RECONNECT

Constitutional Populism versus EU Law: A Much More Complex Story than You Imagined

Working Paper No. 16 – July 2021

Dimitry V. Kochenov
Barbara Grabowska-Moroz

DISCLAIMER
This project has received funding from the European Union's Horizon 2020 Research & Innovation programme under Grant Agreement no. 770142. The information in this deliverable reflects only the authors' views and the European Union is not liable for any use that may be made of the information contained therein.

ACKNOWLEDGEMENTS
The authors are grateful to Martin Krygier, for his patient and generous engagement with this contribution, as well as the assistance of Harry Panagopulos.

Constitutional Populism versus EU Law: A Much More Complex Story than You Imagined

Dimitry Vladimirovich Kochenov
Barbara Grabowska-Moroz

Abstract

Anti-institutional actions resulting from the populist narrative in the EU Member States concentrated on the independence of the judiciary, led – at the supranational level – to a reinvention of the EU rule of law. From a system of 'declaratory' rule of law, where adherence by national authorities to this principle is merely a presumption, the Union has emerged, thanks to the recent foundational case-law of the Court of Justice, as a constitutional system where this presumption is being gradually replaced by a requirement for full adherence as a matter of fact. However, framing EU rule of law as an unconditional good focuses on the specific purpose of reinforcing EU law's supremacy and allows the Court of Justice to question the criticism of its vision of the law from any quarter: the instrumental side of the rule of law reinforces EU law's claim to supremacy pre-empting substantive disagreements about the law. The strategy of deploying the rule of law in such a way has paid off: the Court is triumphant. However, two aspects of this triumph are particularly troubling: first, the absolute lack of change on the ground in Poland and Hungary in the name of which the Court claimed new sweeping powers; and second, the emergence of dual standards of judicial independence demonstrated by the illegal removal of AG Sharpston from office without any lawful reason and in the absence of judicial review. Neither the supremacy of EU law nor its autonomy were able to protect the Court against the attack by the Member States. The same supremacy of EU law was not able to stop the rule of law backsliding in Member States resulting from the constitutional populism offered by their leaders and cheered on by large sections of the general public. The rule of law is forgotten in both respects. A much more complex story of EU rule of law emerges, than the one often told.

Keywords

Rule of Law, Judicial independence, populism, CJEU, Sharpston, Poland, ECt.HR

Authors

Dimitry Vladimirovich Kochenov, Central European University, CEU Democracy Institute, Budapest and CEU Department of Legal Studies, Vienna

Barbara Grabowska-Moroz, Central European University, CEU Democracy Institute, Budapest

Contents

1. Introduction

The effects of populist narratives have become an increasingly important topic on the European Union (EU) agenda, both political and juridical, because no EU Member State is immune from populist movements, which are ever-popular.[1] The last decade demonstrated that domestic constitutional populism has the ability to affect the supranational political entity in a myriad of ways.[2] The rule of law – a fundamental EU value,[3] first assumed politically,[4] then proclaimed judicially[5] and, finally, codified in the Treaties to initially uncertain effects[6] – became a proxy: graduating into the interface between the populism affecting domestic constitutional arrangements and the EU legal order.[7] The inept reaction of the EU institutions to the rule of law crisis in Member States (Poland and Hungary in particular) – 'illiberalism within'[8] – suggests that the constitutional populism undermined the foundations and effectiveness of the EU rule of law. Worse still – the developments over the last decade highlight the fact that the EU might be drifting away from its proclaimed foundations of democracy, rule of law and human rights protection: its very *raison d'être* stands undermined. Indeed, the added value of the Union as a tool to empower 'autocratic legalism',[9] uniting states engaged in 'ruling by cheating'[10] as opposed

[1] D Adamski, 'The social contract of democratic backsliding in the 'new EU' countries', *Common Market Law Review* 56 (2019), 623–665. Cf.: P Blokker, 'Building democracy by legal means? The contestation of human rights and constitutionalism in East-Central Europe', *Journal of Modern European History* 18 (2020), 335–351; F Bignami (ed), *EU Law in Populist Times* (Cambridge: CUP, 2020); P Blokker, 'Populist counter-constitutionalism, conservatism, and legal fundamentalism', *European Constitutional Law Review* 15 (2019), 519–543.

[2] C Closa, 'Reinforcing of EU Monitoring of the Rule of Law', in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016) 15.

[3] L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (28 April 2009) *Jean Monnet Working Paper Series* No. 4/2009; R Janse, *De renaissance van de Rechtsstaat* (Open Universiteit, 2018); S Douglas-Scott, 'Justice, Injustice and the Rule of Law in the EU', in D Kochenov, G de Búrca and A Williams (eds.), *Europe's Justice Deficit?* (Oxford: Hart, 2015).

[4] D Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Criterion of Democracy and the Rule of Law' (2004) 8(10) *European Integration Online Papers* 1.

[5] Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339. For an analysis of this judgement and its importance as regards the principle of the rule of law in the EU legal framework, see K Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law', in M Poiares Maduro and L Azoulai (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 304.

[6] D Kochenov, 'The *Acquis* and Its Principles: The Enforcement of 'Law' versus the Enforcement of 'Values' in the European Union', in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017), 8; LS Rossi, 'La valeur juridique des valeurs: L'article 2 TEU' (2020) 3 *Revue trimestrielle de droit européen*; T von Danwitz, 'Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ' (2018) 21 *Potchefstroom Electronic Law Journal* 2; R Baratta, 'La communauté de valeurs dans l'ordre juridique de l'Union européenne' (2018) *Revue des affaires européennes* 81.

[7] L Pech and J Grogan, *The Meaning and Scope of EU Rule of Law* (2020) RECONNECT Deliverable 7.2 <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf>.

[8] L Pech and KL Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

[9] KL Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545

[10] A Sajó, *Ruling by Cheating* (Cambridge: CUP, 2021).

to a club of rule of law-abiding democracies, is unclear. One thing is certain, however: such a Union cannot have any future.

Time will tell whether relying on the rule of law as a tool to start countering the rise of populism in the EU was a successful strategy. Successful or not, it has taken the world of EU constitutionalism by storm.[11] A significant upgrade of the whole legal framework, including the division of competences between the EU and the Member States, as well as procedural, substantive and enforcement matters, is ongoing in direct response to populist assaults of EU values. It is purely judge-made.[12] EU law is acquiring a new substantive understanding of the rule of law via the articulation of EU law's approach to the independence of the judiciary and the principle of the irremovability of judges.[13] The rule of law route for countering populism is regularly presented as effective and promising, despite 'illiberal democracies' flourishing in several Member States – thus undermining the promise of Article 2 TEU[14] – and despite the supranational commotion not having resulted in any improvements whatsoever on the ground in the captured Member States: the regimes are only getting more entrenched. The Commission bringing and winning cases against these states before the Court of Justice is thus 'losing by winning':[15] a win in every legal battle obscures the fact that the legal war against populism – so far at least – is being lost on all fronts. Losing such a proverbial war amounts to nothing less than the voiding of the core rationale of the Union.

