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Strengthening the rule of law and the EU pre-accession policy: *Repubblika* v. *Il-Prim Ministru*

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

1. Introduction

Can Article 19(1) TEU and Article 47 CFR serve as yardsticks for verifying the legality of procedures applicable to the appointment of judges laid down in the Constitution of Malta? If so, is the role of the Prime Minister in the procedure in question compatible with these provisions of EU law? And if incompatibility is confirmed, how would past and future judicial appointments be affected? These were, in essence, the questions submitted to the Court of Justice, under Article 267 TFEU, by the *Prim'Awla tal-Qorti Ċivili – Ġurisdizzjoni Kostituzzjonali* (First Hall of the Civil Court, sitting as a Constitutional Court of Malta).[1] They gave the ECJ yet another opportunity to shape its ever-growing case law on EU values; in particular, respect for the rule of law and independence of the judiciary.[2]

As is well known and documented in academic literature, the acts of constitutional vandalism in several Member States, especially in Poland and Hungary, have led not only to continuous political confrontations between the European Commission, some EU capitals and the unruly Member States, but also to Article 7 TEU proceedings as well as several high-profile judgments of the ECJ and the European Court of Human Rights.[3] Seen from that perspective, some readers may be excused for thinking that the judgment in

1. See Summary of the request for a preliminary ruling pursuant to Art. 98(1) of the Rules of Procedure of the Court of Justice, available at: <curia.europa.eu/juris/showPdf.jsf?text=&docid=246681&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1266268> (all websites last visited 14 Sept. 2022).

2. See, *inter alia*, Joined Cases C-585, 624 & 625/18, *A. K. and others* v. *Sąd Najwyższy, CP* v. *Sąd Najwyższy and DO* v. *Sąd Najwyższy*, EU:C:2019:982; Joined Cases C-558 & 563/18, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuratur Krajową, formerly Prokuratura Okrgowa w Płocku* v. *Skarb Państwa – Wojewoda Łódzki and others*, EU:C:2020:234; Case C-192/18, *Commission* v. *Poland* EU:C:2019:924; Case C-619/18, *Commission* v. *Poland*, EU:C:2019:531; Joined Cases C-83, 127, 195, 291, 355 & 397/19, *Asociaţia 'Forumul Judecătorilor din România' and others* v. *Inspecţia Judiciară and others*, EU:C:2021:393.

3. See e.g. von Bogdandy, Bogdanowicz, Canor, Grabenwarter, Taborowski and Schmidt (Eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions*

Repubblika is just another episode in the rule of law saga, merely a footnote case. On the contrary, its importance should not be underestimated. Apart from implications for the system of judicial appointments in Malta, and further clarification as to the scope and meaning of Article 19(1) TEU and Article 47 CFR, its true importance lies in the principle of non-regression, which the Court decided to include explicitly in its reasoning. The principle of non-regression precludes EU Member States from adopting national rules which would amount to a regression in their compliance with the standards of the rule of law; it is precisely for this reason that *Repubblika* received attention in academic commentaries.[4]

Building on the existing literature, the present contribution aims to shed additional light on the Opinion of Advocate General Hogan,[5] the judgment of the Grand Chamber, and their joint impact on the EU rule of law *acquis,* as well as on potential further enlargements of the European Union. It is argued that *Repubblika* is not a proclamation of a brand new principle, but more of an important stepping stone in its shaping. As explained in this contribution, the principle of non-regression can be considered a derivative of the principle of loyal cooperation laid down in Article 4(3) TEU. Furthermore, traces of the principle of non-regression have been an inherent part of pre-accession policy for many years now. For the European Commission, *Repubblika* offers new weaponry employable in the infringement procedures *vis-à-vis* recalcitrant EU Member States, as well as a new addition to the pre-accession toolkit which the European Union should make good use of in future accession rounds.

2. Facts and legal background of the case

The facts of *Repubblika* are fairly straightforward. The applicant – Repubblika – is an association aiming at the promotion of protection of justice and rule of law in Malta.[6] It submitted an *actio popularis* challenging the compatibility of provisions on the appointment of judges laid down in the Maltese Constitution with Articles 19(1) TEU, Article 47 CFR, and Article 6 ECHR. Its primary

(Springer, 2021); Pech and Kochenov (Eds.), *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case* (SIEPS, 2021).

4. See Leloup, Kochenov and Dimitrovs, "Opening the door to solving the 'Copenhagen dilemma'? All eyes on *Repubblika* v. *Il-Prim Ministru*", 46 EL Rev. (2021), 692. See also multiple blogposts cited therein.

5. Opinion of A.G. Hogan in Case C-896/18, *Repubblika* v. *Il-Prim Ministru*, EU:C:2020:1055.

6. See further <repubblika.org>.

targets were Article 96(3–4) and Article 100(5–6) of the Maltese Constitution, which allow the Prime Minister, when making a recommendation on a judicial appointment to the President of Malta, to override the results of evaluation of candidates conducted by the Judicial Appointments Committee.[7] Such decisions, though, are subject to numerous procedural caveats regulated in the Maltese Constitution.

As in many other Member States, judicial appointments involve not only the executive or the legislature, but also a judicial council which is supposed to be independent and composed of representatives of the judiciary.[8] In the case of Malta, the Committee was established after the revision of the Constitution in 2016; i.e. two years after Malta's accession to the European Union. In technical terms, the Committee is a subcommittee of the Commission for the Administration of Justice. Its membership comprises the Chief Justice, the Attorney General, the Auditor General, the Ombudsman, and the President of the Chamber of Advocates. The general rules laid down in Article 96(1–4) of the Constitution for the superior courts, and Article 100 *in fine* of the Constitution for the inferior courts, envisage the following procedure. Judges are appointed by the President of Malta, on the recommendation of the Prime Minister based on an evaluation of candidates by the Committee. However, as already mentioned, the Prime Minister *may* proceed with a recommendation without taking into account the results of the Committee's assessment. In that scenario, the Prime Minister must comply with the following requirements. First, the Prime Minister is required to publish in the Malta Government Gazette a decision explaining the reasons behind the use of this procedural vehicle. Second, an oral statement to the Parliament is required.

