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UPGRADING RULE OF LAW IN EUROPE IN POPULIST TIMES

The task of this brief editorial is to provide a concise *tour d'horizon* of EU law development in the field of the Rule of Law over the last years, which have significantly reinforced the powers of the supranational institutions in the domains, which have previously never been considered part of supranational competence/purview of regulation. While the EU has thereby matured, entering a period of new, more credible 'constitutionalism' claims, the solution of the problems, which this *de facto* power grab was intended to solve is nowhere in sight: delegating sore issues to 'Europe' does not bring the expected dividends in the populist times, inviting a conversation about alternative approaches and solutions required.

1. DISCOVERING THE RULE OF LAW – REINVENTING THE UNION

In dealing with the Rule of Law backsliding in the EU, the Court of Justice managed to turn the proclamation-based Rule of Law value of Article 2 TEU into an enforceable substantive principle of law, spanning across both the EU and national legal orders. Adherence to the Rule of Law has always been praised as an essential feature of EU's constitutionalism. The Union possessed – so it seemed – no competence to intervene in the cases when backsliding occurred at the national level.¹ And of course there is nothing close to the US National Guard in the European Union to help restore law and order in the recalcitrant Member States.²

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1 But see Closa, C., Kochenov, D., Weiler, J. H. H., 2014, Reinforcing the Rule of Law Oversight in the European Union, *EUI RSCAS Research Paper*, No. 25.

2 Tushnet, M., Enforcement of National Law against Sub-National Units in the United States, in: Jakab, A., Kochenov, D., (eds), 2017, *The Enforcement of EU Law and Values: Methods against Defiance*, Oxford University Press.

The competence lacuna had to be filled sooner or later, allowing the EU to graduate into a true constitutional system that actually stands by its principles³ – and the case-law of the last three years could be interpreted as starting precisely this kind of transformation. Given its vital importance combined with its innovative nature, one could characterize it as a welcome power grab – an organic part of the usual incrementalism in EU law’s development, but going further than usual this time. What were the main aspects of this development? Four interrelated component parts can be identified.

- The Court has managed, firstly, to turn the presumption of compliance with the rule of law into an enforceable promise backed by the necessary competence to intervene.⁴
- Moreover, secondly, the Court of Justice has also articulated the core substantive elements of the supranational rule of law,⁵ which it had the competence to enforce, going beyond the circularity of the definition offered in *Les Verts* and focusing predominantly on judicial independence.⁶
- The Court has moved on, thirdly, to ensure that its newly-found substance of the rule of law cutting through the legal orders is actually effectively enforceable and that this enforcement includes ample possibilities for interim relief, including the interventions to reverse the structural changes made by the member states in their systems of the judiciary and, crucially, the empowerment of the *national courts* of the Member States, with the help of EU law, to do the same.⁷
- As a consequence, lastly, the Court of Justice joined the emerging trend observable around the world, where international bodies and courts play an increasing role in the structuring and organization of the judiciaries at the national level.⁸

3 Williams, A., 2009, *Taking Values Seriously: Towards a Philosophy of EU Law*, *OJLS*, Vol. 29, p. 549.

4 *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, Case C-64/16, EU:C:2018:117 [GC].

5 For a now classical account, see Pech, L., 2009, *The Rule of Law as a Constitutional Principle of the European Union*, *Jean Monnet Working Paper Series*, No. 4/2009; Janse, Cf. R., 2018, *De renaissance van de Rechtsstaat*, Open Universiteit.

6 Lenaerts, K., 2020, *New Horizons for the Rule of Law within the EU*, *German Law Journal*, No. 21, p. 29.

7 Wennerås, P., *Saving a forest and the rule of law: Commission v Poland*. *Commission v Poland*, Case C-441/17 R, Order of the Court of 20 November 2017 (2019) 56 CMLRev [GC], p. 541.

8 Kosař, D., Baroš, J., Dufek, P., 2019, *The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism*, *EUConst*, Vol. 15, pp. 427–461.

