REVIEW ESSAY

ROBERT LECOURT AND *SUI GENERIS* EU LAW

William Phelan, *Great Judgments of the European Court of Justice – Rethinking the Landmark Decisions of the Foundational Period,* Cambridge University Press 2019, 258 pages. ISBN 978110849908-8

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1 INTRODUCTION

This is a great and original book written by William Phelan who revisits and rethinks the seminal decisions from the European Court of Justice of the early years (1961-1979). The book brings a new understanding and a new thinking as to the foundations of EU law. Importantly, it develops an argumentation on the origins of direct effect, which is both convincing and disruptive. After reading the book, it is difficult to avoid recognizing the crucial role of Robert Lecourt and the concept of self-defence in the landmark decisions of the foundational period. This book helps us to better understand many aspects of the byzantine architecture of EU law. The book provides, in that sense, an in-depth understanding of the connection between the end of the old international legal order and the creation of the new EU legal order. It also helps us to understand the cradle of the doctrine of individual rights in Europe and to reflect on the meaning of the *sui generis* legal order and the existence as well of a *sui generis* constitution. Because a sui generis legal order can only give birth to a sui generis constitution. In previous writings, William Phelan has already discussed in depth the sui generis nature of the European Union as '*un objet politique non-identifié*'[1] and the role of the legal philosophy of Robert Lecourt on EU Law.[2]

In this review essay, I will preliminarily look at the aim and structure of the book. Then I will engage on three topics directly (my first two points) and indirectly (my last point) connected to the book. First, by looking at the monumental impact of Robert Lecourt on EU law. Second, by discussing the importance of safeguards and self-defence on the 'Community logic' ('*logique communautaire*'). Third by having a short reflexion on the years

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[1] William Phelan, 'What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime' 14(3) International Studies Review (2012) 367. In this article, it is made reference to the iconic statement of Jacques Delors calling the European Union 'un objet politique non identifié'. It also refers to others that seems to agree by characterizing the European Union as *sui generis,* unique, new, exceptional, hybrid, and differing from both federal states and international organizations

[2] William Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt', 28(3) EJIL (2017) 935, 945. For Phelan, the essential source for any understanding of Lecourt's legal philosophy before he joined the Court of Justice must be his dissertation on litigation in disputes over real. It is mentioned that the only previous discussion, in European law scholarship, of Lecourt's dissertation is a brief comment by Lindseth in Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010) 140.

after the 'Lecourt years' (1977-2020) and the future of EU law in light of his philosophy and the current rule of law crisis in Europe. In other words, do we need a return to retaliation and self-defence when the rule of law is demolished and individual rights are flouted on a daily basis in Hungary and Poland?

2 AIM AND STRUCTURE OF THE BOOK

This book on the great judgments of the European Court of Justice is a great little book (around 250 pages). However, it is not a case-law book or a course book (though the main findings of the books should be integrated in our teaching of EU law). The book provides a focused argument on the development of EU law.[3] It is a stimulating and easy read, which is catching the reader attention from the beginning to the end. It is certainly one of the best books that I have read in 2020 (and I have read many books during this special Covid19 year!). The book is highly recommended. The book takes the view that the great judgments can be better understood both by comparisons with alternative means of enforcing trade-related Treaty obligations and through the writing of influential Judge Robert Lecourt.[4] This is the two key angles of the book and also its novelty. As to trade obligations, the book shows that the greatest innovations of the European legal order, including the new role for individual rights and national courts provided for by the doctrines of direct effect and supremacy, are directly linked to addressing the practical problem of how to effectively enforce trade obligations between states in an international treaty systems without making use of the mechanisms of safeguards and self-defence (retaliation).[5] As to Robert Lecourt, the book considers that the French judge, is the single individual that can claim the most profound influence on European Law.[6]

In a nutshell, the book shows the logical connection between the end of the use of the traditional international law enforcement mechanisms (such as safeguards and self-help) and the creation of the doctrine of individual rights erupting from *Van Gend en Loos* and *Costa* in the early years of European Law. Therefore, the book puts forward a new understanding of the purpose and impact of the great judgments of the Court of Justice in its most important and creative period.[7] For William Phelan, the conventional account of the great judgments fails to sufficiently engage with the essential distinctions between the European legal order and the enforcement and escape system commonly employed in other international systems.[8] There is a lack of discussion of how these new individual rights and roles for national courts were connected to important international collective action problems and inter-state relationships.[9]

