PORTUGAL

Dulce Lopes and Rita Aroso Duarte[1]

Preliminary Considerations on the Rule of Law Debate in Portugal

The essentially contested concept of the Rule of Law (which translates, in Portuguese, to "*Estado de Direito*")[2] is a dominant figure in the legal and political discourse and over time it has been thoroughly discussed and developed by the Portuguese doctrine, in all its intricate dimensions.

In an undeniably globalised world, the Rule of Law is no longer an exclusively national concept, having acquired significant relevance at international and supranational levels. As one of the EU values enshrined in Article 2 TEU and, therefore, a crucial element of the EU's axiological foundation and part of the political identity shared by the Member States, the Rule of Law plays a key role within the EU legal order. Not only is this value one of the 'Copenhagen criteria' (Article 49 TEU) but its promotion constitutes one of the main objectives of the EU's external action (Article 21 TEU).

In a historical and political period in which the respect for the EU values set out in Article 2 TEU was assumed to be inherent to all the constitutional traditions of the European States, the systemic violations of the Rule of Law by some Member States have brought into light the urgent necessity of further debating the role of the EU in protecting the Rule of Law, its intervention at the national level, the set of available instruments in the EU legal order to uphold this value and how its breach affects the mutual trust and mutual recognition that characterise the cooperation between Member States.

Although this topic has been frequently covered by the Portuguese media and has been an important subject of debate in multiple conferences and forums held in Portugal, the recent nature of this issue justifies the general lack of doctrinal and case law outputs regarding the intervention of the EU in the context of national violations of EU values. However, it is possible to ascertain that the challenges on

[1] Dulce Lopes: Assistant Professor at the Faculty of Law of the University of Coimbra; Investigator at the University of Coimbra, Institute for Legal Research. Rita Aroso Duarte: LL.M. Candidate at the College of Europe (2022/2023); Master's Degree in Public International and European Law, Faculty of Law, University of Coimbra.

[2] The expression "*Estado de Direito*" is used both in national documents and Portuguese translations of EU treaties and legal acts.

the Rule of Law within the EU have been a topic of interest of recent academic work, which the reporters have considered in the present national report.

Throughout the different chapters, the reporters intend to give a dynamic overview of the up to date contribute of the Portuguese doctrine and case law to this particularly interesting, unquestionably challenging and potentially growing topic of EU Law.

Chapter 1: Concept of the Rule of Law

Question 1

The concept of the Rule of Law, characterised by its terminological complexity and its evolving and multidimensional nature, corresponds to "a juridical-political paradigm of Western culture and of the Western liberal State", according to Gomes Canotilho.[3] In this context, it is worth noting that the British expression "Rule of Law" differs from the German-based "*Rechtsstaat*" (from which stems the Portuguese expression "*Estado de Direito*"), as well as the French "*État de droit*" (also derived from the former but with certain singularities), not only at a terminological level ("Empire of Law", on the one hand, and "State of Law", on the other) but also regarding its meaning.

As in many other legal orders, the complex doctrinal discussion regarding the Rule of Law in Portugal was progressively developed over time and many prominent scholars carried out a detailed analysis of the evolution of the Rule of Law in different historical periods and legal cultures.[4]

Before reflecting on the Portuguese doctrinal proposals of definitions, one ought to question how the Rule of Law is incorporated in the Portuguese legal order. According to Article 2 of the Portuguese Constitution of 1976 (CRP), "The Portuguese Republic is a democratic State ruled by Law". As noted by Gomes Canotilho and Vital Moreira, this expression was not part of the Portuguese constitutional terminology before the adoption of the Constitution of 1976, having been used for the first time in the preamble of its original version and, after the first constitutional revision, in the present Articles 2 and 9 (b), always associated with the concept of democratic State.[5]

[3] J. J. G. Canotilho, *Estado de Direito*, Lisboa, Gradiva, 1999, p. 19.

[4] For representative analyses of the concept's evolution *vide* J. J. G. Canotilho, *Direito Constitucional e Teoria da Constituição*, 7th ed. (21st reprint), Coimbra, Almedina, 2019, pp. 91 et seq.; J. Miranda, *Manual de Direito Constitucional*, Part I, Vol. 1, Coimbra, Coimbra Editora, 2014, pp. 84-105; J. R. Novais, *Contributo para uma Teoria do Estado de Direito*, Coimbra, Almedina, 2013, pp. 29 et seq.

[5] J. J. G. Canotilho and V. Moreira, *Constituição da República Portuguesa Anotada: Artigos 1o a 107o,* 4th ed. reviewed, Coimbra, Coimbra Editora, 2007, p. 204.

The polysemic nature of the concept of the "Rule of Law" and its variation depending on the legal culture with which it is associated do not facilitate the adoption of a general and common formulation of the Rule of Law. However, nowadays it is possible to observe the existence of a shared essence of the definitions proposed by many Portuguese scholars.

Jorge Miranda lists a set of characteristic features of the Rule of Law: the social contract, national sovereignty, the law as an expression of the general will, the State as an executor of legal norms (instead of the reason of the State) and the attribution to all individuals of rights enshrined in the laws.[6]

In the same line of thought, Gomes Canotilho considers that the Rule of Law is composed of three dimensions: the subjection of the State to the Law, which translates into the obedience of the governors to the laws and the consequent "rule of law"; the action of the State through the Law, i.e. through the use of legal instruments in the exercise of public powers; and the adoption of legal norms in accordance with the "idea of Law".[7] According to the author and Vital Moreira, the principle of the "democratic State ruled by Law" includes a vast set of rules and principle enshrined in the Constitution which densify the idea of subjection of power to legal principles and rules, granting the citizens freedom, equality and security.[8] Likewise, Maria Lúcia Amaral defines the Rule of Law as the exercise of power in accordance to the Constitution and the laws in conformity with the latter, aiming at guaranteeing human dignity, freedom, justice and security.[9]

In his recent work, Jorge Reis Novais densifies the concept of the Rule of Law by listing "structuring principles": the principles of human dignity, equality, prohibition of excess, protection of legitimate expectations, prohibition of deficit, reserve of law and determinability.[10] The author also mentions other principles related to the organisation of the structure of power within the Rule of Law: the separation of powers, the democratic principle, the principle of secularity and the subsidiarity principle.[11]

Although these definitions vary on different levels, besides having as its common *desideratum* "State legality" ("*juridicidade estatal*")[12], all these concepts include

[6] Miranda, 2014, pp. 94-95.

[7] Canotilho, 1999, p. 53.

[8] Canotilho and Moreira, 2007, p. 205. The authors further emphasise that the core of the democratic State of Law is to protect citizens against prepotency, arbitrariness and injustice. Ibid., p. 206.

[9] M. L. Amaral, *A Forma da República. Uma Introdução ao Estudo do Direito Constitucional*, Coimbra, Gestlegal, 2021, p. 153.

[10] J. R. Novais, *Princípios Estruturantes do Estado de Direito*, Coimbra, Almedina, 2021, p. 22.

[11] Ibid.

[12] Canotilho, 2019, p. 93.

the principles of legality, legal certainty, equality, independence of the judiciary and separation of powers. Furthermore, from a negative perspective, all of them are opposed to the concepts of "State of lawlessness" and "Police State" ("*Polizeistaat*").[13]

a.

The direct connection between the Rule of Law and both the protection of fundamental rights and democracy stems from the Portuguese Constitution, establishing Article 2 that the "democratic State ruled by Law" is "based on popular sovereignty, pluralism of democratic political expression and organisation, respect for and guarantee of the realisation of fundamental rights and freedoms (…), aiming at the realisation of economic, social and cultural democracy and the deepening of participatory democracy".

The protection of fundamental rights is also intrinsically connected to the vast majority of the proposed definitions of the Rule of Law within the Portuguese doctrine. In general terms, according to Gomes Canotilho, a State ruled by Law "is a State of fundamental rights",[14] adding Jorge Reis Novais that at the core of the State's purposes shall figure the protection of fundamental rights.[15] Along the same lines, Jorge Miranda notes that a State ruled by Law is a State which establishes a division of powers and secures legality in order to ensure the protection of citizens' rights.[16]

With regard to democracy, according to Gomes Canotilho and Vital Moreira, the two components of the constitutionally consecrated "democratic State ruled by Law" cannot be separated: while a State can only be democratic when the public power is subject to the Law, a State can only be "ruled by Law" through democracy.[17] While stating that "the heart throbs between the will of the people and the rule of law",[18] Gomes Canotilho stresses that the Constitutional State is not only a State limited by the Rule of Law but also based on the democratic legitimation of power.[19] It, thus, results that, within the Portuguese Constitutional order and doctrine, the Rule of Law and democracy are two indissociable concepts.