All these changes could not but lead to a significant upgrade of Rule of Law standards also at the supranational level, as the Court had to take into account the recent significant advances in the area of understanding of the Rule of Law and apply them to the well-tested areas of EU law, such as the guarantees of independence of the bodies to meet the standards of “court or tribunal” in the context of Article 267 TFEU as well as welcoming direct actions by the Commission against the Member States whose courts fail to take a meaningful part in the dialogue with the Court of Justice. The inter-court dialogue, which the Court is officially striving to protect, is thus not a dialogue of equals any more, as Araceli Turmo has amply demonstrated.⁹ This is notwithstanding the fact that a questionable judicial genre of a press release is at times required to remind the national-level interlocutors of such *status quo*.¹⁰

1.1. TURNING THE PRESUMPTION INTO AN ENFORCEABLE PROMISE

The most recent case-law reinventing EU’s Rule of Law calls for a new way of approaching the Union: from a system of “declaratory” Rule of Law,¹¹ where the adherence of the national authorities to this principle is merely a presumption, the Union emerged as a constitutional system where this presumption is being gradually replaced with a statement of full adherence to this statement as a fact, which comes with a possibility of checking whether this presumption holds true combined with a possibility to police serious deviations both in the political and in the legal context. The consequence of the most recent case-law is the articulation of the rule of law as a workable principle of law applicable across the legal orders in the EU. Indeed, if only an actual, as opposed to a declaratory, Rule of Law system can lend its “constitutional” characterization some truth, the EU is only becoming a constitutional Rule of Law-based system now, in front of our eyes.

The swift transformation of the law at both supranational and the national level that this fundamental shift entails is a result of the revolutionary case-law over the last three years, since the *Portuguese Judges* ruling, where the Court for the first time in EU history turned to Article 19(1)

9 Turmo, A., 2019, A Dialogue of Unequals – The European Court of Justice Reasserts National Courts’ Obligations under Article 267(3) TFEU, *EUConst*, Vol. 15, p. 340.

10 Lindeboom, J., 2020, In the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU’s Press Release Following the *PSPP* Judgment, *German Law Journal*, Vol. 21.

11 Kochenov, D., Declaratory Rule of Law: Self-Constitution through Unenforceable Promises, in: Pribáň, J., (ed.), 2016, *The Self-Constitution of European Society beyond EU Politics, Law and Governance*, Abingdon, Routledge, p. 159.

para 2 TEU in order to kill two birds with one stone. Firstly, it gave clear EU law substance to the value of the rule of law in Article 2 TEU, thus elevating the independence of the judiciary to a new level both in theory and in practice in the context of the EU legal system. Secondly, it found a way to articulate EU law jurisdiction in the cases involving threats to judicial independence at the national level, *de facto* broadening the material scope of EU law to a significant extent.

It goes without saying that such broadening, the possibility of which was predicted by eminent scholars of the past, from Judge Kakouris to John Usher,¹² is rock-solid in terms of its legal grounding in the texts and the spirit of the Treaties. It can be hypothesized that such Rule of Law developments as the ones we witnessed over the last three years, could occur much earlier in the history of EU's constitutionalism. Yet, there was probably no overwhelming need for their articulation before now. Indeed, as one remembers from school physics lessons, where there is action – there is reaction. The presumption of compliance by all the Member States' authorities with the Rule of Law – which I have amply criticized on a number of occasions¹³ – has actually worked well until the moment when Rule of Law and democratic backsliding became the main headache of the powers that be in Brussels and other capitals. Indeed, should the backsliding continue, the very soul of the Union would be emptied of any content: if it is not anymore a club of Rule of Law-abiding democracies, the added value of the whole integration project comes naturally questioned.¹⁴ The issue is

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- 12 Usher, J. A., How limited is the jurisdiction of European Court of Justice?, in: Dine, J., Douglas-Scott, S., Persaud, I., (eds), 1991, *Procedure and the European Court*, London, Chancery Law Publishing, p. 77; Usher, J. A., General Course: The Continuing Development of Law and Institutions, in: Emmert, F., (ed.), 1991, *Collected Courses of the Academy of European Law*, European Community Law, Vol. II, Book 1, The Hague, Martinus Nijhoff Publishers, p. 122; Kakouris, C. N., La Cour de Justice des Communautés européennes comme cour constitutionnelle: trois observations', in: Due, O., Lutter, M., Schwarze, J., (eds.), 1995, *Festschrift für Ulrich Everling*, Baden Baden, Nomos, p. 629; Kakouris, C. N., 1994, La Mission de la Cour de Justice des Communautés Européennes et l'éthos du Juge, *Revue des affaires européennes*, Vol. 4, p. 35.
- 13 Kochenov, D., The EU and the Rule of Law – Naïveté or a Grand Design?, in: Adams, M., Meuwese, A., Hirsch Ballin, E., (eds.), 2017, *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge University Press, p. 419. Take into account, too, the fact that this presumption was the core weakness of the failure of conditionality, which marked the pre-accession exercise in this field: Kochenov, D., 2007, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, The Hague, Kluwer Law International. This weakness is now being directly remedied by the Court in *Repubblika*: Kochenov, D., Dimitrovs, A., Solving the Copenhagen Dilemma, *VerfBlog*, 29 April 2021.
- 14 Koncewicz, T. T., 2019, Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of the Heart, *Indiana Journal of Global Legal Studies*, Vol. 26, p. 501.