The book is divided into ten Chapters. The first nine Chapters focus on nine seminal judgements of the European Court of Justice and the last Chapter (Chapter 10) discusses

[3] See *Great Judgments* 10.
[4] See *Great Judgments* 53.
[5] See *Great Judgments* 3.
[6] See *Great Judgments* 39. Other influential persons are also mentioned such as judge Nicola Catalano and legal attaché (legal secretary) Paolo Gori.
[7] See *Great Judgments* 3.
[8] See *Great Judgments* 222.
[9] ibid.

and concludes on the link between States and individual in the great judgements. Here comes a summary of the first nine chapters and their respective titles:

Chapter 1 Pork Products, 1961 – No Unilateral Safeguards
Chapter 2 Van Gend en Loos, 1963 – Direct Effect
Chapter 3 Costa v. Enel, 1964 – Supremacy
Chapter 4 Dairy Products, 1964 – No Inter-State Retaliation
Chapter 5 International Fruit, 1972 – No Direct Effect for the GATT
Chapter 6 Van Duyn, 1974 – Direct Effect of Directives
Chapter 7 Simmental, 1978 – Obligations of 'Lower' National Courts
Chapter 8 Sheep Meat, 1979 – No Inter-state Retaliation Revisited
Chapter 9 Internationale Handelsgesellschaft, 1970 – Protection of Fundamental Rights

In Chapters 1 to 4, you will find the core of the thesis. In this part of the book, Phelan discusses two judgements (*Pork Products*, 1961 and *Dairy Products,* 1964) which according to him, while their importance has not always been well recognized, should be understood to have played a vital role in the construction of the European Legal order.[10] Robert Lecourt was sitting as a judge as of the ruling in *Van Gend en Loos,* where he is said to have played a major role in the creation of the doctrine of direct effect together with Judge Alberto Trabucchi, acting as *contrepoids* towards the more chilling attitude of the *juge rapporteur* and the President Andreas Donner.[11] It is also interesting to note that the second part (Chapters 5 to 9) of the book is ended by *Internationale Handelsgesellschaft*. This last case from 1970 is engaged with though *Simmenthal* and *Sheep Meat*, delivered later in 1978 and 1979. This is done probably to connect in a better way with the discussion in Chapter 10 on individual rights since *Internationale Handelsgesellschaft* is about the protection of fundamental rights in the European legal order. The creation of individual rights to be protected by national courts is directly related to European's law break with interstate retaliation. For the author, the market citizenship founded in *Van Gend en Loos* was an 'international collective action problem citizenship' a *Pork* and *Dairy* citizenship closely linked to the Court's pioneering decisions on safeguards and self-help.[12] Robert Lecourt is pictured has having the major role of this evolution and in the making of the *annus mirabilis* of the European Court of Justice.[13] For Phelan, Robert Lecourt (due to his background and notably his dissertation written in 1931) was well prepared to recognize the extraordinary potential of the direct effect doctrine to act as a substitute for the reciprocity principles of classical international law.[14]

3 ROBERT LECOURT AND HIS IMPACT ON EU LAW – MONUMENTAL

Robert Lecourt is a hero in many respects: He is both a hero of the French resistance and a hero of EU Law and its *logique communautaire.* And as any hero, there is a certain degree of

[10] See *Great Judgments* 10.
[11] See *Great Judgments* 54-55.
[12] See *Great Judgments* 233.
[13] See *Great Judgments* 239.
[14] See *Great Judgment*s 240-241.

