The Manifestations of the EU Rule of Law and its Contestability: Historical and Constitutional Foundations

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1. *Introduction*

On 16 February 2022[1], in cases C-156/21 and C-157/21, *Hungary v. Parliament and Council* and *Poland v. Parliament and Council*, the Court of Justice of the European Union (CJEU), sitting in plenary session, made a remarkable statement to the effect that, in the light of Article 2 of the Treaty on European Union (TEU), the rule of law in the European Union (EU) constitutes a foundational principle of EU law based on the principle of solidarity[2]. In that judgment, which relates to the legality of the Budget Conditionality Regulation[3], the CJEU appears to understand the rule of law as something that is legally or constitutionally self-evident, based on solid precepts rooted in the text of Article 2 TEU. Historically and generally, the rule of law has always been a contested concept. But can we really posit that it is contested in the context of EU law? And if it is so there as well, what is the exact nature of the contestation? The aim of this article is to answer these two questions. It will first look at the evolution of the concept of the rule of law in the EU from the early years of European integration to its most recent manifestations. To better understand its constitutional development, a comparison will be made between the doctrine of the rule of law and the doctrine of general principles. Secondly, we will analyse the nature of the present contestation which takes the form of the rule *by* law in "illiberal democracies" such as Hungary and Poland. This new narrative running counter to the rule of law is, we will show, fuelled by two basic ingredients: populism and legalism. Notably, we will argue in this essay that the rule by law imposed by these illiberal States on their citizens constitutes not only the main source of contestation of the doctrine of the rule of law in the EU but also its main source of evolution. In other words, the application of the rule by law by illiberal States actually fosters, in turn, the concretisation of the rule of law in the EU.

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2. *The rule of law in the EU as a foundational principle*

As of 2022, the rule of law has been expressly recognised in EU law. However, the principle of the rule of law has travelled a long way in establishing its operational functionality in the constitutional architecture of the EU[4]. In fact, its development in many ways mirrors that of another constituent part of EU constitutional law, namely the doctrine of general principles of EU law[5]. The present section, while tracing the manifestations of the rule of law in the EU from a historical perspective, will also demonstrate an interplay between the principle of the rule of law and that of those general principles, elaborating on how this interplay has had an impact on both legal phenomena.

2.1. *The origins of the rule of law in EU law*

The similarities in terms of their birth and evolution between the rule of law and the general principles are striking – indeed, both seem to have followed a similar process of amplification of their role in the constitutional edifice of the EU. Firstly, both the rule of law and the general principles initially enjoyed the status of implicit, unwritten principles of EU law, technically invisible in the constitutional framework of the EU. Even though the principle of the rule of law determined the trajectory of the European integration process[6], it was perceived as an implied constituent element of the new "sui generis" order rather than as a fully-fledged constitutional principle. This would explain the absence of rule-of-law terminology in the original treaties.

The first signs of indirect manifestation of the rule of law can be traced all the way back to Article 31 of the Treaty establishing the European Coal and Steel Community, which, in explaining the function of the (now-)CJEU, described its duty as ensuring «that in the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed»[7]. However, it was not until the Treaty of Maastricht that primary legislation explicitly indicated the seminal significance of the rule of law for the European project. In this respect, the Treaty of Maastricht confirmed the loyalty of the Member States to the rule of law, democracy and general principles, perceived as fundamental rights, both internally[8] and externally (in the field of development co-operation[9] and in the conduct of the common foreign and security policy)[10]. The links to the principles of democracy and fundamental rights are further explicated in Articles F(1)[11] and F(2)[12], which can be perceived as indirect traces of the substantive conceptualisations of the principle of the rule of law.

The further enhancement of the status of the principle of the rule of law can be dated back to the 1990s – an enhancement that was marked by the victory of liberal thinking over communism, by a reorientation of States of the former Eastern Bloc towards Western values, including the rule of law, and by the subsequent process of EU enlargement in the first decade of the 21st century. This process prompted a strengthening of the position of the rule of law through several channels. Firstly, the enlistment of the rule of law, democracy and human rights as the key requirements

(or "Copenhagen Criteria") for accession to the EU in 1993 reinforced Articles F(1) and F(2) of the Treaty of Maastricht and explicitly underlined their connection with the rule of law. This development paved the way for the intensification of the protection of the rule of law in EU primary legislation, which was subsequently put in practice by the Treaty of Amsterdam. In fact, that treaty not only "upgraded" the rule of law to the category of one of the foundational principles of the EU, common to all Member States[13], and incorporated the Copenhagen Criteria[14], but it also introduced a special mechanism, Article 7 TEU, which enabled the Union to suspend the rights of Member States if they disrespected the EU's common values[15]. Moreover, the Treaty of Amsterdam brought fundamental rights within the scope of adjudication of the CJEU, making them officially justiciable[16]. In 2000, the substantial dimension of the rule of law was also strengthened by the adoption of the non-binding Charter of Fundamental Rights (CFR) of the European Union. Its preamble reiterated the foundational nature of the principles of democracy and the rule of law[17] and stressed their essential importance for the European project, which was further underscored when the CFR was granted legally binding force by the Treaty of Lisbon.

Later on, the Treaty of Nice complemented the "nuclear option"[18] by phasing in a preventive arm of the mechanism which could be triggered in the event of a «clear risk of a serious breach» of the foundational principles of the EU[19]. The finalisation of the status of the principle of the rule of law as the backbone of the EU[20] was then brought about by the Treaty of Lisbon. According to Article 2 TEU, the rule of law constitutes one of the foundational values on which the EU is based[21] at the same time as it remains a guiding principle of the EU in its external action[22]. Moreover, the CJEU has found[23] that Article 19 TEU gives concrete expression to the value of the rule of law in the constitutional order of the EU, emphasising its intrinsic link to the principle of effective judicial protection as guaranteed by the CFR[24].

It is clear that the absence of both concepts – that of the rule of law and that of general principles – from the first treaties contributed to their initial "dormant" position in the constitutional design of the EU. The "unveiling" of those principles by the CJEU then transformed and strengthened the status of each of them in that they were recognised and introduced into the existing hierarchy of the constituent elements of EU law. Hence the CJEU played an active part in enhancing the role of both the rule of law and the general principles of EU law as guiding principles of the constitutional order of the EU, gradually imbuing them with concrete content and turning them into key tool tools of judicial review.

