

Chapter 9

Second-Grade Constitutionalism?

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

*Gábor Halmai**

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

—Mikhail Bulgakov

9.1 Introduction

In this chapter 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 were 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

*Professor and Chair of Comparative Constitutional Law, Department of Law, European University Institute, Florence

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 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 center-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

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, No 10, (2004), <<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,” *SIEPS European Policy Analysis*, Vol. 1, 2012.

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

⁵ In 2000, the far-right Freedom Party headed by Jörg Haider became the coalition partner of the center-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.

⁶ W. Sadurski, “Adding a Bite to the Bark?: A Story of Article 7, EU Enlargement, and Jörg Haider,” *Columbia Journal of European Law*, Vol. 16, 2010, 385, 394.

tried to dismantle both the constitutional court and the president, but the EU was able to exert a stronger influence over events there.⁷⁾

9.2 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 state 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 has not 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. Plans for 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 23 October 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

⁷ About the Romanian crisis, see Vlad Perju, “The Romanian Double Executive and the 2012 Constitutional Crisis,” *International Journal of Constitutional Law*, Vol. 13, No. 1, 2015, 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.

country.⁸ 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 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 2011.⁹

In its opinion, approved at its plenary session of 17–18 June 2011, the Council of Europe’s Venice Commission expressed its concerns about the Fundamental Law, which was drawn up in a process that excluded the political opposition and professional and other civic organizations.¹⁰

⁸ In 2009, 51% of Hungarians disagreed with the statement that they are better off since the transition, and only 30% claimed improvements. Eurobarometer, 2009.

⁹ In an interview on Hungarian public radio on July 5, 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. See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, July 5, 2013. Kossuth Rádió, <www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedekek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>.

¹⁰ 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.

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 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 came into effect. These new laws have been uniformly bad for the political independence of state institutions, for the transparency of law making 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 urging 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 system¹¹ secured two-thirds majority again. 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.

9.3 Poland: Negotiated Liberal Democracy of 1989 and “Remodeling” Democracy after 2015

As opposed to Fidesz in 2011, Law and Justice (Prawo i Sprawiedliwość - 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’s legislative agenda, including limits on the privacy of public officials to be lustrated and freedom of speech and assembly.¹²

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. 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 in October 2015, when the previous Sejm elected them, was unconstitutional. The Tribunal also

¹¹ “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, April 6, 2014.

¹² About the battle for the Constitutional Tribunal, see T.T. Koncewicz, “Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense,” *Int’l J. Const. L. Blog*, Dec. 6, 2015, at: <http://www.icconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense>.

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.¹³

In Orbán's playbook, which is seemingly followed by Kaczyński, the other major target has been the 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

¹³ <www.thenews.pl/1/9/Artykul/250415,Polands-Supreme-Court-opposes-government-in-constitutional-wrangle>.

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.

The third danger to PiS's "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.¹⁴ 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, 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.¹⁵

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."¹⁶ 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

¹⁴ <[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)>.

¹⁵ <<http://uatoday.tv/news/poland-may-soon-change-its-constitution-j-kaczy-ski-642126.html>>.

¹⁶ <www.thenews.pl/1/9/Artykul/251184,Polish-president-calls-for-constitution-to-be-reexamined>.

constitution through sub-constitutional laws. This is what Wojciech Sadurski calls a constitutional coup d'état.¹⁷

9.4 Possible Explanations of the Backsliding

The main reasons for the turn of constitutionalism in these two countries can be described 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. First the period between the 1860s–1870s and the end of the nineteenth century, second after WWI, except in Hungary, where the short liberal democratic period led by Mihály Károlyi was soon followed by the red terror of commune, and white terror of the right wing. The third such short moment occurred after 1945, till the communist parties' takeover. And the fourth was after 1989, when liberal democracy again seemed to be the “end of history.”¹⁸

As surveys on the links between modernization and democracy show, the society's historic and religious heritage leaves a lasting imprint.¹⁹ 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.²⁰ 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

¹⁷ 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/>>.

¹⁸ 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>>

¹⁹ See R. Inglehart and C. Welzel, “Changing Mass Priorities: The Link between Modernization and Democracy,” *Perspectives on Politics*, Vol. 8, No. 2, 2010, 551-567.

²⁰ Id., 553. Christian Welzel in his more 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 minds 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.

international comparative study conducted by researchers of Jacobs University in Bremen and published by the German Bertelsmann Foundation.²¹ 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 post-communist 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.