In its application, Repubblika argued that the system established by the Constitution was in breach of Article 19(1) TEU, Article 47 CFR, and Article 6 ECHR, as the discretion granted to the Prime Minister constituted a threat to judicial independence, as evidenced by allegedly politicized judicial appointments in the recent past.[9] It was also argued that only appointments meeting the requirements outlined in Opinion 940/2018 of the Venice Commission would cut the mustard.[10] Not surprisingly, the Maltese Prime Minister, acting as a respondent in the case at hand, argued to the contrary.

7. Hereinafter referred to as the Committee.

8. For a critical assessment, see Bobek and Kosař, "Global solutions, local damages: A critical study in judicial councils in Central and Eastern Europe", 15 GLJ (2014), 1257.

9. According to the Summary of the Request for Preliminary Ruling, the action primarily focused on judicial appointments which became effective on 25 April 2019.

10. European Commission for Democracy Through Law, Opinion 940/2018 on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement, available at <venice.coe.int/webforms/documents/default.aspx?pdf file=CDL-AD(2018)028-e>.

Against this background, the referring court decided to make a preliminary reference to the ECJ. Being aware of the importance of the case for past and future appointments to the Maltese judiciary, the *Prim'Awla tal-Qorti Ċivili – Ġurisdizzjoni Kostituzzjonali* asked the Court to proceed under the expedited procedure.[11] This request was not, however, granted. As explained in paragraphs 18–22 of the judgment, the expedited procedure is available only in cases of "exceptional urgency"; and cannot be applied when "the sensitive and complex nature of the legal problems raised by a case does not lend itself easily to the application of such a procedure". While the conditions for using an expedited procedure were not met in the case at hand, the President of the Court nevertheless opted to give it priority treatment.[12]

The Polish Government argued that the Court should consider the reference for a preliminary ruling non-admissible.[13] A closer look at the arguments put forward by the Polish representatives may easily leave one perplexed. First, it was claimed that under the preliminary ruling procedure the ECJ has no jurisdiction to decide on the compatibility of national laws with EU law; instead, such matters are considered to be material for infringement procedures under Articles 258 to 259 TFEU. Non-admissibility was, according to the Polish Government, exacerbated by the fact that the Maltese case was an *actio popularis*. Unsurprisingly, such a take on the jurisdiction of the ECJ impressed neither Advocate General Hogan, nor the Court. Both, in unison, explained the obvious: while the Court cannot directly rule on compatibility issues, it can provide domestic judges with an interpretation of EU law in such a fashion as to allow national courts to follow its guidance and to make an assessment themselves. Advocate General Hogan emphasized that the sole fact of domestic proceedings being *actio popularis* did not make the case itself abstract, and thus outside the parameters of the preliminary ruling procedure.[14] Instead, what mattered was the genuine character of the dispute and Article 19(1) TEU being at the heart of it.[15]

The Polish Government then repeated its unsuccessful mantra that since the European Union does not have the competence to regulate judicial systems of the Member States, no specific rules may be established on the basis of

11. Art. 105 of the Rules of Procedure of the Court of Justice.

12. This option is available under Art. 53(3) of the Rules of Procedure of the Court of Justice.

13. Neither the European Commission, nor the governments of Malta, Belgium, the Netherlands, and Sweden, which submitted observations to the ECJ, challenged the admissibility of the reference for preliminary ruling.

14. In accordance with well-established ECJ case law, hypothetical references are not admissible. See, *inter alia*, Case C-83/91, *Wienand Meilicke* v. *ADV/ORGA F. A. Meyer AG*, EU:C:1992:332.

15. Opinion, paras. 22–29.

Article 19(1) TEU.[16] Finally, the Polish Government claimed that since the case did not fall within the remit of the implementation of EU law, the Charter was not applicable. Since these arguments fell within the scope of the first question submitted by the referring court, they were not matters of admissibility, but rather the substance of the case. Therefore, they ended up being attended to in the main part of the Opinion of Advocate General Hogan and the judgment of the Court.

3. Opinion of Advocate General Hogan

Advocate General Hogan started off by looking at the applicability of Article 19(1) TEU and Article 47 CFR to the case at hand and their potential to serve as standards for assessing the legality of the Maltese rules on the appointment of judges. The Advocate General had no doubts that, of the two, Article 19(1) TEU had the more important role. A quick scan of recent ECJ case law was enough to confirm the importance of an independent judiciary for the application of EU law and the functioning of the preliminary ruling procedure.[17] While the organization of national systems of judiciary was the competence of the Member States, this had to be utilized in such a fashion as to remain in compliance with Article 19(1) TEU and to ensure "effective legal protection in the fields covered by Union law". By the same token, Advocate General Hogan rejected the argument of the Polish Government on this topic. As for the potential application of Article 47 CFR, Advocate General Hogan and the Polish Government were, in general terms, in agreement: since the case at hand did not deal with the "implementation of EU law", the condition laid down in Article 51 CFR was not met, so the Charter as such was not applicable.[18] However, as Advocate General Hogan argued, the inextricable links between Article 19(1) TEU and Article 47 CFR meant that in such cases the former should be read in the light of the latter.