The CJEU's adjudication with regard to the principle of the rule of law can be schematically described as consisting of a number of separate waves marking the progressive constitutional maturity of that principle: the formal-procedural wave of the 1980s gradually transformed into a more substantive wave during the 1990s, whereupon there was again a more procedural wave in the second decade of the 21st century. Whilst the triumphal ascension of the rule of law onto the constitutional arena of the EU legal order is often associated with the seminal judgment *Les Verts*[25] of 1983, the first explicit reference to the formally

Court of Justice of the ECSC, hearing at the Villa Vauban, 1952

and procedurally oriented principle of the rule of law can in fact be traced further back to the judgment *Granaria*[26] of 1979, where the CJEU underlined the importance of compliance with EU law together with the significance of access to justice[27]. However, it was indeed the *Les Verts* judgment that explicitly set out the fully-fledged loyalty of the EU legal order to the principle of the rule of law[28]. Interestingly, the procedural facet of the rule of law outweighed its formal facet in this seminal case, where the CJEU ruled that measures adopted by the European Parliament could not escape judicial scrutiny by the CJEU even though the legal framework of EU primary legislation at that time did not envisage the bringing of annulment actions against acts of the European Parliament. It was back then, when the CJEU unveiled the procedurally-oriented essence of the rule of law whose core lies in the existence of judicial review, that the road was paved for the conceptualisation of the rule of law that was to be established in later case-law and would eventually become a standard formulation of the quintessence of the rule of law in the legal order of the EU[29].

Despite the formal-procedural conceptualisation used in *Les Verts*, however, the principle of the rule of law in the EU cannot be categorised as a "thin concept"[30]. In fact, the origins of the "substantisation" of the rule of law date back to the early case-law of the CJEU, namely to the *Stauder* case[31], where the protection of fundamental rights – which constitutes a substantive dimension of that principle – was guaranteed through respect for the unwritten general principles of Community law[32]. This approach has since been extensively used by the CJEU in its efforts to safeguard fundamental rights[33], especially before the CFR became legally binding. The principle of the rule of law actually proved to be instrumental in protecting fundamental rights,

as has been demonstrated by the case-law of the CJEU, including the influential *Kadi I* judgment[34]. What is more, the substantive dimension of the rule of law has later also been strengthened, in particular, through the CJEU's case-law on Article 47 CFR, which encapsulates the principle of effective judicial protection in the EU[35].

As can be seen, the doctrines of the rule of law and the general principles of EU law not only have a great deal in common in terms of their evolution but also overlap with each other in terms of their essence. In this respect, "thick" conceptions of the rule of law, which include elements such as the protection of fundamental rights, are a good illustration of the intrinsic connection between the rule of law and the concept of general principles laying the foundation for the protection of human rights in EU law[36].

Finally, the past few decades have seen an increasingly marked return to the procedural conceptualisation of the rule of law owing to an increase in litigation concerning Article 2 TEU as well as a growing incentive to protect the existence of effective judicial review as underpinned by Article 19 TEU. This process in fact illustrates yet another feature that is common to the rule of law and the doctrine of general principles.

2.2. *Making the rule of law visible in constitutional conflicts*

It is worth underlining that the culmination of the development of both legal phenomena (the rule of law and the general principles) has been triggered by constitutional conflicts of a high magnitude: conflicts between the constitutional courts of some Member States and the CJEU, as was the case for the doctrine of general principles, or conflicts between the EU and some Member States, as was (and still is) the case when it comes to adherence to the rule of law – a burning issue that remains to be unresolved and whose prospects of being resolved remain vague despite the presence of an impressive toolkit in the legal framework of the EU[37]. Notwithstanding differences in timing, both the doctrine of the rule of law and the doctrine of general principles have thriven and become enriched in the context of conflicts, crises and socio-political changes. The amplification of both concepts has led to their codification and to a strengthening of their practical application, reflecting their transformation from passive, invisible constituents of the constitutional framework of the EU into powerful, well-articulated instruments, actively used in litigation for the protection of core constitutional values and fundamental rights in the EU.

The principle of the rule of law vividly demonstrates this observation. However, while the successful outcome of the long journey of the rule of law to the constitutional Olympus of the EU legal order may well give cause for celebration, it should not be forgotten that the primary legislation as of today still lacks an actual definition of the rule of law. This has in fact been extremely troublesome in the context of the saga of the backsliding of the rule of law[38], where attempts have been made to explain some Member States' questionable adherence to the rule of law by reference to diverging understandings of that principle[39], which is notoriously known for its contested nature[40].

The necessity to address this issue was illustrated by a communication published by the Commission in 2014[41], in which it provided, for the first time, a non-exhaustive list of the principles[42] that together define the essence of the rule of law as a foundational value under Article 2 TEU. The Commission also highlighted that the rule of law is «a constitutional principle with both formal and substantive components»[43]. In this context it is also noteworthy that while the Commission in its 2014 Communication presupposes potential diversity in defining the precise content and standards inherent in the rule of law at a national level[44], in its Communication of April 2019 it explicitly states that the principle of the rule of law is «well-defined in its core meaning»[45] and requires the Member States to ensure the compliance of their reforms with «EU legal requirements and European standards on the rule of law»[46]. The Commission's Communication of July 2019 goes even further by underlining that the core meaning of the rule of law, «in spite of the different national identities and legal systems and traditions that the Union is bound to respect, is the same in all Member States»[47] – a position that it has also expressed in later Communications in 2020[48] and 2021[49].

The apotheosis of the conceptualisation of the principle of the rule of law consisted in the adoption of the Budget Conditionality Regulation[50], which is the first act of secondary legislation to provide a definition of the rule of law in the EU[51]. The significance of this piece of legislation, which has survived annulment proceedings brought by Hungary[52] and Poland[53], for the principle of the rule of law cannot be overestimated. In its judgments in the annulment cases, the CJEU not only dismissed the arguments presented by Hungary and Poland to the effect that the EU legislature lacked the ability to give a uniform interpretation to the concept of the rule of law at the EU level, but it also confirmed the obligational nature of the constitutional values of Article 2 TEU, bringing any discussions regarding the allegedly uncertain status of the principle of the rule of law in the EU legal order to an end[54]. As of 25 March 2022, the Commission had already adopted guidelines[55] clarifying the operational functionality of some provisions of the Budget Conditionality Regulation. This step[56] in fact removed the last hurdles on the way to the practical application of that regulation.

