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DE FACTO POWER GRAB IN CONTEXT: UPGRADING RULE OF LAW IN EUROPE IN POPULIST TIMES

Abstract: *Over the last three years European Union (EU) law has experienced a veritable revolution triggered by the Court of Justice's rethinking of the fundamental aspects underpinning both the EU's competence to deal with Rule of Law matters (especially related to the independence and the irremovability of judges at the national level), and the substantive understanding of the key elements of the Rule of Law pertaining to the newly-found competence. An upgraded approach to interim relief in matters related to the Rule of Law completes the picture. As a result, EU law has gone through a profound transformation and the assumptions as to the perceived limits of its reach – insofar as the organization of the national judiciaries is concerned – no longer hold. However, there is also the opposite side to this "Rule of Law revolution." While its effectiveness in terms of bringing recalcitrant Member States back on track has not been proven (and Poland and Hungary stand as valid reasons for doubts); the division of powers between the Member States and the EU has been altered forever. Rule of Law thus emerges as a successful pretext for a supranational power-grab in the context of EU federalism. The picture is further complicated by the fact that the substantive elements of the Rule of Law required by the Court of Justice of the European Union of the Member States' judiciaries are seemingly perceived as inapplicable to the supranational level itself. These include structural independence from other branches of power and safeguards of the guarantees of irremovability and security of tenure of the members of the judiciaries. Taking all these elements into consideration, the glorious revolution appears to have triggered at least as many questions as it has provided answers, while being entirely unable to resolve the outstanding problems on the ground in the Member States experiencing significant backsliding in the areas of democracy and the Rule of Law.*

Keywords: backsliding, Court of Justice, Hungary, judicial independence, Poland, Rule of Law

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INTRODUCTION

The task of this brief engagement is to provide a concise *tour d'horizon* of the developments in European Union (EU or Union) law in the field of the Rule of Law over the recent years – developments which have significantly reinforced the powers of the supranational institutions in domains which previously have never been considered part of the EU's supranational competence/purview of regulation. While the EU has thereby matured, entering a period of new, more credible claims of "constitutionalism," the end solution of the problems which this *de facto* power grab was intended to resolve is nowhere in sight. Delegating contentious issues to "Europe" does not bring about the expected dividends in the populist times, inviting a conversation about alternative approaches and the solutions required.

This article is divided into two parts. The first outlines the core innovations in the area of the Rule of Law brought about by the Court of Justice over the last three years, including a profound reinterpretation (expansion) of the EU's power in this domain; a formulation of EU-level standards applicable to the organization of the judiciaries at the national level; and a rethinking of the ways to enforce the newly-acquired competences and newly-formulated standards. The second part focuses on the implications of the recent developments for the EU itself, as well as offers a view of the progress sketched out in the first part measured against the modest, if not absent, successes on the ground achieved in those countries experiencing Rule of Law backsliding and attacks on the independence of their judiciaries. This analysis sheds new light on the EU's achievements. On the one hand, the Court of Justice (ECJ) does not view itself as bound by the elements of the Rule of Law it has just formulated, and on the other, despite having acquired a vast new competence through a revolutionary reinterpretation of one of the mainstay provisions of the Treaties, the EU has so far failed to attain any successes in that area of the Rule of Law which was used as a reason for explaining the need for the deep reinterpretation in the first place. The resulting picture is mixed: while Rule of Law continues to be undermined in Hungary and Poland as before, the EU is more powerful than ever, even if seemingly oblivious to the values and standards it has just articulated as a pretext for endowing itself with the immense new powers. Both the power-grab and its context matter. As things stand today, the Court of Justice emerges as the only beneficiary of the recent developments, even if not bound by the substance of the values it set out to promote (unsuccessfully for the Rule of Law in Poland – successfully in terms of its own powers).

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 Art. 2 of the Treaty on European

Union (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 the EU's constitutionalism. At the same time the Union possessed – so it seemed – no competence to intervene in those cases where backsliding occurred at the national level.[1] And of course there is nothing close to the US National Guard in the EU to help restore law and order in the recalcitrant Member States.[2]

This competence lacuna had to be filled sooner or later, allowing the EU to graduate into a true constitutional system that actually stands by its principles[3] – and the case law of the last three years could be interpreted as commencing precisely this kind of transformation. Given its vital importance and combined with its innovative nature, one could characterize it as a welcome power grab – an organic part of the usual incrementalism in the development of EU law, but going further than usual this time. The question thus arises: What are the main aspects of this development? Four interrelated component parts can be identified:

1. 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]
2. Moreover, the Court of Justice has also articulated the core substantive elements of the supranational rule of law[5] which it has the competence to enforce, going beyond the circularity of the definition offered in *Les Verts* and focusing predominantly on judicial independence.[6]
3. The Court has moved on to ensure that its newly-found substance of the rule of law, which cuts through the legal orders, is actually effectively enforceable and that this enforcement includes ample possibilities for interim relief, including interventions to reverse the structural changes made by the member states to their judicial systems and, crucially, the empowerment of the *national courts* of the Member States, with the help of EU law, to do the same.[7]
4. As a consequence, lastly, the Court of Justice has joined the emerging trend, observable around the world, whereby international bodies and courts play

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

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

[3] A. Williams, 2009, *Taking Values Seriously: Towards a Philosophy of EU Law*, 29(3) Oxford Journal of Legal Studies 549 (2009).

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

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

[6] K. Lenaerts, *New Horizons for the Rule of Law within the EU*, 21(1) German Law Journal 29 (2020).

[7] Case C-441/17 *Commission v. Poland*, Order of the Court of 20 November 2017 [GC]; P. Wennerås, *Saving a Forest and the Rule of Law: Commission v. Poland*, 56 Common Market Law Review 541 (2019).

an increasing role in the structuring and organization of the judiciaries at the national level.[8]

All these changes could not but lead to a significant upgrade of the Rule of Law standards also at the supranational level, as the Court had to take into account the recent significant advances in the understanding of the Rule of Law and apply them to those well-tested areas of EU law, such as the guarantees of independence of those bodies meeting the standards of "court or tribunal" in the context of Art. 267 of the Treaty on the Functioning of the European Union (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. This inter-court dialogue, which the Court of Justice is officially striving to protect, is thus no longer a dialogue between equals, as Araceli Turmo has amply demonstrated.[9] This is reflected in the fact that the 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 the EU's Rule of Law calls for a new way of approaching the Union; moving from a system of "declaratory" Rule of Law[11] – where the adherence of the national authorities to this principle is merely a presumption – to a constitutional system where this presumption is being gradually replaced by the principle of full adherence to the Rule of Law as a fact. This gives rise to the possibility of checking whether this presumption holds true, combined with the possibility to police serious deviations *both* in the political *and* in the legal contexts. 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 some truth to its "constitutional" characterization, then the EU is only now, before our eyes, becoming a constitutional Rule of Law-based system.

This swift transformation of the law which this fundamental shift entails – both at the supranational and the national levels – is the result of the revolutionary case law handed down over the past three years by the ECJ, beginning with the *Portuguese Judges* ruling, where the Court for the first time in EU history turned to Art. 19(1) 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 Art. 2 TEU, thus elevating the independence of the judiciary to a new level in both theory and in practice in the context of the EU legal

[8] D. Kosař, J. Baroš, P. Dufek, *The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism*, 15(3) European Constitutional Law Review 427 (2019).

[9] A. Turmo, *A Dialogue of Unequals: The European Court of Justice Reasserts National Courts' Obligations under Article 267(3) TFEU*, 15(2) European Constitutional Law Review 340 (2019).

[10] J. Lindeboom, *Is 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*, 21(5) German Law Journal 1032 (2020).

[11] 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*, Routledge, Abingdon: 2016, p. 159.

system. Secondly, it found a way to articulate EU law jurisdiction in 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 a broadening, the possibility of which was predicted by eminent scholars in 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 those witnessed over the last three years could have occurred much earlier in the history of EU's constitutionalism. Yet, there was probably no overwhelming need for their articulation before now. Indeed, as one recalls 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 occasions[13] – actually worked well until the moment when the enforcement of the 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 no longer a club of Rule of Law-abiding democracies, the added value of the whole integration project becomes naturally questionable.[14] The whole point is thus not as much about helping the Polish and the Hungarian people to remain free. The very rationale of the Union as such is at the core of the on-going developments.[15] Tomasz Tadeusz Koncewicz is absolutely right in stating that "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]

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[12] J.A. Usher, *How Limited is the Jurisdiction of European Court of Justice?*, in: J. Dine, S. Douglas-Scott, I. Persaud (eds.), *Procedure and the European Court*, Chancery Law Publishing, London: 1991, p. 77; J.A. Usher, *General Course: The Continuing Development of Law and Institutions*, in: F. Emmert, (ed.), *Collected Courses of the Academy of European Law*, *European Community Law* (vol. II, Book 1), Martinus Nijhoff, The Hague: 1991, p. 122; C.N. Kakouris, *La Cour de Justice des Communautés européennes comme cour constitutionnelle. Trois observations*, in: O. Due, M. Lutter, J. Schwarze (eds.), *Festschrift für Ulrich Everling*, Nomos, Baden Baden: 1995, p. 629; C.N. Kakouris, *La Mission de la Cour de Justice des Communautés européennes et l'ethos du juge*, 4 Revue des affaires européennes 35 (1994).

