

Second-grade Constitutionalism?

Hungary and Poland: How the EU Can and Should Cope With Illiberal
Member States

“There's only one degree of freshness — the first, which makes it also the last”

— Mikhail Bulgakov

Introduction

This paper is part of a larger project, which aims to detect and define the core of constitutional democracy in the Member States of the European Union (EU). The central research question of the larger project is: what are the elements of constitutional democracy, based on the different requirements for the Member States of the EU, and how are constitutional principles applied by Member States, valued by the public and protected by the European institutions. Following this research question, the larger project has four main objectives: 1) to detect and define the principles of constitutional democracy in the EU; 2) to develop a hypothetical

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understanding of the standards derived from the principles of the EU serves as a benchmark to examine different countries, which are either below or beyond these standards; 3) to describe and reason the deviations from these values in certain countries; and 4) to explore the practice of the European institutions in protection of the constitutional principles in the Member States. As a result of this work, a clear comprehension of the core requirements and the reality of constitutional democracy in Europe can be achieved. This can also help to position European constitutional democracy in the world (within the emerging non-liberal but still democratic constitutional systems in the Arab world, or Asia, be they theocratic or communitarian, and also delimit these from the non-democratic autocracies, such as China, also growing in importance).

In this paper I deal with recent deviations from the shared values of rule of law and democracy—the ‘basic structure’ of Europe—in some of the new Member States in East-Central Europe, especially in Hungary and Poland. The starting point of deviation is Article 2 of the Treaty of the European Union, which demands “respect for human dignity, freedom, democracy, equality, rule of law and [...] human rights including the rights of minorities”. The principles of Article 2 TEU are elaborated for candidate countries of the EU in the Copenhagen criteria, laid down in the decision by the European Council of 21 and 22 June 1993, to provide the prospect of accession for transitioning countries that still had to overcome authoritarian traditions. The Treaty on the European Union sets out the conditions (Article 49) and principles (Article 6(1)) to which any country wishing to become an EU member must conform. Regarding constitutional democracy, the political criteria are decisive: stability of institutions guaranteeing democracy; the rule of law; human rights; and respect for,

and protection, of minorities. This was the main instrument, which governed the largest enlargement in the Union's history: starting in 2004 with ten new Member States, mostly from the former communist countries, followed by the accession of Romania and Bulgaria in 2007, and concluded by the admission of Croatia in 2013. As Dimitry Kochenov argues, the assessment of democracy and the rule of law criteria during this enlargement was not really full, consistent and impartial, and the threshold to meet the criteria was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowledgement that the Copenhagen political criteria had been met.¹ Not only were the conditionality requirements not taken seriously, but their maintenance was also missing after accession.² The only time the EU expressed some doubts and extended the validity of pre-accession values-promotion was the so-called Cooperation and Verification Mechanism applicable to Bulgaria and Romania, which remained in force even after they became full members.³ (During the 2012 Romanian constitutional crisis, the Commission successfully used the fact that the Mechanism had been expected to be discontinued in the middle of the crisis as leverage.⁴)

The weakness of the Copenhagen criteria and the lack of their application after accession is one of the reasons for non-compliance after accession in some of the new Member States. The other reason is certainly the authoritarian past of the new

¹ D. Kochenov, 'Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law', *European Integration online Papers (EIoP)* Vol. 8 (2004) N° 10; <http://eiop.or.at/eiop/texte/2004-010a.htm>

² About the so-called 'Copenhagen dilemma' see C. Closa, 'Reinforcing EU Monitoring of the Rule of Law', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016. 15-35.

³ M. A. Vachudova and A. Spendzharova, 'The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession', 1 *SIEPS European Policy Analysis*, 2012.

⁴ See Á. Bátori, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', *Public Administration*, 2016. 10.

democracies. Even though the immediate cause might have been the Austrian ‘Haider affair’⁵, as Wojciech Sadurski rightly argues, the Central and Eastern European applicants’ history was the main reason why Article 7 TEU was revised in the Treaty of Nice. This new provision makes it possible to react not only to a serious and persistent breach by a Member State of principles mentioned in then-Article 6(1) TEU, but also when there is a ‘clear risk’ thereof.⁶

The weakening of liberal constitutional democracy has started in Hungary after the landslide victory of the centre-right Fidesz party in the 2010 parliamentary elections. (In the Summer of 2012 there was a constitutional crisis also in Romania, where the ruling socialists tried to dismantle both the constitutional court and the president, but the EU was able to exert a stronger influence over events there.⁷ Since 2014 there has also been a constitutional crisis in progress in Slovakia, where the Constitutional Court has been working two—and since February 2016 three—judges short, because

⁵ In 2000, the far right Freedom Party headed by Jörg Haider became the coalition partner of the centre-right government, which led to unilateral measures by the Member States against Austria. But this action has left the Member States and the Union institutions extremely reluctant to use similar mechanisms. As the “report of the three wise men” mentions, the measures taken were perceived by the Austrian public as politically motivated sanctions by foreign governments against the Austrian population and therefore fostered nationalist sentiments. For a detailed analysis of the genesis of Article 7 see F. Hoffmeister, ‘Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?’, in A. v. Bogdandy and P. Sonnevend, *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Hart Publishing, 2015. 202-205).

⁶ W. Sadurski, ‘Adding a Bite to the Bark?: A Story of Article 7, EU Enlargement, and Jörg Haider’, 16 *CJEL*, 2010. 385, 394.

⁷ About the Romanian crisis see Vlad Perju, ‘The Romanian double executive and the 2012 constitutional crisis’, *I•CON* (2015), Vol. 13 No. 1, 246–278.; Bogdan Iancu, ‘Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts’, in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area*, C. H. Beck – Hart – Nomos, 2015. 153-169.

the President of the Republic refuses to fill the vacancies.⁸⁾

Hungary: The “Rule of Law Revolution” of 1989 and the “Constitutional Counter-Revolution” after 2010

Hungary was one of the first and most thorough political transitions, which provided all the institutional elements of constitutionalism: checks and balances and guaranteed fundamental rights. Hungary also represents the first, and probably model case, of constitutional backsliding from a full-fledged liberal democratic system to an illiberal one with strong authoritarian elements.

The seriousness of the core values of the EU can be examined through Hungary’s deliberate non-compliance with the principles of constitutional democracy, because it hasn’t yet received significant sanctioning externally nor substantial internal opposition. Therefore, the case has broader implications for Europe and it even has current resonance in some other, especially, the former communist countries of the region.

The characteristic of system change that Hungary shared with other transitioning countries was that it had to establish an independent nation-state, a civil society, a private economy, and a democratic structure all at the same time.⁹ Plans for

⁸ T. Lálík, ‘Constitutional Crisis in Slovakia: Still Far from Resolution, ICONect, August 5, 2016. <http://www.iconnectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution/>

⁹ The terms ‘single’ and ‘dual’ transitions are used by A. Przeworski, 1991. Later, Claus Offe broadened the scope of this debate by arguing that post-communist societies actually faced a triple

transforming the Stalin-inspired 1949 Rákosi Constitution into a ‘rule of law’ document were delineated in the National Roundtable Talks of 1989 by participants of the Opposition Roundtable and representatives of the state party. Afterwards, the illegitimate Parliament only rubber stamped the comprehensive amendment to the Constitution, which went into effect on October 23, 1990, the anniversary of the 1956 revolution, and which was the basic document of the ‘constitutional revolution’ until 1 January 2012.

Before the 2010 elections, most voters had grown dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.¹⁰ Fidesz fed these sentiments by claiming that there had been no real transitions in 1989–1990, and that the previous nomenklatura had merely converted its lost political power into economic influence, pointing to the previous two prime ministers of the Socialist Party, both of whom became rich after the transition owing to privatization. Fidesz’s populism was directed against all elites, including the elites who designed the 1989 constitutional system (in which Fidesz had also participated), claiming that it was time for a new revolution. That is why Viktor Orbán, the head of Fidesz, characterized the results of the 2010 elections as a “revolution of the ballot boxes.” His intention with this revolution was to eliminate any kind of checks and balances and even the parliamentary rotation of governing parties. In a September 2009 speech, Orbán predicted that there was “a real chance that politics in Hungary will no longer be defined by a dualist power space. Instead, a

transition, since many post-communist states were new or renewed nation-states. *See* C. Offe, *Varieties of Transition: The East European and East German Experience* (New York: MIT Press, 1997).

¹⁰ In 2009, 51% of Hungarians disagreed with the statement that they are better off since the transition, and only 30% claimed improvements. (In Poland 14% and 23% in the Czech Republic reported worsening conditions, and 70% and 75%, respectively, perceived improvement.). Eurobarometer, 2009.

large governing party will emerge in the center of the political stage [that] will be able to formulate national policy, not through constant debates, but through a natural representation of interests.” Orbán’s vision for a new constitutional order—one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values—has now been entrenched in a new constitution, enacted in April 2011.¹¹

In its opinion, approved at its plenary session of June 17–18, 2011, the Council of Europe’s Venice Commission expressed its concerns about the document, which was drawn up in a process that excluded the political opposition and professional and other civic organizations.¹²

Before 1 January 2012, when the new constitution became law, the Hungarian Parliament had been preparing a blizzard of so-called cardinal – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These laws affect the laws

¹¹ In an interview on Hungarian public radio on 5 July 2013, elected Prime Minister Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal Constitution. He said: “In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection, more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason, the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there.” *See* A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, 5 July 2013. Kossuth Rádió. <www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedekek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>

¹² *See* <[www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf)>. Fidesz’s counterargument was that the other parliamentary parties excluded themselves from the decision-making process with their boycott, except Jobbik, which voted against the document.

on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, functioning of the Constitutional Court and elections to Parliament. In the last days of 2011, the Parliament also enacted the so-called Transitory Provision to the Fundamental Law, which claimed constitutional status and partly supplemented the new Constitution even before it went into effect. These new laws have been uniformly bad for the political independence of state institutions, for the transparency of lawmaking and for the future of human rights in Hungary.

On 11 March 2013 the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The most alarming change concerning the Constitutional Court annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions; new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions were substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized

domestic rights protection to comply with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaties of the European Union and the European Convention on Human Rights.

In April 2014, Fidesz, with 44,5 % of the party-list votes, won the elections again, and due to 'undue advantages' for the governing party provided by the amendment to the electoral system¹³ secured again two-thirds majority. In early 2015 Fidesz lost its two-thirds majority as a consequence of mid-term elections in two constituencies, but the far-right Jobbik party has received another 20,5 % of the party-list votes. The enemies of liberal democracy still enjoy the support of the overwhelming majority of the voters, who are not concerned about the backsliding of constitutionalism.