3. *Rule* by *law in the Member States – Understanding the contestability of the rule of law from a historical and constitutional perspective*

3.1. *The year 1989 and its aftermath: From (liberal) dream to (illiberal) reality*

The year 1989 is crucial for understanding the current rule-of-law crisis in Europe and the surge of "illiberal democracy" as the main challenger of the constitutional liberal democratic model. That year saw the fall of the Berlin Wall, which kick-started the incorporation of the former States of the Soviet Union block into the EU[57]. A few months earlier, tanks rolling onto Tiananmen Square in Beijing had shown the relentless will of China's government not to abdicate in the face of the birth of a democratic movement[58]. That reaction was bestial. At the same time,

behind the grey walls of the CERN laboratory close to Geneva, Switzerland, a research project involving what would later be known as the World Wide Web was being conducted. Who would have thought at this time that the internet would fundamentally challenge the key tenets of liberal democracy?[59] Who would have thought that it would now be possible to talk of "digital despotism" as a reality? Finally, in October 1989, Professor Koen Lenaerts became a judge at the EU General Court in Luxembourg. He is now President of the CJEU, which is central to the protection of the rule of law in the EU and to the fight against "illiberal democracy", and whose realist interpretation of the EU constitutional framework is vital when it comes to ensuring that the liberal constitutional democracies prevail over the new European autocrats as the other EU institutions are failing to act appropriately.

Three years on from the fall of the Berlin Wall, Francis Fukuyama in his 1992 book *The End of History and the Last Man* considered that there were no more rivals to liberal democracy at the level of ideas[60]. His book was widely misunderstood as predicting the end of all conflicts[61], but it does not – it clearly states that the vast majority of the Third World will remain very much embedded in history and will be a landscape of conflict[62]. However, Fukuyama was right on one important point, namely when he stated that the end of history would be a very sad time where there would be «neither art nor philosophy, just the perpetual caretaking of the museum of human conflicts between states»[63]. In his analysis, Fukuyama stressed the absence of strong ideological competitors to liberalism:

> If we admit for the moment that the fascist and communist challenges to liberalism are dead, are there any other ideological competitors left? Or put another way, are there contradictions in liberal society beyond that of class that are not solvable? Two possibilities suggest themselves, those of religion and nationalism.

He saw liberalism as the connecting thread of the fall of the Soviet Union[64], and he considered that, in Europe, the 19th-century model of great powers had become a serious anachronism since the Second World War[65]. Even so, he failed to see what we know now, that the main and strongest threat to liberal democracy was not external but internal to the concept of liberal democracy – it was in fact its own dark tail: "illiberal democracy". It seems, fatefully, that liberal democracy needed an enemy, and it got one – a very pernicious one indeed.

"Illiberal democracy" is not merely an oxymoron but constitutes a clear and present threat to the rule of law and constitutional democracy as understood in the EU. The essential aim of an "illiberal democracy" is to destroy the link between the rule of law and democracy through rule *by* law, causing an irrevocable "constitutional meltdown" annihilating the separation of powers. Decision K-3/21 of the Polish Constitutional Court, which questioned the legitimacy of the CJEU case-law, is a perfect and frightening illustration of what an "illiberal democracy" can do in and to the EU[66]. However, rather than discussing at length the potential consequences of "illiberal democracy", we here mainly intend to examine the historical roots of that concept as well as its nature.

3.2. *The rise of "illiberal democracy"*

As early as 1997, Fareed Zakaria presented his revolutionary vision of a changing world in an article published in «Foreign Affairs». There he wrote about a new world facing the rise of what he called "illiberal democracy"[67]:

> Democratically elected regimes, often ones that have been re-elected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms. From Peru to the Palestinian Authority, from Sierra Leone to Slovakia, from Pakistan to the Philippines, we see the rise of a disturbing phenomenon in international life: illiberal democracy. It has been difficult to recognize this problem because for almost a century in the West, democracy has meant liberal democracy, a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion[68].

Zakaria's vision became an acrimonious reality in Europe with the ascent to power of *Fidesz* in Hungary and *PiS* (Law and Order) in Poland. Two EU Member States are now "illiberal democracies" situated somewhere between democracies in the traditional sense and totalitarian regimes; those two populist parties have gained legitimacy precisely because they are reasonably democratic[69]. Such legitimacy is key to those parties. Indeed, Viktor Orbán of Fidesz, an innovative ideologist, attempts to equate "illiberal" with "Christian democratic" in order to legitimise the authoritarian character of the Hungarian system[70]. This reflects how that system, and its legitimacy, are crucially dependent on appearances.

However, it also shows that "illiberal democracy" is a dynamic concept[71]. Juxtaposition of Hungary and Poland reveals differences in their approach to illiberalism: for example, Poland may appear more ideologically inclined than Hungary, and the reactions of civil society are also stronger in Poland, whereas in Hungary the populist government comes very close to a "cleptocracy" which is first and foremost interested in economic gain. It is worth noting that the reactions of the European Commission to those two Member States are also different. In the case of Poland, it has focused on bringing infringement actions to protect the independence of the judiciary[72]. In the autumn of 2021, the CJEU ordered Poland to pay a record daily penalty of €1 million for not complying with a decision regarding judicial reform. By contrast, in the case of Hungary, the infringement actions brought focus largely on breaches of free-movement rules and the disregarding of economic freedoms. This difference in the Commission's actions or strategy may in fact reflect a deeper structural difference between the two countries. However, this in no way changes the fact that both Poland and Hungary are sources of inspiration for populists in the rest of the EU. For example, on 26 of October 2021, the French populist leader Marine Le Pen met Viktor Orbán in Budapest a few days after the delivery of the above-mentioned K-3/21 judgment. During this meeting, she did three main things: first, she issued a statement of support for the Hungarian and Polish governments; then she discussed at length the «legitimate K-3/21 ruling» as an expression of sovereignty and of the will of the people; and finally, she concluded by making the following statement: «La Hongrie de 2021, sous votre conduite, se place une nouvelle fois à la pointe du combat pour la liberté des peuples» [«Hungary of 2021, under your

leadership, once again takes the lead in the struggle for the freedom of peoples»][73].

Le Pen's concluding statement in fact reflects one of the ideological tenets of "illiberal democracy", namely its claim – here used for rhetorical effect to circumvent the rule of law – to represent the will of the people.

