

# Hungarian constitutional developments and measures to protect the rule of law in Europe

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**Abstract: L'evoluzione costituzionale ungherese e le misure di protezione della rule of law in Europa** – The essay analyses the constitutional developments in Hungary since 2010 comparing them with those occurring in Poland in the last 4 years. The comparison highlights both similarities and differences in the current constitutional ‘involution’ of the two countries considering especially the impact on the constitution and the role played by constitutional courts. Constitutional regressions are considered in the overall framework of EU democratic conditionality and the measures to deal with the rule of law crisis.

**Keywords:** Hungary; rule of law; EU democratic conditionality; constitutional courts; democratic backsliding.

1465

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## 1. Introduction

The topic ‘Hungarian constitutional developments and measures to protect the rule of law in Europe’ has been the subject of many academic works and debates in the last 9 years. Although events in Poland have overshadowed concerns about constitutional degeneration in Hungary, it is worthwhile to once more reflect on this topic whilst considering the European tools aimed at defending democratic values and a broader comparative overview of the region.

An advanced analysis essentially requires both a political and constitutional assessment in order to understand the cultural and constitutional framework of the new EU Member States, including some defects in their constitutional engineering<sup>1</sup>. It would be also worth reflecting on the effectiveness of the different rule of law mechanisms introduced by European institutions to defend this fundamental feature of democracy<sup>2</sup>. The proliferation of the mechanisms

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<sup>1</sup> Please refer to A. Di Gregorio (Ed.), *The Constitutional Systems of Central-Eastern, Baltic and Balkan Europe*, Comparative Public Law Treatise, The Hague, 2019, *forthcoming*. See also special issues dedicated to this topic on *Hague Journal on the Rule of Law*, Vol. 10, Issue 1, April 2018 (Special Issue on the Crisis of Constitutional Democracy in Central and Eastern Europe) and *Journal of Democracy*, Vol. 29, No. 3, July 2018 (Explaining Eastern Europe).

<sup>2</sup> Apart from the so called ‘nuclear option’, that is Article 7 TEU, which has been activated against Poland in December 2017 but without a real impact (the procedure is politically frozen), we have the *Rule of law mechanism* of the Commission, the *Rule of law dialogue* of the Council, the infringement procedure (Article 258 TFEU), the recommendations of the EU Parliament to the Commission *On the establishment of an EU mechanism on democracy, the rule of law and fundamental rights*. Literature on the subject is very rich: A. von Bogdandy, M. Ioannidis, *Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done*,

demonstrates the difficulty of the EU institutions to address this question and the failure of the entire system of European democratic conditionality<sup>3</sup>. What happened in recent years in Hungary and Poland is particularly striking in terms of speed, hardness and sometimes for the ruthlessness which characterized the constitutional ‘inversion’. The astonishment is all the greater, since this regression takes place in countries, which were the pioneers in the ‘happy’ importation of European constitutional standards.

## 2. Constitutional trends in Hungary (2010-2018)

The Hungarian constitutional regression began after the parliamentary elections of 2010, when the coalition dominated by the conservative party Fidesz (Fidesz-KDNP) obtained a broad enough majority to allow it to modify the constitution then in force<sup>4</sup> and subsequently to adopt a new Fundamental Law. From the constitutional point of view, the Hungarian measures expressing the constitutional involution are innumerable, beginning with the new constitution. In fact, in addition to its conservative contents, the modalities in which it was adopted have been contested, as they were scarcely participative<sup>5</sup>.

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in *Common Market Law Review*, Vol. 51, no. 12, 2014, pp. 59-96; D. Kochenov, L. Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, Vol. 11, no. 3, 2015, pp. 512- 540; A. von Bogdandy, P. Sonnevend (Eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Oxford, 2015; G. Palombella, *Beyond Legality – Before Democracy. Rule of law Caveats in the EU Two-Level System*, in C. Closa, D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, 2016, pp. 36-59; D. Kochenov, L. Pech, *Better Late than Never? On the Commission’s Rule of Law Framework and Its First Activation*, in *Journal of Common Market Studies*, Vol. 54, no. 5, 2016, pp. 1062-1074; A. Jakab, D. Kochenov (Eds.), *The Enforcement of EU Law and Values. Ensuring Member States’ Compliance*, Oxford, 2017; A. von Bogdandy, L.D. Spieker, *Countering the Judicial Silencing of Critics – Article 2 TEU Values, Criminal Liability and Reverse Solange*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-08.

<sup>3</sup> Of a great interest are the suggestions of B. De Witte regarding the future enlargement process of the Union and a rule of law catalogue to be established in addition to the Charter of fundamental rights of the Union: see B. De Witte, *Constitutional Challenges of the Enlargement: Is Further Enlargement Feasible without Constitutional Changes?*, In-Depth Analysis requested by the AFCCO committee, European Parliament, March 2019, at [www.europarl.europa.eu/RegData/etudes/IDAN/2019/608872/IPOL\\_IDA\(2019\)608872\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608872/IPOL_IDA(2019)608872_EN.pdf). See also P. Bárd, A. Śledzińska-Simon, *Rule of law infringement procedures. A proposal to extend the EU’s rule of law toolbox*, CEPS Paper in Liberty and Security in Europe, No. 2019-09, May 2019.