Could there be other long-term winners in this fight, however, besides the illiberal regimes? We believe that the Court of Justice and the EU's authority are definitely among these winners, as the atmosphere of crisis has allowed for a radical redrawing of the boundaries of competences between the EU and the Member States in this area. The Court of Justice is now in the game of policing the very organisation of

[11] L Pech and D Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the* Portuguese Judges *Case* (Stockholm: SIEPS, 2021).
[12] Ibid.
[13] D Kochenov and P Bárd, '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* 1 (2019), 243–288; K Lenaerts, 'Our judicial independence and the quest for national, supranational and transnational justice', in G. Sevik, M-J Clifton, T Haas, L Lourenço and K. Schwiesow (eds.), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher*, Berlin 2019, 155–174; S Adam and P Van Elsuwege, 'L'exigence d'indépendance du juge, paradigm de l'Union européenne comme union de droit', *Journal de droit européen* 9 (2018), 334–343; L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case', *Common Market Law Review* 55 (2018), 1827–1854. For a detailed step-by-step analysis of the relevant case-law, see Pech and Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice*, op. cit.
[14] Rossi, 'La valeur juridique des valeurs', op cit.; M Klamert and D Kochenov, 'Article 2 TEU', [in:] M Kellerbauer M Klamert and J. Tomkin (eds.), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford: OUP, 2019) 22–30; von Danwitz, 'Values and the Rule of Law', op. cit.; Kochenov, 'The *Acquis* and its principles', op. cit.
[15] KL Scheppele, D Kochenov, B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', *Yearbook of European Law* 39 (2020) 3–121.

the national judicial power using Article 19(1) TEU as a pretext. What is crucial in this context is that two apparently very different ideals of the rule of law are being deployed in the process: one applicable to the Member States and another one to the EU and its Court itself. The two seemingly directly contradict each other.

While a lot has been written about the deployment of Article 19(1) TEU as a means to tame the populists in power in select Member States by at least making it difficult for them to attack the independence of their courts (so far entirely unsuccessfully),[16] little has been said about the supranational side of the rule of law coin[17] – one could playfully call it the Court of Justice's 'supremacy populism'. This is exactly what this paper focuses on. In this contribution, we explore the deployment of the principle of the rule of law by the Court of Justice to pre-empt substantive arguments of principle originating in other legal orders. The rule of law, on this count and as used by the Court, emerges as a trump card rendering impossible any dialogue which would result in taming absolute unchecked power, wherever it might lie – the obstacle to absolute power on which the rule of law as an ideal directly depends.[18] Such use of the principle by the most authoritative judicial body in Europe is both dangerous and directly opposed to the very essence of European constitutionalism, we argue. This is particularly the case in light of the huge question marks over the Court's own independence and lawful composition, following the abuse of power by the Member States to appoint a Greek 'Advocate General' in September 2020 in the absence of a vacancy.[19]

2. Constitutional populism in EU Member States – why is it a problem for the EU?

The difficulties with providing a precise definition of populism make discussion about the constitutional consequences of populism particularly challenging. While leaving aside the discussion of whether a

[16] TT Koncewicz, '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' (2020) 5 *Palestra* 167; Scheppele, Kochenov and Grabowska-Moroz, 'EU Values Are Law, after All', op. cit.; C Rizcallah and V Davio, 'L'article 19 du Traité sur l'Union européenne: sesame de l'Union de droit' (2020) *Revue trimestrielle des droits de l'homme* 122.

[17] D Kochenov, 'Rule of Law as a Tool to Claim Supremacy', in Adam Bodnar and Jakub Urbanik (eds), *Περιμένοντας τους Βαρβάρους.* Law in the days of Constitutional Crisis. Studies offered to Mirosław Wyrzykowski (Munich/Baden Baden: C.H. Beck/Nomos, 2021); D Kochenov, 'De Facto Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times' (2021) XL *Polish Yearbook of International Law* (forthcoming).

[18] G Palombella, 'The Rule of Law as an Institutional Ideal', in L Morlino and G Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Leiden: Brill, 2010) 3.

[19] D Kochenov and G Butler, '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', Jean Monnet Working Paper (NYU Law School) No 2/20 <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-02-Dimitry-Kochenov-Graham-Butler.pdf>.

'populist constitutionalism' is even possible, we concentrate on a 'constitutional populism', which we define as those elements of the populist political narrative that affect – directly or indirectly – the shape of a state's constitutional arrangement.

Among various definitions of populism, one element which is often underlined and which seems to be crucial is the anti-pluralist aspect of the populist narrative, which Jan-Werner Muller calls the 'core populist claim': that only the populists properly represent the people.[20] Such an approach has been expressed in the political narrative but also translated into legal amendments which target checks on the power of the sovereign speaking in the name of the 'real people'. Populist constitutionalism is thus necessarily an attack against any meaningful independent institutions, either public or private. It is particularly visible when a populist movement wins the elections and acquires public power.[21] Then anti-pluralism can be easily transformed into broader anti-institutionalism – limiting the factual role of institutions independent from the populist movement. Anti-institutionalism plays a crucial role in dismantling the system of checks and balances. Constitutional populism transforms the anti-pluralist narrative into actions[22] and limits independent sources of opinion: from courts, media and civil society, to academia. It targets those independent actors whose opinions and actions might limit the populists' powers. The role of courts in this picture is of particular relevance. In the majority of modern constitutional systems they are tasked with checking the decisions of public authorities, especially when those decisions affect rights and freedoms.