Having concluded that the case fell within the remit of Article 19(1) TEU, Advocate General Hogan proceeded to the heart of the matter: the question of whether the judicial appointments system provided in the Maltese Constitution was permitted, or precluded, by Article 19(1) TEU. The analysis is lengthy and detailed. It involves exegesis focusing on the application of

16. For similar arguments submitted in earlier cases by the Polish Government and its representatives see e.g. Case C-619/18, *Commission* v. *Republic of Poland*, paras. 37–41; Joined Cases C-585, 624 & 625/18, *A. K.*, paras. 73–75.

17. Opinion, para 37.

18. See, *inter alia*, Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, EU:C:2013:105. For comment, see e.g. Ward, "Article 51" in Peers, Hervey, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights. A Commentary*, 2nd ed. (Hart, 2021).

Article 19(1) TEU, Article 47 CFR, and Article 6 ECHR, to procedures governing the selection of members of the judiciary. Inevitably, Advocate General Hogan looked at the matter also through the lenses of the case law of the Court of Justice and the European Court of Human Rights.[19] In the words of Advocate General Hogan:

> "It follows from *AK* (and the earlier line of case law) that neither EU law nor, for that matter, the ECHR impose any fixed, *a priori* form of institutional guarantees designed to ensure the independence of judges. What is important, however, is that, first, judges must be free from any relationship of subordination or hierarchical control by either the executive or the legislature and, second, judges must enjoy actual guarantees designed to shield them from such external pressures."[20]

With this finding, Advocate General Hogan delved deeper into some aspects of judicial independence, including rules on the composition of courts/tribunals, length of service, grounds for and protection from dismissal, in particular disciplinary procedures, financial autonomy of the judiciary from the executive and the legislature. He argued that, in principle, Article 19(1) TEU was forward looking, thus focusing primarily on securing the independence of judges following their appointment.[21] Yet, in certain circumstances it could be employed to verify the legality of appointment procedures as such. Advocate General Hogan argued:

> "… it is only if one of these aspects of the procedure for the appointment of judges were to present a defect of such a kind and of such gravity as to create a real risk that other branches of the State – in particular the executive – could exercise undue discretion via an appointment which was contrary to law, thereby undermining the integrity of the outcome of the appointment process (and thus giving rise in turn to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned), that the appointment procedure in question might be contrary to Article 19(1) TEU".[22]

An in-depth analysis of the Maltese rules on judicial appointments, as juxtaposed with key independence indicators established in the case law of the ECJ and of the ECtHR, led Advocate General Hogan to the conclusion that the contested rules did not fall foul of requirements laid down in EU law. He

19. Opinion, paras. 50–77.
20. Ibid., para 70.
21. Ibid., para 56.
22. Ibid., para 71.

emphasized the diversity of solutions envisaged in domestic laws, thus precluding a one-size-fits-all approach. For obvious reasons, the centre of gravity of his assessment was the guarantees of judicial independence applicable *de iure*, however their existence *de facto* was a matter for the referring court to decide.[23] Interestingly, according to Advocate General Hogan, the lack of a constitutional provision explicitly guaranteeing the independence of judges was not a handicap as long as guarantees of different aspects of judicial independence were provided.[24]

A few points made by Advocate General Hogan merit further attention. First, unlike the Court of Justice, Advocate General Hogan proposed an answer to the third question posed by the Maltese court, concerning the consequences for past and future judicial appointments if the rules were found to be incompatible with EU law. Bearing in mind the desiderata of legal certainty and respect for *res judicata*, it is not surprising to see Advocate General Hogan advocating against using Article 19(1) TEU (interpreted in the light of Art. 47 CFR) as a vehicle to call into question judicial appointments made before the judgment in *Repubblika*.[25] Second, Advocate General Hogan considered the importance and the formal status of opinions of the Venice Commission. In this respect, he followed the Opinion of Advocate General Bobek in the *Romanian judges* case.[26] Notwithstanding their political importance and legal qualities, from the point of view of EU law, such opinions are merely useful sources of information. What is more, as Advocate General Hogan claimed, the rationale behind opinions of the Venice Commission is "arriving at an ideal system".[27] Consequently, even if the existing Maltese rules on judicial appointments did not meet all, however desirable, recommendations of the Venice Commission, it did not mean *per se* that they would be in breach of Article 19(1) TEU.[28] Third, while Advocate General Hogan did not refer to the principle of non-regression, he did note that similarly framed procedures for the appointment of judges existed at the time of Malta's accession to the Union. With this in mind, according to Advocate General Hogan, they must have been considered compliant with the Copenhagen criteria, as Malta was cleared to join the European Union on 1 May 2004.[29] Furthermore, despite expressing some reservations, the

23. Ibid., paras. 82 and 95.
24. Ibid., para 84.
25. Ibid., paras. 96–104.
26. Opinion of A.G. Bobek in Joined Cases C-83, 127, 195, 291, 355 & 397/19, *Asociația "Forumul Judecătorilor din România" and others* v. *Inspecția Judiciară and others*, EU:C:2020:746.
27. Opinion, para 88.
28. Ibid., paras. 89–92.
29. Ibid., para 100.

European Commission never triggered infringement proceedings against Malta.[30]

4. Judgment of the Court of Justice

The judgment of the Court started with the assessment of arguments presented by the Polish Government on the admissibility of the preliminary reference. The Court, following the Opinion of the Advocate General, rejected the first plea (lack of jurisdiction under Art. 267 TFEU to assess compatibility of national law with EU law), and addressed the second plea (the scope of application of Art. 19(1) TEU and Art. 47 CFR) as part of the answer to the first question submitted by the referring court. The Court unequivocally confirmed that while it, indeed, had no jurisdiction under Article 267 TFEU to rule directly on compliance of domestic law with EU law, it could provide national courts with an interpretation of EU law tailored in such a way as to facilitate such an assessment by domestic courts.

