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THE RULE OF LAW IN EUROPEAN INTEGRATION: ROOTS, FUNCTIONS, CHALLENGES

ВЕРХОВЕНСТВО ПРАВА В ЄВРОПЕЙСЬКІЙ ІНТЕГРАЦІЇ: ВИТОКИ, ФУНКЦІЇ ТА ВИКЛИКИ

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У лекції відомого німецького вченого, професора Гейдельберзького університету та Почесного професора НаУКМА Петера-Крістіана Мюллера-Ґраффа (Peter-Christian Müller-Graff, Heidelberg University, Doctor of Law and a famous specialist in the EU Law) розглянуто важливість дотримання верховенства права в європейській інтеграції.

Лекція розрахована на студентську аудиторію та широке коло читачів.

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"The rule of law in European Integration: roots, functions, challenges" is a vast topic — not only for legal science, but also for historical and political sciences, for economics and sociology, for cultural sciences and psychology and even for anthropology and philosophy. This broad research relevance follows from the law's specific characteristics, first, as a legitimate man-made prescriptive standard that requires behavioral compliance from its addressees, in particular from individuals, enterprises, organisations and public authorities; and, second, as being, in case, enforceable by legitimate public authority.

Western Europe's integration success story since more than two generations[1] has considerably relied on the pacifying ideas of law in general and of the rule of law in particular as a very concrete and essential

[1] See, e. g., *Gabriele Clemens/Alexander Reinfeldt/Gerhard Wille*, Geschichte der europäischen Integration, Paderborn, 2008.

element since 1952. 62 years later, in 2014, the wording "respect for the principle of the rule of law" appears anew at the shores of Eastern Europe in the corner-stone-Article of the first new type Agreement of the European Union's Eastern Partnership, namely in the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Association Agreement).[1] "The respect for the principle of the rule of law" together with the respect for democratic principles and human rights is entrusted with the herculean task to "form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement".[2] This prominent internal and external role of the rule of law mirrors the experience and self-understanding of the European Union, as laid down in the Treaty on European Union (TEU), in which "the respect for the rule of law", first, explicitly figures as one of the so called values on which the Union is founded,[3] second, is expressly emphasized as being "common to the Member States"[4] and, third, shall be upheld and promoted in the Union's relations with the wider world.[5] In the new Association Agreements with Ukraine, Georgia and Moldava even the Court of Justice of the European Union in Luxemburg (CJEU), is entrusted with a binding role for settling disputes over

[1] OJ EU 2014 L 161/3.
[2] Article 2 of the Association Agreement.
[3] Article 2 s. 1 TEU.
[4] Article 2 s. 2 TEU.
[5] Article 3 par. 5 TEU.

certains question of interpretation of Union law which is incorporated in the Association Agreements.[1] The rule of law is everywhere in this *ideal normative* world.

However, in December 2017, challenges of the *real* world to this objective became evident, when the European Commission, in a dramatic move, has proposed, for the very first time, that the Council of the Union determines according to Article 7 par. 1 TEU that there is a clear risk of a serious breach by the Member State Poland of the respect for the rule of law, with the potential consequence for Poland to lose its voting rights as a member of the Union.[2] At the same time, the Commission, in a procedure according to Article 258 of Treaty

[1] E. g., Article 322 par. 2 of the Association Agreement between the European Union and its Member States and Ukraine.

[2] Commission, Press Release „Rule of Law", 2 July 2018.

on the Functioning of the European Union (TFEU), has additionally brought its opinion before the CJEU that the Polish retirement provisions for judges of ordinary courts infringe the independence of the judiciary.[1] This year, in July, an additional infringement procedure has been launched by the Commission against the same Member State declaring its law which forces Supreme Court judges into retirement as a measure that undermines the principle of judicial independence.[2] In August

[1] Commission, Press Release „Rule of Law", 2 July 2018.

[2] Commission, Press Release „Rule of Law" 2 July 2018: based on Article 19 TEU read in conjunction with Article 47 Charter of Fundamental Rights of the European Union (CFR). See as a first reaction the adoption of a provisional measure of the ECJ: Ordonnance de la Vice-Présidente de la Cour in Case C-619/18 R, ECLI:EU:C:2018:852.

Poland's Supreme Court itself referred the same question to the CJEU.[1] Moreover, in July the CJEU had already recognized the possibility that the transnational judicial cooperation between Member States in criminal matters, namely the execution of a European arrest warrant issued by a Polish court, might be jeopardised by this development (in a case on the request of the surrender of a person from Ireland to Poland accused of trafficking in narcotic drugs).[2] These concerns in relation to the Polish judiciary might also embrace the recognition and enforcement of judgments in civil and commercial matters, as provided for in Articles 36 and 39 of the Regulation (EU) No 1215/2015.[3]

These developments and the fundamental orientation of the TEU and the Association Agreement to the "rule of law" raise various basic questions for scholarly reflections. I shall concentrate on four of them from a perspective of legal scholarity: (1.) what is the notion of the rule of law in the *specific* context of European integration? (2.) Which are its roots in this context? (3.) Which basic functions are ascribed to and achieved by it? (4.) Which are its current challenges?