This new reality has fuelled a new debate in the EU about where the "illiberal democracies" should be placed or positioned in relation to the concept of liberal democracy and the tripod of liberalism: democracy, rule of law and human rights. This is a puzzling situation: "illiberal democracies" now form an integral part of the EU, which is grounded on this Western liberal tripod. This debate also sheds (new?) light on the relationship between the rule of law and democracy. In Europe, it is not possible in practice to establish watertight barriers between democracy and the rule of law[74]. Joseph Weiler's reason for calling the term "illiberal democracy" an «oxymoron» is that, in his analysis, the «liberal order» consists of three attributes: democracy, the rule of law and human rights – which Weiler terms «The "Holy Trinity" of the liberal order»[75]. By contrast, according to Gianluigi Palombella, «[t]he rule of law and democracy have coexisted or lived separately. There is no historical evidence as to the necessity of their simultaneous presence»[76]. This debate is in fact reminiscent of the old and ideologically charged debate on the rule of law and democracy[77], where no agreement can really be found, just agreement to disagree. However, the true importance of this debate lies elsewhere. As lucidly put by András Sajó,

> [i]lliberal democracies are democracies of a troubling sort, enabling the totalitarian potential inherent in mass democracy. Illiberal democracies bring to light the authoritarian elements in liberal constitutions, which are historically unfinished and internally vulnerable[78].

It is now time to ask what the key tenets of "illiberal democracy" are.

3.3. *Anatomy of an "illiberal democracy"*

The concept of "illiberal democracy", like those of the rule of law and rule by law, is "essentially contested". This specific feature makes it difficult to define. In this article, we claim that "illiberal democracy" is founded on two basic ingredients: populism (the people) and legalism (the law or rule by law). Whereas the first ingredient (populism) is in common use by scholars trying to define "illiberal democracies", the second one (legalism) appears to be less frequently relied upon. However, the recognition of legalism as a key defining element has gained traction in recent years. We believe that this is due to the influential writings of Corrales (2015)[79], Müller (2016)[80] and Scheppele (2018)[81]. In his recent book *Ruling by Cheating*, András Sajó states, correctly in our opinion, that «the unfaithfulness to the principles of constitutionalism and the narrowness in interpretation disclose the importance of cheating with law as a central legal and social technique of illiberal democracy»[82]. This article will show that legalism, which can be seen as a reduced version of the rule of law, is an essential cog of the system of "illiberal democracy". To defeat the rule of law, populist governments make strategic use of the law in what has been referred to as "lawfare". We consider that, in defining

the concept of "illiberal democracy", it is particularly important to look at the Hungarian example, which is indeed viewed by populists such as Donald Trump and Marine Le Pen themselves as the model for an "illiberal democracy" success story. Against that backdrop, it is no surprise that one of the main features of Le Pen's policy platform for the 2022 elections was a call for in-depth reform of the French constitution. As regards Poland, this "illiberal endorsement" is encapsulated in a slogan used by the Polish populists: «Budapest in Warsaw». Ultimately, the key aim of "illiberal democrats" is to take control and then consolidate and perpetuate power with the help of the people and the law. The law (and rule by law) is here seen as an expression of the sovereignty of the State and an expression of the will of the people («la loi comme expression de la volonté générale») – a key tenet of the French Revolution[83] which can be traced back to Jean-Jacques Rousseau.

The first ingredient: populism

The first basic ingredient of "illiberal democracy" is populism, or the people. Populism can be seen as «a degraded form of democracy that promises to make good on democracy's highest ideals ("Let the people rule!")»[84]. The major danger of populism is that, beyond being a mere reaction to liberalism, it constitutes a threat to democracy itself. In part, this is because "illiberal democracy" creates perfect circumstances for the "tyranny of the majority", of which the Reign of Terror (*la Terreur*) during the French Revolution[85] is the prototypical example. Ironically, the Reign of Terror (or the reaction to it) gave a strong impetus to the nascent liberalist movement and liberalist theories in Europe. Benjamin Constant[86], more famous as the lover of Madame de Staël, spearheaded this movement, which influenced generation of liberals, most notably Isaiah Berlin and his theory about the two concepts of liberty[87].

The people is indispensable to an "illiberal democracy", whose business model is simple: first it pays allegiance to democracy and then it uses illiberal tactics to increase and perpetuate its power[88]. In this way, it insidiously becomes an enemy from within[89]. Indeed, the connection between "illiberal democracy" and populism is almost of a fusional nature – which may not come as a surprise if one views populism as the dark shadow of democracy[90]. According to Cass Mudde and Cristobal Rovira Kaltwasser, «populism is an illiberal democratic response to undemocratic liberalism»[91]. For some, it also has a corrective function in relation to a politics that has somehow grown too distant from people[92] in that it is run by the liberal elites, which must be resisted. As rightly expressed by Cesare Pinelli, populism is an ideology that separates the pure people from the corrupt elite and holds that politics should be an expression of the general will of the people[93]. To him, it is a malaise of constitutional (liberal) democracy[94].

Yet populism is not necessarily the nemesis of democracy. The relationship between the two is indeed far more complex. Along this line of thought, Anselmi points out that

> [P]opulism must be considered as a complex phenomenon deeply connected with democracy, while reductionist interpretations must be avoided. Populism is a modality of social ex-

> pression of popular sovereignty, which acquires different forms but has some very specific traits that are determined by the social conditions of the context where it manifests itself. It is a demand for more democracy on the part of citizens; however, once it has taken hold, it can even generate an involution of democratic institutions. Therefore, I do not agree with those who describe populism as a mere phenomenon of protest or a reaction to the crisis of democracy. Although the word is the object of much polemic and criticism, it refers to a complexity of phenomena which are key to democracy and which need to be investigated[95].

Populism, like "illiberal democracy", is yet another essentially contested concept[96]. The two concepts overlap and populist parties acquiring power through democratic election are often said to run "illiberal democracies". In fact, such situations, which are nowadays not uncommon in Europe, give «new lifeblood to the relationship between populism and constitutionalism»[97]. Generally speaking, populists who have acquired power wearing proper democratic clothes will attempt to do three things: first, colonise the State; second, engage in mass clientelism; and finally, pass discriminatory laws[98].

