DIMENSION PARLEMENTAIRE

COSAC

PLACE OF VALUES AT THE HEART OF THE SENSE OF BELONGING TO THE EUROPEAN UNION

Conclusions of the working group of the Conference of Parliamentary Committees for Union Affairs (COSAC)

June 2022

Ladies and gentlemen,

This report is the unprecedented result of a rare exercise on the European scene: for the first time, two working groups, made up of representatives of the national parliaments of the Member States of the European Union and of the European Parliament, have for several months conducted hearings and led a collective reflection on themes of common interest, while respecting the differences and identities of each.

The initiative was taken by us, the chairmen of the European affairs committees of the French National Assembly and Senate, who have, during the first half of 2022, held the presidency of what is known as COSAC - which brings together the parliamentary committees specialising in EU affairs of the 27 national parliaments of the Member States and the European Parliament -, as part of the parliamentary dimension of the French Presidency of the European Union. On our proposal, the Chairpersons of COSAC decided, at their meeting in Paris on 14 January 2022, to set up two working groups, one about the place of values at the heart of the sense of belonging to the Union, the other about the role of national parliaments in the European Union.

The aim was to work together on the various ways of belonging to the Union, which was one of the three priorities of the French Presidency. How can we pursue the cooperation and integration effort that the Member States are making by participating in the European Union without highlighting the deep ties that unite them but also without respecting the expression of their national diversity? In setting up these two working groups, our aim was to measure the differences in approach between parliamentarians from all over Europe but also to identify points of agreement that could be translated into recommendations. We are convinced that it is through a clear understanding of the differences between us that European cooperation can flourish. The Member States each have a history, an identity and a culture which have a strong European component but also include important national specificities of which the national parliaments are the primary custodians. These elements must be respected but also, in our opinion, be part of a common framework. In this respect, we believe that the national parliaments not only have the task of exercising individual control over the policy of their respective governments, but that they also have recommendations to collectively make at European level. Through its capacity to adopt contributions and address them to the European institutions, COSAC is potentially a collective parliamentary proposal force on European issues. The establishment of these working groups should enable it to better assume this role.

From this point of view, the mission has been fully accomplished. Between February and June 2022, each working group heard several times a month from political leaders or experts from various backgrounds, enabling parliamentarians to compare their points of view and measure their convergence. Each group then adopted, by consensus, a report which is the synthesis of these exchanges and a collection of proposals for action.

The conclusions you have in your hands concern the place of values in the sens of belonging to the European Union. The others are published separately. We hope you enjoy reading them!

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« *Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principle of democracy and the rule of law.* »

Extract from the Preamble of the Charter of Fundamental Rights of the European Union

Sixty-five years after the Treaty of Rome, the European Union is no longer the same as it was in the beginning. The approach described as neo-functionalist, centred on the economic dimension of the rapprochement between states, has become, through the extension of the areas of competence, the path towards a real **political community** at the service of its citizens.

It is true that popular consultations (such as the rejection of the Constitutional Treaty by referendum in France and the Netherlands in 2005) have revealed **citizens' doubts about the European project**. In most countries, voter turnout in elections to the European Parliament remains significantly lower than in major national elections. As for people's sense of belonging, it still resides mainly at the national or even local level, rather than at the European level.

However, as shown by Eurobarometer surveys, EU citizens have a strong **attachment in principle to the building of Europe**, which has been reinforced by Brexit. The peoples of Europe are bound together by a common history. They share the birth of the European Communities, conceived as a response to totalitarianism. **The fundamental attachment to peace and the values of democracy** is common to all Member States. These values are enshrined in the treaties, compliance with which is mandatory for Member States, but also for candidates for accession.

What is new is that the issue of respect for European values and the rule of law is tending to become a **source of tension between Member States**. On the one hand, values and the rule of law were explicitly anchored in primary law by the treatis of Amsterdam and Lisbon with articles 2 and 6 TUE. Two further developments that play a role in this respect are the following : the introduction of regimes limiting the rights of individuals in response to the health crisis and the adoption of legislation accused of undermining the independence of the judiciary, media pluralism and the principle of non-discrimination.

Finally, this reflection on values takes place in the context of the Russian aggression against Ukraine, which is also **a fight to defend European values**: democracy, the rule of law and the principle of non-aggression.

In the light of these elements, the consent of the Presidents of the Conference of the Union Affairs Committees of Parliaments of the European Union (COSAC), on 14 January 2022, to establish a working group on the place of values at the heart of the sense of belonging to the Union is to be welcomed. The working group is composed of members of several national parliaments as well as the European Parliament. It organised hearings of European politicians and experts from different backgrounds under the chairmanship of Ms. Sabine Thillaye, Chair of the National Assembly's European Affairs Committee.

The debates in the working group focused on three main issues:

- What is the understanding of the concepts of values, democracy and the rule of law? Are their contents sufficiently defined? If some national provisions have to be set aside for contravening superior European norms, are these norms clear enough?
- To what extent does the respect for national constitutional identities allow Member States to deviate from certain European values or to interpret them differently from other Member States?
- Are the mechanisms monitoring respect for values and the rule of law relevant and adapted to the twofold need to preserve citizens' sense of belonging around a body of values and to respect national constitutional traditions?

These debates unfolded with the aim of comparing the views of the participants on the various aspects of this issue and **promoting better mutual understanding**. There is no point in denying it : differences of approach exist between national parliamentarians, as they do between governments, on the meaning European values and the rule of law and on the means of enforcing them. The whole point of this working group was to identify possible points of agreement and to reflect the diversity of views on this subject.

It was also to make **directly operational recommendations, adopted by consensus,** in order to achieve a better understanding of the concepts and a better monitoring of their implementation.

This is the purpose of this report which was adopted by consensus[1], at the meeting of the working group on 14 June 2022.

[1] The European Parliament was not in a position to take part in the consensus.

SUMMARY OF THE DISCUSSIONS

EUROPEAN VALUES, RULE OF LAW, FUNDAMENTAL RIGHTS AND DEMOCRACY: WHAT DEFINITIONS?

The working group's debates enabled a reflection on the content to be given to the concept of European values and on their legal scope. These debates were also an opportunity to analyse how the related concepts of the rule of law, fundamental rights and democracy could be distinguished.

European values: a philosophical but also a legal concept that creates obligations for states in accordance with their national constitutional traditions

Introduced by the Lisbon Treaty, Article 2 TEU provides : "The 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 characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men."

Union values as a philosophical concept

As Professor Franz Mayer pointed out, the notion of values is primarily **a philosophical concept**. It has, according to Professor Stéphane Pierré-Caps, a subjective dimension as a reflection of a certain social consensus. Article 6 TEU, in its version prior to the Lisbon Treaty - which was replaced in substance by Article 2 TEU - referred to another concept, that of "principles", which was in this respect "legally more tangible" in the words of Professor Franz Mayer.

As Professor Pierre Bréchon indicated, a value differs from a mere opinion in that it is **hardly malleable over time**. European values are the legacy of a very long history during which principles considered universal have gradually been formed. "As Europeans, we have embraced these values to the point of making them the very essence of our identity" (P. Bréchon).

Values as a central part of the EU legal order

However, by enshrining this concept of values in primary law and by striving to list its components, the Treaty of Lisbon has given it a **normative scope**. Values are binding on the Member States and can be invoked by individuals in support of their claims, particularly before the national courts: they therefore permeate the law of the Member States.

Article 2 TEU provides that European values are "common to the Member States" in a society characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. The values form 'a binding norm of positive law' (S. Pierré-Caps) and the 'constitutional core of the Union' (F. Mayer). Compliance with these common values is thus a key element of the European collective contract and of mutual trust between Member States.

In its judgment of 16 February 2022 regarding the regulation of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, the Court of Justice recalled that the values mentioned in Article 2 TEU define the **identity of the Union** as a legal order common to the Member States. Thus, respecting them is a **condition for the enjoyment of the rights** deriving from the Treaties and the Union must be able to defend them within the limits of its powers.

It is true that Article 4(2) TEU requires the Union to **respect the national constitutional identity of the Member States**. Is the motto of the European Union not "United in diversity"? In fact, as Professor Bréchon pointed out, the differences in the perception of certain values, such as equality between women and men or the relationship with migration, are significant among European peoples.

This obligation to respect national identities does **not call into question the obligation imposed on states to respect European values.** Indeed, if this obligation introduces, according to Professor Mayer, "a sort of limit to European law", the national constitutional identity must respect the framework of values set in Article 2 TEU. Thus, for Ms. Kriszta Kovács, co-chair of the Joint Council on Constitutional Justice of the Venice Commission, Member States do not have a “blank cheque” to build national identities without taking into account European Union law.

Values as a major requirement in the EU accession process

Respect for European values is one of the conditions for accession to the Union. The Copenhagen European Council of June 1993, which defined the criteria for accession to the Union, required candidate countries to establish "stable institutions guaranteeing the rule of law, democracy, human rights and respect for and protection of minorities".

With the Lisbon Treaty, Article 49 TEU was amended to formally include respect for the values of Article 2 TEU in the criteria for membership. It would be paradoxical, to say the least, as it has been indicated, if what was required of candidate states was no longer a full obligation for Member States.

Values as a driving force for belonging to the European political project

These European values can also be the **catalyst for a sense of belonging**. The notion of "constitutional patriotism", defended by the German philosopher Jürgen Habermas, is very clarifying: it implies that a collective identity, whether national or supranational, can be based on the attachment to fundamental rights and freedoms rather than on a cultural community.

Professor Céline Spector believes that, in the face of threats of war and major crises (ecological, economic or health-related), "there is nothing to prevent European integration from creating a 'we', a common self, and therefore a feeling of belonging and collective identity": constitutional patriotism can thus be coupled with an affective dimension. To this end, she calls for the "resources of history and culture to anchor democratic loyalty and a sense of belonging", and defends the emergence in Europe of a "passion for reason", capable of bringing together close but distinct nations.

Fundamental rights: a precise embodiment of European values

European values are conveyed in the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, which became legally binding with the Treaty of Lisbon. These fundamental rights are compulsory not only for the institutions of the Union in the exercise of their prerogatives, but also for the states when they implement European law.

The adoption of this Charter continues a long-standing trend in case law in which the Court of Justice recognised, as general principles of law, the fundamental rights arising from the "constitutional traditions" common to the Member States before they were enshrined in the Charter.

As Professor Pierré-Caps has pointed out, this development is indicative of the approach taken by the Union: the Union does not intend to impose its values, but rather receives them from the Member States and incorporates them into European law by reference to national constitutional traditions.

The rule of law: an indisputable binding scope, a list of constituent rules

Although the rule of law is one of the values on which the Union is based as set out in Article 2 TEU, the Treaties do not provide a definition of this concept. Indeed, definitions by lawyers and political scientists vary, while rule of law or *Rechtsstaatlichkeit* are not exactly similar, as Professor Mayer argued.

A first definition focused on legal criteria

In a narrow conception, linked to the definition given by the Austrian jurist Hans Kelsen, the rule of law can be understood as **the obligation for a state to respect the law**. Closely linked to the principle of legality, the submission of public authorities to legal norms protects citizens from arbitrariness, on the double condition that there is a hierarchy of norms, with an independent judge sanctioning any violations. The mere fact that a state challenges the principle of primacy of Union law would put it in contravention with the principles of the rule of law.

In the same legal approach, Professor Pierré-Caps gives a somewhat broader definition of the rule of law as "a universal principle of political organisation which safeguards democracy and human rights through the intervention of a judge". Mr Tymoteusz Zych, a member of the European Economic and Social Committee's Group on Fundamental Rights and the rule of law, explains that "the rule of law is closely linked to the principles of legal certainty and stability of law, as well as to the trust of citizens in the state and the law it creates."

Building on some of these elements of definition and those updated by the Venice Commission, a consultative body of the Council of Europe, the regulation of 16 December 2020 on conditionality of European funds establishes **a list of criteria to be taken into account in defining the rule of law**: the principle of legality (which implies the existence of a transparent, accountable, democratic and pluralist legislative process); the principle of legal certainty; the prohibition of arbitrariness by the executive; effective judicial protection, including access to justice, provided by independent and impartial courts; the principle of separation of powers; the principle of non-discrimination; the principle of equality before the law.

The necessary consideration of additional material criteria in secondary law

However, the question arises as to whether the definition of the rule of law in the regulation of 16 December 2020 should not include other, more material elements. The hearings conducted by the members of the working group led to identify three such elements:

- **the rights of individuals and groups**, a point particularly raised by Mr. Tymoteusz Zych;

- **freedom of conscience and religion;**

- **the freedom of the media**, which several members of the working group wanted to be taken into account. The need to establish a European public media halfway between Arte and EuroNews was mentioned to give visibility to the European project.

Indeed, media freedom is not included in the list of criteria constituting the rule of law set by the regulation of 16 December 2020, even though this subject is taken into account by the European Commission in its annual reports.

However, Mrs Céline Spector emphasized that, as the French Enlightenment intellectual Benjamin Constant stated, "the question of press freedom and media pluralism are fully part of the definition of the rule of law".

As EU Commissioner Didier Reynders pointed out, the 2021 Rule of law Report reveals that "the media issue is of increasing concern, in particular because of the murder of journalists and attacks on journalists on social networks. In order to ensure media freedom and the effective protection of journalists, the European Commission has made recommendations on these issues to Member State governments. It proposes the establishment of mechanisms to ensure media plurality, for example through fair access to public funding or the fight against "SLAPP suits[2]" aimed at discouraging journalists' public expression.

Forms of organisation or procedures may vary between states

As Professor Mayer has pointed out, the way in which the rule of law is embodied in political systems varies from one Member State to another.

For example, the concept of **separation of powers** is not understood in the same way depending on the nature of the national political system.

Similarly, as Mr. Zych recalled, **the sources of law** are based on different legal systems in different states, between those that are linked to common law and those that fall under continental law. Depending on the state, constitutionality review may be diffuse, i.e. exercised by all courts, or entrusted to a competent court. Finally, the duality of the judicial orders, which implies the existence of an administrative court, is far from universal.

Finally, **the methods of appointment of judges** may vary - even if their election by a simple parliamentary majority is considered unacceptable. As Ms. Spector pointed out, this diversity should in any case not affect the independence of the judiciary, which "excludes disciplinary chambers and the appointment of judges by political powers".

(2) On 27 April 2022, the Commission presented a proposal for a directive on the protection of persons participating in the public debate from manifestly unfounded or abusive legal proceedings ("strategic lawsuits distorting the public debate").

A binding legal scope which cannot be opposed by a reference to national constitutional identity or subsidiarity

The Court of Justice of the European Union has enshrined the rule of law **as one of the general principles of law** binding the states and the European institutions. In the words of European Commissioner Didier Reynders, the rule of law is of 'existential importance' to the Union. Without respect for the rule of law, there would be no mutual trust between Member States: the principle of legality would be rendered meaningless and the principle of the primacy of Union law would be called into question.

As a result, the principle of subsidiarity **cannot be invoked to promote a variable application of the rules of the rule of law**. As Ms.Céline Spector reminded us, the principle of subsidiarity is applicable to the non-exclusive competences of the Union, which means that policies must be developed at the level closest to the citizens. Such a principle regulating the exercise of shared competences between the Union and the Member States is irrelevant to the respect for the rule of law, which is a requirement for all Member States.

No democracy without the rule of law

The discussions in the working group confirmed that **there can be no democracy without the rule of law**. According to Professor Pierré-Caps, the rule of law is "the culmination of the democratic process": it institutionalises the political freedoms that have themselves paved the way for democracy. On the other hand, Professor Mayer emphasized that the rule of law emerged earlier than democracy and could not be equated with it.

It follows that **it is not enough that elections are held regularly in a state for its political system to be called democratic**. The separation of powers, the independence of the judiciary and the freedom of the press are indispensable for democracy to live and flourish. Citizens cannot make informed choices without access to free, transparent information that is independent of the executive branch. The fight against disinformation thus appears to be a priority for the preservation of democratic values.

MONITORING AND CONTROL SYSTEMS FOR COMPLIANCE WITH VALUES: HOW EFFECTIVE ARE THEY?

A pile of inefficient mechanisms

Monitoring compliance with the values of the European Union, and in particular the rule of law, is based on a multitude of **mechanisms** that tend to overlap. A distinction must be made between:

- **the mechanism of Article 7 TEU**, the effects of which are potentially very powerful since the repressive aspect can lead to the suspension of a state's voting rights in the Council. However, despite two procedures launched in 2017 and in 2018 under the preventive arm, the Council has never yet ruled on the mere finding of a risk of violation of fundamental rights or freedoms, even though such a finding only requires a four-fifths majority in the Council of the Union;

- **alternative procedures** put in place by the EU institutions, such as the rule of law Framework established by the Commission in 2014 to establish a dialogue on respect for fundamental rights with a state where there are clear indications of a systemic threat to the rule of law, or the Council's Rule of law dialogues. However, these procedures lack effectiveness. In particular, the practice of Council hearings varies from one Presidency to another;

- **the annual Rule of law Report** published by the European Commission since 2020, which covers the situation in the Union as a whole as well as in each country individually. Its publication is a highlight, but it is essentially a political tool with no concrete consequences - except to alert governments and their public opinions to certain failures in the rule of law.

The resolute action of the Court of Justice of the European Union

By sanctioning national legislation that is contrary to the rules of the rule of law, the Court of Justice plays a leading role in ensuring compliance with these rules.

However, this situation is not optimal, as it fuels criticism against a government of judges in the European Union.

In order to find an alternative to the sanctions of Article 7 TEU, the Regulation of 16 December 2020 introduces a potentially powerful mechanism of conditionality of EU funds to the respect of the rule of law, since it allows the Council to suspend financial aid payments against a Member State responsible for violating the principles of the rule of law.

Although it came into effect on 1 January 2021, the Regulation has only recently become operational. Poland and Hungary filed an action for annulment before the Court of Justice against this regulation, which had the effect of suspending its implementation according to the compromise reached at the European Council of 10 and 11 December 2020. As this action was rejected by the Court of Justice on 16 February 2022, the Commission notified Hungary of the initiation of proceedings against it on 27 April 2022.

In addition to this new element, the National Recovery Plans (NRPs), which allocate the Recovery and Resilience Facility to each country, now establish a link with the implementation of reforms in line with the country-specific recommendations adopted during the European Semester.

PROPOSALS

The working group suggests that all of its proposals be adopted by the Plenary meeting of COSAC as a contribution to the European institutions and forwarded to the Conference of Speakers of the European Union Parliaments to decide on the necessary measures to strengthen interparliamentary cooperation.

PROMOTE A BETTER UNDERSTANDING OF THE CONCEPTS OF EUROPEAN VALUES AND THE RULE OF LAW AND THEIR ARTICULATION WITH THE CONSTITUTIONAL IDENTITY OF THE STATES

The concepts of values and the rule of law open up two sets of questions that need to be clarified.

The first is that of **respect for national constitutional identities**, as prescribed by Article 4(2) TEU. How should this reference to national constitutional orders be reconciled with the legal scope given by the Treaties to European values? This is a first point of debate.

Furthermore, **what precise content should be given to the notions of European values** - which can be interpreted differently depending on the country and the political and philosophical currents to which each country belongs ? **How can we better specify the content of the concept of the rule of law?** As pointed out earlier, the list of criteria in the December 2020 regulation on conditionality of EU funds is less extensive than the list taken into account by the Commission in its annual reports on the rule of law. The latter includes in its analysis elements such as media pluralism and freedom or the fight against corruption.

These uncertainties are an argument used by politicians to challenge the mandatory applicability of the rule of law. They must therefore be discussed in order to allow for a more harmonious application of EU law, in its most essential and freedom-protecting components.