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[1] *Stanisław Biernat/Monika Kawczyńska*, https://verfassungsblog.de/tag/polish-supreme-court/ (23 August 2018).

[2] ECJ Case C-216/18, ECLI:EU:C:2018:586 (LM).

[3] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EU 2012 L 351/1.

A. The Notion of the "Rule of Law" in the Specific Context of European Integration

I. The term "rule of law", as used in the TEU and in the Association Agreement is *not identical* with any specific concept in the historical writings of "common law" scholars on the "rule of law", such as *James Harrington* (1656),[1] *Albert Venn Dicey* (1885)[2] or *Lon Fuller* (1964),[3] although it certainly comprises some of its ele-

[1] *James Harrington*, The Commonwealth of Oceana, London, 1656.

[2] *Albert Venn Dicey*, Introduction to the study of the law of the constitution, London, 1885.

[3] *Lon Fuller*, The Morality of Law, Yale, 1964.

ments. It is an *autonomous* term of European law, which, moreover, finds a different wording in any of the equivalent 24 authentic languages of the TEU[1] as well as of the EU-Ukraine-Association Agreement:[2] e. g. in Ukrainian "verkhovenstvo prava", in French "L' État de droit", or in German "Rechtsstaatsprinzip". In particular, the "Rechtsstaats-prinzip" echoes another, continental concept of the rule of law inspired by *Immanuel Kant*'s enlightened idea of the supremacy of a (written) constitution.[3] But the term "Rechtsstaatsprinzip" in European law is also not identical with any specific concept in the historical writings of continental "civil law" scholars or

[1] Article 55 TEU.

[2] Article 485 of the EU-Ukraine-Association Agreement.

[3] *Immanuel Kant*, Die Metaphysik der Sitten, Königsberg, 1797.

with Article 20 of the German Basic Law, though it surely comprises central elements of it, which also overlap with elements of the "common law"-perception. This is, in particular, the case for the guarantee of fundamental rights and their protection against public actions by independent courts. These elements can be considered as part of the hard core of the European term of the "rule of law".

II. However, I *submit* that, without prejudice to particularities in the national context, the idea of the European rule of law, based on ratified Treaties between States, is *closer* to the *continental* approach, in particular in three respects: *first*, insofar as the legitimacy of law and public power flows *only* from a positive codification (in the Union: from the Treaties) and not also from precedences of the judiciary as in the common law; *second*, insofar as any legislation has to respect the *constitution* (in the Union: the so called primary law as ratified by the Member States) and hence can be subjected to judicial review (in Union law: the annulment procedure according to Article 263 TFEU) as different from the sovereignty of the legislator in Britain; and *third* insofar as the concept of the separation of public power in the tradition of *Montesquieu* (1748)[1] prevails (in the Union between the European Parliament and the Council as the legislature, the Commission as the executive and the ECJ as the judiciary).

[1] Charles de Secondat de Montesquieu: De l'esprit des Loix, Genève, 1748.

B. The Roots of the Rule of Law in European Integration

The first, very subtle expression of the rule of law is the idea of *Treaties* as a pacifying element against force and political arbitrariness in the power tensions and competitions between the different realms in Europe. It emerges in the twilight of proposals for European unification as early as 700 years ago in *Pierre Dubois'* plea for a European Treaty in his book "De recuperatione de terrae sanctae" in 1306.[1] This was not yet the idea of the *rule* of law as perceived today, but only the concept of *a role of* law in interterritorial relations, namely the "pacta sunt servanda"-principle — Treaties have to be kept. The magic of this principle appears as a gradually increasing red thread in the historical development of the idea of European unification, as particularly elaborated, after dark war experiences: e. g., after the Thirty Years' War in *Gottfried Wilhelm Leibniz's* "Codex Juris Gentium Diplomaticus" in 1693,[2] then during the Napoleonic wars in *Immanuel Kant*'s "Zum ewigen Frieden" (Perpetual Peace) in 1795,[3] after them in *Konrad Schmidt-Phiseldek's* "Der europäische Bund" (The European Federa-tion) in 1821,[4] after the German-French

[1] *Pierre Dubois*, De recuperatione de terre sancte. Traité de politique générale, 1306 (publié d'après le manuscrit du Vatican par Ch.-V. Langlois, 1891).

[2] *Gottfried Wilhelm Leibniz*, Codex Iuris Gentium Diplomaticus, Hannover, 1693.