mysticism surrounding the person and more particularly around his writings since Lecourt have had his private affairs destroyed prior to his death.[15] It is thus difficult to trace his personal impact on the birth for the European legal order.[16] Before discussing his key writings, it is worth having a look at his curriculum vitae as it resorts from the curia website.[17] Before becoming a judge in Luxembourg in May 1962, Robert Lecourt had been an academic, a lawyer and a Member of the French government as minister. His dissertation is said to have played a major role in the building of his legal philosophy which has, in turn, influenced EU law. Lecourt became president of the European Court of Justice between October 1967 and October 1976. He died on 9 August 2004. For his *éloge funèbre,* Pierre Pescatore, another prominent judge who joined the Court of Justice in 1967, even spoke of the 'jurisprudential miracle' of the Court's 'Lecourt years' from 1962 onwards.[18] In the book, Robert Lecourt is described as extremely influential and 'one of the leading creators' and a comparison is made to Chief Justice Marshall in the US.[19] For Phelan, no other single judge has had such a profound influence on the development of European law, an influence that is imbued with 'left-leaning Catholicism'.[20]

Two major texts encapsulate the philosophy of Robert Lecourt. His dissertation from 1931: *'Nature juridique de l'action en réintégrande'*[21] and his book from 1976 on the Community legal order: *L'Europe des juges.*[22] In his dissertation, which is written in the very institutionalist inter-war period, Robert Lecourt discussed litigation in disputes over real property. The dissertation was completed at the University of Caen in 1931.[23] A text of Phelan published in 2012 on *sui generis* European law deals in detail with the impact of his dissertation on the judge's thinking.

Two passages are worth quoting here available in his article from 2012:[24]

> Lecourt's contribution to scholarship on the réintégrande, therefore, was to contest the scholarly consensus that it should be understood as a mechanism to protect the true possessors of a property and to declare instead that it was a creation of the courts to prevent public order being undermined by those who would take the law into their own hands. This contribution was acknowledged in later French legal scholarship, with Élisabeth Michelet in 1973, for example, attributing to Lecourt

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[15] See *Great Judgments* 5.
[16] ibid.
[17] See www.curia.eu: 'Born on 19 September 1908; French national; Doctor of Laws; Avocat at the cour d'appel de Paris (Court of Appeal, Paris); reserve captain; Member of the Underground Management Committee of the movement 'Résistance' and member of the National Liberation Movement; Member of the Provisional Consultative Assembly; deputy for Paris (1945-58); deputy for Hautes-Alpes (November 1958); Minister for Justice (on several occasions between 1948 and 1958); Minister responsible for aid and cooperation between France and the Member States of the Community, subsequently for the overseas départements and territories and the Sahara (January 1959-August 1961); Member of the Executive Committee of the European Movement; Judge at the Court of Justice from 18 May 1962 to 9 October 1967, President from 10 October 1967 to 25 October 1976; died on 9 August 2004'.
[18] Pierre Pescatore, 'Robert Lecourt (1908–2004): Eloge funèbre prononcé par Pierre Pescatore ancien Juge de la Cour, à l'audience solennelle du 7 mars 2005', Revue trimestrielle de droit européen (2005/3) 589, 595.
[19] See *Great Judgments* 5.
[20] See *Great Judgments* 239.
[21] Robert Lecourt, *Nature juridique de l'action en réintégrande: étude de la jurisprudence française* (1931).
[22] Robert Lecourt, *L'Europe des juges*, (Bruylant, 1976).
[23] See *Revolutionary Doctrines* 945.
[24] See *Great Judgments* 7.

> the view that *'la réintégrande est fondée sur le principe qu'il est interdit de se faire justice à soi-même*.[25]

And…

> Lecourt had therefore managed to work his way from a discussion of property disputes between country neighbours to a perspective on some of the greatest challenges of international law. Not for Lecourt the commonplace discussions of international lawyers that self-help countermeasures are a necessary 'fact of life' that serve a vital function in encouraging treaty partners to fulfil their legal obligations or, indeed, any recognition that self-help, even of a tempered and regulated variety, must of necessity continue to play a larger role in international than domestic society. Lecourt declared simply that states in international organizations must give up the use of violence and self-help just as individuals are forced to do before the law within a state, mirroring the ability of developing nation-states to put an end to self-help behaviours within their own territories.[26]