<sup>4</sup> Between 2010 and 2011, 12 amendment laws have been adopted to modify the constitution then in force, which dated back to 1949, but was completely rewritten after 1989, especially in the two-year period 1989-1990.

<sup>5</sup> M. Bánkuti, G. Halmai, K.L. Scheppele, *Hungary’s Illiberal Turn: Disabling the Constitution*, in *Journal of Democracy*, Vol. 23, No. 3, 2012, pp. 138-146; N. Chronowski, *The New Hungarian Fundamental Law in the light of the European Union’s normative values*, in *Revue Est Europa*, No. 1, 2012, pp. 111-142; G.F. Ferrari (Ed.), *La nuova legge fondamentale ungherese*, Torino, 2012; G.A. Toth (Ed.), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law*, New York-Budapest, 2012; I. Pogány, *The Crisis of Democracy in East Central Europe: The ‘New Constitutionalism’ in Hungary*, in *European Public Law*, Vol. 19, No. 2, 2013, pp. 341-367; F. Vecchio, *Teorie costituzionali alla prova. La nuova Costituzione ungherese come metafora della crisi del costituzionalismo europeo*, Padova, 2013; G. Halmai, *An Illiberal Constitutional System in the Middle of Europe*, in W. Benedek, F. Benoît-Rohmer, W. Karl, C. Kettemann, M. Nowak (Eds.), *European Yearbook of Human Rights*, Cambridge, 2014, pp. 497-514; A. Arato, *Post Sovereign*

The Hungarian conservative party, as will be later the case for the Polish one, took advantage of some defects of the previous constitutional and legislative framework (see in detail below), which it managed to exploit, before proceeding to distort it. This has allowed setting up a permanent framing process, as can be proved by the seven constitutional revisions that took place after 2011, the last approved on June 2018<sup>6</sup>. Another defect which has been exploited was an electoral law highly rewarding for the first political party, which Fidesz proceeded to manipulate to art.

In the reform plan designed to achieve the goals pursued by Prime Minister Orbán, that is to say, the construction of a nationalist, homogeneous and self-

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*Constitutional Making: Learning and Legitimacy*, Oxford, 2016; A.L. Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy*, London, 2018.

<sup>6</sup> The first amendment, dated 4 June 2012, among other things, incorporated the disputed transitional provisions in the text of the Fundamental Law, making them even more controversial (this decision was then invalidated by the Constitutional Court on 28 December 2012, with decision 45/2012. (XII. 29.) to be in turn superseded by the fourth amendment). The second amendment, dated 29 October 2012, introduced a preliminary registration as a requirement to participate in national elections. It was later declared unconstitutional by the Constitutional Court, on 4 January 2013, with decision 1/2013 (I.7) AB. The third amendment, dated 17 December 2012, reserved for cardinal laws – to be adopted by a two-thirds majority of Members of Parliament present – the legislation concerning the sale and purchase of agricultural land or forests. The fourth amendment, of 11 March 2013, brings back into force the transitional provisions whose incorporation into the Fundamental Law had been declared illegitimate. It also states that the constitutionality control on constitutional laws can only be carried out due to procedural defects, and no longer for substantive aspects. It also states that the Constitutional Court can no longer refer to its own jurisprudence adopted between 1990 and the date of entry into force of the Fundamental Law; that political parties taking part in national and European elections will be able to issue propaganda announcements only on public media, in accordance with the criteria established by cardinal law; that the freedom of expression guaranteed in the Fundamental Law cannot be used to damage human dignity, the dignity of the Hungarian nation or of any national, ethnic or religious minority group; that those who have benefited from university scholarships will have to work for an indefinite period in Hungarian companies or institutions. With the fifth amendment, adopted on 16 September 2013, for the first time critical remarks made by the European Union and the Council of Europe were partially taken into account. Hence, the competence of the president of the National Judicial Office of transferring judicial proceedings from one court to another was suppressed. Privileges that were attributed on the basis of cardinal laws to ‘recognized churches’ have been limited. The prohibition made to the parties to issue propaganda or press releases on commercial media was eliminated, provided, however, that such forms of communication are allowed, free of charge, to all political subjects, in accordance with the criteria of equality. On the other hand, the possibility of abolishing the Financial Supervisory Authority, through its incorporation into the National Bank of Hungary – immediately implemented by ordinary law – is restored. Moreover, with the sixth amendment of 7 June 2016 – that was also approved with the votes of the opposition of ultra-nationalist right-wing party Jobbik – the National Assembly is authorized to declare a ‘state of terroristic emergency’, on the initiative of the government, in case of ‘attack or significant and direct danger of terrorist attack’. The amendment gives the government the power to suspend the laws in force and to take extraordinary measures during the period of validity of this state of emergency. However, the declaration, and any extension thereof, requires the vote of two thirds of the members of the Assembly. Finally, the seventh amendment, of 20 June 2018, declares the obligation for all state organs to protect the ‘Hungarian constitutional identity’ and the ‘Christian culture’. It prevents ‘alien populations’ from settling in Hungary, and makes the condition of homelessness illegal, prohibiting to live in a public place. Lastly, it establishes an order and a body of administrative justice separate from the civil and criminal one. All the details of the revisions may be found on [theorangefiles.hu/amendments-to-the-fundamental-law/](http://theorangefiles.hu/amendments-to-the-fundamental-law/).