[13] For further development *vide* Canotilho, 1999, p. 12; Canotilho, 2019, p. 91; Novais, 2013, pp. 36 et seq.
[14] Canotilho, 1999, p. 49.
[15] Novais, 2013, p. 25.
[16] Miranda, 2014, p. 97.
[17] Canotilho and Moreira, 2007, pp. 204-207.
[18] Canotilho, 2019, p. 99.
[19] Ibid., p. 98.

b.

Over time, the Rule of Law has been characterised in multiple ways, depending on its adjectivation. While the Liberal concept of Rule of Law is founded on the idea of freedom and, hence, on the limitation of political power by the laws,[20] the Social concept of Rule of Law (mostly known as "Welfare State"), emerging from the post-war period, aims to "make economic development compatible with a just social order".[21]

This evolution is connected to the fundamental distinction between a formal or "thin" and a material or "thick" conceptions of the Rule of Law.

Maria Lúcia Amaral combines formal and material elements of this concept. On the one hand, the formal elements ensure the continuity of the previous formal view of the Rule of Law, comprising separation of powers, constitutionality of laws, legality of the Administration and independence of the judiciary.[22] On the other hand, the modern conception of the Rule of Law is founded on the idea that the Law which the public powers are subject to is not "any Law" composed of "any content", bringing into light a substantial or material dimension of the Rule of Law.[23] Therefore, while deviating from the essentially formal liberal perspective,[24] the current concept of Rule of Law enshrined in the Portuguese Constitution is prominently material and pursues certain purposes, which correspond to the values of human dignity, democracy, justice and security.[25] According to Gomes Canotilho and Vital Moreira, the qualification of the "State ruled by Law" as "democratic" in Article 2 CRP aimed exactly at preventing the adoption of a purely formal concept of the Rule of Law in the Portuguese legal order that could easily be manipulated.[26]

c.

Alongside the definition of Rule of Law set out in Article 2 CRP is the reference to "separation and interdependence of powers". This element of the Portuguese definition of the Rule of Law is consensually recognised by scholars,[27] and was

[20] Miranda, 2014, p. 98.
[21] Canotilho, 1999, p. 39.
[22] Amaral, 2021, pp. 154 et seq.
[23] Ibid., p. 153.
[24] Ibid., p. 153.
[25] Ibid., pp. 162 et seq.
[26] Canotilho and Moreira, 2007, p. 204. *Vide* also Novais, 2013, p. 214.
[27] J. Chumbinho, *A Constituição e a Independência dos Tribunais*, Lisboa, Quid Juris, 2009, p. 29; Amaral, 2021, p. 153; L. Neto, 'Estado de Direito Democrático, Força de Lei e Revisões Constitucionais: Cinco Considerações', *e-Pública,* Vol. 3, No. 3, 2016, pp. 20 and 21.

expressly introduced in the CRP by the constitutional revision of 1997, although it was already enshrined in Article 111 as a structural organising principle.[28]

Beyond the traditional idea of separation of powers, the Portuguese Constitution refers to a relationship of interdependence between powers. According to Maria Lúcia Amaral, in order to ensure that the powers are effectively limited and moderated it is not sufficient to divide them among different institutions, being it necessary to establish reciprocal control and supervision.[29]

Considering now the judicial power, Article 203 of the Portuguese Constitution establishes that "(t)he courts are independent and subject only to the law". Often envisioned by the doctrine as a corollary of the principle of separation of powers,[30] the principle of judicial independence is also an element of the modern concept of the Rule of Law. As noted by Nuno Coelho, judicial power has become the "centre of gravity" of the principle of separation of powers, in its function of balancing the legislative and executive powers within the scope of a democratic system of checks and balances.[31]

The concept of judicial independence can have two different dimensions: whereas external independence concerns the autonomy of the judicial power in relation to the other State powers, internal independence corresponds to the guarantee of judges' autonomy within their institutional, bureaucratic or corporate organization.[32] Directly connected to judicial independence are impartiality, often described as the detachment from the litigants in a legal dispute,[33] and irremovability of judges, set out in Article 216 (1) CRP.

---

[28] Canotilho and Moreira, 2007, p. 208. Regarding the division of powers in the Portuguese legal order *vide* Decision no. 195/94, 1 March 1994, Process no. 478/93; Decision no. 24/98, 22 January 1998, Process no. 621/97.

[29] Amaral, 2021, pp. 155 and 156. In the same sense: Canotilho and Moreira, 2007, p. 209. In the Portuguese Constitution there are multiple examples of the checks and balances system, *v.g.* the power of the President of the Republic to veto the legislative acts adopted by the Parliament or the Government (Article 136). In a complementary note, Ana Rita Gil emphasises the important role of the Portuguese Ombudsman within the system of checks and balances, which was also highlighted in the Portuguese Chapter of the EU's Report on the Rule of Law. A. R. Gil, '"Query Procedures" in the European Union: A Challenge or a Guarantee to the European Rule of Law?', e-Pública, Vol. 3, No 3, 2016, p. 9.

[30] O. V. M. Afonso, *Poder Judicial – Independência in Dependência*, Coimbra, Almedina, 2004, p. 72.

[31] N. Coelho, 'A reforma do estatuto do juiz: dimensões essenciais', *JULGAR*, No. 30, 2016, p. 119.

[32] Coelho, 2016, p. 119; J. P. Dias and J. Almeida, 'Efectividade da independência e/ou autonomia do poder judicial em Portugal: reflexões sobre as condições externas e internas', *JULGAR*, No. 10, 2010, p. 79.

[33] Coelho, 2016, p. 119. Nuno Coelho also mentions a relevant dimension of judicial independence, economic independence, which is necessary to ensure that judges carry out their activity with quality and efficiency, thus enabling the proper functioning of the administration of justice, and is often related to their remuneration status. Coelho, 2016, p. 121. The salary reduction of judges of the Portuguese *Tribunal de Contas* was, in fact, the subject of the main proceedings within the case *Associação Sindical dos Juízes Portugueses,* 2018, C-64/16, ECLI:EU:C:2018:117, where the ECJ considered, nonetheless, that the reduction motivated by a response to the economic crisis did not undermine judicial independence.

In this context, it is crucial to consider the Portuguese legal regime for the organisation of the judicial system and the statute of judges. Regarding the first topic, a thorough reform of the organisation of the Portuguese judicial system was carried out: first, through the adoption of Law no. 62/2013, 26 August 2013 (the Law of the Organisation of the Judicial System). In this context, Luís Noronha Nascimento criticises the modification implemented by Article 183 (5) of Law no. 62/2013, considering that it subjected first instance judges to constant ups-and-downs in their professional careers according to successive periodical evaluations and the application of disciplinary sanctions without precedence of disciplinary proceedings, manifestly affecting their irremovability.[34] In more general terms, Conceição Gomes states the existence of some difficulties in breaking the boundaries of the *status quo*, stressing that these reforms should have been truly innovate, strengthening the role of justice in democracy and deepening the relationship between citizens and courts.[35]

Noting, first and foremost, that judges perform their functions on an exclusive basis, by constitutional requirement (Article 216 (3) CRP), the Portuguese Statute of Judges is established by Law no. 21/85, 30 July, and its most recent modification was carried out by Law no. 2/2020, 31 March 2020.

Considering, now, the perspectives of the Portuguese doctrine with regard to the judicial independence and multiple (theoretical and practical) problems related to it, João Paulo Dias and Jorge Almeida emphasise the contribution of the apparent stability of the judicial system to the public credibility of the judicial power as the supervisory power of other State powers and, consequently, the democratic system.[36] Moreover, the authors connect judicial independence to the effective protection of citizens' rights.[37] According to them, although the Portuguese judicial system presents an organisational model that provides for an independent justice system, the exercise of justice and the way in which the judiciary function is evaluated and supervised present elements that indicate the existence of informal mechanisms of control and, therefore, the limitation of an internally independent justice system.[38]

[34] L. A. N. Nascimento, 'A inamovibilidade dos juízes', *JULGAR*, No. 32, 2017, p. 290. Along the same lines, José António Rodrigues da Cunha considers that this reform boosted the risk of the replacement of "irremovability" by "removability". J. A. R. Cunha, 'A reforma judiciária e o novo modelo de gestão pública: vantagens, limites e interrogações', *JULGAR Online*, 2016, <www.julgar.pt/a-reforma-judiciaria-e-o-novo-modelo-de-gestao-publica-vantagens-limites-e-interrogacoes/>, visited 20 July 2022, p. 27.

