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From POLEXIT to E(U)EXIT? Poland, European Union and beyond. The essay in constitutional pessimism[1]

Poland's Accession to the European Union meant that, at the time of Accession, the norms of the Polish Constitution as well as the Polish governance practice did not differ from the axiological standards prevalent within the Union. The way the democratic state ruled by law was understood, especially in the jurisprudence of the Constitutional Court, was consistent with the values common to the member states of the European Union

K. Wójtowicz, *O relacjach pomiędzy prawem międzynarodowym a Konstytucją RP*[2]

Epilogue. Focus on the boats, and miss out on the journey

This analysis will argue that by focusing solely on the boat (*e.g*., the Polish case of the rule of law backsliding), we run the risk of losing sight of how the internal dispute over basic values, which are allegedly shared with other Europeans, translates into the situation in Europe. The rising authoritarian tendencies in one member state affect the journey in an ever closer union among peoples of Europe just as much as they alter the constitutional profile(s) of the rogue member states. Focused on the *boat*, we forget about the *journey* and its destination[3].

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[2] "On the relationship between international law and the Constitution of the Republic of Poland" (my translation). The article is available at http://www.absolwenciprawa69.pl/kategoria.php?artykul=233&kat=2 [accessed on 11.07.2022]. I am grateful to my father, himself a graduate of the 1969 class and a colleague of Professor Krzysztof Wójtowicz, for bringing my attention to this analysis. I found it very fitting for my own reconstruction of the state of Poland and the EU in 2022 and beyond.

[3] See L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU* „Cambridge Yearbook of European Legal Studies" 2017, No. 1; L. Pech, S. Platon, *Menace Systémique Envers l'Etat de Droit en Pologne: Entre Action et Procrastination,* Fondation Robert Schuman, Question d'Europe no. 451, Novembre 13, 2017; D.R. Kelemen, K.L. Scheppele, *Defending Democracy in the EU Member States. Beyond art. 7 TEU* [in:] F. Bignami (ed.), *EU Law in Populist Times. Crises and Prospects*, Cambridge University Press, Cambridge 2019.

This is not surprising. Busy with everyday life, we often lose sight of the processes that take place around us, which can remain unnoticed and incomprehensible[4]. The events of "here and now" absorb our attention, which rarely goes beyond superficial interest and is limited to reading newspaper headlines. We live from news item to news item, losing the essence and meaning of the problem along the way, often without even reflecting on it. A single element obscures the whole. Meanwhile, only by combining dispersed elements can we understand the reality that surrounds us and the changes it is undergoing. Viewing the situation in Poland through the prism of individual events is also the main reason (though not the only one) for the limited effectiveness[5] of the European Commission's attempts to enforce Poland's compliance with the European standards of the rule of law. The common denominator that escapes our attention is the collective term "unconstitutional capture of the state and its institutions." The annihilation of the independent Constitutional Court[6] and repeated attacks on the common courts[7], the National Council of the Judiciary, and the Supreme Court, are only elements of this methodical capture of the state. The battle lines on the domestic front have been clearly drawn. Now with the ultimate abuse of executive and judicial power in the form of the fake constitutional court holding a trial on the very essentials of the EU legal order, the uneasy and once unthinkable questions come to the fore. The 'decision'[8] by the fake court that basically declares Poland's unwillingness to continue as an EU member state has already to all intents and purposes pushed Poland to the periphery of the Union. It also speaks volumes as to how far the new doctrine has come since 2015, and how powerful a justification it provides[9].

Importantly, a "capture" is a process, not just a point in time and space. It has its deep roots in the crisis of the liberal narrative not just in the former states of the

[4] T.T. Koncewicz, *How the EU is Becoming a Rule-of-Law-less Union of States. From POLEXIT to E(U) EXIT?* at https://verfassungsblog.de/how-the-eu-is-becoming-a-rule-of-law-less-union-of-states/ [accessed on 10.07.2022].

[5] K.L. Scheppele, L. Pech, *Protecting the Rule of Law in the EU* at https://verfassungsblog.de/category/debates/protecting-the-rule-of-law-in-the-eu/ [accessed on 10.07.2022].

[6] T. T. Koncewicz, *Of institutions, democracy, constitutional self-defence and the rule of law*, "Common Market Law Review" 2016, vol. 53, issue 6, p. 1753; Idem, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, "Review of Central and East European Law" 2018, vol. 43, issue 2, p. 116; Idem, *Unconstitutional Capture and Constitutional Recapture. Of the Rule of Law, Separation of Powers and Judicial Promises*, "NYU Jean Monnet Working Paper" 2017, No. 3.

[7] Among many analyses consult: L. Pech, P. Wachowiec, D. Mazur, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action,* "Hague Journal of the Rule of Law" 2021, vol. 13, p. 1.

[8] E. Łętowska, S. Biernat, *This Was Not Just Another Ultra Vires Judgment! Commentary to the statement of retired judges of the Constitutional Tribunal* at https://verfassungsblog.de/this-was-not--just-another-ultra-vires-judgment/ [accessed on 10.07.2022].

[9] T. T. Koncewicz, *10 Anti-Constitutional Commandments Taking Stock of 2015-2019 and Beyond* at https://verfassungsblog.de/10-anti-constitutional-commandments/[accessed on 10.07.2022] and also the analysis *infra*.

Eastern bloc[10], but also beyond[11]. Liberalism and democracy – understood as something more than "statistical democracy," that is, the rule of the majority – cease to be those values that are treated as axioms of the legal systems of the EU member states. As a result of a capture, the principles of the rule of law, the separation of powers, the independence of the judiciary, the supremacy of the Constitution, and the central position of a constitutional court that effectively controls the ruling majority, are undermined. The "capture"[12] stands for a gradual weakening of the guarantees that comprise the separation of powers and a moving away from the basic principle of the dispersion of powers between different institutions (to exclude the concentration of power in one centre) towards mono-institutions that guard one official narrative, can do anything, and are not kept in check in any way[13]. Such a takeover undermines the basic assumption of the liberal state that there is not – and cannot be – one omnipotent institution. In a state of liberal democracy, each institution should be limited by law, and it can do only as much as it is allowed by the applicable law. Institutions must accept and bear the supervision exercised by other institutions operating within the legal system. In a democracy, it is the law that is sovereign.

With all this a point of no return might have been indeed reached. POLEXIT looms large[14]. Yet, for POLEXIT to be understood properly, it must be put in a much

[10] For examples see: I. Krastev, *Is East-Central Europe Backsliding? The Strange Death of The Liberal Consensus*, "Journal of Democracy" 2007, vol. 18, p. 56; B. Stanley, *Backsliding Away? The Quality of Democracy in Central and Eastern Europe*, "Journal of Contemporary European Research" 2019, vol. 15; L. Cianetti, J. Dawson, S. Hanley (ed.), *Rethinking 'Democratic Backsliding' in Central and Eastern Europe,* Routledge, London 2019.

