Common Market Law Review **55**: 1–14, 2018.

GUEST EDITORIAL

A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines

1. *What is at Stake?*

The Union's "rule of law crisis" is a multi-faceted phenomenon.[1] Of particular concern are Member States where ruling majorities wilfully uproot the separation of powers. The current focus is very much on Poland. The Polish government has taken extensive measures that have undermined the independence of the Constitutional Tribunal. It has strengthened its influence on the National Council of the Judiciary, which selects the judges. It has dismissed more than 150 (out of 700) presidents and vice presidents of ordinary courts. It has forced almost 40 percent of Supreme Court judges to retire.[2] It has raised the overall number of Supreme Court judges, thereby creating the need for up to 70 new nominations. It has established a new disciplinary chamber as well as an extraordinary appeals procedure before the Supreme Court, which has the potential to subdue independent-minded judges.[3] Yet other Member States should not be forgotten either, such as Hungary. The latter is even said to have become a rather hopeless case – with some involuntary help from Brussels, for example through its provision of funds.[4] If such measures remain unopposed, it will be hard to argue in the

1. Editorial Comments, "Safeguarding EU values in the Member States – Is something finally happening?", 52 CML Rev. (2015), 619, 625-627; Editorial Comments, "The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems", 53 CML Rev. (2016), 597; Editorial Comments, "About Brexit Negotiations and Enforcement Action Against Poland: The EU's Own Song of Ice and Fire", 54 CML Rev. (2017), 1309; on the academic debate: Bonelli, "From a Community of law to a Union of values", 13 EuConst (2017), 793.

2. COM(2017)835 final, European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland: Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, at p. 21, para 116.

3. Act on the Supreme Court of 8 Dec. 2017, *Journal of Laws* (2018), item no. 5.

4. For a dire picture, see Charlemagne, "The EU is tolerating – and enabling – authoritarian kleptocracy in Hungary" *The Economist*, 5 April 2018. See also Halmai, "Illiberal constitutionalism? The Hungarian Constitution in a European Perspective", in Kadelbach (Ed.), *Verfassungskrisen in der Europäischen Union*, (Nomos, 2018), p. 85. See also European

future that they are at odds with the European values as enshrined in Article 2 TEU.[5]

European institutions have started to react far more determinedly than in the Hungarian case. This is to be welcomed. At the same time, the European reactions raise the stakes dramatically. We might even witness a "constitutional moment". This term indicates a situation that deeply impacts on the future path of a constitutional order without formally amending it.[6] At issue is whether illiberal democracies become part of the European public order as laid out in Article 2 TEU, or are opposed by it. In any event, the consequences could be truly far-reaching. In the first case, the conventional self-understanding of Europe cannot be maintained any longer, because the European rule of law would cover what is present in Poland. This would have tremendous implications, for example for the European stance towards critical developments in other Member States or the Union's external policy (Turkey!). In the second case, the European rule of law would be supplemented by "red lines". That would also amount to a "constitutional moment" because it would add substance and bite to the European values.

To advance the second case, the European institutions are to be commended for reacting fiercely. The Commission's actions, in particular its Reasoned Proposal under Article 7(1) TEU regarding the Rule of Law in Poland,[7] merit support, also for good legal reasons. At the same time, much will depend on the judicial branch. An important opportunity to draw such red lines is presented by the *LM* case.[8] Of course, no European political measure or

Parliament, Committee on Civil Liberties, Justice and Home Affairs, 25 June 2018 (Result of roll-call votes), <www.europarl.europa.eu/committees/en/libe/votes-in-committee.html>.

5. See for a comprehensive description Matczak, "10 Facts on Poland for the Consideration of the European Court of Justice"*, VerfBlog,* 13 May 2018, <verfassungsblog.de/10-facts-on-poland-for-the-consideration-of-the-european-court-of-justice>. Opinion on the Draft Act amending the Act on the National Council of the judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the organisation of ordinary courts, adopted by the Venice Commission at its 113th Plenary Session (Venice, 8–9 Dec. 2017), <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e>.

6. Ackerman, *We the People: Foundations*, Vol. 1, (Belknap, 1991), p. 6. Note that the original articulation of this term by Ackerman has a more specific meaning. For further analysis, see Klarman, "Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments", 44 *Stanford Law Review* (1992), 759–797.