[13] D. Kochenov, *The EU and the Rule of Law: Naïveté or a Grand Design?*, in: M. Adams et al. (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge University Press, Cambridge: 2017, p. 419. Also, taking into account the fact that this presumption was the core weakness of the failure of conditionality, which marked the pre-accession exercise in this field, *see* D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, Kluwer Law International, The Hague: 2007. This weakness is now being directly remedied by the Court in Case C-896/19 *Repubblika v. Il-Prim Ministru* [2021] ECLI:EU:C:2021:311: M. Leloup, D. Kochenov, A. Dimitrovs, *Non-Regression: Openning the Door to Solving the "Copenhagen Dilemma"? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru*, Reconnect Working Paper No. 15 – June 2021.

[14] T.T. Koncewicz, *Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of the Heart*, 26 Indiana Journal of Global Legal Studies 501 (2019).

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

[16] T.T. 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*, 5 Palestra 167 (2020).

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 the EU's constitutionalism has thus seemingly brought about 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 process of reinterpreting the requirements of Art. 19(1) TEU as well as Art. 47 of the Charter of Fundamental Rights of the European Union (CFR) as the basis for both the 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 Poland's so-called "judicial reform" – or its indirect intervention, as in *A.K. (The Independence of the Disciplinary Chamber of the Polish Supreme Court).* In this latter case, the Court has instructed its Polish counterpart to apply a clear test of independence to the questionable body at issue (parading as one of the chambers of the Polish Supreme Court); a test, based on the substantive meaning of judicial independence drawn from the analysis of Art. 47 CFR.[19] This elucidation of the possibility of both direct and indirect intervention, combined with the perception of "nothing new," is precisely the appeal and the strength of the remarkable case law handed down over the last three years.

1.3. Preventing rapid 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 sig-

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

[18] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

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

[20] Case C-286/12 *Commission v. Hungary (Judicial Retirement Age)*, EU:C:2012:687. D. Kochenov, P. Bárd, *The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU*, 1 European Yearbook of Constitutional Law 243 (2019).

nificant attention to ensuring that sufficient interim measures are put in place in order to ensure that the attacks against the rule of law will not continue despite the Commission's victories in court during the process. As with many other cases of relevance, the starting point for the interim relief was seemingly disconnected from the rule of law issues as such, and concerned environmental protection measures. Indeed 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 the interim relief required and authorized by EU law.[21]

Most importantly, the case law on interim relief handed down by the Court of Justice can in fact be viewed as a set of examples for the national courts to follow in enforcing EU law. They 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]

The new case law has revolutionized interim relief in reaction to the attacks on whole systems of institutions, as it brought about the requirement of restoration of the *status quo ante*: i.e. the reversal of the attack. As can be seen in the *Polish Forest* case, such developments – combined with newly-discovered monetary tools to influence the authorities (which are particularly persistent in their failure to comply) – 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.

1.4. Supranational consequences: 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 EU law. From *Commission v. France*, which outlawed the abuse of *CILFIT* and thus solidified, 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 and making it applicable to any body aspiring to qualify as a "court or tribunal" of a Member State in the sense of Art. 267 TFEU, the law as it stands draws directly on the saga of the *Portuguese Judges* and the *Commission v. Poland* cases.

Looking at the issue in sector-specific terms, the direction of the development of the law is largely similar, as also the case law on the meaning of "judicial authority" under the EAW FD saw a significant tightening of the notion of the "independence" required in order to be able to send EAW requests. The *Prosecutors* cases make it abundantly clear[23]

[21] Wennerås, *supra* note 7, p. 541.

[22] Lenaerts, *supra* note 17, p. 157 and the references cited therein.