[35] C. Gomes, 'Democracia, tribunais e a reforma do mapa judiciário: contributos para o debate', *JULGAR*, No. 20, 2013, p. 92.

[36] Dias and Almeida, 2010, p. 78.

[37] Ibid.

[38] In other words, certain external influences limit the independence of the judiciary. Ibid., p. 100.

While Luís Noronha Nascimento raises multiple interesting questions regarding the dilemma between a "statute of the European judge" and a "European statute of the judge",[39] Filipe Vilarinho Marques suggests the establishment of common minimum standards on the independence of the judiciary within the EU.[40]

It is worth nothing that a frequent source of threats to the judicial independence in a national legal order is linked to the superior council of the judiciary. Therefore, in Portugal, the composition and appointment procedure of *Conselho Superior da Magistratura*,[41] as well as the judicial control of its decisions,[42] have been the subject of public debate.

Considering the multiple problems that may ultimately undermine the independence of the judiciary, Maria Teresa Santos, José Mouraz Lopes and Nuno Coelho address the issue of corruption as the interference of political power in the exercise of the judicial power.[43] Connecting the concepts of corruption, good governance and the Rule of Law (notably, the separation of powers), the authors conclude that international cooperation for the promotion of the Rule of Law is not only possible but urgently needed.[44]

Lastly, it is important to mention one last dimension of judicial independence: the irresponsibility of judges.[45] Many interesting questions have been raised by the doctrine regarding the *prima facie* paradox between the principle of irresponsibility, on the one hand, and the necessity of ensuring liability for damages, on the other. In this context, Orlando Viegas Martins Afonso clarifies that liability of judges cannot derive from the mere exercise of judicial power (since the principle of irresponsibility applies) but exclusively from the abuse of that power, i.e. to the deviations of the judges' subjection to Law.[46] On this matter, the ECJ case *Ferreira da Silva e Brito and Others* (2015)[47] sparked an interesting debate within Portuguese doctrine regarding non-contractual

[39] L. A. N. Nascimento, 'O Estatuto do juiz europeu ou o estatuto europeu do juiz?', *JULGAR*, No. 25, 2015, p. 187.

[40] F. C. V. Marques, 'O estatuto do juiz e a Europa: a necessidade de regras mínimas comuns', *JULGAR*, No. 30, 2016, p. 140.

[41] Dias and Almeida, 2010, p. 89.

[42] M. P. Beleza, 'Duas questões sobre a impugnação das deliberações do Conselho Superior da Magistratura para o Supremo Tribunal de Justiça: inadmissibilidade de recurso e controlo do erro de facto', *JULGAR*, No. 30, 2016, pp. 19 and 20.

[43] M. T. Santos, J. M. Lopes and N. Coelho, 'Corrupção, Estado de Direito e cooperação: a experiência de um instrumento de cooperação internacional (PACED)', *JULGAR*, No. 39, 2019, p. 77.

[44] Ibid., p. 107.

[45] Which is enshrined, in relation to the judges of the Portuguese Constitutional Court, in Article 222 (5) CRP.

[46] Afonso, 2004, p. 138. For further development regarding the judges' liability *vide* Coelho, 2016, p. 119.

[47] Judgment of the Court (Second Chamber) of 9 September 2015, *Ferreira da Silva e Brito and Others,* C-160/14, ECLI:EU:C:2015:565.

civil State liability for damages caused in the exercise of judicial functions, the obligation of making a reference for a preliminary ruling and the *CILFIT* jurisprudence regarding "*acte clair*". Alessandra Silveira and Sophie Perez Fernandes analyse the main traits of that judgment as well as Article 13 (2) of the Regime of Non-contractual Civil Liability of the State and Public Law Legal Persons (Law no. 67/2007, 31 December), which demands, as a condition for State liability, the withdrawal of the decision which caused the loss or damage, debating in particular its incompatibility with the EU principle of effectiveness as it makes it extremely difficult to obtain reparation.[48]

Question 2

The Portuguese doctrine often highlights the relevance of EU values, as they constitute the core of the "material Constitution of the Union".[49] Miguel Gorjão-Henriques notes that EU Rule of Law "functions as a guarantee of individual rights and as a limit of the action of Union bodies".[50]

Taking into consideration the lack of a legal definition of the Rule of Law in the EU Treaties, the CJEU contributed significantly, through its case law, for the progressive construction and development of the principle of the "Community based on the rule of law" over time, especially by the timeless landmark decision in *Les Verts* (1986).[51]

However, if the Rule of Law is already a contested concept at the national level, its consecration at EU level raised multiple difficulties in establishing a common definition. In seeking to achieve a desirable balance between the total rejection of a European concept of the Rule of Law and the formulation of a concept shared in its entirety by all Member States, the EU institutions have reached the conclusion that it is possible to identify a general consensus on the constituent elements of the core of the Rule of Law concept. It follows from the Rule of Law Report of 2020 that "(w)hile Member States have different national identities, legal systems and traditions, the core meaning of the rule of law is the same across the EU".

[48] A. Silveira and S. P. Fernandes, 'State liability for judicial decisions – between the Portuguese regime and EU law, some lights in the Ferreira da Silva judgment', *UNIO – EU Law Journal*, 2015, <www.officialblogofunio.com/2015/11/16/state-liability-for-judicial-decisions-between-the-portuguese-regime-and-eu-law-some-lights-in-the-ferreira-da-silva-judgment/>, visited 21 July 2022. For further analysis of this case *vide* P. F. Martins, 'Ainda a propósito da independência do poder judical na União Europeia: revisitando a responsabilidade do Estado-juiz por violação do Direito da União e suas aplicações na jurisprudência portuguesa', *e-Pública*, Vol. 9, No. 1, 2022, 28 e ss.

[49] F. Quadros, *Direito da União Europeia*, 3th ed. (2nd reprint), Coimbra, Almedina, 2018, p. 115.

[50] M. Gorjão-Henriques, *Direito da União: História, Direito, Cidadania, Mercado Interno e Concorrência*, 9th ed. (reprint), Coimbra, Almedina, 2020, p. 340.

[51] Judgment of the Court, 23 April 1986, *"Les Verts"*, 294/83, ECLI:EU:C:1986:166.

In this sense, considering the list of elements of the Rule of Law proposed by the Venice Commission of the Council of Europe[52] and the jurisprudence of the ECJ, the Regulation (EU, Euratom) 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 was the first EU legal act to expressly establish a descriptive notion of the Rule of Law, decomposing this value into multiple concrete principles in Article 2 (a).[53]

Considering those principles and the common elements of the dominant concept of the Rule of Law in Portugal, we consider that this concept is in line with the definition gradually established in the EU legal order. Not only the multitude of elements integrating the definition of the Rule of Law proposed by Maria Lúcia Amaral[54] but also the constitutionally consecrated principles to which Gomes Canotilho and Vital Moreira associate the Rule of Law as enshrined in Article 2 CRP[55] correspond to the components of the Rule of Law as set out in Regulation (EU, Euratom) 2020/2092.

However, one may ask: "is there a perfect coincidence between the Portuguese and the EU concepts of the Rule of Law"? There is a specific element of the Portuguese dominant definition that might raise some doubts: the protection of fundamental rights.

At EU level, the fundamental connection between Rule of Law, democracy and the protection of fundamental rights is acknowledged to the point that the doctrine refers to a "triangular relationship".[56] However, these three ideals do not mingle into a single concept: the TEU expressly distinguishes the values of democracy, the Rule of Law and the respect for human rights. On the other hand, as we have mentioned before, the protection of fundamental rights is included by Portuguese authors in the definition of "democratic State ruled by Law".

Furthermore, it is important to highlight the intrinsic link that the constitutional text establishes between the Rule of Law and democracy, thereby transmitting

[52] Venice Commission, 'Rule of Law Checklist', CDL-AD(2016)007-e, 11 de março de 2016, 11.

[53] COM(2019) 163, "Further strengthening the rule of law in the Union: state of play and possible next steps", and COM(2019) 343, "Strengthening the rule of law within the Union: a blueprint for action", were also extremely relevant in this context.

[54] *Vide supra*, p. 6.

[55] These principles consist of, *inter alia*, the principle of constitutionality (Artcle 3 CRP) and its review (Articles 277 e seq.), access to justice and effective judicial protection (Article 20), legality of the Administration (Article 266), reservation of the jurisdictional function to courts (Article 202), and independence of judges (Article 216). Canotilho and Moreira, 2007, p. 205.