Proposals

1. The working group defend the idea that the European conference on the rule of law - which it is proposed to set up (proposal 4 hereinafter) - could **discuss the content of the concepts of European values and the rule of law** and their scope in relation to the reference in the treaties to the constitutional identity of the states. The goal would be to reach a consensual understanding of the problem. The Council of Europe's Venice Commission is doing work of this kind : it seems necessary that, while basing itself on its work, the European Union should also conduct its own reflection.

2. The working group suggests that the outcome of this reflection could be used to **complement the definition of the rule of law** in the December 2020 Regulation on conditionality of EU funds : the outcome could be either a revision of the Regulation in question, the adoption of another piece of secondary legislation or the conclusion of an inter-institutional agreement.

ENSURE BETTER MONITORING OF RESPECT FOR EUROPEAN VALUES AND THE RULES OF THE RULE OF LAW

As the report has shown, the mechanisms for monitoring European values and the principles of the rule of law need to be improved. Without wishing to be exhaustive on this aspect, the working group could recommend the following.

Proposals

3. Based on recommendations made by the European Parliament, the working group could call on the European institutions to make **active use of the monitoring tools** at their disposal:

- the Council should hold more regular hearings of government representatives in a structured and open manner, with full minutes published, also within the framework of existing rule of law dialogues ;

- the Commission should systematically include recommendations to the States in its annual reports.

4. Taking up a suggestion of the Conference on the Future of Europe, the working group would welcome the **annual meeting, after each European Commission report, of a European conference on the rule of law** bringing together representatives of national parliaments, European institutions, governments, local authorities, social partners and citizens. As indicated in proposal 1, this conference would also be the place for a debate with jurists on the content to be given to the concepts of European values and the rule of law and on their scope with regard to the reference of the treaties to constitutional identity of states.

5. The Council of Europe's Venice Commission is doing valuable work in analysing the implementation of rule of law standards. It seems necessary that, while basing itself on this work, the European Union should also conduct its own reflection and **establish an independent body providing expertise and assistance to Member States.**

INVOLVE COSAC IN MONITORING THE IMPLEMENTATION OF THE VALUES AND RULES OF THE RULE OF LAW

National and European parliaments obviously have every right to monitor the way in which European values are implemented and respected. Because the issues at stake are matters of sovereignty that are of direct interest to them. But also because what is at stake are the rights of the people to which they are by nature attentive as legislators.

The parliaments of the Union must act individually through the means of control they have over the action of their government (or of the institutions of the Union in the case of the European Parliament) but also collectively by using the framework of COSAC. By providing a forum for in-depth dialogue and cooperation between national parliaments and the European Parliament, COSAC promotes a confrontation of views on issues such as European values. Through its capacity to adopt contributions and address them to the European institutions, COSAC is potentially a driving force behind proposals on issues of interest to European citizens.

Proposals

6. The working group therefore suggests that future COSAC presidencies make **respect for the rules of the rule of law and European values the subject of either a video conference** based on a hearing of the competent EU Commissioner or another European personality, or an item on the agenda of the meeting of the presidencies or the plenary session. These debates could be prepared by including questions on values and the rule of law in the bi-annual questionnaire.

It would not be necessary to deal with the whole theme at each presidency: on the contrary, it could be much more interesting to focus on one aspect of the problem each time. By including the topic of current challenges to media and democracy on the agenda of the meeting of Presidents on 10 and 11 July, the Czech Presidency fully complies with the recommendation of the Working Group.

However, as each Presidency is completely independent in determining its own work, the working group's recommendation is a mere **suggestion** and is not binding for future COSAC Presidencies – and this even if the importance of institutionalized collaboration between the past, current and future COSAC Presidencies was underlined during the work of the group.

6. The working group could also propose that:

- each assembly appoints one of its members in its European Affairs Committee (two for unicameral parliaments) to follow rule of law issues throughout the year;

- these parliamentarians form a internal COSAC **working group** which could meet once a year, for example to discuss the Commission's annual report. Under the chairmanship of the representatives of the Parliament presiding over COSAC, this working group could adopt recommendations to COSAC by consensus. It could be a prefiguration of the European Conference on the Rule of law above-mentioned (proposal 4);

- the chair of the working group could introduce discussions in COSAC on the theme of values and the rule of law.

CONTRIBUTION

Contribution from Mr. Kristof CALVO, Member of the Belgian Chamber of Representatives (Greens/EFA)

1) The question of values also raises the question of the legitimacy of negotiating trade and political cooperation agreements with countries that blithely flout them. A recent study commissioned by the European Parliament shows that half of the EU's trading partners are autocracies. The latest biennial report (like previous versions) on the implementation of free trade agreements does not refer to values once in its 41 pages.

   Thus, we find it difficult to respect our fundamental values when we negotiate agreements with Vietnam, which puts journalists in prison, when the Commission remains silent in the face of Colombia, which uses the force of private militias against the population and this violence is regular, or when we use the pretext of a development mechanism (the Generalised System of Preferences) to force the repatriation of asylum seekers to their countries of origin.

   We therefore consider it essential, as provided for in Article 3 of the founding Treaty of the European Union, that the Union respect human rights, the sustainable development of the planet, and solidarity in its trade relations with the rest of the world.

2) The fact that media freedom is not included as a criterion for defining the rule of law is perplexing, in an age of fake news, indoctrination of the Russian population, in a post-Capitol Hill world and when the Commission has stood up to a Member State to restrict the media.

MINUTES OF THE HEARINGS

Meeting of Friday 25 February, 2022

Hearing of Mr. Franz MAYER, Chair of Public Law, European Law, Public International Law and Comparative Law at the University of Bielefeld (Germany) and Mr. Stéphane PIERRÉ-CAPS, Professor Emeritus at the University of Lorraine (Nancy)

Ms. President, Sabine Thillaye (France, National Assembly). I would like to say a few words about the war 'on the doorstep of the European Union' (EU). In this context, it is important to identify our differences, find solutions, and have a genuinely shared basis on which to move forward together. Does the EU need to take a position with respect to external actors? We cannot afford to have diverging views within the EU.

I would like to extend a very warm welcome on behalf of us all to Professor Stéphane Pierré-Caps and Professor Franz Mayer, who have agreed to participate today to the first hearing conducted by our working group on the place of European values at the heart of the sense of belonging to the EU.

Before handing the floor to Professor Stéphane Pierré-Caps and Professor Franz Mayer, I would like to go over our agenda: we will be starting our work with this discussion with two professors in public law; their presentations were forwarded to you prior to this meeting. By way of reminder, Franz Mayer holds the chair of public law, EU law, public international law and comparative law at the University of Bielefeld in Germany, while Stéphane Pierré-Caps is emeritus professor at the University of Lorraine in Nancy, France.

We will start by defining one of the terms at stake, the concept of 'European values'. What are their legal and political origins? What do they consist of, and what should be their scope? What distinction should be made between the principles of democracy and those of the rule of law? How should the concept of the rule of law be defined? I am sure that you will be able to open up avenues to be further explored in response to these questions.

Mr. Franz Mayer, Chair of Public Law, European Law, Public International Law and Comparative Law at the University of Bielefeld (Germany). I will be dividing my talk into two parts, starting with some comments on the concept of 'values' and Article 2 of the Treaty on European Union (TEU), before moving on to discuss some more specific aspects of the rule of law.

Let us begin with Article 2 of the TEU. The wording of this article has its origins in the draft Constitution for Europe. Documentation recording the proceedings of the Convention on the Future of Europe contains more specific information about the precise origin of the wording of this article. The article, for the most part, summarises prior provisions and wording, some of which was in the preamble and former article 6 of the TEU.

Since the draft constitutional treaty, the article has also referred to the concept of 'values'. This is a difficult concept to define in legal terms, since it is more of a philosophical category. In the former version Article 6, the word used in German was *Grundsätze* ('principles'), including the principle of the rule of law, which is more tangible in legal terms. The article also asserts that the principles are common to all Member States. This is interpreted as a kind of principle according to which it should be ensured that the constitutional principles of the Union and the constitutions of Member States remain homogenous. In the specialist literature, reference is also made in this respect to the 'constitutional core' of the Union. Only two weeks ago, the Court of Justice of the European Union judged, regarding the conditionality regulation, that Article 2 of the TEU describes the 'constitutional identity' of the European Union, i.e. stating that the Article 2 values define the identity of the Union in terms of a 'common legal order'.

In practice, the values described in Article 2 are also important when it comes to membership. For instance, Article 49 of the TEU specifies that "any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union." Article 7 of the TEU discusses the issue of any breach of these values. The treaty makes it clear that it is not enough to subscribe to and uphold these values at the time of accession; they must continue to be implemented during membership.

Turning now to the 'rule of law'; this is not a simple concept. The term is most easily understood as meaning that laws are observed. Looking at practical conflicts that have arisen in the recent past, for instance with respect to Poland, a conflict occurs if there is a refusal to acknowledge the primacy of EU law over domestic law. This implies a failure to observe the law in itself.

Furthermore, the concept of a 'community of law' plays a role here, in particular in the German debate. Walter Hallstein devised this concept in which law takes precedence over force. The desire to renounce any primacy of force over law once and for all should also be seen in the light of the catastrophic nature of the World Wars. The fact that at the end of the day, European integration represents an aspiration for peace, in the sense that the law is invoked, has once again come to the fore in view of the situation in Ukraine. No longer allowing entire generations to fight on the battlefield and preferring instead to lock heads of state in conference rooms, until they reach an agreement, represents progress in civilisation. Ultimately, this state of affairs, as well as the fact that states are subject to judicial control and that EU Member States are accountable to the Commission, are embodiments of the idea of the community of law and the principle of the primacy of law over force.

Going further, the terms used in various languages (‘*État de droit*’; ‘Rule of law’; ‘*Rechtsstaatlichkeit*’) do not in fact mean exactly the same thing. In English, ‘rule of law’ corresponds to the idea that if a law exists, it must be observed. The German term ‘*Rechtsstaatlichkeitsprinzip*’ (‘principle of the rule of law’) has a similar sense, but also connotes with what falls within the scope of law, the corresponding keywords being ‘*Parlamentsvorbehalt*’ and ‘*Gesetzesvorbehalt*’.

To explain this to my students, I often say that the ‘rule of law’ is in fact a collection of distinct topics. More generally, it can be asserted that the rule of law is the opposite of a rule of power or despotism. That said, in German we have also created a series of more precise distinctions, including between the rule of law in a formal sense and in a material sense. The formal sense refers to aspects such as the primacy of the Constitution, the legality of the administration, judicial independence, the existence of a constitutional court and the separation of powers. The material rule of law refers to the idea of proportionality (as a legal principle), legal certainty, and the guarantee of effective protection of fundamental rights and equitable proceedings.

For the European Union, in other words for EU law, an understanding of the rule of law has also developed through the jurisprudence of the Court of Justice of the European Union. The Court has identified the principle of the rule of law as figuring among the general principles of law. The Court has gone on to embody this in particular areas, with the protection of legitimate expectations, the legality of the administration, legal certainy, the principle of precision, the principle of proportionality, the guarantee of effective legal protection and the principle of judicial independence all being parts of this principle. Naturally, understandings of what the rule of law covers may vary between Member States.

For instance, when it comes to the way separation of powers is understood, practical differences between Germany and France may be observed. In Germany, there is no difficulty in a minister also being a member of parliament, whereas in France, combining these two positions appears impossible since it is contrary to this principle.

At the same time, this shows that there is scarce uniformity. The European Union is a federal or quasi-federal entity that should reflect a degree of diversity. Having differing opinions when it comes to values is entirely acceptable. Nevertheless, some self-evident common points are required, since the concept as embodied in Article 2 is also something of a ‘common commercial basis’. Thus, any Member State in which there is no separation of powers at all, or lacking judicial independence, would no longer be abiding by the principle of the rule of law.

In conclusion, I would like to refer to an idea that is not exactly a legal notion but that is nonetheless established in constitutional law: the issue of evidence, in the sense of what may be deemed to be self-evident. There is a well-known story about determining what, in U.S. law, is no longer covered by freedom of speech and should instead be deemed simply to be ‘obscene’. The Supreme Court examined the issue of how to tell the difference, and one of the judges said the following: “You know it when you see it”.

I believe that the same applies to the rule of law. Despite the differences that may exist between individual understandings of the concept, there are some things that simply do not fulfil this principle, and you know them when you see them. Practically speaking, I find the issue of judicial independence no longer being guaranteed in Poland to be an evident example of this.

Mr. Stéphane Pierré-Caps, Professor Emeritus at the University of Lorraine (Nancy). I will divide my comments into three parts. Firstly, the origin of the concept of 'value', in legal terms, followed by some comments about values within the EU and, to conclude, a discussion of what capacity the EU might have to ensure these values are upheld.

The origin of values is quite recent, and falls within the scope of domestic constitutional law. As far as I know, the Spanish Constitution of 1978 is the first contemporary constitution to include values, in the first clause of its first article. This article provides that "Spain is hereby established as a social and democratic state, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system." It may be observed that the concept of the rule of law is linked to that of values.

Prior to that, in its jurisprudence, the German constitutional court defined the Basic Law as an objective order of values, based on Article 1 of the Basic Law proclaiming the inviolable nature of human dignity. Values therefore form the material basis of Germany's Constitution, which all state authority must abide by. The current trend is to include the concept of value in the introductory clauses of a constitution, as may also be seen in the 1997 Constitution of South Africa.

How should the term 'value' be understood here? The current understanding of the concept of 'value' did not emerge until the second half of the nineteenth century. According to the *Grand Robert dictionary* of the French language, 'valeur' means something deemed to be true, beautiful, and good in the eyes of an individual, more or less in line with how it is appraised in general by contemporary society. This implies that the concept of 'value' has both a subjective dimension depending on individual perception and an objective dimension inasmuch as it reflects a degree of social consensus. Constitutionalisation of values therefore involves a dialectic of power and law with a view to surpassing their traditional opposition.

How can power be subject to law? The answer may be found in the way the concept of 'value' is used, as public authorities set the action through legal means as their primary goal, by providing legal standing to the principles of ethics and fairness. In other words, incorporating a value system into a constitution is simply a transposition of this dialectic relationship between the rule of law and democracy.

The EU adopted this transitive relationship between the rule of law and democracy at a late stage, doing so by adding the concept of values in the introductory provisions to the Treaty on European Union (Article 2). In addition to these textual sources, the Court of Justice of the European Union (CJEU) has, by means of general principles, enshrined the values of the EU as derived from constitutional traditions common to Member States, as indicated in Article 6 of the TEU. The EU does not aim to impose its own values, but

rather to receive them from Member States and incorporate them inasmuch as they are common to the 27 Member States. This common status implies that EU Member States have previously incorporated the axiological dimension of the rule of law in their own legal orders. It is, in turn, a substantive condition on which accession to the EU is dependent, as Article 49 of the TEU now specifies.

As a result, what had been simply a political matter prior to the Treaty of Amsterdam (i.e. the political conditionality implemented during the process of accession to the EU of Central European states) is from now on a binding norm in positive law. Seen thus, the values of the rule of law common to Member States cannot be circumvented by invoking the EU's obligation to respect the Member States' national identities pursuant to Article 4(2) of the TEU. The scope of this latter provision is limited, as it is conditional on the Member State in question respecting the values specifically set out in Article 2 of the TEU.

Values recognised by EU Member States are acknowledged only if they are compatible with EU objectives. In this respect, the CJEU has enjoyed some freedom in determining what the common values of the EU are. There is a trend towards its values becoming autonomous, as embodied by the fact that they are becoming opposable to Member States and may be invoked by individuals. Indeed, combining Articles 2 and 4 of the TEU results in a value-sharing system that constitutes the axiological foundation of the EU, which ensures the principle of mutual trust.

The system whereby the rule of law is promoted and guaranteed within the EU is fundamentally grounded in a consensus on the part of Member States as to the contents, meaning, and universal scope of the values enshrined in Article 2 of the TEU. These values are those of political and constitutional liberalism. On that basis, setting aside any philosophical approach, the concept of the rule of law may be defined as 'a universal principle of political organisation that ensures democracy and human rights through the intervention of the courts'. However, today, the rule of law also appears to be the culmination of the democratic process. Therefore, rule of law and democracy are now closely linked in a way previously unseen.

The concept of the rule of law emerged in Germany in the nineteenth century in the context of a political debate about the limits of the powers of the state. It was preeminent component of liberal constitutionalism, independently of the democratic requirement. The anteriority of the rule of law over democracy is not only chronological; it is also logical, since the rule of law institutionalises political freedom, which in turn opens the way for democracy, rather than the reverse.

To conclude, while it would appear that the rule of law was a structural principle for the EU, it cannot be considered independently from democracy, with which it is now inextricably interwoven. Indeed, the EU has been unable to decide between a systemic approach, advocated by the European Parliament and to a lesser degree by the European Commission, and a case-by-case approach based on upholding the 'acquis communautaire' and effective remedy. It is not certain that the EU has the capacity to enforce respect for its values on Member States.

However, apprehending values is also something that happens within a cultural timeframe, that of Member States. Looking at conditions for accession and the way in which states in Central Europe have joined the EU, it can be observed that they were required to meet a number of conditions, specifically the rule of law and democracy. This created some unease, despite intense activity by some constitutional courts, in particular in Poland and Hungary, but was never really called into question. Everything happened as though the Central European states in question were compelled to relate to the legal requirements of the model promoted by the EU community, rather than from their own national democracies.

Lastly, the issue of reconciling positions on constitutionalism with the traditional paradigms of representative democracy based on elections is a live one. If the EU is based on its own specific values, the way these are determined, their content, and their scope should be the subject of a more genuine agreement on the part of those governed by this legal order, i.e. the people of Europe. It is they who, as the Preamble to the Charter of Fundamental Rights of the European Union notes, “in creating an ever closer union among them, are resolved to share a peaceful future based on common values.”

Ms. President, Sabine Thillaye (France, National Assembly). All our societies are founded on values. How can they be expressed in a coherent, complementary whole framework, that upholds the rule of law (not to be confused with the concept of democracy)? To what extent are these values linked to European identity? What might differentiate them from the values of other Western democracies?

Ms. Vladimíra Marcinková (Slovakia, National Council). It is very difficult to hold a discussion about the values and principles of the EU today, at a time when they are currently being tested in Ukraine. In Slovakia, we are experiencing the displacement of large numbers of families, women, and children, as our citizens are preparing makeshift beds to welcome Ukrainians fleeing the war. As we speak, one of the fundamental values that makes us European is our support for the Ukrainian people. Our actions are the reflection of these values. It appears to me to be difficult to continue our highly practical discussion of the values of the EU, at a time when the only thing on our minds is how we can help the people with whom we are intrinsically linked.

Ms. President, Sabine Thillaye (France, National Assembly). Yesterday, Europe awoke to find itself in another world; we cannot carry on as if nothing had happened. However, we must also continue our work to ensure that the terms ‘rule of law’ and ‘values’ are not hollow words. As members of the EU, we must express solidarity with our immediate neighbours and find a way to assert ourselves in response to what is happening close to our borders.

Ms. Dagmāra Beitnere-Le Galla (Latvia, Parliament). The EU was created with the aim of peace; this value transcends all others. I express my full support to Ukraine.

Moreover, in addition to being founded on culture and reason, the EU is also founded on principles similar to those upheld by France: freedom, brotherhood, and equality. Declaring these values to be universal is an important symbol. Several years ago, I attempted to persuade the French government not to sell warships to Russia. France is a symbol, and as such should uphold these values and principles. We need more practical proof that Europe does indeed uphold these values and principles in order for them to be more than just empty words. To conclude, I would like to underscore the importance of offering financial support to Ukraine, in particular for the purposes of purchasing weapons. Ukraine is fighting not just for itself, but also for the European model.