His dissertation, therefore, puts the basis of the two key precepts entrenched in the Court of Justice case law after *Pork Products,* delivered in 1961 (30 years after his dissertation!): the end of violence or self-defence and the need to rely on the judiciary control (through the national courts and the European Court of Justice in the Community law context) to prevent violence. The other crucial text of Robert Lecourt is his most famous book: *l'Europe des juges* (1976). This book constitutes a symphony to the 'Community logic'. It clearly aimed at popularizing European law among lawyers. This text is also rightly described as bland and as avoiding theoretical debates by Phelan.[27] Nonetheless, it does reflect in depth the legal philosophy of the French star judge. As Robert Lecourt wrote in *l'Europe des juges,* '[w]hen the individual applies to a judge to ensure that their treaty rights are recognized, they are not acting in their own interest alone, but by this behaviour the individual becomes a type of auxiliary agent of the Community'.[28] *L'Europe des juges* was described by Henri Schermers in his book review in Common Market Law Review in 1977 as a true monument of EU law, and particularly of the role of the judge in the European legal order.[29] He even recommended all the non-readers of Common Market Law Review to read it. This in order to learn about the application of the 'Community logic'.[30] For Schermers two conclusions of the book are paradigmatic. First, *l'Europe des juges* has been realised within a 'record time' ('*délai record*').[31] Second, since judicial Europe has been made, it is now time to build on its solid foundations.[32] In 1979, the European Court of Justice delivered its *Cassis de Dijon* ruling (Case 120/78) which will mark the start of the new era of mutual recognition and mutual trust in EU law.[33]

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[25] See *Great Judgments* 7 and *Revolutionary Doctrines* 947.
[26] See *Revolutionary Doctrines* 949.
[27] See *Great Judgments* 237.
[28] See Robert Lecourt, *L'Europe des juges* (n 22) 260.
[29] Henri Schermers, book review of *L'Europe des juges,* 14(2) Common Market Law Review (1977) 261-264.
[30] ibid.
[31] ibid.
[32] Robert Lecourt. *L'Europe des juges*, (n 22) 309.
[33] Case 129/78 *Cassis de Dijon* EU:1979:42.

4 SELF-DEFENCE, THE LEGACY OF *DAIRY PRODUCTS* AND THE *LOGIQUE COMMUNAUTAIRE*

The legacy of *Dairy Products* is enormous. In this case, the two Member States (Belgium and Luxembourg) argued that international law allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own. The European Court of Justice did not sustain the claim and ruled that, '[t]he basic concept of the treaty requires that the Member States not take the law into their own hands. Therefore, the fact that the [other party] failed to carry out its obligations cannot relieve the defendants from carrying out theirs'.[34] Both Pierre Pescatore[35] and Joseph Weiler[36] have expressed the view that the European legal order is a self-contained regime with no use of state responsibility in the classical sense of international law. This order has become something 'new' due to the prohibition of reciprocity and countermeasures. [37] As put by Phelan in a text from 2012, 'the concept of a "self-contained regime", developed in international legal scholarship, is used here to characterize the sui generis nature of the EU as a treaty agreement that imposes costs on organized interests within the Member States but rejects the use of inter-state reciprocity and countermeasures as enforcement mechanisms'.[38] In his words, '[a]pproaching the question of the sui generis nature of the EU through the discussion of its rejection of common ways of addressing international collective action problems in trade politics…helps to identify the puzzle that the EU poses to international relations scholarship'.[39]

The end of recourse to unilateral safeguards (*Pork products*),[40] the logic of direct effect (*Van Gend en Loos*) and the logic of supremacy (*Costa*) are all related to the stop of self-defence held by the Court of Justice in *Dairy Products*. In Phelan's book, it is clearly showed that the end of unilateral safeguards is the precursor of the end of self-defence. For him, direct effect should be understood as a substitute for inter-sate countermeasures or reciprocity mechanisms within the European legal order.[41] Also, relying on the writings of Lecourt, he underlines that Lecourt's explanation of the logic of supremacy in *Costa* is strongly connected with the Community law's prohibition of unilateral safeguards as set out by the Court in *Pork Products* and the Community law's prohibition of self-help.[42]