Poland: Negotiated Liberal Democracy of 1989 and 'Remodeling' Democracy after 2015

Poland's 1989 negotiated democratic transition precedes Hungary's, but it followed Hungary's constitutional backsliding after the Law and Justice Party (known as PiS), led by Jarosław Kaczyński, won parliamentary elections in October 2015. The party

¹³ "A number of amendments negatively affected the election process, including important checks and balances...The absence of political advertisements on nationwide commercial television, and a significant amount of government advertisements, undermined the unimpeded and equal access of contestants to the media," – international election monitors of the Organization for Security and Cooperation in Europe (OSCE) said in its report". See Statement of Preliminary Findings and Conclusions, International Election Observation Mission, Hungary – Parliamentary Elections, 6 April 2014.

had already taken over the presidency in May that year. After Solidarity, led by the proletarian leader Lech Wałęsa, won massive electoral support in partially free elections held in June 1989, Poland's last communist president, General Jaruzelski - based on an arrangement known as 'your president, our prime minister' - was forced to appoint Tadeusz Mazowiecki, Wałęsa's former leading adviser, a liberal intellectual nominated by Solidarity as prime minister. Although due to the negotiated compromise, the key 'power ministries' of interior and defence were still run by communist generals, the Mazowiecki government engineered the most important aspects of the transition, namely securing a free-market economy. The economic reforms caused public disillusionment and widespread job losses.

Mazowiecki's administration also removed the reference to the Communist Party's 'leading role' from the constitution. A month later the party was dissolved, and on 31 December 1989 the Polish People's Republic gave way to the Republic of Poland, and a year later Jaruzelski was replaced by the first democratically elected President, Lech Wałęsa, who stood against Mazowiecki, symbolising the first breakdown within Solidarity. At the end of 1990, Jarosław Kaczyński ran Wałęsa's winning campaign and was rewarded with a position as the head of the presidential chancellery, but later accused him of betraying the revolution, and becoming 'the president of the reds'. Kaczyński's conspiracy theory that liberal intellectuals had become allies to former communists led to a final split known as Solidarity's 'war at the top'.¹⁴ The alleged conspiracy between other dissidents and the governing Polish United Workers party also determined how Kaczyński viewed the 'roundtable' agreement in 1989, which

¹⁴ Ch. Davis, 'The conspiracy theorists who have taken over Poland', The Guardian, February 16, 2016.

lead eventually to the end of the communist regime.¹⁵ The new government parties both in Hungary and Poland rejected ‘1989’ for the same reasons: namely, absence of radicalism of the democratic transition, and for the alleged liberation of the Communist elites.¹⁶

As in Hungary in 1994, the fight among erstwhile Solidarity allies brought Poland’s former communists back into power: the Democratic Left Alliance, the successor to the Polish United Worker’s Party, won parliamentary elections and the presidency in 1993 and 1995 respectively. In contrast to their failed attempt in Hungary in 1995-1996, the Polish post-communists and the liberals successfully negotiated a new liberal democratic constitution, enacted in 1997. Because the new document enshrined the Catholic church’s role in public life, conspiracy theorists charged that it provided additional evidence of a secret liberal-communist alliance. According to the conspiracists, there is no difference between liberal secularism and communist atheism or between liberal democracy and communist authoritarianism. This led in 2001 to the final division of Solidarity into two rival parties: Civic Platform (led by Donald Tusk), and Law and Justice (led by the Kaczyńskis, Jarosław and his twin brother, Lech), the former acknowledging, and the latter denying, the legitimacy of the new constitutional order.

In 2005, Law and Justice defeated Civil Platform, and Tusk won both the parliamentary and the presidential elections. Lech Kaczyński became President of the Republic, while Jarosław became head of the coalition government, which consisted

¹⁵ See J. Gross, ‘Jaroslaw Kaczynski’s party is rewriting the history of Poland’, *Financial Times*, March 13, 2016

¹⁶ See I. Krastev, ‘Walesa, Gorbachev and Freedom's End’, *The New York Times*, March 14, 2016.

of Law and Justice, the agrarian-populist Self Defense Party and the nationalist-religious League of Polish Families. The new government proposed a decommunisation law, which was partly annulled as unconstitutional by the still independent Constitutional Tribunal. The coalition fell apart in 2007, and Civic Platform won the subsequent elections. Donald Tusk replaced Jarosław Kaczyński as Prime Minister, while Lech remained President until he died after his plane crashed in the the Katyn forest near Smolensk in Western Russia crash in April 2010. Although his support has collapsed by the beginning of 2010, and his chances of re-election at the end of the year were widely assumed to be very low, his death fed the theory of a conspiracy between then Poland's Prime Minister Tusk and Russian President Putin willing to kill the Polish President.¹⁷

In 2015, Jarosław Kaczyński's Law and Justice Party returned to power with a vengeance, committed to reshaping the entire constitutional system in order to create a 'new and virtuous Fourth Republic'. This meant a systemic and relentless annihilation of all independent powers that could check the will of the ultimate leader. In that respect, his role model is Viktor Orbán.¹⁸ In 2011 PiS published a long document, authored largely by Kaczyński himself, on the party's and his leader's vision of the state. The main proposition of this paper is very similar to the one that

¹⁷ I. Krastev, 'The Plane Crash Conspiracy Theory That Explains Poland', *Foreign Policy*, December 21, 2015. On April 10, 2016 at an event to commemorate the sixth anniversary of the crash, Jarosław Kaczyński said that "One wanted to kill our memory, as one was afraid of it. Because someone was responsible for the tragedy, at least in moral terms, irrespectively of what were its reasons... Donald Tusk's government was responsible for that." He added: "Forgiveness is necessary, but forgiveness after admitting guilt and administering proper punishment. This is what we need", 'Poland's Kaczyński blames Tusk's government for President's Jet Crash', *Business Insider*, April 11, 2016. In early October Kaczyński expressed his doubts that the Polish government will support Tusk for his second term in the European Council with the same explanation. See <https://www.ft.com/content/d6a93538-8a36-11e6-8cb7-e7ada1d123b1?ftcamp=crm/email//nbe/BrusselsBrief/product>

¹⁸ As early as 2011 Kaczyński announced he wanted to create "Budapest in Warsaw." Cf. J-W. Müller, 'The Problem with Poland', *The New York Review of Books*, February 11, 2016.

Orbán described in his Kötöcsé speech in 2009: a well-ordered Poland should have a ‘centre of political direction’, which would enforce the true national interest. This illiberal counter-revolution of both Orbán and Kaczyński is based on a Communist rejection of checks and balances, as well as constitutionally entrenched rights.¹⁹

As opposed to Fidesz in 2011, PiS lacks the constitution-making or amending 2/3 majority in the parliament. Therefore, they started to act by simply disregarding the Constitution of 1997. The first victim was the Constitutional Tribunal, which already in 2007 had struck down important elements of PiS’ legislative agenda, including limits on the privacy of public officials to be lustrated and freedom of speech and assembly²⁰.

In October 2015, before the end of the term of the old Parliament, five judges had been nominated by the outgoing Civil Platform government, even though the nine-year term of two of them would have expired only after the parliamentary elections. Andrzej Duda, the new President of the Republic nominated by PiS, refused to swear in all the five new judges elected by the old Sejm, despite the fact that the term of office of three of them has already started to run. In early December, in accordance with a new amendment to the Law on the Constitutional Tribunal, the new Sejm elected five new judges, who were sworn into office by President Duda in an overnight ceremony. As a reaction to these appointments, the Constitutional Tribunal ruled that the election of two judges whose term were not yet over by the previous

¹⁹ Wojciech Sadurski, professor of constitutional law, who was the Kaczyński brothers’ fellow student at the University of Warsaw in the 1970s says that this vision bears a striking resemblance to the writings of Stanislaw Ehrlich, their joint ex-Marxist professor. See W. Sadurski, ‘What Make Kaczyński Tick?’, I•CONnect, January 14, 2016.

²⁰ About the battle for the Constitutional Tribunal see T.T. Konciewicz, ‘Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense’, I•CONnect, December 6, 2015.

Sejm in October 2015, was unconstitutional. The Tribunal also ruled that the election of the other three judges was constitutional, and obliged the President to swear them in. Since President Duda refused to do so, the chief judge of the Tribunal did not allow the five newly elected judges to hear cases.

The governing majority also passed an amendment to the organization of the Tribunal, increasing the number of judges that have to be present in a ruling from 9 to 13 out of 15. As opposed to the previous simple majority, decisions of the Tribunal will be taken by a 2/3 majority. With the five new judges, as well as the one remaining judge appointed by the PiS when it was last in government from 2005 to 2007, it may no longer be possible for the Tribunal to achieve the necessary 2/3 majority to quash the new laws. The six-member PiS faction, combined with the new quorum and majority rules, will be enough to stymie the court. Furthermore, the Tribunal is bound to handle cases according to the date of receipt, meaning it must hear all the pending cases, most likely regarding laws enacted by previous parliaments, before any new ones adopted by the new Sejm. For the same reason, the amendment also states that no decision about the constitutionality of a law can be made until the law has been in force for six months. Disciplinary proceedings against a judge can also be initiated in the future by the President of the Republic or by the Minister of Justice, which gives power to officials loyal to PiS to institute the dismissal of judges. In early March the Constitutional Tribunal invalidated all of the pieces of the law restricting its competences. The government immediately announced that it would not publish the ruling because the Court had made its decision in violation of the very law it invalidated. By Polish law, the decision of the Court takes effect as soon as it is published. If the decision is not published, it cannot take effect.