thus not helping the Polish and the Hungarian people to remain free. The very rationale of the Union as such is at issue.¹⁵ Tomasz Tadeusz Koncewicz is absolutely right: “undoubtedly, while this emerging rule-of-law case-law adds constitutional layers to the community of law, its reformative potential and significance go clearly beyond the courtroom.”¹⁶

1.2. ARTICULATING THE SUBSTANCE OF THE EU RULE OF LAW: DISCOVERING THE IMPORTANCE OF JUDICIAL IRREMOVABILITY AND INDEPENDENCE

Appealing to the independence of the judiciary, which is one of the least questioned crucial elements of the rule of law, in order to accomplish the transition from restating presumptions to ensuring compliance is a move of towering importance, especially considered in its simplicity. As explained by President Lenaerts: “It follows that national courts or tribunals, within the meaning of Article 267 TFEU, are, first and foremost, called upon to protect effectively the rights that EU law confers on individuals, thereby providing them with ‘supranational justice’ and upholding the rule of law within the EU.”¹⁷ The revolution at the heart of EU’s constitutionalism has thus brought about seemingly nothing new: all the elements it draws upon – from the on-going dialogue between the national courts acting in their EU law capacity and the Court of Justice to the need to ensure that individuals can fully draw on their “legal heritage”¹⁸ of rights articulated at the supranational level – have been with us all along.

It is the reshuffling of these elements, in the light of reinterpreting the requirements of Article 19(1) TEU as well as Article 47 CFR in order to enable EU’s direct intervention – like in *Commission v. Poland (The Independence of Supreme Court)* where a complete restoration of the *status quo ante* has been ordered by the Court, undoing the so-called ‘judicial reform’ – or an indirect intervention – like in *A.K. (The Independence of the Disciplinary Chamber of the Polish Supreme Court)*, the Court instructing the Polish counterpart to apply a clear test of independence to the

15 Closa, C., Reinforcing of EU Monitoring of the Rule of Law, in: Closa, C., Kochenov, D., (eds.), 2016, *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, p. 15.

16 Koncewicz, T. T., 2020, The Supranational Rule of Law as First Principle of the European Public Space – On the Journey in Ever Closer Union among the Peoples of Europe in Flux, *Palestra*, Vol. 5, p. 167.

17 Lenaerts, K., Our Judicial Independence and the Quest for National, Supranational and Transnational Justice, in: Sevik, G. et al., (eds.), 2019, *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher*, Berlin, Springer, p. 158.

18 CJEU, case 26/62 *Van Gend en Loos* [1963] ECR 1 (special English edition).

questionable body at issue parading as one of the chambers of the Polish Supreme Court, based on the substantive meaning of judicial independence drawn from the analysis of Article 47 CFR.¹⁹ This combination of the possibility of direct and indirect intervention combined with the perception of “nothing new” is precisely the appeal and the strength of the remarkable case-law over the last three years.

1.3. PREVENTING FAST DETERIORATION, WHILE EMPOWERING THE LOCAL COURTS: INTERIM RELIEF

Having learnt from its failures to prevent the successful completion of the attacks against the judiciary in Hungary,²⁰ the Court of Justice and the Commission paid significant attention to ensuring that sufficient interim measures are put in place in order to ensure that the attacks against the rule of law not continue successfully following the Commission’s victories in court and during the process. As with many other cases of relevance, the starting point of the interim relief was seemingly disconnected from the rule of law issues as such and concerned environmental protection measures, yes, scholars saw the implications of saving a UNESCO-protected forest from the spruce beetle instantly as the dawn of a new era in the understanding of interim relief required and authorized by EU law.²¹