In Poland this process started directly after the 2015 elections won by the Law and Justice Party (*Prawo i Sprawiedliwość*) and concentrated on the 'arbiter' – the Constitutional Tribunal – and the process of constitutional judicial review. As a result of the constitutional 'battle' of 2016, the captured Tribunal today legitimises the government's actions against independent institutions, including the National Council for the Judiciary[23] and the Human Rights Commissioner,[24] instead of checking and limiting the government. Taking control of the independent institutions in a longer term guarantees protection against any form of accountability. In any case, the position of the 'Constitutional Tribunal' is in essence irrelevant, legally speaking, given that its composition does not meet the essential criterion of lawfulness: the 'Tribunal' – at least as long as illegally appointed judges take part in hearing any given

[20] J-W Mueller, 'Populism and Constitutionalism', in CR Kaltwasser, P Taggart, PO Espejo, P Ostiguy (eds.) *The Oxford Handbook of Populism* (Oxford: OUP, 2017) 591.
[21] N Lacey shows also that populist movements boast agenda setting ability even if they don't win any elections, see N Lacey, 'Populism and the Rule of Law', *Annual Review of Law and Social Science* (2019) 15:1, 79, 86-89.
[22] W Sadurski, Populism and Human Rights in Poland, in GL Neuman (ed.), Human Rights in a Time of Populism. Challenges and Responses (Cambridge: CUP, 2020) 62–64.
[23] 'Judgment' of the 'Constitutional Tribunal' of 20 June 2017, no. K 5/17.
[24] 'Judgment' of the 'Constitutional Tribunal' of 15 April 2021, no. K 20/20.

case – is not 'established by law', as the European Court of Human Rights has determined in the audacious *Xero Flor* case.[25] The Venice Commission has bemoaned the 'death of constitutional adjudication in Poland'.[26]

In this picture, the independence of domestic courts plays a primary role, since it links populism with the rule of law standards. Access to judicial review is crucial to ensure that the public authorities act within the limits set by the law, which is of particular importance for human rights protection.[27] Undermining the independence of the judiciary in Poland was labelled by the government as a 'reform of the judiciary' and started with a harassment campaign financed and coordinated by a Polish National Foundation, established and controlled by the government. This targeted judges and presented them as incompetent and immoral. The reform was very closely linked with the personnel aspect – removing judges from their functions and appointing new ones. However, such deconstructive populist anti-institutionalism has its limits – institutions are still needed to implement the 'new' law. The new Disciplinary Chamber of the Supreme Court is a telling example – packed with people loyal to the ruling party. The Minister of Justice in particular is leading the judicial campaign against independent judges in Poland. A similar fate has marked the Supreme Court's fight for independence.[28] Having won several important legal battles, the Court – and especially its 'all-star' disciplinary chamber[29] – no longer exists as an independent court of law, should the *Xero Flor* criteria combined with the Court of Justice's case law related to Articles 19(1) TEU and 47 of the EU Charter of Fundamental Rights be applied to it.[30] No independent national institutions able to check the power of the populist government – albeit illegally deployed – are available in Poland today: the rule of law is still hibernating in the country, however, as

[25] *Xero Flor w Polsce sp. z o.o. v Poland*, application no. 4907/18 (ECHR 7 May 2021).
[26] Venice Commission, Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14–15 October 2016) CDL-AD(2016)026-e, para. 128.
[27] See, Venice Commission, Rule of law checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), para. 53.
[28] TT Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence, and the Rule of Law' (2016) 53 *Common Market Law Review* 1753; TT Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 *Review of Central and East European Law* 116; Cf., in meticulous detail, W Sadurski, *Poland's Constitutional Breakdown* (Oxford: OUP, 2019). For a general context, see P Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts' (2019) 15 *EUConst* 48.
[29] L Pech, 'Court of Justice Protecting Polish judges from Poland's Disciplinary "Star Chamber": Commission v. Poland (Interim proceedings)', *Common Market Law Review* (2021) 58:1, 137 – 162; P Bárd, A Sledzinska-Simon, 'On the principle of irremovability of judges beyond age discrimination: *Commission v. Poland*', *Common Market Law Review* Volume 57, Issue 5 (2020), 1555 – 1584; Case C-791/19 R, Order of the Court (Grand Chamber) of 8 April 2020, *European Commission v Republic of Poland*, ECLI:EU:C:2020:277.
[30] See Case C-791/19 R, Order of the Court (Grand Chamber) of 8 April 2020, *European Commission v Republic of Poland*, ECLI:EU:C:2020:277; Joined Cases C-585/18, C-624/18 and C-625/18, Judgment of the Court (Grand Chamber) of 19 November 2019*, A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982; L Pech, 'Court of Justice Protecting Polish judges from Poland's Disciplinary "Star Chamber": *Commission v. Poland* (Interim proceedings)', *Common Market Law Review* (2021) 58:1, 137 – 162.

the justice system is not yet a complete sham and there remain plenty of brave judges who continue the fight for the law against the anarchy of 'populist constitutionalism'.[31]

The Polish case study – and probably to an even greater extent the Hungarian backsliding story, where the populist take-over was much more neat and orderly, amounting to a legal coup[32] – constitutes an example of politics where the 'end justifies the means' and the means are directly linked to the law. Such an instrumentalisation of the law has transformed the rule of law into 'rule by law', which dismantles the very essence of the rule of law, which is based on a permanent conflict between *gubernaculum* and *jurisdictio*, as explained by Gianluigi Palombella.[33] On this reading, the rule of law is unthinkable without the duality of law, implying a cleavage between *jurisdictio* (a law untouchable by the day-to-day rules running the legal system and removed from the ambit of the sovereign) and *gubernaculum* (the use of the general rule-making power).[34] In essence, the rule of law flourishes, where limiting law with law remains a possibility. The elimination of such a possibility marks the end of the rule of law and a potential abuse of the idea in the interest of the dominant political interest with no check or limit to (populist) authority. To put it differently, the duality Palombella describes permits the rule of law to be defined as the subordination of the law to another kind of law, which is not up to the sovereign to change at will.[35] How much can be changed and how far the checks on the dominant authority can intervene is an outcome of constantly ongoing legal-political re-negotiation. The concept of the Rule of Law as such thus emerges as *dialogical* in essence. It presupposes and constantly relies upon an incessant taming of law with law.[36] In this respect, the Rule of Law implies that the law – *gubernaculum* – should always be controlled by law – *jurisdictio* – lying outwith the sovereign's reach. This is precisely what the Polish government has almost eliminated by following the Hungarian path, which has been

[31] A fight which often results in disciplinary proceedings, the removal of judicial immunity or the suspension of the judge (e.g. the cases of Igor Tuleya, Paweł Juszczyszyn and Beata Morawiec). See K Gajda-Roszczynialska, K Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', *Hague Journal on the Rule Law* (2020) 12, 451–483.

[32] KL Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)' (2014) 23 *Transnational Law & Contemporary Problems* 51.

[33] G Palombella, 'The Rule of Law and its core', in G Palombella & N Walker (eds.), *Relocating the Rule of Law*, Oxford 2009, 17–42.

