# HORIZONTAL INTEGRATION AND UNION BASED ON THE RULE OF LAW

https://doi.org/10.47907/livro/2022/RuleofLaw/cap01

Alessandra Silveira*

On 17-18 May 2021, in the context of the "High Level Conference - Rule of law in Europe", one of the recurrent concerns among speakers was the fact that the rule of law barely says much to citizens, it does not appear as a priority in Eurobarometers, perhaps because citizens do not perceive its importance and the consequences of any transgression of it. Given that what we discuss and research among the academic circle only adds value if it can be understood by civilian society, we start this text with what is a plain and obvious idea for legal scholars, but worth remembering when writing for a wider audience: that there can be no notion of legitimate power without the idea of law, since law legitimizes the exercise of power, in so far as it controls and moderates it.

The expression "the rule of law" means that the exercise of public power is subject to legal rules and procedures (legislative, executive, judicial procedures), which allow citizens to monitor (and eventually challenge) the legitimacy of decisions taken by the public power (that is, the constitutionality, legality, regularity of these decisions). That is why the basic idea of the expression "the rule of law" would be to submit power to law, restraining the natural tendency of power to expand and operate in an arbitrary manner. To position oneself in favour of the rule of law means, these days, to intend that public institutions must aim at guaranteeing fundamental rights.

In any case, the value of the rule of law tends to extend beyond the organizational scheme of the State, as it underlies the defence of its

* School of Law, University of Minho.

citizens against any power – be it the traditional power of the State, or the power of novel political constellations such as the European Union, be it the power of private organizational complexes – such as market forces, internet forces, sports forces, etc. We coexist with countless *de facto* powers, many of them with transversal origins, without any element of connection with the traditional power of the State, in a process identified as the deterritorialization of power. As Gustavo Zagrebelsky, Ulrich Beck and Zygmunt Bauman have explained well, a deterritorialization of power has taken place, and it is no longer exercised exclusively in territorial terms, with a growing divorce between power and politics – or between power and legitimacy. All of this points to the idea of a rule of law beyond the State (in its modern conception), which is why today there is more discussion around the design of a "Union of law" in relation to the European Union.

The principle of the rule of law is mentioned in the preambles of the Treaty of European Union (TEU) and of the Charter of Fundamental Rights of the European Union (CFREU), as well as in Article 2 TEU. However, long before the rule of law principle was expressly enshrined in the constitutive treaties, the Court of Justice had already stated in the *Les Verts* judgment of 1986,[1] that the (then) European Economic Community would be a "Community based on the rule of law", in the sense that neither the Member States that make it up nor the European institutions would be exempted from checking the conformity of their acts with the "basic constitutional charter" to which the constitutive treaties correspond. In *Les Verts*, therefore, we identified the bases for the recognition of the (current) European Union as a Union under law, as well as constitutive treaties such as the Constitutional Treaty of the European Union.

Although there is no definition of the rule of law in the constitutive treaties, from the judgments of the Court of Justice it is clear that this is a fundamental norm, which guides and conditions the exercise of public powers. The rule of law is the source of the principles in force in the Union's legal system, such as the principle of legality, the principle of legal certainty, the principle of the protection of legitimate expectations, the prohibition of arbitrariness by the public authorities,

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[1] Judgment *Parti écologiste Les Verts v European Parliament*, of 23 April 1986, 294/83, EU:C:1986:166.

the principle of the balance of power, the principle of equality before the law, and the principle of effective judicial protection, etc. It is a core rule that requires all citizens to be treated by all decision-makers in a dignified, equitable manner, in accordance with the law, giving citizens the opportunity to challenge such decisions before independent and impartial courts.

In any case, those principles are not (and should not be) purely formal and procedural requirements, as they are the means of ensuring respect for democracy and fundamental rights. The rule of law is re-presenting itself today in a global context – marked by fragmentation, financialization, digitalization – which is not exactly a favourable scenario for it. For this reason, proclaiming the value of the rule of law must be interpreted as an attempt to recover, by western legal-political culture, its most recognized and precious heritage.