[11] S. Mounk, *The People vs Democracy*, Harvard University Press, Cambridge 2018; D. Runciman, *How democracy ends*, Basic Books, New York 2018; A. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, "UCLA Law Review" 2018, vol. 65 available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13666&context=journal_articles [accessed on 10.07.2022] and shorter A. Huq, T. Ginsburg, *How we lost constitutional democracy in America* [in:] C. Sunstein (ed.), *Can it Happen Here? Authoritarianism in America*, Dey St. William Morrow, New York 2018; S. Levitzky, D. Ziblatt, *How democracies die*, Crown, New York 2018; D. Landau, *Abusive Constitutionalism*, "University of California Davis Law Review" 2013, vol. 47, p. 189; O. Varol, *Stealth authoritarianism*, „Iowa Law Review" 2015, vol. 100, p. 1673; M. Tushnet, *Authoritarian Constitutionalism,* "Cornell Law Review" 2015, vol. 100, p. 391. For United States' flirt with creeping authoritarianism C. Sunstein (ed.), *Can it Happen Here? Authoritarianism in America*, Dey St. William Morrow, New York 2018; A. Huq, T. Ginsburg, *How to Lose…* and shorter version A. Huq, T. Ginsburg, *How we lost constitutional democracy…*; T. Daly, *Enough Complacency: Fighting Democratic Decay in 2017,* at http://www.iconnectblog.com/2017/01/enough-complacency-fighting-democratic-decay-in-2017-i-connect-column/ [accessed on 10.07.2022].

[12] J.W. Müller, *Rising to the challenge of constitutional capture*, EUROZINE at https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/[accessed on 10.07.2022]. On the constitutional capture in Polish: T.T. Koncewicz, *Unijny etos sądzenia. O fundamentach, metapolityce i POLEXIT* [in:] A. Bodnar, A. Ploszka, (ed.), *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego,* Wolters Kluwer, Warszawa 2020.

[13] For more conceptual analysis I refer here to: T.T. Koncewicz, *Polish Counter-Revolution 2015-2019 and beyond. Of Constitutional Designs, Regime Trajectories, Institutions and Constitutional Fidelities*, 68 "Jahrbuch des öffentlichen Rechts" 2020, vol. 68, p. 702.

[14] More recently see: I. Krastev, *Un Polexit pourrait se produire, non par stratégie, mais par accident*, 5 November 2021 Le Monde at https://www.lemonde.fr/international/article/2021/11/05/ivan-krastev-un-polexit-pourrait-se-produire-non-par-strategie-mais-par-accident_6101092_3210.

broader systemic context[15]. At the bottom line, it brings to the fore the ultimate question of mega – politics of belonging and identity[16].

1. The new doctrine on the rise

What we have witnessed in Poland from 2015-2021 (and beyond?) is the crucial process of transitioning from "resentment" as a vague emotion of rejection and critique of the unsatisfactory liberal *status quo* to the more formalised and institutionalised "politics of resentment". This transitioning is crucial because, through it, a resentment becomes anchored within mainstream politics and is articulated in the public sphere[17]. Just like Nietzsche's *ressentiment* was crucial in the slaves' revolt against their masters, resentment today needs a constitutional code of morality and legality, a constitutional channel to give voice to the emotion and to turn it into a constitutional and political variable. The resentment alone is an emotion in need of a constitutional doctrine, and the politics of resentment adds this crucial dimension of translation: a constitutional doctrine that competes with the dominant liberal constitutionalism and delivers on the promise of populist and emotion-driven narratives.

The new doctrine[18] goes beyond constitutional bad faith, however. It adopts a relentless abuse of constitutional arrangements and engages in rampant legal instrumentalism for the benefit of political ends. The law no longer has its fixed meaning. Rather it changes in response to the demands of politics. What truly differentiates the "politics of resentment" from mere contestation and dissatisfaction with the *status quo* is the *constitutional break* with, hitherto prevalent, constitutional principles, and the

html [accessed on 10.07.2022]; D. Sarmiento, *Poland is a problem for the EU precisely because it will not leave*, 16 October 2021 The Economist https://www.economist.com/europe/2021/10/14/poland-is-a-problem-for-the-eu-precisely-because-it-will-not-leave [accessed on 10.07.2022].

[15] For more see *infra* and my earlier iterations on the subject: T.T. Koncewicz, *Capturing the state and "polexiting" the Union – An essay in constitutional pessimism. Meet the new (un)constitutional doctrine, PART I* at https://reconnect-europe.eu/blog/polexit1/ [accessed on 10.07.2022]; T.T. Koncewicz, *Capturing the state and "polexiting" the Union – An essay in constitutional pessimism. Still paddling together? PART II* at https://reconnect-europe.eu/blog/polexit2/ [accessed on 10.07.2022]; T.T. Koncewicz, *Capturing the state and "polexiting" the Union – An essay in constitutional pessimism. From POLEXIT to E(U)EXIT: a rhetorical figure or (already) creeping reality? Part III* at https://reconnect-europe.eu/blog/polexit3/ [accessed on 10.07.2022]; T.T. Koncewicz, *W Puszczy PiS robi pierwszy wielki krok do polexitu,* https://wyborcza.pl/7,75968,22227617,w-puszczy-pis-robi-pierwszy-wielki-krok-do-polexitu.html [accessed on 10.07.2022]; T.T. Koncewicz*, POLEXIT. Myth and Reality*, „Czas Kultury" 2020, no. 4 at https://www.eurozine.com/spectres-of-polexit/ [accessed on 10.07.2022]; T.T. Koncewicz, *POLEXIT. Quo vadis POLONIA?* at https://verfassungsblog.de/polexit-quo-vadis-polonia/ [accessed on 10.07.2022].

[16] R. Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, "Annual Review of Political Science" 2008, vol. 11.

[17] T.T. Koncewicz, *Understanding the Politics of Resentment. Of The Principles, Institutions, Counter-Strategies and... the Habits of Heart*, "Indiana Journal of Global Legal Studies" 2019, vol. 27, issue 2, p. 501.

[18] This part draws on L. Rye, C. Fassone, T.T. Koncewicz, *Ideas of Democracy and the Rule of Law across Time and Space* at https://reconnect-europe.eu/wp-content/uploads/2019/12/D4.1.pdf [accessed on 10.07.2022].

wholesale rejection of the existing constitutional order. It advocates total *capture* (see *supra*) of the old, and allegedly corrupt, institutions, and in their place brings to life a new institutional order. Constitutional capture has an inherent spill-over effect. The seemingly isolated constitutional capture in Poland and elsewhere carries the risks of adverse consequences throughout the entire continent. Most importantly, it needs its own analytical and conceptual framework and toolkit. With this ambition in mind, a series of 10 commandments (they should not be read as exhaustive) will be set out. Such a systemic and holistic perspective allows us to see through the flurry of individual and often confusing boats.

1.1. New understanding of the role of a constitution

A constitution is no longer understood as a higher law of universal principles, but as yet another tool to protect the existence and uniqueness of the state. A constitution becomes an outlet for political expression of the rules adopted by the majority of the day. Liberal constitutions put a premium on conflict management, inclusion, and evolutionary (incremental) change that would be both open to diversity and accommodate it as a social and normative fact, a trust that is built over time among different components of the polity. A resentful constitution, however, thrives on disengagement and distrust and revolutionary tradition. It builds on the avowed objective of a clean slate and starting from zero and the drive to settle fundamental questions once and for all. Such a constitution of fear reflects a unified vision of the people and a monolithic state[19]. The people are defined by sameness, not differences. A constitution of fear is no longer a tool to protect against the state, rather it becomes a tool to entrench power and exclude dissent in order to create a flattened and barren public sphere. The competition among possible constitutional ideologies and visions of the most desirable models of the state is excluded. Such a constitution petrifies the partisan vision and credo of the powers that be, right here, right now. Such a constitution is an extension of the ever-present legal instrumentalism and drive to settle the score for past wrongs, exclude the traitors, bring to light their misdeeds, and vindicate the long-suppressed vision of the Polish nation and state. In the end, a constitution becomes a political manifesto of power, not a safeguard against the arbitrary power.