As a reaction to the government's (lack of) action, the General Assembly of Poland's Supreme Court judges adopted a resolution stating that the rulings of the Constitutional Tribunal should be respected, in spite of a deadlock with the government. The councils of the cities of Warsaw, Lodz and Poznan have resolved to respect the Constitutional Tribunal's decisions, in spite of the fact that the government is not publishing its rulings.²¹

In Orbán's playbook, which is seemingly followed by Kaczyński, the other major target has been the independent media. At the end of 2015, the PiS government introduced a new law, the so-called 'small media law', amending the former Law on Radio and Television Broadcasting. This amendment enabled the government to appoint and dismiss the heads of the public television and radio. According to the new rules, the presidents and members of the board of both institutions will be appointed and dismissed by the Minister of Treasury instead of the National Broadcasting Council from among multiple candidates. The new law also terminated the current managers' and board members' contracts with immediate effect, allowing the government to replace them. Since the 'small media law' was about to expire on 30 June 2016, the government in April submitted the 'large media law' to the Sejm. The draft bill planned to turn public broadcasters into 'national media', which would be obliged to spread the views of the Polish parliament, government and president, and have to 'respect Christian values and universal ethical principles'. The national media entities would be supervised by the newly established National Media Council. The Council of Europe published an expert opinion of the draft law on 6 June, calling for a number of changes. The report said that new law should ensure that members of the

²¹ <http://www.thenews.pl/1/9/Artykul/250415,Polands-Supreme-Court-opposes-government-in-constitutional-wrangle>

National Media Council are appointed in a transparent way, for instance after public hearing of the candidates, and that the Council should act independently of political influence. The draft suggested that the Council would consist of six members appointed by the parliament and the president, only one of which upon the recommendation of the largest opposition group in the Sejm. On June 9 the government postponed a draft law that was to enter into force on 1 July in order to notify the EU about the far-reaching changes. In the meanwhile, a bridge law created the New Media Council to supervise public media, with two of five members recommended by the opposition.²²

The third danger to PiS' 'centre of political direction' has been an apolitical civil service. Here Kaczyński, just like Orbán, started the complete politicization of the civil service by removing a previously existing rule that the new head of the civil service must be a person who has not been a member of a political party for the last five years. The same law also allows the new head to be appointed from outside the civil service. Another element of Orbán's agenda was to build up a surveillance state. In early February 2016, the new Polish Parliament also passed a controversial surveillance law that grants the government greater access to digital data and broader use of surveillance for law enforcement. On 13 June, the Venice Commission issued an opinion on this, criticizing the government for exercising nearly unlimited capacities without adequate independent checks or reasonable limits to the law.²³ In early May 2016 Jarosław Kaczyński announced his party's aim to change the 1997 Constitution: "the constitution must be verified every twenty years", hinting "next year will be the 20th anniversary of Poland's contemporary basic law". He admitted

²² <https://euobserver.com/political/133761>

²³ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)012-e)

however that “we might not find enough support to change the constitution this term, but it’s time to start to work. We can ask Poles if they prefer Poland that we’ve all seen or? the one that’s ahead of us.”²⁴ A day later Polish President Andrzej Duda said the country’s current constitution was a “constitution of a time of transition”, adding that “it should be examined, a thorough evaluation carried out and a new solution drawn up.”²⁵ These references to a new basic law leave open how the party intends to circumvent the lack of the necessary 2/3 majority in the Sejm for constitution-making. But as critics argue, PiS does not really need a new constitution because what they have been doing since the fall of 2015 is already a *de facto* change of the constitution through sub-constitutional laws. This is what Wojciech Sadurski calls a constitutional coup d’etat.²⁶

Possible Explanations of the Backsliding

The main reasons for the turn of constitutionalism in these two countries can be as follows:

(a) Historically, in the East-Central European countries there were some unexpected moments of quick flourishing of liberal democracy followed by an equally quick delegitimization of it. For instance shortly after 1945, till the communist parties take

²⁴ <http://uatoday.tv/news/poland-may-soon-change-its-constitution-j-kaczy-ski-642126.html>

²⁵ <http://www.thenews.pl/1/9/Artykul/251184,Polish-president-calls-for-constitution-to-be-reexamined>

²⁶ M. Steinbeis, “What is Going on in Poland is an Attack against Democracy”, Interview with Wojciech Sadurski, <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>

over, and also after 1989, when liberal democracy again seemed to be the ‘end of history’.²⁷

As surveys on the links between modernization and democracy show, the society’s historic and religious heritage leaves a lasting imprint.²⁸ According to these surveys, the public of formerly agrarian societies including Hungary and Poland emphasize religion, national pride, obedience, and respect for authority, while the publics of industrial societies emphasize secularism, cosmopolitanism, autonomy, and rationality.²⁹ Even modernization’s changes are not irreversible: economic collapse can reverse them, as happened during the early 1990s in most former communist states. These findings were confirmed by another international comparative study conducted by researchers of Jacobs University in Bremen and published by the German Bertelsmann Foundation.³⁰ According to the study, which examined 34 countries in the EU and the OECD, Hungary has had a low level of social cohesion ever since the postcommunist transformation, ranked at 27th, between Poland and Slovakia. Social cohesion is defined as the special quality with which members of a community live and work together.

²⁷ See the results of the research project “Negotiating Modernity”: History of Modern Political Thought in East-Central Europe, led by Balázs Trencsényi, and supported by the European Research Council, <https://erc.europa.eu/negotiating-modernity-history-modern-political-thought-east-central-europe>

²⁸ See R. Inglehart & C. Welzel, ‘Changing Mass Priorities: The Link between Modernization and Democracy’, *Perspectives on Politics*, 2010, Vol. 8, No. 2, pp. 551-567.

²⁹ *Id.*, p. 553. Christian Welzel in his recent book argues that fading existential pressures open people's minds, making them prioritize freedom over security, autonomy over authority, diversity over uniformity and creativity over discipline, tolerance and solidarity over discrimination and hostility against out-groups. On the other hand persistent existential pressures keep people's mind closed, in which case they emphasize the opposite priorities. This is the utility ladder of freedom. Ch. Welzel, *Freedom Rising. Human Empowerment and the Quest for Emancipation*, Cambridge University Press, 2013.

³⁰ D. Schiefer, J. van der Noll, J. Delhey, & K. Boehnke, *Cohesion Radar: Measuring Cohesiveness*, Bertelsmann Foundation, 2013, <www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_36378__2.pdf>

(b) Even though the transition to democracy both in Hungary and Poland was driven by the fact that a large share of the population gave high priority to freedom itself, but people expected the new states to produce speedy economic growth, with which the country could attain the living standards of West overnight, without painful reforms. In other words, one can argue that the average Hungarian and Polish people pursued the West in 1989, though not so much in terms of the Western economic and political system, but rather in terms of the living standards of the West. Claus Offe predicted the possible backsliding effect of the economic changes and decline in living standards, saying that this could undermine the legitimacy of democratic institutions and turn back the process of democratization.³¹ This failure, together with the emergence of an economically and politically independent bourgeoisie, the accumulation of wealth by some former members of the communist nomenclature, unresolved issues in dealing with the communist past, the lack of retributive justice against perpetrators of grave human rights violations, and a mild vetting procedure and lack of restitution of the confiscated properties, were reasons for disappointment.

(c) According some arguments, the prospects for democracy in the newly independent states of Central and Eastern Europe following the 1989–1990 transition were diminished by a technocratic, judicial control of politics, as well as the loss of civic constitutionalism, civil society, and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism.³²

³¹ Cf. C. Offe, *Designing Institutions for East European Transitions*, Institut für Höhere Studies, 1994, p. 15.

³² See this argument in P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a ‘negative effect’ in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See W. Sadurski, ‘Transitional Constitutionalism: Simplistic and Fancy Theories’, in A. Czarnota, M. Krygier

This concept argues that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardizes the development of participatory democracy.³³ In other words, this view suggests that legal constitutionalism falls short, reducing the Constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems that undermine a robust constitutional democracy based on the idea of civic self-government.³⁴

The concept of civic or participatory constitutionalism is based on ‘democratic constitutionalism’ (James Tully), emphasizing that structural problems in new democracies include the relative absence of institutions for popular participation, which is also related to ‘counterdemocracy’ (Pierre Rosenvallon), as well as robust institutional linkage of civic associations and citizens with formal politics. Critics of this approach say that it does not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters, the elite disdain for participatory institutions. Moreover, the approach does not account for the increasing irrelevance of domestic constitutionalism resulting from the tendencies of Europeanization and globalization, especially the internationalization of domestic constitutional law through the use of foreign and international law in constitution-making and constitutional interpretation.³⁵

& W. Sadurski (Eds.), *Rethinking the Rule of Law After Communism*, CEU Press, **Budapest**, 2005, pp. 9-24.

³³ See R. Albert, ‘Counterconstitutionalism’, *Dalhousie Law Journal*, Vol. 31, No. 1, 2008, p. 4.

³⁴ Cf. Sadurski, 2005, p. 23.

³⁵ See the reviews on Blokkers book by Jiri Priban and Bogusia Puchalska in ICONnect.

<www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism>

(d) There was also a lack of consensus about liberal democratic values at the time of the transition. In the beginning of the democratic transition of these new democracies preference was given to general economic effectiveness over mass civic and political engagement.³⁶ Between 1989 and 2004 all political forces accepted a certain minimalistic version of a 'liberal consensus' understood as a set of rules and law rather than values, according to which NATO and EU accession was the main political goal. But as soon as the main political goals were achieved, the liberal consensus has died,³⁷ and the full democratic consolidation is still better viewed as having always been somewhat illusory.³⁸

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Despite the many similarities there also some differences between the illiberal constitutional systems and their circumstances in Hungary and Poland³⁹. Besides the previously mentioned lack of constitution-making and amending power of PiS⁴⁰, the chances of stopping the backsliding of liberal constitutionalism are better in Poland. As regards internal differences, the parliamentary opposition to PiS, which was not as compromised as its Hungarian counterpart, is much stronger. Fidesz's strongest challenger is the far-right Jobbik party, against which it is always easier to win elections, especially since Fidesz fulfills the agenda of Jobbik. Civil society is also playing a crucial role in Poland, thanks to the more active opposition movement

³⁶ Dorothee Bohle and Béla Greskovits state that East Central European democracies had a 'hollow core' at their inception. See D. Bohle and B. Greskovits, *Capitalist Diversity on Europe's Periphery*, Cornell University Press, 2012.

³⁷ See I. Krastev, 'Is East-Central Europe Backsliding? The Strange Death of the Liberal Consensus', 18. *Journal of Democracy*, (October 2007), 56-63.

³⁸ J. Dawson and S. Hanley, 'What's Wrong with East-Central Europe? The Fading Mirage of the Liberal Consensus', 7 *Journal of Democracy*, (January 2016), 20-34.

³⁹ About the more political differences see S. Sierowski, 'Pathetische Gesten', *Die Zeit*, 21. Januar 2016.

⁴⁰ Although in early 2015 Fidesz lost its 2/3 majority by two votes, it seems that they are able to get these votes if necessary from the far right Jobbik party.

against the Communist regime. In fact, since the end of 2015, there have been constant civic demonstrations in Poland, which with the exception of when the Orbán government was about to introduce an Internet tax, has not happen in Hungary. On the other hand, the exceptionally powerful Catholic Church in Poland seems to support the PiS government. Fidesz can count not only on the public but also the private media, which is mostly in the hands of their own oligarchs. Orbán's main interest seems to be to build up a new financial oligarchy around himself, while Kaczyński is more ideological, including in his opposition to the EU. As Wojciech Sadursi put it, he and his people are not oligarchs, they pursue and really believe in an ideology of Poland as a proud sovereign state based on Catholic national identity.⁴¹ In other words, while the Polish system is ideology-driven, the Hungarian only uses ideology.⁴²

The main external difference is that while Fidesz belongs to the European People's Party, the center-right party faction in the European Parliament, and the EPP needs the votes of Fidesz' MEPs to maintain its majority, PiS is member of the much less important group of Conservatives, which makes the EU more committed to stand up to violations of EU values by the Polish government.