Why acknowledge and emphasize this now? The answer to this question lies on the fact that the rule of law has been under increasing pressure in Europe. Indeed, the rule of law is not immune to the recent crises that the EU has gone through and is still going through, from the European debt crisis, the migrant crisis, followed by the constitutional crisis with Brexit and the populist drift, and now, the health emergency due to the Covid-19 pandemic. The rule of law is threatened when a significant number of actors, in different sectors and different Member States, fail to guarantee normative expectations to the point of creating a deficit in confidence in the law and in public institutions. However, public confidence in the legal systems of all Member States is crucial for the functioning of the European Union as a whole.

Currently, decisions in the field of civil and commercial law of any national court must be automatically recognized and enforced in another Member State – and a European arrest warrant issued in one Member State must be executed in another Member State. This clearly illustrates why all European citizens are affected if the rule of law is not fully respected in a given Member State – which threatens the functioning of the European Union as a realm of freedom, security, and justice without internal borders. That is why the European Union's capacity to defend the rule of law is essential, because it is a question of fundamental values; a question of "who we are", as the European Commission's Vice-President, Frans Timmermans, has already stated.

A community of law such as the European Union presupposes the exercise of a jurisdictional function – separate and distinct from any governmental function. Based on the criteria of judicial independence, the Court of Justice has broadened the scope of protection of the principle of the "Union based on the rule of law" (what does it protect? what does it prohibit?), imposed since the *Le Verts* judgment to a rule that *i)* imposes limits on the European institutions and Member States action in areas covered by Union law, and *ii)* provides guarantees of the rights of individuals affected by European provisions.

In the 2018 *Associação Sindical dos Juízes Portugueses*[2] ("Portuguese Judges") judgment, the Court of Justice was asked to determine whether there is a general principle of EU law, according to which the authorities of the Member States are obliged to respect the independence of domestic judges, as well as to maintain their remuneration at a constant and sufficient level so that they can exercise their functions freely.[3] In its response, the Court of Justice underlined that Article 19 TEU obliges Member States to ensure effective judicial protection in areas covered by EU law. This embodies the value of the rule of law stated in Article 2 TEU and recognizes the integrated nature of the EU's judicial system, as national courts play a role which is jointly assigned to them with the Court of Justice with a view to ensuring respect for the law in the interpretation and application of Treaties. Thus, a problem related to judicial independence in Portugal is necessarily a European problem since domestic courts ensure the application of EU law in each Member State.

Moreover, in the "Portuguese Judges" judgment, the Court of Justice stated that judicial independence presupposes that this judicial function is exercised with total functional autonomy, that is, i) without being subjected to any hierarchical or subordinate link, ii) without receiving orders or instructions from any origin, and iii) protected

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[2] Judgment *Associação Sindical dos Juízes Portugueses*, of 27 February 2018, C-64/16, EU:C:2018:117.

[3] Cf. Alessandra Silveira / Sophie Perez, "A Union based on the rule of law beyond the scope of EU law – the guarantees essential to judicial independence in Associação Sindical dos Juízes Portugueses", *Thinking & Debating Europe – The official blog of* UNIO – EU *Law Journal* (3 April 2018), available at <https://officialblogofunio.com/2018/04/03/a-union-based-on-the-rule-of-law-beyond-the-scope-of-eu-law--the-guarantees-essential-to-judicial-independence-in-associacao-sindical-dos-juizes--portugueses/>.

against external interventions or pressures, which may affect the independence of any judgment of its members and influence their decisions. In particular, protection against removal from office of magistrates and remuneration appropriate to the importance of the functions they perform were mentioned by the Court of Justice as guarantees inherent to judicial independence.

To this extent, in the "Portuguese Judges" judgment, the Court of Justice defined judicial independence within the meaning of EU law, establishing criteria and guarantees for its proper exercise. In later judgments, the understanding of the concept was developed, according to which domestic courts and the Court of Justice share the responsibility for ensuring the full application of EU law in all Member States, as well as judicial protection of the rights conferred on individuals by the European Union. On this basis, measures that make it impossible for domestic courts to perform their functions as courts of the European Union ultimately prevent the Court of Justice itself from complying with its jurisdiction under Article 19 TEU, in order to ensure respect for the law in application and interpretation of Treaties.

This has far-reaching consequences within the framework of the European Union's legal-constitutional model. By giving methodical operability to the values on which the European Union is founded, the Court of Justice has faced up to the challenges of "non-rule of law" that makes constitutional courts partisan across Europe, and instrumentalizes the constitutional identity of the Member States in subverting the application of EU law. The case law of the Court of Justice has reflected an extremely sensitive interpretation of the political and institutional balances on which the Union's survival as a project of legal-political integration depends.