[3] *Immanuel Kant*, Zum ewigen Frieden. Ein philosophischer Entwurf, Königsberg, 1795.

[4] *C.F.G.E. von Schmidt-Phiseldek*, Der europäische Bund, Copenhagen 1821.

war in *Johann Caspar Bluntschli's* "Die Organisation des europäischen Staaten-vereins" (The Organisation of the European Association of States) in 1878,[1] after the First World War in *Coudenhove-Kalergi*'s "Paneuropa" in 1923[2] and after the Second World War in *Robert Schuman's* pioneering plan in 1950.[3] In that period the idea of a rule-based organisation of Europe and, with it, the rule of law entered political reality: idealistically envisaged by main promoting forces in the Hague Congress in May 1948 (I) and, more concretely shaped, by the foundation of the Council of Europe in May 1949 (II) and, later, mightily developed by the establishment and growth of the European Communities in 1952 and 1958 and the European Union in 1993 and 2009 (C).

I. The Hague Congress in May 1948, summoned by a private national organisation, the "United Europe Movement", gathered more than 700 participants from 28 European States,[4] among them prominent politicians of the time, such as *Altiero Spinelli, Konrad Adenauer, Edgar Faure, Francois Mitterand, Winston Churchill* and many others, and revealed three aspects concerning the role of law in the idealistic vision at this event.

1. The first aspect concerns the relation between the idea of a federal Europe and the role of law. In its

[1] *Johann Caspar Bluntschli*, Die Organisation des europäischen Staatenvereins, in: Die Gegenwart 1878, 131 et seq.

[2] *Richard Nikolaus Coudenhove-Kalergi*, Paneuropa, Wien, 1923.

[3] *Robert Schuman*, Déclaration du 9 mai 1950; https://www.robert-schuman.eu/fr/declaration-du-9-mai-1950.

[4] *Gabriele Clemens/Alexander Reinfeldt/Gerhard Wille* (*supra* fn. 3), p. 87.

composition the Hague Conference assembled *different ideas* for the future of Europe from different national groups with different accentuations of Europe's destiny after the European catastrophies in the first half of the 20th century. In the plentitude of concepts, *already basic ideas of a legal* framework became visible, in particular expressed by those who advocated a Federation of European States, as proposed by the "Union Européenne des Fédéralistes", presided by the Dutch *Hendrik Brugmans*, who delivered the opening speech with the message: "nous voulons que soient créés des institutions européennes fédérales, ayant force d'autorité, et capables de cristalliser une société nouvelle des peuples."[1] (in translation: We want the establish-

[1] Discours d'Henri Brugmans (La Haye, 7 mai 1948), www.cvce.eu 3/5.

ment of federal European institutions with strong authority, able to crystallize a new society of peoples). And he added: "rien n'aura été fait, tant que le dogme de la sacro-sainte souveraineté nationale n'aura pas été renversé"[1] (in translation: Nothing will succeed if the sacrosanct dogma of national sovereignty will not be overcome). The idea of a *federation* has, in itself, a *legal* dimension. It requires a reliable legal order for the partition of sovereign competences and the distribution of tax revenue between the Federation and the States, for the participation of the States in the federal legislative procedure, for the relation between federal law and regional law and for the judicial review of federal and state acts.

2. The second aspect of the emerging expectations of the law is linked to the idea of an intergovernmental Europe. It is well known that the federal idea was opposed by the British "United Europe Movement", which only aimed at the *cooperation between sovereign nation states.*[2] But even this concept had a *legal* undercurrent, as far as the organisation of such a co-operation was envisaged, though its concrete structures remained vague. The ensuing discussions showed that the British government was interested only in a loose intergovernemental platform and strictly opposed to the French government's proposals which aimed at the establishment of a European organisation in which Germany would be firmly integrated and controlled.[3]

[1] Id.

[2] *Gabriele Clemens/Alexander Reinfeldt/Gerhard Wille* (*supra* fn. 3), S. 88 et seq.

[3] Id.

3. The third aspect relates to the final pledge of the Hague Convention. Despite the controversy on the organisational perspective, the final pledge *sowed the legal perspective and gist* for European integration in four if its five parts with the words: "(1) We desire a United Europe, throughout whose area the free movement of persons, ideas and goods is restored; (2) We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition; (3) We desire a Court of Justice with adequate sanctions for the implementation of this Charter; (4) We desire a European Assembly where the live forces of all our nations shall be represented".[1]

II. The *next* step in the emergence of the role and rule of law in European integration was its concrete implementation in form of the *Council of Europe* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. The Statute of the Council of Europe was signed by ten states on May 5th, 1949.[2] Next, the Convention was drafted and adopted by the Council of Europe in 1950 and put into force on September 3rd, 1953. The *specific profile* of this new legal dimension becomes apparent, if it is *compared* to *earlier* forms of transnational cooperation in Europe. In this respect five aspects deserve attention.