⁴¹ See M. Steinbeis, *ibid.*

⁴² This is the main conclusion of a Polish-Hungarian comparative study as well. See B. Magyar – M. Mitrovits, 'Lengyel-magyar párhuzamos rendszerrajzok.' [Polish-Hungarian parallel system drawings], *Élet és Irodalom*, August 12 and 19, 2016.

The Use of EU's Authority and Capacity to Protect Constitutional Democracy in Hungary and Poland

Traditional Mechanisms: Infringement Procedures and Article 7

The European Union indeed has authority to protect the values of constitutionalism in the Member States. In the case of Hungary, the EU, until 2013, when the Fourth Amendment to the Fundamental Law was enacted, did not use any of its capacities. In March 2013, after the Fourth Amendment was introduced to the Hungarian Parliament, the Danish, Finnish, Dutch and German Ministers of Foreign Affairs issued a Joint Letter, which called for a new mechanism to safeguard the fundamental values of the EU, secure compliance, and for the Commission to take an increased role in it.⁴³ Later, upon the request of the European Parliament, its Committee on Civil Liberties, Justice and Home Affairs (LIBE) prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment to the Fundamental Law of Hungary.⁴⁴ The report is named after Rui Tavares, a Portuguese MEP at that time, who was the rapporteur of this detailed study of Hungarian constitutional developments since 2010. On 3 July 2013, the report passed with a surprisingly lopsided vote: 370 in favour, 248 against and 82 abstentions. In a Parliament with a slight majority of the right, this tally gave the lie to the Hungarian government's claim that the report was merely a conspiracy of the left.

⁴³ Available at [www.Ministerie van Buitlendlandse Zaken brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme%20\(1\).pdf](http://www.Ministerie_van_Buitlendlandse_Zaken_brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme%20(1).pdf).

⁴⁴ <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>

With its acceptance of the Tavares Report, the European Parliament has created a new framework for enforcing the principles of Article 2 of the Treaty. The report calls on the European Commission to institutionalize a new system of monitoring and assessment. The most important four elements were these:

- a) An “Article 2 Alarm Agenda” which requires the European Commission in all of its dealings with Hungary to raise only Article 2 issues until such time as Hungary comes into compliance with the report. This Alarm Agenda effectively blocks all other dealings between the Commission and Hungary until Hungary addresses the issues raised in the report.
- b) A “Trilogue” (a three-way communication) in which the Commission, the European Council and the European Parliament will each delegate members to a new committee that will engage in a close review of all activities of the Hungarian government relevant to the report. This committee is charged with assessing the progress that Hungary is making in complying with the list of specific objections that the report identifies.
- c) A “Copenhagen Commission” or high-level expert body through which a panel of distinguished and independent experts will be assigned the power to review continued compliance with the Copenhagen criteria used for admission to the EU on the part of any member state. The idea behind this body, elaborated by Jan-Werner Müller, is that non-political experts should be given the task of judging whether member states are still acting on the basis of values of Article 2.⁴⁵

⁴⁵ <http://www.transatlanticacademy.org/publications/safeguarding-democracy-inside-eu-brussels-and-future-liberal-order>. See also J-W. Müller, ‘Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission’, in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016. 206-224.

d) And in the background, there is still Article 7 of the Treaty of the European Union. Article 7, which identifies a procedure through which an EU member state can be deprived of its vote in the European Council and therefore would lose representation in the decision-making processes of the EU, is considered the “nuclear option” – unusable because it is so extreme.⁴⁶ But the Tavares Report holds out the possibility of invoking Article 7 if the Hungarian government does not comply with the monitoring program and reform its ways.

The first reaction of the Hungarian government was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on “the equal treatment due to Hungary”. The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: “We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain.” The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many

⁴⁶ Manuel Barroso, who at that time was president of the European Commission, called the Article 7 mechanism a ‘nuclear option’, even though a sanction under it does not really devastate the member states against which it would be used.

European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls on the Hungarian government “not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families”.⁴⁷ These words very much reflect the Orbán-government’s view of ‘national freedom’, the liberty of the state (or the nation) to determine its own laws: “This is why we are writing our own constitution... And we don’t want any unsolicited help from strangers who are keen to guide us... Hungary must turn on its own axis”.⁴⁸

Encouraged by the Tavares report, Commission President Barroso also proposed a robust European mechanism to be “activated as in situations where there is a serious, systemic risk to the Rule of Law”.⁴⁹ Commission Vice-President Reding, too, announced that the Commission will present a new policy communication.⁵⁰

Due to the pressure, the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the European Parliament. The changes leave in place provisions that undermine the rule of law and

⁴⁷ On the very day that the resolution of the Hungarian Parliament was announced, Hannes Swoboda (Austria), the leader of the S&D Group at the European Parliament, said in a press release that the resolution was an ‘*insult to the European Parliament*’ and demonstrated that Hungary's Prime Minister, Viktor Orbán, does not yet understand the values of the EU. See Hungarian Parliament rejects Tavares report. Brussels, 05/07/2013, Agence Europe.

⁴⁸ For the original, Hungarian-language text of Orbán’s speech, entitled *Nem leszünk gyarmat!* [We won’t be a colony anymore!] see e.g.

<http://www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat> The English-language translation of excerpts from Orbán’s speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012, at: <<http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>>.

⁴⁹ J. M. D. Barroso, ‘State of the Union address 2013’, Plenary session of the European Parliament (Strasbourg: 1 September, 2013) SPEECH/13/684. [http://europa.eu/rapid/press-release SPEECH-13-684 en.htm](http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm).

⁵⁰ V. Reding, ‘The EU and the Rule of Law – What Next?’, Centre for European Policy Studies (Brussels: 4 September, 2013) SPEECH/13/677. [http://europa.eu/rapid/pressrelease SPEECH-13-677 es.htm](http://europa.eu/rapid/pressrelease_SPEECH-13-677_es.htm).

weaken human rights protections. The Hungarian parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013.⁵¹ The government's reasoning states that the amendment aims to "finish the constitutional debates at international forum" (meaning with European Union – G.H.). A statement from the Prime Minister's Office said: "The government wants to do away with those... problems which have served as an excuse for attacks on Hungary," But this minor political concession does not really mean that the Hungarian government ever respected at least the formal rule of law, as some commentators claim.⁵²

The New Rule of Law Framework and Its Use and Non-Use

As none of the suggested elements have worked in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council to strengthen the rule of law in the Member States⁵³. This framework is complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify? and improve the suspected violation of EU law. As the Hungarian case has shown, infringement actions are usually too narrow to address the structural problem which persistently noncompliant Member States pose. This happened when Hungary suddenly lowered the retirement age of judges and removed from office the

⁵¹ Both the foreign and Hungarian Human Rights NGOs said that the 'amendments show the government is not serious about fixing human rights and rule of law problems in the constitution'. See the assessment of Human Rights Watch: <http://www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short>, and the joint opinion of three Hungarian NGOs: <http://helsinki.hu/otodik-alaptorveny-modositas-nem-akarasnak-nyoges-a-vege>

⁵² See A. v. Bogdandy, 'How to Protect European Values in the Polish Constitutional Crisis', *verfassungsblog.de*, 31 March, 2016.

⁵³ Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law, [A new EU Framework to strengthen the Rule of Law](#)

most senior ten percent of the judiciary, including a lot of court presidents, and members of the Supreme Court. The European Commission brought an infringement action, claiming age discrimination. The European Court of Justice in *Commission v. Hungary* established the violation of EU law⁵⁴. But unfortunately, the decision was not able to reinstate the dismissed judges into their original position, and stop the Hungarian government from further seriously undermining the independence of the judiciary, and weakening other checks and balances with its constitutional reforms. Apparently, the ECJ wanted to stay away from Hungarian internal politics, merely enforcing the existing EU law rather than politically evaluating the constitutional framework of a Member State.⁵⁵ This was the reason that Kim Lane Scheppele suggested to reframe the ordinary infringement procedure to enforce the basic values of Article 2 through a systemic infringement action.⁵⁶

The new framework allows the Commission to enter into a dialogue with the Member State concerned to prevent fundamental threats to the rule of law. This new framework can best be described as a 'pre-Article 7 procedure', since it establishes an early warning tool to tackle threats to the rule of law, and allows the Commission to enter into a dialogue with the Member State concerned, in order to find solutions before the existing legal mechanisms set out in Article 7 will be used. The Framework process is designed as a three steps procedure. First, the Commission makes an assessment of the situation in the member country, collecting information and

⁵⁴ ECJ, 6 November 2012, Case C—286/12.

⁵⁵ For the detailed facts of the case and the assessment of the ECJ judgement see G. Halmai, 'The Case of the Retirement Age of Hungarian Judges', forthcoming in F. Nicola and B. Davies (eds.), *EU Law Stories*, Cambridge University Press, 2016.

⁵⁶ See K. L. Scheppele, 'Enforcing the Basic Principle of EU Law through Systemic Infringement Procedures', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016. 105-132.

evaluating whether there is a systemic threat to the rule of law. Second, if a systemic threat is found to exist, the Commission makes recommendations to the member country about how to resolve the issue. Third, the Commission monitors the response and follow-up of the member country to the Commission's recommendations.

In June 2015, the European Parliament passed a resolution condemning Viktor Orbán's statement on the reintroduction of the death penalty in Hungary and his anti-migration political campaign, and called on the Commission to launch the Rule of Law Framework procedure against Hungary.⁵⁷ But the Commission ultimately refused to launch the procedure with the argument that though the situation in Hungary raised concerns, there was no systemic threat to the rule of law, democracy and human rights.⁵⁸

In December 2015, after the Hungarian Parliament in July and September enacted a series of anti-European and anti-rule-of law immigration laws⁵⁹ as a reaction to the refugee crisis, the European Parliament again voted on a resolution calling on the European Commission to launch the Rule of Law Framework. The Commission continued to use the usual method of infringement actions, finding the Hungarian legislation in some instances to be incompatible with EU law (specifically, the recast Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right

⁵⁷ [http://www.europarl.europa.eu/news/en/news-room/content/20150605IPR63112/html/Hungary-MEPs-condemn-](http://www.europarl.europa.eu/news/en/news-room/content/20150605IPR63112/html/Hungary-MEPs-condemn-Orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey)

[Orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey](http://www.europarl.europa.eu/news/en/news-room/content/20150605IPR63112/html/Hungary-MEPs-condemn-Orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey)

⁵⁸ Hungary: no systemic threat to democracy, says Commission, but concerns remain, Press Release, 2 December 2015.