Most importantly, the case-law on the interim relief by the Court of Justice can in fact be viewed as set of examples to follow for the national courts enforcing EU law. These are obliged to grant interim relief to ensure that EU law rights are preserved “before it’s too late”, as President Lenaerts also underlines in his scholarly writings.²²

New case-law has revolutionized interim relief in reaction to the attacks to the whole systems of institutions as it brought about the requirement of *status quo ante* restoration: the reversal of the attack. Such developments, combined with newly-discovered monetary tools to influence the authorities, which are particularly persistent in their failure to comply, as we have seen in the *Polish Forest*, bring the system of remedies in EU law to a new level in terms of guaranteeing effective compliance with the principle of the rule of law.

19 Pech, L., Article 47(2), in: Peers, S. *et al.*, (eds.), 2021, *The EU Charter of Fundamental Rights: A Commentary*, 2nd ed., Oxford, Hart Publishing.

20 CJEU, case C-286/12, *Commission v. Hungary (Judicial Retirement Age)* EU:C:2012:687. Kochenov, D., Bárd, P., 2019, The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU, *European Yearbook of Constitutional Law*, p. 243.

21 Wennerås, P., 2017, p. 541.

22 Lenaerts, K., 2020, p. 157 and the references cited therein.

1.4. SUPRANATIONAL CONSEQUENCE: A GRADUAL UPGRADE OF EU LAW

The most recent rule of law developments have had a direct and unmistakable impact on the supranational level of the law. From *Commission v. France*, which outlawed the abuse of *CILFIT* solidifying, from the ECJ's point of view, the unequal relationship between the courts engaging in the dialogue the Court is striving to protect, to the tightening of the independence requirement applied to any body aspiring to qualify as a "court or tribunal" of a Member State in the sense of Article 267 TFEU, the law as it stands draws directly on the saga of *Portuguese Judges* and the *Commission v. Poland* cases.

Going sector specific, the direction of the development of the law is largely similar, as also the case law on the meaning of the 'judicial authority' under the EAW FD saw a significant tightening of the notion of 'independence' which is required in order to be able to send EAW requests. The *Prosecutors' Cases* make it abundantly clear²³ that the general move in the direction of infusing the idea of independence with more importance is fully aligned in the Area of Freedom, Security and Justice and EU law *sensu lato*, as has been seen in *Banco de Santander SA*.²⁴ All in all, the Union is going through a deep process of rethinking the idea of judicial independence and this rethinking does not only concern the Member States experiencing rule of law or democratic backsliding. Instead it emerges as a general principle applying equally throughout the EU.

1.5. THE COURT OF JUSTICE JOINING THE GLOBAL TREND

The Court of Justice joined the game of domestic judicial design by international courts,²⁵ which the European Court of Human Rights has

23 Joined Cases C-508/18, *OG (Public Prosecutor's office of Lübeck)* and C-82/19 PPU, *PI (Public Prosecutor's office of Zwickau)* and Case C-509/18, *PF (Prosecutor General of Lithuania)*. Cf. Case of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors' Offices, Lyons and Tours)*, C-566/19 PPU and C-626/19 PPU; of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, C-625/19 PPU; and of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU and Case C-510/19 *Openbaar Ministerie and YU and ZV v AZ*. For details, see: Ochnio, A. H., 2020, Why Is a Redefinition of the Autonomous Concept of an "Issuing Judicial Authority" in European Arrest Warrant Proceedings Needed?, 5(3) *European Papers* 1305; Böse, M., 2020, The European Arrest Warrant and the Independence of Public Prosecutors: *OG & PI, PF, JR & YC*, 57 *Common Market Law Review*, p. 1259.

24 Case C-274/14 *Banco de Santander SA* ECLI:EU:C:2019:802.

25 Kosař, D., Lixinski, L., 2015, Domestic Judicial Design by International Human Rights Courts, *American Journal of International Law*, Vol. 109, No. 4, p. 714. The same criticism could apply to international bodies engaged with the elaboration of