The Court then addressed the referring court's first question, on whether Article 19(1) TEU and Article 47 CFR could be yardsticks for the Maltese rules on appointment of judges. Complying with the well-established desideratum of *jurisprudence constante*, the Court reiterated the principles established in its previous judgments, and applied them to the case at hand.[31] In this respect, the Court was in general agreement with its Advocate General. To begin with, the Court emphasized that Article 19(1) TEU applies to "fields covered by Union law", irrespective of whether the Member States implement EU law or not (which is a pre-condition for application of Art. 47 CFR). Thus, the Court pointed out, the Maltese judges installed under the contested rules on judicial appointments, may end up applying and interpreting EU law.[32] Since in the given case the applicant, Repubblika, was not relying on any rights established in EU law, the scenario did not, however, fall within the parameters of the implementation of EU law by a Member State. While this precluded the direct application of Article 47 CFR, that provision had to be taken into account, bearing in mind its links to Article 19(1) TEU. Here again, the judges and Advocate General Hogan sang from the same music sheet.[33]

Moving on to the second question put by the referring court, as to whether the role of the Prime Minister was compatible with the relevant standards of EU law, the Court started with a useful overview of existing case law on

30. Ibid.
31. Judgment, paras. 35–46.
32. Ibid., para 38.
33. Ibid., para 45.

Article 19(1) TEU and the independence of the judiciary.[34] The judges confirmed what is now a well-established principle: that while the organization of the judiciary is a domestic competence, it must be exercised in such a fashion as to be compliant with EU law. With this in mind, the Court elaborated on the relationship between Article 47 CFR and Article 19(1) TEU, concluding that:

> "while Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law".[35]

This, inevitably, led to the conclusion that both provisions can be complied with only if the judiciary of a Member State meets the requirements guaranteeing its independence. After a brief recap of key independence benchmarks[36] the Court considered the established rules in relation to the procedures applicable to judicial appointments in Malta. Here, the Court, while building on the argument of Advocate General Hogan, chose to go much further. The starting point was the same presumption that since Malta was admitted to the European Union on 1 May 2004, it meant that the rules on judicial appointments in place at that time were, in the perception of the European Union, in compliance with the EU common values. Furthermore, in 2016 – when the Maltese Constitution was revised – the Judicial Appointments Committee was established to enhance the democratic credentials of the existing procedure.

The Court emphasized that the compliance of national laws with EU values, as proclaimed in Article 2 TEU, is not only a *conditio sine qua non* for accession to the European Union, but also it "is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State".[37] At this juncture the Court, building on its previous case law, elucidated the basic parameters of the principle of non-regression.[38] It ruled as follows:

34. Ibid., paras. 51–57.
35. Ibid., para 52.
36. Ibid., paras. 53–57.
37. Ibid., para 63.
38. As noted by Leloup, Kochenov, and Domitrovs, the principle of non-regression was brought to the attention of the ECJ already in Joined Cases C-585, 624 & 625/18, *A. K.,* in the submission of the EFTA Surveillance Authority. See Leloup, Kochenov and Domitrovs, op. cit. *supra* note 4, 700.

> "The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organization of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary . . . In that context, the Court has already held, in essence, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding national provisions relating to the organization of justice which are such as to constitute a reduction, in the Member State concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence …"[39]

The question was whether the Constitutional reforms introduced by Malta in 2016 constituted such prohibited regression. The analysis conducted by the Court showed that this was not the case, as the introduction of the Judicial Appointments Committee "may, in principle, be such as to contribute to rendering that process more objective, by circumscribing the leeway available to the Prime Minister in the exercise of the power conferred on him or her in that regard".[40] Furthermore, the Committee itself was procedurally ringfenced from potential influence and pressures coming from the executive and the legislature, thus ticking all the relevant boxes in terms of its independence. As to the judicial appointment procedures themselves, the Court was satisfied with the existing rules establishing the powers of the Maltese Prime Minister to bypass recommendations of the Committee only exceptionally, and subject to procedural caveats laid down in Articles 96(4) and 100(5–6) of the Constitution. This led the Court to the conclusion that Article 19(1) TEU did not preclude the Maltese arrangements for the selection of judges. In the light of this, the Court found it unnecessary to answer the third question asked by the referring court.[41]

5. Analysis

5.1. *Introduction*

The judgment of the Court of Justice in *Repubblika* is important for a number of reasons. First, by calling a spade a spade, it consolidates the incremental evolution of the principle of non-regression. Second, thanks to *Repubblika*, the

39. Judgment, paras. 64–65.
40. Ibid., para 66.
41. Ibid., para 74.

principle of non-regression has the potential to become an even more prominent item in the EU's pre-accession toolkit where respect for EU values has a leading role to play. Third, it contributes to the step-by-step development of the EU rule of law *acquis*. All three implications of *Repubblika* are discussed in turn.

5.2. *The principle of non-regression: Legal character and scope ratione materiae and ratione personae*

As a starting point, it is worth putting the principle of non-regression under a microscope. In the case at hand, the ECJ ruled that the Member States are not permitted to adopt national rules governing the functioning of the judiciary which would amount to regression of rule of law standards. If this were to happen, it would be in breach of Article 19(1) TEU and the values on which the EU is based, as per Article 2 TEU. This, in essence, is what the principle of non-regression amounts to. On a closer look, there is more to this than meets the eye.