Mr. Dario Stefano (Italy, Senate). The times in which we are living have called into question the ideas and values constituting the foundations of our Union on several occasions, including on the departure of an EU Member State, together with the emergence of new destabilising factors as a result of the rise of sovereignism and new threats to security, democracy, and the rule of law. The Union has demonstrated extraordinary resilience in the face of these challenges; they have made us aware of the need to defend and safeguard constituent elements of the identity of the Union as a common legal order founded on shared values and cultural roots.

The respect, by Member States, for the common values on which the Union is founded, in particular the rule of law, solidarity, democracy, and equality, is a necessary condition for the enjoyment of the rights enshrined in the Treaties. The Union must continue to demonstrate its ability to uphold these values. The concept of the rule of law itself refers to common principles; legal security has gradually become an essential instrument in ensuring the construction, evolution, and consolidation of the 'community of law'. Having a dialogue mechanism at EU level is important, but if this dialogue does not result in practical progress, other means must be used, in particular to uphold the independence of judicial power. For instance, in the future, if we have genuinely European resources, this will require Member States to abide by the rule of law and the fundamental values of the Union. The rulings of the Court of Justice in the cases concerning Hungary and Poland are important, because they have reasserted the values on which the Union is founded and are thus a significant, additional component in the integration process.

With this in mind, what could be the best way for the European Union, its Member States, and its institutions to take action in order to ensure legal certainty is observed and to achieve genuine crystallisation of the principles and values that unite us?

Mr. Anton Hofreiter (Germany, German Bundestag). Current events show us how important the application of the principles of the rule of law is within the Union. At the same time, they also show how important it is to be clear in the face of Russia's action against Ukraine.

While I welcome the the adoption by unanimity of the measures taken by the EU in this respect, I deem them not to be severe enough. I am considering whether we should not also be exercising pressure on our national governments for there to be a boycott on Russian fossil raw materials, even though I am aware that it will be difficult for many countries to find substitutes. We should also exclude Russia from Swift as a way of upholding in the eyes of the outside world the principles which we are discussing here internally, in other words asserting that laws and treaties should be observed. I am raising the question as to whether, in our capacity as committee chairs, we should attempt to adopt a common declaration to be addressed to the Commission stating that we are expecting a third raft of even more severe sanctions including the measures I have referred to.

We should also insist more on these principles being better enforced internally, especially as we now find ourselves having to express them in credible fashion externally. With this in mind, I call on us all, and more particularly those Member States that are finding it the most difficult to comply, to bear in mind that any failure to uphold the principles of the Treaties that we have developed and adopted together will strengthen the position of our adversaries in matters of foreign policy. The most dangerous of these opponents is Putin, whose horrific actions we are currently witnessing. I would like them to share this observation with their national governments; we should all be asking our national governments to require even stricter common sanctions against Russia, including those I have listed.

Mr. Andrej Černigoj (Slovenia, National Assembly). With respect to Ukraine, the threats and financial sanctions against Russia are insufficient. We must respond swiftly and unambiguously.

With respect to today's discussion here, it is important to emphasise that we are talking about values and the rule of law in sovereign states. The EU embodies unity in diversity, and we must respect that. It was created by the founding fathers for countries to encourage and help one another, not to accuse each other.

Furthermore, we should not forget the institutions in Strasbourg: if the Council of Europe were to identify a breach, it would be up to the European Parliament to address that. However, the European Parliament cannot be both judge and executioner. The values of the EU are very important, as is the understanding of human life. In this respect, while I believe all individuals to be important, I also believe that small groups of individuals are attempting to impose their beliefs on us, including, for example, the inclusion of the neutral gender. These beliefs will lead us to disaster and do not reflect Europe as we know it.

Ms. Eva Biaudet (Finland, Parliament). I do not agree with the previous speaker. I believe that we need values that protect women's rights and freedoms. I believe that we should discuss such issues, but perhaps on another date.

Today, we are all in shock at what is happening in Ukraine, and that does indeed make it difficult to concentrate on other matters. However, the values of the EU and the rule of law are more relevant than ever. Indeed, any concentration of powers may endanger human rights, democracy, and freedom. It is extremely important for the EU and its Member States to be united in respect of measures and sanctions to be taken against Russia, and united in case of Russian countermeasures. We should also be in a position to discuss the effectiveness of such measures. We will have to face challenges to freedom, democracy, and the respect of sovereign states, as well as the right of the Ukrainian people to decide on their future.

We must also continue to uphold our values and control mechanisms. One of the values presenting an immediate challenge is the decision to share the responsibility of welcoming refugees. It will probably be one of the most difficult decisions to implement in practice.

Challenges relating to human rights and the respect for our values are fundamental. Nobody will uphold them if we do not.

Ms. Roelien Kamminga (Netherlands, House of Representatives). The current situation reveals the need for the EU to be ever more united and in a position to send a clear message.

Moreover, it is vital to discuss how Article 2 of the TEU is interpreted. This article is essential for the rule of law since it represents one of the foundations of our democracy and the way we cooperate. Moreover, we now have new mechanisms in respect of the rule of law, and a a more complete toolbox. We need to recognise our differences, which are part of the appeal of the EU, but Article 2 of the TEU should serve as a starting-point, on the basis of which we can find common ground and thereby have more effective instruments at our disposal.

Ms. Olga Kefalogianni (Greece, Parliament). Unfortunately, our session today is taking place in very unusual circumstances. The Russian act of aggression is a breach to international law and a threat to global stability. This war endangering millions of lives is a frontal attack on democracy.

We are fortunate to have two academics specialising in issues relating to the rule of law with us for this second session, who are able to shed light on the definition of the rule of law with the meaning of EU law.

In Europe, we have quite different legal and cultural traditions when it comes to the concept of the rule of law. However, we are all bound by shared principles that can serve as a basis for a European definition of the concept. Article 2 of the TEU states that the EU is founded on the values of human dignity, freedom, democracy, and equality. Moreover, Article 6 of the TEU assigns the same value to EU Treaties as to the Charter of Fundamental Rights of the European Union. This Charter has endured for several generations, and includes rights in a broad range of categories.

The rule of law and democracy are two closely linked concepts. As the European Commission recently specified, there can be no democracy or respect for fundamental rights if there is no respect for the rule of law, namely respecting the separation of powers. It is vital to fight to preserve these rights. To do so, there needs to be a synthesis of the various legal cultures and traditions of all EU Member States. With this in mind, I welcome the proposal to discuss women's rights and support it being included on the agenda.

Ms. Katarina Amitzboll (Denmark, Parliament). I would like to pay a tribute to the Ukrainians, who are victims in this war. This act of aggression will result in another huge wave of migrants in Europe. Taking care of them will require engagement on the part of all Member States, not simply border countries.

I also welcome the proposal for a working group on women's rights. To implement this, we must clearly define its remit, in order to define the goals to be achieved, the resources, and the tools are available to us.

More generally, we must protect and promote our values, at the risk of seeing them gradually disappear. We must discuss our ideals with external parties in order to preserve the European project, which is currently being challenged by the war on our doorstep.

Ms. President, Sabine Thillaye (France, National Assembly). Thank you all for expressing your solidarity with Ukraine. This war is indeed an attack on our principles. It is vital that we accelerate our work on defining our common values.

Mr. Franz Mayer. Thank you very much, I will respond to the contributions in the order in which they were made. Firstly, I would like to come back to some points raised by Mr. Pierré-Caps.

The Spanish Constitution of 1978 does indeed include a list of principles, including that of the rule of law. I would like to point out that in part, this list was taken from the German Basic Law of 1949, Article 20 of which makes the rule of law a cornerstone of the German constitutional order. Since then, there has indeed been a long tradition of debate on this topic in Germany, including in jurisprudence, as Mr. Pierré-Caps rightly stated. Very early on, the Federal Constitutional Court talked about the Basic Law in terms of an "objective order of values", a concept that has significantly influenced German constitutional discourse. However, that does not mean that this concept has been devoid of criticism. As early as the 1950s, it was criticised by Carl Schmitt, who referred to it as a "tyranny of values". It was well known that he was a difficult person, but despite him no longer being a professor after 1945, he continued to exert significant influence. What I note in his criticism is that inevitably, when one talks about values, the question arises as to what these values are and who defines them.

I would now like to move on to the question of the relationship between values and national identity as referred to in article 4 of the TEU, this issue having been raised several times. Article 2 of the TEU refers to “values common to the Member States”. At the same time, Article 4 expressly states that the EU respects Member States’ national identities, which include national constitutional identities. I believe that the recent jurisprudence of the Court of Justice of the European Union shows that there is a relationship between these two articles, rather than a juxtaposition. This is also clear from the rulings handed down in recent weeks, for instance on conditionality.

From this it follows that Article 2 is the broad framework within which Member States may invoke national constitutional identities by virtue of Article 4. In other words, Article 4 and its reference to Member States’ national constitutional identity allows them to impose some sort of limit on EU law, but this national constitutional identity must nevertheless be within the framework of the values referred to in Article 2. A Member State cannot simply assert that “in our country, national identity and therefore constitutional identity does not allow for separation of powers” and use this argument to justify actions contrary to the common values. In such instances, the values in Article 2 take precedence.

Another point raised was the relationship between the principles of the rule of law and democracy. This has been a long-standing debate in Germany due to the long tradition of these two principles and the fact that they are specified in Article 20 of the Basic Law. There is some overlap between the two. In the German concept of the rule of law, some democratic requirements must be met, such as rules about what must be decided by the Parliament (the *Parlamentsreserve*). This forms part of the principle of the rule of law, and of the principle of democracy.

The question then becomes one of how to transpose such a thing to the EU level. We have the European Parliament, but EU democracy is more complex; national parliaments also play a role. As a result, it is difficult to transpose the existing concept to which I have referred directly to EU democracy. It could thus be worthwhile drawing a clear distinction between the two principles at this level, distinguishing what pertains to the rule of law and what pertains to democracy at that level.

I would now like to say a few words about the relationship between the principles of the rule of law and social values, as referred to by the Chair. Once again, I would like to emphasise that a distinction can be made between the rule of law and democracy. To examine what a specific European identity might be in that respect, and what the particularity of the European concept of the rule of law might be, I would like to come back to the concept of ‘law before power’. This idea, which emerged from the horrifying experience of World Wars in Europe, is not necessarily to be found in other constitutional regions across the world, or at least not so coherently. In my opinion, the notion of ‘law before power’ could be a European hallmark. On that note, I would like to discuss the link between the rule of law and the current situation in Ukraine.

The concept of the rule of law is closely related to the principles of international public law. These rules, which we must all observe, provide a harmonious framework for our relations. Establishing rules with respect to the rule of law necessarily entails the existence of sanctions. However, this becomes more complex in the context of a community with differing domestic laws. To date, this is not an EU competence, but a Member State competence. I see this as a significant limit.

At present, some Member States are in disagreement with the EU about the definition of the rule of law and on the way our internal differences are dealt with. The fact is that conflicts within the EU benefit third countries; the issue of the rule of law clearly has external aspects, too.

For instance, the rule of law implies that international public law is observed. The EU also serves as a role model for other countries. It is supposed to act in line with its declarations, in other words it is not supposed to say one thing and do another. It is clear that Vladimir Putin's worldview is the absolute opposite of the EU's concept of the rule of law. In both his words and actions, the Russian president is applying the law of the jungle.

The European approach, on the contrary, is not to respond with brute force. In this instance, the situation is clear-cut: there can be no possible compromise between the way international relations were conducted in the 1990s, following the law of the jungle, and the rule of law as it is defined today. A choice must be made.

Part of the attraction of the current approach to the rule of law resides in the prospect of a formal definition. The issue is not to deal with matters of substance in detail. Of course, there are limits to this approach, in particular as regards fundamental rights. As part of the rule of law, fundamental rights eventually affect highly sensitive subjects on which Member States have differing views, such as abortion. It is therefore very difficult to achieve a consensus regarding of fundamental rights.

Article 2 of the TEU forms the legal basis for the 'contract' between countries joining the EU and the EU itself. No country is obliged to join the EU, a community that is based on free will. If a Member State no longer wishes to abide by Article 2 of the TEU, it is free to leave the EU by triggering Article 50 of the TEU, as the United Kingdom has done. In this regard, by joining the EU, countries make a 'contractual' commitment to comply with Article 2 of the TEU.

Issues relating to the rule of law can also be examined in terms of its link with democracy. For instance, constitutional courts are wholly antidemocratic. Not all EU Member States have one; for some, the idea of having a constitutional court that could go against the will of the democratic majority is inconceivable. However, this is not the case in Germany or in most other Member States that have previously experienced dictatorships. For them, a strong constitutional court is thus another component of the definition of the rule of law; however, this does not necessarily mean they believe that for a given state to be democratic, it must have a constitutional court.

Mr. Stéphane Pierré-Caps. Neither 'values' nor 'the rule of law' are merely abstract concepts. Current events in Ukraine are a real-life fight to defend our values. Vladimir Putin finds intolerable the idea of aspirations to institutionalise a democratic power on Russia's doorstep.

However, there are also threats to values within the EU itself. For instance, in France, the presidential campaign has revealed a number of candidates whose manifestoes advocate breaches of the EU Constitution and EU law. The media hardly mention this and the public is not reacting to these developments. This is a genuine source of concern; what is happening on the borders of the EU could also spread from within.

Nevertheless, the EU already has the necessary instruments to protect fundamental rights,of the democracy, and the rule of law. In this respect, the CJEU has ruled that Article 19(1) TEU is an implementation of Article 2 of the TEU with respect to the scope of the rule of law[3]. This illustrates the way in which the CJEU is attempting to make the values of Article 2 of the TEU a reality in the various fields covered by the activity of the EU.

It is also a way for the CJEU to pay tribute to the major role played by certain constitutional courts in the process of democratic transition of their respective countries. The role of constitutional courts, which lack democratic legitimacy, is to exercise a power of control rather than action. In this respect, the CJEU, a constitutional court in the broad sense of the term, is doing its job.

With respect to arguments in favour of the use of the mechanisms specified in Article 7 of the TEU, i.e. sanctioning Member States that contravene EU values, the difficulty of establishing a consensus should be noted. Furthermore, in terms of the rule of law and values, it is paramount to preserve the relationship between Member States and the EU, in other words constitutional congruence between the EU and its Member States. In this respect, it is important to educate younger generations about what European construction means for Europe: peace and prosperity. The EU must make itself accessible to Member States, just as Member States should facilitate the work of the EU.

Doing so opens up much broader, forward-looking prospects; the EU should take the lead in strengthening integration and democracy. National populations need to be more involved in European construction, so that they become aware that there is no future in being inward-looking. Activating legal mechanisms, however sophisticated they may be, is not how congruence between Member States and the EU will be preserved. This can rather be achieved by developing the means for citizens to become more engaged in European construction. This task of education appears significant in that there is clearly a degree of suspicion or in some cases rejection of the EU among national populations, fuelled by populism.

[3] CJEU, 27 February 2018, *Associação Sindical dos Juízes Portugueses/Tribunal de Contas*, C-64/16.

Furthermore, EU leaders need to realise that the EU must take responsibility for its own defence, with the means to provide effective and dissuasive defence. A more offensive concept of democracy would not only allow the EU to defend itself against threats that are no longer simply potential but now real and present, but also to uphold its values. Indeed, democracy is not simply a question of highlighting a number of values and principles. It also involves having the ability to defend oneself against enemies.

Ms. President, Sabine Thillaye (France, National Assembly). The role of this working group is indeed to address the issue of how to engage European citizens more and how to nurture this sense of belonging.

In the light of our discussions, I could sum up by reasserting that despite its shortcomings, the EU is a community of law. In view of what is happening in Ukraine at present, we are engaged in a fight to defend our values, and doing so resolutely. Going forward, we need to examine whether our democracies have the ability to defend themselves against multiple threats, both from within and from without.

Meeting of Tuesday 8 March, 2022

Hearing of Mr. Francesco BESTAGNO, Professor of European Union Law, Catholic University of Milan, and Mr. Pierre BRÉCHON, Professor Emeritus of Political Science at the Institut d'Etudes Politiques of Grenoble

Ms. President, Sabine Thillaye (France, National Assembly). The COSAC meeting held last week was a great success, as it led to the unanimous adoption by the EU delegations of a declaration of support to the Ukrainian people. It was also supported by several observer states. The promotion of peace and diplomacy as means of resolving conflicts in an international order based on law: these are certainly founding values of the European Union, and they are spontaneously recognised by all.

The question we will be addressing more specifically today is the material definition of the Union's values. What content can we give to this notion? What consequences does this definition have on the sense of belonging of European citizens, and what should we conclude from it?

On 8 March, International Women's Day, it seems to me that the values linked to real equality between women and men deserve to be reaffirmed. This is all the more necessary in times of conflict, when threats of regression concerning specific rights and violence are particularly topical.

To continue our reflection, we have invited two experts. Professor Francesco Bestagno, who will not be speaking here as a member of the Italian Permanent Representation to the institutions, but rather because of his great expertise in European Union law, a subject he teaches at the Catholic University of Milan. We also welcome Mr. Pierre Bréchon, Professor Emeritus of Political Science at Sciences Po Grenoble, who has studied and written extensively on the issue of European values.

Mr. Francesco Bestagno, Professor of European Union Law at the Catholic University of Milan. I would like to talk about the variety of actions that the European Union is putting in place to strengthen the protection of the rule of law. The European Commission is multiplying actions of this type. Thus, after the judgment of the Court of Justice of the European Union of 16 February on conditionality related to the rule of law, the Commission adopted on 2 March the guidelines for the application of this regulation.

The Commission has considered several levers, in the framework of its "rule of law toolbox". Despite the existence of these tools, the question is how to make them effective against Member States that behave in a way that undermines the principle of the rule of law.

First, a distinction must be made between the rule of law and the 'Union of law', a term coined by the CJEU. It is certain that this Union of law functions in a similar way to a nation state when it comes to the enforcement of the rule of law by public authorities. In the EU, enforcement of the rule of law by the institutions falls to the CJEU, which has the power to exert judicial review over their actions. The real problem of the rule of law in the EU arises when this supranational organisation demands respect for the rule of law from the Member States, which are sovereign states with their own constitutional order.

However, the Treaties provide for instruments to enforce the rule of law by Member States. The Commission can, on the one hand, initiate an infringement procedure against a Member State before the CJEU and, on the other hand, activate the procedure under Article 7 of the Treaty on European Union. The latter instrument has been activated twice against Poland and Hungary. The procedures are still ongoing. In addition, the General Affairs Council maintains a dialogue with all parties concerned.

The "toolbox" complements these instruments. It has been built up from 2012 onwards with the multiplication of additional tools. The last three tools are the most important: the structured dialogue on the rule of law in the Council, the rule of law review cycles with the annual rule of law report and the regulation on the rule of law conditionality mechanism.

In the annual reports, the Commission explains its conception of the rule of law through four pillars: the independence of the judiciary, the fight against corruption, freedom of information and the media, and the system of checks and balances.

The conditionality mechanism of the rule of law has already caused a conflict between the institutions. The European Parliament brought an action for failure to act against the European Commission under Article 265 of the Treaty on the Functioning of the European Union (TFEU) because the Commission had not activated the regulation, which was applicable from 1 January 2021. The publication of the guidelines on the application of this regulation opens the way for a possible decision not to finance a Member State in the event of a violation of the principles of the rule of law.

In the current international context, in the face of serious violations of international law, the European Union has acted in accordance with the law because European sanctions can be challenged before the Court of Justice.

Ms. President, Sabine Thillaye (France, National Assembly). You have anticipated our work by mentioning the European Union's toolbox. We are now going to look at the question of the material definition of the values linked to the European Union.