[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 more details *see* A.H. Ochnio, *Why Is a Redefinition of the Autonomous Concept of an 'Issuing Judicial Authority' in European Arrest Warrant Proceedings Needed?*, 5(3) European Papers 1305 (2020); M. Böse, *The European*

that the general move in the direction of placing more importance on the requirement of independence is fully aligned in the Area of Freedom, Security and Justice and EU law *sensu lato*, as has been seen in *Banco 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 concern only those Member States experiencing rule of law problems or democratic backsliding. Instead, it emerges as a general principle applied 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] a game which the European Court of Human Rights has been playing for years, especially insofar as the aspects of judicial independence and self-governance go. 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, and encompass 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] Court of Justice's efforts to neutralize the Disciplinary Chamber of the Polish Supreme Court as being not independent and threatening the very fabric of the EU (and Polish) legal order could be viewed as a forceful intervention in support of such "internal judicial independence." The same applies to the requirement of independence and self-governance of the judicial councils.[29] Read in this way, the Court of Justice can be seen as extending the meaning of judicial independence even further, assisting the European Court of Human Rights' (ECtHR's) already 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

Arrest Warrant and the Independence of Public Prosecutors: OG & PI, PF, JR & YC', 57 Common Market Law Review 1259 (2020).

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

[25] D. Kosař, L. Lixinski, *Domestic Judicial Design by International Human Rights Courts*, 109(4) American Journal of International Law 714 (2015). The same criticism could apply to international bodies engaged with the elaboration of "soft law" standards which quickly solidify, guiding day-to-day practice. *Cf.* M. de Visser, *A Critical Assessment of the Rule of the Venice Commission in Processes of Domestic Constitutional Reform*, 63(4) American Journal of Comparative Law 963 (2015).

[26] J. Sillen, *The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights*, 15 European Constitutional Law Review 104 (2019).

[27] ECtHR, *Parlov-Tkalčić v. Croatia* (App. No. 24810/06), 22 December 2009. For a detailed analysis of all the relevant ECtHR case law, *see* Sillen, *supra* note 26.

[28] 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* Simplon *and* HG, Reconnect Working Paper No. 8/2020.

[29] *See e.g.* ECtHR, *Oleksandr Volkov v. Ukraine* (App. No. 21722/11), 9 January 2013.

[30] Sillen, *supra* note 26.

does not meet the basic requirement of impartiality set out in Art. 6(1) of the European Convention on Human Rights, and thus is not established by law.[31]

2. WHAT ABOUT THE LARGER CONTEXT?

Upon consideration of the broader context of the welcome power grab outlined above, two problematic issues instantly loom large on the horizon. Firstly, the Court of Justice itself is open about the fact that it does not consider itself bound by the fundamental principles of Arts. 2 and 19 TEU, which it has itself formulated insofar as the principles stemming from those provisions could constrain the power of the Member States, acting collectively as *Heren der Verträge* to exercise dominance over the Court of Justice no matter what the law says. The second problematic issue is that, to use a Russian saying, "the cart is still there." All the commotion notwithstanding, Poland and Hungary are still where they were before the power grab inspired by the proclaimed desire to resolve the problems related to democracy and Rule of Law backsliding started. Many a won case aside, the picture has still not changed, leading to allegations that the EU – and especially the Commission – is essentially "losing by winning."[32] Let us consider the two problematic issues in turn.

The first trouble with all the developments described above is that in the *Sharpston* cases the Court of Justice resoundingly failed to apply to ifself the same standards it has been preaching: it clearly did not feel bound by the imperatives of irremovability and security of tenure with respect to 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 quesitioning its 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 some time to get back on track following such a blow to the system of "integration through law." The Court tells us that everyone – 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*, 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

[31] *Ibidem*, at 109.

[32] K.L. 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*, 39 Yearbook of European Law 3 (2020).

[33] For a detailed step-by-step analysis, *see* D. Kochenov, 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*, NYU Jean Monnet Paper No. 02/2020.

suggesting that at the supranational level an impeccably lawful composition of the Court is not 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]

The problems do not stop here. In fact, a whole new set of issues arises even if one sets 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 to answer, irrespective of how much independence the Court of Justice actually does command, is – along the lines of Dariusz Adamski's thinking,[35] – how much can the courts 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 the winner from the rule of law crisis it is going through. Indeed, the rule of law transformations, which have been briefly outlined above, constitute a very significant turn in the whole history of EU law, and one 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 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 for the Union which is unmistakably attractive. Moving from the world of proclamations, the core values of the Union are now moving into the realm of the law, turning the Union into a true constitutional system – that is, until it is tested by the likes of the *Sharpston* cases.

The same cannot be said, unfortunately, about the Member States experiencing a decline in democracy and the rule of law. 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 set of Member States in question. One may ask: "Is

[34] A question from D. Kochenov to V. Jourová at CEU Democracy Institute discussion *The Future of Democracy in EU Member States* (published on YouTube on 1 March 2021), available at: https://bit.ly/3nPLFXn at 43:37 (accessed 30 May 2021).