referential society – Orbán also theorized ‘illiberal’ democracy<sup>7</sup> –we may find a rather simple scheme, which was then imitated by the Polish PiS. This scheme provided for the neutralization / control and downsizing of the Constitutional Court, which was – thanks to the broad possibility to access it and its authority<sup>8</sup> – the main obstacle in the process of adopting ‘reformist’ legislative packages. Then, it foresaw the replacement of the majority of judges in office through early retirements, as well as the reformulation of the rules to access top-level positions in the courts and in the self-governing body of the judiciary<sup>9</sup> –this in order to block the corruption investigations on political figures of the majority, and to avoid a *de facto* transfer before the ordinary judges of the constitutionality control. The scheme also provided for the increase of control over the power of attorney (for similar reasons). It implied to control access to representation – by reforming the electoral law in a way useful to favour even more the majority party, intervening on party financing rules, electoral propaganda, control over elections and adopting gerrymandering techniques<sup>10</sup>. Lastly, it foresaw the exploitation of other forms of expression of popular consensus – by organizing various types of extremely populist consultations, other than referendums, not regulated by the Constitution. Moreover, a series of fundamental freedoms, as well as minority / immigrant

<sup>7</sup> Speech of 26 July 2014, made in Tusnádfürdő, in ‘Hungarian’ Romania, at the Bálványos Summer Free University and Student Camp, an annual intellectual forum established in 1990 with the aim of promoting cross-border cooperation. On the subject, A. Di Gregorio, *L’Ungheria e i valori europei. Un matrimonio difficile*, in *Rassegna Parlamentare*, No. 2, 2018, pp. 445-451.

<sup>8</sup> The Court’s competences were indeed very broad, above all due to the possibility it had to rule abstractly through the mechanism of the *actio popularis*, a possibility substituted in 2011 by the individual appeal of the citizens, which was, however, perceived as a downscaling, as it is not suitable to face ‘systemic issues’. With regard to its authority, the Court had demonstrated its independence both in terms of protection of fundamental rights and enforcement of checks and balances, often opposing the ruling political majority.

<sup>9</sup> The alignment of the retirement age for judges, with the exception of the president of the *Kúria*, to the general retirement age (and therefore the decrease from 70 to 62 years), starting from the entry into force of the new FL (Article 26 of Fundamental Law and Article 15 of the Transitional Provisions) was officially justified by the need to make the judicial system more efficient through the inclusion of younger judges. It was, instead, an actual purge that involved a relevant number of judges (274 out of 2900) and in particular the high positions of the judiciary (about a quarter of the judges of the Supreme Court and half of the presidents of the regional and provincial courts). Furthermore, a substantial reform of the body corresponded to the change of the name of the Supreme Court, with the reintroduction of the name prior to the communist period, namely *Kúria*. The appointment of a new president of the *Kúria* was provided for (Article 14 of Transitional Provisions) as well as new rules for the election of that office (Article 114 law 61/2011), which have prevented the re-election of the previous president. Finally, in the new FL, there was no explicit mention of the National Judicial Council whose competences were mostly transferred to the National Judicial Office, and in particular to the president of the NJO. The NJC was not abolished, but became an essentially advisory body. In this regard, see the opinions of the Venice Commission of 19 March 2012, 28 August 2012 and 15 October 2012. See also: S. Benvenuti, *La riforma del sistema giudiziario ungherese tra recrudescenze autoritarie e governance europea*, in *Nomos*, No. 3, 2012, pp. 1-19; G. Halmi, *The Early Retirement Age of the Hungarian Judges*, in F. Nicola, B. Davis (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, Cambridge, 2017; W. Brzozowski, *The removal of judges and the rule of law*, in M. Belov (Ed.), *Rule of law at the beginning of the twenty-first century*, The Hague, 2018, pp. 275-291.

