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The Rule of—and not by any—Law. On Constitutionalism

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Abstract: To some, the rule of law has been an abstract promise, to others, it is a rather conservative stumbling block, and often, it is a taken for granted ingredient of modern societies, not much cared for, neither looked after. Yet today, 'law' is grabbed by people who plan to abuse it, in utter disregard of the justice demands that inform the very idea. In Hungary, Poland and Turkey, the courts have been subject to 'reform', streamlining them into servants of the political regime. In Germany, right wing politics present themselves as the 'true' defenders of the '*Rechtsstaat*', yet use it to frame more or less evidently racist attacks on refugees and others sufficiently 'othered'. Also, neo-fascist spokespeople on US and UK campuses and beyond present themselves as committed to 'free speech' and 'academic freedom', yet abuse both in attacks on the very foundations of democratic debate as well as education that deserves its name. In light of such developments, there is a need to explain and defend constitutionalism, as the foundation of democratic societies that deserve the name.

Key words: Constitutionalism; Rule of Law; Judicial Role; Attacks on Courts

1. *Introduction*

In 2015, many Poles took to the streets to defend their constitutional court. In 2016 and 2017 thousands marched in Warsaw and 200 other cities in Poland to defend the rule of law, against legislative 'reform' acts that were out to destroy it as an independent institution. This is indeed noteworthy. It is also a bit surprising. Generally, it seems not very fashionable to rally for courts. Imagine the slogan: 'I want my court', or: 'Rise for the Rule of Law'. Such calls tend not to get people going. But this is exactly the chorus in need of members, with the program of 'Rise for the Rule of Law!', 'Call for Constitutionalism!', 'Defend Fundamental Rights!'.

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In Poland, the people who rallied to defend the rule of law have understood that the courts, to effectuate the rule of law, are key components of a working democracy, and that there is no protection of fundamental rights without them. At least they got it, confronted with a majority that seems not to care, at its best. In 2018, Polish citizens, and in particular Polish women, took to the streets again, to call for reproductive freedom. They ask for fundamental human rights. Indeed, this is what constitutionalism is all about, inextricably connected to the rule of law, to have such rights protected by an independent judiciary. These Poles on the streets got it, too. However, the majority that continues to give their vote to the governing party does still support the contrary. Yet when rights vanish, and when there are no courts to protect them independently, red lines have been crossed. This matters to some much earlier than to others, yet the attack is a fundamental danger to democracy as such.

Attacks have also been levelled in Hungary. Indeed, the Polish governing party followed a Hungarian script to destroy constitutionalism yet pretend all is legal. Similar threats take place in Romania, Bulgaria, Slovakia, or Greece, and elsewhere. The rallying for a constitutional court that deserves the name in Poland, as well as rallies that took place in Budapest, or in Temesvar, or in Athens, and the calls from lawyers associations in Europe as well as intense appeals to justice in Turkey are not only attempts to defend what is at stake in each national context and legal regime. They are reminders to not take the rule of law for granted. As such, they are also an appeal to watch out for courts, which is grounded in deep worries as to the state of rights, which do in fact safeguard existential needs of people. Certainly, rationales and contexts differ, as protest is fueled by varying concerns. Sometimes, such rallies are desperate attempts to defend the basics of democracy, as in Poland. In other instances, they are reminders directed at those holding office, be it in government, parliament or on a bench, to do their job right. Thus, some critics of legal 'reform' seek to restore democracy, and some critics of the executive, the legislative or the judicial branch seek to improve it. Yet others are out to attack and eventually destroy it. To not fall for the latter, and to not be registered in the attackers' camp, there is a need to revisit the rule of law, and constitutionalism.

This is a current legal problem. It is not abstract nor is it happening elsewhere, abroad, or far away. Globalization also affects the law, so that, despite the trends towards nationalism and single units that leave larger unions, we are connected anyway. Indeed, there are attacks on the rule of law in Britain, too, in rather massive efforts to curb judicial review, with the suggestion to leave human rights systems that do in fact deliver

protection rather than remain mere promise.[1] In Germany, there is a new right wing party in many state and federal parliaments that praises a version of the rule of law that does not deserve its name. And in many more countries, there are similar moves.

The current legal problem of an attack on the rule of law, and on courts in particular, is not a problem for lawyers or for judges only. Note that the Poles that rallied in the streets were citizens. In the middle of the controversies around the Polish constitutional court and judiciary, destroyed in the name of 'us', of 'the real will of the people', and of 'the nation', artist Marta Górnicka has called attention to the crisis of the rule of law and attack on constitutionalism. It is a paradigmatic move. Górnicka asked 55 people from all sides of the Polish political spectrum to come together, and sing — yes: sing! — the constitution.[2] On constitution day, celebrating 250 years of constitutional history in Poland, thus a proud moment of an avant-garde history in the development of the rule of law, she did put the C.O.N.S.T.I.T.U.T.I.O.N. FOR A CHOIR OF POLES centre stage, for the people, by the people, and to quote the telos of the EU, as well as of Canada, 'united in diversity', or in the ancient lingua franca: *In varietate Concordia*.[3] Górnicka, in her invitation to the people, asked the 'Dear

[1] One such effort in Britain is the Judicial Power Project, run by Policy Exchange, which lists only two members of staff who run a vast array of activities online (at http://judicialpowerproject.org.uk/people-2/), with the intellectual backup of John Finnis and Jeffrey Goldsworthy, but also enlisting eminent historian Sir Noel Malcolm. See P Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) University of Queensland Law Journal 355.

[2] M Górnicka, 'Konstytucjia (Constitution)' (NOWY TEATR, 10 April 2016) <http://www.nowyteatr.org/en/event/konstytucja> last accessed 29 October 2018. She explains: 'WHY THE CONSTITUTION? Because it concerns all of us, even though we may have completely different opinions about it. Because today we are constantly referring to it – to defend it, to demand its change, to violate it, or to protect it. Because it is our pride. And our shame. Because it is our FUNDAMENTAL LAW. . . . We do not intend to show that we can sing in unison. We will create a choir which will speak with a variety of voices. . . . Join us! ANYONE can help read the Constitution.' See J-T Kühling, 'On the Common Good: The Institution of the Chorus and Images of a Nation in Marta Gornicka's Theatre' (2017) 1-2 *Polish Theatre Journal* <http://www.polishtheatrejournal.com/index.php/ptj/article/view/119/555> last accessed 29 October 2018.

[3] This is the 'motto' of the European Union (EU) since 2000, adding to pluralism as an element of European law; Art. 2 Treaty on European Union [2012] OJ C 326/01 (TEU). The concept is specifically known both to immigration societies (for Canada, see A Godbout, 'Canada: Unity in Diversity' (1943) 21 *Foreign Affairs* 452 and to nations that acknowledge their cultural and religious heterogeneity, like India (see J Nehru, 'The Variety and Unity of India' in *The Discovery of India* (first published 1946, OUP 1989) 61-63). It is also a focus of transitional constitutional moments, as in South Africa, explicit in the Preamble to the 1996 Constitution 'that South Africa belongs to all who live in it, united in our diversity.' Regarding challenges, see K Banting and W Kymlicka (eds), *The Strains of Commitment: The Political Sources of Solidarity in Diverse Societies* (OUP 2017).

Society, How are you? How are you doing? . . . Whose "Polish values" are Mine? or Yours? What is taking freedom away from us? Is there any US? We want to ask you about it, Society. We want to ask about it in the theatre. So this time WE ARE INVITING YOU onstage to read the Constitution.' In Warsaw, they sang. By now, it sounds desperate.

You may not want to sing. Yet the choir illustrates the urgency of the call on everyone to reconsider and eventually support constitutionalism. Facing attacks covered as reform in the name of the people, there is an urgent necessity to talk about the rule of law, or the *Rechtsstaat*, and an urgent need to act beyond talking. The rule of law is a *conditio sine qua non* of democracy and fundamental rights. Thus, 'The Rule of Law vs. the Rule of Courts', as it has been framed in Britain,[4] is a false dichotomy. It is false because the rule of law, in a rights-respecting democracy which does not allow for unlimited power of either majorities or economic or cultural, ethnic or gendered elites, needs independent courts with the authority of judicial review, as a legal limit of legislation. Certainly, this may be conceptualized in various ways, with and without single written documents, with more or less specialized constitutional review,[5] and with a variety of devices to allow for political choice within legal boundaries. Also, political culture matters as much as institutional design of all public powers. Yet as such, the rule of laws frames, enables, and eventually protects democracy, in respect of fundamental rights, and courts render such rights realities, not mere rhetoric as promises on paper.

There are serious attacks on the constitutional rule of law all over the world, and they are growing in intensity and popular success. Some have succeeded already. They differ. But it seems they are often underestimated in the beginning, and they are strategically complicated, in that they cover as 'reform', following the 'will of the people' against an 'elite', and in their use of widespread skepticism and criticism regarding courts and judicial review. Often, criticism was not meant that way. To not feed the wrong

[4] For a prominent example, see R Ekins and C Forsyth, *Judging the Public Interest: The Rule of Law vs. the Rule of Courts* (Policy Exchange 2015), published under the auspices of the Judicial Power Project (n 1); see also the panel discussion on the report, 'Judging the Public Interest: The Rule of Law vs. the Rule of Courts' *Judicial Power Project* <http://judicialpowerproject.org.uk/judging-the-public-interest-the-rule-of-law-vs-the-rule-of-courts-2/> last accessed 29 October 2018. Helena Kennedy has already raised attention to Guantanamo, to the increase in surveillance, and to the reduction of legal protection, in more and more penal and socially unequal societies, collaborating with autocratic regimes, H Kennedy, *Just Law* (Chatto & Windus 2004).

[5] See JA King, 'Institutional Approaches to Judicial Restraint' (2008) 28 Oxford Journal of Legal Studies 409, and for topical comparison, N Dorsen, M Rosenfeld, A Sajo, S Baer and S Mancini, *Comparative Constitutionalism* (3rd edn, West Publishing 2016).

campaign, there is thus an urgent need to distinguish critique from attack. In fact, there is a need to draw red lines to allow for action, and eventually join the chorus of a unity in diversity, based on equal respect. I move in four steps.

First, there are many skeptics when it comes to constitutionalism and judicial review of legislation in particular. The aggressive skeptics work in politics, namely populism. But there are also skeptics in the academy — those who do *not* like the law, who despise legalism or the juridical, reject judicial activism, and call constitutional jurisprudence a new 'supremacy'. It is important to understand the skeptic's concern, but it is vital to distinguish criticism from attack.