⁵⁹ See G. Halmai, 'Hungary's Anti-European Immigration Laws', Transit Online, 4 November, 2015. <http://www.iwm.at/read-listen-watch/transit-online/hungarys-anti-european-immigration-laws/>

to interpretation and translation in criminal proceedings (Directive 2010/64/EU)).⁶⁰

This was the first time that the Commission has alleged a violation of the Charter of Fundamental Rights in an infringement action.⁶¹

Also at the end of May 2016, the Commission issued two infringement procedures against Hungary. The first one demands that Hungary change its law forbidding the

⁶⁰ Regarding the asylum procedures, the Commission was concerned that there was no possibility to refer to new facts and circumstances in the context of appeals and that Hungary was not automatically suspending decisions in case of appeals - effectively forcing applicants to leave the territory before the time limit for lodging an appeal expired, or before an appeal has been heard. Regarding rights to translation and interpretation, the Commission was concerned that the Hungarian law fast-tracked criminal proceedings for irregular border crossings, which did not respect provisions of the Directive on the right to interpretation and translation in criminal proceedings, which ensures that every suspect or accused person who does not understand the language of the proceedings is provided with a written translation of all essential documents, including any judgments. Also, the Commission expressed its concerns about the fundamental right to an effective remedy and a fair trial under Article 47 of the Charter of Fundamental Rights of the EU. There were concerns about the fact that under the new Hungarian law dealing with the judicial review of decisions, in the event that an asylum application is rejected, a personal hearing of the applicant is optional. The fact that judicial decisions taken by court secretaries (a sub-judicial level) that lack judicial independence also seems to be in breach of the Asylum Procedures Directive and Article 47 of the Charter. http://europa.eu/rapid/press-release_IP-15-6228_en.htm

⁶¹ See this option as one of three scenarios using the Charter as a treaty obligation in F. Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?', in A. v. Bogdandy and P. Sonnevend, *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Hart Publishing, 2015. 201. (According to Hoffmeister in the first scenario, a Charter right is further specified by EU secondary law. For example, Article 8 Charter on the protection of personal data lies at the heart of Directive 95/46/EC which largely harmonises the rules on data protection in Europe. In the second scenario, the Charter right is not underpinned by specific EU legislation. That is the case, for example, with Article 10(1) of the Charter on the freedom of thought, conscience and religion.) According to Armin von Bogdandy and his colleagues national courts could also bring grave violations of Charter rights, such as freedom of the media in Article 11 to the attention of the CJEU by invoking a breach of the fundamental status of Union citizenship in conjunction with core human rights protected under Article 2 TEU. The idea behind this proposal is that the EU and Member States can have an interest in protecting EU citizens within a given member state. See A. von Bogdandy, & M. Kottmann & C. Antpöhler & J. Dickschen & S. Hentrei & M. Smrkolj, 'Reverse Solange. Protecting European Media Freedom Against EU Member States', *Common Market Law Review*, Volume 49, 2012. The proposal was released for public debate by the German-English language public law portal [verfassungsblog.de](http://www.verfassungsblog.de) in February 2012; (see: A. Bogdandy & M. Kottmann & C. Antpöhler & J. Dickschen & S. Hentrei & M. Smrkolj, A Rescue Package for EU Fundamental Rights - Illustrated with Reference to the Example of Media Freedom (2012), *Verfassungsblog*, 15 February, <http://www.verfassungsblog.de/en/ein-rettungsschirm-fur-europaische-grundrechte-dargestellt-am-beispiel-der-medienfreiheit/#.Uenz3hbkVUT>. The debate initiated by the editors (http://www.verfassungsblog.de/rettungsschirm-fr-grundrechte-ein-onlinesymposium-auf-dem-verfassungsblog-2/#.Uen2_hbkVUT) featured comments by Michaela Hailbronner, Daniel Halberstam, Dimitry Kochenov, Matthias Kumm, Peter Lindseth, Anna Katharina Mangold, Daniel Thym, Wojciech Sadurski, Pál Sonnevend, Renáta Uitz and Antje Wiener.

sale of agricultural land to foreigners.⁶² The other requests that Hungary ensure that Roma children enjoy access to quality education on the same terms as all other children and urges the government to bring its national laws on equal treatment as well as on education and the practical implementation of its educational policies into line with the Racial Equality Directive.⁶³

The first step to use the new Rule of Law Framework was taken by the European Commission against Poland in early January 2016. The Commission initiated a dialogue with Poland. Meanwhile, the Polish Foreign Minister asked the Venice Commission, the advisory body of the Council of Europe for an opinion on the legal solutions contained in the amendments to the Law on the Constitutional Tribunal. The Venice Commission issued its opinion in mid March of 2016.⁶⁴ The report states that “Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections.” Regarding the Constitutional Tribunal, it remarked: “as long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but so is democracy and human rights.”

⁶² http://europa.eu/rapid/press-release_IP-16-1827_en.htm

⁶³ http://europa.eu/rapid/press-release_MEMO-16-1823_da.htm

⁶⁴ Opinion no. 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland. Adopted by the Venice Commission at its 106th Plenary Adopted by the Venice Commission at its 10 Plenary Session (Venice, 11-12 March 2016). Before the Venice Commission discussed the draft report at its plenary meeting, the draft was leaked and published in the Polish daily, Gazeta Wyborcza at the end of February.

After the Polish government made clear that it did not intend to follow the recommendations of the Venice Commission, the European Parliament on April 13, 2016 voted overwhelmingly in support of a resolution declaring that the Polish government's confrontation with the Constitutional Tribunal posed a danger to 'democracy, human rights and the rule of law'.⁶⁵ The non-binding resolution was backed by a coalition of liberal⁶⁶ and left-wing factions, but approved by 513 votes to 142 with 30 abstentions⁶⁷. The resolution also called on the Polish government to end the crisis over the Tribunal, and if that does not happen, for the European Commission to activate the 'second stage' of the rule of law mechanism. But the resolution was not warmly received by the European Commission. First Vice President, Frans Timmermans suggested there may be enough progress to preclude further EU action.⁶⁸ Also Donald Tusk, president of the European Council and former Polish prime minister, without having the power to oppose the parliamentary resolution or any future action of the Commission, expressed caution: "I don't think that today or in the near future anyone in Europe would want to impose sanctions or penalties against Poland. I wouldn't support such a step."⁶⁹

⁶⁵ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0123+0+DOC+PDF+V0//EN>

⁶⁶ Guy Verhofstadt, leader of the liberal ALDE group said: „Respect for European values is not a choice but an obligation...The PiS government is distancing Poland from a community of values. See <https://www.socialeurope.eu/2016/04/europes-rule-law-crisis/>

⁶⁷ The group of the European Conservatives and Reformists (ECR), including the British Tory MEPs voted against the resolution and issued a counter resolution

(<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2016-0465&format=XML&language=EN>). By contrast, the majority of the European People's Party faction, with the unanimous exception of the Hungarian Fidesz MEPs supported the motion against Poland. See <http://www.votewatch.eu/en/term8-situation-in-poland-motion-for-resolution-vote-resolution.html>

⁶⁸ <http://www.politico.eu/article/timmermans-ramps-up-pressure-in-poland-constitutional-crisis/>

⁶⁹ <http://www.politico.eu/article/european-parliament-scolds-poland-constitutional-tribunal-probe-rule-of-law/>. Tusk is in a delicate situation, not just because he was a previous prime minister of Poland, but also because he has to have the Polish government's consent soon for his renewal as president of the Council. And he also needs the support of the members of European People's Party's (EPP) faction, including Fidesz. This might explain his following words at the event marking the 40th EPP: "I am terribly proud to be in the same party with such people as ... Viktor Orbán." <http://www.consilium.europa.eu/en/press/press-releases/2016/05/30-pec-speech-epp/>

In early June 2016 the Commission finally decided to send its opinion⁷⁰, despite a furious statement of Jaroslaw Kaczyński, who warned that if the Commission continued to press its unprecedented rule of law procedure against Poland, the country could issue a challenge to the European Court of Justice ‘at any time,’ adding that the inquiry was ‘dreamed up’ and went beyond what is allowed by the EU treaties⁷¹. After the adoption of the opinion, Frans Timmermans said: "The rule of law is one of the foundations of the European Union. There have been constructive talks which should now be translated into concrete steps to resolve the systemic risk to the rule of law in Poland. The Opinion adopted today presents our assessment of the issues at stake, building on the dialogue, which started in January. On this basis we stand ready to continue the dialogue with the Polish authorities."⁷²

The Polish parliamentary majority responded by adopting a new law on the Constitutional Tribunal on 7 July that leaves no doubts that they are not holding back. The law reintroduces the provisions that were already either disqualified by the Court as unconstitutional, or criticized by the Venice Commission. As Tadesz Koncewicz

⁷⁰ The full text of the opinion was not published, and a request by Laurent Pech, professor of Middlesex University was rejected by the Commission on the ground that the disclosure “would undermine the protection of the purpose of the ongoing investigation” as any disclosure “at this point in time would affect the climate of mutual trust between the authorities of the Member state and the Commission, which is required to enable them to find a solution and prevent the emergence of a system threat to the rule of law”. The Commission’s subsequent decision to publish a Rule of Law [Recommendation on 27 July 2016](#) led Professor Pech to ask the Commission to review their initial refusal to disclose the Opinion, adopted on 1 June 2016. Having reviewed the application, the Secretariat General of the Commission finally accepted the disclosure of the full text of the Opinion. For the story of the FOI request and the full text see Laurent Pech’s blogpost of 19 August, 2016. <http://eulawanalysis.blogspot.it/2016/08/commission-opinion-of-1-june-2016.html>

⁷¹ <http://www.politico.eu/article/poland-and-commission-plan-crisis-talks/>. Boyden Gray, former US ambassador to the EU in an op-ed article written in the Wall Street Journal also questioned the authority of the EU to use the Framework against Poland: “The European Union’s current overreaching and meddling in Poland’s legal affairs under the guise of its lawless, ironically named “Framework to Strengthen the Rule of law,” provides a glimpse at some of the dynamics underlying last month’s Brexit vote. The framework, announced in March 2014, did not directly factor into Brexit, but it demonstrates the EU’s troubling propensity to harass its member states and dictate Brussels-based solutions for domestic problems. If pursued, the framework could further destabilize the EU.” <http://www.wsj.com/articles/the-european-union-shows-poland-why-we-have-brex-it-1467747768>.

⁷² http://europa.eu/rapid/press-release_IP-16-2015_en.htm

points out, the attacks on the Court have two dimensions: external and internal. The external opens up the possibilities for the government to unconstitutionally interfere in a way that makes the Court dependent on outside forces. Internally, the provisions tie the Courts's and cripple its ability to act in a timely and speedy fashion.⁷³ To 'compensate' for the most questionable and clearly unconstitutional provision, which required a the two-third majority of every court decision to annul a law, which was harshly criticized by the Venice Commission, the new law introduced the minimum number of judges to sit on the Full Court. According to this quorum provision, at least 11 judges out of the 15 will always be required. As a result of this, the main powers reserved to the Full Court will remain on paper, for instance if four of the six judges nominated by PiS are absent. As an external limitation, the absence of the Attorney General, an appointee of the governing majority, whose mandatory participation is required in a number of cases, can also make it impossible for the Court to rule. The judges loyal to the government still, in a minority, will have also another opportunity to block the review procedure of a questionable law of the new parliament. At least four of them will have the right to demand postponement of any case twice during a three-month period, without giving reasons.

