GENERAL ASSEMBLY OF JUDGES OF THE SUPREME ADMINISTRATIVE COURT OF POLAND

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It is a great honour and pleasure to attend the General Assembly of Judges of the Supreme Administrative Court of Poland and to be in such distinguished company.

My speech today will focus on the rule of law within the European Union (the 'EU'). I chose this topic not only because the Court of Justice of the European Union (the 'Court of Justice') has developed important case law regarding the rule of law but also because, when war is on our doorstep, we must never forget the values on which the EU is founded.

The EU is, first and foremost, a 'Union of values'.[1] Indeed, Article 2 of the Treaty on European Union ("TEU"), defines the EU as a "Union of values", namely those of "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".

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[1] Koen Lenaerts, *The European Union as a Union of Democracies, Justice and Rights*, INTERNATIONAL COMPARATIVE JURISPRUDENCE 132, 136 (2017). See also Armin von Bogdandy, *Towards a Tyranny of Values ?*, in DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES 73, 79 (Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski & Matthias Schmidt eds, 2021) who uses the expression 'community of values'.

These values constitute our common heritage and stand at the very apex of the EU legal order in which all citizens and all Member States are equal, but remain equally bound to respect the said values.

Within the EU's system of checks and balances, the Court of Justice of the European Union, together with the national courts, ensures the full application of EU law in all Member States and effective judicial protection of the rights of individuals under that law. To put it simply, the mission of the EU's judiciary, national and Union-level combined, is to uphold the rule of law. However, the concept of the "rule of law" is not a simple one. As I have written extra-judicially, the Court is, in the interpretation of this concept, mindful of the limits of its own competence and of its role within the EU's architecture. It seeks notably to draw inspiration from the constitutional traditions common to the Member States, but makes sure that the *sui generis* constitutional structure of the Union, founded on and anchored in the values of Article 2 TEU, is protected at all times.

In today's talk I would like to take you on a brief jurisprudential trip down memory lane with a finish line in the present day, through which I will argue that whilst the topic of judicial independence, as a core constituent of the respect for the rule of law, is often perceived as a "regional" or an "era-specific" issue, it is in fact a universal yardstick of a functioning democracy, to which all Member States must be - *and are* - held accountable in the same manner. It is true that the Court of Justice's case law emphasising respect for the rule of law has gained a

lot of attention in recent years, but it is far from novel. On the contrary, it dates back all the way to the seminal judgment in *Les Verts*[2] delivered in 1986, in which the Court of Justice captured the essence of the rule of law as the idea that neither the EU institutions nor the Member States are above the law. It stressed that in a Union based on the rule of law, the system of governance is one of *law* and not one of *men.* If this fundamental value is not respected, all other values listed in Article 2 TEU become empty promises.

The case law focusing more specifically on the concept of 'judicial independence' finds its origins in the *Wilson* ruling from 2006,[3] delivered following a preliminary reference by the Luxembourgish Administrative Court. The Court of Justice made clear that this concept has both an internal and an external dimension. *Internally*, judicial independence is intended to ensure a level playing field for the parties to proceedings and for their competing interests. Independence requires courts to be impartial. *Externally*, judicial independence establishes the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure that might jeopardise the independent judgement of their members as regards proceedings before them.[4] That protection must apply to the members of the judiciary, by, for example, laying down guarantees against removal from office.[5]

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[2] Judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166.
[3] Judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paras 49 to 52.
[4] *Ibid*., para. 51.
[5] See judgments of 22 October 1998, *Jokela and Pitkäranta*, C-9/97 and C-118/97, EU:C:1998:497, para. 20, and of 4 February 1999, *Köllensperger and Atzwanger*, C-103/97, EU:C:1999:52, para. 21.

After the *Wilson* ruling, it was only a matter of time for the question to arise as to what happens when a 'court or tribunal', within the meaning of EU law, sees its independence threatened by the political branches of government and whether it could rely on EU law in order to protect itself. This issue is a fundamental one. Without independent judges, public authorities are free to exercise their power arbitrarily with impunity. Without independent judges, there is no cooperation with the Court of Justice through the preliminary reference procedure with the aim of providing the effective judicial protection of rights enshrined in Union law. Without independent judges, the Union's judicial system as a whole is weakened and the rule of law rendered meaningless in practice.[6]

Looking at those consequences, it does not come as a surprise that in the seminal *Associação Sindical dos Juízes Portugueses* case – also known as the '*Portuguese Judges Case*' – the Court of Justice held that Article 19 TEU – the Treaty provision imposing on the Member States the obligation to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law – may be relied upon in order to set aside national measures that call the independence of the national judiciary into question.[7] The lessons that can be drawn from the ruling of the Court of Justice in the *Portuguese Judges Case* mark a 'constitutional moment' for the rule of law within the Union. Indeed,

[6] See in this respect, judgment of 25 July 2018, *Minister for Justice and Equality*, C-216/18 PPU, EU:C:2018:586, paragraph 48, in which the Court ruled that judicial independence "forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded".