1.2. The Law, understood as the will of the majority & 3. Suspicion of inter/supra/national institutions

As there is no place for a veto emanating from within the government other than from the majoritarian parliaments, the politics of resentment targets institutions that otherwise might be seen as a brake on the power of the people's representatives. The institutions are only accepted if they are seen as "our" institutions and translate only messages that the ruling parties believe to be deserving of being present in the public sphere. Such an understanding leads to an important tweak to the established

[19] T.T. Koncewicz, *A Constitution of Fear,* at https://verfassungsblog.de/a-constitution-of-fear/ [accessed on 10.07.2022].

narrative: institutions that have been channeling (for populists "distorting") the rule of law (see commandment 10 below) must be dealt with as expeditiously as possible. All institutions – domestic, and supranational, and international – stand in the way of the new doctrine and, as such, will not be tolerated. With extreme majoritarianism as one of the new doctrine's cornerstones, disabling constitutional courts and judicial review has been the first order of the day for constitutional capture. Not surprisingly, the Polish Constitutional Court was the first one to go… The success of the doctrine depended on disabling the guardians in the first place.

1.3. Primacy of politics over law, and the political over the legal

The law has no independent standing within the constitution of resentment: it is understood as the outcome of political action, used and abused to achieve whatever objectives the current majority wants to pursue. The law becomes a blunt political instrument. It no longer tames politics, but rather it serves the political. For populists, liberal constitutions with their openness and inclusion are unnecessary inventions of elitist minorities and only distort the communication between the representatives of the people and the people themselves. As such, the law must be remodeled and harnessed so as to enable and protect the decision-making that at long last reflects the purified rule of the people. With this, one of the post-1945 paradigms according to which "politics must adapt to laws, not the law to politics" ("*Politia legibus, non leges politiae adaptandae*") becomes obsolete.

1.4. A new kind of political conflict

The politics of resentment in Poland transforms our traditional understanding of political conflict. While politicians and political parties in democracies routinely put forward competing visions for society and politics, they always stick to the language of probability in setting out their alternatives to the existing government. They are prepared to test their alternatives through procedures and elections, and accept that the constitution is the stage that frames political contestation. As liberal democrats, they share a commitment to the core values of freedom and equality, and the formal acknowledgement that their political adversaries have as valid a claim to represent the people as they do.

1.5. What are the constitutional courts for?

H. Schwartz has argued that the rise of the independent constitutional courts in Eastern Europe was remarkable and that these courts were ready to challenge and overturn important statutes, bills, and regulations. He concludes "and most (of these courts – T.T.K.) seem to have gotten away with it"[20]. Unfortunately, the last 6 years painfully show that this time the Polish Constitutional Court ("the Court") has not gotten away with it. The Court once a proud institution and an effective check

[20] H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, University of Chicago Press, Chicago 2000, p. XI.

on the will of the majority, is now a shell of its former self. It has become a dangerous and unhinged institution that uses judicial review both as a blunt sword to punish the opponents and to promote the illiberal agenda of the ruling majority.

Judicial review, one of the great achievements of the 1989 (r)evolution(s), is discarded with dramatic consequences. What has long been overlooked is the fact that the constitutional court is not seen as a mere obstacle to be removed. A constitutional court's role as one of the linchpins of a new liberal democratic order is transformed from a counter-majoritarian institution to an ally of the majority and a shameless government enabler[21]. As I have previously argued[22], three interconnected transformations have reshaped the face of what used to be the Polish Constitutional Court: i) judicial review has been *weaponised* and used against the opposition; ii) constitutional review has been *intrumentalised* in the process of implementing the political agenda; and finally, iii) judicial *rubber-stamping* of all unconstitutional schemes placed before it is enacted by the ruling majority. To this list might be added iv) the courtroom is *used* to create what Otto Kirchheimer termed "effective political images" that cast some political actors as villains ("justice has been done to them") and others as political heroes ("their virtuousness has finally been rewarded"). Political justice must be swift and leave public opinion with indelible and black-or-white memories[23]. Constitutional review acts as an enforcer of political justice. Quite a change from what we had aspired to back in 1989…

[21] For an incisive analysis: L. Garlicki, *Disabling the Constitutional Court in Poland?* (p. 63–69) and M. Wyrzykowski, *Bypassing the Constitution or Changing the Constitutional Order outside the Constitution* (p. 159–179) [in:] A. Szmyt, B. Banaszak, *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, Gdańskie Wydawnictwo Naukowe, Gdańsk 2016; W. Sadurski, *What Is Going on in Poland Is an Attack against Democracy?* at http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy [accessed on 10.07.2022]; T.T. Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense* at www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense [accessed on 10.07.2022]; T.T. Koncewicz, *Farewell to the Polish Constitutional Court* at http://verfassungsblog.de/farewell-to-the-polish-constitutional-court [accessed on 10.07.2022]; T.T. Koncewicz, *Statutory Tinkering: on the Senate's Changes to the Law on the Polish Constitutional Tribunal* at http://verfassungsblog.de/statutory-tinkering-senate-polish-constitutional-tribunal [accessed on 10.07.2022]. For a useful and detailed recap, see also the Helsinki Foundation for Human Rights, *The Constitutional Crisis in Poland 2015–2016*, Report (August 2016) at http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf [accessed on 10.07.2022]. More recently, see comprehensively W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 [accessed on 10.07.2022].

[22] T.T. Koncewicz, *From Constitutional to Political Justice – How and Why do Constitutional Courts Matter in the Authoritarian Regimes* at https://reconnect-europe.eu/blog/blog-constitutionalpolitical-justice/ [accessed on 10.07.2022].

[23] O. Kircheimer, *Political Justice. The Use of Legal Procedure for Political Ends*, Princeton University Press, New Jersey 1961.

1.6. Collectivity (community) over the individual (citizen) & Human rights ("dignitary rights") take a backseat to the interests of ethnocultural community

The constitution of fear (element 1 above) aims to transform the citizens into the anonymous, ethnic and pure people where individualism takes a backseat to the communal. Open and participatory citizenship are concepts alien to the constitutional language of the new doctrine. Those who plead their human rights to the detriment of the state, and even dare to take their grievances to the supranational level, are cast as traitors. Think, for example, of the backlash against those judges who have the courage to refer questions for preliminary rulings to the Court of Justice (on this also sections II and III, *infra*). Again, there is no place for nuancing here.

1.7. From the rule of law to the rule by law

Finally, most crucially, there is the changing understanding of the rule of law. The rule of law no longer frames the decision-making process, *but rather*, rule by law facilitates the expression of the will of the people (or their representatives). Rule of law is seen as an obstacle to protecting the collectivity and the common good. First, the Polish government has been insisting that the rule of law should be interpreted differently from what was hitherto accepted. Second, they insist that there is no agreement on what the rule of law entails in practice (application). Those two new elements transform the rule of law – one of the paradigms of the post 1989 transition. Poland has been steadily moving away from *the rule of law* and embracing *the rule by law*. Mere legality of the majority position suffices to legitimize the law.