7. Reasoned Proposal cited *supra* note 2.

8. Case C-216/18 PPU, *Minister for Justice and Equality* v. *LM*, (pending), Reference for a preliminary ruling from the High Court (Ireland) made on 27 March 2018: <www.courts.ie/Judgments.nsf/0/FD843302847F2E228025825D00457F19>. This case is based on a decision of the Irish High Court 2013 295 EXT;2014 8 EXT; 2017 291 EXT *The Minister for Justice and Equality* v. *Celmer*, [2018] IEHC 119, <www.courts.ie/Judgments.nsf/0/578DD3A9A33247A38025824F0057E747>. See also Opinion of A.G. Tanchev in Case C-216/18 PPU, *LM*, EU:C:2018:517.

judicial decision can restore the separation of powers within a Member State. They can only contribute to Polish self-healing which must take place through its internal constitutional process. However, the importance of European political or judicial decisions is not limited to this, as they are crucial for upholding European liberal constitutionalism in the rest of the Union.

2. *Operationalizing the Value of the Rule of Law*

By now, much has happened to operationalize – i.e., interpret, apply and even impose – the rule of law value. Confuting many who consider the rule of law value of Article 2 TEU an all too vague political statement, the guardians of the Treaties have developed it in a way that allows for a juridical assessment of Member States' activities. To be clear, the institutions have not set out to demarcate the value by creating definitions that can be applied in a formalistic manner, but have rather linked the value of the rule of law to well-established principles. Their application requires much contextualization and circumspection and will contain political, that is to say discretionary, evaluative and opportunistic, elements. But that is the path of the law, in particular when it comes to "constitutional moments".

A groundbreaking contribution to the operationalization of the rule of law value can be found in the ECJ's recent decision in the case of *Associação Sindical dos Juízes Portugueses* (*ASJP*). Its interpretation of Article 19 TEU covers the institutional dimension of domestic judicial independence.[9] The European rule of law has thus become justiciable *vis-à-vis* the Member States.[10] The Commission contributes to this development by compiling relevant principles and combining them into a sensible whole, in particular in its Rule of Law Framework.[11] It relies on many sources: the Court's rulings, but also decisions and opinions of other institutions, in particular the European Court of Human Rights and the European Commission for Democracy through Law (the Venice Commission). Such a broad spectrum contributes significantly to the legitimacy of its endeavour.

The Commission's Rule of Law Framework is an important step with regard not only to the interpretation but also, possibly, the normativity of the rule of law. Although it shows some weaknesses, for example by making it almost indistinguishable from the values of democracy and human rights, it

9. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

10. Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861; Case C-452/16 PPU, *Poltorak*, EU:C:2016:858.

11. COM(2014)158 final/2, European Commission, Communication from the Commission to the European Parliament and the Council: A new EU framework to strengthen the rule of law, p. 4, and Annex I.

seems a convincing operationalization that is in tune with the *acquis* of European public law. The Commission has reiterated the Framework's interpretation in its Reasoned Proposal under Article 7(1) TEU regarding the Rule of Law in Poland.[12] Moreover, it referred to the rule of law value in its 2018 Justice Scoreboard for "monitoring of justice reforms at EU level" as well as in its last Country Report on Poland under the European Semester.[13] The Commission's recent regulation proposal on "generalized deficiencies as regards the rule of law" even provides a definition for the threshold of "generalized deficiencies" of the rule of law.[14] Operationalization can also be helped by a newly suggested Justice, Rights and Values Fund with a total volume of 947 million euros.[15] Already in force – albeit not yet enforced – is the Union's Regulation on European Political Parties, which makes it possible to review whether a European political party complies with Article 2 TEU.[16]

Notwithstanding a number of doctrinal issues that remain open, at least the basis for legally assessing Member States using the rule of law value is now fairly well-established. From the Polish "White Paper on the Judiciary" one can deduce that not even the Polish Government puts that into question, since it defends its measures on the merits of the European rule of law.[17] The impressive rebuttal of that "White Paper" by the Polish Judges Association as well as by the Polish Supreme Court also show a well-established juridical link between the vague rule of law value and crucial features of the domestic judiciaries.[18] The European rule of law has thus become an operational principle in European political and legal controversies.