Phelan also relies on Lecourt's writing to demonstrate the importance of *Dairy products* on the *logique communautaire*. Notably, a brief article from 1965 on 'The Judicial Dynamic in the Building of Europe' appears to be crucial to understand the role of the end of the logic of self-defence on the s*ui generis* nature of EU Law.[43] In this article, Lecourt discussed together the *Van Gend*, *Costa* and *Dairy Products* triad as the seminal case law creating the new legal order. For Lecourt, it is the principle established in the *Dairy Products* that justifies the European Law doctrines of direct effect and supremacy, as well as the role they grant to

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[34] Cases 90/63 and 91/63 *Commission* v *Luxembourg and Belgium* EU:C:1964:80.
[35] Pierre Pescatore, *Droit International et Droit Communautaire, essai de refléxion comparative* (Nancy, 1969) 18.
[36] Joseph Weiler, 'The Transformation of Europe', 100 Yale Law Journal (1991) 2403, 2422.
[37] ibid.
[38] See *What Is Sui Generis about the European Union?* 369.
[39] See *What Is Sui Generis about the European Union?* 379.
[40] See *Great Judgements* 27.
[41] See *Great Judgments* 43.
[42] See *Great Judgements* 82-83.
[43] See *Great Judgements* 114-115; see also Robert Lecourt 'La Dynamique Judiciaire dans l'Édification de l'Europe', 64 France Forum (1965) 20.

national courts and individuals in the enforcement of European law.[44] As put by the French judge, 'The Court was led to conduct a sort of x-ray analysis of the Treaties to discover the solution to certain legal cases'.[45] The result of this is that individuals can invoke a direct right to ensure the respect of the directly applicable provisions of the Treaties.[46]

After the delivery of *Dairy Products,* the book shows its constant influence on seminal cases such as *International Fruit* (1972), *Simmenthal* (1978) and *Sheep Meat* (1979). For Phelan in *International Frui*t, it is fundamentally because the GATT allows unilateral use of safeguards, derogations mechanisms and retaliatory suspension of obligations that the GATT should not receive direct effect. If the GATT had rejected both unilateral use of safeguards, derogations mechanisms and retaliatory suspension of obligations, the Court, would have allowed direct effect.[47] In a similar vein, the obligations of lower national court in *Simmenthal* is seen as a logical consequence of the role that the Community legal order sought to create for national courts, that is to say to replace the role of inter-state retaliation.[48] The essential value of *Sheep Meat* is that it demonstrates that states benefiting from the Community legal order must be prepared to accept both the lack of direct consequences arising from the Article 169 (258 TFEU) and 170 (259 TFEU) procedures and the intermittent ineffectiveness of enforcement through direct effect.[49]

5 AFTER THE LECOURT YEARS (1977-2020)

What's left of the Lecourt years? As a preliminary point, it is interesting to note that Phelan's book discussed two cases of 1978 (*Simmenthal*) and 1979 (*Sheep Meat*) as the last great judgments of the Lecourt years. Robert Lecourt stopped to be judge at the European Court of Justice in October 1976, but his legacy is certainly present in these two judgments. It is also worth noting that the *Cassis* ruling was delivered in 1979, but it is not included in the book. Arguably, this seminal case marks the start of a new era: mutual trust. But perhaps the logic of mutual trust is also not so far in terms of reasoning from the original cases of the 1960s?

Mutual trust is the next 'civilised' and logical step after the end of retaliation.[50] The principle of mutual trust has the effect of tilting the balance between EU interests (free movement and cooperation) and Member State interests (protection of safety levels of various kinds) in favour of the former. However, it should be borne in mind that the principle, since being precisely a principle, may not be understood as absolute. Through the principle of mutual trust, the Member States could keep their own safety standards, but without these functioning as barriers to free movement or other cooperation. The Member States retain, to a certain degree, the option of referring to national safety standards if it is done in a proportionate manner (this is the so-called 'rule of reason' as established in *Cassis*).

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[44] See Robert Lecourt 'La Dynamique Judiciaire dans l'Édification de l'Europe', 20-22, see *Great Judgments* 116.
[45] See Robert Lecourt 'La Dynamique Judiciaire dans l'Édification de l'Europe' 21.
[46] See *Great Judgements* 7. In this part of book, Phelan stresses the important role of article 5 EEC Treaty and interestingly that this provision has often been downplayed or omitted in the doctrine commenting the founding judgments of the CJEU.
[47] See *Great Judgments* 149.
[48] See *Great Judgments* 183-184.
[49] See *Great Judgments* 196.
[50] See Xavier Groussot, Gunnar Thor Petursson, Henrik Wenander, 'Regulatory Trust in EU Free Movement Law: Adopting the Level of Protection of the Other?' 1(3) European Papers (2016) 865.