1. *First*: the Statute of the Council of Europe is the first international Treaty in Europe which *conceptionally*

[1] Message to Europeans (The Hague, 10 May 1948), www.cvce.eu 2/2.

[2] *Gabriele Clemens/Alexander Reinfeldt/Gerhard Wille* (*supra* fn. 3), S. 89 et seq.

aims at *European unity, different* from the *power balancing* Treaties such as, e. g., the Westphalian Peace Treaties (1648) or the Final Act of the Congress of Vienna (1815) or the Paris suburb Treaties (1919/1920). The Statute emphasizes in its Preamble the ideals of peace based upon justice and international co-operation, spiritual and moral values, individual freedom and political liberty, rule of law and democracy. It utters the belief "that, for the maintenance and further realisation of these ideals and in the interest of economic and social progress, there is a need of a closer unity between all like-minded countries of Europe".[1]

2. *Second*: To these ends the Council of Europe is, in particular, mandated to *elaborate conventions* which foster *legal harmonisation* and the *authority of law among* and *in* the Member States.[2] Many initiatives have been launched: some 200 conventions such as, e. g., on cybercrime, against corrup-tion, organised crime, terrorism and trafficking of human beings *and* on promoting the rule of law e. g., by the European Commission for the Efficiency of Justice.[3] *In particular*, the protection of *human rights* has been fostered, notably through the great European Convention for the Protection of Human Rights and Fundamental Freedoms,[4] but

[1] Council of Europe, European Treaty Series – No. 1, https://rm.coe.int/1680306052.

[2] This conclusion can be drawn from Article 1 of the Statute of the Council of Europe.

[3] See for the full list: http://www.coe.int/en/web/conventions/full-list.

[4] Rome, 4.XI.1950; https://www.echr.coe.int/Documents/Convention_ENG.pdf.

also through specific actions such as, e. g., the protection of social rights, linguistic rights and minority rights.[1]

3. *Third*: The Statute of the Council of Europe *transcends* a *pure classical* intergovernmental cooperation insofar as it sets up a permanent organisational structure which does not only provide for a Committee of Ministers (as the representatives of the national governments),[2] but *also* for a *Consultative Assembly*,[3] which can be considered as an *embryonic federal* element (with its link to national parliaments[4]).

[1] See the list *supra* fn. 39.
[2] Article 13 et seq. of the Statute of the Council of Europe.
[3] Article 22 et seq. of the Statute of the Council of Europe.
[4] Article 25 of the Statute of the Council of Europe.

4. *Fourth*: The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols *transgress* classical intergovernmental cooperation insofar as they, first contain a *catalogue of concrete substantive rights of individuals*, which are, second, connected to the *judicial enforcement system of a Court* as an impartial body,[1] established as the ECHR in Strasbourg in 1959 and turned into a full-time Court in 1998.[2] The well-known consequence is visible, first, in thousands of applications of *individuals* against contracting states each year, alleging that the respective state has violated one of their rights under the Convention and, second, in a multitude judgements of the ECHR in which a state is convicted (because of violations, e. g., of Article 3 — inhuman and degrading treatment and punishment, of Article 5 — liberty and security, of Article 6 — fair trial, including the "reasonable time" —requirement in proceedings before national courts, of Article 10 — freedom of expression, of Article 1 of Protocol No. 1 — property).[3] *Inter-State* applications are relatively rare,

[1] Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[2] Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery established thereby; https://www.echr.coe.int (European Treaty Series — No. 155).

[3] For the statistics on violations by Article and by State 1959—2017 see https://www.echr.coe.int.

but they happen in cases of fundamental importance and scope such as the several pending applications of Ukraine against Russia since 2014 concerning the events in Crimea and Eastern Ukraine.[1]

5. *Fifth: Summarized*, however, the *role of law* within the Council of Europe and the Convention *does not raise* to *supranational* elements. The *Council cannot* legislate, but can *only* recommend conventions for adoption.[2] And the judgements of the *ECHR* have no direct or overriding effect in relation to the national measures concerned nor can they be enforced by the ECHR, the Council of Europe or individuals. They only oblige the respective state "to abide by the final judgement of the Court",[3] be it reparation, be it "just satisfaction" to the injured party,[4] be it an interim measure,[5] as, e. g., adopted by the ECHR in the Ukraine/Russia-case calling upon both Contracting Parties concerned to refrain from any measures, which might entail breaches of Convention rights of the civilian population.[6]

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[1] 20958/14 Ukraine v. Russia; 43800/14; 42410/15; 8019/16; 70856/16; Press Release ECHR 173 (2018), 9.5.2018.

[2] Article 15 b of the Statute of the Council of Europe.