12. Reasoned Proposal cited *supra* note 2, p. 1, para 1.

13. SWD(2018)219 final, Commission Staff Working Document, Country Report Poland 2018 accompanying the document Communication from the Commission to the European Parliament, the Council, the European Central Bank and the Eurogroup: 2018 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011, p. 3, 29.

14. COM(2018)324 final, European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, at Art. 2(b).

15. COM(2018) 321 final, Annex to the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A modern budget for a Union that protects, empowers and defends: The multiannual financial framework for 2021–2027, p. 48.

16. Regulation (EU, EURATOM) No. 1141/2014 of the European Parliament and of the Council of 22 Oct. 2014 on the statute and funding of European political parties and European political foundations, O.J. 2011, L 317/1, at Art. 3(1)c, Art. 6(1).

17. Chancellery of the Prime Minister of Poland, "White Paper on the Reform of the Polish Judiciary", 7 March 2018, <www.premier.gov.pl/files/files/white_paper_en_full.pdf>, para 166.

18. Iustitia (Polish Judges Association), "Response to the White Paper Compendium on the reforms of the Polish justice system, presented by the Government of the Republic of Poland to

3. *The political branch in troubled waters*

Opposing the Polish measures is extremely sensitive because it implies going against a democratically elected government that is transforming basic features of its constitutional order. For that reason it is to be welcomed that the European political branch has become active. Since lessons have been learnt from the miserable action national governments undertook against Austria in 2000, the institutional activities are so far concentrated in the institutions of the Council of Europe and the Union. The European Commission in particular tries to position itself as a defender of European values, thereby responding to the harsh criticism levelled against its earlier reluctance. In the Polish case, it has deployed two core instruments for the first time. This is significant in and of itself, as the first usage of an instrument often impacts on its further utilization. Unfortunately, there is a clear and serious risk of failure, with a possibly calamitous impact on the European rule of law.

One instrument is the Commission's already mentioned "Rule of Law Framework" of 2014, which was designed as an instrument whose quick implementation could avoid escalating the situation into Article 7 TEU territory. Read as an "*a maiore ad minus*" approach that is permissible under Article 7(1) TEU and Article 292 TFEU,[19] it provides the Commission with a procedure for engaging – through an opinion and later recommendations – in a dialogue with a Member State in case of an observed "systemic threat to the rule of law". To date, the use of the Framework has not yielded tangible results, which casts much doubt on the instrument's capacity to impose results. The Polish authorities have not undertaken any remedial action; they have merely made some minor concessions of an illusory nature and clearly no practical consequence.

The Commission then introduced the second instrument to show it "meant business". On 20 December 2017, it launched the procedure under Article 7(1) TEU for the first time ever. It finds that there is a clear risk of a serious breach of the rule of law in Poland, indicates rather precisely which steps need

the European Commission", 17 March 2018, <twojsad.pl/wp-content/uploads/2018/03/iustitia-response-whitepaper.pdf>; Gersdorf (First President of the Supreme Court), "Opinion on the White Paper on the reform of the Polish judiciary", 16 March 2018, <archiwumosiatynskiego.pl/images/2018/04/Supreme-Court-Opinion-on-the-white-paper-on-the-Reform-of-the-Polish-Judiciary.pdf>.

19. Giegerich, "Verfassungshomogenität, Verfassungsautonomie und Verfassungsaufsicht in der EU: Zum 'neuen Rechtsstaatsmechanismus' der Europäischen Kommission" in Calliess (Ed.), *Herausforderungen an Staat und Verfassung: Liber Amicorum für Torsten Stein zum 70. Geburtstag*, (Nomos, 2015), pp. 499, 535–536. For the opposing view, Document 10296/14 of the Legal Service of the Council, "Commission's Communication on a new EU Framework to strengthen the rule of law: – compatibility with the Treaties", 27 May 2014, <data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>.

to be taken, and asks that the Council recommend that Poland take such steps.[20] It hereby confutes a statement by the fomer Commission President Barroso, who depicted Article 7 TEU as the "nuclear option",[21] a statement that evidently delegitimizes the actual use of this instrument. The legitimacy of its use is corroborated by the European Parliament[22] as well as the Committee of the Regions,[23] which support the Commission and call upon the Council to quickly follow up on the Commission's action.