Another provision that can immunize laws adopted by the new governing majority from effective constitutional review is the one that strictly requires the Constitutional Tribunal to hear cases in the order they are filed. In addition, the temporary provisions of the new law state that it must be applied to the approximately one hundred cases that were pending before before the Court before the law's entry into force.

Additionally, the law states that any new law can only be considered by the Court

⁷³ See T.T. Koncewicz, 'Farewell to the Polish Constitutional Court', verfassungsblog.de, July 9, 2016.

after a 30-day minimum waiting period. Also an internal attack on the Court's jurisdiction, there is a limitation on its power to review the procedure in which an act was enacted. According to this new provision, the Court is only entitled to check the contents of a challenged act, and not, for instance, the lack of competence of the lawmaking body.

One of the new external limits allows the President of the Republic to veto the previously autonomous decision of the General Assembly of Constitutional Tribunal judges to exclude a judge for disciplinary reasons, which would have threatened some low moral standing judges nominated by PiS. The President of the Republic will also have the power to change the sequence in which the Court has to adjudicate its cases. The President of Poland is free to select as President and Vice-President of the Tribunal from the list submitted by the General Assembly of the judges. The new rules do not rule out a situation in which a judge receiving one vote (which can be his/her own) will be considered as a candidate for the position. Probably the dirtiest trick among the external attacks is a provision limiting the duty of the government to publish the judgments of the Court issued after 10 March, which is exactly one day after the most important judgment annulling the first amendment to the law on the Constitutional Tribunal, and not published by the government so far. Another highly provocative sign of the lack of willingness to compromise is the fact that three judges constitutionally elected by the previous Sejm still wait to be sworn in by the President, and the new law fails to provide any guarantee for them to reach the bench ever.

As a reaction to the new law, the human rights commissioner of the Council of Europe, Nils Muižnieks, has expressed concern about the adoption of the bill: “I am very concerned about the adoption by the Polish Sejm of a bill on the Constitutional Tribunal yesterday because it poses a serious threat to the rule of law. For this serious reason, I call on the Senate to prevent a bad bill from becoming law and ensure that the rule of law in Poland is fully respected.” Secretary General of the Council of Europe, Thorbjørn Jagland, also responded to the Polish parliamentary action by asking the Venice Commission to examine the legislation.⁷⁴ On 27 July, the European Commission opened the second phase of the mechanism by publishing its Recommendation. The document closely reflects the content of the Opinion, but it puts more emphasis on the issue of the effective functioning of the Polish Constitutional Tribunal following, *inter alia*, the adoption of the law on the Constitutional Tribunal by the Polish Parliament on 22 July 2016. The Recommendation announced that there was “a systematic threat to the rule of law in Poland”⁷⁵. Frans Timmermans, the Commission vice-president, called on the Polish government to take action to guarantee the independence of the constitutional tribunal over the next three months.⁷⁶

Despite the Commission Recommendation, the new law on the Constitutional Tribunal was formally approved on 30 July and was due to take effect on 16 August 2016. But the regulation was challenged even before taking effect by opposition parties who sent it to the court for scrutiny. The Constitutional Tribunal ruled on 11

⁷⁴ <http://www.humanrightseurope.org/2016/07/poland-nils-muiznieks-concerned-by-new-constitutional-tribunal-bill/>

⁷⁵ Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.217.01.0053.01.ENG

⁷⁶ <https://www.theguardian.com/world/2016/jul/27/poland-rule-of-law-systematic-threat-european-commission>

August that most of the provisions in the new law replicate those already found to be unconstitutional in the March judgment. Therefore, the Tribunal reiterated that its ruling about the unconstitutionality of the new law must be published immediately in the shortest possible time. This warning was a reaction to a statement of Kaczyński, which was pronounced even before the decision, saying that whatever the Tribunal decides it will not be published.⁷⁷ After this judgment, the government raised a new, most probably deadly weapon in the war against the Court: the prosecutor launched an abuse-of-powers investigation against the head of the Tribunal, Andrzej Rzeplinski.⁷⁸

Assessment of the Framework

There are critiques of the Framework, which were formulated in general terms, without any reference to its use in the Polish case. The UK government, for instance, criticized the proposal right after its adoption. The Cameron government raised two critical objections: the duplication of existing institutions and procedures to deal with the same issue, and the undermining of the role of Member States in the Council by the Commission's enhanced role.⁷⁹

The British criticism was followed by some harsh concerns of the Council, first formulated in an Opinion of its Legal Service, the main argument being that the

⁷⁷ See T.T. Konczewicz, 'Polish Constitutional Tribunal goes down with dignity', verfassungsblog.de, 25 August 2016.

⁷⁸ See T.T. Konczewicz, 'Constitutional justice in Handcuffs? Gloves are off in the Polish Constitutional Conflict', verfassungsblog.de, 3 September 2016.

⁷⁹ See UK House of Commons, European Scrutiny Committee Documents considered by the Committee on 7 May 2014 – Commission Communication, A new EU Framework to strengthen the Rule of Law. www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xliiii/8304.htm.

absence of solid and unambiguous Commission competence made the Framework procedure incompatible with the principle of conferral.⁸⁰ Based on this Opinion, the Italian Presidency of the Council prepared a short paper about a potential mechanism, which emphasized the exclusive role of the Council and the method of ‘constructive dialogue’.⁸¹ The Council endorsed both the ‘dialogue among all Member States’ and its own exclusive role under the new mechanism „based on the principles of objectivity, non-discrimination and equal treatment of all Member States...without prejudice to the principle of conferred competences, as well as the respect of national identities of all Member States”.⁸²

As Carlos Closa observed, the proposed ‘naming and shaming’ procedure, which takes place once a year in the Council, and does not even need to be public, does not foresee any ultimate consequences.⁸³ Joseph Weiler on the other hand argues that the Council’s dialogue approach was driven from an implicit acknowledgement of the constitutional limits imposed on the Union against the “appetite for jurisdictional and competence expansion of the Union in general and the Commission in particular”.⁸⁴

Weiler, while acknowledging the mostly noble intention of the Commission by

⁸⁰ Council of the European Union, Opinion of the Legal Service, Commission’s Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties Doc 10296/14. <http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>.

⁸¹ Italian Presidency of the Council of the European Union A Fresh Start Programme of the Italian Presidency 1 July to 31 December 2014. http://italia2014.eu/media/1349/programma_en1_def.pdf.

⁸² Conclusion of the Council of 14 December 2014. Press Release of the Council, 16 December 2014, PRESSE 652 PR CO 74. In 3 October the Italian government hosted the ‘annual rule of law dialogue’ in Rome with the participation of 12 governments’ representatives. <http://www.politico.eu/article/meps-call-for-better-monitoring-of-rule-of-law/>

⁸³ The detailed critique of the ‘dialogue’ see C. Closa, ‘Reinforcing EU Monitoring of the Rule of Law’, in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016. 32-35, as well as P. Oliver and J. Stefanelli, ‘Strengthening the Rule of Law in the EU: The Council’s Inaction, Special Issue of the *Journal of Common Market Studies* on the Rule of Law, JCMS Volume 54, Number 5, 2016.

⁸⁴ J.H.H. Weiler, ‘Epilogue: Living in a Glass House. Europe, Democracy and the Rule of Law’, in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016. 313.

framing the states' violation of the Union's core values as one concerning the rule of law, suggests to replace the formalist notion of the rule of law with a substantive and not merely procedural content, which entails an insistence on democratic legitimation. And since neither of the two primordial features of democratic legitimation – accountability and representation – operate in the EU, Weiler concludes that although the Union should take robust actions within its competences and jurisdictional limits against Member States violating the rule of law, it should also eliminate its own democratic deficit.⁸⁵ But even regarding the members states' democratic crisis, Amichai Magen raises the question why it has been framed exclusively in terms of the rule of law, rather than the other foundational values listed in Article 2 TEU.⁸⁶

Another general theoretical critique of the Framework comes from the sociological reflections of Paul Blokker, who also characterizes the EU's action as being a one-sided legalistic and formal-procedural approach.⁸⁷ He argues for consideration of 'supporting circumstances' in terms of the social and political structures and cultural support within the Member States which encourage more civil participation in constitutional matters.

Critics of the Framework's use in the case of Poland argue that the pre-Article 7 procedure of dialogue, which could lead to the Commission's advice to move on to activate Article 7, is based on the Commission's assumption that the state of rule of law is not that bad in Poland, and that it will take a lot of time, especially because the

⁸⁵ Ibid.

⁸⁶ A. Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU', Special Issue of the *Journal of Common Market Studies* on the Rule of Law, JCMS Volume 54, Number 5, 2016.

⁸⁷ P. Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law. Sociological Reflections, in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016. 249-269.

Polish government is not ready for a constructive dialogue.⁸⁸ Therefore, reliance on the Rule of Law Framework alone, if only because of its soft and discursive nature, cannot remedy a situation where systemic violations of EU values form part of a governmental plan to set up an ‘illiberal’ regime, as happened both in Hungary and Poland.⁸⁹

Hence, it is a legitimate question whether the Commission should have started an Article 7 procedure in the first place, and preferably not only against Poland but against its forerunner, Hungary at once, in order to avoid that Hungary – as Prime Minister Orbán already indicated in early January in the Hungarian public radio⁹⁰ – vetoes the sanctions of Article 7, which requires unanimity.⁹¹ But one has to take into account also that Article 7, especially in the case of new Member States, which are very dependent on EU funding, is not the most effective tool without the threat of economic sanctions.⁹² It is also true, on the other hand, that economic sanctions

⁸⁸ When Günther Oettinger, Germany’s representative on the European Commission called the recently initiated dialogue a ‘supervision’ proceeding, Polish Justice Minister Zbigniew Ziobro issued the following response: „You demanded that Poland be placed under supervision. Such words, spoken by a German politician, have the worst possible connotations for Poles. For me, too. I am the grandson of a Polish officer who during the second world war fought in [Poland’s] underground Home Army against ‘German supervision.’ Although most Poles remain broadly pro-EU, they also value their national independence and are likely to react instinctively against the idea of foreign interference in their domestic affairs. This may explain Civic Platform’s only half-hearted support for the Commission’s intervention. See A. Szczerbiak, ‘How Will the EU’s ‘Rule of Law’ Investigation Affect Polish Politics?’, <https://www.socialeurope.eu/2016/02/how-will-the-eus-rule-of-law-investigation-affect-polish-politics/>

⁸⁹ See D. Kochenov and L. Pech, ‘Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation’, *JCMS*, 2016, 1-13. Similarly ‘Assessing the strategic use of the EU fundamental and human rights toolbox’, Working Package No. 14. <http://www.fp7-frame.eu>

⁹⁰ <http://www.politico.eu/article/poland-strikes-back-at-eu-on-media-law-frans-timmermans-stepkowski-andrzej-duda/>

⁹¹ D. Kochenov, ‘The Commission vs Poland: The Sovereign State Is Winning 1-0’, verfassungsblog.de, 25 January, 2016. About the suggestion to start a joint Article 7 procedure against Poland and Hungary see K.L. Scheppelle, ‘EU can still block Hungary’s veto on Polish sanctions’, politico.eu, January 11, 2016. Armin von Bogdandy sees a realistic chance that even the current Hungarian government does not stand with the PiS government in undoing Europe. See A. v. Bogdandy, ‘How to Protect European Values in the Polish Constitutional Crisis’, verfassungsblog.de, 31 March, 2016.