Their overarching purposes will then be to increase their dominance over society, to replace the former reigning elite with a new "illiberal elite" and to stay in power. This is why it is important to look at populist governments through the prism of totalitarianism rather than through that of democracy. It is also why the term "illiberal democracy" can be seen as a misnomer with regard to its second element[99]. In fact, an "illiberal democracy" is an unsustainable democracy, since its final aim – or why not its *Endlösung* – is to undermine the very idea of democracy by controlling "the people", their precious votes and their weakened will.

Alexis de Tocqueville, in Chapter 7 of *Democracy in America*, which is entitled «Of the Omnipotence of the Majority in the United States and its Effects», underlines the risk of a tyranny of the majority where public opinion becomes an all-powerful force and where the majority may tyrannise unpopular minorities and marginal individuals[100]. Larry Siedentop, known for taking his inspiration from Tocqueville, writes in *Democracy in Europe* that «judicial review, as Tocqueville noticed in the 1830s, is the most powerful weapon available in the defense of liberal democracy against a populist form of democracy, the unadulterated majority principle»[101].

The second ingredient: legalism or rule by law

The second basic ingredient of "illiberal democracy" is legalism or rule by law. Jan-Werner Müller starts his book *What is Populism?* by quoting Bertolt Brecht: «All power comes from the people, but where does it go?»[102]. A populist thinker would perhaps answer that the power goes into the law, since the law is the favourite instrument of governance in an "illiberal democracy". By now it is well known that "illiberal democrats" come to power with a phalanx of lawyers, not with a phalanx of soldiers[103]. In addition, history has shown that strongmen tend to be surrounded by very capable lawyers[104], such as Carl Schmitt for Hitler or Santi Romano for Mussolini. Moreover, as Tocqueville showed, rule by law is also central to the flourishing of democracy[105]. Against this background, it is not so surprising that legalism constitutes the lifeblood of "illiberal democracy"[106].

This symbiosis between legalism and "illiberal democracy" is a recently observed phenomenon, and it is clear that legalism is not one of the basic ingredients that immediately come to mind as one tries to define "illiberal democracy". In 2015, Javier Corrales mentioned the concept of «autocratic legalism» in his article on Venezuela and Chávez. One year later, Müller referred to «discriminatory legalism»[107]. However, we have to wait for Scheppele's 2018 article on «autocratic legalism» to find a text going deep into the concept of legalism in relation to "illiberal democracy". Anatomically speaking, it might be claimed that legalism (or rule by law) is the brain of an "illiberal democracy", whereas populism is its heart. Both of them are indispensable, but one of them is about passion (people) while the other is about reason (law). Importantly, the technicalities and apparent (but fake) neutrality of rule by law make it immune from the people's emotions[108]. Differently put, legalism and populism are the yin and yang of "illiberal democracy".

Legalism in its rule-by-law form is also one of the favourite weapons of governance of the autocrats in China[109]. Nowadays and in a similar vein, most European populists are legalists. The concept of legalism can be traced back to Hobbes and the Leviathan, where the law is described as an ordering tool[110]. As a phenomenon, legalism has been a particularly popular object of study in sociology, especially within the Weberian school of thought. Weber himself spent a considerable amount of time describing the meanderings of legalism from a comparative perspective, finding that societies based on civil law tend to be more prone to legalism[111]. In the 1920s and 1930s, legalism was at the core of the debates among "institutionalists" such as Hauriou, Schmitt and Romano. The democratic wing of institutionalism, including Hauriou, considered that «the respect for the established laws» is key to the equilibrium of the rule of law[112]. By contrast, its autocratic wing realised that the law can be used as an instrument to gain and maintain power, or even to maintain an equilibrium of fear through rule by law.

There is clearly a risk in using legalism to maintain the equilibrium of power in a democratic society. Indeed, legalism may help make order triumph over freedoms[113]. The conservatism of the law and of lawyers may come in handy for those trying to bring about such a paradigm shift or political change as the one discussed here[114]. Further, it is important to keep in mind that a revolution is always the *last* stage of a political shift, never the first one. What happens in an "illiberal democracy" is that «the new autocrats target the features of the constitutional order that will ultimately stand in the way of their domination of the political space»[115]. This phenomenon has been referred to as «constitutional capture»[116]. It reflects modern-day autocrats' realisation that, to be able to exercise unconfined power, they do not need to kill their opponents[117] – rule by law is a sufficient weapon[118]. In that respect, Brian Tamanaha, in his many writings, has perfectly grasped the power of the law from a legal-realist perspective, where legalism is often discussed in the light of the concepts of the rule of law and rule by law[119].

In brief, "illiberal democracies" rule by means of law; this is rule by law in its purest sense, and also a component of a "thin" or "formal" understanding of the rule of law[120]. For this reason, rule by law can in

fact be seen as a «partial» rule of law[121]. By contrast, rule by law as fostered by "illiberal democracy" is the enemy of the liberal vision of the "substantive" or "thick" rule of law[122]. As explained by Sajó and Tuovinen,

> [t]o assume that the emerging illiberal regimes are based on a radical denial of the rule of law is wrong. We are confronted here with a borderline case, a mixture of an abused rule of law and rule by law; it is true that the rule of law is fatally compromised in matters crucial for the political power and related economic domination, but much less in everyday life. We can see how this legalism leads to a pattern where the rule of law is simultaneously followed and breached. There are two parts to the process: the first is a legally compliant change, the second is a replacement by a process that while on its face acceptable, works in the government's favor, or at least does not hinder it, ultimately – step by step – undoing the checks and balances of the constitutional system[123].

The use of rule by law in the illiberal regimes of Europe is aimed at breaking down the «grammar of legality»[124] of the former liberal regimes and at building a new grammar based on the negation of the rule of law in the "thick" (liberal) sense. To paraphrase Raz[125], in "illiberal democracies" the law or legalism is used as a knife, but a very peculiar type of knife: a switchblade knife (or flick-knife), which the regime activates insidiously and at will against its enemies. As so elegantly put by Scheppele, putting power into law makes the autocrats look like democrats playing hardball rather than dictators playing softball[126]. "Illiberal democracies" are chameleon democracies. Their true intentions must be revealed for all to see, so that we may react and fight them as best we can before it is too late.

