

# Indiana Journal of Global Legal Studies

2019

Volume 26

Issue 2

# Understanding the Politics of Resentment: of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of Heart\*

TOMASZ TADEUSZ KONCEWICZ\*\*

---

\* Precursor of the paper was presented at the Indiana Journal of Global Legal Studies 26th Annual Symposium “Globalization in Question: Populist Resistance and a New Politics of Law?”, Indiana University, Maurer School of Law—Bloomington, April 11-13, 2018. This analysis takes into account legal developments until December 2018. It draws on the research carried out as 2017-2018 LAPA Fellow in Program in Law and Public Affairs (LAPA) at Princeton University (<http://lapa.princeton.edu/content/politics-resentment-and-constitutional-capture-learning-constitutional-debacles-and-thinking>). LAPA and Princeton University have provided a dream environment for thinking through the ideas and concepts presented here and I am very much indebted to the Program and the people associated with it.

\* LL.M. School of Law of the University of Edinburgh; Professor of Law; Director of the Department of European and Comparative Law at the Faculty of Law and Administration of the University of Gdansk; 2017–2018 LAPA Crane Fellow, The Program in Law and Public Affairs, Princeton University; 2019 Fernand Braudel Senior Fellow, European University Institute; attorney; Member of Polish Bar; 2015-2016 Fulbright Visiting Professor, University of California Berkeley Law School; former référendaire in the Court of the European Union and former legal adviser to the Polish Constitutional Court. My heartfelt thanks go to Professor Fred Aman not only for his kind invitation to join the ranks of the panelists on the Annual Workshop of the Indiana Journal of Global Legal Studies, April 11–13, 2018, but first and foremost for his constant encouragement and friendship that go beyond the academic. I am equally grateful to Martin Shapiro, Ezra Suleiman, George Bustin, Zdzisław Brodecki, Kim Lane Scheppele, Dan Kelemen, Dmitry Kochenov, Gabor Halmai, Petra Bard, Laurent Pech, Tom Daly and Jan W. Müller for inspiration(s) and discussion(s) on the problems presented here in real time. It goes without saying that all the deficiencies are mine.

Indiana Journal of Global Legal Studies Vol. 26 #2 (Spring 2019)  
© Indiana University Maurer School of Law

application of EU law as an essential component of the rule of law,<sup>357</sup> the existence of effective judicial review as the essence of the rule of law,<sup>358</sup> the guarantee of judicial independence as inherent in the adjudication and a prerequisite for ensuring the effective judicial protection,<sup>359</sup> and now mutual trust in the performance and status of the Member States' courts, are all essential elements of the European *First Principles*. Respect for and trust in the rule of law are existential components of the original consensus on which all other commitments of the parties are built. The moment these principles start to crumble, so will the consensus. At long last, the politics of resentment face a powerful enemy: European courts with their own fidelities and loyalties.<sup>360</sup> From the way Poland has rejected the court's order in the logging case, ridiculed the court's judges, and has continued to defy the authority of the court, it is clear the constitutional stakes could not be higher—survival and long-term viability of the consensus is at stake despite the parties' continuing desire to belong and be bound by the *First Principles*.

Martin Shapiro's famous reconstruction of incrementalism is crucial for understanding how the Court of Justice has been incrementally building and defending *First Principles* of the European legal order when faced with the systemic rejection of these principles by the Member States.<sup>361</sup> Make no mistake, though, this is only the

357. Application for Interim Measures under Article 279 TFEU and Article 160(2), (European Commission v. Republic of Poland), Judgment, 2017 I.C.J. 877 (Nov. 2017).

358. Request for a Preliminary Ruling under Article 267 TFEU (PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others), Preliminary Ruling, 2017 I.C.J. 236 (Mar. 2017).

359. Request for a Preliminary Ruling Under Article 267 TEU from the Supremo Tribunal Administrativo, 2018 I.C.J. ¶ 167 (May 18).

360. This optimism must be qualified though in light of the most recent and disappointing judgment. See Request for a Preliminary Ruling Under Article 267 TFEU from the High Court (Ireland), (Minister for Justice and Equality v. LM), Judgment, 2018 I.C.J. 586 (Mar. 2018). The Court seems to have failed to deliver on the promises opened by the Portuguese judges case. For further analysis, see Kim Lane Scheppele & Daniel Kelemen, *Defending Democracy in EU Member State. Beyond Article 7 TEU*; See also generally *The CJEU's Deficiencies Judgment*, VERFASSUNGSBLOG (Aug. 2018), <https://verfassungsblog.de/category/themen/after-celmer/>.

361. Tomasz Tadeusz Konciewicz, *The Politics of Resentment and First Principles in the European Court of Justice*, in F. Binghami, (ed.), *The EU in populist times*, (Oxford University Press, forthcoming). See Kim Lane Scheppele & Daniel Kelemen, *supra* note 360. On December, 17, 2018, the Court in C - 619/18 R held by way of an order for interim measures that Poland must immediately suspend the application of provisions of national legislation relating to the lowering of the retirement for Supreme Court judges. The Order in French is available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=209302&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=9995654>. On the constitutional importance of the order see *Editorial Comment. 2019*

beginning. The time of *mega-politics* has indeed arrived.