[56] S. Carrera, E. Guild and N. Hernanz, 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism', *Centre for European Policy Studies*, 2013, pp. 16 et seq.

the idea that one does not exist without the other. For this reason, the distinction between both concepts is not as clear in the Portuguese legal order as in the TEU.

Therefore, in conclusion, the Portuguese concept of the Rule of Law essentially coincides with the concept adopted in the EU legal order. If anything, we could state that it is broader that the latter. However, in no situation does it conflict with the concept of Rule of Law within the EU.

Question 3

During the 1980s, the role of the State has significantly changed in Portugal and one of the manifestations of this new configuration was the transmission of regulatory tasks traditionally entrusted to the State to independent administrative authorities, endowed with independence and autonomy from political power.[57]

According to Article 267 (3) CRP, "(t)he law may establish independent administrative entities", being worthy of consideration the Framework Law for independent administrative entities with regulatory functions in the economic activity of the private, public and cooperative sectors, Law no. 67/2013, 28 August 2013. In particular, the regulatory authorities in the financial, economic, communication and transport areas are of particular importance, such as the Competition Authority, the Regulatory Authority for Energy Services, the Commission of Securities Market, the Health Regulatory Authority and the National Communications Authority.

It is important to note that, although they share the regulatory power with the Government, these regulatory entities are entirely independent and, therefore, are not subject to the supervision of the Government.[58] However, Maria João Lourenço notes that this "de-legalisation phenomenon", i.e. the possibility of certain matters to be ruled through regulations adopted by non-elected entities, has raised some concerns: in particular, the possible lack of democratic legitimacy and the possible distortion of the traditional system of the hierarchy of infra-constitutional normativity.[59] Hence, the author considers necessary to find the right balance between the necessity of ensuring the liability of these entities for their regulatory acts, on the one hand, and their independence, on the other.[60]

[57] M. J. Lourenço, 'Deslegalização e poder regulamentar das entidades reguladoras independentes', *JULGAR Online*, 2018, <http://julgar.pt/deslegalizacao-e-poder-regulamentar-das-entidades-reguladoras-independentes/>, visited 18 July 2022, p. 1.

[58] Ibid., p. 18.

[59] Ibid., p. 2.

[60] Ibid., p. 22.

Overall, Carlos Blanco de Morais considers that regulatory agencies in Portugal develop their activity with a "medium-low level of independence".[61]

As a factor of reconciliation with democratic accountability, and besides the fact that the decisions rendered by such agencies can be appealed to courts, a special mention should be given to the role of the Parliament, since agencies should present their plans and reports to the Parliament and respond to its queries (Article 21 (1) (c) and Article 49 of Law no. 67/2013). Pedro Filipe Gonçalves da Rocha includes as possible factors of legitimation democratic legitimacy (indirectly through the government); procedural legitimacy (through a just and participated procedure); legitimacy through jurisdictional control; legitimacy through the Constitution; legitimacy through their constitution (given the participation of the Parliament); and legitimacy through their results.[62]

Question 4

Article 20 of the Portuguese Constitution enshrines the "right to access to justice and effective judicial protection", which are considered "rights of analogue nature" to "rights, freedoms and guarantees" (specially protected in the Portuguese legal order) and comprise a multitude of rights in favour of all citizens (Article 12 CRP).

These constitutionally consecrated rights are composed of various dimensions in all areas of law (civil, administrative and criminal law). What Maria Amália Santos[63] refers to as a general "right to judicial protection" entails the rights to access to law and the courts to defend their legally protected rights and interests (Article 20 (1) CRP), to get legal information, legal advice and legal representation (no. 2), to obtain a decision within a reasonable time (no. 3) and the right to a fair trial (no. 3), while being connected to the adversarial principle[64] and the equality principle.[65]

As noted by Carlos Lopes do Rego, extremely pertinent to a good understanding of the fundamental right to access to justice is the analysis of some decisions of the

[61] C. B. Morais, 'A Lei-Quadro das Entidades Reguladoras e o seu Estatuto de Independência', *JURISMAT,* No. 7, 2015, <www.recil.ensinolusofona.pt/bitstream/10437/8108/1/A%20Lei-Quadro%20das%20Entidades%20Reguladoras.pdf>, visited 29 July 2022, p. 165.

[62] P. F. G. Rocha, 'Autoridades Reguladoras Independentes: entre a Legitimação Democrática e a Legitimação Procedimental', *CEDIPRE Online*, 2020, <www.fd.uc.pt/cedipre/wp-content/uploads/pdfs/co/public_38.pdf>, visited 30 August 2022, pp. 24-36.

[63] M. A. Santos, 'O direito constitucionalmente garantido dos cidadãos à tutela jurisdicional efectiva', *JULGAR Online*, 2019, <http://julgar.pt/o-direito-constitucionalmente-garantido-dos-cidadaos-a-tutela-jurisdicional-efectiva/>, visited 19 July 2022, pp. 12 et seq.

[64] Ibid., p. 13.

[65] Ibid., p. 14. Directly connected to the right of effective judicial protection is also the adoption of interim measures. Ibid., p. 17.

Portuguese Constitutional Court.[66] It follows from the Decision no. 127/2016 that "the constitutional text, explicitly or implicitly, sets out unavoidable requirements regarding the configuration and organisation of judicial proceedings in general, which are a direct corollary of the idea of a democratic State based on the rule of law"[67], adding Decision no. 243/2013 that this right implies a series of interactions between the plaintiff, the defendant and the judge.[68] The Constitutional Court further explained this right in other decisions, such as Decision no. 193/2016.[69]

Putting into perspective the rights that the Constitution and the national law enshrine with regard to effective remedies and access to courts, Catarina Santos Botelho and Manuel Afonso Vaz, explore the main issue of the Portuguese legal order in light of Article 6 ECHR (right to a fair trial): justice delays[70]. For several years, the Portuguese State has been condemned by the ECtHR for the excessive duration of judicial procedures. One can consider, for instance, Cases *Martins Moreira v. Portugal*[71] (1988), *Comingersoll S.A v. Portugal*[72] (2000) and *Fernandes de Oliveira v. Portugal*[73] (2019). However, the authors highlight recent improvements in the celerity of justice, giving as examples the adoption of accelerating mechanisms such as the software program "Citius" and the investment in alternative means of conflict resolution *(v.g.,* arbitration and mediation).[74]

Chapter 2: Normative Foundations for the Role of the European Union in Protecting the Rule of Law

Question 5

Taking into consideration the paramount importance of Rule of Law at EU level, is the intervention of the EU aiming at its protection at national level viewed by the Portuguese doctrine as an intrusive interference in purely domestic issues or a natural consequence of the role EU values play in the Union's legal order? Recent academic work is representative of how perceptions may vary.

[66] C. L. Rego, 'Garantia da via judiciária, arbitragem necessária, direito ao recurso e patrocínio judiciário: questões recentes na jurisprudência constitucional', *JULGAR*, No. 29, 2016, p. 77.

[67] Decision no. 127/16 of the Portuguese Constitutional Court (TC), 24 February 2016, Process no. 756/15.

[68] Decision no. 243/13 of the Portuguese Constitutional Court (TC), 10 May 2013, Process no. 12/13.

[69] Decision no. 193/16 of the Portuguese Constitutional Court (TC), 4 April 2016, Process no. 919/15.

[70] C. S. Botelho and M. A. Vaz, 'Algumas reflexões sobre o artigo 6.º da Convenção Europeia dos Direitos do Homem – Direito a um processo equitativo e a uma decisão num prazo razoável', *e-Pública*, Vol. 3, No. 1, 2016, p. 233.

[71] Judgment of the ECtHR of 26 October 1988, *Martins Moreira v. Portugal,* Application no. 11371/85.

[72] Judgment of the ECtHR of 6 April 2000, *Comingersoll S.A v. Portugal,* Application no. 35382/97.

[73] Judgment of the ECtHR (Grand Chamber) of 31 January 2014, *Fernandes de Oliveira v. Portugal,* Application no. 78103/14.

[74] Botelho and Vaz, 2016, p. 233.