Second, many skeptics work with flawed accounts of political realities. In many areas, there is not too much law out there, but too little. Also, populism is dangerous in its nationalism, racism, antisemitism and sexism, not least, yet it is specifically dangerous in that it seeks to destroy the rule of law. And even more specifically, the danger arises because populism taps into a general contempt of institutions, getting at an independent judiciary first, in fact out to undo the rule of law that may stop its agenda. Then, populists even claim to be the only true defenders of the rule of law themselves, to in fact destroy it.

Third, to fight back, there is a need to understand what is at stake. Although legal actors and courts do react to pressure, they need a chorus. When attacks hit judges and courts directly, it is often too late. To rise in defense, constitutionalism needs to be clearly defined. As such, it is inextricably linked to a specific mandate of courts, in exerting judicial review. This is why there is a red line to be drawn when courts are torn apart. Contrary to those that call it 'Western' or otherwise inherently biased, constitutionalism is, historically and conceptually, also not an elitist project. Instead, it does only work when people take it in their hands, in active democracies, in a commitment to respect fundamental rights, and courts that adjudicate them independently. And in fact, beyond a chorus, there are many ways to make that happen.

2. *Skeptics, Critique and Attacks*

When it comes to law, to constitutionalism and to constitutional courts or supreme courts with constitutional mandates in particular, there is the grand history of enlightenment and the modern rule of law. However,

there is also a long tradition of skepticism and critique.[6] Yet because today, the rule of law is not criticized but under attack, it is crucial to distinguish the two, and to not have onés critical skepticism registered as applause for the latter, thus, supporting attacks.

Criticism matters. To be clear, some of the most productive strands in dealing with law are the critical traditions that challenge 'legalism' and the 'juridical'. Some discuss law as a normative force that covers, perpetuates or ontologizes inequalities.[7] Others focus on problematic versions of 'rights' that amount to rather egocentric claims of idealized economic actors, or to 'trumps' to fight one another.[8] Namely, what is known as CLS, short for critical legal studies born out of legal realism, as well as feminist, or now often labelled gender, as well as queer legal studies, and antiracist and anti-colonial jurisprudence, seek to expose where law is used as a velvet glove on the fist of domination.[9] Such criticism also discusses ways to improve the justice system in the land of the Magna Carta, as a country of impressive Law Lords and still too few Ladies. It focuses on injustice to women, injustice to the young, injustice to the working class, injustice to immigrants and national minorities, exclusion of people who are racialized or culturalized as 'the other'. Such criticism exposes injustice to homosexuals, as well as discrimination of transsexuals and intersexuals, and one may update the list. Yet the key message is: Law matters because these people matter, and even elected political majorities shall not ever be allowed to forget about such individuals that are not mainstream and do not define politics, and independent institutions must take care of this if all else fails. In times of a growing sense of

[6] See MA Wilkinson, 'The Reconstitution of Post-war Europe*:* Liberal Excesses, Democratic Deficiencies' in MW Dowdle and MA Wilkinson (eds), *Constitutionalism Beyond Liberalism* (CUP 2017) 38-78; on Eastern Europe, see A Mazmanyan, 'Judicialization of Politics: The Post-Soviet way' (2015) 13 International Journal of Constitutional Law 200; on India, see R Sen, 'The Disputed Role of the Courts' (2017) 28 Journal of Democracy 96. Australia is not a prime example for the trend, see N Aroney and B Saunders, 'On Judicial Rascals and Self-Appointed Monarchs: The Rise of Judicial Power in Australia' (2017) 36 University of Queensland LJ 221.

[7] Based on Marx's analysis of exploitation, Catharine MacKinnon has called law an ontological force that defines sex as a heteronormative and abusive account of gender, in C MacKinnon, *Towards a Feminist Theory of the State*, (Harvard UP 1989). On racism in the common law, see P Williams, *The Alchemy of Race and Rights* (Harvard UP 1991).

[8] There is much literature on the legal subject, eg on autonomy that ignores dependency on a mother, the social nature of a family and society, or the reduction to *homo oeconomicus*, in criminal or torts law. See N Ngaire and RJ Owens (eds), *Sexing the Subject of Law* (Sweet & Maxwell 1991); N Lacey, *Unspeakable Subjects*: *Feminist Essays in Legal and Social Theory* (Hart Publishing 1993).

[9] Difference has been described as a glove covering the ineffectiveness of traditional equality law, MacKinnon (n 7). For Britain, see H Kennedy, *Eve Was Framed. Women and British Justice* (Random House 1993); and Kennedy, *Just Law* (n 4).

economic disparities, and with the increase in relative poverty in otherwise affluent societies, coupled with the sense that no one cares which then informs new brands of populism, such critique is desperately needed.

Indeed, criticism is particularly relevant for judges. It is a key device to remind sitting judges of their task, namely to take in varying perspectives and not stay comfortably with onés own. Specifically, any court vested with the amazing powers constitutionalism attaches to supreme or constitutional courts and tribunals needs such critique. Thus, a reminder of the challenge of 'judicial activism' is an often very refined echo of all our doings. Judges need that, as does every institution with the mandate to protect the constitution that lives up to the task. It is crucial to constantly reflect on the difference between legal and political rationale, and to safeguard the space for politics as much as the protection of fundamental rights even politics cannot crush. But such critical reminders are a reflexive tool, not a silencing device. Even radical critique that goes to the roots of a problem may be productive, to enhance legal protection, yet is categorically different from attempts to undo or destroy it. As much as critique is needed, and indeed read and heard and taken into account by courts, it is fundamentally different from destructive attacks.

As such, there is also a need for informed criticism of what I call 'varieties of constitutionalism', including varieties of courts and their practice of judicial review, to implement the rule of law in protecting fundamental rights. In Europe, and regarding the EU, such criticism is motivated by a strong commitment to cooperation and integration, as opposed to a search for additional reasons to reject it, or leave. For national constitutional courts like the German one in the city of Karlsruhe, criticism is always also a reminder that to rather loudly participate in the European as well as the global conversation about democracy and fundamental rights today, one needs to reflect on one's always already positioned perspective, the limited function of constitutional courts, and, again, the legal rationale that differs from the political code. In the EU, criticism must address and adapt notions of democracy, beyond fuzzy complaints of a democratic deficit. A simple dislike of a particular ruling driven by sheer political preference presented as theory or scholarship will not do. Neither does nihilism to abandon the law, in a privileged disregard of the serious consequences taken too lightly.[10]

[10] Some nihilism is misleadingly labelled 'postmodern', rejecting the law in its indeterminacy. On the 'siren call' of law, see C Smart, *Feminism and the Power of Law* (Routledge 1989) 160.

Yet often, there is the notion that constitutionalism is a 'threat' to democracy, as 'new constitutionalism' with law is indeed backed up by courts,[11] including national and international courts and tribunals with a constitutional mandate. Then, there is a rather general assumption that the more adjudication, as 'constitutionalization', the less politics. This assumption does profit from a positive pro politics intuition, and from a well-established skepticism contra courts, in discussions of 'judicial activism'.[12] And beyond nuanced analyses of what courts do and what they should not engage in doing, there is growing political momentum to fight the 'supremacy' of constitutional and supreme courts, targeting a 'gouvernement des juges'.[13]

Note that criticism of judicial review is a reaction to a rather young phenomena. While the idea of fundamental human rights is old, the practice of enforceable protection of human rights gradually evolved much later. It is the point of the 20th century post-1945 consensus. While the idea of human rights dates back a long way and can be traced across space and time, across religion, ideologies and culture, the institutional practice to have law both protect and govern politics is rather new. And while this story may be told in various versions as well, it is the qualitative step of the 20th century to turn an idea into an enforceable practice. It backs fundamental rights and democratic deliberation with independent institutions, namely public courts, to limit the other political powers, including grand majorities. As such, the practice of constitutionalism is young. Details vary, but legal protection is key.

Also note that judicial review is not just an idea but a practice born out of suffering from bad practices. In light of the specific historical reasons for judicial review, it becomes clear what is at stake when it crumbles.

[11] R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. (Harvard UP 2009); T Gyorfi, *Against the New Constitutionalism* (Edward Elgar 2016). See also Y Dezelay and GG Bryant (eds), *Global Prescriptions: the Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press 2002).

[12] 'Activism' has become a pejorative term, despite the task of courts to actively intervene when properly called upon. Then, an inactive court does not do its job. On another level, there is also the assumption that courts are meant to speak the law, not make it – which is a rather naïve idea of the practice of judging. Also, to purist believers in a clear distinction between law and politics, constitutional courts go too far by definition, yet this is an ideological claim as well.

[13] On Europe, see A Stone Sweet *Governing with Judges: Constitutional Politics in Europe* (OUP 2000); M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialization* (OUP 2002). See further C Neal Tate and T Vallinder (eds), *The Global Expansion of Judicial Power* (NYU Press 1995); R Sieder, L Schjolden, and A Angell (eds), *The Judicialization of Politics in Latin America* (Springer, 2016). There is much more work on the critique compared to still few studies on courts as institutions, with specific practices and functions.

Formal judicial review is not what matters, as the formal rule of law. When the horrors of the Holocaust undeniably came to light, there was a clear need for institutions able to eventually stop democracy from being destroyed, stop law from being abused, stop political majorities driven by public sentiment, which was already then, notably, populist nationalism. The meaning of the rule of law is thus substantive.[14] It puts judicial power behind the grand promise of the then not yet formally united United Nations, after 1945, that never again would human beings be denied dignity. A little later, the rule of law was also the backup for Hallstein and others who argued for a united Europe, to never again kill each other in war.[15] Eventually, the assumption that one needs a rule of law that matters drove many other versions of liberating politics. It is also part of the consensus that built so slowly to stop colonial terror, and to fight genocide and femicide, as gendered weapons of war, and to have crimes against humanity eventually be tried in court. The meaning of 'never again' is, thus, 'it shall not happen', really.