The Commission's proposal merits close attention. It is detailed and extensive. It integrates the findings of other institutions, such as the Council of Europe and the United Nations, as well as civil-society organizations.[24] This fends off accusations that the findings are partisan. By demonstrating that many institutions share its findings, the Commission makes itself the voice of a broad alliance. At the same time, it underlines the legal dimension of the issue by making its proposal resemble a reasoned opinion in infringement proceedings. The Commission's proposal thus evidently aims to be two things at the same time: a convincing *political* value judgement, as well as a *legally* sound analysis. This is not paradoxical but rather how political institutions should decide.

The legal reasoning of the Commission as to why there is a clear risk of serious breach might appear somewhat thin, as it does not really develop what the threshold requires. However, one needs to consider that institutional developments towards an authoritarian regime tend to be hard to grasp from a legal standpoint, because legal analysis focuses on individual acts. Taken individually, such measures lend themselves more easily to justification (although most of the Polish measures against the Constitutional Tribunal seem rather clear cases).[25] Indeed the Polish Government tries to defend its measures through legal comparison with "unsuspicious" countries.[26] Therefore, to determine convincingly a "clear risk of a serious breach" of an

20. Reasoned Proposal cited *supra* note 2.

21. SPEECH/13/684, Barroso (President of the European Commission), "State of the Union address 2013", 11 Sept. 2013, <europa.eu/rapid/press-release_SPEECH-13-684_en.htm>.

22. P8_TA-PROV(2018)0055, "European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP)".

23. RESOL-VI/30, 6391/18, "Determination of a clear risk of a serious breach by Poland of rule of law – Resolution of the European Committee of the Regions of 22 February 2018".

24. Reasoned Proposal cited *supra* note 2, para 183 and the respective footnotes.

25. Iustitia, op. cit. *supra* note 18, p. 92; Venice Commission, "Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland", Opinion No. 833/2015, CDL-AD(2016)001, paras. 126, 137, 138.

26. White Paper on the Reform of the Polish Judiciary, cited *supra* note 17. But see also the rebuttal cited *supra* note 18.

Article 2 TEU value, all Polish measures affecting the judiciary must be considered together,with due regard to the overall political and social conditions in the country. Such determination inevitably entails an important discretionary and evaluative dimension, which strictly doctrinal arguments cannot fully guide.

It is now for the Council to act, which would require the approval of four-fifths of its members, that is to say 22 Member States. The Council has debated the matter in the General Affairs Council.[27] But it is distinctly possible that the Council will not decide on the matter, for instance in order to keep the Member States united in difficult times (just consider Brexit). However, such an omission could be used as an argument that the Council – and hence the Member States – do not deem the policies of the Polish Government, in particular the changes to the Polish judiciary identified in the Commission's Proposal, to be an infringement of Article 2 TEU. Accordingly, such policies could more easily be presented as conforming to the founding values of the European Union. They could possibly even be considered an expression of the European rule of law. However, it should not be forgotten that there are also the courts. As so often in European crises, much will depend on the Court of Justice of the European Union as well as on the domestic courts – in short, on the entire judiciary in the European legal space.

4. *The Judicial Branch: "I love you, like I love Ireland"*

Contrary to the Council, courts cannot refrain from making a decision. What might help the courts is the realization that they will be heavily criticised regardless of how they adjudicate the Polish situation.[28] Still, the courts should seize any opportunity to draw red lines for the European rule of law.[29] Within the complex European judicial system, it is for the ECJ to decide if Poland infringes a European value; domestic courts should decide this issue only if the ECJ does not do so.

The ECJ might be called upon either via infringement proceedings initiated by the Commission or via preliminary ruling requests referred to it by national

27. General Affairs Council, "Rule of law in Poland", 17 April 2018: <www.consilium.europa.eu/en/meetings/gac/2018/04/17/>.

28. The new Vice President of the Polish Constitutional Tribunal has already stated that he would consider any ECJ decision against Poland illegitimate, Muszyński, "Polski Trybunał w unijnej rzeczywistości", <www.rp.pl/Opinie/303229983-Polski-Trybunal-w-unijnej-rzeczywistosci – Mariusz-Muszynski-o-mocy-wyrokow-TSUE-w-Polsce.html> (in Polish only).