<sup>10</sup> In this regard, please refer to the OSCE periodic reports adopted at the time of the main electoral rounds.

rights were limited, as it is accurately recalled in the Sargentini Report<sup>11</sup> and in those that preceded it (in particular: freedom of association, of the media, of religion, academic freedom<sup>12</sup>, freedom of expression, the rights of women, of minorities, of the homeless<sup>13</sup>, of privacy, etc)<sup>14</sup>. Faithfully following the program,

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<sup>11</sup> The European Parliament voted on 12 September 2018 with a large majority (448 votes in favor, 197 against and 48 abstentions) a Resolution on the so-called Sargentini Report (from the name of the Dutch member of the Green Group) which asked the Council for the activation of the art. 7.1 of the TUE. The Resolution analytically lists the various stages of Hungarian illiberal degeneration that justify the danger of a systematic violation of the values of the Union as summarized in Article 2 of the TUE. Please refer to C. Curti Gialdino, *Il Parlamento europeo attiva l'art. 7, par. 1 TUE nei confronti dell'Ungheria: quando, per tutelare lo "Stato di diritto", si viola la regola di diritto*, in *Federalismi.it*, n. 18, 2018. In addition to this, several infringement procedures raised by the European Commission before the European Court of Justice produced a series of decisions unfavorable to the Hungarian government. For example, in the decision of 6 November 2012, the Court ruled that the decrease in retirement age for judges, notaries and prosecutors from 70 to 62 years represented an unjustified discrimination based on age. In the decision of 8 April 2014 the European Court ruled that with the early termination of the mandate of the Commissioner for the protection of personal data, Hungary violated the obligations assumed under the directive 95/46. For what concerns the Strasbourg Court, with the decision of 27 May 2014 on the Baka case (the president of the Supreme Court was ordered to resign from office three and a half years before the expiry of his mandate) this Court recognized the violation of both Article 6 of the ECHR, for lack of remedies for the protection of the right to judicial protection, and Article 10, since in the actions of the government there had been the clear intention of persecution against those who had expressed criticism against the reforms of the judiciary in progress. The decision of the EU Court of Justice of November 2012 was implemented through the Act XX of March 2013, in which the pension age for judges, notaries and prosecutors was gradually lowered from 70 to 65 with the final transition at the new threshold since 1 January 2023. The law provides for a plan for the reintegration of judges previously retired with three possibilities (effective reintegration, placement in 'expectation' lists, compensation for damage). With the decision of 6 September 2017, the EU Court of Justice rejected the appeal of Hungary and Slovakia against the decision of the European Council of September 2015 'establishing temporary measures in the field of international protection for the benefit of Italy and Greece', on the relocation, in a two-year period, of 120,000 people in clear need of international protection. The European Commission – which had launched an infringement procedure against Hungary in December 2015 in connection with the law on asylum – in July 2018 referred Hungary to the Court of Justice for violating, with the laws of the so called 'stop-Soros' package, the directives on the procedures for granting / withdrawing international protection (directive 2013/32 / EU), on reception (directive 2013/33 / EU) and on repatriation (2008/115 / EC) of the asylum seekers.

<sup>12</sup> In this respect, in addition to reforming the law on national higher education, penalizing, among others, the Central European University, the governmental majority has also launched a new reformist campaign that involves the Academy of Sciences. Moreover, it infringed in various ways academic freedom and scientific research. See T.D. Ziegler, *It's Not Just About CEU: Understanding the Systemic Limitation of Academic Freedom in Hungary*, in *VerfBlog*, 26 March 2019. On the reform of the universities, see the opinion of the Venice Commission of 9 October 2017 CDL-AD(2017)022 *Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education*, endorsed by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017).

<sup>13</sup> A recent decision on the matter (4 of June 2019) of the Hungarian Constitutional Court was favorable to the criminalization of the homelessness. For a negative comment see: N. Chronowski, G. Halmai, *Human Dignity for Good Hungarians Only: The Constitutional Court's Decision on the Criminalization of Homelessness*, in *VerfBlog*, 11 June 2019 and V.Z. Kazai, 'No one has the right to be homeless...', in *VerfBlog*, 13 June 2019.

<sup>14</sup> Already in the Resolution of 16 December 2015 *On the situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015*, the European Parliament had emphasised the worsening of the rule of law principle and of the fundamental rights protection: 'inter alia freedom of expression, including academic freedom, the human rights of migrants, asylum

a transformation is being carried out, not only for what concerns institutions or the form of state, but also of the Hungarian civil society itself, tamed by the pounding nationalist rhetoric of the external enemy. All these developments have continued to produce critical reactions both from the international legal scholarship and from the European institutions.

The ‘constitutional revolution’ of the right-wing Government has applied the spoils system with scientific rigour. Particular attention must also be paid to the transformation of the system of government – a growing presidentialisation of the executive and a progressive weakening of parliament<sup>15</sup>. The absence of manifest and continued conflicts between institutions, such as those occurring in Poland since November 2015, not only between the Government and the Constitutional Tribunal but generally between the government-parliamentary majority and almost all of the judiciary (the ‘parallel legal system’)<sup>16</sup>, does not mean that the situation is peaceful but, on the contrary, that the system of checks and balances has been weakened.