been playing for years, especially as far as the aspects of judicial independence and self-governance go. The Court could in fact be inspired by its Strasbourg *homologue* in framing the issue – even if the Strasbourg standards of judicial independence appear to go further than what the Court of Justice has articulated so far, and include the emerging notion of ‘internal judicial independence’,²⁶ including the requirements for judges “to be free from directives of pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in a court.”²⁷ Besides the ‘fake judges’ considerations,²⁸ ECJ’s efforts to neutralize the Disciplinary Chamber of the Polish Supreme Court as not independent and threatening the very fabric of EU (and Polish) legal order, could be viewed as a forceful intervention in support, precisely, of the internal judicial independence. The same applies to the requirement of independence and self-governance of the judicial councils.²⁹ On this reading, the ECJ is moving the meaning of judicial independence even further, helping the ECtHR, which has already done significant work in this direction, as Joost Sillen has recently demonstrated.³⁰ The two standards – of ‘internal independence’ and ‘established by law’ in fact obviously and necessarily converge, since a court lacking internal independence does not meet the basic Article 6(1) ECHR requirement of impartiality and is thus not established by law.³¹

2. WHAT ABOUT THE LARGER CONTEXT?

Once the broader context of the welcome power grab outlined above is considered, two problematic issues instantly loom large on the horizon. Firstly, the Court of Justice is open about the fact that it does not consider itself bound by the fundamental principles of Articles 2 and 19 TEU, which

‘soft law’ standards which quickly solidify, guiding day-to-day practice. Visser, Cf. M. de, 2015, A Critical Assessment of the Rule of the Venice Commission in Processes of Domestic Constitutional Reform, *American Journal of Comparative Law*, Vol. 63, No. 4, p. 963.

26 Sillen, J., 2019, The Concept of “Internal Judicial Independence” in the Case Law of the European Court of Human Rights, *European Constitutional Law Review*, 15, p. 104.

27 ECtHR *Parlov-Tkalčić v. Croatia*, Application No. 24810/06, 22 December 2009. For a detailed analysis of all the relevant ECtHR case-law, see, Sillen, J., 2019.

28 Pech, L., 2020, Dealing with “Fake Judges” under EU Law: Poland as a Case Study in Light of the Court of Justice’s Ruling of 26 March 2020 in *Simplon* and *HG*, *Reconnect Working Paper* No. 8, Leuven.

29 E. g., ECtHR *Oleksandr Volkov v. Ukraine* Application No. 21722/11, 9 January 2013.

30 Sillen, J., 2019.

31 *Ibid.*, p. 109.

it has itself formulated as far as the principles stemming from those provisions could constrain the power of the Member States, acting collectively as *Heren der Verträge* to exert dominance over the Court of Justice no matter what the law says. The second trouble is that – following a Russian saying – “the cart is still there”: all the commotion notwithstanding, Poland and Hungary are where they were before the power grab inspired by the proclaimed desire to solve the problems related to democratic and Rule of Law backsliding has started. Many won cases aside, the picture has not changed, leading to allegations that the EU – and especially the Commission – is essentially “losing by winning”.³² Let us consider the two in turn.

The first trouble with all the developments described above is that the Court of Justice has resoundingly failed to apply the same standards it has been preaching to itself in the *Sharpston* cases: it clearly did not feel bound by the imperatives of irremovability and security of tenure of its own members. Worse still, by refusing to question outright violations of primary law by the Member States, President Lenaerts’ Court has dismissed any possibility of the application of the newly-found principles to itself at all – in a thoughtless gesture of haphazard nonchalance it has dismissed any claims of own structural independence from the Masters of the Treaties.³³ Yet, by its own standards a non-structurally independent body is not a court. It will take the Union time from getting back on track after such a blow in a system of “integration through law”. The Court tells us that anyone, from the Spanish tax tribunals in *Banco Santander SA* to the German prosecutors have an independence problem, which *de facto* disqualifies them from any participation in the intricate dance of the dialogical rule of law. Yet, continues the same Court, basic rule of law principles applicable to the national judiciaries are not to be expected to bind the Court of Justice itself: the naked Emperor is above the law, undermining its workings and appeal by suggesting that at the supranational level impeccably lawful composition of the Court is not at all required. The Commission concurs. When asked, Vice-President Jourová clarifies that she is “aware” of the problem of the potentially unlawful composition of the Court in violation of the principles the Court has been preaching and the requirements of Primary Law, but whatever happens, “the Court has to be regarded as the highest authority, when it comes to EU law”.³⁴

32 Scheppele, K. L., Kochenov, D., Grabowska-Moroz, B., 2021, EU Values Are Law, After All, 38 *Yearbook of European Law*, early view.