1.8. The Counter-Constitution

Now combine elements 1-10, and what you get is a new constitutional design centred around the resentful counter-constitution that redraws constitutional boundaries by sheer politics of force. The force creates the facts on the ground and does not pay much attention to constitutional constraints. The qualification "counter"[24] emphasizes that this new constitutional setting is built in direct opposition to the liberal understanding(s) that prevailed post-1989[25]. While the content of the new anti-constitutional doctrine in Poland has been firmly established, what keeps changing are the plots, characters, and the doctrine's reach. With the counter-constitution as the crowning moment of the deliberate capture of the independent institutions and of the

[24] K.L. Scheppele, *The Social Lives of the Constitutions* [in:] P. Blokker, Ch. Thornhill (ed.), *Sociological constitutionalism*, Cambridge University Press, Cambridge 2017.

[25] J. Zajadło, T.T. Koncewicz, *Po co PiS-owi konstytucja? Po nic. Woli państwo bez prawdziwej Konstytucji* https://oko.press/koncewicz-zajadlo-po-co-pis-owi-konstytucja-po-nic-woli-panstwo-bez-prawdziwej-konstytucji/ [accessed on 10.07.2022].

incremental transformation of the citizens into captive minds[26], the free-floating resentment has finally found its (un)constitutional manifestation and home…

How does this internal strife translate then into the European level of governance?

2. The EU meets Poland

If this is your land, Where are your stories?

E. J. Chamberlin, *If this is your land, Where are your stories? Reimagining Home and Sacred Space*[27]

2.1. The constitutional design in error?

Read against the background of the new doctrine (*supra I*), Poland (and earlier Hungary) now proposes a new understanding of the decision on integration: we, Europeans, differ in terms of our understanding of the constitutional essentials, because the rule of law in Poland means something different than elsewhere (and there is no consensus in this regard at the level of a common understanding of, for example, the elements of judicial independence. The juxtaposition of values stabilized at the level of the European Union member states, with our textual understanding of the community and values that comprise this community, leads to an inevitable collision with this view from Poland.

The question remains, however: why, after 2015, was the European Union missing in action in the case of Hungary, and now Poland? The European Union was surprised by the constitutional crisis and the dispute over values because it had been founded on the premise that the community of states would be a celebration, rather than negation, of liberal democracy. The establishment of the first Community was accompanied by the presumption that none of the states would question its foundations and the common system of values that determined the shape of the post-war European consensus. The Communities were conceived as a celebration and triumph of liberal democracy. Today, however, we can see that the assumptions of this post-war constitutional order do not work. We are dealing with a "constitutional design in error"[28]. What is this error in the constitutional foundations of the European Union? The community cannot protect itself, the integrity of the EU legal order, and the citizens of the member states from their own states, because in 1951 no one predicted that the liberal foundations of the post-war European order would be called

[26] On this fatal transition see: T.T. Koncewicz, *From Captured State to Captive Mind The authoritarian train's last stop* at https://verfassungsblog.de/from-captured-state-to-captive-mind/ [accessed on 10.07.2022].

[27] J.E. Chamberlin, *If this is your land, where are your stories?: reimagining home and sacred space*, Pilgrim Press, Cleveland: Ohio 2004.

[28] T.T. Koncewicz, *European Union and Democratic Backsliding, Constitutional design and change* [in:] X. Contiades, A. Fotiadou (eds.) *Routledge Handbook of Constitutional Change,* Routledge 2020 with further references.

into question. Today, Hungary and Poland place this danger on the agenda. This, in turn, poses a new difficult question: how can we rethink the assumption about common values in a situation where there are member states that, first, are not ready to read the common values in a collaborative and consensus – friendly fashion, and secondly, propose their own vision of functioning in the community?

Joining the European Union in 2004 was simply a *moment* in time. The accession to the Union, however, raised a question (which at that time was ignored): how do we function in a community and how do we navigate integration, which is a *process*? How do we operationalize our participation by building standards? Here we have suffered spectacular failures. In a sense, the basic paradigm of 1989 – that we shall not turn back from liberalization and democratic changes – is broken. In 2015, this paradigm was undermined as the transition from one stage to another was reversed. Must we now go back to square one and try to redefine our values? The biggest challenge is: how do we build a constitutional context around common values, knowing that a large part of Polish society does not understand what provisions are contained in the Polish Constitution? But building a constitutional context is a task that goes beyond, and is much more difficult than, adding new institutions and creating procedures. We cannot continue to focus only on the institutional aspect of Polish democratic consolidation, because we will make the same mistake that we made in 1989. In 2022, we must be aware that Poland's membership of the Union also entails an obligation towards the community that Poland is co-creating.

2.2. Understanding art. 2 of the Treaty on the European Union

Few remember that in the Treaty of Paris of 1951, the Community was based on one fundamental assumption: we unite because we believe that there are common and basic values – constitutional essentials – that, despite our differences, make us want to live together. These common values were not just a text but were rooted in a standard resulting from the legal culture built up over generations. Yet the reference to values in art. 2 of the Treaty on European Union (TEU)[29] should be read as having two dimensions: the *acceptance* (the Union is founded on shared values) and the *practice*[30]. The former speaks to a textual perspective and the grand narrative of the

[29] Art. 2 TEU reads. "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". In French: "L'Union est fondée sur les valeurs de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de l'État de droit, ainsi que de respect des droits de l'homme, y compris des droits des personnes appartenant à des minorités. Ces valeurs sont communes aux États membres dans une société caractérisée par le pluralisme, la non-discrimination, la tolérance, la justice, la solidarité et l'égalité entre les femmes et les hommes".

[30] For theoretical discussion see: A. Williams, *The Ethos of Europe*, Cambridge University Press, Cambridge 2016; M. Frischut, *The Ethical Spirit of EU Law*, Springer 2019; N. Walker, *The Philosophy of European Union Law* [in:] D. Chalmers, A. Arnull (ed.), *The Oxford Hanbook of European Union Law,* Oxford University Press, Oxford 2015, pp. 7-11. On art. 2 TEU with further references T.L. Boekestein, *Making Do with What We have: On the interpretation and Enforcement of the EU's Foundign Values*,

values, the latter is concerned with the context and is praxis centered. Only when values are translated into, and function through, virtues does the reference to the values in the Treaties take on a real meaning. Values, when practiced, help build the praxis and this in turn helps to nurture a sentiment of indeed being shared and experienced together. Values without virtues resemble an empty shell: full of constitutional rhetoric, but not much more. The member states, in good faith, sign the treaty and commit themselves to a certain discipline that goes beyond the interests and preferences of any one state. In this way they recognize that such a discipline will be binding on them in their collective actions in the European public sphere. The acceptance tells only half of the story, however. The outcome of the exchanges is recognized as legitimate if it respects the procedural framework(s) that discipline and constrain these exchanges. The compromise that binds all parties to the original consensus must be discourse-based. Crucially, though, for the discourse to have this tone – setting and defining impact – it must be anchored in at least some recognition of commonality and essentials and the responsibility for the common good that this discourse serves. We are in the Union together, and the element of sharing must not only be present throughout the process, but also assumed at the very beginning. The problem is not so much that the values have been brought within the Treaty's normative space, but rather the adoption of the counter-factual assertion that the values are shared. Being founded on shared values not only implies that at any given moment all the values should be indeed practiced and respected. It also acknowledges that differences will be ironed out based on the overarching belief that an initial anchoring in shared commonalities convinced all the parties to the consensus to come together. Founding presumes good constitutional faith in talking through our differences and bargaining to arrive at the consensus – a friendly constitutional arrangement. The anchoring is not about imposing values but inviting actors to sit down and talk about possible tensions in the practice of the consensus. Practice follows founding. The latter secures the former in that practice will always be read considering the common founding.