It is important to consider that the rule of law is not pursued only through the courts, as all public bodies must live up to their responsibilities. Indeed, in the toolbox for the rule of law within the framework of the European Union there are also instruments of an essentially political character – for example, the European Commission's annual report on the rule of law, discussed and considered in other Union institutions since 2020, in order to identify weaknesses regarding judicial independence, the fight against corruption, media pluralism, checks and balances – that is, regarding the institutional framework for surveillance and scrutiny by public authorities.

In addition to this preventive mechanism, there are two other political tools whose practical consequences remain unknown: one of them would be the Article 7 TEU procedure, which would aim at verifying the existence of a manifest risk of a serious violation of the values of the European Union by a Member-state (in a first phase), as well as the existence of a serious and persistent violation of those values (in a second phase). And another policy tool recently created would be the Rule of Law Conditionality (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).

As for the procedure provided for in Article 7 TEU, it is actionable when a sudden deterioration of the rule of law in a Member State requires a stronger and more structured reaction on the part of the European Union. Moreover, this is the most emblematic political instrument available to defend the rule of law in the European Union, despite its weakness of requiring unanimous approval from Member States, in order to decide whether there is a serious and persistent violation of Union values, which would lead to the suspension of the rights of the Member State which prevaricates – and even their right to vote in the Council.

To date, this procedure has only been triggered in two specific cases: in December 2017 against Poland (at the initiative of the European Commission) and in September 2018 against Hungary (at the initiative of the European Parliament). However, the procedure never went beyond the first phase (verifying the existence of a manifest risk of a serious violation of the values of the Union), the deliberation of which does not require the unanimity of the Member States but the qualified majority of 4/5 of the members of the Council. The unanimity of the European Council is only required in a second phase in order to verify the existence of the serious and persistent violation of the values of the Union, which may lead to the suspension of rights of the Member State in a third phase by decision of the qualified majority of the Council – that is, 72% of the members of the Council that make up 65% of the population [Articles 354 and 238(3) b) Treaty of Functioning of the European Union (TFEU)].

The Portuguese Presidency of the Council of the EU finally announced its intention to hold the Hungary and Poland hearings at the end of June 2021 – a procedure triggered under the application of

Article 7 TEU. However, in Hungary's case, this process is only being carried out more than ten years after the first alarms were raised by the European Parliament, which early intervention would have made it possible to act in a timely manner and avoid the worst. What is the point now of verifying the existence of a clear risk of a serious breach, if the risk has already been confirmed – and will both Member States protect each other to avoid the unanimity that would then lead to sanctions? It is only possible to offer some effectiveness to the provisions of Article 7 TEU through the adoption of alarm mechanisms – which oblige the EU institutions to give precedence to the rule of law in all interactions with the government of a Member State that is the target of such a procedure.

Hungary was able to delay the Article 7 TEU procedure by seeking the annulment of the European Parliament's resolution to the Court of Justice under Article 263 TFEU. In the Opinion presented by the Advocate General Michael Bobek delivered on 3 December 2020, no error was identified in the interpretation of the relevant rules or in the practice of the European Parliament, so the Advocate General proposed to the Court of Justice that Hungary's action for annulment should be dismissed.[4] It was in question whether or not the reasoned proposals adopted under Article 7 TEU would be subject to judicial review in the light of Article 269 TFEU, as well as how abstentions in the European Parliament should be considered in order to determine whether the majority of 2/3 of the votes cast required by Article 354 TFEU had been achieved. On June 3, 2021, the Court of Justice dismissed Hungary's appeal as unfounded.[5]

As for the Rule of Law Conditionality (Regulation 2020/2092) – aimed at protecting the Union's financial interests, which are at risk due to the general weakness of the rule of law in a Member State – its application depends on the decision of the Court of Justice regarding

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[4] Cf. Conclusions presented on December 3, 2020 by Advocate General Michael Bobek in Case C-650/18, ECLI:EU:C:2020:985.