(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.²² 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.²³ This concept argues that the legalistic

²¹ D. Schiefer, J. van der Noll, J. Delhey, and K. Boehnke, *Cohesion Radar: Measuring Cohesiveness*, Bertelsmann Foundation, 2013 <www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_36378__2.pdf>

²² Cf. C. Offe, *Designing Institutions for East European Transitions*, Institut für Höhere Studies, 1994, 15.

²³ 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 and W. Sadurski (Eds.), *Rethinking the Rule of Law after Communism*, CEU Press, Budapest, 2005, 9-24.

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.²⁴ 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.²⁵

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.²⁶

(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.²⁷ The satisfaction of the basic economic needs of the populace was so important for both the ordinary people and the new political elites that not even constitutions really did make a difference.²⁸ 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

²⁴ See R. Albert, “Counterconstitutionalism,” *Dalhousie Law Journal*, Vol. 31, No. 1, 2008, 4.

²⁵ Cf. Sadurski, 2005, 23.

²⁶ 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>.

²⁷ 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.

²⁸ See U. Preuss, *Constitutional Revolution. The Link between Constitutionalism and Progress*, Humanities Press, 1995, 3.

as the main political goals were achieved, the liberal consensus has died,²⁹ and the full democratic consolidation is still better viewed as having always been somewhat illusory.³⁰

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Despite the many similarities, there are also some differences between the illiberal constitutional systems and their circumstances in Hungary and Poland.³¹ Besides the previously mentioned lack of constitution-making and amending power of PiS,³² 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 fulfils the agenda of Jobbik. Civil society is also playing a crucial role in Poland, thanks to the more active opposition movement 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.³³ In other words, while the Polish system is ideology-driven, the Hungarian system only uses ideology.³⁴

²⁹ See I. Krastev, "Is East-Central Europe Backsliding? The Strange Death of the Liberal Consensus," *Journal of Democracy*, Vol. 18, October 2007, 56-63.

³⁰ J. Dawson and S. Hanley, "What's Wrong with East-Central Europe? The Fading Mirage of the Liberal Consensus," *Journal of Democracy*, Vol. 7, January 2016, 20-34.

³¹ About more political differences, see S. Sierowski, "Pathetische Gesten," *Die Zeit*, Vol. 21, January 2016.

³² 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.

³³ See Steinbeis, What is Going on in Poland is an Attack against Democracy

³⁴ This is the main conclusion of a Polish-Hungarian comparative study as well. See B. Magyar and M. Mitrovits, "Lengyel-magyar párhuzamos rendszerrajzok," [Polish-Hungarian parallel system drawings], *Élet és Irodalom*, August 12 and 19, 2016.

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.

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

Based on the Hungarian example, Mark Dawson and Elise Muir argue that the EU, instead of addressing its values directly toward Member States not complying with the principles of fundamental rights and rule of law, prefers to use indirect means of pressure, dependent on EU economic competences to a large extent.³⁵ But 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 play a greater role in it.³⁶ 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 on the Fundamental Law of Hungary.³⁷ 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.

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. As none of the available tools has worked in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council to strengthen the

³⁵ See M. Dawson and E. Muir, "Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law," *German Law Journal*, Vol. 14, No. 10, 2013.

³⁶ Available at <[www.Ministerie van Buitlandlandse Zaken brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme%20\(1\).pdf](http://www.Ministerie_van_Buitlandlandse_Zaken_brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme%20(1).pdf)>

³⁷ <www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>

rule of law in the Member States.³⁸ 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 that persistently noncompliant Member States pose. 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.³⁹

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-step procedure. First, the Commission makes an assessment of the situation in the member state, collecting information and 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 suggesting 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.⁴⁰ 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.⁴¹

³⁸ Communication from the Commission of March 11, 2014, A new EU Framework to strengthen the Rule of Law, A new EU Framework to strengthen the Rule of Law.

³⁹ 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.

⁴⁰ <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>.

⁴¹ Hungary: no systemic threat to democracy, says Commission, but concerns remain, Press Release, December 2, 2015.

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 2016.⁴² 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.

In early June 2016 the Commission decided to send its opinion, despite a furious statement of Jarosław 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 treaties.