[3] Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[4] Article 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[5] Rule 39 of the Rules of the ECHR (1 August 2018).

[6] ECHR 073 (2014).

C. The Functions of the Rule of Law in the European Communities and the European Union

In 1951, independent from the Council of Europe and the European Convention for the Protection of Human Rughts and Fundamental Freedoms, the law was entrusted with a new and leading role in European integration by six continental core states: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Since then, this trust in law guided and developed this very successful type of European integration. I submit *three* considerations on this mighty development: on the idea of Europe as a Community of law (I), on its two dimensions (II) and on its evolving new and broader feature as respect for the rule of law in European integration (III).

I. *First*: The European Communities as a Community of Law. The European Communities were founded on the idea as a Community of law more than sixty years ago. "The European Community is a Community of law"[1] is the famous wording of the first President of the Commission of the EEC (since 1958) and co-author of the Treaties of Rome, *Walter Hallstein*, a former professor for private and commercial law. This was neither a specific *academic* nor a specific *German* understanding nor was *Hallstein alone* with this idea. Many influential persons from the six founding Member States shared it. *Antoine Vauchez*, in his most recent

[1] *Walter Hallstein*, Die Europäische Gemeinschaft, 5. Aufl., Stuttgart, 1979, S. 51ff.

book "L'Union par le Droit",[1] displays an impressive group of powerful practicians of this idea in those years, among them — next to *Hallstein*: *Michel Gaudet* (the French co-author of the Treaties of Rome and the first Directeur Général of the Service Juridique of the Commission since 1958); *Andrè Donner* (the Dutch President of the ECJ since 1958); *Alberto Trabucchi* (the Italian judge at the ECJ since 1962); *Fernand Dehousse* (the Belgian President of the Parliamentary Assembly of the Council of Europe, later member of the European Parliament); *Robert Lecourt* (the French judge at the ECJ since 1962, later its President); One can add to this group *Pierre Werner*, the Luxembourgish Prime Minster since 1959.

II. *Second*: The idea of the European Community of law in conjunction with the supranational dimension of Community law had, from the very beginning, and still has two dimensions and functions: a static one (1) and a dynamic one (2).

1. On the *one* side, it has a rather *static* dimension, in the sense of respecting the contractually agreed and determined togetherness (in legal terminology: the so called primary law). This is the "*pacta sunt servanda*"-principle.

The *core* of this dimension is the *thought* to base the European civil, economic, social and political togetherness on the stabilising authority of law or, more concrete, on contractually, hence *voluntarily* entered and ratified commitments. It is the *vision* to durably

[1] *Antoine Vauchez*, L'Union par le Droit — L'invention d'un programme institutionnel pour l'Europe, Paris, 2013.

immunize the European togetherness through law against short-term political mood changes, vibrations and relapses into miserable national conflicts of the continent with itself and, in this sense, to gradually *depoliticize* transnational conflicts. It is, more concrete, the *concept* to permanently establish the European togetherness through legally binding — and in case judicially enforceable — commitments to common objectives (similar to a partnership agreement[1]), to mutually binding substantive obligations[2] (originally especially in order to establish the common market),

[1] See *Peter-Christian Müller-Graff*, Verfassungsziele der EU, in: Manfred Dauses (Hrsg.), Handbuch des Europäischen Wirtschaftsrechts, EL 31, München 2012, A I par. 2.

[2] Article 3 TEU.

to mutually guaranteeing the cross-border private initiative of the market participants,[1] to mutually submitting to common institutions with legislative and administrative powers[2] and to mutually respecting a common system of legal protection and conflict resolution through a common court.[3] In short: it is the *plan* to civilize the handling of transational egoisms, competitions and conflicts through law.

2. On the *other* side, the idea of the supranational Community of law comprises the *dynamic* dimension of progressively creating new or more detailed elements of the legally binding togetherness, namely the creation of new primary law and secondary law. This idea can be called: *Ius creat ius* — law generates law. In this sense it contains also the concept of transnational civil, economic, social and political *net-building*, hence *integration through law*. Scholarly literature on this line of understanding is abundant. Examples are *Mauro Cappeletti's* and others' enciclopedic efforts in the eighties of last century.[4] In this perspective, law is not only understood as a stabilising instrument or *object* of integration, but as an *agent* and *active subject* of integration. This concept assumes that the law of integration does not only shape transnational reality

[1] See *Peter-Christian Müller-Graff*, Privatrecht und Europäisches Gemeinschaftsrecht — Gemeinschaftsprivatrecht, 2. Aufl., Baden-Baden 1991, S. 17.

[2] Today Article 13 et seq. TEU; Article 223 et seq. TFEU.

[3] Today Article 19 TEU; Article 251 et seq. TFEU.