[5] Judgment *Hungary v European Parliament*, of 3 June 2021, C-650/18, ECLI:EU:C:2021:426. On the theme cf. Alessandra SILVEIRA / Maria Inês COSTA, "The rule of law and the defence of citizens against any power (on the case C-650/18 Hungary v European Parliament)", *Thinking & Debating Europe – The official blog of* UNIO – EU *Law Journal*, 4 June 2021, available at <https://officialblogofunio.com/2021/06/04/the-rule-of-law-and-the-defense-of-citizens-against-any-power-on-the-case-c%e2%80%91650-18-hungary-v-european-parliament/#more-5218>.

two actions for annulment, namely case C-156/21 (whose applicant is Hungary) and case C-157/21 (whose applicant is Poland) both of 11 March 2021. Regarding the Rule of Law Conditionality Regulation, it is important to highlight the European Parliament Resolution of 16 December 2020, in which the Parliament demarcated itself from the Conclusions of the European Council of 10 and 11 December 2020, according to which i) the guidelines to be adopted by the European Commission regarding the application of the Rule of Law Regulation will be developed in close consultation with the Member States, and ii) until these guidelines have been completed, the European Commission will not propose measures under the Rule of Law Regulation. The European Parliament reacted strongly to the European Council's conclusions by stressing the fact that it does not exercise legislative functions and that a political statement by the European Council does not represent an authentic interpretation of the legislation.

It should be noted that under the provisions of Article 17(3) TEU, the European Commission must act independently, and it shall not receive any instructions from any Government or Union institution/body, meaning the European Council does not have powers to prevent the Commission from acting in defence of the application of EU law.[6] Thus, the European Commission's Vice-President, Vera Jourová, admitted publicly at the "High Level Conference - Rule of law in Europe" that, as soon as the Court of Justice rules on the Rule of law Regulation, it will be applied retroactively from 1 January 2021, with the European Commission vigilant as to any breach of the rule of law after that date.

Are such mechanisms of political control of respect for the rule of law in the European Union enough? Apparently not, since the governments of the Member States play both sides – the national and the European one – and tend to protect each other when they are part of European institutions of an intergovernmental character – namely, the Council of the European Union and the European Council. Perhaps it may be necessary to come up with solutions that have been proposed by the European Parliament for years, such as the establishment of

[6] Cf. Pedro FROUFE / Tiago CABRAL, "Heresy, realpolitik, and the European Budget", *Thinking & Debating Europe – The official blog of* UNIO – EU *Law Journal* (4 January 2021), available at <https://officialblogofunio.com/2021/01/04/editorial-of-december-2021/>.

an independent Copenhagen Commission, which would perform an on-going verification of the rule of law and fundamental rights in all Member States – an idea developed in the European Parliament report of 30 January 2019 on the application of CFREU. Given that there are criteria for the accession of a European State to the European Union under Article 49 TEU – criteria adopted at the Copenhagen European Council in 1993 – these cannot only serve as pre-conditions for accession, but also as references on the basis of which Member States are periodically evaluated.

Furthermore, the Strategy of 2 December 2020 aimed at strengthening the application of the CFREU provides that from 2021 onwards the European Commission will present a new annual report on the application of the Charter in EU. Unlike the Commission's previous reports on the CFREU, this one will look more closely at the application of the Charter in the Member States and will provide the Commission with new elements for assessing the compliance of national legislation with EU law. A recent Eurobarometer survey showed that only 42% of respondents had heard about the Charter and that only 12% actually know what it is and what it stands for. However, six out of ten respondents want to know more about their rights and what bodies and institutions they should turn to, and whether their rights under the Charter have been violated.

Recalling the ideas present at the beginning of this text, why is it important to make citizens more aware of the value of the rule of law and the European values culture in the present historical moment?

Because the entire legal-constitutional construction of post-war Europe is based on the idea that in the absence of the rule of law, democracy becomes the tyranny of the majority. Without the rule of law, we are left with nationalist populism and its disastrous consequences. Nationalist populism seeks to achieve its goals by destroying the dialectical connection between democracy and the rule of law, as if the will of the majority has no limits in a democracy, allegedly because the popular will is above institutions. Such populist movements gain strength and come to power precisely through the instrument of formal democracy – that is, through voting and the majorities that the vote is capable of forming. These phenomena are potentially threatening to democracy, however much they are generated in democracy, from the exercise of fundamental rights that

define and sustain it – such as freedom of expression and association. Therefore, more than ever, it is necessary to explain to citizens how the dialectical relationship between the rule of law and democracy works – and to combat its subversion.