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

this ruling makes it crystal clear that there is an unbreakable link between respect for the rule of law, the principle of effective judicial protection and judicial independence.[8]

In the context of the Area of Freedom, Security and Justice, this means that only independent judicial authorities may issue European arrest warrants. Given that the execution of those warrants more often than not entails limiting the fundamental rights of the person concerned, and notably his or her right to liberty, those warrants must be issued by an independent body that affords effective judicial protection to those rights. In the *Poltorak* ruling from 2016,[9] the Court therefore clarified that the term 'judicial authority' cannot cover police services - which in this case happened to be Swedish - nor can a European Arrest Warrant issued by such services be regarded as a 'judicial decision'. Later on in 2019, in *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)* judgment,[10] the Court of Justice held that, since the German public prosecutor's offices of Lübeck and Zwichau were subject to directions or instructions in a specific case from the executive, they were not independent, thereby lacking the authority under EU law to issue European arrest warrants.

In a Union based on the rule of law, no one is above the law. That includes the Union institutions. In the context of 'rule of law litigation', the Court of Justice can therefore be called upon to verify whether the

[8] Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paras 36 to 41.
[9] Judgment of 10 November 2016 in case C-452/16 PPU, *Poltorak*, EU:C:2016:858.
[10] Judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456.

Union institutions, when adopting measures strengthening the rule of law within the EU, respect their powers as conferred on them by the Treaties. In the recent *Conditionality* judgments, issued last year, the Court of Justice, while ruling on the merits of two annulment actions brought respectively by Hungary and Poland against Regulation 2020/2092 establishing a horizontal conditionality mechanism,[11] shed further light on the meaning and the force of Article 2 TEU. Sitting in Full Court, it held – and I quote – that *'[t]he values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties*.'[12] The Court of Justice went on to rule that '*Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which… are given concrete expression in principles containing legally binding obligations for the Member States*'.[13]

Several important conclusions can be drawn from these passages. *Firstly*, the Court of Justice shed light on the legal value of the Article 2 TEU values, by confirming that they are not mere aspirations, but rather the foundation of principles, which impose legally binding obligations on all the Member States. *Secondly,* the Court made clear

[11] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, (2020) O.J. (L 433I) 1, and corrigendum (2021) O.J. (L 373) 94 (EU, Euratom).
[12] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 127, and *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 145.
[13] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 232, and *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 264.

that these values are not 'imposed by Brussels or by Luxembourg', but are rather the result of a "bottom-up" approach, inspired by the constitutional traditions common to all Member States. This also means that compliance with Article 2 TEU in no way imposes a particular constitutional model. It in fact allows room for national diversity, provided that the red lines drawn by the framework of reference that these values imply, are not crossed. *Thirdly and fundamentally,* the Court of Justice recalled that the very identity of the EU is based on those values.[14] Without respect for democracy, liberty and justice, the Union as we know it would cease to exist. That is why the EU has no choice but to defend them. That is also why, prior to accession, any candidate State for EU membership must align its own constitution and national identity with the said values.[15] That value alignment is not only a precondition for accession, but an ongoing commitment for all the Member States for the duration of their membership. Put differently, accession is the starting point in value protection, not the finish line. Indeed, EU identity and national identities are in a mutually reinforcing relationship. By protecting the values contained in Article 2 TEU, EU law also protects the identities of the Member States. Consequently, authoritarian drifts cloaked in constitutional reforms have no room in the EU, because they simultaneously betray the constitutional traditions common to the Member States and undermine the identity of the EU.

[14] See, in this regard, K. Lenaerts and J.A. Gutiérrez-Fons, 'Epilogue – High Hopes: Autonomy and the Identity of the EU' (2023) *European Papers* (*forthcoming*).
[15] Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311.

In that regard, I would like to wrap up our jurisprudential trip by drawing your attention to paragraphs 62 to 80 of the judgment of the Court of Justice in *Commission v Poland (Independence and private life of judges)*,[16] delivered on the 5th June 2023. Those paragraphs contain a concise and clear explanation as to why the Court of Justice enjoys jurisdiction to examine the compatibility with EU law of legislative reforms that target the national judiciary. Notably, it recalled that '*although the organisation of justice in the Member States… falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from Articles 2 and 19 TEU*'.[17] In addition, since the Court of Justice '*has exclusive jurisdiction to give the definitive interpretation of EU law …, it is for the Court, in the exercise of that jurisdiction, to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law.'* This means, in essence, that that scope cannot depend on *'the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with that of the Court of Justice'*.[18]

As this brief and necessarily selective voyage through time demonstrates, it is of utmost importance to understand that any undue interference with the independence of national judges triggers a domino effect by undermining the trust that the Member States placed in each

[16] Judgment of 5 June 2023, *Commission v Poland (Independence and private life of judges)*, C-204/21, EU:C:2023:442.
[17] *Ibid*., para. 63.
[18] *Ibid*., para. 79.

other in creating the EU and thus threatens the rule of law in the Union as a whole. Attacks on the judiciary in one Member State cannot be brushed aside as being ‘no one else’s business’. On the contrary, due to the essential nature of judicial independence in the EU legal order, they are ‘everyone’s business’. Conversely, it would also be naive to consider that any Member State is immune to the attempts of the political majority of the moment to restrain the crucial role that judges play and take their independent status and contribution to society for granted.

Believing in democracy, liberty and justice for all and fighting for them is both an individual choice as a human being and a collective choice as a society. In any union based on the rule of law, it is even more than a choice, it is a responsibility. The Court of Justice cannot, should not and - I believe - does not stand alone in upholding the values on which the EU is founded. Deepening democracy through the rule of law must indeed be our daily joint endeavour in order for the European Union to remain a “Union of democracies,” a “Union of rights,” a “Union of justice” and, let us not forget, a “Union of peace”.

Thank you very much for your attention.