The commitment that keeps us together is to the essential and principled core of the European public space, and art. 2 TEU expresses this most basic commitment that all parties undertake when they decide to join. The commitment is not based on exact identity but rather on the principled commitment to the essentials that make up the core. Indeed "We might note that many important principles of law have solid cores that can be legally enforced even if there is disagreement about where the boundary is at the margins. Most general principles have clear cores and contestable margins, and it is no argument against the existence of the clear core that one can imagine cases at the margins over which one can reasonably argue"[31]. The problem is not with the acceptance of this starting point but rather with the articulation of the

"German Law Journal", (2022) vol. 23 p. 431 and T.T. Koncewicz, *European Values*, [in:] S. Garben, L. Gormley (eds.), *Oxford Encyclopedia of EU law* (2022, *forthcoming*).

[31] L. Pech, K.L. Scheppele, *Is the Rule of Law Too Vague a Notion?* at https://verfassungsblog.de/the-eus-responsibility-to-defend-the-rule-of-law-in-10-questions-answers/ [accessed on 10.07.2022].

explicit contents and parameters of the core and the contours of the behavior that will not be tolerated when judged against the essential core.

When we agree to share, the underlying assumption is that we will be able to draw the red lines of what is prohibited and ultimately counteract such behavior once the lines so drawn are overstepped. Otherwise, the recognition of commonality loses much of its purpose. Membership ethos explains that member states are bound to adopt a certain attitude toward other actors, and is reflected, among other things, in their duty to have due regard to the Union system and abide by the most fundamental Treaty rules. Today, this idealized notion of membership resembles a myth in search of both the storyteller and the public interested in listening. As European societies evolve and advance, it must be asked whether "we the European peoples" are ready to continue living together in a constitutional regime, internally divergent, and one that is ready to respond to the exigencies and demands of new realities. James Tully's canoe metaphor eloquently summarizes the challenge, promise, and dream behind this question: "Perhaps the great constitutional struggles and failures around the world today are groping towards the third way of constitutional change, symbolized by the ability of the members of the crew of the canoe to discuss and reform their constitutional arrangements in response to the demands for recognition as they paddle. A constitution can be both the foundation of democracy and, at the same time, subject to democratic discussion and change in practice".

Narrative and messaging matter here. The Union does not impose anything on us. Being in a community means that its members voluntarily accept certain rules of conduct that bind everyone as a condition of living together. Diversity (from the perspective of states – the members of the community) constantly seeks compromise with the pursuit of uniformity (the perspective of the Union). Integration is a process, not a zero-sum game following the antagonistic logic of "Us – good vs. Them – bad," and "sovereign states vs. a non-sovereign Union". When you become part of a community, benefits go hand in hand with responsibilities. If you do not respect the latter, the rest of the community may one day decide that they no longer want to play for the same team as you. At this point, you are relieved of your duties, but at the same time, you lose the benefits that the community guaranteed. The EU only enforces the terms of the contract we signed in 2004. The element of entrusting the courts as independent and impartial arbitrators to settle conflicts that the states would not be able to resolve among themselves has been, from the very beginning, the foundation of the EU contract.

2.3. The Court of Justice and constitutional crying out in the wilderness?

The respect for courts and their decisions and the trust in the reformative power of law have been at the forefront of European integration and defined the post-war liberal consensus. The authority of the Court of Justice of the European Union (hereinafter referred to as "the CJEU" or "the Court"), the binding nature of its rulings, and the emancipation of national courts as courts of general jurisdiction

in the sphere of Union law, were essential parts of the original consensus that paved the way for the first Communities. The respect for the law in art. 19 TEU has defined the ethos of the Court[32] and anchored its mission within the telos of the European integration[33]. The destructive and antagonistic self-help and retaliation were ruled out and so was the contractual principle *do ut des* according to which "I perform as long as you perform". Rather states were obliged to comply with their Community obligations irrespective of whether others do the same. It was left to the courtroom with its own logic, argumentative framework(s) and a set of principles, to define the content and extent of the obligations undertaken on Accession Day. For the community of law to survive, any unilateral action by the states was to be banished from the Community vernacular. All the disputes were to be dealt with within the framework of the European judicial system and the judgments by the Court of Justice would be binding on all parties to the contract. In this way post-war liberal constitutionalism has delivered on its promise and goal of "never again". The latter was underpinned by three fundamental propositions: i) the Constitution is the ultimate law of the land that ii) disciplines the fleeting majorities through the regime of constitutional rights and independent institutions. Finally, iii) every political power is a power constrained by courts. The supranational courts, the Court of Justice, and the European Court of Human Rights, have a special constraining role to play here. The pledge of "never again" was supposed to be the long-lasting lesson from the past.

The place of the Court in the EU legal system must be read against this more systemic and historic background. It has been designed so that states would have a very limited possibility of interfering with its jurisprudence[34]. In the Union, all members follow the law equally and unconditionally, not only when they are comfortable with it, and if others follow it too. There is a peculiar egalitarianism in the courtroom: powerful Germany has one vote, just like little Luxembourg. In the courtroom, there is a language of rules and regulations, to which ad hoc politics yields – it

[32] On the role of art. 19 TEU K. Lenaerts, *How the ECJ Thinks: A Study on Judicial Legitimacy,* "Fordham International Law Journal" 2013, vol. 36, p. 1303; T. Tridimas, *The Court of Justice of the European Union*, [in:] R. Schutze, T. Tridimas (eds.), *Oxford Principles of European Union Law*, Oxford University Press 2018, in particular pp. 581-609; R. Barents, *Remedies and Procedures before the EU Courts,* Wolters Kluwer 2016, in particular pp. 107-125. More recently with further references T.T. Koncewicz, *The Core of the European Public Space. Revisiting Art. 19 TEU in Times of Constitutional Reckoning* at https://verfassungsblog.de/the-core-of-the-european-public-space/ [accessed on 10.07.2022].

[33] C.N. Kakouris, *La Mission de la Cour de Justice des Communautés Européennes et l'ethos du Juge,* "Revue des affaires européennes" 1994, no. 4, p. 35.

[34] T.T. Koncewicz, *Filozofia europejskiego wymiaru sprawiedliwości. O ewolucji podstaw unijnego porządku prawnego,* (with the foreword by Professor Martin Shapiro, Warsaw 2021. On the book https://reconnect-europe.eu/news/new-book-on-the-philosophy-of-the-european-judicial-system/) [accessed on 10.07.2022]. It brings together various arguments and strands of research on the role and place of the Court of Justice in post-war liberal European settlement as well as the misunderstanding and hostility the Court generates in Poland now. For the argument in a much condensed form, see my https://konstytucyjny.pl/t-t-koncewicz-trybunal-sprawiedliwosci-unii-europejskiej-i-unijny-etos-sadzenia-najpierw-sprobuj-zrozumiec-instytucje-a-dopiero-potem-krytykuj [accessed on 10.07.2022].

is civilized and curbed by them. If you want to win, you have to convince others through the strength of your arguments, not the size of the jar full of spruce bark beetle brandished in the courtroom by a representative of the government as an argument in favour of… relentless logging in the UNESCO-protected Białowieża Forest[35]. Such populist theatrics may appeal to voters' emotions, but in the courtroom, it is laughable and discrediting. The Law and Justice Party is afraid of the Court of Justice because, in the courtroom, it must speak to it in the language of the court and follow the logic of the courtroom. Ultimately, it is the authority and force of arguments that will prevail, rather than arguments of force.