[4] Mauro Cappeletti et al. (eds.), Integration Through Law, Berlin/New York, 1985.

and togetherness, but, once in the world, due to its inner rationale, also generates new law in new challenges to the European cohesion. It expects (and even predicts to a certain degree) that the dynamics of integration law gradually create new elements of the European polity and society. Political scientists labelled this hypothesis as the "functional" or "neo-functional" theory (e. g.: *Ernst B. Haas*[1] on the shoulders of *David Mitrany*[2]) in contrast to the pure intergouvernmental theory (*Stanley Hoffmann,*[3] *Andrew Moravcsik*[4]). It is a *hypothesis*.

But this hypothesis proved to be *true in reality* in form of *integration milestones* and the *emancipation* of integration law from *traditional* elements of international Treaty law.[5] Some *headwords* might suffice to prove the case. Already the establishment of the *High Authority* of the European Coal and Steel Community (ECSC) with administrative powers required

[1] *Ernst B. Haas*, The Uniting of Europe: Political, Social, and Economic Forces 1950–1957, Stanford 1958.

[2] *David Mitrany*, A Working Peace System: An Argument for the Functional Development of International Organization, Oxford, 1943.

[3] *Stanley Hoffmann*, The State of War: Essays on the Theory and Practice of International Politics, New York/Washington/London, 1965.

[4] *Andrew Moravcsik*, The Choice for Europe. Social Purpose and State Power from Messina to Maastricht, Cornell (Ithaca), 1998.

[5] *Peter-Christian Müller-Graff*, Primürechtliche Entwicklungsschritte der Gemeinschaftsintegration zu einem transnationalen Gemeinwesen, integration 2007, 407.

an effective system of judicial protection and led to the creation of the *European Court of Justice* (ECJ; today CJEU). The innovative concept of the *common market* sparked the epocally new idea and reality of internationally founded, but *directly* applicable individual rights of the market participants before *national courts*[1] with primacy over conflicting national law[2] in the sense of the non-applicability of colliding national law (e. g. of the German prohibition of the marketing of imported beer that did not fulfill the requirements of the German law on purity of beer[3]). Already in 1964, in the leading case on the relationship between Community law and national law ("Costa/ENEL") the ECJ held "that the law stemming from the Treaty, an independent source of law, could not ... be overriden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question."[4] Attention has to be given to the ECJ's formulation "domestic legal provisions, however framed". This wording comprises also constitutional provisions and this consequence has been expressly confirmed by the ECJ in several later judgements, e. g. in 2010 in the case

[1] Leading case: ECJ, Case 26/62, ECLI:EU:C:1963:1 (Van Gend & Loos).

[2] Leading case: ECJ, Case 6/64, ECLI:EU:C:1964:6 (Costa/ENEL).

[3] ECJ, Case 178/84, ECLI:EU:C:1987:126 (Commission/Germany).

[4] ECJ, Case 6/64, ECLI:EU:C:1964:6 (Costa/ENEL).

"*Winner Wetten*" with the words: "Rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law".[1]

This path of establishing European subjective rights, European legal primacy and European sovereign rights was *successively widened* from the former European Communities to today's European Union (of Lisbon[2]). In its substance it followed the *inner logic* of the *internal market law*. It led – always embedded in law – in particular, towards the objective of the absence of internal border controls for persons,[3] towards the objective to establish an economic and monetary union[4] and towards the widening of the exclusive competence of the Union in commercial policy.[5] The conferral of legislative powers to the European level consequently triggered the Act on Direct Elections to the EP,[6] the qualified majority principle and the demographic factor for Council decisions[7] and the ordinary legislative procedure.[8] The increase of sovereign European powers consequently set off the requirement of fundamental rights' protection in relation to

[1] Case C-409/06, ECLI:EU:C:2010:503, par. 61 (Winner Wetten).

[2] Based on the Treaty of Lisbon, signed on 13 December 2007, entered into force on 1 December 2009.

[3] Today: Article 67 par. 2 TFEU.

[4] Today: Article 3 par. 4 TEU.

[5] Today: Article 207 par. 1 TFEU.

[6] Today: Article 14 par. 3 TEU.

[7] Today: Article 16 par. 3 and 4 TEU.

[8] Articles 289 par. 1, 294 TFEU.

European administrative and legislative actions[1] and national implementation measures[2] as well as judicial review criteria such as the principle of proportionality.[3] The intensification of socio-economic transnational contacts brought on the concept of the Union's citizenship[4] with certain participation rights in other Member States' sovereign rights (in particular in municipial elections[5]). In this way the "Community of law" has emerged as the backbone of a durable and evolving transnational Union.

III. *Third*: Summarized, the *role* of law in European integration has *gradually* turned from the respect for Treaties into the full-fledged concept of respect for the *rule of law*: more concrete into a legal order characterised by the separation of power of European institutions, by the legality of administration, by the judicial review of political acts, by the emergence of directly applicable subjective rights and by the protection of fundamental rights by independent courts (such as, e. g., the protection of personal data of the young Austrian lawyer *Maximilian Schrems* by the CJEU against their transfer by "Facebook" to the United States[6]).