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

⁴² Opinion no. 833/2015 on Amendments to the Act of June 25, 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, March 11-12, 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.

criticized by the Venice Commission. As a reaction to this, 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 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.”⁴³ On 28 October, a day after the expiration of the deadline set by the Recommendation in a letter to the European Commission, the Polish prime minister dismissed the Commission’s demand to take steps to rectify its alleged erosion of democratic standards, saying that the issue would be resolved domestically.⁴⁴ On 21 December 2016, the Commission adopted an additional Recommendation regarding the rule of law in Poland, because “there continues to be a systemic threat to the rule of law in Poland”, hence the Commission invites the Polish government to solve these problems within two month, and if there is no satisfactory follow-up it will decide “whether or not to resort to the procedure laid down in Article 7 TEU”.⁴⁵ The concerns of the Commission were linked to the adoption of three new laws that permitted the President of the Republic to name a temporary Constitutional Tribunal President replacing the outgoing head of the court. The new interim President’s first action was to allow the three so-called ‘anti-judges’, unlawfully elected by the PiS majority in Sejm to assume their judicial duties suspended by the previous Tribunal President, and participate in the meeting to nominate a new President to the head of the state, who two days later appointed the temporary President as the new permanent President of the Tribunal.

On 20 February, 2017 the Polish government once again has dismissed the European Commission’s demands by saying that the changes Warsaw has implemented are "in line with European standards" and that it has created "the right conditions for a normal functioning" of the Constitutional Tribunal.

⁴³ Commission Recommendation (EU) 2016/1374 of July 27, 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>.

⁴⁴ A. Eriksson, “Poland Rejects ‘Interferences’ on Rule of Law,” euobserver, October 28, 2016 <<https://euobserver.com/institutional/135716>>.

⁴⁵ http://europa.eu/rapid/press-release_IP-16-4476_en.htm

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.⁴⁶

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 absence of solid and unambiguous Commission competence made the Framework procedure incompatible with the principle of conferral.⁴⁷ 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".⁴⁸ 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.⁴⁹

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

⁴⁶ See UK House of Commons, European Scrutiny Committee Documents considered by the Committee on May 7, 2014 – Commission Communication, A new EU Framework to strengthen the Rule of Law. <www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xliii/8304.htm>.

⁴⁷ 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>>.

⁴⁸ 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>.

⁴⁹ Conclusion of the Council of December 14, 2014. Press Release of the Council, December 16, 2014, PRESSE 652 PR CO 74. In October 3 the Italian government hosted the "annual rule of law dialogue" in Rome with the participation of 12 governments' representatives. <www.politico.eu/article/meps-call-for-better-monitoring-of-rule-of-law/>.

consequences.⁵⁰ 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.”⁵¹ Weiler, while acknowledging the mostly noble intention of the Commission by 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 – operates 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.⁵² But even regarding the Member States’ democratic crisis, Amichai Magen raises the question of why it has been framed exclusively in terms of the rule of law, rather than the other foundational values listed in Article 2 TEU.⁵³

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.⁵⁴ He argues for consideration of “supporting circumstances” in terms of the social and political structures and cultural support within the Member States that encourage more civil participation in constitutional matters.

Similarly, Armin von Bogdandy and his colleagues argue that the most apt European response to systemic deficiencies is to combine judicial mechanisms with complementary political approach. Therefore, they propose to consider complementing their earlier “Reverse

⁵⁰ For a detailed critique of the “dialogue,” see Closa, *Reinforcing EU Monitoring of the Rule of Law*, 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, Vol. 54, No. 5, 2016.

⁵¹ 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.

⁵² *Ibid.*

⁵³ 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 Vol. 54, No. 5, 2016.

⁵⁴ 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.

Solange”⁵⁵ approach with a “Systemic Deficiency Committee”, composed of eminent figures, which should monitor the respect of fundamental European values in all Member States.⁵⁶

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 Polish government is not ready for a constructive dialogue. 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.⁵⁷

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 on the Hungarian public radio⁵⁸ – vetoes the sanctions of Article 7, which requires unanimity.⁵⁹ But one has to also take into account 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.⁶⁰ In principle sanctions could

⁵⁵ See 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, Vol. 54, No. 5, 2016.

⁵⁶ See A. v. Bogdandy, C. Antpöhler, M. Ionnidis, *Protecting EU Values – Reverse Solange and the Rule of Law Framework*, MPHIL Research Paper Series, No. 2016-04.

⁵⁷ See D. Kochenov and L. Pech, “Better Late Than Never? On the European Commission’s Rule of Law Framework and Its First Activation,” *Journal of Common Market Studies*, Vol. 54, Issue 5, 2016, 1062-1074. Similarly “Assessing the strategic use of the EU fundamental and human rights toolbox,” Working Package No. 14. <www.fp7-frame.eu>.

⁵⁸ <www.politico.eu/article/poland-strikes-back-at-eu-on-media-law-frans-timmermans-stepkowski-andrzej-duda/>.