4. *Conclusion*

"Budapest in Warsaw", "Budapest in Paris", "Budapest in Brussels" – if we are not vigilant, all three may well become constitutional reality. The concept of "illiberal democracy" is growing in Europe and now constitutes the main contender of the rule of law as applied on a liberal basis by the CJEU and the majority of the courts of the Member States. As explained above, the goal of "illiberal democracy" is to take control through elections and then consolidate and perpetuate power with the help of the people and the law. It constitutes a clear and present threat to the rule of law and constitutional democracy as understood in the EU because, through rule by law, it is capable of destroying the link between the rule of law and democracy. However, paradoxically, the rise of rule by law in "illiberal democracies" also constitutes the main source of development and concretisation of the rule of law in the EU. From a historical perspective, the EU rule of law has evolved from an undefined and invisible principle in the first years to a better defined, explicit and justiciable principle in recent years. The degree of consolidation of the principle of the rule of law is thus proportionate to the growth of its main constitutional threat, which is coming from the illiberal EU Member States: rule by law.

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[2] Case C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97; case C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98.

[3] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1.

[4] X. Groussot, A. Zemskova, *The Resilience of Rights and European Integration*, in A. Bakardjieva Engelbrekt, X. Groussot (eds.), *The Future of Europe: Political and Legal Integration Beyond Brexit*, Oxford, Hart Publishing, 2019[1], <http://www.bloomsburycollections.com/book/the-future-of-europe-political-and-legal-integration-beyond-brexit/ch4-the-resilience-of-rights-and-european-integration/>, accessed 16 August 2019.

[5] See X. Groussot, *General Principles of Community Law*, Groningen, Europa Law Publishing, 2006.

[6] A. von Bogdandy, J. Bast, *Principles of European Constitutional Law*, Oxford Hart, 2010, p. 28.

[7] This passage is sometimes (although rarely) translated as «the rule of law must be observed» (the French version reads «La Cour assure le respect du droit dans l'interprétation et l'application du présent Traité et des règlements d'exécution.»), see S.A. Scheingold, *The Rule of Law in European Integration: The Path of the Schuman Plan*, New Orleans, Quid Pro Books, 1965.

[8] Preamble of the Treaty of Maastricht: «confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law».

[9] Treaty of Maastricht, Article 130(u)(2): «Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms».

[10] Treaty of Maastricht, Article J.1(2): «The objectives of the common foreign and security policy shall be: […] to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms».

[11] Treaty of Maastricht, Article F(1): «The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy».

[12] Treaty of Maastricht, Article F(2): «The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law».

[13] Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts, OJ C 340, Article 6 (1): «The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States».

[14] Ivi, Article 49.

[15] Ivi, Article 7.

[16] Ivi, Article 46.

[17] Charter of Fundamental Rights of the European Union, OJ C 326, preamble, para 2: «Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law».

[18] D. Kochenov, L. Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in «European Constitutional Law Review», n. 11, 2015, p. 512; C. Hillion, *Overseeing the Rule of Law in the EU*, in C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016, p. 75, <https://www.cambridge.org/core/books/reinforcing-rule-of-law-oversight-in-the-european-union/overseeing-the-rule-of-law-in-the-eu/0D711904A72F45D2FA2CFF182EBEA04A>.

[19] Treaty of Nice, cit., C 325/12, Article 7.

[20] *Editorial Comments: The Rule of Law as the Backbone of the EU*, in «Common Market Law Review», 2007, p. 875.

[21] Article 2 TEU: «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities».

[22] Article 21 TEU: «The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law».

[23] Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* [2018], ECLI:EU:C:2018:117, p. 32.

[24] X. Groussot, J. Lindholm, *General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union*, in K.S. Ziegler, P.J. Neuvonen, V. Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law:*

Constructing Legal Orders in Europe, Cheltenham, Edward Elgar Publishing, 2022, pp. 308-326.

[25] Case 294/83, *Les Verts* [1986], ECLI:EU:C:1986:166.

[26] Case 101/78, *Granaria BV v. Hoofdproduktschap Voor Akkerbouwprodukten* [1979], ECLI:EU:C:1979:38.

[27] «Thus it follows from the legislative and judicial system established by the Treaty that, although respect for the principle of the rule of law within the Community context entails for persons amenable to Community law the right to challenge the validity of regulations by legal action, that principle also imposes upon all persons subject to Community law the obligation to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court», ivi, p. 5.

[28] «It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.». Case 294/83, *Les Verts* [1986], ECLI:EU:C:1986:166 (endnote 25 above), p. 23.

[29] The idea that «the existence of judicial review is inherent in the existence of the rule of law» has been expressed in different ways in many judgments of the CJEU; see, e.g., case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986], ECLI:EU:C:1986:206, pp. 18-19; case 222/86, *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (Unectef) v. Georges Heylens and others* [1987], ECLI:EU:C:1987:442, p. 14; joined cases C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja) and others v. Juntas Generales del Territorio Histórico de Vizcaya and others* [2008], ECLI:EU:C:2008:488 p. 80; case C-562/13, *Centre Public d'action Sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida* [2014], ECLI:EU:C:2014:2453, p. 45; case C-362/14, *Maximillian Schrems v. Data Protection Commissioner* [2015], ECLI:EU:C:2015:650, p. 95; case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and others* [2015], ECLI:EU:C:2017:236, p. 73; case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* [2018], ECLI:EU:C:2018:117 (endnote 23 above), p. 36; case C-134/19 P, *Bank Refah Kargaran v. Council of the European Union* [2020], ECLI:EU:C:2020:793, p. 36.

[30] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, Cambridge University Press, 2004, <https://www.cambridge.org/core/books/on-the-rule-of-law/A22B686FAAED-3D4ACA202BEF5FC760EB>.

[31] Case 29-69, *Erich Stauder v. City of Ulm - Sozialamt* [1969], ECLI:EU:C:1969:57.

[32] Groussot, Zemskova, *The Resilience of Rights* cit., p. 103.

[33] Opinion 2/94 of the Court of 28 March 1996 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:1996:140.

[34] Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008], ECLI:EU:C:2008:461; Groussot and Zemskova (endnote 4 above) cit., pp. 119-120.

[35] See, e.g., case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* [2018], ECLI:EU:C:2018:117 (endnote 23 above).

[36] See, e.g., E.O. Wennerström, *The Rule of Law and the European Union*, Uppsala, Iustus, 2007; T. Tridimas, *General Principles of EU Law*, Oxford, Oxford University Press, 2005; T. Konstadinides, *The Rule of Law in the European Union: The Internal Dimension*, Oxford/Portland, Hart Publishing, 2017.