In light of this history, constitutionalism is not just the promise of dignity, liberty and equality. It is the commitment that fundamental rights shall be implemented, as realities, backed up by courts. After 1989, this was the calling again. It felt as if constitutionalism had made it, picking away at the Berlin wall, or meeting across East and Central Europe to discuss new constitutions, design proper constitutional courts, and install a sound protection of human rights. When ten Eastern and Central European new member states acceded to the EU, it felt that way in Budapest and Warsaw, Paris and Berlin, that 'we made it', in Europe

[14] In German constitutional theory, this was fiercely disputed early on. A formal concept of the *Rechtsstaat* is associated with Ernst Forsthoff, and a substantive concept featured by Wolfgang Abendroth, but also by philosopher and once social-democratic Minister of Justice Gustav Radbruch. The formal concept of the rule of law is not just positivism, because positivists risk law to be abused. The German Federal Constitutional Court emphasized early on that the rule of law carries an idea of justice as '*Gerechtigkeit*', ie BVerf GE, Judgment of the First Senate of 18 December 1953, BVerfGE 3, 225, 232. Today, the Venice Commission emphasises a material notion of the rule of law ('*materieller Rechtsstaatsbegriff*'), European Commission for Democracy Through Law, 'Rule of Law Checklist (Adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2018)' (18 March 2016) CDL-AD(2016)007, § 18, referring to T Bingham, *The Rule of Law* (Penguin 2010).

[15] Walter Hallstein is one of the prominent designers of Europe as a political entity. In 1952, he stated that Europe puts law in the place of power and its manipulation, and that law trumps violence and political pressure. See W Hallstein, 'Die EWG – Eine Rechtsgemeinschaft' in W Hallstein, *Europäische Reden* (T Oppermann ed, Deutsche Verlags-Anstalt 1979) 344, 348. As President of the Commission of the European Economic Community visiting the British Institute of International and Comparative Law, London 25 March 1965, he calls the EU Treaty its constitution.

and for Europe. People removed the Iron Curtain and truly ended the Cold War to finally live together united in diversity, now the motto of the EU, for which Art. 2 TEU now phrases the essentials. Namely, the Visegrad group explicitly committed itself to state independence, democracy and freedom, a parliamentary democracy and a modern state of law, respecting human rights and freedoms in 1991.[16] Here, democracy and human rights were to become a reality, not merely decorative window-dressing, with new courts to in fact limit power, via the rule of law. This was not limited to Europe, but happened on all continents, in African states transitioning from classic colonialism to new democracies, throughout Asia and in sometimes rapidly liberating constitutionalism in central and south America. There was 'constitutionalism on the rise',[17] which meant new constitutions everywhere, with courts to back up the text, some specialized, following Hans Kelsen's model in its German version, and others adding a constitutional mandate to the jurisdiction of supreme courts or tribunals.

Now note that sharp criticism of judicial review has been, specifically, levelled at international legal regimes. Today, it targets the European Court of Justice (ECJ), where it adds to the often fuzzy assumption of a democratic deficit. More intensely, it focuses on international criminal law, in the form of the International Criminal Court and *ad hoc* Tribunals. In Britain, it hit the strong regional human rights system of the European Court of Human Rights (ECtHR or the Strasbourg Court), similar to attacks on the Inter-American Court of Human Rights in San José. Beyond varying motifs and reasons, there is a crucial difference between critical accounts of the aim and practice of international or transnational legal regimes. But often, we see attacks on the ECJ or ECtHR, as part of new nationalisms out to destroy the rule of law. They call the post-1945 and post-1989 consensus into question. For various reasons, if the 20th century is the time of the rise of constitutionalism, the 21st century is the

[16] Declaration on Cooperation between the Czech and Slovak Federal Republic, the Republic of Poland and the Republic of Hungary in Striving for European Integration (Visegrad, February 15 1991). Sadurski describes the declaration as 'powerfully idealistic in nature, promoting romantic ideals of a "return to Europe" and pan-European solidarity. It was a timely reminder that the EU's identity is based on values, and not just a calculus', W Sadurski, 'That Other Anniversary (Guest Editorial)' (2017) 37 European Constitutional Law Review 417, 419

[17] See B Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Virginia Law Review 771, but then also eg VT Le Vine, 'The Fall and Rise of Constitutionalism in West Africa' (1997) 35 *Journal of Modern African Studies* 181; DS Law and M Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 California L Rev 1163; K Whittington, RD Kelemen and DA Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP 2008).

time of skepticism. Sometimes, it is ignorance that feeds neglect, then erosion[18] and loss. This, again, is a key current legal problem, and it has amounted to an imminent crisis in Europe and beyond.

3. *Reality Check: A Test for Skepticism*

The skeptics say that there are too many courts, too much decided by judges, too much law. Now is that really the case?

Take the EU and the ECJ. Among skeptics, the EU is seen as overly court-driven, in that the ECJ forced member states to implement EU law beyond or without enough political acceptance. But is such an account, and the general dismissal, correct? Generally, consider the trend to privatize and in fact to 'dejusticialize' conflicts, in taking them away from the justice system, often scandalized as creating 'parallel justice systems' ('Paralleljustiz') in migrant communities, yet much more forcefully driven by private companies to protect their needs.[19] Consider non-discrimination in law, specifically regarding sex discrimination in the labor market. Consider equal treatment regarding age understood in numbers instead of abilities. Consider the fight against disabling people through the failure to enable diversity. Did EU law or the ECJ go too far – or maybe not far enough to really mandate equal participation, social security and social inclusion? The story of Luxembourg's jurisprudence is often not described as progress in consensus building in a region – but why not, and who is telling this story in whose name? Also consider data storage and the right to privacy. Are the EU and the ECJ 'doing too much', or do they attempt to react to global players, and still achieve too little? As usual, details matter, since what matters are the people whose rights are at stake.

Then, take the Strasbourg Court. Very often, it is criticized as overstepping the boundaries of any law, and its rulings are described as outrageous interventions into domestic affairs. Never mind that it is the global example of a regional human rights system with teeth, because it has a court. So is there really too much law when prisoners are protected as

[18] Developments certainly vary in context. On Eastern Europe, see contributions to M Krygier and A Czarnota (eds), *The Rule of Law After Communism: Problems and Prospects in East-Central Europe* (Routledge 1999); A Sajo and R Uitz, *The Constitution of Freedom* (OUP 2017). On Africa, see HK Prempeh, 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2005) 80 Tulane L Rev 1239; M Tushnet and M Khosla (eds), *On Asia, Unstable Constitutionalism: Law and Politics in South Asia* (CUP 2015).

[19] Consider contributions to P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2012).

members of a society, by being given the right to vote? And is there really too much law when a court asks a religious majority in a country to also consider the rights or religious minorities, in a public building? Whose interests are at stake, and for whom exactly is there something too much, or indeed, too little?

Also, take international tribunals and, in particular, the International Criminal Court. In critical studies, there are indeed important reminders of the role that international tribunals can play not only to consolidate and allow for legitimate authority, but also to serve a colonial interest, as another 'progeny of global governance,' including 'lucrative opportunities for lawyers and publicists,' who form an 'arbitration fraternity.'[20] But this is criticism, not attack. Attacks generalize and denounce international courts and tribunals as non-legitimate, as either biased or at least uninformed intervenors in domestic matters. The prosecution of war criminals as well as the prosecution of prominent politicians is then hindered all along, with very little support, still dropping.[21] For critics of the new constitutionalism, courts that do in fact intervene are not a good idea anyway. But is that really the case?

[20] P Singh, 'Revisiting the Role of International Courts and Tribunals' in P Singh and B Mayer (eds), *Critical International Law* (OUP 2014) 101, 111 (quoting Sornarajah), 113 (quoting Chimni) in a critical discussion of A Von Bogdandy and I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2012) 23 European Journal of International Law 7. See also G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality. Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012). On bypassing the law in international missions, see ML Grasten, 'Whose Legality?' in NM Rajkovic, T Aalberts and T Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (CUP 2016) 320-342. On contextual factors, see F Zarbiyev, 'Judicial Activism in International Law—A Conceptual Framework for Analysis' (2012) 3 *Journal of Int'l Dispute Settlement* 247. See also L Helfer and K Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' (2013) 14 Theoretical Inquiries in Law 479; K Wellens, 'The International Court of Justice, Back to the Future: Keeping the Dream Alive' (2017) 64 Netherlands Int'l Law Rev 193; B Schotel, 'Multiple Legalities and International Criminal Tribunals: Juridical versus Political Legality' in Rajkovic et al (eds), *ibid*, 209-232.

[21] For a critical discussion, see Singh (n 20). Several countries have already withdrawn from international jurisdiction. For instance, Bolivia, as early as 2007, Ecuador, and Venezuela have withdrawn from the International Centre for the Settlement of Investment Disputes. African states have withdrawn from the International Criminal Court, notably Burundi in 2017 and Kenya, reacting to charges against the President. In 2018, the Philippines issued an official notice of withdrawal from the International Criminal Court, reacting to preliminary examinations on crimes in relation to the 'war on drugs'. See further M Nel and VE Sibiya, 'Withdrawal from the International Criminal Court: Does Africa have an alternative?' (2017) 17 African Journal on Conflict Resolution 79. Also, the United States withdrawal from the UN Human Rights Council in June 2018 may be seen as another feature of its record to not join global efforts to install a rule of law.

Then move to the domestic scene. Are courts with constitutional jurisdiction really too much? Again, the question needs to ask 'for whom?' exactly. Notably, rulings from national constitutional courts do indeed regularly bother people in power, if they intervene forcefully. When the German Federal Constitutional Court invalidated one antiterrorism police and security forces law after the other,[22] it was too much for those who sought more police control, but may have been too little for those who care for privacy. Also, when the Federal Constitutional Court mandated minimum dignified existence as a human right for refugees on German territory[23] — for whom is this going too far? And when 'Karlsruhe', code for the Federal Constitutional Court that resides in the city by that name, calls on EU actors to abide by the treaties, and urges the German government to ask parliament before it acts[24] — is this too much, really, and for whom?

The argument here is that what we do not have too much law in the 21st century. In the 20th century, we agreed that human dignity is inviolable, yet in the 21st century, we see torture not only in dictatorial regimes, as exceptions to the rule. Instead, we see torture used and defended by official actors in, what is still a paradigmatic shift, the US government. And it is not only a US problem. Today's problem is thus not only that we see human rights violations. They always threaten the rule of law, in that they show a lack of protection, a failed promise, a deficiency. Yet an exception to the rule is very different from a dismissal of the rule itself. Even when violated, there is still a consensus that actors must follow the law, that human rights are generally respected, that there is judicial review, by independent courts, that is followed up on. Different from that, it is a crisis of law itself when the rule is dismissed as such.