33 See, for a detailed step-by-step analysis, Kochenov, D., Butler, G., 2020, The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution, *NYU Jean Monnet Paper*, No. 02/2020.

34 A question from Kochenov, D. to Jourová, V. at CEU Democracy Institute discussion *The Future of Democracy in EU Member States* (published on YouTube on March 1,

Our problems do not stop here. In fact a whole new set of issues arises even once one set aside the Court's supranational assault on the meaning of the core elements of the principle of the Rule of Law, which it has just formulated for the national courts. The general question that arises irrespective of how much independence the Court of Justice actually does command – along the lines of Dariusz Adamski's thinking³⁵ – is how much the courts can actually do in the face of a rising tide of populism? And this is, probably counterintuitively to some, where the EU, rather than the backsliding Member States seems to be emerging as a winner from the rule of law crisis it is going through. Indeed, the rule of law transformations, which I briefly outlined above, constitutes a very significant turn in the whole history of EU law, which will have lasting consequences. The EU is definitely better off and more powerful as a result – even if not more 'value based'. Even more: the Court of Justice emerges as a particularly strong winner from the whole rule of law upgrade story, particularly so, given the inability of other EU institutions to act in any more or less consequential, effective, and coherent manner.³⁶ The Court, even if it is not lawfully composed itself, is "the last soldier standing",³⁷ offering a new vision of constitutionalism to the Union, which is unmistakably attractive: from the world of proclamations, the core values of the Union are moving to the realm of the law, turning the Union into a true constitutional system – until it is tested in the likes of the *Sharpston* cases, that is.

The same cannot be said, unfortunately, about the Member States experiencing the democratic and rule of law decline. Indeed, the Union can seemingly do very little on the ground, the supranational rule of law revolution notwithstanding. This has nothing to do with any particular

2021), (https://www.youtube.com/watch?v=Qj6xGSe24dc&fbclid=IwAR1t5IrHv_hxmfoOg78Ndctv7cNLuHykcf8V0vDK8qCRcqNeX-4XEf4NvdA at 43:37).

35 Adamski, D., 2019, The Social Contract of Democratic Backsliding in the "New EU" Countries, *Common Market Law Review*, Vol. 56, p. 623. Sajó, A., 2019, The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies, *The Hague Journal on the Rule of Law*, Vol. 11, p. 371; Blauberger, M., Kelemen, R. D., 2017, Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU, *European Journal of Public Policy*, Vol. 24, No. 3, p. 321; Blokker, P., EU Democratic Oversight and Domestic Deviation from the Rule of Law, in: Closa, C., Kochenov, D. (eds.), 2016, *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, p. 249.

36 See the *JCMS* special issue edited by Kochenov, D., Magen, A., Pech, L. (eds.), 2016, The Great Rule of Law Debate in the EU, *Journal of Common Market Studies*, Vol. 54, pp. 1043–1259. Cf. e.g., Schout, A., Luining, M., 2018, The missing dimension in rule of law policy From EU policies to multilevel capacity building, *Clingendael Instituut Report*, p. 12.

37 Kochenov, D., Bárd, P., 2019.

set of Member States in question. “Is something ‘wrong’ with Central and Eastern Europe?”³⁸ while obviously relevant in the context of Hungary and Poland, is not the most important question to consider. What the EU needs, is a set of legal-political tools to prevent backsliding in any of its regions and presenting this necessity as region-specific is not sufficient. This is particularly so, given the awful Brexit populism and numerous other worrying signs coming from all kinds of directions. Populism is not the exception in the world today – it is the rule. In this context the assaults on the rule of law are bound to intensify, since populism and the attacks on the rule of law are frequently connected, as Nicola Lacey teaches us.³⁹ It thus appears that “autocratic legalism” is here to stay and the EU needs effective tools to combat it wherever and whenever backsliding occurs.⁴⁰

As the law stands today, once again, it is undeniable that while the EU has received its rule of law upgrade, which is very welcome, the consequences of this upgrade in practice on the ground in the backsliding jurisdictions could be very limited for now. Dariusz Adamski is absolutely right: courts “cannot preclude a social contract of democratic backsliding when a society concludes that an illiberal system is superior to its previously tried liberal alternatives.”⁴¹ And this, precisely, seems to be the case in at least two EU Member States at the moment.⁴²