[37] A. Zemskova, *En (del)seger för rättsstatsprincipen*, in «Europakommentaren», 9 March 2022, <https://europakommentaren.eu/2022/03/09/en-delseger-for-rattsstatsprincipen/>, accessed 25 March 2022.

[38] L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, in «Cambridge Yearbook of European Legal Studies», n. 19, 2017, p. 3.

[39] See arguments put forward by Hungary in case C-156/21, *Hungary v. European Parliament and Council of the European Union*

[2022], ECLI:EU:C:2022:97, pp. 199-212; see arguments put forward by Poland in case C-157/21, *Republic of Poland v. European Parliament and Council of the European Union* [2022], ECLI:EU:C:2022:98, pp. 67-69.

40 J. Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, in «Law and Philosophy» 2002, n. 21, p. 137; J. Waldron, *The Rule of Law as an Essentially Contested Concept*, in J. Meierhenrich, M. Loughlin (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge, Cambridge University Press, 2021 <https://www.cambridge.org/core/books/cambridge-companion-to-the-rule-of-law/rule-of-law-as-an-essentially-contested-concept/66DF80FFCD91CBE9B0044CA82F2AB207>.

41 Commission, *Communication «A New EU Framework to Strengthen the Rule of Law»*, COM (2014) 158.

42 «Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law»; ivi 4.

43 *Ibidem*.

44 *Ibidem*.

45 The non-exhaustive list of the principles subsumed under the rule of law was complemented with the principle of separation of powers, whereas the requirement of independent and impartial courts was formulated as «effective judicial protection by independent and impartial courts», a precision that is of seminal importance as it is not enough to have independent and impartial courts, but it is also important to ensure that the procedural dimension of the rule of law is put into practice; Commission, *Communication «Further Strengthening the Rule of Law within the Union. State of Play and Possible Next Steps»*, 3 April 2019 (Brussels 2019) COM (2019) 163 1. Note that the principle of «prohibition of arbitrariness of the executive powers» and that of «prohibition of the arbitrary exercise of executive power» are used interchangeably throughout the Commission's Communications from 2014, 2019, 2020 and 2021.

46 Ivi 9.

47 Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, «Strengthening the Rule of Law within the Union, A Blueprint for Action»*, Brussels, COM(2019) 343 final, 17 July 2019 1.

48 Commission, *Communication «2020 Rule of Law Report. The Rule of Law Situation in the European Union»*, COM (2020) 580 1.

49 Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, «2021 Rule of Law Report: The Rule of Law Situation in the European Union»*, COM (2021) 700 final 1.

50 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1.

51 Article 2(a): «"the rule of law" refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU», *ibid.*; the increasingly important role of the procedural dimension of the rule of law is here illustrated by the explicit inclusion of access to justice in one of the constituent elements of the rule of law. It is also noteworthy that the definition of the rule of law was complemented with the principle of non-discrimination.

52 Case C-156/21, *Hungary v. European Parliament and Council of the European Union* [2022], ECLI:EU:C:2022:97 (endnote 39 above).

53 Case C-157/21, *Republic of Poland v. European Parliament and Council of the European Union* [2022], ECLI:EU:C:2022:98 (endnote 39 above).

54 A. Zemskova, *Rule of Law Conditionality: A Long-Desired Victory or a Modest Step Forward?: Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21)*, in «EU Law Live», 2022, <https://rgdoi.net/10.13140/RG.2.2.14189.46562>, accessed 9 March 2022.

55 Commission, *Communication «Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget»*, Brussels, 2 March 2022, C(2022) 1382 final.

56 D. Kochenov, *The CJEU Judgement on the Budget Conditionality Regulation: Unleashing EU Rule of Law Enforcement*, in «Review of Democracy», 21 February 2022, with Kochenov, Baraggia, Bonelli, Bard and Garner.

57 9 November 1989 (fall of the Berlin Wall).

58 4 June 1989 (Tiananmen Square).

59 F. Fukuyama, *Making the Internet Safe for Democracy*, in «Journal of Law and Democracy», n. 32, 2021, p. 37.

60 F. Fukuyama, *The End of History*,

in «The National Interest», n. 16, 1989, pp. 3-18.

[61] See J.-W. Müller, *What is Populism?*, Philadelphia, University of Pennsylvania Press, 2016, p. 5.

[62] Fukuyama, *The End of History* cit., p. 15.

[63] Ivi, p. 18.

[64] Ivi, p. 12.

[65] Ivi, p. 16.

[66] See case K-3/21 decided by the Polish Constitutional Court.

[67] F. Zakaria, *The Rise of Illiberal Democracies*, in «Foreign Affairs», n. 76, 1997, pp. 22-43.

[68] Ivi, p. 22.

[69] *Ibidem.*

[70] H. Nyysönnen, J. Mätsälla, *Liberal Democracy and its Illiberal Critique: The Emperor's New Clothes*, in «Europe-Asia Studies», n. 76, 2021, p. 273.

[71] *Ibidem.*

[72] See interview with Koen Lenaerts in «Politico», 13 December 2021. In the case of Poland, Lenaerts echoed comments from the French President Emmanuel Macron, who had called the rule-of-law dispute with Warsaw a problem «of independence of the justice system» rather than one of the primacy of EU law: «Of course, it is a competence of each member state to organize its own judiciary as it sees fit. But member states must not undermine, in the eyes of the public, the independence and impartiality of the judges.». Lenaerts also said that the independence of the judiciary is a major issue in the EU's rule-of-law disputes with both Poland and Hungary. Moreover, Lenaerts also noted that the accusations of a power grab made even less sense for countries that had joined the EU in 2004 (such as Poland and Hungary) or later, as they had all accepted the accumulated body of EU law when they entered the bloc: «[a]ny state that joins the EU accepts the union as it is at that time», he said.

[73] See «Le Monde», 28 October 2021.

[74] See also M. Krygier, *Democracy and Rule of Law*, in Meierhenrich, Loughlin (eds.), *The Cambridge Companion to the Rule of Law*, cit. For him, democracy and the rule of law are intimately tied by a common price: that of «Eternal Vigilance» (at p. 424).

[75] See J. Weiler, in A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, Berlin, Springer, 2021, p. 5.

