on the Judiciary, introduced a reform of the revision system in administrative law matters by the Spanish Supreme Court (*recurso de casación contencioso-administrativo*).[42] Before that, the admission of cases to be discussed by the Supreme Court was based on the sum at stake. Only those cases in which the sum at stake was 600,000 euros or above were adjudicated by the Supreme Court for review, and the Court elaborated fine rules setting how to calculate that amount, in many cases to the detriment of the litigant.

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[40] See the report prepared by this Committee in Francisco Velasco (ed.), *Informe explicativo y propuesta de anteproyecto de ley de eficiencia de la Jurisdicción Contencioso-Administrativa*, Ministerio de Justicia, 2013.

[41] This is all referred to the Third Chamber of the Spanish Supreme Court, namely the Administrative Law Chamber (*Sala de lo Contencioso-Administrativo*), thus equivalent to the *Conseil d'Etat* in France, the *Consiglio di Stato* in Italy or the *Bundesverwaltungsgericht* in Germany. The Spanish Council of State (*Consejo de Estado*) has only advisory functions and none of them jurisdictional.

[42] It modified various articles of the Statute on Judicial Review (*Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa*/LJCA).

Such a system was criticised by many and some judges at the Supreme Court expressed their doubts concerning effective judicial protection. On the one hand, only matters of high economic value reached the Court. On the other hand, the Court could only settle case-law on those matters, thus leaving lower judges without general criteria about the interpretation of many other norms. These arguments inspired the abovementioned Committee to propose the reform, which at the end was very much influenced by the opinions of the Supreme Court's judges willing to change the system.

The proposal was preceded by a thorough study of equivalent remedies in other jurisdictions and the conclusion was that the Supreme Court had to reduce the number of cases it heard in order to provide clearer, updated and thus useful case-law, i.e. guidelines for lower judges. Even if the Supreme Court's case-law is not binding for lower judges in Spain, its authority is usually followed and is therefore an important instrument. The goal was also to include any legal matter, independently of its economic importance. All this should guide judges and therefore contribute to effective judicial protection, thus also to the rule of law.

The key concept in the new system is the expression "objective revision interest" (*interés casacional objetivo*): the case will be admitted if it raises a question of objective revision interest for the Supreme Court. This may be equivalent to the "point of law of general public importance" in appeals before the Supreme Court in the United Kingdom[43] and to a certain extent to the criteria used by the US Supreme Court to grant *certiorari*. The Spanish Court has a wide margin of appreciation concerning the concurrence of such an interest, yet it is not absolute discretion, unlike the US system. There are various parameters set in the Statute that indicate that an objective revision interest concurs, and they have different magnitudes in the Court's argumentation. Whereas in some cases they are just indicators that the Court may take into consideration or not, in other cases they must be followed or otherwise it must be explained why, if concurring, the Court has decided not to admit a case.

Various indicators are included in relation to EU law. For instance, objective revision interest may concur when the decision of the lower court sets an interpretation of national or EU norm contradictory with interpretations from other judicial bodies of the same norms in the same type of cases (article 88.2.a) LJCA). Also, the same interest may concur if the judicial decision of the lower court interprets and applies EU law in apparent contradiction with the case-law of the Court of Justice or in cases in which the Court's intervention in a preliminary ruling may still be required (article 88.a.f) LJCA.

It could be argued that due to the primacy of EU law and the role of national judges as European judges a more elaborate regulation of this should have been adopted. Indeed, if a reform is to come, it should clearly include a new regulation of this aspect, containing more clear obligations vis-à-vis EU law.

The Spanish reform of the revision's system for administrative law matters is reminiscent of previous reforms in other contexts. It follows the path of similar regulations in civil, criminal and labour law, where the concept of objective revision system has already been used for some years. But it also follows the model of the reform of the remedy for the protection of fundamental rights before the Spanish Constitutional Court, a reform which was introduced in 2007 and was declared in conformity with the European Convention on Human Rights by the ECtHR in the judgment *Arribas Antón*

[43] Section 40(2) of the Constitutional Reform Act 2005 read together with Supreme Court Rules 2009 and Practice Direction 1.

rendered on 20 January 2015[44]. The purpose was also to introduce a system where the Constitutional Court would have a wide margin of appreciation to select the cases it was going to decide on, so as to provide general interpretation of the fundamental rights standards which could serve as guidelines for ordinary courts, including the Supreme Court. Indeed, according to article 53.2 of the Spanish Constitution, protection of fundamental rights in Spain is primarily granted by ordinary courts (i.e. those pertaining to the judiciary in the strict sense and not the Constitutional Court), leaving for the Constitutional Court the role of guardian of the whole system.

All this shows a trend in today's legal orders, where the role of high courts is being redefined in order to grant them a stronger and more central position than the one they had before. By selecting cases they select the agenda and in a certain way they place themselves in a position of co-legislators or co-regulators. They are also in a better condition to monitor the whole system, since they identify the key issues that need to be addressed, something which could be of particular importance in EU law, in order to promote an homogeneous understanding of EU enforcement in conformity with EU values. If lower courts have been important in developing the system of preliminary rulings, defying in some cases higher courts not willing to accept supranational courts above them, once the system is mature, a redefinition of the role of courts in Europe is necessary. This may be helpful as well to fulfil the need of judicial cooperation the Commission referred to in the Communication establishing a Strategy for the Rule of Law.

## 4. Conclusions

The EU is the result of a historical evolution. It is a political entity that has grown over time, has assumed more competences and now performs functions that are far from limited to the economic realm. Common values were hinted at in the Schuman Declaration as well as in political documents, such as the Copenhagen Declaration on European Identity. They are now contained in article 2 TEU and have been developed by norms and soft law instruments. Here, the role of courts in interpreting and applying the law, so as to make those values effective, is paramount. Besides human rights, the rule of law is one of the common values that need to be addressed. Recent events in certain Member States jeorpardise the rule of law. Thus, a common framework and clear judicial guidelines that are effectively applied are necessary. In this context, the role of national high courts, as key actors between lower and supranational courts, is relevant. Therefore, it is argued here that recent reforms of high courts' jurisdiction redefine their role and place them in a co-regulatory position that may well contribute to the effectiveness of EU law and of effective judicial protection.

[44] Case n. 16563/11

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