The rule of reason established in *Cassis* is also arguably strongly connected to the issue of limited Member States discretion when derogating from EU law. As mentioned in the book of Phelan, Paolo Gori in 1967 relied on *Pork Produ*cts case as the first example of the very strict approach adopted by the Court to allowing derogations from the fundamental rules of the Common market.[51]

Already in January 1977 with the *Bauhuis* judgment, three months only after the end of the Lecourt Presidency, the Court of Justice considered in the harmonized context of veterinary and health inspections that the system is based on the 'trust' the Member States should have towards each other.[52] The fundament for this mutual trust in EU law is the principle of loyalty, laid down in Article 4(3) TEU (ex Article 5 EEC, ex Article 10 EC). Based on this principle, the CJEU has repeatedly stated that the Member States need to trust each other in carrying out their respective duties under harmonized EU law. There is a clear connection between trust and the principle of cooperation. As rightly emphasised by Phelan, the principle of cooperation was already present in the core reasoning of the Court in both *Van Gend en Loos* and *Costa*, though the academic commentators never really lifted up its importance at this time.[53] The end of retaliation or self-defence in *Dairy Products* is not to be logically dissociated from the increase in cooperation due to the very existence of Article 5 EEC.

Mutual trust has spread rapidly after *Cassis* in both legislation and case law to become one of the core principles of EU law. *Opinion 2/13* and the *Achmea* case are remarkable examples of its fundamental importance in EU law to define the boundaries of 'autonomy' of the European legal order.[54] Koen Lenaerts, the President of the European Court of Justice, in his personal capacity, considered that the principle of mutual recognition is a constitutional principle that pervades the entire Area of Freedom, Security and Justice.[55] However, at the same time he acknowledged that the principle of mutual recognition has to be applied in light of the principle of proportionality. He also emphasised that the principle has to respect the margin of discretion left by the EU legislator to national authorities and that it must take into account national and European public-policy considerations.[56] It is true that that mutual trust is not blind, yet it is also true that the reliance on mutual trust to define and justify the autonomy of the EU legal order in the context of the present rule of law emergency has rendered it blind.[57] This is what we can call a 'blind autonomy'.[58] Mutual trust should not be relied on the present context by the European Court of Justice as a justification tool. This crisis of 'mutual trust' puts into jeopardy the whole structure of the *sui generis* European legal order and strongly shakes the cooperation between the Member States.

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[51] See *Great Judgment*s 27-29.
[52] Case 46/76 *Bauhuis,* EU:C:1977:6, para 22.
[53] See *Great Judgments* 76.
[54] Case C-284/16 *Achmea,* EU:C:2018:158.
[55] Koen Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice, The fourth annual Sir Jeremy Lever Lecture All Souls College, University of Oxford, 30 January 2015, www.law.ox.ac.uk.
[56] ibid.
[57] ibid.
[58] For a development on the concept of autonomy. See Xavier Groussot and Marja-Liisa Öberg, 'The Web of Autonomy in the EU Legal Order: An Analysis of Achmea and its Consequences', in Graham Butler and Ramses Wessel (eds.), *EU External Relations Law: The Cases in Context* (Hart Publishing, 2021, Forthcoming).

It also begs the question whether the potential end of a cooperation based on trust entail a return to self-defence. We have seen previously that with *Dairy Products* the Member States have renounced their ability to take self-help action to enforce their legal rights. Can the present situation lead to a return to the pre-*Pork Products* and *Dairy Products* situations? That is to say, a situation where States can rely on counter-measures within a Community legal order? This time, however, these counter-measures would be to taken to enforce respect of the rule of law in Europe, specifically targeting the autocratic Member States that are enthusiastically not only destroying the rule of law within their own countries, but also the entire European Union law. Drawing a parallel with the Lecourt years, which are described in the Phelan's book as *annus mirabilis*,[59] the present years marked by many crises can certainly be described, in contrast, as the a*nnus horibilis* of European law. This is so because the *sui generis* nature of the European legal is clearly put on trial. A trial that may call for the return to self-defence and thus a return to classic international law.