Despite the prosecution against judges and other control institutions, including a series of independent agencies, what emerges in the Hungarian case, is not only the violation of the rule of law but also of the other two components of the Copenhagen criteria, required for access to the EU, that is to say democracy and human rights (plus minority rights). As can be seen from the aforementioned Sargentini Report, these are broad-based interventions that go in a direction that is not even that of a conservative democracy, as Orbán claims, but barely of an electoral democracy. In fact, the Fidesz has been governing without interruptions since 2010 (for Orbán, though, it is the fourth mandate, between 1998 and 2002 he was already head of a more composite and inhomogeneous coalition) wounding the democratic value of changeovers of power. Inter alia, the media manipulations and the restrictions of a series of political freedoms such as those of association, press, meeting, propaganda, have clearly favoured Fidesz’s success.

The political super-majority has, often in an underhanded manner<sup>17</sup>, changed the rules of the democratic game. All these actions did not cause at the beginning severe reactions from European institutions.

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seekers and refugees, freedom of assembly and association, restrictions and obstructions to the activities of civil society organizations, the right to equal treatment, the rights of people belonging to minorities, including Roma, Jews and LGBTI people, social rights, the functioning of the constitutional system, the independence of the judiciary and of other institutions and many worrying allegations of corruption and conflicts of interest’.

<sup>15</sup> Z. Szende, *Marginalizing the Parliament, (anti) Parliamentary Reforms in Hungary after 2010*, paper delivered at the XXX Conference of the Italian Society of Political Science (SISP), 15-17 September 2016, University of Milan.

<sup>16</sup> Please refer to A. Di Gregorio (with the collaboration of A. Angeli and J. Sawicki), *Epilogue: The ‘Wounded’ Constitutionalism in Hungary and Poland*, in A. Di Gregorio (Ed.), *The Constitutional Systems of Central-Eastern, Baltic and Balkan Europe*, cit.

<sup>17</sup> T.G. Daly, *The Democratic Recession and the ‘New’ Public Law: Toward Systemic Analysis*, paper presented at the I-CON Conference on ‘Borders, Migration and the Other’, Berlin, 17-19 June 2016, differentiates between countries in which democratic recession occurred after a coup d’état or a change of government and those, like Hungary or Poland, in which changes are

### 3. Constitutional crises in Hungary and Poland: Similarities and Differences

The seriousness of the ongoing processes in Hungary and Poland lies in the fact that through the tool of constitutional law the role of important checks and balances e.g., constitutional courts, ombudsman, self-governing bodies of the judiciary, independent agencies monitoring the media or the press, prosecutors, has been weakened. Looking at the political context, a crisis of the very principle of majoritarian democracy has led some authors to speak of ‘majoritarian autocracies’<sup>18</sup>. Other important defects in this framework are the limits of post-communist constitutional ‘engineering’. In fact, certain mechanisms, which were appropriate for a transitional context in which checks and balances were still fluid are unsuitable for the current super-majority scenery. These include the choice in favour of a ‘selective’ electoral system and of a powerful constitutional court.

The Polish and Hungarian constitutional crises have many common features, despite the different forms of government i.e. semi-presidential and parliamentary, respectively. Both countries widely implemented the spoils system and in both cases, the majority right-wing nationalist parties challenge the manner in which the transition to democracy took place in 1989, although these parties both came from the opposition to the old communist regime.

It is imperative to look back at the modalities and protagonists of the transition to democracy and the following period. In Poland, for example, the roots of today’s phenomena are to be found in the dynamics of the transition<sup>19</sup> as well as in the events of the short-lived coalition government of PiS with two smaller right-wing parties between 2006 and 2007<sup>20</sup>. The intolerance towards the new post-communist and pro-European course was openly expressed once PiS had obtained an absolute majority of seats in both chambers of the parliament in the 25 October 2015 general elections.

Following the Hungarian model, the new Polish leadership has gradually and systematically started to bring the main counter-majoritarian powers back under the control of the governing majority, commencing with the Constitutional Tribunal and continuing with media. Ordinary judges and prosecutors have been also affected by negative changes. As for the so-called ‘justice package’<sup>21</sup>, it is essentially composed of three laws, the act on ‘general’ courts (civil and criminal courts), the act that amends the act on the National Council of the Judiciary (KRS)

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more subtle and take a long way to be confirmed. Of the same Author please see, *Enough Complacency: Fighting democratic decay in 2017*, in *Int’l J. Const. L. Blog*, 10 January 2017.

<sup>18</sup> L. Pech, Laurent, K. L. Scheppele, *Poland and the European Commission, Part I: A Dialogue of the Deaf?*, in *VerfBlog*, 3 January 2017.

<sup>19</sup> The Law and Justice Party (PiS) created by the Kaczyński twins in 2001, is a fragment of the Solidarity movement that promoted, along with other stakeholders (including the Catholic Church), the transition from communism.