Mr. Pierre Bréchon, Professor Emeritus of Political Science at the Institut d'Etudes Politiques of Grenoble. I will first try to give you a definition of the notion of European value. Then I will draw up a list of these values. These two prerequisites will enable me to answer the following question: are we attached to the values set out in the European treaties, or to values rescrited to a particular geographical area?

First, our values are embedded in our “internal software” and define us in all our actions and beliefs. Contrary to an opinion, a value is not malleable over time.

The values defended and promoted by the Union are listed in the Treaty on European Union and more precisely in Article 2. These values are the legacy of a very long history in which universal principles have gradually taken shape. As Europeans, we have embraced these values to the point of making them the very essence of our identity. These include the values of democracy, all fundamental social rights, the righs of the defence, equality and others.

We see in the study I shared with you that Europeans still identify more with their national and local identity than with these "European values". They are more attached to their nation state than to the notion of "world citizen". As indicated in recent Eurobarometers, those who consider themselves to be European citizens represent a minority. Furthermore, attachment to European identity does not depend on how long a country has been a member of the European Union, but on other socio-cultural factors.

Concerning the definition of a 'European', the Eurobarometer that I am sharing with you shows that the attributes that allow people to identify with a European culture are more or less represented, or important, depending on the geographical area. For example, religious affiliation is a more significant element for Eastern Europeans than for Western Europeans.

In addition, overall trust in the European Union changed significantly between 1990 and 2007. There was a significant decline in the late 1990s, but this did not lead to an overall lack of trust. The reason for this is that our lifestyles are increasingly affected by Brussels policy and the end of the permissive consensus of the time.

To conclude, I would say that the European Union has a very rich range of values on which it can draw to define its own identity. It is within the Member States that these values are promoted. However, surveys show that today's heads of state find it difficult to preserve some of these values and to promote them among their citizens. Again, geographical differences are marked. The issue of immigration is not perceived in the same way in all countries. The same is true for gender equality. The construction of a European feeling, that of being a people together, could only be established in the long term, thanks to in-depth institutional work.

Ms. President, Sabine Thillaye (France, National Assembly). Indeed, the construction of a European sense of belonging must complement the national identity.

Ms. Eva Biaudet (Finland, Parliament). It is interesting to consider the opinion of women on the issue of European values. Women want the European institutions to work more on the issue of gender equality and women's rights in general.

The Istanbul Protocol is a privileged tool to fight the scourges that women suffer today, such as domestic violence. This instrument is a test of how far we are prepared to go to defend women's rights.

We are at the beginning of a new stage where we must concretise these efforts by giving a clear definition to European values, currently undermined by the war in Ukraine. We must respond to the demands of our citizens and fully implement the Istanbul Protocol. We could learn important lessons about ourselves.

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). I would like to question you first of all about the rule of law mechanism. What are the first conclusions after just over a year of operation? Also, in the light of these conclusions, how can it be made more effective? Finally, how could this mechanism be extended to other EU institutions?

Mr. Anton Hofreiter (Germany, Bundestag). The figures mentioned above are recent and are likely to change rapidly with the crisis in Ukraine. We must reaffirm that cohesion is essential and that democracies must support each other against attacks. A positive aspect of this crisis is the strengthening of cooperation and cohesion in Europe. The different European countries will only be able to withstand this type of crisis if cohesion works at all levels, including at the level of citizens.

Mr. Pierre Bréchon. Concerning gender equality, an interesting flash Eurobarometer was published a week ago in view of International Women's Day. Moreover, the data from the survey on the values of Europeans show that the demand for equality between men and women is very strong in the Nordic countries, it is strong in the West of Europe but it is weaker in the South and even weaker in the East. Thus, these data show that historical traditions continue to have an effect today. Values are deeply rooted and do not change in a quick and immediate way.

As for the second intervention, a value system can undergo cyclical changes, as the war in Ukraine shows. This war is leading to reactions of solidarity towards refugees but also towards the defence of the rule of law and democracy. However, we should not overestimate these cyclical developments, which often lose their importance once the crises have passed. Solidarity increases in times of crisis, but it is not necessarily sustainable, as we saw during the covid-19 pandemic.

Mr. Francesco Bestagno. Concerning the first intervention on the Istanbul Convention, it must be stressed that an effort is being made at the level of the institutions to achieve the ratification of the Convention. The Court of Justice of the European Union has qualified the Convention as a mixed agreement, thus requiring ratification by the EU and all Member States. If ratification is not possible, the agreement will enter into force as an incomplete mixed international agreement. However, in this case it would still have legal force and would be important for the protection of women's rights.

Regarding the second intervention, one of the tools could be the forthcoming Rule of Law Report 2022, which contains many recommendations. National parliaments could request an exchange with the Commission to discuss the follow-up of the implementation of the recommendations in all EU countries. The Commission is open to dialogue and could provide guidance on how best to achieve the objectives set out in the recommendations. As regards internal EU mechanisms, the Regulation on rule of law conditionality will soon apply. At this stage, an exchange with the European Parliament would be beneficial. Dialogues between the European Commission, the European institutions and national parliaments are essential and should continue.

Finally, with regard to Mr. Bréchon's speech on solidarity and common responses to the exceptional situation in Ukraine, I believe that these responses are a positive signal. However, we must also take into consideration the need to maintain the mechanisms in place and to continue to issue regular communications and recommendations from the institutions. Only in the long term will we be able to create a common awareness that will enable us to deal with exceptional situations in the future but also to deal with everyday situations.

Ms. President, Sabine Thillaye (France, National Assembly). Our discussions are conditioned by the war in Ukraine led by Russia, which in a way also translates into attacks on our areas of freedom, and our area of law. However, we have managed to put together, albeit imperfectly, a space that is governed by law and based on common values.

Our next meeting will be an opportunity to have an open discussion on what we have learned from these round tables and how these reflections can contribute to the definition of "value" and "rule of law".

Meeting of Tuesday 22 March, 2022

Exchange of views between the members of the working group

Ms. President, Sabine Thillaye (France, National Assembly). Our meeting today is dedicated to an exchange of views on the lessons to be drawned from the first hearings and the future activities of the working group. A note has been sent to you showing the main ideas arising from our first three meetings.

Three key concepts have been at the heart of our discussions and our hearings have tried to better define them: European values, the rule of law and democracy. As regards European values, as Professor Mayer pointed out, this is a philosophical concept. However, by enshrining this concept of values in the body of the treaties and by endeavouring to list its components, the Treaty of Lisbon has given it a legal scope.

Article 2 of the Treaty on European Union states that European values are “common to the Member States”. In a recent judgment of 16 February 2022 concerning the regulation establishing a conditionality mechanism, the Court of Justice recalled that the values referred to in Article 2 of the TEU define the identity of the Union as a legal order common to the Member States, that respect for them is a condition for the enjoyment of the rights deriving from the Treaties and that the Union must be able to defend them within the limits of its powers.

It is true that Article 4(2) of the TEU obliges the Union to respect the national constitutional identity of the States. Nevertheless, this obligation to respect national identities cannot, according to the professors we heard, call into question the obligation of the States to respect European values. As they pointed out, respect for European values was one of the conditions required of candidate countries for their accession to the Union.

As Professor Mayer points out, the concept of the rule of law is not an easy one. It is part of the values on which the Union is based. However, the Treaties do not define the concept. As the speakers recalled, the Court of Justice has enshrined the rule of law as one of the general principles of law which is binding for the Members States and the European institutions. The December 2020 regulation on conditionality of EU funds gives a comprehensive list of criteria to be taken into account in defining the rule of law: the principle of legality; the principle of legal certainty; the prohibition of arbitrariness by the executive; effective judicial protection, including access to justice, provided by independent and impartial courts; the principle of separation of powers; the principle of non-discrimination; the principle of equality before the law.

As Professor Meyer has pointed out, however, conceptions of the rule of law may vary from one Member State to another. For example, the concept of the separation of powers is not understood in the same way depending on the nature of the national political system.

The notion of the rule of law also appears to be closely linked to that of democracy. According to Professor Pierré-Caps, the rule of law is even “the culmination of the democratic process”: it institutionalises the political freedoms that have themselves paved the way for democracy. The notion of the rule of law thus appears to be consubstantial with that of democracy, while being based on distinct criteria.

In this context, a number of questions arise. To what extent can respect for national constitutional identities allow Member States to deviate from certain European values, such as gender equality, or to interpret them in a way that differs from the common interpretation adopted by the other Member States? Some consider that it is difficult to refer to the notion of the rule of law because of the uncertainties surrounding its definition. Is this analysis shared by the members of the working group? Media freedom and the fight against corruption are not included in the list of criteria for the rule of law set out in the December 2020 regulation, even though these subjects are taken into account by the European Commission in its annual reports. Should media freedom and the fight against corruption be included in the definition of the rule of law? Finally, can democracy exist without the rule of law?

Mr. Gaëtan Van Goidsenhoven (Belgium, Senate). The various hearings were very enriching and enabled us to draw two lessons. Firstly, it appears that the European Union, both in its conception and in its existence, conveys our values. However, these values can highlight oppositions within the Union. Thus, through its institutional architecture and legal coordination, the European Union must be both the guardian of these values at the entry point and the arbitrator within it. Although we question the capacity of our institutions to enforce these values within our Union, the judgment of 16 February 2022 of the Court of Justice of the European Union on the conditionality of EU funds was a strong signal sent to our partners in the context of the war in Ukraine. In this respect, these two current events seem to reinforce the fact that the Union is capable of enforcing its founding principles.

Furthermore, the interviews mainly focused on the relationship between European values and the Member States. However, it would be necessary to draw up an in-depth report on the importance of these values for our fellow citizens. The various experts stressed the transfer of certain national principles to the common base of the European Union which could, in the long term, lead to an overlap between national and European principles. It would therefore be relevant to study the question of the attachment of our fellow citizens to European values.

Finally, the way in which the European Union implements these values must be given our attention. The question that arises concerns the respect of our common principles, which today is implemented in a very vertical way. However, our societies today are in constant demand for transversality and participation.

Ms. President, Sabine Thillaye (France, National Assembly). The question of individual attachment to values is very important. However, how can we measure it? We need to find out if there are any studies on this subject.

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). The reflection on how to make the relationship between the values of the European Union and our political choices closer is particularly urgent. The role of parliaments is central, especially in the dialogue with our governments. As the European Commission has pointed out, it is necessary to deepen this dialogue, taking into account the recommendations made by the Commission to improve the mechanism for protecting the rule of law.

A second important point is the sense of belonging to the European identity. This identity is linked to the founding values of the Treaty on European Union, but also to the transparency and political responsibility that must link the European institutions to the citizens and public opinion. It is necessary to strengthen all means of communication to better inform our citizens about the activities of the European Union bodies. For example, the European Parliament, in plenary sessions, must inform and share European values. We also have other useful instruments, such as the Conference on the Future of Europe, to help make the values behind European integration more concrete.

Finally, in the dramatic context of the war in Ukraine, we must not forget the values that form the basis of our economic and social model. This model is unique in the world and we have a responsibility to safeguard it, including the values laid down by the European Court of Justice, such as the right to health, the concept of fair work and social assistance.

President Sabine Thillaye (France, National Assembly). It is indeed very important to emphasise transparency, especially at the Council level. We must also ensure the link, in the constituencies, between our citizens and the European institutions to allow the dissemination of European values.

Mr. Anton Hofreiter (Germany, Bundestag). The ruling of the European Court of Justice on the rule of law conditionality mechanism underlines the problems faced by some of our Member States. Democracy and the rule of law are particularly under threat in Hungary and Poland. Corruption is also widespread: the judgements of the Polish Constitutional Court show that Polish courts are no longer independent.

So, what will happen after our debate? What can we do to safeguard these values? What can the European Commission do?

Our discussions are a good start, but there is a need to find an answer to deal with this problem, as it affects many national parliaments.

Ms. President, Sabine Thillaye (France, National Assembly). One of the reasons for the existence of this working group is to establish a dialogue at the level of national parliaments and to be able to agree on a definition of “European values”, “rule of law” and “democracy”. For example, can democracy really exist without the rule of law? Should media freedom and the fight against corruption be included in the list of criteria for the rule of law?

Mr. Gaëtan Van Goidsenhoven (Belgium, Senate). These questions are fundamental. A democracy could not exist in the long term without the rule of law.

Ms. President, Sabine Thillaye (France, National Assembly). One of the arguments for the existence of democracy without the rule of law is that representatives have been freely elected, which gives them a certain legitimacy. However, this argument can be dangerous.

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). A democracy without the rule of law cannot exist because this situation is contradictory. A citizen must express a free and informed choice, especially concerning a value system or a political system. However, this citizen must have transparent access to this information in order to understand the relationship in society between national and European institutions. If the citizen does not have access to this information, then he or she does not have the possibility to determine which values he or she wants to defend and how these values can be reflected in concrete political choices. Thus, at the time of the elections, they will not be able to exercise their right to vote in a democratic way.

Ms. President, Sabine Thillaye (France, National Assembly). In order for citizens to be well informed, it is necessary to have free and independent media. In your opinion, should media freedom be included in the list of criteria for the rule of law?

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). Media freedom is fundamental. In the Council of Europe, there is a lot of debate on this subject. We must protect the work of journalists, including by providing them with the economic means to continue to exercise their profession. It is fundamental to put media freedom and the training of journalists at the centre of the rule of law, including the ethical aspect. Social networks and the expansion of the means of communication are today also essential instruments for safeguarding democracy.

Mr. Davor Ivo Stier (Croatia, Parliament). A democracy cannot exist without the rule of law and full respect for the law. An idea is emerging in Central Europe that Christian democracies could be opposed to liberal democracies. This idea is false and is based on a doctrine that tries to connect the teachings of the Church with liberal democracy. Furthermore, when we speak of democracy and the rule of law, we must emphasise that this is a Western understanding of these concepts, which refers to our liberal democracies. However, there are other types of regimes that are defending themselves as democracies and are in fact autocratic or totalitarian regimes.

So, when we talk about a democratic system, a balance of powers is necessary. This balance includes the independence of the judiciary, freedom of the press, freedom of thought and religion. The rule of law is intrinsically linked to this idea of liberal democracy. We need to focus on this specific issue rather than dealing with European values in too general a way.

Ms. President, Sabine Thillaye (France, National Assembly). The concepts of rule of law and democracy are therefore closely linked. A rule of law cannot exist without democracy, although some people say that a democracy can exist without the rule of law.

Mr. Anton Hofreiter (Germany, Parliamentary Assembly). Media freedom should be one of the criteria for defining the rule of law. Another criterion must be the independence of the judiciary. I would like to submit to you the idea of approving a text in which we can present our common positions.

Ms. President, Sabine Thillaye (France, National Assembly). I support this idea and I will submit a questionnaire to help determine the points on which we agree.

Meeting of Tuesday 12 April, 2022

Hearing of Ms. Céline SPECTOR, Professor of Political Philosophy at the Sorbonne, and Mr. Tymoteusz ZYCH, Director of the Polish *think tank* Logos Europa

Ms. President, Sabine Thillaye (France, National Assembly). Our meeting is topical as the meeting of European Affairs Ministers is being held today in Luxembourg. The ministers will discuss the European Commission's annual reports on the rule of law in several countries, including Luxembourg, Malta, Austria, the Netherlands and Hungary. In due course, I would like to hear your views on the triggering of the mechanism for the suspension of EU funds on 5 April by the European Commission against Hungary.

Today's round table debate brings together two experts, Ms. Céline Spector and Mr. Tymoteusz Zych, who will help us to better understand the concepts of values, democracy and the rule of law. We are thus concluding the first phase of our work on understanding these concepts. We will start the second phase on the implementation of rule of law rules on 26 April with the hearing of Didier Reynders, European Commissioner for Justice.

Ms. Kriszta Kovács, who has been a senior advisor to the Hungarian Constitutional Court and co-chair of the Joint Council on Constitutional Justice at the Venice Commission, is unfortunately unwell and will not be able to join our discussions.

I will first give the floor to Ms. Céline Spector, Professor of Political Philosophy at the Sorbonne. You have recently published a remarkable book "*No Demos? Souveraineté et démocratie à l'épreuve de l'Europe*", which I recommend everyone to read. You advocate the advent of what you call "a European federal republic", a notion that is being discussed within the European Union. The emergence of a Europe capable of asserting its political and military power and defending its universal values seems necessary to you.

However, the traditional framework for expressing sovereignty seems obsolete to you. In your view, European integration has given rise to a new political form that combines the prerogatives formerly attributed to state sovereignties, such as the right to mint money or to control its borders. At the same time, you point out the risks of this situation, namely the erosion of national sovereignties before a full and complete sovereignty at the level of the Union has been established.

I hope that in saying this I have not misinterpreted your views.

Ms. Céline Spector, Professor of Political Philosophy at the Sorbonne. The Union's values are not negotiable. They have gradually become constitutionalised and form the vital basis of our association. In other words, they are the foundation of the accession process. As the República judgment makes clear, national identity cannot justify failure to respect the Union's values. Yet we face a double risk: the challenge to the rule of law in some Eastern countries and the ineffectiveness of universal values as a catalyst for a sense of belonging.

First of all, it is necessary to revisit the meaning of "constitutional patriotism", a notion defended by Jürgen Habermas in the 1990s. For Habermas, when we discard tradition and religion as sources of legitimacy, collective identity can only be political, i.e. focused on the defence of fundamental rights and freedoms.

Habermas adds a strong universalist dimension to the original conception of constitutional patriotism. He believes that loyalty to rights and procedures is fundamental. Therefore, European identity cannot be based on a cultural community. Universal principles or values such as those set out in Article 2 of the Treaty on European Union must be given priority. These values are, for example, dignity, freedom, democracy, equality, the rule of law, but also respect for human rights allowing for the peaceful coexistence of national and regional cultures. Thus, only this patriotism is able to stabilise political life. It is based on a civilised confrontation between political traditions and political sensibilities, however different they may be.

Yet constitutional patriotism has often been seen as contradictory. Can we reconcile the particularistic dimension of patriotism with the universalism of attachment to constitutional principles? Is the universal enough to create a 'we', a common self, a common sensibility? Some believe that constitutional patriotism is devoid of an affective dimension, incapable of creating a real sense of belonging to a community and unable to satisfy the desire for a collective identity.

To understand the resistance of nations and nationalism, including in the European Union, we have to start from the very meaning of nationalism. As the sociologist Norbert Elias suggests, the "nation" is endowed with an emotional aura, it is sacred and worthy of admiration. Elias insists on the '*nous*', the image of the '*nous*' and the ideal of the '*nous*', created by the nationalist ethos. Thus, "I am French" is equivalent to saying "I believe in specific values and ideals".

Are we to believe then that Europe, because it is not one large nation, could not forge a sense of belonging on the basis of non-specific and non-exclusive universal values? I do not think so. On the one hand, within a nation, a sense of loyalty is forged over time by distinguishing regional differences. This has been a long and painful process at the level of nation states. We could conceive it from the increased interdependencies in Europe, on the basis of freedom of movement and non-discrimination at the upper level. If we accept a processual and partly constructivist view of nationalisation processes, there is no reason why European integration should not end up creating a 'we', a common self and thus a sense of belonging and collective identity. It is possible to associate universal values, defended by the Union, with a sense of belonging that is always particular, individualised, linked to a form of pride that fulfils the ideal of the 'nous'.

Several elements contribute to this sense of belonging within the European Union. On the one hand, the threat of armed conflict catalyses the sense of belonging, as we are seeing today with the war in Ukraine, because of solidarity through fear. On the other hand, major ecological, economic or health crises can unite peoples if, and only if, the institutions that protect them at the European level react adequately by responding to their aspirations.