The signs are clear, unfortunately. The EU institutions are not able to rely effectively on procedure established by Article 7 TEU. The rule of law conditionality mechanism is not yet in place and perhaps will never be in place.[60] The European Commission has taken action against the autocratic States under Article 258 TFEU, but this it is not enough to stop the illiberal momentum. The only remaining legal availability is thus the recourse to Article 259 TFEU – a provision reminiscent of the old Community legal order, which has been used rarely (only eight times) and successfully only in six circumstances. It is easy to understand the lack of use of this provision since Article 259 TFEU goes against the very essence of cooperation and allows for retaliation. Yet, it is the only available means during this sad (and hopefully temporary) moment of mutual distrust.

Some years ago, Kim Lane Scheppele proposed the reliance on the direct action mechanism to deal with the limited effectiveness of financial sanctions and to subtract any EU funds, which the relevant Member State would be entitled to receive.[61] Dimitry Kochenov has proposed to take it a step further by applying what Scheppele proposed to the direct actions by Member States against other Member States. [62] This will free the potential of Article 259 TFEU allowing it to play an active role in the system by policing the values of the Union within defiant Member States.[63] Deploying this proposal will obviously entail modifying the present practice of (limited) application of Article 259 TFEU. But this can be deemed necessary in order to ensure that the whole *sui generis* architecture of EU legal order does not rumble due to the impossibility to sustain the key and essential values of European integration enshrined in Article 2 TEU.

On the 1st December 2020, the lower house of the Dutch parliament adopted a resolution requesting the government to start procedures against Hungary and Poland under

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[59] See *Great Judgment*s 5, 233.
[60] Doubts are still valid after the compromise reach on 10-11 December 2020 leading to a conditional 'rule of law conditionality', see for development (n 63).
[61] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2015). She focuses on how to empower the European Commission to intervene in the cases related to rule of law breach by 'systemic infringement procedure' thus leading to an effective application of Article 258 TFEU.
[62] Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool´, December 2015 Hague Journal on the Rule of Law 7(2):153-174.
[63] ibid.

Article 259 TFEU for breaching the rule of law. Other Member States are certainly thinking to do the same thing. The ministry of justice of Poland is already speaking in terms of retaliation by suing the Netherlands for alleged tax malpractice. The wheels of retaliation are in motion for the better and for the worse (and certainly much more for the worse). Yet one thing remains sure, Hungary and Poland will be the great losers of this destructive game: 25 Member States against two Member States is not really a fair game, right?

If the (now accepted) 'rule of law conditionality system' (which is tied to the Covid19 rescue package)[64] and the potential 259 TFEU actions do not appease the situation by a quick return to a normal 'rule of law situation'; then countermeasures and retaliation[65] outside the field of EU law will have to be envisaged to impede Hungary and Poland to use Europe as a cash machine and at the same time violate our core fundamental values.[66] What would Robert Lecourt think of the current situation and the potential return to retaliation and self-defence in our *sui generis* EU law?

[64] On 10 and 11 December 2020, the European Council adopted conclusions on the MFF and Next Generation EU, COVID-19, climate change, security and external relations. Brussels, 11 December 2020 (EUCO 22/20). We are in a strange situation of conditional 'rule of law conditionality' where the European Council has breached the principle of institutional balance and has misuse the text of Article 15 TEU all this in order to reach a deal with Poland and Hungary. According to article 2 (c) of the conclusions: 'With a view to ensuring that these principles will be respected, the Commission intends to develop and adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment. Such guidelines will be developed in close consultation with the Member States. Should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment. The Commission President will fully inform the European Council. Until such guidelines are finalised, the Commission will not propose measures under the Regulation'.

[65] If Poland and Hungary had blocked the process during the European Council, it would have been possible to create a rescue fund between the remaining 25 Member States based on international law.

[66] Poland is the in greatest beneficiary of EU funds with 124 billion euros granted since 2004 (See *Dagens Nyheter*, 9 December 2020).