The same applies to the recent uses of the exceptional state of emergency. Turkey has perpetually justified the removal of thousands of people from office on dubious to no grounds after the attempted coup, by eliminating recourse to judicial review in a state of emergency. France has reacted to terrorism also by removing legal protection, eventually stopped by the *Conseil Constitutionnel*, which in turn has become more

[22] A summary of the jurisprudence can be found in the decision on the Federal Police Agency BKA, BVerfG, Judgment of the First Senate of 20 April 2016 — 1 BvR 966/09 – published in German and Engish online at www.bverfg.de

[23] BVerfG, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10 (Asylum Seekers Benefits).

[24] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 (Lisbon Treaty).

of a fundamental rights defending institution than before,[25] and then is confronted with even harsher critiques. And this is not a Turkish or French problem only. Also, in the monetary crisis, we saw many actors empowered to control these markets in utter disregard even of the already few rules of the financial market. And there are still many people playing with money - not their money, but yours - whatever the law says, if there is any. Finally, there is the refugee crisis, in fact a crisis of law applied to refugees. There, we do not only see a humanitarian catastrophe as well as deficiencies in the legal and administrative schemes to administer asylum. Rather, we see accountable actors simply and explicitly disregard and reject the law. Certainly, the EU Dublin rules have not been designed fairly, and are in need of reform. But 'the refugee problem', in Europe formerly known as the home of enlightenment and of those who truly learned their lesson after 1945 and after 1989, feeds populism as a defence of 'us', of 'our people', more important than the law, even the constitution, or a court ruling. This has been explicitly stated by Hungarian and by Polish officials, it is part of Swiss populism and it was an element in the Brexit campaign, when 'those judges' were labelled 'enemies of the people'. Luckily, in recent elections, the majority of German and French voters did not go for the far right. But the risk is growing, and a mainstream pushes that way.

The argument is thus that there is not too much law out there, but too much unrestricted power. There is not too much court action, but too little to stop economic exploitation, both of people and of the environment. There is not too much transnational and international law, but far too little accountability by law to stop manipulative private power and rather classic human rights violations.[26] In its human rights report 2017, Human Rights Watch starts with a description of the crisis of law that populism creates.[27] In Europe, we do not see too much law protecting refugees, or too much law that limits the greed of financial market actors,

[25] See Cons const, 1er déc 2017 D 2017 2428 (*État d'urgence (fouille des bagages et véhicules): inconstitutionalité du régime*). In Turkey, the Court did not stop emergency rule since July 20, 2016. This is why many government decrees cannot be challenged in court, which remove thousands of people from public office on dubious grounds, including judges.

[26] Aidan Hehir starts the collection, A Hehir and RW Murray (eds), *Protecting Human Rights in the 21st Century* (Routledge 2017) 1, by stating: 'In recent years, the dramatic deterioration in respect for human rights across the globe has led to a proliferation of denial and fatalism.' See also H Kim, 'Missed Opportunities in the Judicialisation of International Criminal Law? Asian States in the Emergence and Spread of the Rome Statute System to Punish Atrocity Crimes' (2016) 35 Netherlands Quarterly of Human Rights 246; and more generally on womeńs rights, C MacKinnon, *Are Women Human?* (Harvard UP 2007).

or stops the rapid growth of economic inequalities, or steps up at the persistence of racism, of antisemitism, and of sexism, not least. Beyond the formal promise, human rights are not a reality.

Rather than too much law, we also see an erosion of the rule of law. This is different from insufficient implementation. Instead, the rule of law is often disregarded, and deliberately attacked, to be eventually destroyed. In light of the lack of substantive protection of real people, it is deeply worrying that there are more and more instances in which courts are seen and treated as a costly commodity, and not very well taken care of. It is also worrying when public officials denounce rulings or even disregard them. But in the 21st century, we do see outright attacks. The more successful they are, the more we see unlimited powers 'governing without judges'.[28]

Today, the political reality is filled with several strategies to free political power from legal restraints, amounting to a crisis of the rule of law. These need to be properly understood, to avoid compliance, and to avoid criticism being enlisted as applauding attacks. Certainly, contexts matter.[29] Yet overall, the political realities put the skepticism regarding constitutional courts to a severe test. And this test is difficult, for several reasons. They are particularly problematic because they are executed by legal means themselves, dressing up as law. Also, they are sometimes defended by flawed comparison. And they are couched in harsh and handy rhetoric that registers way too easily not only with populist sentiment, but also with established criticism of judicial review. In addition, there are dangerous unfriendly takeovers of essential notions of democracy and the rule of law, in fact rejecting constitutionalism.

[27] K Roth, 'The Dangerous Rise of Populism: Global Attacks on Human Rights Values' in Human Rights Watch, *World Report 2017: Events of 2016* (2017) <https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf> last accessed 29 October 2018. The Pew Research Centre, in its research on attitudes toward government, found 17 % of all asked to not adhere to basic democratic standards, and more than one in three are at least skeptical, while it remains overall optimistic. R Wike and others, 'Globally, Broad Support for Representative and Direct Democracy' (*Pew Research Center*, 16 October 2017) <http://www.pewglobal.org/2017/10/16/democracy-widely-supported-little-backing-for-rule-by-strong-leader-or-military/> last accessed 29 October 2018, Section 2. See also the account of reactions to the crisis in human rights protection: denial or fatalism, Hehir and Murray (eds) (n 26).

[28] V Beširević, '"Governing Without Judges": The Politics of the Constitutional Court in Serbia' (2014) 12 International Journal of Constitutional Law 954.

[29] On Eastern Europe, see W Sadurski, 'Constitutional Courts and Constitutional Culture in Central and Eastern European Countries' in A Febbrajo and W Sadurski (eds), *Central and Eastern Europe After Transition*. (Routledge 2016) 111-130; and W Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP 2012). See also L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.

A. Chicken, Autocratic Legalism, and Unfriendly Takeovers

Recent attacks on the rule of law are dressed up as legal arguments, and appear to be playing by the rules while in fact destroying them. In many countries, attacks on the rule of law are staged by means of, or even in the name of, law. This is not entirely new, but comes in updated varieties.[30]

To focus on the EU – and leave aside Turkey as well as Russia, in addition to many Southern and Central American states, populist leaders and parties staged a 'legal reform', 'simply' changing 'some technical rules'. In Hungary first, and then in Poland, they changed the procedures of access to and the competence of courts, of selection, monitoring, discipline and retirement age of judges, in a quick succession of tiny steps. Yet what is meant to seem a rather technical and small matter does in fact destroy constitutionalism. It is no coincidence that the attack starts with the constitutional court, by changing its mandate, reach and procedure, eventually re-staffing the bench, and then destroying the independence of the entire justice system, again by changing procedure, selection, disciplinary control and career options, step by step, seeming rather formal and small. When this is done, one may return to a new normal. Poland thus gestured to satisfy critics in the EU to undertake yet another 'reform', returning power to institutions that were dismantled early on. But since they have been re-staffed entirely, to now serve the government, this is merely decorative – all but window-dressing.

Madeleine Albright, in her recent warning against fascism on the rise, reminds us of Mussolini's strategy of 'chicken plucking', one feather at a time.[31] In the European attack on the rule of law, the key strategy is 'reform' that seems boringly technical or sounds at least plausible, looked at in isolation, and is quickly done, without much participation and debate. All in all, this destruction of the rule of law dresses up as law, in fact to undermine it.

There are many examples of how this is done. If you take over the internal management of an institution, you may redirect the whole *spiel*. In Poland, the government simply did not publish opinions of the constitutional court, to block them from coming into force, and some rulings were simply taken out of the database. Merely formal, it seems, and not that easy to scandalize. Then, they changed internal working rules. Just a

[30] One may study the rise of fascism in Germany in the 1930s, or consider Rhodesia 1965, where a revolution was dressed in legality. See V Kumar, 'International Law, Kelsen, and the Aberrant Revolution' in Rajkovic et al (eds), *The Power of Legality: Practices of International Law and Their Politics* (n 20), 157-187.

[31] M Albright, *Fascism: A Warning* (Harper Collins 2018).

technicality, one may think, and rather plausible to require a minimum presence or dealing with files in chronological order. But such petty rules have the potential to put a court to sleep. If you mandate a specific order of dealing with cases, and give the president the right to order otherwise, you do not create a fair procedure. Instead, this allocates power to manipulate and stop a court from intervening in politics. So if you order a court to not handle a case earlier than a few months after filing date, you silence it, and let the other powers off the hook. If you allow a court to accept a case only if a — varying — minimum number of judges agrees, and put enough friends on the bench yourself, you create a lame duck that does not bother you anymore. Then, the rule of law becomes the rule of any law that passes, rather than the constitutional rule of law bound to democracy and fundamental rights.

Attacks that dress up as legal are not a new phenomenon. Decorative or rhetorical constitutionalism are a challenge in many post-authoritarian, including postcolonial and post-Soviet settings. One may also call them unfriendly takeovers. They occupy our core concepts, ideas and ideals, namely constitutional democracy, rule of law, rights, court and procedure. But they in fact destroy it. This is not just a change of the rules, it is also a war of words, an epistemic battle. Famously, there is a proposal for 'illiberal democracy', which is no democracy at all.[32] Also, autocrats present their project as 'true democracy', based on the 'true will of the nation', to in fact usurp power for an ethnically and religious homogenous majority, in explicit disregard of targeted minorities, and no protection of individual liberties either. In Poland, the president of a house of parliament stated that the will of the people, that 'our will' shall count, and not the law.[33] In Germany, populist nationalists claim that they are

[32] F Zakaria, 'The rise of Illiberal Democracy' (1997) 76 *Foreign affairs* 22. Prominently, Hungarian Prime Minister Viktor Orbán discussed this in 'The End of Liberal Democracy, Talk on 26 July 2014' (*Free Hungary*, 30 July 2014) <http://www.freehungary.hu/index.php/56-hirek/3123-full-text-of-hungary-pm-viktor-orban-s-scandalous-speech-at-the-xxv-balvanyos-free-summer-university-and-youth-camp> last accessed 29 Oct 2018. Orban proposes an end of liberal democracy, to install an illiberal Christian democracy, as explained in: Hungarian PM sees shift to illiberal Christian democracy in 2019 European vote (Reuters World News, 28 July 2018 <https://uk.reuters.com/article/uk-hungary-orban/hungarian-pm-sees-shift-to-illiberal-christian-democracy-in-2019-european-vote-idUKKBN1KI0BY>, last accessed 29 Oct 2018. On Hungary, see P Krastev and J van Til (eds), *The Hungarian Patient: Social Opposition to an Illiberal Democracy* (Central European University Press 2015), and for current developments, contributions to verfassungsblog.de.