I therefore defend an institutionalist perspective. The question of institutions is decisive. They must be deliberative and representative and allow for adequate protection and redistribution in a context of crises.

My conclusion differs slightly from that of the political scientist Justine Lacroix. Depriving ourselves of the resources of history and culture to anchor democratic loyalty and a sense of belonging remains dangerous. Universal principles are inscribed in a particular culture, which expresses them through rituals, symbols and stories. These accompany collective action in defence of the principles of justice and freedom. They thus allow constitutional patriotism to be embodied in a particular way within an affective community. It is therefore a question of creating in Europe a passion of reason, to use Julien Benda's expression, which is likely to bring about new icons to counter exclusive myths and nationalist idols.

Ms. President, Sabine Thillaye (France, National Assembly). Before I give the floor to the next speaker, I would like to share with you the views of Ms. Kriszta Kovács, which she shared with me by e-mail. Ms. Kovac believes that Article 4(2) of the Treaty on European Union enshrines the national identity of states. However, states do not have a blank cheque to build national identities without taking into account European Union law. The case law of the Court of Justice leaves room for cultural considerations (protection of the national language, *etc*.). Nevertheless, it requires that the national identity component be enshrined in domestic law from the very foundation of the independent and democratic state. The margin of appreciation of the states is limited to matters that do not fall within the values of the Union as set out in Article 2 of the Treaty on European Union.

Ms. Kovacs has sent us one of her articles on the subject which will be sent to you shortly.

I now give the floor to Mr. Tymoteusz Zych, member of the Group on Fundamental Rights and Rule of Law of the European Economic and Social Committee. You are a regular speaker on behalf of bodies such as the Venice Commission and the OSCE's Office for Democratic Institutions and Human Rights. You are also the director of a think tank, Logos Europa, which was created recently but is already influential in Poland.

Would I be incorrect if I said that you defend the Polish government's justice reforms? In any case, we are interested in your approach to the notions of values and the rule of law. Do you share Ms. Kovacs' analysis? Do you think that respect for national constitutional identities allows Member States to move away from certain European values or to interpret them differently?

Mr. Tymoteusz Zych, Director of the Polish think tank Logos Europa. The concept of the rule of law is the most fundamental intellectual structure of European legal culture. This concept is much older than the modern concept of the state. It unites all the main currents of classical and modern European legal thought.

Aristotle reiterates this idea in *Politics* when he states that the government of the law is more just than that of any of the citizens. The fundamental purpose of the rule of law was defined by Cicero in *Pro Cluentio*, where he believes that to be free we must be servants of the laws. Wawrzyniec Goślicki, a Polish thinker of the sixteenth century, summarised these two positions well in *De Optimo Senatore*, in which he argues that kings rule according to the law and by the law and that the main purpose of their rule is to enforce liberties.

The modern idea of the rule of law was developed in opposition to the absolute power of one person, despotism and tyranny, which appeared with absolute monarchies. From the outset, two formulas can be distinguished. The first is the notion of “rule of law”, which originated in common law, rooted in tradition, custom and based on legal precedent. It was first described in a comprehensive way by Samuel Rutherford. He proved that rulers are subject to the law. The second is the continental concept of *Rechtstaat*, which takes into account the same elements but emphasises positive law and the creative power of the state.

Despotism, authoritarianism and dictatorship are still opposed to the rule of law today. To despise the rule of law is to despise the binding provisions of law, including the fundamental guarantees of human rights. We see this with the Russian invasion of Ukraine, which is not only violating the prohibition of war, but also committing atrocities against civilians.

In addition to the supremacy of binding legal norms over rulers, other constitutive aspects of the idea of the rule of law are: respect for the fundamental rights and freedoms of individuals and groups; judicial independence and the independence of judges, which implies guarantees concerning the mandate of judges; and the effective enforcement of legal decisions by courts and administrative bodies. Similarly, the rule of law is closely related to the principles of legal certainty and stability of the law, as well as to citizens' trust in the state and the law it creates.

Nonpolitical constitutional review is also important. However, the basic standards of the rule of law can be implemented in various ways. We must bear in mind that the motto of the European Union is “United in Diversity”. The divergence of legal solutions on our continent can only be seen as a problem.

The differences between the basic legal structures of constitutional states are profound. The system of sources of law may have different characteristics: in common law countries, custom and precedent enjoy formal authority, whereas in continental law, these two sources are not binding. The majority of law-abiding states have a written constitution. However, this is not an absolute rule. Constitutions have never been formally adopted in the United Kingdom and New Zealand: the legal systems are based on both constitutional custom and acts of general legislation with special authority.

In some countries, the system of constitutional review is based on Kelsen's idea of the constitutional court and is abstract in nature. In other countries, it is dispersed and based on case law, as in the United States and the United Kingdom. The Dutch Constitution goes further by explicitly prohibiting judicial review of statutory norms; formally, the Conseil d'État has only an advisory role, but enjoys significant authority. The structure of the judiciary often includes a separate system of administrative courts, but in many countries, it is the general courts that review administrative acts and decisions.

The idea of the rule of law is also linked to the concept of a tripartite division of powers, which is however far from being a universal norm. Switzerland and the United Kingdom have never recognised a clear division between the judiciary, the legislative body and the executive. Models for the appointment of judges may differ considerably in technical terms, ranging from systems that leave the decision to democratically appointed committees, as in Germany, to those that rely on committees composed mainly of current members of the judiciary. Nevertheless, in the vast majority of European countries, their election by a simple parliamentary majority is considered unacceptable.

As the legal systems of the European countries are very diverse, it is difficult to assess the quality of the solutions in question. However, one thing is certain: the principle of the rule of law is stronger if these principles are anchored in the consciousness of the citizens and are not set against the tradition and culture of the state.

At the same time, it is necessary to identify misconceptions and naïve beliefs, which have done much damage in the past. Modern European states governed by the rule of law are democratic countries where no democratic majority judgment can revoke the most fundamental legal norms. Such a position can have tragic consequences. At one time, the normative illusion was widespread, focusing only on the formal aspect of the rule of law and the internal consistency of the solutions adopted in a given country. The reality of dictatorships has painfully verified the danger of this belief.

We cannot assess the rule of law without reference to the material circumstances, in particular the analysis of the application of the law. We must distinguish between the essential characteristics of the rule of law and the divergent solutions that are legitimately in force on our continent. The reaction of international bodies must be thorough and careful, but also firm if necessary.

The rule of law must apply not only to those who are politically weak, but primarily to those who are powerful. The reality of recent months shows us the tragic consequences of what can happen if the protection of the rule of law is not ensured.

Ms. President, Sabine Thillaye (France, National Assembly). Ms. Spector, you say that we should create the passion of reason. Could you tell us more about this? How, in practice, can we create this passion of reason?

Ms. Céline Spector. The practicalities are always tricky. I built my reflection on the basis of the resistance created by Europe and the European Union. I tried to reconstruct the sovereignist argument in all its facets, taking into account the importance of nations and cultural diversity.

The European Union must be able to respond to these arguments and generate emotional support. This feeling varies from country to country, but it is particularly weak in France. We could strengthen it by improving the teaching of European civic education. In France, this education is insufficient in terms of the way it is taught. There is a profound lack of knowledge of the European institutions.

As a result, there is a lack of gratitude towards the European institutions. Many philosophers, in conjunction with social psychologists, have pointed out that this feeling of gratitude is fundamental to creating a loyalty comparable to or greater than that experienced within nation states. Creating this loyalty means showing individuals that they will not be harmed by the application of European law and that they can even benefit from it. It is not a question of falling into propaganda or rhetorical manipulation, but of making people more aware of the mechanisms of the institutions and their contribution to the Europeanisation process.

The opening of markets in Europe has created both winners and losers. It is important to prevent the losers of Europeanisation from harbouring resentment, anger or even hatred towards the European institutions. Thus, the passion of reason requires a reinforced civic education but also, more broadly, knowledge of the European Union's actual actions. Certain improvements have been made possible by the European institutions, notably the integration of the ten countries of Central and Eastern Europe, Cyprus and Malta in 2004.

The cultural aspect is important. A European *Bildung* is necessary. This could be done through architecture, design or even foundations that subsidise artistic and cultural events on a Union-wide scale to strengthen the sense of belonging.

Ms. President, Sabine Thillaye (France, National Assembly). Theoretical training courses do not generally arouse passion. The passion of reason seems to me difficult to achieve if citizens do not adhere to it. However, it is necessary to continue to transmit this sense of belonging.

Mr. Tymoteusz Zych. Concerning the construction of the European identity, the identity of the citizens of the European Union is a fundamental factor. There are many common experiences at the European level, especially through crises. While we have this common heritage, it is not easy to find examples of common policies at European level before 1950.

Today, after more than 70 years of European integration, this legacy is important. We are facing an unprecedented military aggression against a European country, associated with the European Union. These events will be critical for the future construction of our identity both in its definition and in the sense of belonging to a community.

Joint political action and sanctions to address military aggression that threatens the rule of law and European values are essential.

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). Regarding the construction of the European identity and the passion of reason, I think that in order to build consensus and create ideals, we have to make the right political choices. We have to show that Europe and its values meet the needs of the citizens. Do you think that by doing so we would facilitate the development of the European identity? Would it be useful to transform the decision-making processes at the European level? For example, we could promote direct elections of leaders to create greater cohesion and strengthen the common European identity.

Ms. Céline Spector. In politics, optimism is not always enough. According to John Rawls, a political philosopher of the 20th century, the principle of “fair play” is limited. Making good political choices to improve the lives of citizens does not necessarily result in gratitude and loyalty.

Manipulation, lies and bad faith exist, as illustrated by the Leave campaign preceding the Brexit referendum. Passions can be manipulated and foster resentment and anger among the losers of Europeanisation. Rational arguments are not always enough to penetrate public debate.

Faced with this shortcoming, there are several ways to increase European democratic legitimacy. The first is to increase the powers of the European Parliament, for example by giving it the first and last word in the legislative process. In particular, it would be necessary to give it a right of legislative initiative. We will not have a real parliament if it does not have the power of amendment. I am also in favour of transnational lists.

These transformations could strengthen European democratic legitimacy and cohesion. There is also a need to increase the budget of the European Parliament to bring redistribution issues to the forefront, especially those concerning the perimeter of the welfare state. As long as the Parliament does not consider these issues and the politics of consensus prevails, we cannot create a passion of reason.

Other avenues can be explored, particularly that of culture. Within the framework of constitutional patriotism, adherence to universal values and principles of law has been excessively dissociated from the relationship with culture and history, in particular the fratricidal history of the European peoples. It is a question of working with the negative in order to highlight the effects of the Union. The memory of war must remain fundamentally anchored in European culture.

Mr. Tymoteusz Zych. We also have to deal with a process that has not yet been mentioned: the quasi-privatisation of political power by certain multinational companies, especially digital companies. Thus, it is essential to regulate access to information, especially on social networks. Social networks are of fundamental importance and transform the way people perceive reality.

Of course, a state alone cannot regulate the digital space. To protect our digital rights, it is necessary to make decisions at the European level. The effects of access to information on our identity must be taken into account. In this sense, the Digital Services Act and the Digital Markets Act are important first steps. Nevertheless, monitoring the application of these laws seems necessary to cope with the progressive privatisation of political power.

Ms. Dagmara Beitnere-Le Galla (Latvia, Parliament). In Europe, the Member States are organised in different ways: there are parliamentary systems, presidential systems, *etc*. What are the consequences of this organisation on the procedures for electing judges? Furthermore, the media have the power to influence the political life of the Member States. Can we find solutions on a European scale, even though we are politically different?

Mr. Tymoteusz Zych. We have to distinguish between two different forms of media: the classical media based in a Member State and which are subject to legal provisions in place and the "unconventional" media which do not respect certain European and national regulations; the latter use disinformation as a political tool. They have the power to limit or influence freedom of expression and in a certain way to threaten democracy.

Regarding the election of judges, two systems coexist. The first concerns the election of judges *via* political entities, the parliament or the executive with the approval of the parliament or through a commission specially designed for this task. The second mode involves the election of judges by their peers. In the majority of European countries, these two types of procedures are combined, and the level of politicisation of these elections is an essential element. In most cases, a qualified majority, i.e. a political consensus, is required to elect judges. It would be problematic if judges were elected without this political consensus.

Ms. Céline Spector. From a theoretical point of view, we must differentiate between the attribution of judicial power, the question of election or appointment and the question of the separation of powers. In *L'Esprit des Lois*, Montesquieu emphasises that only one rule is universal: the non-cumulation of executive, legislative and judicial powers. This translates into a strict independence of the judiciary from the other powers to guarantee political freedom. The diversity of systems is not a strong argument because it has no impact on the rule of judicial independence. The theory of the rule of law presupposes judicial independence, which excludes disciplinary chambers and the appointment of judges by political powers.

Mr. Tymoteusz Zych. I agree with you on the principles, but I would like to add a marginal observation: Montesquieu was right to describe the threats to the rule of law resulting from the concentration of powers. However, he did not describe the English political system because the judicial and legislative powers were held by the House of Lords.

Ms. President, Sabine Thillaye (France, National Assembly). Mr. Zych, you mentioned the motto of the European Union: "United in diversity". How do you view the debates on the respect for the rule of law? Do you think that unity takes precedence over diversity?

Mr. Tymoteusz Zych. Diversity and the rule of law are linked. However, subsidiarity is also a key concept. Therefore, the rule of law and subsidiarity should be treated as interrelated concepts.

We have already mentioned the rule of law and the need for judicial independence. However, the rule of law also implies the guarantee of human rights, which are universal in scope and derive from the concept of human dignity. Twenty years ago, we adopted the European Charter of Fundamental Rights. It shows that because of their universal nature, certain basic rights must be respected. However, when it comes to the implementation of these rights, there is still some leeway for the Member States.

Ms. Céline Spector. Coming back to the European motto, we have to distinguish between what is cultural and linguistic diversity and what is the Article 2 of the TEU and European values. European values are part of the conditions of accession. European states cannot subscribe to the Copenhagen criteria and then, once they have joined the Union, use cultural diversity as a reason to refuse to apply them.

Ms. President, Sabine Thillaye (France, National Assembly). How do you view the European procedures for anchoring common values?

Ms. Céline Spector. I insist on the need to strengthen education about Europe. In France, ignorance of the European institutions is widespread outside the circle of European affairs specialists. The awareness-raising work carried out by some associations and universities must be reinforced. Indeed, this is the way to anchor European values in the daily lives of citizens.

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). What can be the concepts of European public goods?

Ms. Céline Spector. Public goods can be defence, peace, a stable economy. However, I would like to emphasise the ecological and environmental transition. If we want to bring Europe closer to its citizens, we must take into account subjects that young people are passionate about. The ecological transition must be one of the main European public goods to be defended at the European level through the *Green Deal*. By involving citizens' collectives in civil society, we strengthen the European public space with pan-European events.

Mr. Tymoteusz Zych. The protection of human rights can unite Europeans. Russia's human rights violations in Ukraine are one of the many reasons why we must react. The protection of refugees as well as solutions to humanitarian crises are decisive factors for the creation of the future European identity.

Ms. President, Sabine Thillaye (France, National Assembly). Do you make a distinction between the protection of fundamental rights and the rule of law?

Mr. Tymoteusz Zych. The Charter of Fundamental Rights defines the rights of European citizens. These rights are well anchored in European values. However, the rule of law also defines standards in several European texts – but the concrete technical solutions are not so clearly defined. For example, while constitutionality judicial control may be carried out differently by the Member States, the objective is to make sure it exists. We can see that there is a European standard to be met, but that this does not determine the legal provisions to be put in place.

In conclusion, the rule of law is more closely linked to the principle of subsidiarity than to fundamental rights.

Ms. Céline Spector. The question of the rule of law is clearly distinct from that of subsidiarity. The latter assumes, essentially, that political life must take its place as close as possible to the citizens. In this sense, the Union's competences must be reserved for subjects where there is a real European added value.

The rule of law concerns the submission of rulers to the law, the separation of powers, the issue of media pluralism. There are also many particular variations of these standards, but they are not part of the rule of law.

Ms. President, Sabine Thillaye (France, National Assembly). The issue of media freedom is not included in the definition of the rule of law by the Venice Commission, nor by the December 2020 regulation on conditionality of EU funds. We need to reflect on how to improve the inclusion of media freedom in the criteria for the rule of law while respecting national constitutional identities.

Ms. Céline Spector. Benjamin Constant, in France, considered freedom of the press to be a necessary condition for the maintenance of a free constitution and the rule of law. Freedom of the press and media pluralism are fully part of the definition of the rule of law.

Mr. Tymoteusz Zych. The question of the primacy of European law is unquestionable because it is enshrined in the European Treaties. The protection of the freedom of the press is within the jurisdiction of the Union, which is also laid down in the European Charter of Fundamental Rights.

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). Freedom of the press is a fundamental issue. We have talked about it in many meetings of this working group. We need to continue this work in order to better understand the relationship between the freedom of the press and the rule of law within the European Union.

Mr. Tymoteusz Zych. The threats to freedom of the press at the European level are a broad topic. The approval of the Digital Services Act and the Digital Markets Act is a first step. We are succeeding in regulating these markets and protecting fundamental rights. We have also succeeded in strengthening the legislation in relation to the digital giants. I cannot say that the legal scope of these two pieces of legislation will be sufficient.

However, in this area, the European level is more relevant than the national level.

Ms. Céline Spector. We should make media pluralism and as much freedom of the press as possible compatible with the fight against disinformation and manipulation. The balance to be struck is delicate.

Ms. President, Sabine Thillaye (France, National Assembly). Thank you very much for your participation.

Meeting of Tuesday 26 April, 2022

Hearing of Mr. Didier REYNDERS, European Commissioner for Justice

Ms. President, Sabine Thillaye (France, National Assembly). First of all, I would like to thank you, Mr. Reynders, for agreeing to this hearing before the working group set up by COSAC on the theme of European values at the heart of the sense of belonging. Our group comprises more than forty parliamentarians from the 27 Member States and the European Parliament. Since the beginning of our work last February, we have held several hearings with professors of political philosophy and heads of think tanks in order to better understand the content of the notions of European values and the rule of law. We also wanted to better understand the distinction between the rule of law and democracy.

We are now embarking on the second stage of our work, which is to assess the effectiveness of existing mechanisms for monitoring and following up the rules relating to the rule of law. Our aim is to adopt a report combining the points of view of the members of our group on these issues.

Commissioner, we would be very interested in hearing your analysis of the scope of the various monitoring mechanisms, their effectiveness and their possible development. It is clear that these mechanisms are numerous and somewhat redundant. I will quickly list them: the mechanism of Article 7 of the TEU, which has been triggered against two Member States but has not led to any finding of the existence of a risk of violation of fundamental rights, nor *a fortiori* to the triggering of sanctions; the Framework for the rule of law set up by the Commission, which has not been activated in recent years; the existing dialogues on the rule of law within the Council, which are interesting but can be seen as a way for Member States to escape their responsibilities with regard to Article 7; the mechanism of conditionality of European funds, which opens up the possibility of suspending payments on the basis of a decision by the Council by a qualified majority, but whose implementation was suspended until the recent Court judgement ruling it as compatible with the treaties.

Finally, the most effective monitoring – and lobbying – tool so far is the Commission's publication of its annual reports on the rule of law. The third report, to be published in July 2022, is said to include, for the first time, recommendations to the Member States. We would be interested to have a confirmation of this.

Commissioner, do you think that national parliaments have a role to play in the monitoring of the rules on the rule of law and in what way?

Commissioner Didier Reynders, European Commission. I would like to thank the working group on the values of the Union within COSAC for inviting me to participate in this exchange of views. Initiatives such as these help to promote what I would call a culture of the rule of law within the Union.