29. The Advocate General in Case C-216/18 PPU, *Minister for Justice and Equality* v. *LM*, indeed addresses the Polish situation. However, he does so only in terms of human rights and thereby fails to fully meet the challenge, see para 39.

courts, i.e. in top-down or bottom-up proceedings. The traditional path for judicially supervising the Member States is the infringement procedure, the standard interaction between the two guardians of the Treaties. The infringement procedure should hence also play a vital part in the rule of law crisis. The values in Article 2 TEU are subject to the Court's jurisdiction and thus to its mandate to ensure that "the law is observed" (Art. 19(1) TEU), and the Court now seems ready to use this mandate.[30] Article 7 TEU does not preclude parallel infringement proceedings, as the *Van Gend en Loos* precedent exemplifies.[31] How to frame a possible case is more problematic: after all, the Polish situation is triggered by a combination of measures that are as diverse as they are numerous. However, the Court has already held in the past that it can use infringement proceedings to make a finding of general and continuous deficiencies in a Member State,[32] thereby overcoming its normal focus on an individual and concrete setting.

Although infringement proceedings are therefore legally viable, one should nevertheless consider that it is a heavy burden for the ECJ to have to decide whether the Polish measures violate the European rule of law. However, this burden can be shared among several courts if the issue is handled via a preliminary ruling procedure, as the ECJ is then responding to concerns expressed by national courts. Deciding the issue in a preliminary ruling procedure would also continue the European tradition that most decisions of deep constitutional impact are taken in the European *Gerichtsverbund*, the European union of courts. Indeed, the *LM*[33] case, which was referred to the ECJ by the Irish High Court, is a first example. As the vivid Polish reactions to this referral show,[34] it has the potential to become a landmark decision on the issue.

"I love you, like I love Ireland" was a big hit of Polish rock music in the 1990s. As the main vocalist of the group "Kobranocka" said, "Ireland … had

30. Case C-477/16 PPU, *Kovalkovas*, and Case C-452/16 PPU, *Poltorak.* In the infringement proceedings against Hungary concerning judicial independence, (Case C-286/12, *Commission v. Hungary*, EU:C:2012:687) the Commission and the Court were criticized for framing and deciding the case on the grounds of discrimination rather than Art. 2 TEU: Halmai, "The early retirement age of the Hungarian judges", in Nicola and Davies (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press, 2017), p. 471.

31. Case 26/62, *Van Gend en Loos* v. *Administratie der Belastingen*, EU:C:1963:1. See, in detail, Scheppele, "Enforcing the Basic Principles of EU Law through Systemic Infringement Actions" in Closa and Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016), p. 105.

32. Case C-494/01, *Commission* v. *Ireland*, EU:C:2005:250, para 36.

33. Case C-216/18 PPU, *Minister for Justice and Equality* v. *LM,* (pending).

34. See in this respect the statement of the Association of Judges of Ireland in defence of the referring judge <aji.ie/communications/press-release-2018-03-15/>.

a similar history, just like us they fought for independence. We loved them for that. I loved them and love them to this day."[35] To "love somebody like Ireland" means to love someone deeply. This special relationship between Poland and Ireland is evidently significant in this case. More broadly, the reference in the LM case demonstrates that it is inevitable that national courts become involved to vindicate the rule of law in the European legal space.[36]

The concrete issue addressed in the preliminary reference is whether Ireland may refuse to surrender a Polish citizen to Poland following a European Arrest Warrant (EAW) because of a systemic deficiency in the rule of law in Poland.[37] The referring Irish High Court considers that the Polish measures breach fundamental values such as the "independence of the judiciary and respect for the Constitution" and amount to "systemic breaches of the rule of law" as well as "fundamental defects in the system of justice".[38] It therefore sees a real risk for the protection of the individual's fundamental right (to a fair trial). This occasion could, and should, be used by the ECJ to draw red lines, by declaring the changes in the Polish judiciary an infringement of Article 2 TEU and a systemic deficiency.