When one state fails to fulfill its obligations, the others cannot unilaterally close their borders and block citizens or goods of the former. Instead, they must take the matter to a court of law, wait for a decision, and strictly comply with it, regardless of its content. This is because, by joining the Union, the states concluded a contract with each other, one of the key points of which was to respect the competences of the Court of Justice, its jurisdiction, and the obligation to comply with any decision issued by the so-recognized court. For the obligation to be credible from the outset, it had to be respected not only *ex post* (when the judgment was delivered) but also *ex ante* (when the case is still pending). Only then do the common market and the political community make sense. The case-law of the Court must be read as a constant exposure of the consequences of the Union's status as a community (union) based on the rule of law. Whenever the rule of law has been threatened, the Court, based on its role as a guardian of the Treaties, has always been ready to make the necessary intervention.

Words do matter here. The jurisprudence of the Court on the so-called reforms of the justice system in Poland is a response to the first steps towards the "POLEXIT", that is, withdrawing Poland from the Union[36]. Attacking the preliminary ruling procedure, which is a cornerstone of European integration, instituting disciplinary proceedings against the judges who apply European law, feigned gestures supposedly inhibiting the takeover of the Supreme Court, rejecting the Court's judgment of 19 November 2019, brazenly disrespecting its interim order of 9 April 2020, and inciting the fake constitutional court to rule on the constitutionality of the very foundations of the original consensus – these are all, unfortunately, manifestations of a no longer creeping, but rather galloping, POLEXIT.

[35] T.T. Koncewicz, *The Politics of Resentment and First Principles in the European Court of Justice* [in:] F. Bignami (ed.), *The EU in populist times. Crises and Prospects*, Cambridge University Press, Cambridge 2019.

[36] On this case law see S. Platon, *Court of Justice Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: Miasto Lowicz*, "Common Market Law Review" 2020, vol. 57, p. 1843; T.T. Koncewicz, *The Existential Jurisprudence of the Court of Justice of the European Union. An essay on the judicial incrementalism in defence of European First Principles* [in:] K. Szczepanowska-Kozłowska (ed.), *Profesor Marek Safjan znany i nieznany. Księga jubileuszowa z okazji siedemdziesiątych urodzin,* Warszawa 2020. For a holistic approach to the case law consult papers published in „Palestra" 5/2020 at https://palestra.pl/pl/czasopismo?rocznik=2020 [accessed on 10.07.2022].

In doing so, Poland puts itself outside the community and loses what remains of its "legal credibility." There is one place for a state that wants to play only for itself and emphasizes its uniqueness against others: outside the community. However, when properly understood, POLEXIT goes beyond only this. Attacks on the Court not only marginalize Poland within the wider political community and ultimately push it out of the EU, but also transforms a Polish citizen back into a servant of the state and a second-class European citizen, deprived of the protection offered to citizens in other countries by European law and the court. It is a return to a world in which a citizen has no chance – he must shine with the reflected light of the state and obey its will. He is supposed to live in the shadow of "a constitution of fear". Here we come to the point: what is the spirit of European law?[37] Is it just a slick-sounding metaphor? Thanks to European law and the jurisdiction of the Court of Justice, a citizen lives "at the edge of systems" and no longer belongs exclusively to the territory delimited by the borders of "his/her" state. Citizens get to make their own choices and decide where they want to work or buy a car. European law has survived for more than half a century precisely because it has been applied to individual citizens' cases in the local courts of the member states. The spirit of integration, therefore, consists in liberating the citizen from the corset of the all-powerful state in whose shadow the citizen has lived so far, and in the strict observance of the judgments issued. The contradiction between the European vision and ideal, and the doctrine that the Law and Justice Party lives and breathes, is therefore fundamental. While, according to the party's narrative, the citizen is to live in the shadow of the "constitution of fear," which allows the state to interfere with his or her rights and life without limits, post-war Europe promotes a constitutional culture of restraint and moderation. While Law and Justice strives at all costs to squeeze the citizen into the state framework, the Union frees us from this framework and opens new opportunities. While European law gives a citizen a chance to win against the powerful state, the latter would like to see its EU obligations as a worthless piece of paper. For the Law and Justice party, a good citizen is a controlled citizen, convinced that the state's decisions are always good for him or her and meekly accepting them.

On the ruins of the rule of law it is the citizens who must ask about the far-reaching European consequences (for themselves) of current Polish policy, where everyone is our enemy plotting to hurt Poland – the chosen one among nations, a state that questions the foundations of the Union, and rejects the authority of the courts and judicial decisions. Citizens must understand that electing a party that rejects the separation of powers and tolerance for others, and that promotes chauvinism and divisions while elevating distrust, pettiness, and the desire for revenge to the rank of political "virtues", comes at a cost that will one day have to be paid. Citizens who care about Europe and Poland in Europe cannot agree to the rejection of the

[37] T.T. Koncewicz, *On the rubbles of the rule of law*, Eurozine at https://www.eurozine.com/on-the-rubble-of-the-rule-of-law/ [accessed on 10.07.2022].

fundamental core of integration and European law. The legalistic autocrats[38] of the Polish government, backed by the "authority" of the unlawful group of persons masquerading as judges, show us how the captured state works. Today we can no longer deny that a spectacle is taking place in front of our eyes, in which everyone plays their role on the board of the political game called "How to manipulate law and institutions?" and "How to destroy law and institutions when they resist?". It is scary to think what will happen when citizens buy (or have they already bought?) this politically fabricated show.

Yet this domestic exit is only half of a developing story.

3. From POLEXIT to E(U)EXIT and back. More than a metaphor?

Unfortunately, the spinelessness of the EU, the blatant incompetence of the European Commission and of its leadership do not help, to say the least. Those among us who – despite all the let downs and discouragement – still believe, and want to believe, in a peaceful, united, and integrated Europe as a value that keeps European peoples together, are left all alone. It is time to shout out bluntly that today it is the collective malaise and escapism of the EU institutions that enable the capture that marches on and produces effects that are and will be impossible to roll back. Rome has been burnt down and yet the Commission still fiddles by dialoguing with the arsonists, by slavishly sticking to its futile repertoire of grand gestures and press releases full of empty promises... Is anybody still listening in Brussels? Or has turning the other cheek simply become the new normal for the European bureaucrats? The shady pact of selling out the rule of law to save the budget (and that is a mild description of the Commission's capitulation and institutional humiliation)[39] only corroborates the fact that the, once proud, guardian of the Treaties has become a puppet at the hands of the member states. It is high time to recognize this and call a spade a spade, rather that pretending that Commissioner Jourova has something interesting to say. The European constitutional tragedy sees the Commission becoming part of the problem, rather than a solution… The Union stands hollowed out and bereft of any guiding principles other than the internal market[40]. This is as bad as it gets.

All this European procrastination, and the ultimate dereliction of duties by those who should be at the forefront of saving the last remnants of the European rule of law and legal credibility, unfolds to the accompaniment of sovereign war

[38] K. L. Scheppele, *Autocratic Legalism*, "The University of Chicago Law Review" 2018, vol. 85, p. 545.

[39] A. Alemanno, M. Chamon, *To Save the Rule of Law you Must Apparently Break It* at https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/[accessed on 10.07.2022]; A. Alemanno, *The EU Parliament's Abdication on the Rule of Law (Regulation)* at https://verfassungsblog.de/the-eu-parliaments-abdication-on-the-rule-of-law-regulation/ [accessed on 10.07.2022].