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[1] Leading case: ECJ, Case 29/69, ECLI:EU:C:1969:57 (Stauder/Ulm); today: Article 6 TEU and Charter of Fundamental Rights of the European Union (CFR).

[2] Today: Article 51 par. 1 CFR as codification of the ECJ's earlier jurisprudence on this question.

[3] Today: Article 5 par. 4 TEU.

[4] Today: Article 20 et seq. TFEU.

[5] Today: Article 22 par. 1 TFEU.

[6] Case C-362/14, ECLI:EU:C:2015:650 (Maximilian Schrems).

D. The Challenges to the Rule of Law in European Integration

The question is at hand whether these findings can also hold true for the future of both dimensions and functions of European Union law in light of the *current* (I) as well as the permanent (II) challenges.

I. *First*: Well known *current* challenges to Union law concern, among others, in particular *four*: to the law of the economic and monetary union (keyword: budgets of Euro-States in contradiction to the obligation of Article 126 par. 1 TFEU to avoid excessive deficits); to the asylum rules (keyword: disrepect of the procedural responsibility of the first entry state — the so called

Dublin principle[1]); to the requirement of the independence of judges as a core part of the rule of law in the sense of Article 2 TEU (keyword: the Polish cases); and to the supranationality of Union law by the decision of the United Kingdom to withdraw from the Union which is also motivated by the renunciation of the supranational European rule of law, legal harmonisation and the jurisdiction of the CJEU.

1. These challenges *may* identify present *limits* of the potential of the *dynamic* function (the "integration through law"). On the other side, it is visible, that, until now, the inner rationale of Union law has *not lost* its *orientating, path guiding force* for *new political and legal integration initiatives* along the lines of the four main operative objectives of the Union (Article 3 TEU)[2] and their concretizing primary law.

a. The *budget problems* of some Euro-States have generated the strong will to avoid the relapse into different national currencies with their potential for distortions of competition in the internal market and with their transaction costs, and have led to the conclusion of a *new* Treaty on Stability, Coordination and Governance in the Economic and Monetary Union[3] and to the

[1] Article 13 of Regulation (EU) No 604/2013, OJ EU 2013 L 180/31.

[2] See as a commentary *Peter-Christian Müller-Graff* (*supra* fn. 56), A I par. 90 et seq.

[3] See *Ulrich Hufeld*, Das Recht der Europäischen Wirtschaftsunion, in: Peter-Christian Müller-Graff (Hrsg.), Europäisches Wirtschaftsordnungsrecht (Enzyklopädie Europarecht Band 4), Baden-Baden, 2015, § 22 par.135 et seq.

establishment of a *new organisation of mutual support* between the present Euro-States, the so called European Stability Mechanism (ESM). It is a new international organisation which intensifies the intergovernmental coordination of economic and budgetary politics on the basis of the provisions for a competitive market economy with far reaching reform-consequences for budget-support seeking Euro-States.[1] The ESM is a specific form of *solidarity* driven by the genuine own interest of the Euro-States in stabilising their common currency. The compatibility of this device with Union law has been affirmed by the CJEU[2] and

[1] See *Ulrich Hufeld* (*supra* note 87), § 22 par. 156 et seq.
[2] Case C-370/12, ECLI:EU:C:2012:756 (Pringle).

also explicitily laid down by an amendment to Article 136 TFEU.

b. The challenge of the *migration pressure* on Europe has revealed the dangers of returning triggered to internal border controls with its restrictions on the free movement of persons and goods and hence has triggered, at least, some *solidarity* initiatives on Union level in order to uphold the Dublin principle,[1] in particular through financially and personally supporting Member States which are most affected by the inflow of nationals of third countries such as Greece, Malta and Italy[2]. *However*, these efforts don't seem to be *sufficient* yet. The relevant solidarity provision in primary law (Article 80 TFEU) needs to be significantly activated. In addition, only recently, the strengthening of external border protection devices has gained new momentum.[3] A modification of the Dublin-principle by a mechanism of fair distribution of asylum-seekers is discussed.[4] The distribution by qualified majority decisions of the Council, hence against the will of some states, as tried in 2015,[5] does not seem meaningful. However, compensation payments of States unwilling

[1] *Supra*, fn. 85.

[2] See, e. g., European Commission, Migration and Home Affairs, Press Release: Migration: Commission awards additional emergency funding to improve reception conditions in the Greek Islands and in Bulgaria.

[3] See: Österreichischer Vorsitz im Rat der Europäischen Union, Programm, https://www.eu2018.at/de.