The rule of law, democracy and fundamental rights are the very foundations of the European Union. The rule of law has a special function within the values set out in Article 2 of the Treaty on European Union, as it guarantees the protection of all other fundamental values. The rule of law is of existential importance for the European Union, which is a union of law. It guarantees the effective application of Union law and plays a crucial role in the functioning of the Union, ensuring mutual trust because ultimately the word trust is at the heart of the functioning of the Union.

However, in recent years the rule of law has been challenged in some Member States and these are developments that are of serious concern to the European Commission. For this reason we have gradually developed various instruments.

These key elements of the Commission's guidelines were a commitment to produce an annual report on the 27 Member States. Last July, the Commission adopted the second annual report. This new edition deepens the Commission's assessment and follows up on the challenges identified in the first report as well as those resulting from the pandemic. We are currently preparing the third report, which should be adopted in July. Member States and stakeholders have had the opportunity to provide input and we have just completed the country visits which consist of a series of meetings with independent bodies, judicial bodies and civil society organisations. The aim of the report is to assist and support Member States in their efforts to maintain the rule of law and to prevent problems from arising. The findings of the reports are objective and can feed into discussions between Member States and at national level. We can already see that our reports have had an impact on the ground, as positive reforms in the field of justice have been influenced by the reports' findings and subsequent exchanges with the Commission.

From this year onwards our reports will also include recommendations to all Member States and this development will strengthen our ability to convince Member States to implement the necessary rule of law reforms. At the EU level, in the General Affairs Council, ministers discuss the rule of law situation in five different Member States every six months. The last discussion took place on 12 April and covered Luxembourg, Hungary, Malta, the Netherlands and Austria. Once a year the ministers also hold a discussion on the situation of the rule of law in the European Union following the publication of the report. This debate will take place during the next Czech Presidency, as the third edition will be published in July. The debate with the European Parliament is also particularly important. I had the opportunity to present the Rule of Law 2021 report to the LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs of the European Parliament) and we have continued the dialogue with the European Parliament. I would like to emphasise that we are discussing the 27 Member States in order to have a comprehensive view of the whole European Union. I am determined to conduct this debate also in the national parliaments. On 2 October I discussed the second edition of the report in Vienna, Rome, Luxembourg, Warsaw, Paris, Brussels and virtually with the Dutch Parliament. This is very important because national parliaments play an essential role in promoting and protecting the rule of law. If we want to organise reforms to improve the rule of law in the Member States, we have to be in contact with the government but also with the parliaments because the reform decisions will be in the hands of the parliaments with new laws or sometimes with constitutional

revisions. It is essential to go to the parliaments to discuss with the majority but also with the opposition in order to start a real democratic debate. COSAC and the working group on European values are really a key example of the role of parliaments in Europe.

For this reason, the Commission has considerably strengthened its capacity to react to problems in situations where the rule of law is affected. The Commission can, as guardian of the Treaties, initiate infringement proceedings against a Member State before the European Court of Justice, as it has done on several occasions, notably in the context of the discussion on the independence of the judiciary in Poland. Recently, following the decision of the Polish Constitutional Court, which declared certain provisions of the EU Treaties unconstitutional and expressly challenged the primacy of EU law and the case law of the Court of Justice on the independence of the judiciary, the Commission decided in December last year to initiate a new infringement procedure against Poland, knowing that there were already other procedures under way, notably concerning the discipline of judges.

The decisions of the Court of Justice are increasingly in line with the decisions of the European Court of Human Rights in Strasbourg. As a result, we have more and more elements that allow us to better define the mechanisms concerning European values, but above all concerning the concrete elements of the rule of law, notably the independence of the judiciary. Another instrument for reacting to threats to our values is that provided for in Article 7 of the Treaty on European Union. This mechanism establishes a procedure in the event of a "clear risk of a serious breach of the Union's values" or a "serious and persistent breach of those values". The deterioration of the rule of law situation in Poland led the Commission to open the Article 7 procedure in 2017. In 2018, the European Parliament decided to do the same for Hungary. Both Article 7 procedures are still ongoing before the Council and the Commission is always available for hearings or presentations of the state of play.

The Commission's work on the rule of law is also reinforced by new instruments. Since last year, there has been a regulation on budget conditionality linked to the rule of law. For the first time, the Union will be able to protect its budget against violations of the rule of law. Measures that can be proposed in this context include the suspension or even termination of certain EU funding. The Court of Justice recently confirmed the validity of the cross compliance regulation after appeals by Hungary and Poland. The Commission will take the next step with regard to Hungary. We will send a formal notification letter to the Hungarian authorities which will trigger the procedure, having already sent an administrative letter in November last year, and based on Hungary's replies we have now decided to go one step further and trigger the procedure with this notification.

In the National Recovery Plans we also ask to implement reforms in line with the country-specific recommendations adopted in the European Semester. A number of Member States have already implemented reforms to meet the requirements set out in the documents adopting the national recovery plans. Above all, I would like to emphasise that the Commission now has a number of instruments at its disposal to take action and does not hesitate to do so when necessary. The promotion and respect for the rule of law is a common responsibility of all EU institutions, all national institutions and national parliaments.

I am delighted to be able to discuss the rule of law report with you and I would like this debate to continue throughout the year and for national parliaments to see what reforms need to be implemented to address the concerns raised in the national chapters by Member State.

To conclude, I would like to stress that national parliaments obviously have a role to play since each government will take a position in the Council. It is normal for national parliaments to have a say in the position that will be expressed by the national governments in the Council.

National parliaments can both promote the culture of the rule of law, develop reforms on the basis of the rule of law report, the recommendations will help you with that, but national parliaments can also have an influence on the positions taken by governments in the Council.

Ms. President, Sabine Thillaye (France, National Assembly). The last point mentioned on the control capacities of our governments raises the question of the differences between the prerogatives of the European Affairs committees of the national parliaments. It is obvious that there is an imbalance in the power of control of the government between the different national parliaments and this is a purely democratic issue.

Mr. Gaëtan Van Goidsenhoven (Belgium, Senate). The latest report on the rule of law puts this issue at the heart of the construction of European identity. It is essential that all Member States are united around the same values to ensure the proper functioning of our Union. On 17 February this year, the CJEU endorsed the conditionality mechanism for European funds in the event of violations of the principles of the rule of law by rejecting the appeals of Poland and Hungary. Have you already seen any concrete effects?

Commissioner Didier Reynders. The first assessment that we can make of this regulation concerns its validity. As you mentioned, the CJEU has ruled on the subject, and its decision is binding and valid. The Commission will now use it by sending an official notification to Hungary. Then the procedure will have to take its course and we will see whether the Council will be seized. In parallel, I mentioned the recovery plans, and in these we have asked the Member States to implement reforms, and this is a very effective instrument. For example, last year in Italy there was a debate on the reform of justice and several laws were adopted to reform the justice system. However, there is still a blockage on the Hungarian and Polish plans. It is very early to draw conclusions on the conditionality mechanism but we know that the budgetary argument is strong and we can hope that the mechanism will be effective.

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). My first question concerns a specific personal situation. I am currently in Strasbourg at the Parliamentary Assembly of the Council of Europe, of which I am a member. The Assembly recently adopted an important resolution on strengthening the strategic partnership between the Council of Europe and the EU. The resolution calls for an intensified dialogue between the two institutions within the framework of the existing EU rule of law mechanisms. I would like to hear your views on possible initiatives in this regard. My second question concerns

the modalities to be implemented to strengthen the tools for communicating and informing our citizens about the activities of the EU.

Commissioner Didier Reynders. The relationship between the Council of Europe and the European Union is reflected in our important collaboration on the rule of law.

For example, in the report on the rule of law, the recommendations of the Venice Commission are taken into account, particularly in the area of judicial reform or the fight against corruption. Moreover, there is a movement towards convergence between the case law of the European Court of Human Rights and that of the Court of Justice of the European Union, fostered by a dialogue between the Presidents of the two Courts but also with the Member States. Finally, with the Treaty of Lisbon, we made a commitment to precede the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Concerning your question on communication to citizens, I will mainly come back to the part on the rule of law. I have asked the European Union Agency for Fundamental Rights to present a specific programme to each Member State with the aim of promoting a dialogue with civil society. The aim will be to make recommendations on how we can keep the debate on the rule of law alive throughout the year and show that the idea of the rule of law is not an abstract concept. For example, guaranteeing access to an impartial judge allows the citizen to challenge a decision taken by a public authority before an impartial court. In this context, national parliaments have a role to play as do professional associations in the field of justice. We also need to communicate better on the recommendations made to Member States. Indeed, the annual reports on the rule of law make it possible to highlight improvements and setbacks in a number of States.

Ms. President, Sabine Thillaye (France, National Assembly). It is important to develop the link with the local level. The concept of the rule of law may seem abstract and it may be difficult to explain the impact of the rule of law to citizens who do not travel or trade with another Member State.

Mr. Rui Lage (Portugal, National Assembly). The European Union is an active player in the promotion of democracy and human rights. The enlargement of the European Union has led to major reforms in the fields of justice, minority rights and the rule of law. However, today, the rule of law is under threat in some EU Member States, which partly undermines citizens' confidence in the Union's ability to protect these values. These threats concern, for example, the weakening of press freedom and the independence of the media in the countries of the Višegrad Group. In this respect, we welcome the decision to initiate proceedings against Hungary. However, by initiating action only against Hungary and not Poland, does Europe not send the message that there is a double standard regarding respect for the rule of law?

Commissioner Didier Reynders. After the enlargement of the European Union, we have seen an improvement in the respect for the rule of law and democracy in many Member States. However, the war in Ukraine and other crises show that we must continue to ensure respect for the rule of law. Particularly at this time, if we wish to have a credible international order based on respect for established rules, we ourselves must enforce these rules within the European Union.

The Rule of Law Report 2021 shows that the issue of the media is of increasing concern, particularly because of the murder of journalists and attacks on journalists on social networks. We have tried to take concrete steps to ensure media freedom and effective protection of journalists by sending recommendations to the governments of the member states.

For Hungary and Poland, we have launched some procedures. For Hungary, we have a solid case to launch the conditionality mechanism for EU funds, including the observations of the European Anti-Fraud Office. Concerning Poland, we sent a letter last November and we continue to analyse the situation to determine the different means of action. For example, we are making sure that we treat both countries fairly, so as not to create double standards. Finally, we also make sure that we analyse the situation in other Member States and make recommendations and observations.

Ms. President, Sabine Thillaye (France, National Assembly). Within the European Union, our definition of the rule of law is based on the definition proposed by the Venice Commission, which does not specifically include the media. Shouldn't this definition evolve to include free access to information?

Commissioner Didier Reynders. The third chapter of the report on the rule of law deals precisely with media plurality and freedom of the press. This chapter shows the deterioration of the situation, for example because of the murder of journalists in Malta or in the Netherlands with the problem of organised crime. Because of this situation, we wanted to propose different initiatives to the Member States to put in place mechanisms to guarantee media plurality. For example, access to public funding must be granted fairly. We also sent recommendations to Member States to strengthen the protection of journalists to fight against "SLAPP suits" aimed at silencing journalists.

Ms. President, Sabine Thillaye (France, National Assembly). The accession of the European Union to the European Convention on Human Rights raised a lot of reservations because it raised the question of the primacy of EU law. What is your opinion on this?

Commissioner Didier Reynders. In recent years, we have worked hard to try to respond to the observations made by the Court of Justice of the European Union. Since then, the case law of both courts has also developed in the same direction and the dialogue between the courts has been strengthened. However, some legal and political aspects remain to be determined. For example, it is necessary to take into account the situation within the Council of Europe due to the war in Ukraine.

However, the accession of the Union remains an obligation established by the Lisbon Treaty and it seems logical to me because we share common values, accepted by the Member States themselves. Moreover, this process does not prevent us from having our own instruments, including the Treaties and the Charter of Fundamental Rights.

Ms. President, Sabine Thillaye (France, National Assembly). The first conclusions of the Conference on the Future of Europe should be presented on 9 May. Do you think that the issues surrounding a reform of the treaties, and in particular Article 7, will be raised? Moreover, the Council does not have a fixed deadline for taking a decision under Article 7. The procedure can then go on indefinitely, regardless of the question of qualified majority or unanimity.

Commissioner Didier Reynders. The purpose of the Conference on the Future of Europe is to bring together proposals from European citizens. To put limits or a framework on these proposals would distort the debate.

Regarding the modification of the treaties, this question would require a substantial timeframe and would generate important constraints, but I think that in the medium and long term, this debate will arise. In the short term, however, we have a satisfactory set of mechanisms, including the conditionality of funds or Article 7, which have been approved by the European Court of Justice. We should focus on making these tools work as well as possible. However, the door remains open to proposals that might be made at the end of the Conference on the Future of Europe or also by national parliaments.

Meeting of Tuesday 24 May, 2022

Hearing of Ms. Kerstin McCOURT, Acting Advocacy Director for Europe and Central Asia at Human Rights Watch and Mr. Filipe MARQUES, President of the Association of European Judges for Democracy and Freedoms.

Ms. President, Sabine Thillaye (France, National Assembly). I am pleased to open this meeting of our working group, which is devoted to the first item on our agenda, a hearing of Mr. Filipe Marques and Ms. Kerstin McCourt. Ms. Gwendoline Delbos-Corfield, MEP, will not be able to participate in our discussion. Mr. Filipe Marques, you have been President of the Association of MEDEL since 2017. In this capacity, you are the author of numerous publications and speak at many international conferences and seminars. Ms. Kersty McCourt, you are currently the Acting Advocacy Director for Europe and Central Asia at Human Rights Watch. You are a lawyer and human rights professional with more than eighteen years of experience in leading human rights, justice reform, and civil society programmes.

Ms. Kerstin McCourt, Acting Advocacy Director for Europe and Central Asia at Human Rights Watch. As an international organization I will focus on the trends and the ways in which the EU is able to hold Member States to account. The first observation concerns the decline of the rule of law in recent years. Freedom House's 2021 index showed a decline in global freedoms for the 16th consecutive year. Also in 2021 the CIVICUS Monitor – which monitors the respect for freedoms of assembly, association and expression – ranked 12 countries in the European Union as open, 13 countries experiencing narrowing freedoms and, for the first time, two countries were ranked as obstructed.

Human Rights Watch has documented the breakdown of the rule of law in a number of countries – namely the systemic failures in Hungary and Poland but also concerning violations in a number of other countries: for example, the dissolution of an anti-discrimination group in France that is likely to have a chilling effect on civil society and the intimidation and criminal investigations by Greek authorities against NGOs.

One EU response to these regional trends has been the European Commission’s annual Rule of Law report. The report provides an overview of ongoing reforms and challenges in Member States but fails to draw a distinction between localized problems and systemic challenges. Consequently, it is impossible to analyze trends and identify where emerging challenges lie. Thus, whilst the report aims to be a preventive tool – it is currently unable to effectively serve that purpose.

On the other hand, the 2022 edition, due to be published in July, will for the first time include recommendations. This is a welcome step but one that may be hampered by a lack of benchmarks and the limited analysis. However, the idea of identifying the challenges and addressing them at their roots is a good one. As national parliaments

you can play an important role in contextualizing the reports, holding national debates and taking forward future recommendations.

The annual report is the broadest tool in the EU's toolbox. The EU has developed and expanded the toolbox over the last years – but in our view, none of the tools have been used to their full effect or deployed with sufficient speed. Consequently, the combined impact of the EU's tools, has done little to stem the decline of the rule of law in key Member States. The most targeted tool – to address specific violations of EU law – are the infringement proceedings leading to cases before the European Court of Justice. In 2017, in response to the NGO law in Hungary, the Commission launched one of the first rights-based cases resulting in a precedent setting judgment that set out key features of the right to freedom of association. Subsequent judgments against Hungary and Poland ruled on the independence of the judiciary, academic freedom and asylum law.

Unfortunately, the Commission's failure to ask the Court to accelerate the proceedings and demand a halt to violations during the proceedings has resulted in irreversible damage. Hungary and Poland also failed to adequately implement the judgments properly and fines were not immediately imposed. Currently, two further cases, on media freedom and freedom of expression related to LGBT rights, are waiting to be referred to the court. As parliamentarians, highlighting these judgments – applicable across the entire union – and asking why they remain unimplemented is important.

Furthermore, this briefing comes just a day after the fourth hearing under the Article 7(1) process against Hungary which took place yesterday. As recalled earlier this year by the Court, Article 7 was designed to hold member states to account for serious and persistent breaches of the values contained in Article 2 of the Treaty of the European Union. Ultimately – with a unanimous decision of the member states - it could lead to a suspension of voting rights. The process was triggered in relation to Hungary by the European Parliament nearly four years ago in 2018 and the one in relation to Poland was triggered by the Commission in 2017. The process envisions a series of hearings, followed by recommendations, and if violations persist a vote. Four years in the European Council has failed to set out clear recommendations with a timetable to implementation. All the key issues appear to have been discussed at yesterday's hearing – including a further change to the Hungarian Constitution that was subsequently approved earlier this afternoon – and allows for rule by decree under a new "state of danger" based on an "armed conflict, war or humanitarian disaster in a neighbouring country".

In this context, the slow and painstaking process of Article 7 has allowed violations to continue unabated and increasingly authoritarian regimes to become entrenched. Thus, the organisation of hearings by parliaments around the Article 7 process is very useful. We also encourage you to urge your own ministers to push for a clear timetable and concrete recommendations for moving the Article 7 mechanism forward.

The final and most recent tool is the rule of law conditionality mechanism, designed to protect the EU budget against corruption and the use of funds amid rule of law violations. After a long delay and legal challenges by Hungary and Poland, the mechanism was activated against Hungary on 27 April this year. The process allows for a formal exchange between the Commission and the member states concerned. In this case, the

Hungarian government can propose measures to address the Commission's concerns. If unsatisfactory the Commission will submit a decision to the Council who will vote by qualified majority on the suspension of the funds. Used with diligence this mechanism has the potential to push Hungary to enact reforms. It is though important to note that it only concerns the EU budget and is unable to address wider state capture of public funds.

As parliamentarians, ensuring debates at the national level and urging Ministers to support the suspension of funds is critical.

In conclusion, important steps have been taken to safeguard the rule of law, but more concerted and timely action is needed to have a significant impact. At the same time, constant vigilance is required to identify new concerns and the current Rule of Law Report is not up to that task.

The long-term consequences of allowing a severe deterioration of the rule of law within the EU should not be under-estimated. The critical role that you can play in maintaining vigilance and translating the rule of law into the day-to-day concerns of your constituents is essential.

Ms. President, Sabine Thillaye (France, National Assembly). There are some very interesting solutions to be examined. As national parliamentarians, we need to be more involved and this is one of the objectives of this working group.

Mr Filipe Marques, President of the Association of European Judges for Democracy and Freedoms. As President of an association of judges and prosecutors from several European countries, I will focus my speech on the respect of the rule of law and the independence of the judiciary. However, I would like to highlight some key points concerning the fundamental values that allow us to establish a sense of belonging to the European area.

In a study recently published by the German Marshall Fund for the United States, Jacob Funk Kirkegaard tried to define "European interests" in relation to "national interests". The first interest identified is the preservation of democratic values and respect for the rule of law in the European Union. However, while these notions are cornerstones of the Union, it is a "value" and not an "interest". Moreover, I do not believe that it is only an "interest for domestic purposes", but also a fundamental value for the Union's foreign policy and international assertion.

The first point brings me to what has become a common misconception at European level: the confusion between interests and values. An interest is something that can change over time and can vary according to political, economic and social circumstances. A value is something that is permanent, stable and underpins a whole project. Respect for the rule of law is and must unquestionably be a value and not an interest of the Union as the CJEU has stated.