[34] For a detailed exposé, see G Palombella, 'Beyond legality–before democracy: Rule of Law caveats in the EU two-level system', in C Closa and D Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge 2016, 36–58. See also, G Palombella, 'The Rule of Law and its core', in G Palombella & N Walker (eds.), *Relocating the Rule of Law* (Oxford: OUP, 2009), 17–42.

[35] G Palombella, 'Beyond legality–before democracy: Rule of Law caveats in the EU two-level system', in C. Closa & D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016), 36–58.

[36] According to Palombella '[it] amounts to preventing one dominant source of law and its unconstrained whim, from absorbing all the available normativity', see, G Palombella, 'The principled, and winding, road to *Al-Dulimi*. Interpreting the interpreters', *Questions of International Law* (2014), 15–30, at 18; D Georgiev, 'Politics or Rule of Law', *European Journal of International Law* 4 (1993), 1–14, at 4.

even more successful, notwithstanding the fact that its actions were infinitely more 'legal' and technically smooth, if not convincing to the informed observer.[37] Either the dialogical heart of the rule of law is killed via a series of constitutional violations, as in Poland – or in apparent conformity with the constitution, as in Hungary, does not matter at all. What counts is whether the dialogue between the two types of law is ongoing or not.

It is unquestionable that at the time of writing, this dialogue is dead in Hungary, where the very idea of the constitution has been turned into a political tool for daily use, and in Poland, where the executive ignores the constitution which led to 'the unimaginable':[38] the breakdown of liberal-democratic constitutionalism coupled with national-level defiance.[39]

It goes without saying that taking control of the independent actors (constitutional courts in particular) was important to limit the importance of *jurisdictio.* However, the existence of international law[40] and of course, the supranational legal orders,[41] contributes to the policing of the *gubernaculum–jurisdictio* duality, leading – potentially at least – to the emergence of additional safeguards for the rule of law.[42] In their myriad forms, written and unwritten, supranational or intergovernmental, these examples create a legal tension that limits and polices the possibility of the sovereign in his own legal order. The policing of the *jurisdictio–gubernaculum* divide, ensuring its preservation and an ongoing dialogue and tension between the two, is thus possible through means both internal and external to a given legal system. The fact that an anti-institutional populist narrative affecting the Member States' constitutional arrangements, especially the independent judiciary, is relevant from the EU law perspective, was confirmed by the European Court of Justice in 2018 in the *Portuguese Judges* ruling,[43] where the Court

[37] KL Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)' (2014) 23 *Transnational Law & Contemporary Problems* 51; G Halmái, 'The Early Retirement Age of Hungarian Judges', in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge: CUP, 2017), 471; K Kovács and KL Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union' (2018) 51 *Comm. and Post-Comm Studies* 189.

[38] M Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland', *The Hague Journal on the Rule of Law* 11 (2019), 417–422.

[39] W Sadurski, *Poland's Constitutional Breakdown* (Oxford: OUP, 2019); L Pech & KL Scheppele, 'Illiberalism within: Rule of Law backsliding in the EU', *Cambridge Yearbook of European Legal Studies* 19 (2017), 3–47; A Jakab & D Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017); C Closa & D Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016).

[40] R Dworkin, 'A new philosophy of international law', *Philosophy and Public Affairs* 41 (2013), 2–30.

[41] For an argument that numerous Central and Eastern European States were actually motivated by the desire for external legal checks on their laws – a *jurisdictio* – when joining the Council of Europe, see W Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford: OUP, 2012).

[42] G Palombella, *È possibile una legalità globale?*, Bologna 2012, at ch. 2.

[43] Case C-64/16, judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117; L. Pech and S. Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case' (2018) 55 *CMLRev* 1836.

of Justice linked judicial independence with the rule of law and with the States' obligations to provide legal remedies. This case was only a stepping stone, starting a line of case law leading to a number of further significant developments[44] which culminated most importantly in the *Repubblika* judgment,[45] where the lowering of the standards of the rule of law and adherence to other values, compared with what was observed on the date of accession of each Member State to the Union, was found to be prohibited in what is now known as the 'non-regression principle' in EU law.[46] This case law became a milestone in the evolving EU rule of law upgrade, which aims to reintroduce the *gubernaculum–juristictio* divide in Hungary and Poland.

3. Upgrades to the Union's rule of law system to tame the backsliding Member States

The failure of the political responses to the rule of law crisis[47] made it obvious that it was only a matter of time before the Court of Justice would be invited to opine on the rule of law. In dealing with the rule of law backsliding in the EU, the Court of Justice has very much drawn on the dialogical appeal of engaging with, on the one hand, the institutions of the Union and the judges in the Member States whose independence is threatened, on the other. It thus draws on the Commission's direct actions as much as on preliminary references from the national courts under attack to turn the proclamation-based rule of law value of Article 2 TEU into an enforceable substantive principle of law – at least insofar as it concerns the independence of the judiciary – which has been brought into the picture by bridging Articles 2 and 19 TEU.

The history of the rule of law crisis suggests that it was not obvious (at least for the Commission) that judicial independence plays a central role in securing the rule of law in the EU.[48] Even worse, the Commission continues to drag its feet, even after receiving the Court's detailed explanations. We thus

[44] For a detailed analysis, see Pech and Kochenov, 'Respect for the Rule of Law in the Case-Law of the Court of Justice', op. cit.
[45] Case C-896/19, judgment of the Court (Grand Chamber) of 20 April 2021, *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311.
[46] M Leloup, D Kochenov and A Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All the Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*' (2021) *RECONNECT Working Paper* No. 15.
[47] See *Journal of Common Market Studies* special issue edited by D Kochenov, A Magen and L Pech, 'The Great Rule of Law Debate in the EU' (2016) 54 *Journal of Common Market Studies* 1043; A Schout and M Luining, 'The missing dimension in rule of law policy From EU policies to multilevel capacity building' (2018) *Clingendael Instituut Report*, 12.
[48] Case C-286/12, judgment of the Court (First Chamber), 6 November 2012, *Commission v Hungary*, ECLI:EU:C:2012:687.

completely disagree with the *Common Market Law Review* authors who claim that the Commission's direct actions before the Court of Justice have achieved an 'age of maturity'.[49] Given the lack of evidence of even a minimum of critical thought, combined with its already strong track record of losing by winning as mentioned above, Laurent Pech could not be more right when he referred to the Commission's 'dereliction of duties'.[50] It is this dereliction and its feeble command of EU law that gave the enemies of EU values in Hungary and Poland the upper hand. The EU's response to the removal of judges from office in Hungary as a result of lowering their retirement age was an infringement action based on EU secondary antidiscrimination law.[51] It seemed that the EU institutions, the European Commission in particular, believed that constitutional values and standards, such as the judicial independence of domestic courts, properly remained outside the scope of EU competences.[52] Advocate General Kokott mentioned this aspect in her opinion, but it was not even mentioned in the Court's ruling.[53] As explained by Karen Alter long ago: if you don't ask the Court of Justice, it won't tell… The perceived competence lacuna stemming from the Commission's inability to connect the values on which the law of the Union is based with precisely that same law of the Union,[54] had to be filled sooner or later, allowing the EU to graduate into a true constitutional system which actually stands by its principles[55] – and the case law of the last two years could be interpreted as starting precisely this kind of transformation.