[33] See TT Koncewicz, 'A Constitution of Fear' (*VerfBlog*, 16 November 2017) <https://verfassungsblog.de/a-constitution-of-fear/> last accessed 29 Oct 2018; 'The Consensus Fights Back: European First Principles against the Rule of Law Crisis (part 2)' (*VerfBlog*, 5 April 2018) <https://verfassungsblog.de/the-consensus-fights-back-european-first-

the 'true defenders' of the *Rechtsstaat*,[34] similar to a US President that claims another 'truth'. But as much as 'alternative facts' are not facts, such a 'true *Rechtsstaat*' has nothing to do with the rule of law, in its constitutional sense, either. Again, these are unfriendly takeovers, which Kim Scheppele calls 'autocratic legalism',[35] and Wojcech Sadurski describes as the 'death of democracy'.[36]

The plucking chicken strategy has an additional effect. 'Legalistic autocrats' do not only deploy the law to achieve their aims, while impending autocracy may not be evident at the start.[37] Also, populists use false comparisons to defend their moves. At the International Conference of Constitutional Courts in 2017, a Turkish judge argued that his state has removed judges from office in an attempt to save the state, and he explained that this is simply what Germany did when rebuilding the court system after 1989. And if the world tolerated Germany doing this, it must be ok. Luckily, my Federal Constitutional Court colleague Justice Eichberger has a clear understanding of red lines: the comparison is not only flawed, it is outrageously wrong. Yes, in both instances, judges and administrators were removed from office. But no, Germany did not act by decree in a state of exception without judicial review, and no removal was based on dubious allegations, but required a fair procedure based on, again, the rule of law. This is not to say that all went just fine. But it puts a comparative observation in context.

principles-against-the-rule-of-law-crisis-part-2/> last accessed 29 Oct 2018. This does refute the opposition, and it silences all critics, in that they cannot even insist on law to get a voice, or remind us of the limits even for majorities. This 'will of the people' then takes away, in the name of true democracy, freedom of speech and the media and assembly, as well as academic freedom, to stifle critique, and it silences courts to watch out for these. Here, 'our will', newly defined, shall win, at any price. In fact, this is a price some people pay first, but everyone else sooner or later.

[34] The rule of law, or *Rechtsstaat*, features prominently in the program of the German Alternative für Deutschland - AfD. For a critical analysis of right wing populism see A Speit, *Bürgerliche Scharfmacher: Deutschlands neue rechte Mitte–von AfD bis Pegida* (Orell Füssli Verlag 2016).

[35] KL Scheppele, 'Autocratic Legalism' (2018) 85 U Chicago L Rev 545.

[36] W Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (2018) Sydney Law School Research Paper No 18/01 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491> last accessed 29 Oct 2018; see also Sadurski, 'That other anniversary' (n 16).

[37] Scheppele, 'Autocratic Legalism' (n 35). See also J Corrales, 'Autocratic legalism in Venezuela' (2015) 26 Journal of Democracy 37.

B. *Harsh and Handy Rhetorics*

In Hungarian and Polish, but also in French and Swiss and recent German politics and loudly in the Brexit campaign, courts have been confronted not just with criticism, but with harsh attacks. Namely, the EU has been attacked as 'Europe', often confounding the EU with the Council of Europe, as 'driven by judges only'. This appeals to the intuitive no-go, that motivates a critique of judicial review, in places that cherish parliament or praise politics by referenda or large majorities won in elections. Yet gaining votes does indeed not justify a regime in which majorities are entirely sovereign to have their way. Rather, it is the very idea of constitutionalism to both fairly form and frame power, thus limiting it to protect weaker interests, based on the rule of law eventually enforced by courts.

The current attacks on law and courts are most striking in, but not exclusive to, populist politics. Specific conditions matter. The speedy destruction of constitutionalism succeeds in contexts in which constitutionalism has been brought about by strong social movements,[38] but also in contexts in which it is considered a project of elites. Yet the populist politics that take over follow a pattern.

As such, populism is a political syndrome which combines content with form, ideology with discursive strategy. Populism targets others to 'defend' 'us', and plays with nostalgia, in romanticizing a homogeneity, eg national Christian white family based collective, or Germany in the 1950s, or some illusion of cultural isolation. Also, populism employs demagogy, agitation, stereotyping and resentment. Yet populism also specifically targets institutions - the topic indeed ranks second, right after immigration/refugees. [39] It is thus not enough to criticize the racism and the antisemitism and the islamophobia and the heteronormativity of populist politics. We also need to understand the attack on institutions. It is often peppered with an attack on the people who serve in them, like 'those politicians', or on people that otherwise protect the rule of law, like 'those judges'. Yet the attacks on the rule of law and constitutionalism are also specifically complicated in that they tie into the skepticism regarding judicial review that is so widespread.

[38] J Colon-Rios, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012); M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2008).

[39] A media analysis for five European countries is K Poier, S Saywald-Wedl and H Unger, *Die Themen der 'Populisten'* (Nomos 2017). 'Institutional reform' is a key issue.

Dropping derogatory remarks about courts and judges, as well as about government and administration, right wing populists do appeal to many critics' discomfort. The sometimes subtle, yet often harsh and personalized critique of 'elites', dismissing 'those' 'up there', be it a bench or government position, and 'bureaucracies', particularly 'Brussels' seek to have the critics of such systems share the feeling that 'enough is enough', that it is time 'time to leave' (or 'exit'), or to 'take over'. In many contexts, it is rather easy to crack jokes about the regulation of bananas (an often heard reference to the EU), share a story of corruption (widespread in many post-Soviet as well as Latin American states), ridicule inefficiency or elitism (an easy one in the US), and enlist envy of overpaid bueraucrats (targeting 'Eurocrats' in Brussels, or 'Washington', etc). The right-wing attacks want us to believe that really, bureaucracy overdoes its job, at least in Brussels, inferring 'too much EU', that there are 'too many laws' in general, and 'poorly written' as well, and that the courts are 'going too far', too often. Dońt you agree that we need to stop that? In Europe, one may add a critical comment on 'Karlsruhe again', or dismiss complex decisions in one tweet or tabloid heading regarding 'those judges', or even better: 'those foreign judges' in Strasbourg, who simply do not understand, or in 'Luxembourg', with their 'judicial activism'. These days, what may have started as critique eventually informs a more general skepticism, and it is now used in a dangerous political project. Today, what has been written as critical analysis of legal developments is now registered as applause and support for a program to take down the rule of law entirely.

C. *Unfriendly Takeovers: 'Illiberal Democracy', the Rule of 'Our' Law*

The utter disregard and disrespect for the rule of law in general, and of courts in particular, is not only driven by, and does employ, populist sentiment and enlists established skepticism. Moreover, and adding to the use of legal means to undo the law, there are striking attempts to capture essential terms, not only calling right-wing politics a 'spring' or 'movement', but also in claiming 'democracy' and the 'the rule of law', or '*Rechtsstaat*', itself.

As is well-known and more and more often cited without qualifications, Hungarian political leader Orban has defined his understanding of democracy as 'illiberal democracy'.[40] This is an unfriendly takeover, in an

[40] For a critical account, see Pech and Scheppele (n 29); G Halmai, 'Second-Grade Constitutionalism? The Case of Hungary and Poland' (2017) *CSF-SSSUP Working*

epistemic struggle. And it is not the only one. Populists all over Europe call for 'institutional reform'. German right wing populist call themselves the true defenders of the *Rechtsstaat*. French right wing nationalist populist Marine Le Pen agitated against, explicitly, the '*gouvernment des juges*'.[41] In that move, she distorts critique into attack. Also, several German '*Staatsrechtslehrer*', as prominent and traditionally influential law professors, do not only generally complain that constitutional courts 'go too far', but also see 'a loss of the *Rechtsstaat*'. They dislike that the government around Chancellor Merkel did not close all borders to refugees in 2015, and claim they would not take sufficient care of law and order anyway.[42] Beyond them simply being wrong as to the law, these self-proclaimed 'true' defenders of legality do employ the very concepts and terminology known from the critics of legalism and judicialization, of bureaucracy and of judicial review, of a 'new constitutionalism', but indeed feed attacks. In Britain, there has been the tabloid critique of judges as 'enemies of the people', and there is the idea of the 'British Bill of Rights'; in Switzerland, there is the campaign against '*Fremde Richter*' ('foreign judges'), which uses a long history of legal nationalism, launched by right wing politicians. These are attacks on judges and on courts, yet also attempts to redefine the very essentials of constitutionalism, to in fact undo it.[43]

Paper 1/2017, 9-12 <https://www.santannapisa.it/sites/default/files/halmai_finale.pdf> last accessed 29 October 2018.

[41] Le Pen promised to stop the 'gouvernement des juges', who 'dérive anti-démocratique, oligarchique', because '[ils] sont là pour appliquer la loi, pas pour l'inventer ou contrecarrer la volonté du peuple'. The same applies to Fillon: 'la France a un problème avec le gouvernement des juges européens'; 'Je proposerai que la France quitte la CEDH', see F Saint-Pierre, 'Dénoncer un «gouvernement des juges»? C'est un contresens historique' *Mediapart* (1 March 2017) <https://blogs.mediapart.fr/francois-saint-pierre/blog/010317/denoncer-un-gouvernement-des-juges-c-est-un-contresens-historique-0> last accessed 29 Oct 2018.