The second point concerns the role that the Union must play at international level to ensure respect for the rule of law and the independence of the judiciary. Situations such as the recent rollback of the rule of law in Turkey must elicit a firm response from the Union, which must therefore entrench its foreign policy on this fundamental principle. Thus, with regard to the existing mechanisms for monitoring the rule of law and the means of improving them, there have been important and positive developments. Since the Commission organised the *Assises de la Justice* in 2013, the range of instruments has expanded and the annual report on the rule of law is a good example. However, it is essential that the Commission continues to use the most binding instruments at its disposal.

The recent reappointment by the Polish Parliament of the members of the Supreme Judicial Council should lead to a new infringement procedure.

An end must also be put to the slowness of the Article 7 procedure, the consequences of which are not limited to the area of the judiciary. For example, the recent blocking of the total embargo on Russian imports could have been solved if certain states in breach of the rule of law had already been suspended from voting rights in the Council.

As regards the sense of belonging, we are faced with risks but also with opportunities. The attacks on the independence of the judiciary have led to the unification of the judiciary in the Union. In ten years, we can say that a real sense of belonging has been created among magistrates in the European judicial area. This sense of belonging can give us hope for the future of the Union.

Ms. President, Sabine Thillaye (France, National Assembly). Ms. McCourt, you mentioned that a large number of judgments are not followed up. How can you explain this?

Ms. Kerstin McCourt. Some of the proceedings were initiated on the basis of a violation of EU values. For example, regarding the NGO law in Hungary, the European Commission launched a second procedure to encourage the implementation of the first judgement and for the possible application of sanctions and fines. The Hungarian government's response was to annul the law in question and adopt a very similar one that raised the same rule of law concerns. For other laws, such as the law on academic freedom or the law on assistance to migrants, the provisions are still in place and the judgments have not been enforced. It seems to me that this pattern is also found in Poland with the judicial system, despite the fact that a significant part of the judgements is implemented. However, the changes made are insufficient and superficial. The Court of Justice of the European Union is a powerful court that is able to impose significant fines. However, these fines do not come quickly enough. The tools available to the Union are not used quickly enough and do not allow sufficient pressure to be applied on national governments.

Mr. Filipe Marques. The Council of Europe and the European Court of Human Rights also have a serious problem with the implementation of decisions. In the European Union, there are instruments to enforce the decisions of the European Court of Justice, including for example the power to impose heavy fines as against Poland. These situations are not limited to Poland and Hungary, and include the Romanian

Constitutional Court. Thus, the CJEU is facing a crisis of competence and mistrust. In the case of Poland, for example, the Disciplinary Chamber, suspended by the CJEU, is still in operation. The very authority of the CJEU is sometimes questioned. However, if we look at the history of the European Union, the Court of Justice has played an essential role in the building of Europe. To call it into question would be to call into question the whole European project.

President Sabine Thillaye. Ms. McCourt, you mentioned the need for national parliamentarians to take more responsibility for these issues, for example by contextualising the European Commission's report. Could you elaborate on this?

Ms. Kerstin McCourt. The concept of the rule of law may seem to be an abstract concept that does not apply to the daily lives of citizens. However, the rule of law is concretely translated into the ability to express ourselves freely, free media, access to housing and schooling, economic and social rights *etc*. As a parliamentarian, you are confronted with the everyday problems of your citizens. You can then use the parliament as a forum to link debates on the rule of law with national issues. Parliamentarians can also put pressure on the executive.

Ms. President, Sabine Thillaye (France, National Assembly). I agree with you. Commissioner Reynders also said that we need to develop a culture of the rule of law. However, it is very complicated to raise the subject of the rule of law during an election period in France. On the one hand, the French expression is less evocative than the English "rule of law" and on the other hand, citizens do not feel concerned by these issues in the rural world.

Mr. Marques, for you the notion of the rule of law is broader and you mentioned the question of the media. I also agree with the inclusion of media freedom in the notion of the rule of law. However, the Venice Commission does not include media freedom in its definition of the rule of law. The European Union does not define the concept of the rule of law: Article 2 lists common European values, of which the rule of law is one, but does not offer a real definition of the rule of law.

Mr. Filipe Marques. The relativisation of the notion of the rule of law represents a real danger. Although it is difficult to communicate on the rule of law, there are initiatives, such as our association MEDEL, which allow the importance of the rule of law to be conveyed to the population. Through our association, we try to explain to the population that it is not a problem of magistrates, judges and prosecutors but a problem of citizens. Some issues may concern citizens more than others. For example, the question of the independence of the judiciary may seem remote to them, but as soon as we talk about the protection of minorities, citizens perceive it more easily because it is a sensitive subject.

We need to explain the concrete consequences of the rule of law so that citizens realise that it is not about the privileges of the judiciary but about the protection of democracy. For example, it should be explained that the rule of law is about the existence of an independent institution, to which a citizen can trust to ensure that these rights are respected. To effectively protect the rights of minorities, for example, it is essential to have an independent judiciary. In this way, citizens will better understand the importance of the rule of law in their daily lives.

We also try to explain that mutual trust between European courts is the basis of the European judicial area. In concrete terms, a Portuguese judge is not obliged to know the national laws of the other European countries, but he or she must trust the judges of the other countries who have given a decision that the Portuguese judge must apply in his or her country. To do this, it must be ensured that the guarantees of independence are equally strong in all Member States. This mutual trust is the basis of the European judicial area, and the Court of Justice of the European Union has tried to explain this several times in its recent judgments.

It is important to discuss these issues with the representatives of the national parliaments because they have to convince their governments of the importance of mutual trust.

I would like to make an appeal to the European governments: when the European Commission launches an infringement procedure against a Member State concerning the rule of law, the rest of the Member States that support the rule of law must be involved. The rest of the Member States that support the rule of law should intervene in the proceedings to show their unity and support for the Commission in this process.

Regarding the definition of the rule of law, it is true that it is absent from the EU Treaties but the European Court of Justice has already done so through its decisions. This is very important because it is important to avoid Member States giving their own definitions of the rule of law.

Ms. Kerstin McCourt. It is very important to observe the development of the case law with regard to the definition of the rule of law. Regarding the Article 7 procedure, it is clearly linked to the two European treaties which include a list of values and refer to the Charter of Fundamental Rights.

Ms. President, Sabine Thillaye (France, National Assembly). I would like to thank Mr. Marques and Ms. McCourt for their time. Do you have any final message for us before the end of this session?

Mr Filipe Marques. I would like to stress that national parliamentarians have a key role to play in putting pressure on the European institutions because we cannot compromise on the rule of law. Despite the difficulties that the Russian invasion of Ukraine has brought, we must not compromise fundamental values such as judicial independence. The European Commission must be firm with the Member States in respecting the rule of law.

Ms. Kerstin McCourt. I would like to come back to the different tools that exist and I would like to stress the need to use them quickly in order to exploit their full potential. We can hold Member State governments to account and safeguard the rule of law and respect for fundamental rights.

Ms. President, Sabine Thillaye (France, National Assembly). Colleagues, the draft conclusions of our work were transmitted to you last Friday and I propose that we have a first exchange on these draft conclusions. Then, a new version of this document will be sent to you at the end of the week. I propose that we meet on 9 June at 2 p.m. to examine the amendments to the draft conclusion and the contributions of some of you in order to be annexed to the final report. I hope that we will be able to adopt the conclusions of our work by consensus at the final meeting on 14 June. Do you have any comments on these working arrangements?

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). The proposed conclusions indicate a shared intention to strengthen the exchange on the rule of law.

At an interparliamentary meeting in 2020, we put forward the idea of a parliamentary session devoted to the topics covered by the European Commission's annual reports: in this respect, the proposal in point 4 is important. We must encourage an exchange of views on these issues and give priority to the national parliaments, whose role is fundamental.

I would also like to point out that, in the framework of the rule of law mechanism, the follow-up to the reports has given rise to interparliamentary meetings in recent years. Proposals to give COSAC a greater role should be tempered by the autonomy of national parliaments. I am also puzzled by the proposal in point seven which seems to introduce a very complex control mechanism.

The draft conclusion may benefit from useful reflections by the Court of Justice at our next joint meeting.

Mr. Anton Hofreiter (Germany, German Bundestag). I found today's hearing very interesting and I think it is very good that we have been able to draw conclusions from our work. The idea of an annual European conference is very relevant. I think that the subject of the rule of law should be dealt with regularly. Personally, I think that this is a targeted idea and that it will help to structure the debate on the rule of law.

Point 7 is more problematic for me. This warning mechanism is complicated because we have to ensure that the European rules that we have all unanimously approved are respected.

According to the experts, the Court of Justice has already clarified the definitions of the different values and has also defined the term rule of law. Since these terms are clearly understood, we do not have a problem of definition. It is rather countries like Hungary and Poland that have an implementation problem.

What interests me today is the implementation of common European values. European democracy is in crisis. It will only be sovereign if all Member States naturally respect the rule of law.

Ms. President, Sabine Thillaye (France, National Assembly). Thank you for your remarks and I take note of your criticism concerning point 7, which will be deleted from the draft conclusions.

Meeting of Wednesday 1 June, 2022
at the Court of Justice of the European Union
(Luxembourg)

Hearing with Mr. Koen LENAERTS, President of the Court of Justice

Vice-President Lars Bay Larsen. In the temporary absence of President Lenaerts, I would like to welcome all our visitors to the Court of Justice of the European Union. This is the first meeting of its kind, to discuss the various aspects of the subject of the rule of law, as well as the sometimes delicate relationship between the primacy of Union law and national law, including the constitutional structures of the Member States.

By way of introduction, I will simply recall some basic information about the Court. When I travel to the Member States, in academic circles or at other events, I am sometimes asked: "What is the Court's jurisdictional policy on this or that subject? What is the link between the Union and the European Court of Human Rights? I simply reply that we have no jurisdictional policy, except to carry out our mission, which is to rule on a case-by-case basis to ensure "respect for the law in the interpretation and application" of the treaties. Nothing more, nothing less.

In this respect, the Court does not take up cases on its own initiative: they are brought before the Court, which rightly rules on them provided that the cases fall within its prerogatives. The majority of the cases brought before us, about 75%, are referred under the preliminary ruling proceedings. The remainder may be direct actions of various kinds, such as infringement procedures. These are generally brought by the Commission or, now once or twice a year, by a Member State against another Member State that is alleged to have infringed Union law. We are also seized of appeals against decisions of the General Court. While the latter are no less important, actions for failure to fulfil obligations and requests for preliminary rulings typically concern cases raising the issues that interest us today. Without further ado, I will turn the floor over to Ms. Thillaye and then to Mr. Rapin.

Ms. President, Sabine Thillaye (France, National Assembly). We would like to talk about two subjects that are crucial for the future of the European Union: the principle of the primacy of Union law, which is sometimes undermined, and respect for the rules of the rule of law. This visit shows our desire to learn more about the role of the Court in European integration, as well as its competences for the interpretation and uniform application of Union law, and thus to obtain some answers to the questions we ask ourselves as parliamentarians. Jean-François Rapin will introduce the subject of primacy, while I will say a few words about the working group on the rule of law. On our initiative, COSAC decided for the first time to set up two working groups, one on the role of national parliaments within the European Union, the other on the values, in particular the rule of law, at the heart of the sense of belonging.

The work of the latter has highlighted the active role of the Court in defending the rule of law, without this being a deliberate intention on its part. Mr. Vice President, you have recalled that the Court only says what the law is following appeals brought before it. However, the Court has repeatedly identified national legislation that it considers to be contrary to such important rules as the independence of the judiciary, academic freedom and the rights of individuals – and this at a time when the Council is being very careful in implementing Article 7 of the Treaty on European Union (TEU), the central provision for sanctioning violations of European values.

However, the judgment handed down by your court on 16 February 2022[4] opens the way for the implementation of the December 2020 regulation, which makes European funds conditional on respect for the rule of law. What is your analysis of the implementation of this mechanism? This mechanism appears to be both complete, by opening up the possibility of suspending payments, but also complex, since violations of the rule of law can only be condemned if they are "directly linked" to budgetary execution – which limits its scope.

The work of our group has also revealed incompleteness in the definition of the rule of law. The regulation of December 2020[5] gives a very legal definition, which takes up the case law of the Court. However, the regulation does not mention freedom of association, nor, above all, freedom of the media, without which there is no rule of law. In a recent judgment of 15 March 2022[6], the Court protected the right of a journalist, under certain conditions, to disclose privileged information. In general, however, the Court can only rule when rules harmonized by Union law are at stake – knowing that secondary legislation relating to the media is rather poor. In your opinion, should the December 2020 regulation be revised to include media freedom in the list of criteria constituting the rule of law?

Furthermore, what scope do you give to the need stipulated by the treaties to respect the constitutional identity of the Member States? The experts interviewed believe that this reference does not call into question the obligation of the member states to respect European values. Should we not also admit that the Member States may, depending on their social model, develop different understandings of the common conception of certain values? This aspect has been developed in our work, even if this is not my position.

Mr. President Jean-François Rapin (France, Senate). Today, the Court has an essential role as guardian of the European treaties, which translates into three main missions: to control the legality of the acts taken by the Union; to ensure that the Member States respect their obligations via actions for failure to fulfil obligations; and to ensure the uniqueness of European law by means of preliminary rulings. In order to ensure this last mission, the Court very early on affirmed the principles of the direct effect of Union law and its primacy over the domestic legislation of the Member States.

[4] CJEU, 16 February 2022, *Hungary/Parliament*, C-156/21.
[5] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.
[6] CJEU, 15 March 2022, *M. A v. Autorité des marchés financiers (AMF)*, C-302/20.

This primacy concerns all binding Union norms, whether they are derived from the Treaties or from secondary legislation – regulations, directives and judgements of the Court. In the event of an apparent conflict between a national rule and a directly applicable rule of Union law, the national court must overcome the conflict by interpreting the national rule in accordance with the requirements of Union law or by rejecting the national rule on its own. The Court does not act on its own initiative in order to give its judgments on the interpretation of Union law; it acts in response to preliminary questions from the national courts, which are, and remain, the ordinary courts of European law. However, let us be frank: the affirmation of the principle of primacy has never been easy. Several constitutional courts very quickly reaffirmed their constitutional identity in order to delimit national and European competences. The *Solange* case of the Federal Constitutional Court[7], which in 1974 established the unalterable character of the German constitutional identity and recalled that the Member States were masters of the treaties, is a case in point. In fact, the European Union cannot and must not intervene in all areas: it only has powers of attribution that are strictly defined by the treaties. Article 4 of the TEU provides that the European Union and its member states work together according to a principle of loyal cooperation, that national security remains the sole responsibility of each state and that the European Union must respect "national identities, inherent in their fundamental structures, political and constitutional".

Two recent developments have renewed the debate on the scope and implementation of the principle of primacy.

On the one hand, the case law of the Court has accompanied the construction of the Union. Initially focused on economic matters, it now extends to health, the environment and, since the Lisbon Treaty, to the area of freedom, security and justice. This evolution has been validated by the Member States and ratified by our parliaments. However, the degree of precision of certain recent rulings affecting sovereign prerogatives, for example in the area of general data retention for reasons of national security or military working hours, was poorly anticipated in France and raises legitimate questions.

On the other hand, we note that tensions are now head-on between the CJEU and several Member States on the rule of law, a concept that has recently appeared in European law and is the subject of an active policy of the Union – in particular on the subject of the independence of judges. I note with gravity that European unity is sometimes at stake. To illustrate my point, I would like to remind you of the Court's decision of 15 July 2021 asking the Polish court, in matters of judicial reform, to set aside the implementation of constitutional requirements that would conflict with Union law[8], and the response of the Polish Constitutional Tribunal of 7 October 2021, which declared your interpretation of the treaties unconstitutional[9].

[7] BVerfGE, 29 May 1974, *Solange I*.
[8] CJEU, 16 July 2021, *Commission v. Poland*, C-791/19.
[9] Constitutional Tribunal of Poland, 7 October 2021, K 3/21.

In conclusion, I will share with you two questions and my deep conviction. Is the Court, in preparing its judgments, attentive to the acceptability of its decision? Does the Court sometimes show restraint in order to take into account the constitutional identity of the member states? It is a question of building constructive jurisprudence through dialogue between the judges, but also of developing dialogue with the national parliaments. The latter are the first sentinels of the principle of subsidiarity and, through their proximity to the ground, the best "sounding boards" for the hopes and doubts of our fellow citizens about the Union. Their unease must not be overestimated or dismissed, or else there will be another Brexit or a rise in populism. While respecting the independence of the Court, it seems to me that initiatives such as today's and, in return, the appearance of members of the Court before our assemblies, are fruitful and should be carried out regularly.

Vice-President Lars Bay Larsen. Following on from my introduction, I would like to point out that the Court does not take up new cases on its own initiative, considering that it would be good for the Union to develop the law in this or that area. In accordance with the powers conferred on it by the Treaties, our activity consists of interpreting primary and secondary legislation, and sometimes leads us to invalidate secondary legislation – although we cannot invalidate primary legislation, which is a matter for the Member States alone. When the Court delivers a judgment, in interpreting the provisions at stake, it tries to understand the will of the Member States through the treaties, both in terms of their wording and the broader context of their elaboration. On the other hand, the Court cannot set aside a part of the treaty that it does not like, because of an unfortunate wording, or add elements to it. This difficulty also arises in the review of secondary legislation, when European and national politicians are confronted with a judgment that they find difficult to understand or disagree with. The legislator can amend secondary legislation and clarify its intention – although I am aware that it is difficult to reach qualified majority or unanimity in the Council of the EU, which is a political choice to protect minority states. The fact remains that judges, both European and national, cannot satisfy everyone.

President Koen Lenaerts, President of the Court of Justice. Welcome to all. It is important that the European Affairs Committees of the parliaments of the Member States visit the Court, to listen and understand each other. The national parliaments play an essential role, according to the very terms of Title II of the TEU, in its wording resulting from the Treaty of Lisbon. They participate in the democratic legitimization of the Union's legislative process, upstream of it and in addition to the European Parliament, by exchanging in each Member State with the ministers who participate in the Council of the Union. Thus, I agree with the words of Vice-President Bay Larsen: it is always possible, when the Court adopts an interpretation of the secondary legislation of the Union, to modify the legislation, as in the national legal orders. The political process retains the upper hand, provided that the amended legislation complies with the primary law and the "*bloc de constitutionnalité*" on which the common legal order of the Union and the State respectively are based.

As regards primacy, the term is somewhat abused. Primacy should not be confused with supremacy. The principle of primacy does not imply any moral supremacy – "*Anwendungsvorrang*" in German.

This principle only means that in the event of a conflict between a national norm and a norm common to the 27 Member States, the latter prevails in order to preserve the equality of the states and their citizens, provided that it was adopted in conformity with the constitutional provisions of the Union (treaties, Charter of Fundamental Rights).

In fact, the content of our case law is the result of the development of the Union. Thirty-five years ago, when I was a young judge at the Court, we were dealing with the free movement of goods and services without any political interest. At that time, it was "low politics", one of the most sensitive cases being the purity of German beer, which prevented the import of French and Belgian beers[10]. It is the Member States, not the Court, that have conferred new powers on the Union through successive treaties since the Single European Act, more or less every five years: the single currency through the Maastricht Treaty of 1992; the area of freedom, security and justice through the Treaty of Amsterdam of 1997; the Treaty of Nice of 2001; and the Lisbon Treaty of 2007. These modification treaties entrust new political matters to common governance, as the Member States consider that they can only be effectively managed at the European level: internal market; judicial cooperation in civil and criminal matters; asylum and immigration, *etc*. This is "high politics".