First, the legal character of the principle of non-regression merits attention. Arguably, it joins the pantheon of judge-made general principles of EU law. The ECJ seems to have anchored it in Articles 2 and 19(1) TEU. In other words, it may not be explicitly laid down in the EU founding treaties, nevertheless the Court has derived it from there. However, as already noted in the introduction, the principle itself is not as new as one may *prima facie* think. In order to explain this further, it is important to consider the relationship between the principle of non-regression and the principle of loyal cooperation, which is laid down in Article 4(3) TEU. There is no doubt that this principle is of foundational importance for the European Union and its legal order. Unsurprisingly, its scope and prominence have already been widely discussed, and no detailed repetition is needed here.[42] A reminder is fitting, though, that the principle of loyal co-operation imposes a twofold obligation on the EU Member States. On the one hand, it requires them to take all positive actions necessary to meet the requirements of EU law. On the other hand, it prohibits the Member States from taking steps that could undermine achievement of the Union's aims. Arguably, it is at that second juncture that the principles of loyal co-operation and of non-regression meet. The former plays the role of *lex generalis*; the latter, building on Article 4(3) TEU, can be considered as *lex specialis* applicable to the rule of law principles enshrined in Articles 2 and 19(1) TEU. Indeed, as the ECJ ruled in *Repubblika*, the principle of non-regression establishes a negative obligation to refrain from adopting national provisions undermining the independence of the judiciary. As already

42. See, *inter alia*, Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014).

noted, though, the Court based the principle in question on Articles 2 and 19(1) TEU, without mentioning the principle of loyal cooperation. Despite this, the inextricable links between the two are quite clear; in *Repubblika* the ECJ has contributed to shaping the principle of non-regression, rather than creating it from scratch.

The next issue worth comment is the scope of the principle of non-regression. *Repubblika* and the follow-up case law seem to imply that the scope *ratione materiae* goes beyond the rules on the appointment of judges, extending to all values falling under the rule of law umbrella. This is a welcome development, which will give an additional boost to the commitment to EU values, as laid down in Article 2 TEU, as well as to the obligations stemming from Article 19(1) TEU. Since *Repubblika* is anchored in Article 2 TEU, one could also argue that the scope of the principle of non-regression covers *all* EU values listed therein, which would – apart from the rule of law – also include, for example, respect for human dignity, freedom, democracy, equality, and human rights. Furthermore, the way the Court frames the principle in *Repubblika* (see the exact wording of paras. 64–65 quoted above) suggests that the principle of non-regression applies to any downgrade of rule of law standards as may appear in the domestic legislation of a Member State. This triggers a reasonable question whether the principle of non-regression would also apply if national law ticked all the rule of law boxes on paper, but that serious deficiencies existed in its application in practice. While clarification from the Court in this respect is yet to come, arguably, the principle of non-regression extends to both – the law in the statute book and the law in operation. In future, such issues could potentially be raised both in infringement procedures brought by the European Commission and in references for preliminary rulings submitted by national courts. Furthermore, it is worth considering whether the principle of non-regression is applicable beyond the realms of rule of law and other EU values laid down in Article 2 TEU. Thus far, it has been employed by the Court of Justice in four instances, all of which related to the rule of law.[43] In its future case law, the Court is likely to indicate the direction of travel in this respect.

Finally, the scope of application of the principle of non-regression *ratione personae* merits a closer look. *Repubblika* may give the impression of an inextricable link between accession to the European Union and the principle in question. Indeed, the ECJ (and, for that matter also A.G. Hogan) reasoned that the national rules which were challenged by the applicant had survived the

43. Apart from *Repubblika*, the principle of non-regression was employed by the ECJ in Joined Cases C-83, 127, 195, 291, 355 & 397/19, *Asociaţia 'Forumul Judecătorilor din România'*, Case C-791/19, *Commission* v. *Poland*, and Case C-157/21, *Poland* v. *European Parliament and Council of the European Union*, EU:C:2022:98.

pre-accession scrutiny, therefore they must have complied with Article 2 TEU at the time Malta joined the European Union in 2004. While in the context of the present case such an approach had merits, in the greater scheme of things the limitation of the scope of the principle only to recent EU entrants would be problematic at many levels. First, it would undermine the principle of equality of the Member States.[44] Second, it would trigger many additional questions; for example, for how many years after the accession would it apply and which rule of law standards would serve as a point of reference? It may sound like a cliché, but it is nevertheless true that the rule of law requirements have developed quite considerably since the six founding Member States created the then European Communities.

In fact, the way ECJ case law is developing shows that the principle of non-regression applies to all EU Member States, and it has been uncoupled from Article 49 TEU. A prime example is Case C-791/19, *Commission* v. *Poland*, where the Court reiterated the key parameters of non-regression without linking it to accession as such.[45] Such an approach is perfectly plausible, as it respects the already mentioned equality of Member States. This case also demonstrates the principle of non-regression in operation. The ECJ ruled that Poland was in breach of Article 19(1) TEU as the Disciplinary Chamber at the Supreme Court lacked independence; this constituted a regression within the meaning of *Repubblika*.[46] The two judgments seen together may serve as encouragement for the European Commission to rely on the principle of non-regression in future infringement cases. Bearing in mind its constitutional importance, the principle could also be used as an aggravating factor for the calculation of financial penalties under Article 260 TFEU, where the seriousness of the breach is one of coefficients. Still, one should not be under the illusion that it can be a magic wand that would solve all rule of law problems. The case of Poland demonstrates that the Member States may go as far in their constitutional vandalism as to refuse to pay penalties imposed by the Court of Justice.[47] Seen from that perspective, the principle of non-regression is a useful addition, but its real effectiveness may

44. Rossi, "The principle of equality among Member States of the European Union" in Rossi and Casolari (Eds.), *The Principle of Equality in EU Law* (Springer, 2017); Claes, "The equality of the Member States" in Ziegler, Neuvonen and Moreno-Lax (Eds.), *Research Handbook on General Principles of EU Law. Constructing Legal Orders in Europe* (Edward Elgar, 2022).