It is important that the ECJ decide the issue because these red lines should be drawn in a process that itself respect these European founding values. First, central to the rule of law is the principle to be heard, which also protects the Member State under scrutiny. Therefore, Poland should have a formal role in the proceedings and be represented by its legitimate government. A domestic court can hardly provide for that. Second, the autonomy of judges is a "key matter" for the functioning of the preliminary ruling procedure. Third, and more generally, a systemic rule of law problem with judicial independence impinges on the effectiveness of the entire EU legal system; thus, an overall European assessment of the matter is necessary. For all these reasons, the ECJ should evaluate the impact the legislative changes in Poland have on judicial independence, building on its judgment in *ASJP* and its case law regarding the principle of effective judicial protection.

35. Interview with the leader of "Kobranocka", Andrzej Kraiński, <gazetapraca.pl/gazetapraca/1,68946,3425292.html> (in Polish only).

36. Canor, "My brother's keeper? Horizontal *Solange*: 'An ever closer distrust among the peoples of Europe'", 50 CML Rev (2013), 383.

37. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. 2002, L 190/1, as amended by Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, O.J. 2009, L81/24.

38. Joined Cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, para 140.

However, the Irish court has not referred this issue to the ECJ, as it apparently makes the autonomous finding that a systemic breach of the rule of law (as laid down in Art. 2 TEU) has occurred. This is not convincing: although much speaks in favour of assuming a breach, the criteria of the *CILFIT* doctrine are not fulfilled, which means that the ECJ must decide the issue. Indeed, the *Identitätskontrolle I* ruling of the German Federal Constitutional Court has been convincingly criticized for not requesting a preliminary ruling.[39] The ECJ should reformulate the questions and provide the Irish court with an answer it had not requested.[40]

Admittedly, such a reformulation might be critically perceived as judicial activism. Yet the question whether there is a violation of the rule of law in Poland and whether that violation amounts to a systemic deficiency is of a constitutional magnitude for the European legal space, which is why the Court of Justice should not shy away from answering it (be it directly in infringement proceedings or indirectly in a preliminary ruling). If, however, the ECJ wishes to remain neutral on whether a systemic deficiency is present in Poland, it should at least contribute by providing the national court with the criteria for establishing a systemic deficiency in the rule of law. It would then fall upon national courts to decide, with some European guidance, on the constitutional direction of the European legal space.

If a breach of the rule of law is found, the next question is what that entails. The possible impact of the *LM* ruling is colossal and could by far exceed that of *N.S.*[41] or *Aranyosi*.[42] These cases dealt with a particular violation of a certain human right under specific circumstances. The *LM* case, by contrast, deals with a comprehensive violation of the value of the rule of law. It is about a Member State suffering from a systemic deficency in upholding the rule of law, because the independence of the judiciary has been undermined. That could have the broadest implications and could possibly affect the fundamental principle of mutual trust on which the entire judicial cooperation in the European legal space rests. Not only will criminals not be surrended on the basis of an EAW, but asylum seekers will not be transferred on the basis of Dublin mechanism; moreover, civil judgments originating from this State will possibly not be enforced by the national courts of all the other States.

39. Order 2 BvR 2735/14 of 15 Dec. 2015; see e.g. Burchhardt, "Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht", 76 *Heidelberg Journal of International Law*/ZaöRV (2016), 527, 547–550.

40. Case C-303/15, *Naczelnik Urzędu Celnego I w Ł.* v. *G.M. and M.S.*, EU:C:2016:771, para 16.

41. Joined Cases C-411/10 & C-493/10, *N.S. and Others* v. *Secretary of State for the Home Department*, EU:C:2011:865.

42. Joined Cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru.*

By significantly reducing horizontal judicial cooperation, the *LM* case could therefore isolate Poland within the European legal space, although hopefully only temporarily. This is a harsh consequence, but a number of reasons speak for it. The respect of the rule of law value is a precondition for membership (Art. 49 TEU), for mutual trust,[43] for all fundamental rights, for the entire European edifice.[44] If that is not enough: the future of the European rule of law, as Europe thought it knew it, is at stake if no one opposes the developments in Poland. All this would justify significantly reducing horizontal cooperation with Poland.