[40] For more detailed analysis see: T.T. Koncewicz *How the EU is Becoming a Rule-of-Law-less Union of States…*

rhetoric at the domestic level. Here the soloists are representatives of the government, outdoing themselves in their ignorance, judicial brawling, and tearful martyrdom scenes in the hope that their electorate will notice and appreciate it. This is a spectacle in which a pseudo-constitutional court speaks about the compliance of the preliminary ruling procedure with the Polish Constitution, holds trial over the legality of the decisions by the Court, and creates the appearance of legality, or in Kircheimer's parlance, effective political images.

This new illegal business as usual becomes the new normal and nobody seems to care anymore[41]. Meanwhile, the parliament continues legislative efforts to take over the remnants of an independent judiciary and render the Polish courts asking questions to the Tribunal as pointless. From a tragicomedy, this performance turns into a drama of the rule of law when the Deputy Minister of Justice fights against rebellious judges using an internet-media campaign and loyal servants, and one by one supranational courts are declared to have no legal authority in Poland. And the EU is watching all of this while sending a new flurry of protest letters and concocting risible "compromises" with the autocrats. Yes, words do matter here, like never before.

This leads us to a more general takeaway. We have focused too much on how the capture in Poland has changed the constitutional profile of that state. Given the ample evidence, the time has now come to recognize that the deliberate process of removing "the community of law"[42] component from the Union legal order alters the constitutional profile of … the Union itself. The "community of law" no longer serves as the guiding star for actions of the institutions. The once cherished, "community of law" becomes an empty slogan. From a non-negotiable asset, it has been downgraded to yet another card to be played and traded should the institutional calculus so demand. Right before our eyes, the EU is becoming a rule-of-law-less union of states. This is exactly how and when domestic POLEXIT meets supranational E(U) EXIT. This is not yet another allegoric figure (which I very much wish it would be) but rather a matter-of-fact recognition of surrounding tragic reality. Words do matter after all.

As vital as the courtroom is, and has been, in the history of European integration, its promises and opportunities must be read in the light of its inherent limits. The supranational legality will come into being as fully shaped only when the judiciary *and* the political work in tandem and in collaboration. Both the *judicilization of the politics* (with shrinking space for political discourse) and the *politicization of*

[41] On this: T.T. Koncewicz, *When Legal Fundamentalism Meets Political Justice*, „Israel Law Review" 2022, p. 1-58, available at https://www.cambridge.org/core/journals/israel-law-review/article/when-legal-fundamentalism-meets-political-justice-the-case-of-poland/99F9CFE7FE8196B568D4A1464D811890 [accessed on 3.10.2022] and also *De la justice constitutionnelle à la justice politique*, "Revue des droits et libertes fondamentaux" 2020, vol. 79 at http://www.revuedlf.com/droit-fondamentaux/dossier/de-la-justice-constitutionnelle-a-la-justice-politique-quest-ce-que-les-polonais-ont-perdu-en-2015-et-quont-ils-obtenu-en-retour/ [accessed on 10.07.2022].

[42] L. Pech *et al.*, *Meaning and scope of the rule of law* at https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf [accessed on 10.07.2022].

the judiciary (with concerns over the growing role of the courts in the political process and choices that should be left to democratically responsible leaders) must be front and center. Judicialization of the supranational governance must be reconstructed as a joint enterprise which assumes a collaborative reading of the European consensus. Given the disagreements that go to the heart of the supranational consensus, the role of the political institutions of the supranational governance must be acknowledged. These institutions take part in the operation of, and contribute to, the practice and legality of the supranational legal order by using their own competences and procedures. Just as the judiciary has its own fidelities to the law and values, so does the political. Supranational legality needs both if the commitments to the consensus are to be credible and if this union is to stand a chance and to move forward…

4. Learning from the past or still repeating the same mistakes?

As argued in section II of the present analysis, the world of European post-war constitutionalism has been defined by restraint and moderation. However, this world and its precepts are alien to the new authoritarians. The stage for the principal confrontation between two kinds of opposing legalities has been set. By rejecting the Court, capturing the independent judiciary, hollowing out judicial review, attacking the preliminary ruling procedure, and altogether rewriting the liberal rule of law, Poland is turning its back on the community of law and the principles that generations of Poles yearned for post-1945, and now seem… shockingly ambivalent about.

Where does it leave us today? It is not an easy question to ponder. In 2022, the Polish *raison d'état* needs a civic narrative, reflection, and a discussion over the future shape of Europe and its place within it, in place of the current yammering and sowing of lies that poison hearts and souls. It was Polish citizens who voted for accession. It is highly probable that the same citizens will soon have to vote in favor of our staying in the Union, given the unprecedented step of the "pseudo–constitutional court" undermining one of the cornerstones of European integration in the form of the preliminary ruling procedure and the intimidation of judges who apply European law. Who would have thought that, 16 years after Poland's accession to the EU, it would be necessary to remind ourselves about the foundations of the EU legal order, to which we have committed ourselves voluntarily, and that such a discussion would take on existential importance in the face of the impending (or already creeping some might argue) POLEXIT.

Today we live not only in a state devoid of any checks and balances. We live in a state in which the authorities can do virtually anything, all in times of a global pandemic, which is used as a convenient excuse to further consolidate power and curtail civil rights. The efforts of the last five years to take over independent institutions are falling into a ghastly logical whole at the worst possible moment for both Europe, and our civic rights and liberties. While the financial crisis and Brexit are

undoubtedly events that make us reflect on the future of the European Union and the optimal model of European integration, the crisis of values in the form of one member state of the EU undermining liberal democracy, the rule of law, and the rights of minorities as well as attacks on independent courts, strikes at the very axiological foundations of the Union and question its continuity.

Therefore, placing the foundations front and center becomes a key factor. We cannot take Poland's membership in the Union for granted and treat it as an element of our everyday life. The EU citizens' freedoms to travel, work, shop in Berlin, holiday in Greece, were not given to us once and for all just because Poland is the chosen nation that always deserves something. Have we forgotten that a border separated us from Europe only 18 years ago and a passport was necessary for travelling? When we give up on the community and violate the obligations that define our commitment to the community, we must also be ready to give up on the normative opening and all the opportunities and subjective rights that come with belonging to a community of law and common values. Reminding ourselves about it should be a civic response to the hateful poisoning of the hearts and souls of Poles by the narrative (laced with ignorance) of an evil Europe plotting against Poland, not appreciating our individuality, going after our sovereignty, *et cetera*. It is necessary to go beyond the micro-perspective dominating in Poland, determined by disputes taking place "here and now," in favor of macro-reflections: "what is next?". The fundamental question is how this "here and now" will affect our lives and change them in the future.

Thinking about Europe in terms of community and the values that bind European states and nations is of particular importance in Poland in A.D. 2022. The "Polish constitutional tragedy" of the last six years must be a constant warning against the civil *non possumus* and the disastrous consequences of turning away from Europe, with all its flaws and imperfections. Let us think about Europe, let us vote for Europe (and Poland in it), and let us understand the far-reaching disastrous consequences of the current Polish politics.

Epilogue… or a new Prologue? Looking beyond here and now

The events of recent years, together with the never-ending announcements of retaliation against the Court, judges, and now the outright assault on the integrity of EU law by means of the captured and weaponized constitutional review, are all part of the open war of the Polish government with the Court of Justice. These events fully justify posing the following question: *Quo vadis Polonia?* What about your willingness to respect commitments, judgments, and procedures you entered into voluntarily?