[35] D. Adamski, *The Social Contract of Democratic Backsliding in the "New EU" Countries*, 56 Common Market Law Review 623 (2019). A. Sajó, *The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies*, 11 The Hague Journal on the Rule of Law 371 (2019); M. Blauberger, R.D. Kelemen, *Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU*, 24(3) European Journal of Public Policy 321 (2017); P. Blokker, *EU Democratic Oversight and Domestic Deviation from the Rule of Law*, in: C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge: 2016, p. 249.

[36] *See* the special issue of the Journal of Common Market Studies edited by D. Kochenov, A. Magen, L. Pech, *The Great Rule of Law Debate in the EU*, 54 Journal of Common Market Studies 1043 (2016). *Cf. e.g.* A. Schout, M. Luining, *The Missing Dimension in Rule of Law Policy: From EU Policies to Multilevel Capacity Building*, Clingendael Instituut Report, 2018, p. 12.

[37] Kochenov and Bárd, *supra* note 20.

something 'wrong' with Central and Eastern Europe?"[38] While obviously relevant in the context of Hungary and Poland, this 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 helpful. 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 becoming the rule. In this context, the assaults on the rule of law are bound to intensify since, as Nicola Lacey has pointed out, populism and the attacks on the rule of law are frequently connected.[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 may be very limited for now. Dariusz Adamski is absolutely right that 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 is precisely what 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 are busy undoing not only judicial independence, but also essentially the idea of legality *as such*, and enjoy a popularity that will not go away on the back of the Court's rule of law case law, however far-reaching it may be. 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 powers does not work in Central Europe and that any long-term solution must have the broad support of the people (footnotes omitted).[43]

Undoubtedly the supranational transformation of the rule of law into that 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 lies a belief in the centrality and importance of EU law to all the Member States. Justin Lindeboom has justified this belief

[38] J. Dawson, S. Hanley, *What's Wrong with East-Central Europe? The Fading Mirage of the "Liberal Consensus"*, 27 Journal of Democracy 21 (2016).

[39] N. Lacey, *Populism and the Rule of Law*, 15 Annual Review of Law and Social Science 79 (2019).

[40] K.L. Scheppele, *Autocratic Legalism*, 85 University of Chicago Law Review 545 (2018).

[41] Adamski, *supra* note 35, p. 659.

[42] P. Blokker, *Building Democracy by Legal Means? The Contestation of Human Rights and Constitutionalism in East-Central Europe*, 18(3) Journal of Modern European History 335 (2020); P. Blokker, *Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism*, 15(3) European Constitutional Law Review 519 (2019).

[43] Kosař, Baroš and Dufek, *supra* note 8, p. 461.

very consistently, demonstrating its soundness, especially when viewed from Brussels or *Kirchberg*: any real legal system claims supremacy and *is* self-referential in its 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] Should this be the case, the foundations of the rule of law that the ECJ is defending are very feeble indeed – and this is the focus of the analysis in the remainder of this work.

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 the *Portuguese Judges* ruling.[45] If the Court states that "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 this not smell of a circular and unhelpful approach to the rule of law, and even a denial of the meaning of the concept? As has been stated: "How can the mundane objective of 'compliance with EU law' be constitutive of 'the essence of the rule of law'?"[47] To ensure that the fundamental developments described above are a success, the Court will need to think very hard and be as convincing as possible in answering this question. What we have at hand at the moment is a rule of law proclamation which is not applicable in its essence to all participants in the articulation of the dialogical rule of law, hinting at the fact that the principle, in all its glory, is delineated with some other ends in mind, rather than serving the law *sensu stricto*. As a result, the glorious new sandcastle 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. At the same time however, considering in full its disconnect from the stated goals it is aimed to achieve and cites as its justification, the castle is a nonetheless a success and can last at least until the sea licks it off the shores.

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[44] M. Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in: G. Palombella, N. Walker (eds.), *Re-locating the Rule of Law,* Hart Publishing, Oxford and Portland: 2008, p. 47; G. Palombella, *The Rule of Law as an Institutional Ideal*, in: G. Palombella, L. Morlino (eds.), *Rule of Law and Democracy: Inquiries Into Internal and External Issues*, Brill, Leiden and Boston: 2010, p. 4; 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 University Press, Cambridge: 2016. *Cf.* D. Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, 34 Yearbook of European Law 82 (2015).

[45] Editorial Comments, *EU Law between Common Values and Collective Feelings*, 55 Common Market Law Review 1 (2018).

[46] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, para. 36.

[47] Editorial Comments, *supra* note 45, p. 1334.