In favour of the first perspective is, in the first place, the argument of national identity, enshrined in Article 4 (2) TEU, which is often invoked to sustain the opposition to the adoption and enforcement of a supranational concept of the Rule of Law.[75] Moreover, some authors argue that the role played by the EU in upholding the Rule of Law at national level might embody an interference in the internal affairs of a Member State, thus affecting its sovereignty.[76] In this sense, Inês Pereira de Sousa poses the question of whether, in the case of the *Portuguese Judges* (C-64/16), the ECJ has gone too far.[77] The author considers that, by deriving from Article 19 (1) second paragraph TEU the obligation of the Member States to ensure that their courts abide by the principle of judicial independence, the ECJ might have interfered in matters of the exclusive competence of the Member States.[78]

Adopting the second perspective, Beatriz Correia dos Santos sets aside both arguments, considering that the concept of the Rule of Law is built on the basis of the main common characteristics of the national definitions and that, since the accession to the EU results from a sovereign act, States voluntarily choose to be bound by the EU values.[79] Also Miguel Poiares Maduro and Benedita Menezes Queiróz share the view that there are three good reasons for the EU to act in enforcing the Rule of Law at the national level: moral and political externalities that violations of fundamental rights or the Rule of Law in a Member State may cause in another Member State; the will of Member States to externally bind themselves to fundamental rights and the Rule of Law, creating a form of external constitutional discipline; and the fact that, in a form of integration generating interdependence, violations of Rule of Law coming from a Member State may directly impact on the other Member States making them unwilling participants of those violations.[80]

This important question has been subject to public debate in Portugal as is shown by the High-Level Conference on the Rule of Law in Europe organised by the

[75] B. S. C. C. Santos, *A Condicionalidade dos Fundos Europeus. A vacina eficaz contra o ataque ao Estado de Direito?*, 2021, (LL.M. thesis on file at <www.repositorio.ucp.pt/handle/10400.14/36756>), p. 14.

[76] Ibid., p. 14.

[77] I. P. Sousa, 'O Acórdão Associação Sindical de Juizes Portugueses como Antecâmara para a Intervenção do TJUE na Crise do Estado de Direito na União Europeia', in F. S. V. R. M. Gonçalves and E. G. S. P. Brito (Ed.), *Análise Crítica do Direito Público Ibero-Americano*, Porto, Universidade Lusófona do Porto and Instituto Iberoamericano de Estudos Jurídicos, 2020, p. 268.

[78] Sousa, 2020, p. 268.

[79] Santos, 2021, p. 14.

[80] M. P. Maduro and B. M. Queiroz, 'A Hard Law Approach to States Systemic Violations of Article 2 of the Treaty of the European Union: Reasons and Means' *in* E. Fisher, J. King and A. L. Young (Ed.), *The Foundations and Future of Public Law,* Oxford, OUP, 2020, pp. 370-371.

Portuguese Presidency of the Council on 17/18 May 2021, in Coimbra,[81] and the Conference on the Rule of Law held on 9/10 December 2021, in Lisbon.[82]

Question 6

The role of the EU in enforcing the Rule of Law in the Member States is based on the peculiar integration procedure that characterises the European Union, based on a high level of interdependence between the Member States and, moreover, between the national and the EU legal orders.[83]

On the one hand, the interdependence that characterises the relations between Member States is reflected on the mutual trust and mutual recognition that underlie any form of State-to-State cooperation and causes the dissemination of the effects of a national Rule of Law crisis. In other words, considering the level of interdependence between Member States, the consequences of systemic violations of the Rule of Law at national level are not confined to the State's physical borders, spreading its effects to other Member States and rendering a quick response from the EU necessary.[84] On the other hand, the interdependence between the EU and national legal orders is undeniable since the embryonic phase of the European project and is evidenced by, *inter alia*, the principle of primacy of EU law and the system of judicial cooperation between domestic courts and the CJEU entailed under Article 267 TFEU.

Chapter 3: Instruments for enforcing and protecting the rule of law and the role of the CJEU

Question 7

In the context of the ongoing Rule of Law crisis, characterised by systemic violations of this EU value which have been analysed by some Portuguese authors,[85] the debate concerning the legal and political instruments available at EU legal order to safeguard the Rule of Law is more relevant than ever before.

[81] *Vide* book in < https://estudogeral.uc.pt/bitstream/10316/104159/1/RuleOfLaw_Livro.pdf >.

[82] *Vide* program in <www.fd.lisboa.ucp.pt/asset/10281/file>.

[83] Santos, 2021, p. 15.

[84] R. S. A. A. Duarte, *A Crise do Estado de Direito na União Europeia e o Papel do TJUE,* Coimbra, Almedina, 2022, pp. 75 and 76.

[85] Regarding the successive breaches of Rule of Law in Hungary *vide* A. J. M. O. R. Mota, *O Estado de Direito na União Europeia: o caso da Hungria – dilemas e limitações*, 2020, (LL.M. thesis on file at < www.iscte-iul.pt/tese/10929>); M. C. Duarte, 'Hungria: O Estado de Direito em Crise?', *Revista Portuguesa de Ciência Política*, No. 9, 2018, 13-30. Concerning the (lack of) respect for the Rule of Law in Poland *vide* J. I. Matos, 'Poland and the Crisis of Rule of Law: "Alea Jacta Est?"', *UNIO – EU Law Journal*, 2019, <www.officialblogofunio.com/2018/11/19/poland-and-the-crisis-of-rule-of-law-alea-jacta-est/>, visited 1 August 2022.

Starting with the most important hard law instrument, the complex procedure enshrined in Article 7 TEU, composed by preventive (no. 1) and repressive (nos. 2 and 3) mechanisms, has been discussed by the Portuguese scholarship for different reasons. The first observation made by the doctrine is the high demand of its formal prerequisites, being requested a specific majority of 4/5 (nos. 1 and 3) and unanimity (no. 2). Beatriz Correia dos Santos underlines the strictly political nature of this instrument which is essentially inefficient against non-liberal States that adopt a passive reaction.[86] Another common statement regarding Article 7 is the negative impact that the often-used expression "nuclear option" has over potential intentions of mobilisation. The constant reference to its costly impact and exceptional character have made its activation a "non-option" and blocked the political will of the EU institutions and Member States holders of the power of initiative.[87] For all these reasons, the apparently powerful mechanism set out in the Treaty which allows, ultimately, for the suspension of the Member State's rights was left totally immobilised during the ten first years of its consecration. Nowadays, in spite of having been activated by the Commission against Poland (2017) and by the EP against Hungary (2018), its use falls short to its potential and purpose.[88]

Considering the consensual insufficiency of this political instrument, the Portuguese scholarship has analysed some of the decisions that have been adopted by the ECJ in infringement proceedings and preliminary ruling cases. For instance, Nuno Piçarra and Sophie Perez have analysed the crucial ECJ decision in the *Repubblika* case (2021),[89] through which the ECJ established the principle of non-regression,[90] and Joana Gama Gomes reviewed the decision *IS* (2021),[91] related to the implementation of disciplinary actions against Polish judges based on the alleged illegality of a request for a preliminary ruling.[92]

[86] Santos, 2021, p. 20.

[87] *Vide* T. F. M. Rocha, *A Era Digital e o Estado De Direito Democrático na União Europeia*, 2020, (LL.M. thesis on file at <www.repositorio-aberto.up.pt/handle/10216/131465>), p. 22; Santos, 2021, p. 52.

[88] Santos, 2021, p. 16.

[89] Judgment of the Court (Grand Chamber) of 20 April 2021, *Repubblika v Il-Prim Ministru*, Case C-896/19, EU:C:2021:311.

[90] N. Piçarra and S. Perez, 'Summaries of judgments: Repubblika v Il-Prim Ministru | Asociația «Forumul Judecătorilor din România» and Others', *UNIO – EU Law Journal*, 2021, <www.officialblogofunio.com/2021/07/12/summaries-of-judgments-repubblika-v-il-prim-ministru-asociatia-forumul-judecatorilor-din-romania-and-others/>, visited 5 August 2022.

[91] Judgment of the Court (Grand Chamber) of 23 November 2021, *Criminal proceedings against IS*, C-564/19, ECLI:EU:C:2021:949.

[92] J. G. Gomes, 'Can a judge's request for a preliminary ruling be illegal and lead to disciplinary action? – The Court of Justice conclusions in case C-564/19', *UNIO – EU Law Journal*, 2022, <www.officialblogofunio.com/2022/05/25/can-a-judges-request-for-a-preliminary-ruling-be-illegal-and-lead-to-disciplinary-action-the-court-of-justice-conclusions-in-case-c-564-19/>, visited 4 August 2022. Moreover, Alessandra Silveira and Maria Inês Costa analysed the case C-650/18, Hungary v European Parliament. A.