45. Cf. Joined Cases C-83, 127, 195, 291, 355 & 397/19, *Asociația 'Forumul Judecătorilor din România'*, para 162.

46. Judgment, paras. 112–113.

47. The Polish Government has, so far, refused to pay penalties due as per Order of the Vice-President of the Court, Case C-204/21 R, *Commission* v. *Poland*, EU:C:2021:878; Order of the Vice President of the Court, Case C-121/21 R, *Czech Republic* v. *Poland*, EU:C:2021:752.

prove to be limited in some circumstances. At the same time, it may prove beneficial for the future development of EU pre-accession policy.

5.3. *The evolving role of EU values in EU pre-accession policy*

5.3.1. *The basics*

Article 49 TEU, which regulates the main parameters of accession to the European Union, makes it crystal clear that only European countries who respect the EU values laid down in Article 2 TEU, and who are committed to their promotion, may become Member States of the European Union.[48] Its current wording was introduced by the Treaty of Amsterdam,[49] however compliance with EU values as a pre-condition for EU accession goes back many years. Democratic credentials already became part of the enlargement discourse in the 1980s, when Greece, Portugal, and Spain negotiated the terms of accession, and in turn became Member States (respectively in 1981 and 1986).[50] Compliance with EU values evolved into one of the formal conditions of membership when the European Council adopted the Copenhagen Criteria in 1993.[51] The latter were tailor-made for Central and Eastern European countries, which, at the turn of 1980/1990, after a tectonic political shift, started on the path to democracy and the market economy.[52]

Since then, the pre-accession policy has developed considerably, in particular as far as compliance with EU values is concerned. This became particularly visible when Bulgaria and Romania, due to their slow progress with democratic reforms, failed to join in 2004. Their accession was delayed to 2007, but it was clear that the prospect of EU membership was not a magic wand that could provide a quick fix for underlying rule of law issues. At that stage, however, it was too late to introduce major changes to the procedure

48. For an assessment see, *inter alia*, Erlbacher, "Article 49 TEU" in Kellerbauer, Klamert and Tomkin (Eds.), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP, 2019).

49. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, O.J. 1997, C 340/1.

50. This was hardly surprising bearing in mind that all three States were at the time emerging from years of dictatorships and, in the case of Greece, military juntas. See further e.g. Tsoukalis, *The European Community and its Mediterranean Enlargement* (George Allen & Unwin, 1981); Seers and Vaitsos (Eds.), *The Second Enlargement of the EEC. The Integration of Unequal Partners* (Macmillan Press, 1982).

51. European Council, "Conclusions of the Presidency", 21–22 June 1993, SN 180/1/93 REV 1, p. 13.

52. See, *inter alia*, Mayhew, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe* (Cambridge University Press, 1998); Ott and Inglis (Eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (T.M.C. Asser Press, 2002); Hillion (Ed.), *EU Enlargement. A Legal Approach* (Hart, 2004).

governing their inclusion. With this in mind, the European Commission opted for a post-accession monitoring mechanism, which, in hindsight, seems to have had limited success.[53] Mid-2022, i.e. 15 years after accession, it still remains in force in relation to Romania.[54]

Compliance with EU values has now moved to the centre of the pre-accession policy. First, a halfway model was developed in relation to Croatia and Turkey.[55] Its main feature was increased attention to rule of law issues. Second, the pre-accession policy has been revamped further for the purpose of future accessions. It is no secret that all current candidate and potential candidate countries suffer from rule of law deficiencies of various kinds.[56] In order to appreciate the importance of *Repubblika*, it is fitting at this stage of the analysis to take a closer look at the main parameters of the current pre-accession policy and the role that respect for EU values plays in it.

Ever since the commencement of accession talks with Croatia in 2005, the EU values dossier has a dedicated Chapter 23 in the membership package. This is, by far, the most important chapter, even before negotiations start. Rule of law conditionality is now omnipresent, as soon as countries express a desire to join the European Union.[57] A good example is Albania, which has been subject to strict rule of law benchmarking at every step of its *rapprochement*; first to obtain the candidate status, and later to receive the green light to start accession negotiations. In the new methodology approved by the European Commission in 2020, Chapter 23 belongs to the first cluster of negotiation chapters, which is called fundamentals.[58] It is the first to be opened, and the

53. See Łazowski, "And then they were twenty-seven ... A legal appraisal of the sixth Accession Treaty", 44 CML Rev. (2007), 401; Spernbauer, "Benchmarking, safeguard clauses and verification mechanisms – what's in a name? Recent developments in pre- and post-accession conditionality and compliance with EU law", 3 *Croatian Yearbook of European Law and Policy* (2007), 273.

54. See COM(2021)370 final, "Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism".

55. On the Croatian experience see e.g. Vlašić Feketija and Łazowski, "The seventh EU enlargement and beyond: Pre-accession policy vis-à-vis the Western Balkans revisited", 10 *Croatian Yearbook of European Law and Policy* (2014), 1.

56. The current list of candidate countries includes Serbia, Montenegro, Albania, North Macedonia, Ukraine, and Moldova. The potential candidates are Kosovo, Bosnia and Herzegovina, and Georgia. Turkey is also a candidate country though after changes brought during the last decade, Turkey and democracy are no longer on speaking terms. Consequentially, its membership bid and accession negotiations have stalled completely.

57. It is also at the heart of the Eastern Partnership, that is the regional dimension of the European Neighbourhood Policy. See e.g. Poli (Ed.), *The European Neighbourhood Policy – Values and Principles* (Routledge, 2016).