While it is undeniable that the supranational judiciary can, on some occasions, be much more effective than the political institutions in bringing about tangible results in terms of the defense of the rule of law, the bigger picture still remains quite grim, as the populist forces busy undoing not only judicial independence, but also, essentially, the idea of legality as such enjoy popularity and will not go away on the back of the Court’s rule of law case-law, however far-reaching. This towering problem has been outlined with particular clarity by David Kosař, Jiří Baroš and Pavel Dufek:

While the European Court of Justice surely plays an important role, especially in the current developments in Poland, the failure of the Pan-European template shows that a top-down approach to the separation of

38 Dawson, J., Hanley, S., 2016, What’s Wrong with East-Central Europe? The Fading Mirage of the “Liberal Consensus”, *Journal of Democracy*, Vol. 27, p. 21.

39 Lacey, N., 2019, Populism and the Rule of Law, *Annual Review of Law and Social Science*, Vol. 15, p. 79.

40 Scheppele, K. L., 2018, Autocratic Legalism, *University of Chicago Law Review*, Vol. 85, p. 545.

41 Adamski, D., 2019, p. 659.

42 Blokker, P., 2020, Building Democracy by Legal Means? The Contestation of Human Rights and Constitutionalism in East-Central Europe, *Journal of Modern European History*; Blokker, P., 2019, Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism, *EUConst*, Vol. 15, p. 518.

*powers does not work in Central Europe and that any long-term solution must have the broad support of the people' [footnotes omitted].*⁴³

The supranational transformation of the rule of law as part of EU law applicable to the national level judiciaries in the EU has been far-reaching, swift, and all-encompassing. Yet, at the core of it, there is a belief in the centrality and importance of EU law to all the Member States. Justin Lindeboom has justified this belief very consistently, demonstrating its soundness, especially when viewed from Brussels or Kirchberg: any real legal system claims supremacy and is self-referential in own importance. With the latest case-law from Danish, Czech, and, crucially, German highest courts, the limited, if not myopic, nature of this picture is clear: not all the “participants in the dialogue” believe that the ECJ is, indeed, the court to lead the pack. In the absence of such a belief, self-referentialism can become dangerous and, indeed, end up denying the very essence of the rule of law.⁴⁴

3. IS THE POWER GRAB A SUCCESS?

The editors of the *Common Market Law Review* might be right in their analysis of the fundamentals underlying *Portuguese Judges*.⁴⁵ If the Court states “the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law,”⁴⁶ does it not smell a circular and unhelpful approach to the rule of law, indeed, the denial of the meaning of the concept? “How can the mundane objective of ‘compliance with EU law’ be constitutive of ‘the essence of the rule of law?’”⁴⁷ To make sure that the fundamental developments described above are a success, the Court will need to think very hard, to be as convincing as possible in answering this question. What we have at hand at

43 Kosař, D., Baroš, J., and Dufek, P., 2019, p. 461.

44 Krygier, M., The rule of Law: Legality, Teleology, Sociology, in: Palombella, G., Walker, N., (eds.), 2008, *Re-locating the Rule of Law*, Hart Publishing, p. 47; Palombella, G., The Rule of Law as an Institutional Ideal in: Palombella, G., Morlino, L., (eds.), 2010, *Rule of Law and Democracy: Inquiries Into Internal and External Issues*, Brill, p. 4; Palombella, G., Beyond Legality—before Democracy: Rule of Law Caveats in the EU Two-Level System, in: Closa, C., Kochenov, D., (eds.), 2016, *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press. Cf. Kochenov, D., 2015, EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?, *Yearbook of European Law*, Vol. 34, p. 82.

45 Editorial Comments, 2018, EU Law between Common Values and Collective Feelings, *Common Market Law Review*, Vol. 55, p. 1334.

46 *ASJP*, para. 36.

47 Editorial Comments, 2018, p. 1334.

the moment is rule of law proclamation not applicable in essence to all participants in the articulation of the dialogical rule of law, hinting at the fact that the principle is brought in, in all its glory, with some other ends in my mind, rather than serving the law *sensu stricto*. As a result, the glorious new sand castle of the Rule of Law has not altered the state of the sea of populism in the countries offered as a valid reason for its construction. Considered in full disconnect from the stated goals it aimed to achieve and was justified by, however, the castle is a success and can last, at least until the sea licks it off the shores.

Essay History:

Received: 10 April 2021

Accepted: 11 June 2021