Maybe the pandemic situation has brought about the decisive timing to tackle the theme of European integration from the standpoint of individuals, in the light of their daily experiences of life, from the horizontal integration perspective – even if in a digital environment because of the health crisis – and not as much (or not only) from the perspective of vertical integration.[7] When we discuss themes such as "EU republican citizenship", "EU polity", and "EU democracy" we are immediately faced with some proposals of institutional reforms in the European Union, always determined by a vertical integration angle. However, perhaps this is the time to tackle the problem from a horizontal integration standpoint – or from a shared horizon of living, in which a collective will can be created through expansive communication. As explained by Ulrich Beck, only when individuals understand the European Union as a project of their own, only when they are in the position to assume the perspective of other Member-States' citizens, only then will there be an adequate environment in which to talk, properly, of a European democracy.[8]

The pandemic we are still living through is particularly propitious to Europeans raising awareness on how we all share the same political destiny. To this extent, "How is it possible to guarantee that a larger number of individuals can have the opportunity of learning to see themselves through the eyes of others?" (e.g., through the eyes of other Member-States' citizens). This question could be broken down into several others: "How can we open privileged channels of communication between individuals? And which channels should be opened? And who would be the translators, i.e., the bodies responsible for intermediation, the agents who communicate the interests and realities of all interested parties?" (in a broader sense of the term, relating concerning

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[7] On the topic cf. Alessandra Silveira *et al.,* "Conference on the future of Europe and the defence of European values", *Thinking & Debating Europe – The official blog of* UNIO – EU *Law Journal* (6 May 2021), available at <https://officialblogofunio.com/2021/05/06/editorial-of-may-2021/>.

[8] On the topic cf. Ulrich Beck, *A Europa alemã – de Maquiavel a «Merkievel»: estratégias de poder na crise do euro*, Lisbon: Edições 70, 2013.

"driving towards us", revealing mindsets and different world views, as we are only interested in what we know).[9]

It is time to scrutinize the European political community, revealing the current Europe of European citizens,[10] and doing it by departing from civilian society, i.e., from what civilian society can do in this sense beyond public authorities. It is important to consider the extent to which trust in European solutions to tackle the health crisis can create a political space that reconciles Europeans, promoting compromises between different visions of Europe. It is important to find solutions of vertical integration and (most of all) of horizontal integration that allow us to choose between different political alternatives to the Union, in detriment to the "lazy" choice of being for or against remaining in the European Union.

Indeed, it is not an easy undertaking – but it is not impossible either. Everything becomes more complicated as European citizens from the north and the south, from the east and the west, from more or less robust economies, etc. aim for different and sometimes contradictory goals. However, looking at things more closely, the differences between European citizens also are reproduced inside the Member States – and it has been possible to manage and to accommodate them democratically.

This is where the concept of solidarity of citizens among citizens emerges, so that they become more responsible with one another. The idea of equivalent cost sharing can be disseminated through learning processes; it can be stimulated by the perception of political and economic needs. And that is how trust is built, and traditions are altered. As more and more citizens find themselves able to understand the influence of European Union decisions on their lives – and the more this is emphasized by the media – the wider their interest in exercising their democratic rights as European citizens will be.

The solution is widely studied and requires a different approach not only from i) national governments (which tend to "nationalize" successes and "Europeanize" failures to win elections), but also from

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[9] Cf. Eduardo Prado Coelho, "Unidos na diversidade?", in Paula Moura Pinheiro, ed., *Portugal no futuro da Europa*, Lisbon: Gabinete em Portugal do Parlamento Europeu/Representação da Comissão Europeia em Portugal, 2006, 75.

[10] The idea is put forward by Ulrich Beck, regarding a social contract for Europe, cf. *A Europa alemã*, 101.

ii) national media (which can contribute decisively to the reciprocal opening up of public opinion in the Member States) and from iii) national political parties (that have sown separationist trends between national and European policy and are now dealing with rising populism).

Perhaps the "Conference on the Future of Europe" could become a forum for reflection and dialogue around multiple issues associated with the development of a European political community. It is relevant to consider how European and national authorities can develop emotional communication with European citizens – communicating with people's concerns, creating more empathy, and deepening European identity – as long as it also unravels to what extent civilian society can proceed with that goal.