<sup>20</sup> J.-P. Massias, *Droit constitutionnel des États d’Europe de l’Est*, Paris, 2013, pp. 141-143.

<sup>21</sup> A. Angeli, A. Di Gregorio, J. Sawicki, *La controversa approvazione del “pacchetto giustizia” nella Polonia di “Diritto e Giustizia”: ulteriori riflessioni sulla crisi del costituzionalismo polacco alla luce del contesto europeo*, in *DPCE Online*, Vol. 31, No. 3, 2017.

and the act on the Supreme Court (SN), adopted in a first version in July 2017<sup>22</sup>. This overall reform was only partially halted by the intervention of the European Court of Justice, which after the October 2018 order of its Vice-President imposing the suspension of the act on the Supreme Court and the reinstatement of judges made to retire early, issued a final ruling on the retirement age of the Supreme Court's judges the 24 June 2019<sup>23</sup>. It can certainly be assumed that the direction previously set to constitutional justice was the one that led to proceed undisturbed on the path of these 'systematic' reforms. The aim, at least in view of the results, seems to be to obtain a judicial system more pliable to the political one, in the broad sense, given that the general criterion that they have attempted to impose implies that the filling of offices and the permanence in the same is tied to the arbitrariness of parliamentary decisions.

Other restrictive acts have concerned the subjugation of key institutions of the political system and the exercise of a series of fundamental freedoms. All these measures<sup>24</sup> have profoundly undermined a series of fundamental rights, thus eroding the rule of law, as highlighted by the European Commission in its four recommendations on the rule of law (2016/1374 of 27 July 2016, 2017/146 of 21 December 2016, 2017/1520 of 26 July 2017, 2018/103 of 20 December 2017)<sup>25</sup>.

Further critical aspects related to the PiS 'power takeover' concern several new appointments in public institutions and public companies, as well as the reform of school programs in a more conservative and patriotic direction. The constitution has been disregarded, and openly violated (starting from the very beginning of the political takeover). It should also be considered that the attack on judicial power followed a number of 'unpleasant' judgments – and of public inquiries that involved important political leaders – issued by judges that consequently 'had to be silenced' (see the well-known *affaire Kamiński*). The launch of the judicial reform was preceded by a defamatory campaign towards judges, portrayed as a self-referential and corrupt elite.

<sup>22</sup> See J. Sawicki, *La via giudiziaria come possibile soluzione alle minacce per lo stato di diritto: la Polonia dinanzi alla Corte di giustizia dell'Unione europea*, in *Osservatorio AIC*, n. 3, 2019 and A. Di Gregorio (with the collaboration of A. Angeli and J. Sawicki), *Epilogue: The 'Wounded' Constitutionalism in Hungary and Poland*, cit.

<sup>23</sup> The Court declared that "first, by providing that the measure consisting in lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) is to apply to judges in post who were appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU". [curia.europa.eu/juris/document/document.jsf?text=&docid=215341&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=827674](https://curia.europa.eu/juris/document/document.jsf?text=&docid=215341&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=827674).

<sup>24</sup> A complete list of measures can be found in the Recommendations on the rule of law of the European Commission and also in W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, in *Sydney Law School Research Paper*, No. 18/01, 2018. See also L. Pech, P. Wachowicz, *1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)*, in *VerfBlog*, 13 January 2019 and *(Part II)*, in *VerfBlog*, 17 January 2019. A useful timeline of the events can be found in P. Gambatesa, *Timeline of EU-Poland relations dealing with the rule of law*, [free-group.eu/2019/01/26/%EF%BB%BFtimeline-of-eu-poland-relations-dealing-with-the-rule-of-law/](https://free-group.eu/2019/01/26/%EF%BB%BFtimeline-of-eu-poland-relations-dealing-with-the-rule-of-law/).

<sup>25</sup> [eur-lex.europa.eu/eli/reco/2018/103/oj](https://eur-lex.europa.eu/eli/reco/2018/103/oj).

In both countries there is a majority conservative government despite the differences in the party and electoral systems, mixed with the predominance of the majority system in Hungary and a proportional representation system resembling the Spanish one in Poland. But the Polish case is politically different since up to October 2015 it was difficult to build a stable and cohesive ruling majority and this was the first time in the history of the former communist Poland that a one-party government was formed. FIDESZ has had a constitutional majority since 2010 and constitutional ‘outrages’ were perpetrated before the adoption of the new Fundamental Law. The PiS had to restrict itself to implement its legislative program and take advantage of some mistakes of the old legislation regulating the activity and composition of the Constitutional Tribunal, such as the election of constitutional court judges by a simple majority of the *Sejm*. This is a communist legacy as the election by a simple majority was provided for in the *Sejm* Standing Order of 1986. This procedure had many negative consequences. Another political aspect that is worth noting is that the centre-left forces are now completely unrepresented in the Polish parliament, which has not happened in Hungary.