⁹² See B. Bugarič and T. Ginsburg, ‘The Assault on Postcommunist Courts’ *Journal of Democracy*, Volume 27, Number 3, July 2016. 69-72, at 79.

should be backed by a strong regional consensus and strong domestic support, and neither of these conditions are present in Poland nor Hungary currently.⁹³

Instead of the Article 7 approach, Brussels has chosen the very cautious pre-Article 7 option, and only against Poland. This indicates that the EU is not quite ready to treat equally serious problems equally, and irrespective of the importance and the political colour of the governing forces of a particular Member State, and is reluctant to sanction either of these backsliding Member States. In the case of a small Member State, such as Hungary, one must keep in mind first and foremost that the governing Fidesz party delivers votes to the EPP, the largest faction at EP⁹⁴. In the case of Poland, the main reason for the reluctance may lie in its importance of the country within the EU that is a reliable ally against Russia's threatening rhetoric. In other words, the main reason why the Parliament has not had much of an impact on rule of law development may be explained with reference to its own internal political division.⁹⁵ But the Parliament is far from alone in having treated the issue as a purely political one. The Commission also politically calculated its inaction in the case of Hungary and slow action regarding Poland. In other words, the Commission disengaged from conflicts that it assessed to be too costly, trying to maintain its

⁹³ Such sanctions were proposed against Poland and Hungary in mid-August 2016 by two German members of European Parliament. Ingeborg Gräßle, a Christian-Democrat MEP and the head of the Parliament's committee on budgetary control suggested: "There needs to be stronger rules for the disbursement of funds...Countries that don't respect EU laws, or countries that don't participate enough in the resettlement of migrants or the registration of refugees, should be deprived of funds." Vice president of the Parliament, the Liberal Alexander Graf Lambsdorff, singled out Poland and Hungary as net recipients of EU funds that have been flouting EU values by saying: "The federal government must ensure, when the EU budget is reviewed this fall, that EU countries that are net recipients, such as Poland and Hungary, show more solidarity in [on] the issue of refugees and also respect European values." <http://www.welt.de/politik/ausland/article157586134/Deutschland-ist-Zahlmeister-in-Europa.html>

⁹⁴ See this conclusion in R.D. Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union', forthcoming in *Democratic Dysfunction*, a special issue of *Government and Opposition*, E. Jones and M. Matthijs (eds.)

⁹⁵ J. Sargentini and A. Dimitrovs, 'The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States?', Special Issue of the *Journal of Common Market Studies* on the Rule of Law, JCMS Volume 54, Number 5, 2016.

credibility.⁹⁶ Also after the enormous blow of Brexit, EU leaders do not want to reinforce the impression that the EU is disintegrating rather tolerating non-compliance with the joint values.⁹⁷ This allowed member states to engage in symbolic or creative compliance, designed to create the appearance of norm-conforming behavior without giving up their original objectives. The implication of this is that both compliance and enforcement is symbolic.⁹⁸ The Council openly formulated a harsh critique of the Rule of Law Framework, willing to replace it with the harmless approach of yearly dialogue with all Member State. In other words, besides the political unwillingness of the Parliament, there was a clear rivalry between the Council, which has been given a role by Article 7, and the Commission, mandated to act by the Rule of Law Framework.

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The possibility of shortcomings of the rule of law mechanism in the case of Poland led to a legislative initiative report prepared by the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) (rapporteur: Sophie in't Veld (ALDE, Netherlands), accompanied by a European Added Values Assessment (EAVA) prepared by the European Parliament's think tank, called Added Value Unit,

⁹⁶ See a similar critique of the Commission's behaviour by Sophia in't Veld, rapporteur of the LIBE committee, while proposing a new proposal, known as the EU Pact for Democracy, the Rule of Law and Fundamental Rights: "The Commission will only do something when there's a problem somewhere. Political considerations play a role: is it a big country or a small country? Which parties are in government? The big leap that we need to take is that we monitor all member states on the same basis." <http://www.politico.eu/article/meps-call-for-better-monitoring-of-rule-of-law/>

⁹⁷ See J-W. Müller, Hungary's Refugee Referendum Is a Referendum on Europe's Survival, Foreign Policy, 29 September, 2016.

⁹⁸ This phenomenon is convincingly proved by Ágnes Bátori through the examples of the 2010 French, 2012 Romanian and the 2010-2013 Hungarian constitutional crises. See Á. Bátori, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', Public Administration, 2016.

presenting recommendations to the Commission on an EU mechanism on democracy, the rule of law and fundamental rights. In early October 2016 LIBE adopted the recommendations.⁹⁹ The main conclusion of the EAVA is that there is a gap between the proclamation of the rights and values listed in article 2 TEU and actual compliance by EU institutions and Member States, resulting in significant economic, social and political costs. The root causes for this lack of compliance are to be found in certain weaknesses in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights. These weaknesses, the EAVA argues, could be overcome by an inter-institutional pact further clarifying the scope for EU action and the division of labor between and among the EU institutions, agencies and Member States in the areas of monitoring and enforcement.¹⁰⁰ Both the LIBE recommendation and the EAVA interim assessment analyses the specific policy option called for in Parliament's resolution of 10 June 2015. This policy option proposes the establishment of an EU mechanism (or 'pact' as the recommendation suggests to name it) aimed at strengthening the enforcement of democracy, the rule of law and fundamental rights. It has two core elements: a) an annual monitoring of democracy, the rule of law and fundamental rights based on an EU scoreboard; and b) an EU policy cycle for democracy, the rule of law and fundamental rights, involving EU institutions and national parliaments. If approved this a permanent monitoring mechanism would complement the Rule of Law Framework.

In order to support the preparation of the legislative report by the European Parliament (LIBE) 'on the establishment of an EU mechanism on democracy, the rule

⁹⁹ <http://www.politico.eu/article/meps-call-for-better-monitoring-of-rule-of-law/>

¹⁰⁰ T. Evas, W. Van Ballegooij, 'An EU Mechanism On Democracy, The Rule of Law And Fundamental Rights: Interim European Added Value Assessment', April 13, 2016. <https://epthinktank.eu/2016/04/13/an-eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights-interim-european-added-value-assessment/>

of law and fundamental rights' (2015/2254(INL)) on 14 March 2016 the European Parliament sent a request the EU Fundamental Rights Agency (FRA) to deliver an opinion "on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values as listed in Article 2 TEU." In its opinion dated 8 April 2016, FRA proposes the creation of create an EU fundamental rights information system, which could be used to populate indicators to systematically monitor respect for the values of Article 2 of the TEU, and allow for the generation of regular synthesis reports, thereby providing an objective evidence base of information and contextual analysis of indicators¹⁰¹, and check-lists¹⁰². These synthesis reports could complement the various reports related to fundamental rights delivered by the three EU institutions; the European Parliament, Council of the EU and the European Commission. They could also contribute to the annual dialogue on the rule of law in the Council of the EU, as well as other debates on the situation in EU Member States that risk undermining mutual trust in the common area of freedom, security and justice.¹⁰³ One can only hope that this time the Parliament, the Council and the Commission really will follow the recommendation for cooperation, contrary to what happened after the Tavares report, which also suggested inter-institutional cooperation between the Council, Commission and Parliament in setting up a review mechanism for Hungary.

¹⁰¹ About the possibility to develop indicators based on the Charter drawing upon experience of developing indicator tables to assist monitoring of state human rights treaty compliance by United Nations human rights treaty bodies see M. Scheinin, 'The Potential of the EU Charter of Fundamental Rights for the Development of Rule of Law Indicators', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016. 172-186. Also András Jakab suggests to use the EU Charter to enforce rule of law compliance. A. Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016. 187-205.

¹⁰² Such a rule of checklist was adopted by the the Venice Commission at its plenary session in 11-12 March 2016, and endorsed by the Council of Europe's Ministers' Deputies meeting in 6-7 September. European Commission for Democracy Through Law, CDL-AD(2016)007.

¹⁰³ See Opinion 2/2016 of the European Union Agency for Fundamental Rights on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information. Vienna, 8 April 2016.

Present and Future of Constitutionalism in Poland and Hungary

The current Polish and Hungarian constitutional system constitutes a new, hybrid type of regime, between the ideal of a full-fledged democracy and a totalitarian regime¹⁰⁴. Even when there is a formal written constitution, an autocracy is not a constitutional system¹⁰⁵. Therefore, China, Vietnam, Cuba, Belorussia, the former Soviet Union, and former communist countries cannot be considered to be constitutional systems, even though, as William J. Dobson argues, “today’s dictators and authoritarians are far more sophisticated, savvy, and nimble than they once were.”¹⁰⁶ What happened in Hungary and Poland is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way that liberal constitutional system is functioning. Both Hungary and Poland became an illiberal democracy, which was the openly stated intention of PM Orbán,¹⁰⁷ and also PM Beata Szydło (with Kaczyński, ruling from behind the scenes as he holds no official

¹⁰⁴ For the classic differentiation between totalitarian (dictatorial) and authoritarian systems see J. Linz, *Totalitarian and Authoritarian Regimes*, 1975.

¹⁰⁵ About totalitarian systems with written constitutions see J. Balkin – S. Levinson, ‘Constitutional Dictatorship’, Yale Law School, 2010

¹⁰⁶ W. J. Dobson, *The Dictator’s Learning Curve. Inside the Global Battle for Democracy*, Doubleday, 2012. p. 4.