[76] G. Palombella, *Illiberal, Non-democratic and Arbitrary? Epicentre and Circumstances of a Rule of Law Crisis*, in «Hague Journal of the Rule of Law», 2018, p. 10.

[77] See Waldron *The Rule of Law as an Essentially Contested Concept* cit. (endnote 40 above).

[78] See, in general, A. Sajó, *Ruling by Cheating: Governance in Illiberal Democracy*, Cambridge, Cambridge University Press, 2021, pp. 18-55.

[79] J. Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, in «Journal of Democracy», n. 26, 2015, p. 37.

[80] See Müller, *What is Populism?*, cit.

[81] K.L. Scheppele, *Autocratic Legalism*, in «The University of Chicago Law Review», n. 85, 2018, p. 545.

[82] See Sájo, *Ruling by Cheating*, cit., pp. 279-327.

[83] See also Article 6 of the French Declaration of Human Rights of 1789.

[84] See Müller, *What is Populism?*, cit., p. 6.

[85] See, for a contextual (but fictional) appraisal of the year 1793, e.g. V. Hugo, *Ninety-Three*, <https://www.gutenberg.org/ebooks/49372>.

[86] See B. Constant, *The Liberty of Ancients compared with that of the Moderns*, 1819, <https://oll.libertyfund.org/>.

[87] I. Berlin, *Two Concepts of Liberty*, Oxford, Oxford University Press, 1969, pp. 118-172.

[88] T.S. Pappas, *The Specter Haunting Europe: Distinguishing Liberal Democracy Challengers*, in «Journal of Democracy», n. 27, 2016, p. 28.

[89] *Ibidem.*

[90] See C. Mudde, C.R. Kaltwasser, *Populism and (liberal democracy): A Framework of Analysis*, in C. Mudde, C.R. Kaltwasser (eds.), *Populism in Europe and the Americas: Threat or Corrective for Democracy*, Cambridge, Cambridge University Press, 2012, pp. 18-34.

[91] *Ibidem.*

[92] See Müller, *What is Populism?*, cit., p. 8.

[93] C. Pinelli, *The Rise of Populism and the Malaise of Democracy*, in S. Garben et al. (eds.), *Critical Reflections on Constitutional Democracy in the European Union*, Oxford/Portland, Hart, 2019, 27-46. See also C. Mudde, *Europe's Populist Surge: A Long time in the Making*, in «Foreign Affairs», 2016. November/December, p. 25; M. Anselmi, *Populism: An Introduction*, August 2017, <researchgate.net/publication/326624002_Populism_An_Introduction>, p. 8.

[94] Pinelli *The Rise of Populism and the Malaise of Democracy* cit., p. 45.

[95] Anselmi, *Populism: An Introduction*, cit., p. 2.

[96] See G. Martinico, *Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perpective*, Cambridge, Cambridge University Press, 2021, pp. 12-13.

[97] Martinico *Filtering Populist Claims to Fight Populism*, cit., p. 14.

[98] Müller, *What is Populism?*, cit., p. 41.

[99] See Pinelli *The Rise of Populism and the Malaise of Democracy*, cit.

[100] A. de Tocqueville, *Democracy in America*, vol. 1, part II, ch. 7, <https://www.gutenberg.org/files/815/815-h/815-h.htm>, october, 4, 2022.

[101] L. Siedentop, *Democracy in Europe*, New York, Columbia University Press, 2002, p. 98.

[102] Müller, *What is Populism?*, cit., p. 48.

[103] Scheppele, *Autocratic legalism* cit., p. 581.

[104] D. Dyzenhaus, *Lawyers for the Strongman*, 2019, <https://aeon.co/essays/carl-schmitts-legal-theory-legitimises-the-rule-of-the-strongman>.

[105] See Tocqueville, *Democracy in America*, cit. See also Pinelli, *The Rise of Populism and the Malaise of Democracy*, cit., p. 41.

[106] See A. Sajó, J. Tuovinen, *The Rule of Law and Legitimacy in Emerging Illiberal Democracies*, in «Osteuropa Recht», n. 64(4), 2018, p. 523.

[107] Müller, *What is Populism?*, cit., p. 46.

[108] See A. Mazmanyan, *On Legalism, Illiberal Takeover, and the Immune System of Constitutional Democracy*, in U. Belavusau, A. Gliszczynsska-Grabias (eds.), *Constitutionalism under Stress*, Oxford Scholarship Online, 2020. According to him, if populism and its favourite weapon of «autocratic legalism» represent an infection or a virus, then the degree of mass legalism within a society represents the state of the immune system called upon to resist this virus.

[109] See Y. Wang, *Tying the Autocrats' Hands: The Rise of the Rule of Law in China*, Cambridge, Cambridge University Press, 2016.

[110] T. Hobbes, *Leviathan*, Cambridge, Cambridge University Press, edited by R. Tuck, 2019 (fifth reprint),

[111] M. Weber, *Weber on Law and Economy in Society*, edited and translated by M. Rheinstein, Cambridge, Harvard University Press, 1954.

[112] M. Hauriou, *Principes de Droit Public*, Paris, Dalloz, 2010 (reprint of the edition of 1910).

[113] See, in general, J. Shklar, *Legalism: Law, Morals and Political Trials*, Cambridge, Harvard University Press, 1986, p .17.

[114] See Weber, *Weber on Law and Economy in Society*, cit.

[115] Scheppele *Autocratic legalism* cit., p. 570.

[116] *Ibidem.*

[117] Scheppele *Autocratic legalism* cit., p. 577.

[118] See J. Raz, *The Authority of the Law*, Oxford, Oxford University Press, 1979.

[119] See Tamanaha, *On the Rule of Law: History, Politics, Theory*, cit.

[120] *Ibidem*.

[121] See Wang, *Tying the Autocrats' Hands: The Rise of the Rule of Law in China*, cit.

[122] See, in general, Waldron, *The rule of law as an Essentially Contested Concept* (endnote 40 above).

[123] Sajó, Tuovinen, *The Rule of Law and Legitimacy in Emerging Illiberal Democracies*, cit., p. 522.

[124] This is a terminology used by Dyzenhaus (see, e.g., D. Dyzenhaus, *Thomas Hobbes and the Rule by Law Tradition*, in Meierhenrich, Loughlin cit., p. 261).

[125] Raz, *The Authority of the Law*, cit.

[126] Scheppele, *Autocratic legalism* cit., p. 581.