58. COM(2020)57 final, "Enhancing the accession process – A credible EU perspective for the Western Balkans".

last to be closed in the membership talks.[59] Furthermore, as evidenced by the pending negotiations with Montenegro and Serbia, Chapter 23 is heavily underpinned by opening, mid-term, and closing benchmarks, aimed at securing reforms necessary in order to comply with EU values laid down in Article 2 TEU. They are outlined in screening reports prepared by the European Commission at the final stages of the pre-negotiation phase, and subsequently subject to revisions. All of this aims to make sure that new entrants comply with all rule of law requirements, including independence of the judiciary, by the time of accession at the latest, and that newly introduced reforms are bulletproof.[60] The rationale behind the recent reforms of the pre-accession policy has also been to remedy what Dimitry Kochenov called a failure of conditionality in the recent accession rounds.[61]

5.3.2. *Why the Repubblika case matters in the pre-accession context?*

When it comes to pre-accession policy, the judgment in *Repubblika* is important for several reasons. First, it fills a very significant gap, allowing the European Commission to use the principle of non-regression in infringement cases against recalcitrant new Member States who cannot resist the temptation to dismantle pre-accession reforms once they join the European Union. Second, with the principle of non-regression fully on board, the EU has received a more efficient instrument in its pre-accession toolkit. The judgment definitely contributes to solving what academic commentators call the "Copenhagen dilemma".[62] During accession talks, the European Communities, and subsequently the European Union, have been free to shape rule of law conditionality in all types and forms. However, until recent rule of law related case law of the Court of Justice, as of the date of accession the newcomers were allowed to swap the music score from Beethoven's "Ode to Joy" to Cole Porter's "Anything Goes". The common wisdom was that rule of law infringements could be tackled as part of the pre-accession policy, but the European Union lacked the functioning apparatus to enforce compliance with EU values once candidate countries had become Member States. The Article 7 TEU procedure, due to its predominant political flavour and the leading role

59. See further on the new methodology, Ćemalović, "One step forward, two steps back: The EU and the Western Balkans after the adoption of the new enlargement methodology and the conclusions of the Zagreb Summit", 16 *Croatian Yearbook of European Law and Policy* (2020), 179.

60. See further, *inter alia*, Ognjanoska, "Promoting the rule of law in the EU enlargement policy: A twofold challenge", 17 *Croatian Yearbook of European Law and Policy* (2021), 237.

61. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International, 2008).

62. See Leloup, Kochenov and Dimitrovs, op. cit. *supra* note 4, 702–703.

played by the Council/European Council, was doomed from the start. The ongoing saga with Article 7 TEU proceedings against Poland and Hungary is sufficient evidence in this respect.[63] For many years, the big unknown was whether the preliminary ruling and infringement procedures could be employed to tackle rule of law deficiencies. As is well known, the addition of Article 19(1) TEU by the Treaty of Lisbon, followed by the judgment in *Associação Sindical dos Juízes Portugueses*, were breaking points. The latter case was, to paraphrase Bonelli and Claes, a truly serendipitous judicial moment which opened a lot of doors.[64] With other cases that followed, it became clear that "Anything Goes" was no longer possible. The judgment in *Repubblika* and the recognition of the principle of non-regression is an important milestone in this respect. However, also in the pre-accession context, it is not as novel as it may *prima facie* look.

To start with, all EU newcomers have the obligation to comply with EU law in its entirety, with the exception of selected acts of EU secondary law covered by transitional arrangements.[65] In accordance with the principle of immediate effect, the EU *acquis* starts to apply to new Member States as of the date of accession.[66] This also means that from the date of entry, the principle of loyal co-operation applies. Consequently, new Member States are not permitted to regress on their EU law commitments and, should that happen, the European Commission can step in with infringement procedures. Furthermore, in the three most recent enlargement rounds, the Acts on Conditions of Accession, forming an inherent part of the Accession Treaties, contained safeguard clauses which could have been triggered if newcomers failed to comply with their commitments.[67] In relation to the non-regression principle, the JHA

63. See further e.g. Kochenov, "Article 7: A Commentary on a much talked-about 'dead' provision" in von Bogdandy et al., op. cit. *supra* note 3.

64. Case C-64/16, *Associação Sindical dos Juízes Portugueses* v. *Tribunal de* Contas, EU:C:2018:117. See further the annotation of the case by Bonelli and Claes, "Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary", 14 EUConst (2018), 622.

65. See further Łazowski, "Permanent derogations and transitional arrangements for new Member States of the European Union: Accession condictiones sine quibus non" in Fromage (Ed.), *(Re-)defining Membership: Differentiation in and outside the European Union* (OUP, 2023) forthcoming.

66. See further Kalėda, "Immediate effect of Community law in the new Member States: Is there a place for a consistent doctrine?", 10 ELJ (2004), 102.

67. Treaty between [the 15 Member States of the EU] and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, O.J. 2013, L 236/17; Treaty between [the 25 Member

safeguard clauses are particularly noteworthy as one can detect traces of that principle in their design. For instance, Article 39 of the Act on Conditions of Accession of Croatia allowed the European Union to trigger – within the first three years of Croatia's membership – the safeguard clause, and impose measures, including the suspension of selected parts of the EU *acquis*, should there be "serious shortcomings or any imminent risk of such shortcomings" in the transposition or implementation of the EU *acquis* in the Area of Freedom, Security, and Justice.[68] Arguably, a regression on rule of law commitments could have triggered the safeguard clause. For instance, undermining the independence of the judiciary would have affected the application of EU criminal law mutual recognition instruments, which, as is well known, hinge on mutual trust.[69]

As alluded to earlier, the principle of non-regression may also have implications for pre-accession policy in future. First, it strengthens the authority and the legitimacy of the European Commission to design and enforce rule of law conditionality. Traces of the principle of non-regression are clearly visible in recently adopted negotiation frameworks for membership talks with Albania and North Macedonia. In both instances, regression in rule of law reforms may be the catalyst for triggering the suspension of accession negotiations.[70] Second, the principle of non-regression should be codified in future accession treaties, giving the Commission additional instruments to challenge – under safeguard clauses or infringement procedures – rule of law "reforms" in future Member States of the kind that have been seen in Poland or Hungary. Above all, now the principle has been further articulated and the EU has an adequate procedural apparatus, a combination of all these may have a deterrent effect.