In 2018 a preliminary reference from a Portuguese court allowed the Court of Justice to transform both judicial independence and the rule of law into enforceable elements of the Treaty framework, making it unquestionable that the EU has competence to intervene.[56] If before *ASJP* the Commission's inaction could probably have been attributed to a lack of imagination, after *ASJP* it has been a bald and inexplicable dereliction of duties. The institution observed the destruction of the Polish Constitutional and then Supreme Court, followed by the harassment of judges, fully in the knowledge that *ASJP* created

[49] L Prete and B Smulders, 'The Age of Maturity Of Infringement Proceedings' (2021) 58 *Common Market Law Review*, 285–332.
[50] L Pech, Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairsof the Houses of the Oireachtas, Policy Brief—January 2021, 9; L Pech, P Wachowiec and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', *Hague Journal on the Rule Law* (2021) 13, 1–43.
[51] Case C-286/12, judgment of the Court (First Chamber), 6 November 2012, *Commission v Hungary*, ECLI:EU:C:2012:687.
[52] But see C Closa, D Kochenov and JHH Weiler, 'Reinforcing the Rule of Law Oversight in the European Union' (2014) *EUI RSCAS Research Paper* 2014/25.
[53] Case C-286/12, view of Advocate General Kokott of 2 October 2012, European Commission v Hungary, para. 54, ECLI:EU:C:2012:602; Case C-286/12, judgment of the Court (First Chamber), 6 November 2012, *European Commission v Hungary*, ECLI:EU:C:2012:687.
[54] D Kochenov, 'The *Acquis* and Its Principles', op. cit.
[55] Cf. A Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *Oxford Journal of Legal Studies*, 549.
[56] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* EU:C:2018:117.

a functional link between the domestic judiciary and the supranational requirement of the judicial independence as the core element of the rule of law as mentioned in Article 2 TEU, which enunciates a standing obligation to provide remedies '*sufficient to ensure effective legal protection in the fields covered by Union law*'.[57] The independence of domestic courts was re-positioned via Article 19 TEU as a 'concrete expression to the values of the rule of law'.[58]

Firstly, *ASJP* gave clear EU legal 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 the EU law jurisdiction with cases involving threats to judicial independence at the *national* level, *de facto* broadening the material scope of EU law to a significant extent. *ASJP* became the core legacy of President Lenaerts' Court: the articulation of the rule of law as a workable principle of law applicable across the legal orders in the EU.

From a broader rule of law perspective *ASJP* allowed the development of the substantive elements of the supranational rule of law[59] by focusing predominantly on judicial independence[60] – the direct offspring of the natural limitations of Article 19 TEU, which creates a framework which is certainly insufficient to ensure full-blown protection of the Union at all levels against the rise of 'populist constitutionalism' and which the Court is only starting to remedy now via the articulation of 'non-regression' in the *Repubblika* case law.[61]

Appealing to the independence of the judiciary, which is one of the least questioned elements of the rule of law, in order to accomplish the transition from the Commission's untested assumption that the values on which EU law is built are not justiciable – in contradiction to a huge body of literature arguing the contrary[62] – is a move of towering importance, especially considered in all 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

[57] Article 19 (1) TEU.
[58] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117, para. 32.
[59] For a now classic account, see L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (28 April 2009) Jean Monnet Working Paper Series No. 4/2009. Cf. R Janse, *De renaissance van de Rechtsstaat* (Open Universiteit, 2018).
[60] K Lenaerts, 'New Horisons for the Rule of Law within the EU' (2020) 21 *German Law Journal*, 29.
[61] Case C-896/19, judgment of the Court (Grand Chamber) of 20 April 2021, *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311, para. 64; D Kochenov and A Dimitrovs, 'Solving the Copenhagen Dilemma: The Repubblika Decision of the European Court of Justice', *VerfBlog* 28 April 2021, https://verfassungsblog.de/solving-the-copenhagen-dilemma/; Leloup, Kochenov and Dimitrovs, *op cit*.
[62] L Pech and J Grogan, Unity and Diversity in National Understandings of the Rule of Law in the EU, RECONNECT Deliverable 7.1, 33; Closa, Kochenov and Weiler, 'Reinforcing the Rule of Law Oversight', op. cit.

individuals, thereby providing them with 'supranational justice' and upholding the rule of law within the EU'.[63]

The deep change at the heart of EU's constitutionalism has thus brought about seemingly nothing new: all the elements it draws upon – from the ongoing 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'[64] of rights articulated at the supranational level – have been with us all along. It is their reshuffling, in the light of reinterpreting the requirements of Article 19(1) TEU as well as Article 47 of the Charter in order to enable EU's direct intervention – as in *Commission v Poland (The Independence of the Supreme Court)*[65] where the complete restoration of the legal *status quo ante* has been ordered by the Court, undoing the so-called 'judicial reform' – or indirect intervention – in *A.K. (The Independence of the Disciplinary Chamber of the Polish Supreme Court)*,[66] where the Court took upon itself to instruct its Polish counterpart to apply a clear test of independence to the questionable body at issue, parading itself 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.[67]

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 this remarkable case law over the last three years. The concrete result, however, was chaos in the Polish legal system and the further deterioration of the very idea of the law in a situation where it is now unclear which court is a 'court' and which is not, and which judge is a real judge as opposed to an impostor. Some courts follow the Court of Justice's view and proclaim that other courts – which are supported by the sham institutions parading as courts, long hijacked by the populist authorities and staffed by unlawful appointees – are not legally composed and vice versa. We can only wish the best of luck to any litigant in Poland today and should of course forget about the very idea of the orderly application of EU law by the Polish 'courts' – to which end the Court of Justice provided instruction to the local courts on how to determine which among their peers