Regarding the accession criteria, also known as "Copenhagen criteria", the Portuguese doctrine has mentioned the classical "Copenhagen dilemma", which translates into the discrepancy between the strict control of the Member State's respect for the EU values before the accession ("*ex ante*" control) and the lack of mechanisms aimed at supervising the continuity of such respect after accession ("*ex post*" control).[93]

Moreover, in respect to the (limited) material scope of the CFREU, the Portuguese scholars emphasise that the ECJ considered, in the *Portuguese Judges* case, that Article 19 TEU refers to "matters covered by Union law", irrespective of the situation in which Member States apply that law within the meaning of Article 51(1) of the Charter.[94] Considering that the ECJ founded its decision solely on the mentioned article, not invoking Article 47 CFREU, Alessandra Silveira affirms that "it seemed certain to state following the judgment *ASJP* that the scope of application of Article 19(1) TEU is broader than the scope of EU law for the purposes of Article 47 CFREU".[95]

Besides these relevant instruments of protection of the Rule of Law, Beatriz Correia dos Santos briefly analyses the Rule of Law Framework of 2014 (which precedes the application of Article 7 TEU), the Rule of Law annual dialogue promoted by the Council and the recent Rule of Law Reports.[96]

a.

As one of the multiple judicial remedies available at EU level, infringement actions (enshrined in Articles 258-260 TFEU) have played a fundamental role in the quick response of the CJEU to the current Rule of Law crisis. Besides surpassing the difficulties stemming from the inefficiency of merely political dialogues by allowing the ECJ to declare the disconformity of State acts with EU Law, infringement proceedings have allowed the Court to adopt interim measures under Articles 278 and 279 TFEU.[97]

Silveira and M. I. Costa, 'The rule of law and the defense of citizens against any power: on the case C-650/18 Hungary v European Parliament', *UNIO – EU Law Journal*, 2021, <www.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/>, visited 4 August 2022.

[93] Rocha, 2020, p. 21; Santos, 2021, p. 16.

[94] A. Silveira, P. Froufe, S. Perez and J. Abreu, 'União de direito para além do direito da União – as garantias de independência judicial no acórdão Associação Sindical dos Juízes Portugueses', *JULGAR Online*, 2018, <http://julgar.pt/a-reforma-judiciaria-e-o-novo-modelo-de-gestao-publica-vantagens-limites-e-interrogacoes/>, visited 2 August 2022, p. 5; Sousa, 2020, p. 263.

[95] A. Silveira, 'Building the ECJ puzzle on judicial independence in a Union based on the rule of law (Commission v Poland in the light of ASJP)', *UNIO – EU Law Journal*, 2019, <www.officialblogofunio.com/2019/07/08/building-the-ecj-puzzle-on-judicial-independence-in-a-union-based-on-the-rule-of-law-commission-v-poland-in-the-light-of-asjp/>, visited 4 August 2022.

[96] Santos, 2021, p. 25-27.

[97] Duarte, 2022, pp. 136-138; Martins, 2022, p. 20.

Nonetheless, can one affirm that infringement actions have been, in the current challenging *status quo*, an effective tool? First of all, Portuguese authors have highlighted the limitation of its scope, corresponding the object of infringement proceedings to concrete breaches of EU Law provisions instead of episodes of systemic violations of EU values.[98] Moreover, despite its undeniable relevance, the continuous non-compliance with ECJ decisions by the convicted State is an indicator of the limited efficiency of this judicial remedy.[99]

For this reason, Rita Aroso Duarte analyses Kim Lane Scheppele's proposal of a "systemic infringement action", based on a pattern of systemic violations of the Rule of Law, which would trigger the application of not only the sanctions set out in Article 260 (2) TFEU but also the suspension of budget income in favour of the condemned State, while not requiring the revision of the Treaties.[100]

b.

Although Portuguese doctrine has not started a full debate on the new fund conditionality regime yet, Beatriz Correia dos Santos thoroughly analysed Regulation (EU, Euratom) 2020/2092. While recognising the appropriate contribution of this general regime that aims at protecting EU's financial interests and the mutual trust to the respect for EU values that underlie the execution of EU's budget, the author states that the suspension of funds in the case of violations of the Rule of Law can, notwithstanding, have negative effects on citizens' quality of life and even promote a sceptic attitude towards the Union.[101] Moreover, the author emphasises the different impact of the conditionality regime depending on the economic capacity of the concerned State.[102] The author concluded, however, that this is a risk worth taking considering the long-term purpose of the suspension of funds: ensuring the respect for EU values.[103]

Within this scope, the ECJ decisions of 16 February 2022 are of paramount importance.[104] In the cases C-156/21 and C-157/21, Hungary and Poland, respectively, requested the annulment of the Regulation (EU, Euratom) 2020/2092

[98] Duarte, 2022, p. 139; Santos, 2021, pp. 22-23.

[99] Duarte, 2022, pp. 149-153.

[100] Ibid, pp. 134-136.

[101] Santos, 2021, p. 33.

[102] Ibid., p. 34.

[103] Ibid., p. 33. *Vide* also the reflections of Cruz Vilaça on the subject available at <www.cruzvilaca.eu/pt/noticias/O-que-e-o-Regime-de-Condicionalidade-para-protecao-do-orcamento-da-Uniao-Europeia/125/>, visited 30 August 2022.

[104] Judgment of the Court (Full Court) of 16 February 2022, *Hungary v European Parliament and Council of the European Union*, C-156/21, ECLI:EU:C:2022:97; Judgment of the Court (Full Court) of 16 February 2022, *Republic of Poland v European Parliament and Council of the European Union,* C-157/21, ECLI:EU:C:2022:98.

on the new conditionality regime under Article 263 TFEU. Following entirely the Conclusions of AG Tanchev, the ECJ dismissed the actions brought by Hungary and Poland against the conditionality mechanism and developed a complex and extremely relevant argumentation. As noted by Rita Aroso Duarte, via these decisions, the ECJ clarified important features of the constitutional framework of the Union, refused the instrumental invocation of the "national identity" argument in order to disrespect EU values and clarified the nature and purposes of the conditionality regime.[105] Therefore these two ECJ decisions will undoubtedly become landmarks in its case law on the protection of the Rule of Law and will play a key role on the future steps of the resolution of the current crisis.[106]

c.

For the time being, no extended academic work has been dedicated to the possibility of creating additional instruments aimed at protecting the Rule of Law or the reflection regarding hard and soft law instruments. For instance, instead of proposing the adoption of additional instruments, Beatriz Correia dos Santos[107] and Rita Aroso Duarte[108] consider that the mechanisms available at EU level are sufficient to uphold the Rule of Law against systemic breaches by Member States, depending its efficiency on the political will of the institutions and the method of their conciliation.

Question 8

With regard to the landmark case of the *Portuguese Judges*, Alessandra Silveira highlights that "(i)t is a judgment of far-reaching consequences for effective judicial protection and the rule of law within the European Union – and, arguably, for the construction of the legal-constitutional model that supports the European integration".[109]

In more general terms, considering the ulterior ECJ decisions both in the context of references for preliminary rulings and infringement proceedings, Rita Aroso Duarte starts by emphasising the crucial role of the ECJ's case law. However, the author recognises multiple limitations to the Court's intervention: the limitation of

[105] Duarte, 2022, pp. 87-90.

[106] Duarte, 2022, p. 91. In the same sense, Gonçalo Martins de Matos considers that "these decisions constitute a huge step in the fight for the protection of the Rule of Law within the EU, a fight that many sceptics would say was lost". G. M. Matos, 'The relevance of judicial institutions in upholding the Rule of Law', *UNIO – EU Law Journal*, 2022, <www.officialblogofunio.com/2022/02/19/the-relevance-of-judicial-institutions-in-upholding-the-rule-of-law/>, visited 4 August 2022.

[107] Santos, 2021, p. 53.

[108] Duarte, 2022, pp. 159-161.

[109] Silveira, 2022.

the judgments' impact stemming from the principle of conferral and the nature of the preliminary rulings, the constant non-compliance with the Court's decisions by the defaulting Member States and the manifestly low number of infringement procedures started by the Commission.[110]

Weighing up these positive and negative aspects, the author stresses the need to strengthen and maximise the intervention of the Court in the context of the Rule of Law crisis, making some proposals[111], in order to ensure the effective performance of its role as the "guardian of values" vis-à-vis the insufficiency of political mechanisms of protection of the Rule of Law.

Question 9

As mentioned *supra*, the interventive role of the CJEU in upholding the Rule of Law since the case of the *Portuguese Judges* has caused contradictory reactions.