[42] Among them, C Hillgruber (ed), *Gouvernement des juges - Fluch oder Segen* (Schöningh 2014); former Federal Constitutional Court justice U DiFabio, *Migrationskrise als föderales Verfassungsproblem. Gutachten für die bayerische Staatsregierung*, 2016 <http://www.bayern.de/wp-content/uploads/2016/01/Gutachten_Bay_DiFabio_formatiert.pdf> last accessed 29 Oct 2018; H-J Papier, 'Asyl und Migration – Recht und Wirklichkeit' (*VerfBlog*, 18 January 2016) <https://verfassungsblog.de/asyl-und-migration-recht-und-wirklichkeit/> last accessed 29 Oct 2018. A prominent voice is legal scholar B Rüthers, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat* (Mohr Siebeck 2014), which is particularly worrisome because Rüthers has famously exposed fascist jurisprudence by excessive interpretation of law by civil courts, in *Die unbegrenzte Auslegung* (Mohr Siebeck 2012). Exposing the flaws of the argument is D Thym, 'Der Rechtsbruch-Mythos und wie man ihn widerlegt' (*VerfBlog*, 2 May 2018) <https://verfassungsblog.de/der-rechtsbruch-mythos-und-wie-man-ihn-widerlegt/> last accessed 29 Oct 2018. 'Eine Tarnkappe, die den behaupteten fortwährenden Rechtsbruch nutzt, um das System zu delegitimieren – anstatt sich auf die Sachdebatte einzulassen.'

4. *What Is At Stake*

In light of such developments, there is a need to take sides, and act. Thus, we need to clarify the essentials of constitutionalism, and understand why courts specifically matter.

A. *Constitutionalism*

The key argument is that when the skeptics say that judges shall not govern, they do misrepresent, or miss, the very meaning of constitutionalism which informs the character and function of courts. The idea is that there is only constitutionalism if it is 'robust'.[44] Certainly, many controversies must be subject to action, discourse, politics, debate, and law is not always the best way to go. But the key element of constitutionalism is to protect those that do not have a voice in such discussions, and thus need legal protection since politics do not care. Without courts, they risk to have their lives disregarded, and trampled upon. A rejection of the rule of law thus comes at a cost that real people have to carry. If we take political realities into account, a dismissal of courts with a constitutional mandate is not only naïve or ignorant, but it also perpetuates elitist privilege.

Necessarily, constitutionalism therefore includes the rule of law.[45] The United Nations have defined the minimum content,[46] and there is more

[43] For example, In Britain, British judges on the ECtHR have been targeted personally in the past. See also T Masengu, 'The Vulnerability of Judges in Contemporary Africa: Alarming Trends' (2017) 63 *Africa Today* 2. Threats also target ombudspersons, lawyers, legal scholars, and political activists, as well as journalists that expose violations of constitutional commitments, including corruption. On human rights defenders, see G Blouin-Genest, MC Doran and S Paquerot (eds.), *Human Rights as Battlefields: Changing Practices and Contestations*, Springer 2018.

[44] A Harel, *Why Law Matters* (OUP 2014) 175, 191, on judicial review. For definitions, see Dorsen and others, *Comparative Constitutionalism* (n 5) 36; G Casper, 'Constitutionalism' in L Levy, KL Karst and DJ Mahony (eds) *Encyclopedia of the American Constitution 2* (Macmillan 1986) 473 (descriptive and prescriptive connotations); D Grimm, *Constitutionalism - Past, Present, and Future* (OUP 2016); on varieties D Grimm, 'Types of Constitutions' in M Rosenfeld and A Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 98.

[45] See Bingham n 14. See also G Corstens, *Understanding the Rule of Law* (Hart Publishing 2017).

[46] United Nations, *Rule of Law Indicators* (2011) <https://www.un.org/ruleoflaw/blog/document/the-united-nations-rule-of-law-indicators-implementation-guide-and-project-tools/> last accessed 29 October 2018, referring to Report of the Secretary-General on the 'Rule of law and transitional justice in conflict and post-conflict societies' (UN Doc S/2004/616, 3 August 2004), para 6. See also, UN Report of the Secretary-General Addendum: Strengthening and coordinating United Nations rule of law activities (UN Doc A/68/213/Add.1, 11 July 2014) and UN General Assembly, 'Transforming our

to work with. The notion of the 20st century is that there is no constitutionalism that deserves its name without courts to eventually implement it. Human rights may be a wonderful idea, as is democracy, but in real power struggles, both need the rule of law to work for everyone, and to guarantee that those in charge do their best to come close to these grand promises. As such, constitutionalism connects democracy and human rights, by the rule of law, and installs courts as the backup to make it work if all others do not comply anyway.[47] Courts, then, do not replace politics, but are the safety belts for democratic politics that do not hurt anyone.

Put differently, it is certainly wonderful if powerful actors do struggle with each other politically, but those who are not part of this and those not taken care of do need a guarantee to be taken into account, beyond those in power optimizing their own stakes. A reference to 'legal culture'[48] will not do, implying that a commitment to the basics cannot be subject to the law. It reminds me of the gentle dismissal of the human right to sex equality by pointing to parents, kindergarten and schools to produce people that do implement equality on their own. Such referrals are mere devices to not care. Instead, constitutionalism is the normative and institutional concept behind the idea that essentials count when the going gets tough, i.e. it safeguards democracy when powerful people lose their patience with democratic deliberation and compromise, or forget about some fundamental rights for some, as happens these days.[49] Politics may be driven by fear and a hope for certainty and safety in exclusive isolation, often as national romanticism. But rulings are bound to a different rationale. It is then that societies need the law, and in which people need courts to make sure they matter. Specifically, when majorities ignore or actively exclude minorities of any kind and when social justice is deemed too costly, you do need courts to guarantee the rule of law.

world: the 2030 Agenda for Sustainable Development' (UNGA Res 70/1, 21 October 2015), Goal 16.

[47] See M Adams, A Meuwes and E Hirsch Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (CUP 2017).

[48] Sometimes, it is described as a dilemma in that the liberal state cannot by itself procure the interior forces it rests upon, known as the Böckenförde-dictum in German constitutional theory (see EW Böckenförde, Staat, Gesellschaft, Freiheit (Suhrkamp 1976), 60). However understood, it does not render democracy and fundamental rights out of reach of constitutional law.

[49] On the US, see AR Hochschild, *Strangers in Their Own Land* (New Press 2016); JD Vance, *Hillbilly Elegy: A Memoir of a Family and a Culture in Crisis* (Harper Collins 2016).

This combination is called constitutionalism.[50] It is neither categorically new nor otherwise specific, in that it allows for what I call varieties. But it is the normative and institutional commitment to protect and implement fundamental rights, which in turn allow for and protect democratic politics. Here, the constitution is not a formally specific type of text, nor is this another name for a specific 'Western' version of democracy, or a specific notion of the rule of law. Instead, constitutionalism binds the basics together, in that it frames democratic government as taking its legitimacy from the people, as inclusive as possible, and in that it limits any governments decisions by fundamental rights. It is the frame for a democracy that deserves its name, as a political system that respects fundamental rights of all, including those that differ.

B. *The Role of Courts*

As such, constitutionalism is a demanding recipe for nation states and transnational structures alike, with and without written constitutions. It asks for an institutionalized reality of democratic government that respects fundamental rights. Without functioning institutions, and namely: independent judicial review, constitutionalism does not deserve the label, but is fake, window-dressing, mere rhetoric. Therefore, courts are key. They are the institutions that implement the rule of law, and courts with constitutional jurisdiction are the institutional backup to ensure that the commitment to essentials is not just an idea, but a reality, in at least trying. Beyond their legal role, courts may also represent as well as communicate the basics that count in a society.[51] But the core function of courts with a constitutional mandate is to protect fundamental rights even against legitimate majority government, based on the rule of law, and thus democracy. As such, constitutionalism backed up by courts ensures that governments are formed and can be removed by a procedure agreed on beforehand, and that all have a say in this, by way of equality in voting both regarding access and results, to be held accountable beyond election days, and allow for those who lost to eventually win again.

To make sure this works, there must be a separation of powers, better captured as a complicated web of checks and balances, with an independent judiciary. One needs truly independent courts to safeguard fair play at the centre of all political struggles for power, to safeguard democracy. This

[50] See C Thornhill, *A Sociology of Constitutions* (CUP 2011), updated in P Blokker and C Thornbill (eds), *Sociological Constitutionalism* (CUP 2017).

[51] LR Barroso, 'Counter-Majoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies' (2017) Revista Direito e Práxis (forthcoming).

requires adequate design of selection, discipline, and resources, as well as the power to handle internal matters. Only then does judicial review ensure that the rule of law is not the rule of *any* law. Courts with the power of judicial review ensure that all rules are both shaped and limited by, and may even be required to enhance, democracy, because of our commitment not just to law, but to a more substantive claim of what may be called justice.

For those who now feel that courts get too much attention, there are two additional arguments why they are key. For one, the populists got it. They understand the inextricable connection of democratic politics, fundamental rights and independent courts. Because wherever populism and autocrats started running the show, it is the courts they get at quickly. Besides attacks on critical media and academics, autocrats start their political takeover by destroying constitutional courts, in particular. They know that independent constitutional courts are the last resort when it comes to majorities abusing their powers, to eventually redesign the state, in abandoning democracy. They know that there is no constitutionalism without them, thus no democracy, no rule of law, no human rights when people really need them, for real. Therefore, there is an urgent need to properly understand, and eventually defend, such courts today.

Also, the attacks on courts that protect fundamental rights spare dominant economic and social elites and cultural hegemons that enjoy and perpetuate privilege. Thus, a defence of courts is also a defence of the weak and vulnerable in a given society. Note that courts are specifically attacked because of rather specific rulings. In Britain as well as in Azerbaijan, the paradigmatic case that has fuelled tremendous attention when compared to the number of people it really affected is a ruling that mandates voting rights for prisoners.[52] This led to an often confused yet effective critique of 'foreign judges'. What happens, really, when courts stop attempts to label someone not just guilty of, but also define a person as an outsider on all counts, not anymore a citizens whose vote shall count? In other instances, a court is attacked because it protects a minority by mandating secularism in public institutions, and some are attacked for rulings in favour of a sexual minority. Such 'issues', which are in fact the lives of people, tend be framed as the heart of a nation, be it one religion or one version of family, often upgraded to 'family values'. Do courts tend to disturb a hegemon? In other contexts, the final drop that makes the water spill is the opening of investigations against politicians, which lead to

[52] For Britain, the ruling is *Hirst v United Kingdom (No 2)* (2005) ECHR 681. In 2017, after 12 years, a deal was struck to allow a small number of prisoners to vote.

withering support for the ICC. More generally, a court that allows all government action to pass and upholds all legislation is not in danger. But a court that protects minorities or strengthens political opposition and does not cater to majoritarian sentiment is. It is when courts irritate politics that they risk their standing.