[63] Lenaerts, 'Our Judicial Independence and the Quest for National, Supranational and Transnational Justice', op. cit., at 158.
[64] Case 26/62 *van Gend en Loos* [1963] ECR 1 (special English edition).
[65] Case C-619/18, judgment of the Court (Grand Chamber) of 24 June 2019, *Commission v Poland*, ECLI:EU:C:2019:531; P Bogdanowicz, M Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18, *European Commission v Republic of Poland*' (2020) 16 *European Constitutional Law Review*, 306–327.
[66] Joined Cases C-585/18, C-624/18 and C-625/18, judgment of the Court (Grand Chamber) of 19 November 2019, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy* and *DO v Sąd Najwyższy*, ECLI:EU:C:2019:982; M Krajewski, M Ziółkowski, 'EU judicial independence decentralized: A.K.', *Common Market Law Review* 2020, 1107–1138.
[67] Cf. L Pech, 'Article 47(2)', in S Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd ed. Oxford: Hart Publishing, 2021).

is not a court in the sense of Article 19 TEU. 'Nothing new' – yet totally and absolutely new indeed, having never been done before.

The Court of Justice reinforced these substantive developments, allowing determination of when the standard of Article 19 TEU was met, by employing tools such as interim measures to address – in its own mind and of course in accordance with its most laudable best efforts – the actual threats to the rule of law.[68] The starting point of interim relief in direct action cases was seemingly disconnected from the rule of law issues as such and concerned environmental protection measures: yes, scholars instantly saw the implications of saving a UNESCO-protected forest from the spruce beetle as the dawn of a new era in the understanding of interim relief required and authorised by EU law.[69] New case law has revolutionised interim relief in response to attacks on 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 fining tools to motivate those authorities which prove particularly persistent in their failure to comply, as we have seen in the *Polish Forest* case, 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. In the eyes of the Court, that is. In practice, Poland has never complied with any of the Court's and the Commission's efforts to the extent of undoing the populist attacks on the rule of law. Even the now proverbial *Polish Forest* continued being cut down for a long time after the interim measures, pushing the Commission to bring a new case to enforce compliance with the law.[70]

There was thus indeed a true revolution in thinking about the value of the rule of law by the Court of Justice which has significantly reshaped the constitutional fabric of the Union. The populist attacks on the rule of law provided a superb background for these judicial innovations to shine, while ensuring that no one is really against them – who could be against the 'rule of law'? If we look at what is happening on the ground in Poland and Hungary, however, nothing appears to have been achieved successfully so far, based on the Court's renewed, ever-more-centralised approach. In fact, the only tangible outcome of the whole story above is that the Court of Justice has joined an emerging trend which can be observed around the world, where international bodies and courts play an increasing active role in structuring

[68] P Wennerås, 'Saving a forest and the rule of law: Commission v Poland. Case C-441/17 R, *Commission v Poland*, Order of the Court (Grand Chamber) of 20 November 2017' (2019) 56 *Common Market Law Review*, 541.
[69] Id. Case C-441/17 R, order of the Vice-President of the Court of 27 July 2017, *European Commission v Republic of Poland*, ECLI:EU:C:2018:255.
[70] R Frost, 'Poland set to resume logging in one of Europe's last primeval forests', *Euronews* 15 March 2021 – https://www.euronews.com/green/2021/03/12/poland-set-to-resume-logging-in-one-of-europe-s-last-primeval-forests.

and organising judiciaries at the national level.[71] The European Court of Human Rights was there first of course, playing the same interventionist game for years, especially with respect to judicial independence and self-governance. The Court of Justice 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, encompassing also the emerging notion of 'internal judicial independence',[72] 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'.[73] Most importantly, the ECtHR has emphasised the 'established by law' criterion to be met by all the courts in Europe. In *Xero Flor* it clarified that if a member is appointed in the absence of a vacancy, they do not form a court established by law,[74] meaning that individuals dressed as judges are in fact engaged in a meaningless masquerade.

As simple and convincing as that seems, the Court of Justice has not yet made this move and stands to learn a great deal from the simplicity and elegance of the Court of Human Rights in dealing with populist abuse and the kangaroo-court buffoonery currently so rampant in Poland today – to take but one example.[75] In other words, while laying claim to the competence to help and solve rule of law problems inflicted upon the judiciaries of the Member States by illiberal populist regimes, the Court of Justice has achieved very little on the ground beyond internalising its new powers to the full. There will be no moving back, of course: all the national judiciaries will now be vetted by the Court of Justice.[76]

[71] D Kosař, J Baroš and P Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (2019) 15 *European Constiutional Law Reivew* 427, at 461.
[72] J Sillen, 'The Concept of "Internal Judicial Independence"' (2019) 15 *European Constitutional Law Review*, 104.
[73] ECt.HR *Parlov-Tkalčić v. Croatia* Application No. 24810/06, 22 December 2009. For a detailed analysis of all the relevant ECt.HR case-law, see, J. Sillen, 'The Concept of 'Internal Judicial Independence'', op. cit.
[74] *Xero Flor w Polsce sp. z o.o. v Poland*, application no. 4907/18 (ECHR 7 May 2021), para 277: 'the breaches of the domestic law […] concerned a fundamental rule of the election procedure, namely the rule that a judge of the Constitutional Court was to be elected by the Sejm whose term of office covered the date on which his seat became vacant'; M Leloup, 'The ECtHR Steps into the Ring: The Xero Flor ruling as the ECtHR's first step in fighting rule of law backsliding', *VerfBlog* 10 May 2021, https://verfassungsblog.de/the-ecthr-steps-into-the-ring/.
[75] L Pech, '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 *Simpson* and *HG*' (2020) *RECONNECT Working Paper* 8.
[76] For a detailed analysis of the most recent example, see A Dimitrovs and D Kochenov, 'Of Jupiters and Bulls: CVM as a Redundant Special Regime of the Rule of Law – *Romanian Judges*', *EU Law Live (Weekend edition)* June 5, 2021; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, judgment of the Court (Grand Chamber) of 18 May 2021, *Asociaţia "Forumul Judecătorilor din România" and Others v Inspecţia Judiciară and Others*, ECLI:EU:C:2021:393.

4. Non-dialogical developments of the rule of law in the European Union – what can be done?

The EU's response to the consequences of the populist narrative led to important improvements in the prestige of the rule of law as a principle and a value in the legal-political fabric of the EU. Such developments as the ones we have witnessed over the last three years could and should have occurred much earlier in the history of EU's constitutionalism. Yet there was probably no overwhelming need for their articulation before now. Indeed, if we recall our school physics lessons, only once there is action is there reaction.