As I write these words, the time has come to finally recognize that the entire post-1989 constitutional profile of Poland has been irrevocably affected. Tinkering here and there, while foolishly hoping that the EU will come to our rescue, must be finally thrown out the window. The European stakes (and costs) of the domestic

constitutional reshuffling happening right before our very eyes should be spelt out in so many words[43]: either respect the core rules of the community that you voluntarily accepted on Accession Day *or* leave. With the emasculation of constitutional review and the incapacitation of the judiciary, the very paradigms that have shaped Polish democratic transformations in and post-1989 have been called into question[44]. When law and institutions begin to serve ruthless politics, instead of civilizing and constraining it, one of the foundations of the post-war European order is destroyed – the belief that any political power must be limited and controlled by institutions independent of it, above all, the courts. Honesty is needed more than ever, and we must be aware of what is at stake in the uncompromising political game that rages on. It is no less a choice between our participation in the European legal community, whose rules, and principles we accepted voluntarily in 2004 and which had been the dream and aspiration of entire generations of Poles after 1945, or… a definitive POLEXIT.

And yet, as has been argued here, to make this sorry state of affairs even more miserable, POLEXIT has now found a powerful supranational ally. With the "community of law" happily brushed aside by the institutions and the unbound Masters of the Treaties, we are staring into the eyes of E(U)EXIT: Institutions that were designed to act as the safety-valve and emergency brake against the authoritarian impulses of states, are now playing their own part in enabling and shepherding the dangers they were supposed to avert.

The dream of the Founding Fathers back in 1951 was that law, not war, would become the device to reconcile and frame the diverse interests of Member States and ensure that 'never again' would be indeed woven into the fabric of the European continent. It was expected that the language and behaviour appropriate to a courtroom would prevail with its trust in the power of argument, not simply antagonistic arguments of power. While this shift and belief were emblematic of the post – war settlement, they seem now to be on the defensive for the reasons explained in the preceding analysis. Despite all the historic baggage and traumatic experiences, we the Europeans do not seem to be learning from the, after all, not-so-distant past. The constitutional decay moves beyond the domestic and spills over into the supranational. We are living in times which favour constitutional bad faith, dishonesty, and a comfortable looking the other way when something should have, and must have, been said and done, even if only for symbolic reasons.

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[43] J.-W. Müller, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, "European Law Journal" 2015, vol. 21, p. 141.

[44] M. Wyrzykowski, *Trwa wojna przeciw konstytucji*, (*The war against the Constitution rages on*) at https://kulturaliberalna.pl/2021/03/02/trwa-wojna-przeciw-konstytucji/ [accessed on 10.07.2022]; M. Wyrzykowski, *W 2021 Konstytucja leży podarta na strzępy*, (*In 2021 the Constitution lies down shredded into pieces*) at https://kulturaliberalna.pl/2021/03/09/w-2021-konstytucja-lezy-podarta-na-strzepy/ [accessed on 10.07.2022]; M. Wyrzykowski *To nie kryzys, to wojna,* (*It is not a crisis. It is a war*) at https://magazynpismo.pl/idee/rozmowa/miroslaw-wyrzykowski-to-nie-kryzys-to-wojna/?seo=pw [accessed on 10.07.2022].

In times like these, constitutional symbols of decency and resilience do matter more than ever and yet we have none left to fall back on. It is pertinent to quote here Professor David Edward, who with his usual perspicacity and clarity both warned and encouraged us. He argued: "Those of us who are old enough to remember the times of despair, then of hope and optimism, and now perhaps of bewilderment, can nevertheless look back and reflect that, in spite of all the hostile rhetoric, the achievements of the past half century have been immense and the community of interest amongst our peoples is real"[45]. These words should resonate now in the capitals of Europe and help to rediscover the spirit of the First Principles that laid foundations for the ever closer union among peoples of Europe[46].

And yet, as of now "the ever-closer union" continues to be bound together by the fact of statal membership with the citizens still lurking in the shadow of this state-driven narrative. The design is still dominated by a Union of states and, at best, market-driven, and self-interested economic operators. The challenge before the supranational legal order clearly goes beyond institutional and procedural dimensions and technocratic tinkering. It starts from and recognizes that we need to move beyond *ad hoc* patching up of the sinking ship and embrace a more systemic rethinking of the system's ailments and their causes. If the union of states does not make a leap towards *community of values,* shared legality and practice enforced in the name of the European peoples and explained as such, the EU's vocation and mission will be constantly called into question. Only the sum of *commitment of the member states,* a *special ethos of membership*, *novel justificatory narrative(s),* and *triggering the civic register* can ensure the long-lasting credibility and legitimacy of the supranational design and governance.

Without doubt, the question of who will be the constitutional storyteller of the European *First Principles* and the contours of the overlapping consensus is, and will be, crucial as the European Union ponders and tries to narrate its future story[47]. For any myth to survive, though, supranational governance and design need not only crafty storytellers, but also a good story to tell, an engaged audience to listen, counter-strategies to defend the myth(s), and counter-narrative(s) to explain and justify the original consensus that first brought states and European peoples together[48]. The European Union seems to be falling short in all these registers of myth-telling,

[45] Manuscript on file with the Author.

[46] On the symbolic meaning of the union consult T.T. Koncewicz, *L'Union de droit supranational comme premier principe de l'espace public européen. D'une union toujours plus étroite entre les peuples d'Europe mis à l'épreuve?* [in:] *La Collection débats et documents de la Fondation Jean Monnet pour l'Europe,* Lausanne 2021, available at https://jean-monnet.ch/en/publication/22e-numero-de-la-collection-debats-et-documents/.

[47] P. Blokker, *A New Narrative for a Citizens' Europe* at https://reconnect-europe.eu/blog/a-new-narrative-for-a-citizens-europe/ [accessed on 10.07.2022] and his *How to narrate the future of Europe?* at https://reconnect-europe.eu/blog/how-to-narrate-the-future-of-europe/ [accessed on 10.07.2022].

[48] On this, see my *If you are Europe, what is your story in 2022?* at https://verfassungsblog.de/if-you-are-europe-what-is-your-story-in-2022/ [accessed on 10.07.2022] and *What Does it Mean to be a Member State of the Union in 2022 and beyond?* at https://reconnect-europe.eu/blog/what-does-it-mean-to-be-a-member-state-of-the-union-in-2022-and-beyond/ [accessed on 10.07.2022].

defending, and building new myths for the generations to come. As the supranational legal order moves forward, ponders and narrates its myths, the memory of why the states joined in 1952 is, and will be, of fundamental importance. Amnesia and inability to critically retool the founding narrative(s) and adapt them to the changing world already set free the majoritarian politics and shattered one of the founding myths of the first Communities that of the constrained political power and the overlapping, and not perfect, consensus. All this as part of the never ending and elusive search for the workable equilibrium between the existential diversity of the parts on the one hand and the necessary minimum sharing among all the parties to the consensus on the other. This is the true challenge of *mega-politics* that the supranational governance, design, and legality face today and in the foreseeable future.

When laws and institutions come to serve politics, rather than holding power in check, a cornerstone of the post-war European order is lost. Let us be mindful of what could be at stake. Do we stay in the Europe to which generations aspired after WWII, and thereby recognize the precepts we have accepted in 2004? Or do we opt for Polexit – with no going back. While the choice remains always ours, the open questions are the ultimate statements in constitutional pessimism.