¹⁰⁷ In a speech delivered on 26 July 2014 before an ethnic Hungarian audience in neighboring Romania, Orbán proclaimed his intention to turn Hungary into a state that “will undertake the odium of expressing that in character it is not of liberal nature.” Citing as models he added: “We have abandon liberal methods and principles of organizing society, as well as the liberal way to look at the world... Today, the stars of international analyses are Singapore, China, India, Turkey, Russia. . . . and if we think back on what we did in the last four years, and what we are going to do in the following four years, than it really can be interpreted from this angle. We are . . . parting ways with Western European dogmas, making ourselves independent from them . . . If we look at civil organizations in Hungary, . . . we have to deal with paid political activists here. . . . [T]hey would like to exercise influence . . . on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of the liberal state, that we should make it clear, that these are not civilians . . . opposing us, but political activists attempting to promote foreign interests. . . . This is about the ongoing reorganization of Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests.” See the full text of Viktor Orbán’s speech here: <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>

post), have described its actions as a blitz to install ‘illiberal democracy’¹⁰⁸ Both the Hungarian and the Polish system represents an atypical form of hybrid regimes, because, as opposed to such approaches in Latin-America, the former Soviet republics or Africa, where the basis is a presidential constitution, in Poland and Hungary the formal parliamentary system remained in place with the decisive role of the Prime Minister. In Poland the formally powerful head of the government leads behind the scenes as the head of the governing party, who has no other official state function besides being an MP of the Sejm.¹⁰⁹

The backsliding has happened through the use of ‘abusive constitutional’ tools: constitutional amendments and even replacement in the case of Hungary, and unconstitutional laws in Poland.¹¹⁰ These two case studies have shown that both the internal and the external democratic defense mechanisms against this abusive use of constitutional tools failed so far. The internal ones (constitutional courts, judiciary) failed because the new regimes managed to abolish all checks on their power, and the international ones, such as the EU toolkits, mostly due to the lack of a joint political will to use them.

¹⁰⁸ Sławomir Sierakowski, ‘The Polish Threat to Europe’, Project Syndicate, January 19, 2016.

¹⁰⁹ About this special feature of the hybrid regimes see K. Bachmann, ‘Auf dem Weg in ein hybrides System. Die Ursachen der Machtübernahme durch die Partei Recht und Gerechtigkeit in Polen 2015’, 48 *Transit*, 2016. 77-90.

¹¹⁰ The category of ‘abusive constitutionalism’ was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. See D. Landau, ‘Abusive Constitutionalism’ 47 *UC Davis Law Review*, 2013. 189-260. Abusive constitutional tools are known from the very beginning of constitutionalism. The recent story of the Polish Constitutional Tribunal reminds of the events in the years after the election of Jefferson, as the first anti-federalist President of the US. On 2 March 2 1801, the second to last day of his presidency, President Adams appointed judges, most of whom were federalists. The federalist Senate confirmed them the next day. As a response, Jefferson, after taking office, convinced the new anti-federalist Congress to abolish the terms of the Supreme Court that were to take place in June and December of that year, and Congress repealed the law passed by the previous Congress creating new federal judgeships. In addition, the anti-federalist Congress had begun impeachment proceedings against some federalist judges. About the election of 1800 and its aftermath see B. Ackerman, *The Failure of the Founding Fathers. Jefferson, Marshall, and the Rise of Presidential Democracy*, Harvard University Press, 2007.

In this illiberal democracy the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their power is strongly limited. Also, as in many illiberal democracies, fundamental rights are listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of independent judiciary, and Constitutional Court/Tribunal.

As many scholars noted, there is an incredible range of nondemocratic, non-authoritarian regimes and their relationship with each other and democracy is often imperfect and unclear. Countries in this “grey zone” inspired a lot of concepts, which were created to capture the mixed nature of these regimes. Steven Levitsky and Lucas A. Way introduced the term “competitive authoritarianism” for a distinctive type of “hybrid” civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents’ abuse of the state places them at a significant advantage vis-à-vis their opponents.¹¹¹

The hybridity of Hungarian and Polish constitutionalism differs from the authoritarian character of Putin’s Russia, where due to failing competing parties and candidates the results of parliamentary and presidential elections are uncertain. Therefore, the Russian regime can be considered as authoritarian, while the Polish and the Hungarian ones are still democratic, even if illiberal.

The case of Poland and Hungary proves that democracy and liberalism do not necessarily go hand in hand. Besides liberal democratic (or democratic and rule of law-oriented, ‘rechtsstaatlich’) constitutions and political systems there exist non-

¹¹¹ See S. Levitsky and L. A. Way, *Competitive Authoritarianism. Hybrid Regimes After the Cold War*, Cambridge University Press, 2010. p. 5.

liberal democratic ones (radical democracies without a bill of rights, such as most of the Commonwealth constitutions until very recently, or constitutions based on popular sovereignty, but little weight to the people's interest in the day-to-day politics, such as the constitutions of Latin American countries), also liberal but non-democratic constitutions (such were the ones in France after 1815, or the constitutional system of the Austro-Hungarian Monarchy), and finally neither liberal nor democratic socialist constitutions (of the former and current communist countries).¹¹²

The problem with the Polish and Hungarian illiberal constitutional system is that these countries are currently members of the European Union, which considers itself to be a union based on the principles of liberal democratic constitutionalism. Of course the citizens of Hungary and Poland, as any other citizens of a democratic nation-state, have the right to oppose joint European measures for instance on immigration and refugees, or even the development of a liberal political system altogether. However, this conclusion must be reached through a democratic process. There are still a significant number of people who either consider themselves as supporters of liberal democracy, or at least represent views, which are in line with liberal democracy. But if Hungarians and Poles ultimately opt for a non-liberal democracy, they must accept certain consequences including parting from the European Union and the wider community of liberal democracies.

¹¹² Almost this same typology of constitutions and governance systems are used by the constitutional scholar Dieter Grimm, and the sociologists Iván Szelényi and Tamás Csillag. See D. Grimm, 'Types of Constitutions', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, 2012. 98-132.; I. Szelényi – T. Csillag, 'Drifting Liberal Democracy: Traditionalist/Neo-conservative Ideology of Managed Illiberal Democratic Capitalism in Post-communist Europe', *Intersections, EEJSP*, 1/2015. 18-48. Besides the four joint categories, Grimm adds a fifth type of constitution to his typology, namely the social or welfare state constitutions (such as the Indian, the Brazilian, the Japanese, the South Korean or the South African), which are not liberal regarding social and economic rights.

The described democratic backsliding in Hungary and Poland demonstrates that an institutional framework is a necessary but not sufficient element of a successful democratization. Behavioral elements, among them political and constitutional culture are as important as institutions. The other lesson of these case studies is, on the one hand, that the very definition of democracy is changing, and it is not necessarily liberal. On the other hand, the borders between democratic, authoritarian or dictatorial regimes are blurred, and there are a lot of different hybrid systems, such as the current Hungarian and Polish regimes.¹¹³ Another important aspect of these developments that emerging democracies are not anymore influenced exclusively by the liberal democratic West.¹¹⁴ There are economists claiming that the real question is not why are there less and less liberal democracies, but why liberal democracies still exist.¹¹⁵ Others search for ‘post-liberalism’¹¹⁶ in the wake of financial crisis, and after Brexit¹¹⁷.

¹¹³ Asking the question whether liberal democracy is at risk, Ivan Krastev responds that the big difference compared to the 1930s is that even extremist parties do not contest the democratic aspect of the liberal democratic consensus. Instead, they have a problem with the liberal part of it. See I. Krastev, ‘Europe in Crisis: Is Liberal Democracy at Risk?’, in *Democracy in Precipice*, Council of Europe Democracy Debates 2011-2012. Council of Europe Publishing, 2012. 67-73.

¹¹⁴ See R. Youngs, ‘Exploring ‘Non-Western’ Democracy’, *Journal of Democracy*, October 2015.

¹¹⁵ S. Mukand – D. Rodrik, ‘The Political Economy of Liberal Democracy’, Institute of Advance Study, Princeton, 2015. Joschka Fischer, former German foreign minister and vice-chancellor gave an interesting explanation what might have caused the decline of liberal democracy: “How did we get here? Looking back 26 years, we should admit that the disintegration of the Soviet Union – and with it, the end of the Cold War – was not the end of history, but rather the beginning of the Western liberal order’s denouement. In losing its existential enemy, the West lost the foil against which it declared its own moral superiority.” J. Fischer, ‘Europe’s Last Chance’, *Project Syndicate*, August 29, 2016. <https://www.project-syndicate.org/commentary/europe-needs-bold-leaders-by-joschka-fischer-2016-08>

¹¹⁶ See J. Milbank and A. Pabst, *The Politics of Virtue, Post-Liberalism and the Human Future*, Rowman and Littlefield, 2016.

¹¹⁷ M. Kettle, ‘Brexit Was a Revolt Against Liberalism, We Have Entered a New Political Era’, *The Guardian*, 15 September, 2016.

The behavior of the Hungarian government, supported by the other three Visegrád countries, among them Poland during the refugee crisis, has taught us that the strengthening of populist and extreme nationalist movements across Europe is incompatible with the values of the liberal democracy, and that membership in the European Union isn't a guarantee for having liberal democratic regimes in all Member States. Unfortunately an outside fear of threats, physical and social, lately, for instance, the refugee crisis and its main reason, the Syrian conflict, strengthened illiberal democracies, such as Turkey and authoritarian regimes, such as Russia all over Europe, and in the case of Hungary and Poland even inside the EU¹¹⁸, not to mention the perspectives of the forthcoming US presidential election.¹¹⁹ The division between the old and the new Member States, and the support of the far right parties has been strengthened even in the old Member States.¹²⁰ EU institutions have proven incapable of enforcing compliance with core European values.

¹¹⁸ At a conference in the Polish town Krynica, in mid September 2016 Orbán and Kaczyński proclaimed a 'cultural counter-revolution' aimed at turning the European Union into an illiberal project. A week later at the Bratislava EU summit the prime ministers of the Visegrád 4 countries demanded a structural change of the EU in favor of the nation states. Sławomir Sierakowski even speaks about an 'illiberal international'. S. Sierakowski, 'The Illiberal International', *Social Europe*, 13 September 2016.

¹¹⁹ The success of Donald Trump, an authoritarian presidential candidate in the US can be explained with the same reasons. See A. Taub, 'The Rise of American Authoritarianism', *Vox*, 1 March 2016. About the socio-psychological causes of authoritarianism see Bob Altemeyer's work, who is based on Adorno's 'fascist personality concept explains the 'authoritarian personality' with authoritarian submission, authoritarian aggression, and conventionalism. Cf. B. Altemeyer, 'The other 'authoritarian personality.' in M. Zanna (Ed.) *Advances in Experimental Social Psychology*, 30, 47–92.

¹²⁰ Regarding the constitutional crisis of the EU, Michael Wilkinson draws attention to the dangers of 'authoritarian liberalism'. See M. A. Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', 14 *German Law Review*, 2013, 527.