The rule of law transformations briefly outlined above constitute a very significant turn in the whole history of EU law which will have lasting consequences, but not necessarily the ones sought by the advocates for this case law involving the judges in Poland and Hungary, who are under obscurantist populist attack. While the EU is definitely better off and more powerful as a result – even if not more 'value based', as we shall see below – the situation on the ground remains unchanged and the populist attacks on the rule of law continue largely unabated. It is the Court of Justice which emerges as a particularly strong winner from the whole rule of law upgrade story, particularly given the inability of the other EU institutions to act in a more consequential, effective or coherent manner. The Court has been characterised as 'the last soldier standing',[77] 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 law, turning the Union into a true constitutional system.

However, and to emphasise this once again, none of these developments arrested the rule of law backsliding nor the populist rise. Even the most forceful of the Court's case law only proved that the Union can achieve very little on the ground to stop the populist narrative and the anti-pluralist attacks on the rule of law and independent institutions guarding it. As the law stands today 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 in the backsliding jurisdictions have so far been very limited. 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'.[78]
The Court's case law not only did not stop the process of dismantling the *gubernaculum–jurisdictio* divide, but quite the opposite, raised doubts as to whether the EU legal system is itself rooted in

[77] Kochenov and Bárd, 'The Last Soldier Standing?', op. cit.
[78] Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries', op. cit., at 653–654.

dialogical constitutionalism – i.e. the rule of law. Is the rule of law first and foremost a consequence of the construction of the EU legal system, which does not imply limiting EU law by any 'higher' or 'outside' law? Taking Opinion 2/13 as the key example, we have argued extensively that the Court could be deploying the rule of law rhetoric at the supranational level in a manner which is in no way different to that of Orbán or Kaczyński, using 'the law' as a trump card to claim supremacy and ignore the inconvenient arguments as well as the *rights* of others.[79] In other words, what the Court of Justice appears to be trying to preserve in Poland and Hungary under the brand-name of the 'rule of law' is very far removed from what it means by the same term in the context of its own legal order, where rule of law essentially stands for a tool to claim supremacy.[80] Where rule of law is but a trump card to discredit other views while restating the EU's own authority, no dialogical understanding of the concept is possible. Indeed, the conflict between *gubernaculum* and *jurisdictio*, which is so absolutely vital for the preservation of the rule of law as we explained above, is dead.

This lack of the *gubernaculum–jurisidictio* divide in the context of the EU legal order, i.e. at the supranational level properly speaking, is thus closely linked to the principle of the supremacy of the EU law. The Court's case law objects to any outside scrutiny, pushing the glorification of the EU's autopoetic nature almost to the extreme. Scrutiny *'from below'* has remained only a threat (albeit a productive one)[81] and the Court has expressly prohibited – now twice[82] – scrutiny 'from above', all in the name of 'autonomy'. Using the principle of the rule of law to set aside fundamental substantive human rights and vital constitutional principles, when these are in the way of the EU's unconditional supremacy claims, is in direct conflict with the very essence of the principle.[83] Indeed, the Court needs to be reminded that supremacy is one thing (even when the Court, obviously, states that EU law demands it and this demand is strict)[84] and the rule of law is something very different. Should this difference be downplayed, the rule of law emerges as a tool for over-simplifying complex substantive constitutional

[79] D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2019) 34 *Yearbook of European Law* 74.
[80] Kochenov, 'Rule of Law as a Tool to Claim Supremacy', op. cit.
[81] *Solange I – Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermitte* (BVerfGE 37, 271). For an analysis of the whole story see, FC Mayer, 'Multilevel Constitutional Jurisdiction', [in:] A von Bogdandy & J Bast (eds.), *Principles of European Constitutional Law* (Oxford: OUP, 2011), 399–440, at 410–420; JHH Weiler and NJS Lockhart, ''Taking Rights Seriously' Seriously', *Common Market Law Review* 32 (1995), 51–94, and 579–627 (Part I and Part II).
[82] Opinion 2/94 – *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECR I-1759); Opinion 2/13 – *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECLI:EU:C:2014:2454).
[83] For the similar developments in the Russian Federation, see, P Kalinichenko and D Kochenov, 'Introductory Note to Amendments to the 1993 Constitution of the Russian Federation Concerning International Law (2021)', 60 *International Legal Materials* 2021, 341.
[84] J Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 *Oxford Journal of Legal Studies* 328.

dilemmas – not always in the interests of the preservation of a high level of protection of fundamental rights and respect for crucial constitutional principles in Europe. The Court's reliance on the argument of 'autonomy' and 'supremacy' has made it clear on numerous occasions that what we are dealing with is a recurrent claim to externally unchecked power.[85] Using this reasoning, the Court has effectively brought all checks on the rule of law under its own control by virtue of the expanding scope of EU law. It is precisely the reason to be suspicious and to want *more* rather than less Socratic contestation.[86]

Untamed power leads to many problems, but there is an almost surprising twist to this tale: the Court of Justice *is* apparently also acting under direct orders from the Member States, despite their acting entirely *ultra vires*. The dismissal of Advocate General Sharpston and the appointment of an usurper in the absence of a vacancy and in direct violation of AG Sharpston's security of tenure is an illustration of where the self-proclaimed power to claim supremacy and autonomy ends: in abuse at the hands of the Member States, whose decision is non-reviewable even if it breaks the Treaties, the Court of Justice has told us.[87] Brexit was used by the Member States, unanimously, as a pretext to get rid of a British-Luxembourgian citizen occupying the post of Advocate General, before her tenure expired. The whole story is too dirty and complex to provide all the details here, since the Member States acted in direct breach of the Treaties and the Court ruled that the actions of the Member States, collectively, were unreviewable, no matter what, thus signalling a principled acceptance of the lack of any structural independence from the Masters of the Treaties.[88] What is crucial here for us, however, is that by arguing that it cannot review an appointment in direct contravention of the Treaties, that very Court has both

[85] Piet Eeckhout made a most persuasive argument that federal division of competences cannot possibly play any role here, since, no matter which level of government is responsible, the fundamental values, as expressed in the ECHR have to be respected, as rightly put by Eeckhout 'for the CJEU […] to assume that responsibility and division of competences are one and the same, is not an example of proper judicial reasoning, to say the least'. It is thus clear that the CJEU simply deploys 'autonomy' as a flimsy pretext to ensure that its own jurisdiction is unchecked: P. Eeckhout, 'Opinion 2/13 on EU accession to the ECHR and judicial dialogue – autonomy or autarky?', *Fordham International Law Journal* 38 (2015), 955–992.