⁵⁹ D. Kochenov, “The Commission vs Poland: The Sovereign State Is Winning 1-0,” *verfassungsblog.de*, January 25, 2016. About the suggestion to start a joint Article 7 procedure against Poland and Hungary, see K.L. Scheppele, “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*, March, 31 2016.

⁶⁰ See B. Bugarič and T. Ginsburg, “The Assault on Postcommunist Courts” *Journal of Democracy*, Vol. 27, No. 3, July 2016, 69-72, at 79.

concern any “right deriving from the application of the Treaties” to the Member State concerned, but Article 7(3) is unclear as the substance of the sanctions that can be imposed. There are arguments that the suspension of EU funding can be among them.⁶¹ But even if this is the case, it is also true that economic sanctions should be backed by a strong regional consensus and strong domestic support, and neither of these conditions is currently present in Poland or Hungary.

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 color of the governing forces of a particular Member State. Also, the action indicates the Commission’s reluctance 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 EP.⁶² 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.⁶³ But the Parliament is far from being the only one to have 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 credibility.⁶⁴ 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

⁶¹ See L. Besselink, *The Bite, the Bark and the Howl. Article 7 TEU and the Rule of Law Initiative*, Amsterdam Law School Legal Studies Research Paper No. 2016-02. University of Amsterdam, 2016, 9.

⁶² 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.).

⁶³ Sargentini and Dimitrovs, *The European Parliament’s Role*.

⁶⁴ See a similar critique of the Commission’s behavior 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.” <www.politico.eu/article/meps-call-for-better-monitoring-of-rule-of-law/>.

the joint values.⁶⁵ 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 are symbolic.⁶⁶ 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 States. 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.

9.6 Present and Future of Constitutionalism in Poland and Hungary

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 illiberal and undemocratic systems,⁶⁷ which was the openly stated intention of PM Orbán⁶⁸ and also PM

⁶⁵ See J-W. Müller, *Hungary's Refugee Referendum Is a Referendum on Europe's Survival*, *Foreign Policy*, September 29, 2016.

⁶⁶ 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 Bátori, *Defying the Commission*.

⁶⁷ As Jan-Werner Müller rightly argues, it is not just liberalism that is under attack in these two countries, but democracy itself. Hence, instead of calling them “illiberal democracies” we should describe them as illiberal and “undemocratic” regimes. See J-W. Müller, “The Problem with ‘Illiberal Democracy’”, *Project Syndicate*, January 21, 2016.

⁶⁸ In a speech delivered on July 26, 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->

Beata Szydło (with Kaczyński, ruling from behind the scenes as he holds no official post), describing their respective actions as a blitz to install an illiberal state.⁶⁹

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.⁷⁰ 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.

The democratic backsliding in Hungary and Poland as has been described here demonstrates that an institutional framework is a necessary but not sufficient element of a successful democratization. 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 and authoritarian regimes are blurred, and there are a lot of different hybrid systems, such as the current Hungarian and Polish regimes. Another important aspect of these developments is that emerging democracies are not anymore influenced exclusively by the liberal democratic West.⁷¹ There are economists claiming that the real question is not why are there less and less liberal democracies, but why liberal democracies still exist.⁷² Others search for “post-liberalism”⁷³ in the wake of financial crisis, and after Brexit.

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 liberal democracy, and that membership in the European Union is not a guarantee for having liberal democratic regimes in all Member States. Unfortunately, an outsize fear of

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⁶⁹ Sławomir Sierakowski, “The Polish Threat to Europe,” *Project Syndicate*, January 19, 2016.

⁷⁰ The category of “abusive constitutionalism” was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. See D. Landau, “Abusive Constitutionalism” *UC Davis Law Review*, Vol. 47, 2013, 189-260.

⁷¹ See R. Youngs, “Exploring ‘Non-Western’ Democracy,” *Journal of Democracy*, October 2015.

⁷² S. Mukand and D. Rodrik, “The Political Economy of Liberal Democracy,” *Institute of Advance Study, Princeton*, 2015.

⁷³ See J. Milbank and A. Pabst, *The Politics of Virtue, Post-Liberalism and the Human Future*, Rowman and Littlefield, 2016.

threats, physical and social, lately, for instance, the refugee crisis and its main reason, the Syrian conflict, strengthened illiberal systems, such as Turkey and authoritarian regimes, such as Russia, all over Europe, and in the case of Hungary and Poland even inside the EU, not to mention the perspectives of the forthcoming US presidential election. The division between the old and the new Member States, and the support of the far-right parties, have been strengthened even in the old Member States.⁷⁴ EU institutions have proven incapable of enforcing compliance with core European values.

⁷⁴ 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,” *German Law Review*, Vol. 14, 2013, 527.