At the same time, this solution does not foreclose *vertical* cooperation, as it allows national courts to continue using the preliminary ruling procedure. This is particularly important, because the ECJ and valiant Polish courts can thereby continue to fight jointly for the European rule of law or the rights of Union citizens.[45] In other words, the fact that the independence of the Polish judiciary as a system is compromised does not exclude recognizing the independence of individual courts.

The different functional logic of the preliminary ruling procedure, on the one hand, and horizontal judicial cooperation on the other allows for this distinction. In a preliminary ruling procedure, the ECJ can assess the referring court in light of its case law on judicial independence, a review that is more difficult in the case of horizontal cooperation. Moreover, the ECJ merely interprets EU law in a preliminary ruling procedure, leaving the national court to apply it to the facts, whereas horizontal judicial cooperation directly affects individuals: while horizontal cooperation may subject an individual to the authority of another Member State, a preliminary ruling procedure can in fact help an individual *vis-à-vis* the authority to which he or she is already subjected.

This leads to the critical issue of the threshold for non-cooperation. The Advocate General in the *LM* case suggests following *Aranyosi*.[46] Accordingly, non-cooperation would require "substantial grounds to believe" that the requested person's right to a fair trial "will run a real risk", for which there is no evidence in the *LM* proceedings. However, the Advocate General's

43. Opinion 2/13, *on the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, para 168.

44. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, paras. 41 and 43.

45. In detail, von Bogdandy, Kottmann, Antpöhler, Dickschen, Hentrei and Smrkol, "Reverse *Solange* – Protecting the essence of fundamental rights against EU Member States" 49 CML Rev. (2012) 489.

46. Opinion of A.G. Tanchev in Case C-216/18 PPU, *LM*, para 5.

suggestion falls short of responding to the nature and severity of the Polish rule of law crisis. Since the Polish Government's measures undermine the independence of the entire judiciary, there is little or no point conducting an individual and specific assessment of the concrete risks faced by the person concerned. There is at present always the danger that any case might at some point come before a compromised judge. This suggests following the test the Court developed in *N.S.*,[47] so that the abstract risk for the individual concerned should suffice to refuse a surrender. From a systemic standpoint, the refusal to surrender on the basis of a merely abstract risk is justified by the urgent need for red lines.

5. *Conclusion*

For more than two decades, the constitutional developments in Central and Eastern European countries were mainly considered a constitutional sideshow, that depicted countries "catching up" with their luckier neighbours who had never suffered Soviet occupation. Now, these countries stand in the limelight: much of the future path of European constitutionalism depends on how their peoples decide.

The rest of Europe cannot do a great deal for those countries' constitutionalism. One cannot expect from the deployment of the instruments analysed in this editorial a "solution" to the crisis. None but the citizens of those countries themselves can restore the separation of powers among their countries' institutions. The decisions taken by EU institutions can only contribute "to creating a situation where self-healing through domestic processes is still possible".[48]

However, one needs to look beyond those countries to understand the importance of using these instruments now. European decisions confronting the Polish Government are crucial to uphold a liberal and democratic self-understanding of European constitutionalism throughout Europe. Otherwise, the current Polish undermining of the independence of its judiciary is likely to count towards defining the European rule of law, facilitating similar developments in other places and compromising large parts of European foreign policy. Much is at stake. Yet, as the Polish anthem

47. Joined Cases C-411/10 & C-493/10, *N.S.*

48. Sonnevend, "Preserving the acquis of transformative constitutionalism in times of constitutional crisis: Lessons from the Hungarian case" in von Bogdandy, Ferrer Mac-Gregor, Morales Antoniazzi and Piovesan (Eds.), *Transformative Constitutionalism in Latin America* (OUP, 2017) p. 123, 145.

goes, "Poland Is Not Yet Lost"; and nor is the constitutional European project, if the institutions act wisely.

Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor,
Maciej Taborowski and Matthias Schmidt*

* Respectively: Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg; Assistant Professor, Faculty of Law and Administration, Warsaw University; Professor, School of Law, College of Management, Zefat Academic College, Israel; Assistant Professor, Faculty of Law and Administration, Warsaw University; Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg. This Guest Editorial is part of an ongoing collaboration between the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, and the Chair in European Law of the Faculty of Law and Administration, Warsaw University. The authors wish to thank Theodor Shulman for language editing.