Another relevant difference concerns the nature of the ruling party and its leadership. If in the Hungarian case the leadership is evident and undisputed (Orbán is both the leader of the ruling party and the head of the executive power), in Poland the effective political leader is a ‘simple’ Member of Parliament. Moreover, the longer permanence in power of Orbán makes any positive evolution in the short time improbable, also considering the massive institutional transformation taking place and that the electoral legislation in force is an obstacle to political turnovers.

From a constitutional perspective, each of the two country has specific defects of its own in terms of their constitutional engineering.

It can be observed for Hungary that:

- The procedure for amending the constitution and for adopting a new constitution coincides – the parliament is both a legislative and constituent body. The process is easy to implement not only in terms of the required majority but also because the initiative for amendments is easy to put forward as it only requires a request from a single deputy and there are no explicit limits to the constitutional amendments.
- There is an excessive reference to cardinal laws; both before and after the 2010 constitutional ‘revolution’.
- There are no provisions to fight against ‘anti-system’ political parties, at least in the Fundamental Law.
- The rules for the election of constitutional judges have been simplified for the benefit of the ruling majority.

These are the main shortcomings in the case of Poland:

- The judges of the Constitutional Tribunal are elected by one house of the parliament based on a simple majority – the proceeding is required by law but not by the Constitution.
- The Constitutional Tribunal is regulated by ordinary and not constitutional law.
- The requirements to elect judges of the CT provided for by the Constitution are quite vague.

### 3.1 *The different systemic role of the constitutional courts*

Whilst it is easy to identify the reasons for the offensive campaign against the Constitutional Court in Hungary due to its high prestige and the fact that it virtually dictated the constitutional law of the transition period<sup>26</sup>, the same is less obvious in the Polish case. Here, the roots of the conflict are not to be found so much in the authoritativeness of the Tribunal, which gradually increased from 1997 onwards, but rather in a series of rulings it delivered in 2006-2007 during the first Government ruled by PiS. A political condition much less favourable than today and that J. Kaczyński has never accepted.

The Hungarian Constitutional Court is an example of the very strong and active role played by constitutional courts in the aftermath of the transition from communism, which has repeatedly brought them into conflict with the government in office<sup>27</sup>. This strong role has been possible for a number of reasons. Firstly, some of these courts have been super-equipped and have often delivered judgments on the relationship between the different State powers, so determining the real functioning of the form of government and thus counterbalancing the shortcomings of the constitutional text and of the political system. The access to the courts is very broad, as was in Hungary until 2010. In some cases, the constitutional courts have been forced to work with interim or otherwise incomplete constitutional texts, or with constitutional ‘patchworks’ (as in Poland until 1997) so they had a great deal of freedom of action (and made free use of international standards on human rights). The ‘moral’ legitimacy of constitutional judges, most of them were well-known dissidents or leading actors during the transition period, has been a relevant factor in some countries in order to increase the authoritativeness of the courts.

The powerful role of the courts has been criticized by some commentators because it was perceived they had overshadowed the legitimacy of new democratic parliaments<sup>28</sup>. This perception was likely to weaken the relevance of the same

<sup>26</sup> L. Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, in A. Von Bogdandy, P. Sonnevend (Eds.), *Constitutional Crisis in the European Constitutional Area*, cit., pp. 5-31.

<sup>27</sup> L. Sólyom, G. Brunner. *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, Ann Arbor, 2000; A. Di Gregorio, *La giustizia costituzionale nei paesi ex socialisti*, in A. Di Gregorio, *La giustizia costituzionale in Russia. Origini, poteri, giurisprudenza*, Milano, 2004, pp. 11-58.

<sup>28</sup> S. Holmes, *Back to the Drawing Board*, in *East European Constitutional Review*, Vol. 2, no.1, 1992, p. 22.

transition and representation. Schwartz points out with reference to the Hungarian Court that the decisions of that Court often attracted the criticism of the Government, but among the reasons for the leading role there has been precisely the long constitutional list of competencies, which was difficult to reduce in ‘normal’ political conditions<sup>29</sup>. The *actio popularis*, which has enabled the HCC to be called upon constantly by ordinary citizens producing a real popular constitutional jurisdiction, caused the Court to be overworked. Therefore, a reduction in access was more or less inevitable and the same Venice Commission did not find anything to say on the point of elimination<sup>30</sup>. The Hungarian Constitutional Court was by an author even called a ‘supreme moral authority analogous to a Politburo’<sup>31</sup>, both with reference to its width of competence and because the Court addressed many sensitive issues from the perspective of human rights through the principle of human dignity extrapolated from the ‘invisible Constitution’. The Court prevented the transition to democracy being monopolized by a particular interest group despite, or perhaps because of, the absence of a complete fundamental law as a basis for a wide and stable national unit<sup>32</sup>.