5. *Red Lines*

In the 21st century, the current legal problem is the attack on constitutionalism. Populism starts with an attack not only on media and NGOs and academics, but specifically also targets constitutional courts, including national and international institutions with such a mandate. To remove a potential obstacle in their way, populism seeks to destroy the very legitimacy of the rule of law. These attacks are not just another version of judicial review skepticism, to enhance an argument, modify doctrine, or eventually even change rulings, but attack essentials. Therefore, there is a political necessity to react.

A. *Not 'Elsewhere'*

In light of Poland and the growing knowledge of what actually started in Hungary and more attention paid to other states in a crisis of the rule of law, current attacks on constitutionalism and on courts in particular are not just 'their problem', in 'those' young democracies in the East or otherwise elsewhere. We are all interrelated anyway. Even in Britain, there is really no way to totally exit. Since people move, law is anchored in many locations anyway. We are subject to and in need of law in many instances that reach beyond a national border. You may think of binational family and relationship law, or patent law, or the law in cyberspace.

Yet we are also formally connected. There is the EU, in which several states have serious problems regarding the rule of law, as EU member states, a family that still also cares for Britain. So if political leaders feature an 'illiberal democracy', it is not just some interesting idea elsewhere. Instead, it is an attack on *our* political way of dealing with each other, protected by the rule of law. Also, if an ambassador of one member state explains it will not accept a decision of the ECJ on the distribution of refugees in the EU, it is utterly dangerous for those in need of protection

and for all of us. Leaving the European consensus does violate the Copenhagen principles.[53]

In addition, there is the connection via membership in the larger family of the Council of Europe, including Britain, Turkey, Russia or Azerbaijan. If the latter do not generally accept ECtHR decisions anymore, and if Russia and Turkey stop paying their dues, in an unprecedented move, to not have the court do its job,[54] it is not their or just the Courts problem, but it is about all members. The attacks on Strasbourg puts people at risk all over the region, and because of the standard setting force of the Court, even beyond. Therefore, the recent Draft of the Copenhagen Declaration on the Court raises concerns.[55]

Also, there is the United Nations. We are even formally united in the 21st century, beyond the cultural and social ties of globalization. Therefore, attacks on courts in tweets against 'those' or 'so-called' judges in the US[56] are part of our shared world. They cannot be easily dismissed as 'American', and certainly not considered as just an

[53] See G Verhofstaedt, 'Europe's rule-of-law crisis' *The Japan Times* (12 April 2016) <https://www.japantimes.co.jp/opinion/2016/04/12/commentary/world-commentary/europes-rule-of-law-crisis/#.Ww178y--Lsk> last accessed 29 Oct 2018: 'An unresolved financial crisis, a refugee crisis, a deteriorating security environment, and a stalled integration process have created throughout Europe a toxic, unstable political environment in which populism and nationalism thrive. Perhaps the clearest manifestation of this is the erosion of the rule of law in the European Union ... Hungary and Poland are now jeopardizing hard-won European democratic norms – and thus undermining the very purpose of European integration. The sad reality is that, were they to apply for EU membership today, neither country would be admitted.'

[54] Documented in NP Engel, 'Russland testet das Rückgrat des Europarates' (2017) 14 EuGRZ 720, regarding Turkey, Azerbaijan and Ukraine. In the Council of Europe, the Russian delegates lost the right to vote after the invasion of Crimea, and Russia stopped sending delegates in 2016 and 2017. Also, Turkey reacted to the Vaclav Havel Human Rights Prize awarded to Murat Arslan, a former constitutional court judge in jail.

[55] The Declaration is part of a process to improve the system, with conferences in Interlaken 2010, to Izmir 2011, Brighton 2012, and Brussels 2015. See A Queralt Jimenez, 'The Copenhagen Declaration: Are the Member States about to Pull the Teeth of the ECHR?' (*Verfassungsblog*, 9 April 2018) <https://verfassungsblog.de/the-copenhagen-declaration-are-the-member-states-about-to-pull-the-teeth-of-the-echr/> 29 Oct 2018.

[56] The Tweet of President Trump said: 'The opinion of this so-called *judge*, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!' (4 February 2017) <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en> last accessed 29 Oct 2018. Similarly: 'Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!' (5 February 2017) <https://twitter.com/realdonaldtrump/status/828342202174668800?lang=en> last accessed 29 Oct 2018. In June 2017, Mother Jones, the critical magazine featured a title 'Trump vs The Law', with a caricature of Trump with Iustitia as his blonde hairdo <https://www.motherjones.com/mag/2017/05/toc/> last accessed 29 Oct 2018.

individuaĺs flaw, or disregarded as absurd. Rather, US attacks on judges and courts are globally significant, particularly not coming from somebody, but from a state actor with extreme media attention. The point is that when the rule of law falls somewhere, we are all at risk.

B. *Courts Need Allies*

To properly react, we need to understand that courts are an essential ingredient of constitutionalism, as the concept that protects democracy and fundamental rights of each and everyone in the polity, with the means of the rule of law. Because of this inextricable connection, it is not only up to courts themselves to fight back. Even powerful courts do occupy a limited sphere of action, and they need friends on their side.

However, it is certainly plausible to call on courts to react themselves first. Generally, courts with a constitutional mandate do have to maneuver in the political landscape anyway, and thus tend to register political pressure quickly, as they are institutions walking the fine line between law and politics. In their judicial competence, courts also have a choice. On the one hand, it is tempting to withdraw. Then, courts expand a jurisprudence of 'political questions' and subsidiarity and margins of appreciation and separation of powers with latitude for legislators, all doctrines to free legislative, executive and judicial power by regular courts from constitutional limitations.[57] Some do discuss the Strasbourg line of decisions on secular constitutionalism that way, in that the ECtHR moved from a strong defence of secularism, to protect equal freedom, in the 2009 ruling on *Lautsi I*,[58] to much leeway for majoritarian religious belief, like Italian Catholicism, in 2010 in *Lautsi II*.[59] Others wonder when the German Federal Constitutional Court will give up its resistance to surveillance in attempts to curb terrorism. In other instances, courts may circumvent a controversial issue, as exemplified by the Luxembourg decision in C-286/12 on the sudden age limits for judges in Hungary. However, shy courts do risk not living up to the task. Therefore, many courts seek a balanced way to juggle between withdrawal and holding up.

[57] On courts' reactions, see J Odermatt, 'Patterns of Avoidance: Political Questions before International Courts' (2018) 14 Int'l J of Law in Context (forthcoming). See also my Newman Lecture, 'Rights Under Pressure: Practicing Constitutional Law in Turbulent Times' (Yale Law School, March 2016) <https://law.yale.edu/yls-today/yale-law-school-videos/susanne-baer-rights-under-pressure> last accessed 29 Oct 2018.

[58] *Lautsi v Italy* [2009] ECHR 1901.

[59] *Lautsi v Italy* [2011] ECHR 2412.

On the other hand, facing pressure, some courts do decide to intervene even more forcefully than before, and face the risk of being attacked even more because of it. There are many examples along these lines. As exemplified by the Irish High Court in *Celmer*, courts may use a case to call for additional intervention, and ask for a European red line. The same call is one dimension of rulings in which national courts do prohibit governments to send people to countries that have destroyed the rule of law and thus do not guarantee fundamental rights. These are always decisions in a given case, with limited implications, yet they also set an impulse for a broader discussion of the legal standards once agreed upon. Similarly, the German Federal Constitutional Court jurisprudence on European integration may be understood as an attempt to not only decide a given case, but also emphasize, and defend, the link between the rule of law and democracy. Therefore, the Court conditions European integration on voter participation and on fundamental rights, based on the national constitution, and therefore labelled 'constitutional identity',[60] yet in fact to protect national diversity, in equal respect and with a commitment to an overlapping consensus. Again, this is the application of a national constitution at hand, and it may also inspire the application of international standards.[61] Yet at the same time, courts may strive to employ what I call 'institutional wisdom' such institutions need to protect themselves. To engage in a transnational exchange that way is then not a scandalized 'war of the judges' competing for a fetishized yet non-existent 'last word'.

[60] It is relevant regarding the depth of EU integration, but even more so in cases of expedition in relation to the prohibition of torture (BVerfGE 94, 49 [100]), or respect for the guilt principle in criminal proceedings. On this, see PM Huber, 'The Federal Constitutional Court and European Integration' (2015) 21 European Public Law 83; A Voßkuhle, 'European Integration Through Law: The Contribution of the Federal Constitutional Court' (2017) 58 European J of Sociology 145. For a critical account J Bast, 'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review' (2014) 15 German LJ 167. The concept has been used by many other courts throughout Europe to defend constitutionalism, but also abused by others to drop out of transnational human rights obligations: see L Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights' (2016) 12 European Constitutional L Rev 377. On the use in Hungary, in decision No. 22/2016. (XII.6.) AB, see AR Nagy-Nádasdi and B Kó halmi, 'Hungarian Constitutional Identity and the ECJ Decision on Refugee Quota' (VerfBlog, 8 September 2017) <https://verfassungsblog.de/hungarian-constitutional-identity-and-the-ecj-decision-on-refugee-quota/> last accessed 29 Oct 2018. More broadly on this issue, see R Uitz, 'National Constitutional Identity in the European Constitutional Project' (VerfBlog, 11 November 2016) <https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/> last accessed 29 Oct 2018.

[61] One example is the move from Case C-105/14 *Criminal Proceedings against Taricco and others* [2016] 1 CMLR 21 paras 28-29, to Case C 42/17 *MAS and another v Presidente del Consiglio dei Ministri* [2018] 2 CMLR 15 para 61.

Instead it is an active move to establish a jurisprudence that takes additional commitments seriously into account. While some younger constitutional courts were deliberately internationalized, others are or have become the pride of a new nation, yet all have the option to embed national law in the international legal order. As such, embedded constitutionalism does also create an international network of courts needed to defend their very doings.

Thus, some courts move forward when under attack. Yet others do indeed withdraw from intervention. And beyond the formal judicial mandate, many judges do engage in a challenging conversation among national, transnational and international courts.[62]

Yet courts and judges are not very well equipped to defend themselves, since their standing is entirely based on recognition by all other powers,[63] political actors have the power to define the rules of the game. Since such rules are often deemed but technical and small matters that evade public attention, and since constitutional courts tend to disturb political power and are thus no natural allies to influential players, the power of a constitutional court may in fact be quickly undone. But when the going gets tough, courts need strong actors on their side. The citizens who rallied in Poland got that, and many political developments in many countries do illustrate the point. As strong as they may seem, courts are in need of support from all over the political spectrum, to ensure the democratic rules of the game.