The affirmation, as a result of the (re)interpretation of Article 19 (1) second paragraph TEU, of an obligation of Member States to ensure the respect for judicial independence by their courts generated, for some authors, the risk of extending the scope of application of EU law to so-called "purely internal situations".[112] However, Alessandra Silveira, Pedro Froufe, Sophie Perez and Joana Abreu set aside this argument by noting that as long as the effectiveness of EU law is at stake, the CJEU has intervened multiples times in situations apparently unconnected to EU law.[113] In the *Portuguese Judges* cases there are no doubts: by basing its decision exclusively on Article 19 TEU and not applying Article 47 CFREU which enshrines the right to effective remedies, the CJEU aimed at surpassing the difficulties caused by the limited scope of Article 51 (1) CFREU.[114]

Chapter 4: Impact on Mutual Recognition and Mutual Trust

Question 10

The issues of mutual recognition under the influence of EU law have been extensively dealt by the Portuguese doctrine, although usually linked with specific areas such as private international law, administrative and criminal law. In what is specifically related to the link between concerns regarding the Rule of Law and

[110] Duarte, 2022, p. 158.
[111] Ibid, pp. 143, 152 and 153.
[112] Sousa, 2020, p. 268.
[113] Silveira, Froufe, Perez and Abreu, 2018, p. 10.
[114] Ibid., p. 7.

the enforcement of decisions issued by other Member States of the EU, doctrine has been less prolific.

However, Dulce Lopes analysis this question in the aftermath of the CJEU cases *N.S.* and *Aranyosi and Caldăraru*,[115] particularly in migration issues;[116] and Agostinho Soares Torres and Fátima Pacheco look at the issue from the point of view of the refusal to execute a European Arrest Warrant.[117]

As for instances where national courts have refused (or simply questioned) to enforce judicial decisions or European Arrest Warrants from other Member States based on concerns related to the Rule of Law, most of the claims have been dismissed by Portuguese Courts, precisely given the scope and strength that mutual recognition entails, and which has been explicitly recognised by Courts.

However, in the Supreme Court of Justice decision of 14 February 2019, the Court found that there were serious reasons why the Portuguese State should refuse to surrender the defendant and appellant to the United Kingdom if the facts for which the surrender of the defendant – who had already served a sentence of four years' imprisonment for three counts of money laundering – is requested are that he should comply with a judicial confiscation order for ten years' imprisonment, since it is considered that such a sentence is inappropriate, disproportionate and not absolutely necessary.[118]

Question 11

Within Portuguese doctrine, Maria Francisca Almeida Andrade analyses this issue with a view that the refusal to enforce due to systemic deficiencies of the issuing Member State should be based on a global appraisal of those deficiencies and not on a concrete basis shown in the particular case at hand.[119] This position, that contravenes the *Aranyosi and Caldăraru* judgment findings, which require

[115] Judgement of 21 December 2011 N. S. v. Secretary of State for the Home Department, C-411/10 and C-493/10, ECLI:EU:C:2011:865; and Judgement of *Pal Aranyosi and Robert Caldăraru,* C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

[116] D. Lopes, *Eficácia, Reconhecimento e Execução de Actos Administrativos Estrangeiros*, Coimbra, Almedina, 2018, pp. 557 and 673.

[117] A. S. Torres and F. Pacheco, 'Entre o reconhecimento mútuo e os direitos fundamentais: as respostas recentes do tribunal de justiça da união europeia quanto à inexecução facultativa do mandado de detenção europeu – um novo e atribulado caminho na cooperação internacional?', *JULGAR*, No 29, 2019, < http://julgar.pt/wp-content/uploads/2019/09/JULGAR39-01-AT-FP.pdf>, visited 30 August 2022.

[118] Decision of the Portuguese Supreme Court of Justice (STJ), 14 February 2019, Process no. 120/17.2YREVR.S1.

[119] M. F. A. Andrade, *Os limites ao princípio da confiança mútua e a tutela do estado de direito no âmbito da cooperação judicial penal: a necessidade da reconfiguração de um equilíbrio à luz da situação do Estado de Direito na Polónia*, 2021, (LL.M. thesis on file at <www. https://repositorio.ucp.pt/bitstream/10400.14/36316/1/202834743.pdf>, pp. 47-50.

that the "executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State" (para 92) is also discussed by Miguel Poiares Maduro and Benedita Menezes Queiróz.[120]

Portuguese Courts mainly follow the criteria laid down in the CJEU case law, once they consider, within the asylum field, that the concrete process should show that there are good reasons to believe that there are systemic deficiencies in the procedures and conditions of the issuing States that lead to inhuman or degrading treatment. Also the investigating obligations of the Portuguese Authorities are considered to be very limited while the allegations of flaws in the asylum system of the responsible Member State must be extremely severe.[121] A particular mention is due to the decision of the Central Administrative Court – South of 14 May 2020, which tries to lay down the criteria to evaluate systemic failures entailing the risk of inhuman or degrading treatment, with respect to another Member State, as follows "existence (i) of notorious facts (as defined in the Code of Civil Procedure) or (ii) of a minimally densified factual indicative allegation (iii) to the effect that the other Member State has international protection with a serious or gross level of inadequacy, (iv) even when not compared with Portugal".[122]

Question 12

In other areas, mutual recognition has been impaired with reference to the clause of international public order that, due to its concrete nature, does not allow for a wider appraisal of Rule of Law concerns. This was the case at hand in the Supreme Court of Justice decision of 9 July 2015, according to which it was not possible to grant the exequatur on the basis of paragraph 1 of the Article 34 of the Regulation (EC) 44/2001, for manifest violation of Portuguese public policy, more precisely violation of procedural public policy, for failure to respect the principles of adversarial proceedings and equality of the parties, fundamental principles of the Portuguese domestic legal order.[123]

[120] M. P. Maduro and B. M. Queiroz, 2020, p. 377.

[121] *Vide* the decisions of the Portuguese Administrative Supreme Court (STA) of 27 May 2021, Process no. 01357/19.5BELSB and of 4 February 2021, Process no. 0115/20.9BELSB. For further references on Portuguese case law, *vide* the Country Report on Portugal, available at <www.asylumineurope.org/reports/country/portugal/asylum-procedure/procedures/dublin/#_ftn61>.

[122] Decision of the Central Administrative Court – South (TCASul), 14 May 2020, Process no. 2199/19.3BELSB.

[123] Decision of the Supreme Court of Justice (STJ), 9 July 2015, Process no. 134/14.4TBCBC.G1.S1

Question 13

To the best of the reporters' knowledge, there are no instances where either national authorities or legal scholars have challenged the compliance with the Rule of Law by EU institutions themselves.

a.

Regarding the European Public Prosecution Office, Portugal has welcomed this EU innovation, having submitted an opinion according to which it did not consider the proposal to be incompatible with the principle of subsidiarity.[124] Portuguese doctrine also welcomed this organ, though pointing out the compatibilisation issues with the Portuguese legal order.[125] An issue that immediately arose was the definition of the selection procedure and *status* of the prosecutors. For this purpose, a working group was established, a public call was launched in 2018 and a Parliamentary audition was held for the role of the national European Prosecutor.[126] Law No 112/2019, 10 September that adapts national law to Regulation (EU) 2017/1939 also establishes the criteria and selection procedures for the European Prosecutor and for the Deputies' European Prosecutors. Nonetheless, the issue arose at the EU level, given that the Portuguese selection was not coincidental with the European selection committee and that some errors regarding the curricula of the selected prosecutor were transmitted. An appeal on this issue was presented to the General Court but considered inadmissible.[127]

b.

The inter-governmental character of some EU institutions and procedures seem not to allow national political authorities to evade requirements stemming from the Rule of Law. Indeed, there is legislation that regulates the participation of the Portuguese Parliament in the Process of European Construction (Law No 43/2006, of 25 August 2006) in which the Parliament participates through a hearing in the process of designation of any personalities, including in the jurisdictional area, that the Government intends to propose to occupy posts within the EU (Article 7-A).

[124] *Vide* COM/2013/0851 final.

[125] *Vide* J. A. C. Rodrigues, *Um Ministério Público Europeu – Algures entre o Optimismo e a Resistência?,* Coimbra, Almedina, 2012; M. Santos, *Para Um (novo) Modelo de Intervenção Penal na União Europeia*, Sintra, Rei dos Livros, 2016; M. J. Antunes and N. Brandão, 'EPPO Independence and Accountability', *in* K. Ligeti, M. J. Antunes and F. Giuffrida (Ed) *The European Public Prosecutor's Office at Launch – Adapting National Legal Systems, Transforming EU Criminal Law*, Milan, Wolters Kluwer, CEDAM, 2020, pp. 17-22.

[126] Documents publicly available at <www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3D%3DBQAAAB%2BLCAAAAAAABAAzNDAzMQUAfDA3ZwUAAAA%3D>.

[127] Order of the General Court (Ninth Chamber) of 8 July 2021, T-25/21, ECLI:EU:T:2021:424.