5.4. *Once again, the independence of the judiciary: Another brick in the wall?*

Last but not least, *Repubblika* adds to the growing volume of case law on EU values, in particular respect for the rule of law and the independence of the

States of the EU] and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, O.J. 2005, L 157/11; Treaty between [the 27 Member States of the EU] and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, O.J. 2012, L 112/10.

68. For a commentary, see Łazowski, "EU do not worry, Croatia is behind you: A commentary on the seventh Accession Treaty", 8 *Croatian Yearbook of European Law & Policy* (2012), 1.

69. See, *inter alia*, Mitsilegas, *EU Criminal Law*, 2nd ed. (Hart, 2022).

70. General EU Position on Accession Negotiations with Albania, para 14; General EU Position on Accession Negotiations with North Macedonia, para 14. Both documents on file with the author.

judiciary. The objection on admissibility raised by the Polish Government, gave the Court a further opportunity to reiterate some fundamentals. It is now clear that the establishment of the domestic judiciary is a competence of the Member States, but – as in other areas – this domestic competence must be exercised in compliance with EU law, including its general principles. This approach to interaction between national and EU competence is very well established in the realm of the Internal Market. For instance, requirements which need to be complied with in order to create pharmacies or gambling outlets, are a matter of domestic law. At the same time, any conditions which need to be complied with under national law must be compatible with key principles underpinning the right of establishment and the free movement of services.[71] Similarly, taxation of dividends, which is a matter regulated exclusively in domestic law, must remain compatible with free movement of capital: Member States have the freedom to regulate the level of taxation, but tax rates cannot, as a general rule, be discriminatory.[72] As one would expect, in relation to the domestic competence to set up the judiciary and the limits thereto, the Court has been consistent throughout. While the current Polish Government keeps on challenging the Court's approach, attempts such as made in *Repubblika* are doomed to fail.[73]

The ECJ also took this opportunity to re-state the key ingredients of an independent judiciary, which is essential for compliance with the requirements of Article 19(1) TEU. In this respect, *Repubblika* does not add much new; but it does cement the existing case law. The Court did not, unlike Advocate General Hogan, find it appropriate to discuss the status in EU law of the opinions of the Venice Commission, or their relevance in assessing the independence of the judiciary of the Member States. The Court acknowledged, however, the recent reforms of the *modus operandi* for judicial appointments in Malta, which go in the direction outlined by the Venice

71. See e.g. Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd* v. *Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, EU:C:2009:519; Case C-46/98, *Carmen Media Group Ltd* v. *Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein*, EU:C:2010:505; Joined Cases C-570 & 571/07, *José Manuel Blanco Pérez and María del Pilar Chao Gómez* v. *Consejería de Salud y Servicios Sanitarios and Principado de Asturias,* EU:C:2010:300; Case C-531/06, *Commission* v. *Italy*, EU:C:2009:315.

72. See e.g. Case C-35/98, *Staatssecretaris van Financiën and B.G.M. Verkooijen*, EU:C:2000:294; Case C-292/04, *Wienand Meilicke, Heidi Christa Weyde and Marina Stöffler* v. *Finanzamt Bonn-Innenstadt*, EU:C:2007:132. See also COM(2003)810, "Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – Dividend taxation of individuals in the Internal Market".

73. See examples in note 16 *supra*.

Commission.[74] The judgment allowed the ECJ to look into compliance of the Maltese law with the EU *acquis*. Under the preliminary ruling procedure, the Court could not directly rule on matters of compatibility; its answer is thus framed as an interpretation of Article 19(1) TEU, allowing the referring court to apply this to the facts of the case. While the Court indicated that the Maltese provisions did not as such seem to fall foul of Article 19(1) TEU, it was for the referring court to check whether compliance *de iure* also translated into compliance *de facto*. Unfortunately, it was deprived of this possibility as Repubblika, following the ECJ's judgment, withdrew its application, and the case was removed from the docket of the Maltese court.[75]

6. Conclusions

Repubblika is an important decision. As explained above, it is a useful addition to the existing legal framework, including the ECJ's rule of law case law. However, its real importance lies in the consolidation of the principle of non-regression in relation to the rule of law, including the standards of the independence of the judiciary. Time will tell to what extent the principle of non-regression will play a role in infringement procedures, or even Article 7 TEU proceedings. One swallow does not make a summer, but the subsequent application of the principle of non-regression in Case C-791/19, *Commission* v. *Poland*, shows its potential, and by the same token, emphasizes the importance of *Repubblika.* It is now up to the European Commission, and the ECJ to use it further. The principle of non-regression is also likely to serve as an important contribution to pre-accession policy. It will allow the European Commission to give an extra boost to conditionality and benchmarking. Building on existing practice, it would be a welcome development if the principle of non-regression were to be codified in the future accession treaties to give it a firm standing in EU primary law.

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74. Judgment, para 24. On the substance of these reforms, see further Commission, "2020 Rule of Law Report Country Chapter on the rule of law situation in Malta" SWD(2020)317 final.

75. I am grateful to Dr. Ivan Sammut for his advice on the matter.

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