C. *People*

The main reason to rise against the attacks on the rule of law, as a key ingredient of constitutionalism, and to prevent or undo the destruction of independent constitutional courts, is that this is not an abstract problem. You need to watch out for the courts, and for constitutionalism, because

[62] An impressive analysis is provided by U Haltern, *Europarecht II* (3rd edn, Mohr-Siebeck 2017) 1559 et seq.

[63] Serge Brammertz, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, reflecting on why that tribunal prosecuted all those indicted, while other tribunals—notably the International Criminal Tribunal for Rwanda—closed despite 8 people never being tried, and the Lebanon-Tribunal without any arrest yet, said that political support was key: 'Das schönste Mandat der Welt nützt nämlich nichts, wenn man damit alleingelassen wird.' ['The most beautiful mandate in the world is worth nothing if you are left alone with it.'] Interview with Stefan Willeke, 'Ich was sehr allein' (Die Zeit, 11 Jan 2018) <https://www.zeit.de/2018/03/serge-brammertz-chefanklaeger-jugoslawien-tribunal> last accessed 5 May 2018.

their destruction hurts real people. To defend constitutionalism is to protect people from harm.

This is another lesson from Poland. In Warsaw, people did not only rally in favour of an independent judiciary. Thousands of women did, in the summer of 2016, and will again, in the winter of 2018, rally for their right to decide to end a pregnancy. Their request to send a referendum 'Save the women' to the committees, thus still use formal political venues, was rejected, and there is no constitutional court anymore to check that decision independently. In Hungary, legislation that destroys critical media, civil society and academic work, as well as legislation that fuels racism, and blocks solidarity with people in need, does not face the risk to be stopped by independent and courageous courts. Where such autocrats rule, there is no institution to eventually stop those in power, governing at the expense of anyone who does not fit. There again, when the law is attacked, the attack hits people.

More generally, if constitutions become but window-dressing for autocratic regimes, and if courts become political institutions to cover up sheer power and its abuse, it is people who suffer. This is why an increase in judicial intervention may be driven by needs that are not met by majorities in power.[64] Also note that many people run away from a lack of legal protection, specifically because the law in their home-country does not respect their fundamental rights, and must be sheltered by way of asylum. Regarding Poland, Adam Bodnar, the courageous ombudsman still in office, has said it clearly: 'Every limitation of judicial independence means, sooner or later, a limitation of rights and freedoms. Without independent courts, citizens are left to the grace of the political and financial interests of an omnipotent state.'[65] And note that this may be any citizen, including you, your relatives, loved ones and friends, in relation to what autocrats deem to 'fit' their imposed normality.

D. *Action Beyond Values*

So what are we, and what are you, to do? If there are court proceedings, you may very well trust us judges. But many serious violations of fundamental rights and democratic essentials never reach the courts.[66] When

[64] J Couso, A Huneeus and R Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (CUP 2010).

[65] A Bodnar, 'Protection of Human Rights after the Constitutional Crisis in Poland' (2018) 66 *Jahrbuch für öffentliches Recht*.

[66] Notably, access may in fact be hindered, eg for lack of exhaustion of national remedies, as exemplified in the ECHR ruling regarding Turkey: *Köksal c. Turquie* (App no 70478/

they do, note that courts are institutions in the real world. Judges read the papers, and some use social media, and discuss issues with friends and family, at home, in universities and other publics. If you want judges to not withdraw but take a stand for constitutionalism, and if you care for courts, let them know.

Also, use legal means to counter the attacks on constitutionalism. While it is certainly important to discuss values, they are no replacement for rights. We do not have to wait for values to be shared before being able to apply the laws we agreed to. Therefore, referring to Art. 2 TEU, it is important to remind Europeans of the consensus that feeds the treaties, but this does not mean to forget the binding force of them.[67] In German constitutional law, there was a craving for constitutionalism as an 'order of values' past 1945, a *Werteordnung* after its total loss, and there is currently a search for 'values' as elements of a '*Leitkultur*', often to counter cultural change brought by migration. And such a reference to values may upgrade the standing of and commitment to law. Yet when the 'order of values' indicates closure and exclusion, and when 'values' replace rights and disregard the essence of legal protection, a focus on values only is a problem. As such, values are insufficient to counter the attack. Specifically, because and if independent courts are the institutions to halt a ruthless majority, and to care for those who do not fit in, are left behind or left out when 'we' run 'our' show, it is not enough to ponder values, since legal protection is at stake as such. In particular, values as rather fuzzy majoritarian sentiment do not help us to protect constitutionalism and the courts who implement it, because it is courts and constitutionalism that stand directly in the way of such populist, and eventually autocratic, political programs. Therefore, the essentials of our legal order must still be protected as law, and by legal means.

The same applies to those who opt for 'flexible' discussions and political moves and call on diplomacy instead of law. In the case of Hungary, beyond committed beginnings by Barroso or Reding, nothing serious happened, because conservative European politicians, collaborating with the very actors that threaten the fabric of the EU in a faction of

16), Decision of 16 June 2016. The fewer the national remedies for breaches of the rule of law, the more international courts will be forced to expand admissibility.

[67] T von Danwitz, 'Values and the Rule of Law: Foundations of the European Union–An Inside Perspective from the ECJ' (2018) 21 Potchefstroom Electronic Law Journal <https://journals.assaf.org.za/per/article/view/4792> last accessed 5 May 2018; M Bonelli, 'From a Community of Law to a Union of Values' (2017) 13 European Constitutional Law Review 793; C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016); A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values-Ensuring Member States' Compliance* (OUP 2017).

the European Parliament, opposed such proceedings. In the case of Poland, and late, EU commissioner Timmermans declared, in December 2017, that the Commission took pains to start Art. 7 (1) TEU proceedings. Two years of intense dialogue with no result, and 13 new laws passed to 'reform' the judicial system, the Commission said, indicate a 'clear risk of a sincere violation of the rule of law'. The legal conditions need to be agreed upon. Prominent suggestions to not react by law, but politically only,[68] tend to disregard the very idea of constitutionalism. It is the commitment that courts protect people at risk, and to rely on law to make that happen. Therefore, beyond all necessary politics and diplomacy, there is an urgent need to draw red lines, to protect the rule of law and make sure it still exists. Such red lines help to distinguish between critique and attack. But they are also in fact needed to safeguard the essentials of constitutionalism today, also by legal means. We need to be smart in drawing them, and fast as well.

It is a time when no one should take the rule of law for granted, or the existence of independent courts. Recently, the German federal government agreed upon a new initiative to strengthen the *Rechtsstaat*, to build a '*Forum Recht*' in Karlsruhe, as a space – real and virtual – to discuss what is too often taken for granted. Indeed, we want it to be exciting and controversial, not least to contribute to the ability to clearly draw red lines. And so to bring law to the centre-stage!

As such, constitutionalism only works with courts, but it also only survives when it is really people who take constitutionalism in their hands. Law is practice, not neat doctrine only. And constitutionalism is neither a formal exercise nor a political power game, but always both, and more. As such, constitutionalism needs you. So join the chorus: rise for the rule of law, stand up for human rights, and call for constitutionalism.

Be quick. Things go down the drain very quickly. When such populist landslides gain speed, legal protection is taken away from elections and public opinion, which makes autocrats accelerate. Recent elections in Hungary have thus been criticized as marked by 'intimidating and xenophobic rhetoric, media bias and opaque campaign financing', with public television 'clearly favoring the ruling coalition'.[69] In Turkey, after the coup, the government swiftly expelled thousands of judges, professors and administrators from their jobs, and refilled the institutions they

[68] eg C Möllers, 'Buntes Potpourri' *Frankfurter Allgemeine Zeitung* (12 April 2018) <http://www.faz.net/aktuell/politik/staat-und-recht/polen-und-ungarn-die-eu-und-autoritaere-entwicklungen-15537193.html> last accessed 29 Oct 2018.

[69] OECD, Elections in Hungary, 2018, , at 28 <https://www.osce.org/odihr/elections/hungary>, last accessed 29 Oct 2018.

served, namely courts, the media, public prosecution offices and the police, with people to their liking. For many reasons, the Turkish constitutional court accepted the removal and incarceration of two of their colleagues. Much later, it sought to get back on track, and declared the long pre-trial detention of journalists to violate the constitution, for which it gave extensive reasons, also based on the ECHR.[70] But the lower criminal court simply did not accept the ruling. Similarly, the current Hungarian constitutional court has struck down several legislative acts.[71] But it does not effectively protect democratic essentials, the embeddedness in Europe, minorities and people. When justice has been 'successfully reformed', it may be too late for such attempts to protect fundamental rights. We must work to ensure that it does not stay that way. Therefore, stage a rally, organize a conference and a happening, contribute to a blog or sing the constitution, with people from all over the political spectrum that are committed to constitutionalism that deserves the name. It might be a bit like the bench in a court that profits from diversity: a collegial court is made to work closely together, intensely interact with conservatives and progressives, nationalists and cosmopolitans, and last but not least men and women of all sort of sexual and gender identities, to find consensus in diversity. In Warsaw, there were actors, football fans, members of a shooting association, Christians, Vietnamese, Jews, the *Chorus of Women*, Muslims, refugees, people with down syndrome, pensioners, children. Marta Gornicka had them sing the constitution. It is a choir of very different voices. Join in! You will find your own voice!

[70] B Cali, 'Will Legalism be the End of Constitutionalism in Turkey?' (*Verfassungsblog*, 22 January 2018) <https://verfassungsblog.de/will-legalism-be-the-end-of-constitutionalism-in-turkey/> last accessed 5 May 2018. It indicates a crisis also when judges call for harsh verdicts of politicians in the opposition before a trial, as in Iran after the protests in early 2018; see 'Justiz fordert Höchststrafe für Anführer der Proteste im Iran> (*Deutsche Welle*, 8 Jan 2018) <https://p.dw.com/p/2qUYA> last accessed 29 Oct 2018.

[71] In November 2017, the Court struck down a court president's disciplinary code for judges (30 November 2017, IV/1259/2016), and it declared a rule to be unconstitutional that required poor people to care for a 'orderly' living circumstances to be allowed to work in funded employment (Decision of 9 November 2017, SZ II 1220/2013), yet it did not act on any significant political project of the government. As Andras Sajo has pointed out, this may slow down politics and give society time to breathe, yet does not indicate the power to stop autocratic leaders.