[86] See, M. Kumm, 'The idea of Socratic contestation and the right to justification', *Law and Ethics of Human Rights* 4 (2010), 142–175, at 164.

[87] See Case C-684/20 P Order of the Court (First Chamber) of 16 June 2021 in *Sharpston v Council of the European Union and Conference of the Representatives of the Member States* ECLI:EU:C:2021:486 and C-685/20 P Order of the Court (First Chamber) of 16 June 2021 in *Sharpston v Council of the European Union and Conference of the Representatives of the Member States* ECLI:EU:C:2021:485, fully confirming the earlier Orders of the Vice President: Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU:C:2020:700, (10 September 2020); Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU:C:2020:705, (10 September 2020). For the analysis of the latest Orders, see D Kochenov and G Butler, 'CJEU's Independence and Lawful Composition in Question (Part V)', *VerfBlog*, 19 June 2021: <https://verfassungsblog.de/cjeus-independence-and-lawful-composition-in-question-part-v>.

[88] D Kochenov and G Butler, 'The Independence and Lawful Composition of the Court of Justice of the European Union', op. cit.; L. Pech, 'The Schrödinger's Advocate General,' *VerfBlog,* 29 May 2020: <https://verfassungsblog.de/the-schroedingers-advocate-general>

failed to meet the standard of lawful composition, which is a necessary element of the rule of law in its own case law and also according to the ECtHR's[89] – and opened a Pandora's box of arguments concerning its own structural independence: can it be that the EU system of institutions is structurally unfit to provide robust checks against the abuse of power by the *Herren der Verträge*? The implications are far-reaching: it is established case law that a body lacking structural independence is not a 'court or tribunal' in the sense of Article 267 TFEU, which enables the dialogue between the national and supranational courts and the flow of preliminary questions – the blood in the veins of the EU legal system. If a Spanish tax tribunal is not independent enough simply because the authorities can terminate the mandates of its members prematurely – as we learned from *Banco Santander SA* – is the Court of Justice still a court on this basis, given that the Member States have committed an illegal but legally non-reviewable assault against a sitting member of the Court whose mandate has not yet expired and is guaranteed by primary law? And what about the Greek usurper appointed to no vacancy at all: does his presence on the bench render decisions in which he took part void, as the ECtHR standard would imply?[90]

The Court 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 ruled out any possibility of the application of its newly-discovered principles to itself. In a thoughtless act of haphazard nonchalance it has dismissed any argument for its own structural independence from the Masters of the Treaties. Yet by its own standards, a non-structurally independent body is not a court. It will take the Union time to get back on track after such a blow to a system of 'integration through law'. The 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, an impeccably lawfully composed Court is not required at all. It is not only the substance of the rule of law, thus, which emerges as having radically different meaning nationally and supranationally in the EU. The idea of basic judicial independence and the lawful composition of a court or tribunal have also changed their meanings *in EU law* depending on where you are – in Brussels, or in Warsaw or Budapest.

[89] *Xero Flor w Polsce sp. z o.o. v Poland*, application no. 4907/18 (ECHR 7 May 2021); M Leloup, 'The ECtHR Steps into the Ring: The *Xero Flor* ruling as the ECtHR's first step in fighting rule of law backsliding', *VerfBlog* 10 May 2021: <https://verfassungsblog.de/the-ecthr-steps-into-the-ring>.
[90] Kochenov and Butler, 'CJEU's Independence and Lawful Composition in Question (Part V)', op. cit.

5. Conclusion

This puzzling reality is extremely dangerous and certainly does not help in the fight against the rise of populism. A non-independent court receiving orders from its masters and slicking the bitter pill of humiliatingly blunt illegal appointments to and sackings from the bench is closer to the Supreme Court in Warsaw, rather than what the ECtHR or any national standards of judicial independence outside of Warsaw or Budapest would imply. There is one difference, however: when the Supreme Court in Warsaw was attacked, it staged a fight to safeguard its own independence and failed. The Court of Justice, by contrast, declared that the attack against it was not reviewable as a requirement of the rule of law: it has no competence to review whether it is structurally independent, we are told. One person seems convinced.[91] Others are silent or disgusted at this betrayal of European values by a court entrusted, precisely, with their protection.

Anti-institutional actions resulting from the populist narrative in the EU Member States concentrated on the independence of the judiciary, led – at a supranational level – to a reinvention of the EU rule of law. From a system of 'declaratory' rule of law,[92] where adherence by national authorities to this principle is merely a presumption, the Union has emerged as a constitutional system where this presumption is being gradually replaced by a requirement for full adherence as a matter of fact. This comes with a possibility of checking whether the presumption holds true combined with a possibility of policing serious departures *both* in the political *and* in the legal context. The swift transformation of the law at both supranational and national levels 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) para 2 TEU and killed two birds with one stone.

However, framing EU rule of law as an unconditional good, by focusing on the specific purpose of reinforcing EU law's supremacy and allowing the Court of Justice to question the criticism of its vision of the law from any quarter, is a crucially important chapter of the EU's rule of law story, and worth reflecting on. This paper focused on the instrumental side of the rule of law story which enabled and reinforced EU law's claim to supremacy. The strategy of deploying the rule of law in such a way has paid off: the Court is triumphant. However, two aspects of this 'triumph' are particularly troubling: first, the absolute lack of change on the ground in Poland and Hungary; and second, the emergence of dual

[91] S Lashyn, 'The Unsuccessful Bid of the British Advocate-General to Remain on the Bench Despite Brexit' 84 *Modern Law Review* (early view).
[92] D Kochenov, 'Declaratory Rule of Law: Self-Constitution through Unenforceable Promises', in J Přibáň (ed.), *The Self-Constitution of European Society beyond EU Politics, Law and Governance* (Abingdon: Routledge, 2016) 159.

standards of judicial independence demonstrated by the illegal removal of Advocate General Sharpston from office without any valid reason and in the absence of any serious judicial review. Neither the supremacy of EU law nor its autonomy were able to protect the Court against this attack by the Member States, which chose a murky way to punish 'the Brits', even at the cost of the dignity of the continental legal system. The same supremacy of EU law was not able to stop the rule of law backsliding in Member States resulting from the constitutional populism offered by their leaders and cheered on by large sections of the general public. The rule of law is forgotten in both respects.

RECONNECT, led by the Leuven Centre for Global Governance Studies, brings together 18 academic partners from 14 countries.

Find out more about the RECONNECT project at
www.reconnect-europe.eu