[4] See: European Commission, The Reform of the Dublin System, https://ec.europa.eu/home-affairs .

[5] Council Decision (EU) 2015/1601, OJ EU 2015 L 248/80.


НАЦІОНАЛЬНИЙ УНІВЕРСИТЕТ
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to take in their share of asylum seekers under the debated fairness mechanism,[1] seems a reasonable contribution to guaranteeing free movement without internal border controls in the Union.

c. The events concerning the role of the *Constitutional Court* and the whole *judiciary in Poland* have led to the *activation of a* new *informal instrument* (the so called "rule of law" – procedure[2]), *but*, due to its ineffectiveness, recently to the triggering of the mentioned procedure to suspend certain Union rights of the Member State in question.[3] These questions have, as also mentioned, most recently also arrived at the CJEU: besides the initiative of the Commission also by way of concrete preliminary reference questions of national courts such as the question of an Irish court whether a person, staying in Ireland and accused in Poland, i. a., for trafficking in narcotic drugs, has to be surrendered on the basis of the European Arrest Warrant to a Member State with systemic deficiencies of the independence of its judiciary.[4]

[1] See European Commission, Press Release: Towards a sustainable and fair Common European Asylum System, 4 May 2016; Press Release: European Agenda on Migration: Commission calls on all parties to sustain progress and make further efforts, 13 June 2017.

[2] European Commission, Press Release: European Commission presents a framework to safeguard the rule of law in the European Union, 11 March 2014.

[3] European Commission, Press Release: Rule of Law: European Commission acts to defend judicial independence in Poland, 20 December 2017.

[4] Case C-216/18 PPU, ECLI:EU:C:2018:586 (LM).

d. Eventually, the United Kingdom's probable withdrawal from the Union and, by that, renunciation of the supranational European rule of law has, until now, united all other Member States in appreciating, in principle, the overall advantages of the supranational European rule of law. Moreover, the attempts of *the United Kingdom* for gaining *selective* access to the internal market after withdrawing from the Union, without accepting all its rules, has, until now, united all other Member States in pursuing the common position of *upholding* the *undivisibility* of the internal market law concept.[1]

2. Concerning the more *static* function of Union law as a *durable* depoliticization of transnational conflicts, the current challenges may not contain imminent spill-over threats to it. *Internal market law* is complied with to an impressive degree by the Member States. In addition *fines* imposed on undertakings which violated European antitrust law (most recently a € 4,3 billion fine against Google in the Android case[2]) are appealed before the CJEU, but, if confirmed by the judiciary, they are paid. And the number of *preliminary reference procedures* from national courts to the ECJ for the interpretation of Union law has reached a new record.[3] *However*, the realization of this function of European

[1] See No. 4 of the Statement of the Informal meeting at 27 in Brussels, 29 June 2016.

[2] European Commission – Competition 40099, 18 July 2018.

[3] See: ECJ, Press Release No 17/17: Statistics concerning judicial activity in 2016.

Union law largely depends on its living authority and the authority of courts which centers in the respect by the addressees. This leads to the concluding aspect of the permanent challenges (II).

II. Political attacks on the authority of law and social contempt of the law are a *permanent* challenge to the rule of law. The social and political authority of the European rule of law requires, first of all, a fan of law specific elements: good reasonable Union legislation in the sense of *Immanuel Kant*; time adequate amendments to primary law (if necessary); regular monitoring of the aptitude of existing Union law; prudent rulings of the ECJ; loyal cooperation of national courts in the interpretation and application of Union law; intelligent, respected and well paid judges in the Member States; and, last not least, a common societal and political appreciation for the civilizing potential of reasonable law and of prudent courts. It requires also the effective acceptance of legal restrictions of political actors and their constituencies. The Swiss law professor *Werner Kägi* once remarked that the "Rechtsstaat" is the order, in which a politically mature people accepts its own self-restraint.[1]

On the *other side*: The rule of law does not imply rigidity, stiffness or inflexibility of rules towards new developments. Primary and secondary Union law, if it proves to be outdated, unrealistic or overambitious, can be modified, revised, changed, amended

[1] *Werner Kägi*, Rechtsstaat und Demokratie, in: Festgabe für Zaccaria Giacometti, Zürich 1953, S. 132, 141.


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and repealed. It is the prime responsibility of the legislator of Union law (thus for primary law the Member States; for secondary law the institutions of the Union) to avoid adopting unrealistic provisions. However, the authority of law — not only of European Union law — fundamentally demands as a general principle that adopted provisions and court decisions are taken *seriously* and *complied with* by their addressees. Otherwise, disrespect at one corner of the legal order could contaminate the authority of law in other areas. In the case of the European Union this would damage its indispensable fundamentals. After all, if the authority of the rule of Union law stands firm in its challenges, it will serve as the Union's precious cornerstone also in the future of European integration.

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