This process, bitterly debated within and between the member states, results in legislative acts containing grey areas. Member States that have not agreed within the Council of the Union to obtain a qualified majority or unanimity then bring opposing interpretations of the text before the Court. These cases are similar to the situation of parties to a private law contract, who argue before the judge to make the contract say what they would have liked it to say. The Court must ensure that the common rules at the adoption stage, with their grey areas, remain common in their application – it is up to the political process to make the norm evolve, which often happens. Thus, following developments in case law, the previous legislative act may be "recasted", incorporating aspects of case law while at the same time being able to include provisions that differ from the case law.

The final phase of interaction between the jurisdictional and political processes may then occur. One example is the sensitive subject – in France, but not only – of balancing the protection of privacy (personal data) and the protection of public security. The EU adopted Directive 2006/24[11], which the Court invalidated in accordance with its role as a constitutional court. Within the Member States, several constitutional courts had already ruled that laws transposing the directive were contrary to their national constitutions (Germany, Romania, and Belgium). The Austrian Constitutional Court and the Irish Supreme Court had then questioned the CJEU on the conformity of the Directive with primary law, to which we answered in the negative *via* the Digital Rights Ireland judgment of April 2014[12].

[10] ECJ, 12 March 1987, *Commission/Germany*, C-178/84.
[11] Directive 2006/24 of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.
[12] CJEU, 8 April 2014, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources*, C-293/12 and C-594/12.

Normally, when a constitutional court strikes down a law within a Member State, it is up to the legislative power to amend the law accordingly. Such a process has not been initiated in this case at the European level. Member States retain their own legislation, whose compliance with Union law is verified as it existed before the adoption of the now annulled Directive 2006/24. In this respect, the European Commission, the Member States, the Council of the Union and the Parliament are asking the Court to "delineate" the path. But is it the – delicate – task of the Court to assess the legality of national norms, in the manner of a *Conseil d'État* giving opinions on draft laws?

The primacy debate is therefore a false debate. The rule of conflict of norms works very well. The Court made this clear again in its *Popławski 2* judgment of June 2019[13]: a national norm must be left unenforced if it is contrary to a rule of Union law with direct effect. Going back to the *Solange I* and *II*[14] rulings, none of these cases is a frontal attack on primacy: as long as Union law does not guarantee a protection of fundamental rights equivalent to that of the German Constitution, the Constitutional Court will ensure its protection. In fact, this jurisprudence is to be welcomed, culminating in the recent *Recht auf Vergessen I* and *II*[15] judgments, and is evidence of a harmony between the constitutional systems of the Member States and Union law. They call for a more demanding protection of fundamental rights at the level of the Union, which has in the meantime adopted a Charter of Fundamental Rights that is applied almost daily by the Court. The Court based the aforementioned invalidity of Directive 2006/24 on the retention of data or on equality between men and women in insurance contracts[16].

These rulings, in line with the *Solange* case law, are independent of the question of primacy. As regards the decision of the Polish Constitutional Tribunal mentioned earlier – but can we still speak of a constitutional court? –, it was a request from the Polish Government that this court, composed entirely of judges appointed by the same Government, should rule in its favour. This is different from a dispute before a constitutional court, which normally protects the citizen petitioner in a procedure against the government, without being a body intended to stamp the latter's wish.

I appeal to your sense of the state and the rule of law as politicians. The Polish Constitutional Court has managed to capture the debate on the basis of primacy, whereas the purpose of the case law of the CJEU is to guarantee the rule of law, the independence of the judiciary and the impartiality of the judges, so that they are situated at an equidistance between the public and private parties. The jurisprudence of the Court is demanding, precisely because the national judges are the ordinary courts sanctioning infrigements to the law of the Union. By presenting this as a problem of primacy, Poland has been able to find support in all Member States, with different sensibilities.

[13] CJEU, 24 June 2019, *Popławski 2*, C-573/17.
[14] BVerfGE, 29 May 1974, *Solange I*; BVerfGE, 22 October 1986, *Solange II*.
[15] BVerfGE, 6 November 2019, *Recht auf Vergessen I and II*.
[16] CJEU, 1 March 2011, *Association belge des Consommateurs Test-Achats ASBL e.a.*, C-236/09.

It should be noted that reactions to the Court's judgments differ in the Member States depending on the subject matter. For example, the Court's case law on the protection of privacy was applauded in Germany and criticized in France. Conversely, our case law on the wearing of religious symbols in the public space and in work relations has been praised in France – because of the importance of the separation of church and state - and criticized in Germany. With regard to asylum and immigration, the Court's rulings have been criticized in Hungary and welcomed in other Member States.

Relativizing the absolute nature of primacy amounts to practicing unilateralism, with each party using the case law that suits it. Fortunately, the Court's case law influences national jurisdictions: in France, the Conseil constitutionnel faithfully followed our case law in a decision of February 2022[17], contradicting a decision of the Council of State[18].

It is sometimes necessary to wait one, two or five years, but the element of convergence eventually prevails. In Germany, for example, the Court has had difficulty in getting the relationship between the Charter and the national Basic Law accepted: the contribution of the initial CJEU rulings of 2013, *Åkerberg Fransson*[19] and *Melloni*[20], is now incorporated by *Recht auf Vergessen I* and *II*. Incidentally, there was also resistance when the Union was smaller, for example in France. In the *Cohn-Bendit* case[21], the State Council refused to refer a question to the CJEU, even though it is now the best student in the class.

We must not allow ourselves to be led down a slippery slope that could call into question the founding principles of the Union's legal order. As the Vice-President suggested, we must convince the other Member States to take the necessary measures at European and national levels to ensure this convergence. I am sure that the Union lawmakers will take initiatives after our jurisprudence on the protection of privacy and the protection of security, because the path is sufficiently marked out.

Ms. President, Sabine Thillaye (France, National Assembly). I agree with what you said, there must also be a dialogue between judges and lawmakers. Words have a meaning, like *Anwendungsvorrang* and primacy. We should not be misled by deceptive terms – and, for example, not confuse primacy with supremacy. This brings me to the question of the rule of law. Article 2 TEU mentions the rule of law among the values of the Union but does not give a definition. How can we arrive at a complete definition? In its annual report on the rule of law, the Commission includes, for example, the issue of the media, which is not included in the Venice Commission's definition.

President Koen Lenaerts. I would like to draw your attention to the fact that there is now a definition emanating from the legislator of the Union, in the famous regulation of December 2020 which was the subject of an action for annulment by two Member States.

[17] Constitutionnal Council, 25 February 2022, *M. Habib A. and others*, n° 2021-976/977 QPC.
[18] Council of State, 21 April 2021, *French Data Network et autres*, n° 393099.
[19] CJEU, 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10.
[20] CJEU, 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, C-399/11.
[21] Council of State, 22 December 1978, *Ministre de l'Intérieur v. Cohn-Bendit*, n° 11604.

In the judgment of February 16, 2022, delivered in plenary session, the Court specifies that this regulation is in conformity with the treaties as long as it corresponds to the field of competence of the Union, in this case on the basis of Article 322 of the Treaty on the Functioning of the European Union (TFEU). Other cases could be envisaged, as media companies – hich you mentioned – are service providers that can be linked to the internal market.

Mr. President Jean-François Rapin (France, Sénat). I agree with your analysis, Mr. President. A recent round table organized in the Senate stressed that the political process provided the Court with the tools it now uses. This rethoric on the primacy of Union law must be explained, not only to national parliamentarians, but also to parliamentarians and European Commissioners – the latter sometimes telling us that domestic law is no longer of much use.

President Koen Lenaerts. I would like to give the floor to the colleagues of the Court who have discussed or published on this subject, in particular Ms. Lucia Serena Rossi, author of an article on the legal value of values in the *Revue trimestrielle de droit européen*[22].

Ms. Lucia Serena Rossi, Member of the Court of Justice. Following on from Ms. Thillaye's interesting mention of Article 4 TEU, I would like to mention the relationship between Articles 2 and 4 TEU. I note that, in the light of our case law and legislation, the concepts of values and the rule of law are gradually being developed. The Court has already handed down numerous judgments on the independence of the judiciary and of judges. Then, the Court ruled that respect for Article 2 was a condition for the continued enjoyment of the rights deriving from the provisions of the treaty. Indeed, respect for the fundamental rights and values set out in Article 2 is linked to membership of the Union itself. The Court has so far laid the foundations for a collective reflection to define the content of Article 2, fed in particular by the national constitutional courts and the doctrine. With regard to Article 4 on loyal cooperation and national identity, the Court has been called upon to rule on the effects of the judgments of a constitutional court, in this case the Romanian Constitutional Court[23], which invoked national identity as a reason to depart from the primacy of Union law and the values of Article 2. However, the latter is a pillar of the Treaty and cannot be dismissed in the name of national identity. Indeed, respect for national identity is framed, since the same Article 4 sets out other principles: the principle of attribution; the principle of loyal cooperation; the principle of equality of Member States before the law.

Ms. Ineta Ziemele, member of the Court of Justice, President of the Sixth Chamber. The question of the apprehension of the rule of law by the law of the Union is essential: it was raised by Poland and Hungary in their challenge of the conditionality regulation of December 2020. The Court rejected Hungary's argument that the rule of law is a philosophical or political term. In the case law of the Court, the elements of the rule of law are already subject to judicial review.

[22] Lucia Serena Rossi, “La valeur juridique des valeurs. L’article 2 TUE: relations avec d'autres dispositions de droit primaire de l’UE et remèdes juridictionnels”, *RTD eur.*, vol. 56, n° 3, 2020, pp. 639-657.
[23] CJEU, 22 February 2022, *RS*, C-430/21.

Coming back to your initial presentations, it seems to me that there is a need to deepen the synergies and mutual influences between the judiciary, the legislative power and the executive, both at the national and European levels. Most of the examples that have been mentioned today reflect discomfort and misunderstandings. The only way to overcome them is to engage in a dialogue on national and constitutional identities and on the identity of the Union. To this end, a first meeting was organized in September 2021 between the Court and the 27 constitutional courts, for open and direct exchanges.

Mr. Siniša Rodin, Member of the Court of Justice, President of the Ninth Chamber. "What are we protecting when we protect the rule of law? What is the purpose of this protection? How does this fit in with the primacy of Union law? These questions, which haunt us, permeate all the subjects covered so far by the Court's case law. The legal and political notions of the rule of law may differ, even though both are based on the same idea of the separation of powers, the protection of human rights, equality, *etc*. However, not every illegality in the application of the law is equivalent to a breach of the rule of law, because the Union has functioned for several decades without mentioning the rule of law while sanctioning infringements. The turning point, in my opinion, comes with the case of the Portuguese judges[24]. For the first time, the Court explicitly ruled that national courts are part of the architecture of Article 19 TEU, and therefore must also ensure respect for the rule of law.

With regard to the primacy of Union law, one of the major tasks of Union law, since the beginnings of the European Communities and the *van Gend en Loos* judgment[25], is to ensure the protection of individual rights, which implies equality both between citizens and between Member States. The mechanism of the primacy of Union law is the guarantee of this. However, the Union is not a unitary system and the primacy of Union law is not absolute. The structure of Union law, which has prevailed since its inception, is that there are first common rules, and then justifications that can be invoked by the Member States to deviate from them – public security, public health, all of which we know. In a broader context, we have introduced a "super-justification" which is national constitutional identity. However, this can never go against the fundamental values of the EU, which is essential to the European project and on which the member states have agreed.

Mr. Domagoj Hajduković (Croatia, Parliament). I am very much in favor of the enlargement of the Union, and the work of the candidate countries on the rule of law shows that it is one of the fundamental principles on which our Union is based. Thus, the publication by the European Commission of annual reports on the rule of law is to be welcomed. It is an opportunity for national parliaments to be more involved and to hold governments accountable for the results on the rule of law. We have discussed the report in our Parliament: it is an indicator that addresses the good and the bad points, as well as the areas for improvement. After two years of pandemic, we are facing, with the aggression of Ukraine, circumstances that can threaten the rule of law. It is therefore crucial for the Union to defend its fundamental values and rights.

[24] CJEU, 27 February 2018, *Associação Sindical dos Juízes Portugueses/Tribunal de Contas*, C-64/16.
[25] ECJ, 5 February 1973, *van Gend en Loos v. Netherlands Inland Revenue Administration*, C-26-62.

Ms. Marina Berlinghieri (Italy, Chamber of Deputies). I would like to share a number of elements for our common reflection. Is there a possible way of reconciling the Union's accession to the European Convention on Human Rights with the specificity and autonomy of Union law? I would also like to point out that the rules of procedure of the Italian Chamber of Deputies allow parliamentary committees to examine the Court's judgments, after which a document is adopted requesting the Government to take certain measures. How is it possible to envisage forms of dialogue between national parliaments and the Court?

President Koen Lenaerts. It is precisely this type of meeting, here with members of the COSAC, that makes it possible to have a dialogue. Members of the Court have already spoken before plenary sessions of parliaments, at national and regional level, in Belgium for example. These exchanges are useful to explain elements of the case law and to indicate, possibly, aspects of the legislation that can – or cannot – be modified. In the judgment of 16 February 2022, the concept of the identity of the Union was used for the first time and defined on the basis of Article 2 TEU, not only from the rule of law, but from all the values – human dignity, freedom, democracy, human rights in a society characterized by pluralism, tolerance, equality and solidarity. National identity cannot be used to diminish these values.

Ms. Anca Dana Dragu (Romania, Senate). The idea of having a preventive weapon established by the Commission, in the form of this instrument for evaluating the rule of law in the Member States, is the right way. In this examination, it is important to analyze both the role of civil society and the independence of the media, which are the fundamental pillars that could ultimately change public opinion and the position of parliaments on issues such as the principle of primacy. We in Romania are committed to the values of the Union. With regard to the Romanian Constitutional Court case, which was mentioned earlier, the dialogue should continue. More generally, we should keep in mind the common objectives at the level of the Union, namely to have stronger and more resilient economies. Law, primary or secondary, must be the same, as basic arithmetic.

Ms. Hajnalka Juhász (Hungary, National Assembly). First of all, I would like to reaffirm that Hungary fully agrees with the fundamental rights, the values of Article 2 TEU and the European Charter of Fundamental Rights. The Hungarian courts rely on the CJEU, continuing to use preliminary rulings in various matters. We are aware that the Court is confronted with fundamental and complex questions concerning European integration, such as the respective competences of the Union and the Member States or the relationship between Union law and national legal orders. These questions must be dealt with carefully, taking into account the respective constitutional orders and, where possible, the opinions of constitutional courts. The question of the primacy of Union law has long been the basis of a fruitful dialogue between the CJEU and the national constitutional courts. This is even more important nowadays, when issues of the constitutional identity of the Member States and the rule of law seem to appear more frequently in the cases brought before the Court. More recently, in February 2022, the Court drew a clear distinction between the conditionality mechanism and that of Article 7 TEU, whose procedures and objectives are different. Like my colleagues and the members of the Court, I stress the importance of a proper dialogue. The Hungarian Constitutional Court has always been a constructive partner in this dialogue.

Its judgement from last December, ruling that interpretation of fundamental rights cannot be subject to judicial review by the CJEU, cannot be confused with a debate on the primacy of Union law. Let us remember that the Union was created by voluntary decisions of sovereign states. The instruments of the rule of law have real force if they reinforce the community of values between Member States. The role and responsibility of national constitutional institutions is decisive in defending these values. A constructive approach, in a constitutional dialogue based on mutual respect and fair treatment, is therefore key.

Ms. Nathalie De Oliveira (Portugal, Parliament). I would like to say, on behalf of the Portuguese parliamentarians, that we believe in the work of interpretation of the Court, which will enrich the concept of national identity – which does not belong only to the Member States. The jurisprudence of the Court allows the conciliation between the concepts of national identity and European values, on the way to a possible standardization of norms.

Mr. Gaëtan Van Goidsenhoven (Belgium, Senate). The conclusions of the Conference on the Future of Europe recently demonstrated that citizens want more direct but also clearer governance at the Community level. They suggest that these changes should be made within our founding texts, after a process of reflection aimed at consolidating cooperation between Member States. Faced with the upheavals of the world geopolitical scene, we realize – even more than before – that the Union embodies a space for the preservation of individual freedoms and the free destiny of States. The reinforcement of this common legal basis appears therefore as a tool, which could become more a marker of our positioning on the international scene. On the eve of the potential opening of a conference to revise the European treaties, would it not be desirable for certain concepts and general principles (rule of law, primacy of Union law) to be explicitly included at the top of the hierarchy of norms of our EU legal corpus?

President Koen Lenaerts. To come back, first of all, to primacy and questions of terminology, I referred to "*Anwendungsvorrang*" in German, but also in Dutch, my mother tongue, where there is only the word "*voorrang*". Latin languages and English have both words, "supremacy" and "primacy". The emphasis on primacy rather than supremacy comes from the Constitutional Court of Spain, the first court to distinguish between "*primacía*" and "*supremacía*" in a ruling on the compatibility of the Spanish Constitution with the Constitutional Treaty[26]. The latter, which now exists in the form of the Treaty of Lisbon, included an express clause enshrining the primacy of Union law, as advocated by Mr. Van Goidsenhoven. This clause no longer appears in the Treaty of Lisbon, but a declaration is annexed to the Final Act of the Intergovernmental Conference that adopted the Treaty: all Member States recognize the primacy under the Court's established case law, stemming from *Costa v. ENEL* of 1964[27]. The Court has incorporated this declaration into its case law: the primacy of Union law is, of course, derived from the case law inspired by the treaty (context, objectives, provisions), but has been confirmed by Member States. It is therefore not an invention of the Court.

[26] Constitutional Tribunal of Spain, 13 December 2004, DTC n° 1/2004.
[27] ECJ, 15 July 1964, *Costa v. ENEL*, C-6-64.

Secondly, following the intervention of Ms. Dragu, I insist on the fact that the same Constitutional Court of Romania courageously refered the Court in the *Coman* case[28], on the recognition of a same-sex marriage legally concluded in Belgium – whereas Romania does not recognize it. In response, the Court cautiously explained the requirements of EU law: Member States are obliged to recognize a same-sex marriage contracted elsewhere, solely for the purpose of granting the right of residence to one of the spouses and without affecting family law. This is part of the national identity of each Member State, as our colleague Juliane Kokott explained in the conclusions of the Bulgarian *Pancharevo* case[29], which follows the *Coman* case.

This brings me to my last point. Much of what we are discussing today depends on the willingness and commitment of the supreme and constitutional courts of the Member States to refer cases to the Court. In the *RS* case, the Romanian Constitutional Court ruled that, in the interests of the law, a reference for a preliminary ruling from a court of original jurisdiction was not necessary. The case, however, concerned a criminal law directive on the right to be assisted by a lawyer, which is a legislative instrument of the Union. The trial court maintained his questions and asked the CJEU whether the attempt by the Constitutional Court to prohibit him from referring the question for a preliminary ruling was compatible with Union law, under threat of disciplinary action. The supreme and constitutional courts must understand that the more cases they refer to us, the less dissonance there will be in the Union's legal order. These preliminary references allow for a pan-European debate, as all Member States can intervene. In fact, the case we examined this morning, which is still pending, concerns a preliminary ruling from a Hungarian trial court, whereas the Hungarian Supreme Court had previously had the opportunity to question us.

My message also applies to national identity, which has already been accepted in a significant number of cases, but cannot be used for unilateral purposes. For example, the CJEU judges in the Romanian *RS* case of 22 February 2022 that it is up to the Romanian Constitutional Court to explain why the issue of national identity is problematic, so that the Court can incorporate it into its interpretation of Union law.

[28] CJEU, 5 June 2018, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16.
[29] CJEU, 14 December 2021, *Stolichna obshtina, rayon "Pancharevo"*, C-490/20.

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