Chapter 5: The Rule of Law and the Existential Requirements of EU Law

Question 14

a.

To the best of the reporters' knowledge, there have been no national judicial decisions that challenge the primacy of EU law in Portugal, neither in general, nor in relation to the Rule of Law.

b.

Primacy in Portugal has been understood by doctrine as a fundamental principle enshrined in Article 8 (4) of the CRP, which provides the foundations for an automatic reception of the preference of EU law, anchored in a constitutional pluralist paradigm[128] and a dialogue between judges.[129] Maria Luísa Duarte emphasises that "at least in the domain of fundamental rights, the risk of collision between EU law and the Portuguese Constitution is very residual and even unlikely".[130] In cases where that conflict might exist there is a strong doctrinal tendency that considers that, unless there may be a violation of "fundamental principles of the Democratic State Ruled by Law" (whose appraisal is reserved for the Constitutional Court), it is for the CJEU to decide on the validity of EU norms, ensuring their correct interpretation and application.[131]

The recent decision no. 422/2020 of the Portuguese Constitutional Court of 15 July 2020[132] – and the first of its rank that addresses the issue of primacy – confirms that tendency by stating that "whenever the assessment of an EU rule is at stake in light of a (fundamental) principle of the democratic rule of law that, within the scope of the EU, has a parametric value functionally equivalent to the one recognised in the Portuguese Constitution, the Constitutional Court shall

[128] *Vide* F. L. Pires, *Introdução ao Direito Constitucional Europeu*, in Análise Social, XXXVI, Vol. 158-159, 2001, p. 119 and M. G. Teles, 'Constituições dos Estados e Eficácia Interna do Direito da União e das Comunidades Europeias – Em Particular sobre o Artigo 8.º, n.º 4 da Constituição Portuguesa', *Estudos em Homenagem ao Professor Doutor Marcello Caetano no centenário do seu nascimento*, Vol. II, Coimbra, Coimbra Editora, 2006, p. 326.

[129] *Vide* R. M. M. Ramos, 'Constituição Europeia e Constituição da República Portuguesa', in *Estudos de Direito da União Europeia*, Coimbra, Coimbra Editora, 2013, p. 287, and A. M. G. Martins, *Manual de Direito da União Europeia,* 2nd ed., Coimbra, Almedina, 2018, p. 545.

[130] M. L. Duarte, *Direito da União Europeia – Lições Desenvolvidas*, Lisboa, AAFDL, 2021, p. 372.

[131] *Vide* J. M. C. Costa, 'O Tribunal Constitucional Português e o Tribunal de Justiça das Comunidades Europeias', *in Ab Vno ad Omnes – 75 Anos da Coimbra Editora*, Coimbra, Coimbra Editora, 1998, pp. 1363-1380; A. Patrão and M. Canotilho, 'A admissibilidade dos recursos de fiscalização concreta da constitucionalidade de normas de Regulamentos da União Europeia, in *Estudos em Homenagem ao conselheiro Presidente Joaquim de Sousa Pinheiro*, Coimbra, Almedina, 2019, pp. 36-38.

[132] Decision no. 422/2020 of the Portuguese Constitutional Court (TC), 15 July 2020, Process no. 528/2017.

not assess its compatibility with the latter, and shall issue a decision refraining from cognizance" (para 2.7.). Only if this equivalence is not safeguarded should the Constitutional Court intervene upholding its "autonomous space of national control", established in the final segment of Article 8(4) of the Constitution (para 2.6.4.).[133]

This decision does not exclude that primacy (or challenges to primacy) could be called upon to allow for adjudication in cases related to the infringement of the equality principle. Indeed, this was the main issue at stake. However, the Court concluded that EU law complies with the principle of equality and highlights the alignment and interpenetration of fundamental values that occurs at this level between the European Union and the national legal order, propitiating a strong basis for mutual trust (para 2.8.).

Question 15

According to Fausto de Quadros, the concept of "national constitutional identity" set out in Article 4 (2) TEU corresponds to the idea that through the evolutionary process of European integration the identity of each State shall be preserved and respected. To better comprehend its complexity, the author divides "national identity" into three types of identity: political identity, which implies, among others, the respect for each State's *Kompetenz-Kompetenz* and territorial integrity; legal identity, which requires the preservation of every State's national law; and cultural identity, referring to the States' language, History and cultural traditions.[134]

Considering the Portuguese Constitution, Article 8 (4) establishes that the primacy of EU law is conditioned by the constitutional requirement of "respect for the fundamental principles of the democratic State ruled by law". In accordance with Gomes Canotilho and Vital Moreira, it follows from this article that the primacy principle is limited by the "essential core of the Constitution" which works as a sort of "public order limit".[135] It is possible to conclude, therefore, as Maria Luísa Duarte states,[136] that the Portuguese Constitutional identity is essentially characterised by the principle laid down in Article 2 of the CRP.

On the flip side of the coin is the progressively recognised "EU constitutional

[133] This decision also addresses, although as *an obiter dictum*, the question of systemic violations or qualified infringements of EU Law, in opposition to more general infringements of EU law (para 2.3.2.2.). For a comment on this decision, *vide* C. S. Botelho, 'O lugar da Constituição portuguesa no constitucionalismo transconstitucional contemporâneo – A propósito de um subsídio à exportação', *in* R. Costa (Ed.) *Direito das Empresas – Reflexões e Decisões*, Coimbra, Almedina, 2022, pp. 345-375.

[134] Quadros, 2018, pp. 119-120.

[135] Canotilho and Moreira, 2007, p. 267.

[136] Duarte, 2021, p. 372.

identity". While Jónatas Machado considers that EU primary law can undoubtedly be qualified as of constitutional nature,[137] Fausto de Quadros goes further by affirming that EU values and fundamental principles, which constitute the core of the EU's "material Constitution", are EU's *ius cogens*.[138]

Regarding the relation between national and EU constitutional identities, Fausto de Quadros states that the principle of integration, which has always characterised the European project, and the respect for the national identity of Member States do not exclude one another but complement each other in a process of "dialectical tension".[139]

In this regard, it is extremely relevant to consider, besides the abovementioned Decision no. 422/2020, the Decision no. 574/14 of the Portuguese Constitutional Court in which the Court, referring to a "multilevel constitution system" at EU level, stated that "(i)n this field there is not even a divergence between European Union Law and Portuguese Constitutional Law. In fact, the constitutional principles of equality, proportionality and protection of legitimate expectations, which have served as parameters for the Constitutional Court to assess the constitutionality of national rules (…) are part of the hard core of the rule of law, integrating the common European legal heritage, to which the Union is also bound".[140]

In this sense, doctrine has emphasised the necessity to carry out a systematic interpretation of Article 4 (2) TEU in order to avoid the abusive use of "national constitutional" exceptions as a shield from the compliance with EU Law.[141] Regarding the ECJ case *Taricco* (2015) and the principle of higher level of protection enshrined in Article 53 CFREU, Alessandra Silveira and Sophie Perez Fernandes note that when a particular element is part of the constitutional identity of a Member State, the Court's case law subordinates the application of Article 4 (2) TEU to a proportionality test under EU law, which does not always results in favor of the Member States' interests,[142] in order to prevent the identity claims of Member States from obstructing the achievement of the fundamental objectives of the Union.[143]

---

[137] J. Machado, '*Direito da União Europeia*, 3rd ed. (reprint), Coimbra, Gestlegal, 2019, p. 58.

[138] Quadros, 2018, p. 109.

[139] Ibid., p. 121.

[140] Decision no. 574/14 of the Portuguese Constitutional Court (TC), 14 August 2014, Process no. 818/14, para. 12.

[141] A. Silveira and S. P. Fernandes, 'Saga Taricco Continua: Entre Identidade Constitucional Do Estado-Membro E Nível Mais Elevado De Proteção Dos Direitos Fundamentais – Onde Fica A Efetividade Do Direito Da UE?', *Cadernos do Programa de Pós-Graduação em Direito PPGDir./UFRGS*, Vol. XII, No. 1, 2017, p. 27; Duarte, 2021, p. 370; F. B. Callejón, 'A relação dialética entre identidade constitucional nacional e europeia, no quadro do Direito Constitucional Europeu', *UNIO – EU Law Journal*, Vol. 3, No. 1, 2017, p. 16.

[142] *Vide* Judgment of the Court (Grand Chamber) of 24 May 2011, *European Commission v. Grand Duchy of Luxemburg*, C-51/08, EU:C:2011:336, para. 124.

[143] Silveira and Fernandes, 2017, p. 25.