1475

Moreover, unlike the older European courts, post-communist constitutional courts found themselves faced with a different transition context, in which there had been a strong continuity of leadership and structures. Their leading role was acceptable and necessary perhaps only in the first few years following the transition. In 1993, Holmes criticized the use of the German model of a strong constitutional court seen as superior to the legislator, which he considered ‘not appropriate for struggling post-communist societies that do not have the luxury of an inherited property system or a militarily imposed answer to questions of citizenship and territorial rights’. Holmes even talks about a ‘spirit of anti-parliamentarism’<sup>33</sup>.

The common features of the ‘fourth generation courts’, however, should not overshadow the differences between countries. The Polish Constitutional Tribunal arises from a communist concession to the opposition forces in 1982 and had a series of functional limitations until 1997. Only after 1999 did the judgments of unconstitutionality of laws obtained the definitive consecration of *res judicata*.

<sup>29</sup> H. Schwartz, *The New Courts: An Overview*, in *East European Constitutional Review*, Vol. 2, no. 2, 1993, pp. 28-32.

<sup>30</sup> See Opinion of 28 March 2011 n. 614 *On Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary*, in [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2011\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2011)016-e).

<sup>31</sup> In an interrogative form: E. Klingsberg, *Safeguarding the Transition*, in *East European Constitutional Review*, Vol. 2, no.2, 1993, pp. 44.

<sup>32</sup> According to L. Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, in A. von Bogdandy, P. Sonnevend (Eds.), *Constitutional Crisis in the European Constitutional Area*, cit., the Court was indeed the protagonist of the transition, with very strong guarantees of independence, extensive use of abstract control, freedom to define the procedural rules, to elect the president, to go beyond the *petitum* and to be a counterbalance to the parliament. In 1989 at the round table the different parts were uncertain about their future and about who would win the election so they wanted a strong body, a guardian of their rights for the future (but this also applies to other post-communist countries).

<sup>33</sup> S. Holmes, *Back to the Drawing Board*, cit.

The Constitutional Tribunal was therefore of fundamental importance in the terminal phase of the communist period, especially from the symbolic point of view, but it was not as disruptive as in the Hungarian case.

Despite this sad picture, examining the constitutional jurisprudence subsequent to the neutralization of the Hungarian Constitutional Court, it can be said that it demonstrates a more articulated and sophisticated legal reasoning, if compared to that of the Polish CT<sup>34</sup>. The attitude towards constitutional values of the current Polish leadership should be considered as ‘rough and brutal’.

#### 4. On the European democratic conditionality and conclusions

There is a number of reasons for the constitutional ‘backslidings’ in some EU new Member States, especially the inability of Central and Eastern European countries to achieve a full democratic maturity because of their communist past; the absence of constitutional traditions and the difficulty to ‘absorb’ the benefits of the struggle for the limitation of power in a short period of time, which, however, took centuries for Western European countries to achieve<sup>35</sup>.

Nevertheless, the peculiarities of these countries have not been taken into account, especially the welfare State crisis, at the moment of their admission into the European Union. Instead, values and conditions have been imposed. The ‘negative’ liberal constitutional model, adopted in reaction to the communist past, was not suitable for this context, at least not initially. While there was no alternative for the catalogues of rights, a greater gradualism in dismantling social benefits and a measured transition to a market economy would have been preferable. The great sacrifices required to ‘join Europe’ were not rewarded with equal treatment like other Member States. This has encouraged a defensive attitude to the national sovereignty.

Membership in the Council of Europe had a less stringent conditionality when compared to the EU requirements because of the different purposes of this organization which was primarily meant, during the last 30 years, to promote, in general terms, ‘rule of law, democracy and human rights’ in the former communist countries. Nevertheless, the European Commission and the Venice Commission work together for the protection of the rule of law, as shown by their joint actions and the mutual appeal to the values sponsored by one or other body e.g., Article 6, par. 3 TUE, the EU Charter of fundamental rights and the Memorandum of Understanding between the Council of Europe and the European Union<sup>36</sup>.

<sup>34</sup> In the legal reasoning of the Hungarian Court a higher degree of maturity is detectable, even when it supports the governing majority. See A. Di Gregorio, *Constitutional Courts in the Context of Constitutional Regression. Some Comparative Remarks*, in M. Belov (Ed.), *Courts and Politics*, Routledge, Oxford, forthcoming.

<sup>35</sup> B. Bugarič, *A crisis of constitutional democracy in postcommunist Europe: ‘Lands in-between’ democracy and authoritarianism*, in *International Journal of Constitutional Law*, Vol. 13, no. 1, 2015, pp. 219-245; B. Bugarič, T. Ginzburg, *The assault on postcommunist courts*, in *Journal of Democracy*, Vol. 27, no. 3, 2016, pp. 69-82. See also A. Di Gregorio, *Lo stato di salute della rule of law in Europa: c’è un regresso generalizzato nei nuovi Stati membri dell’Unione?*, in *DPCE on-line*, n. 4, 2016, pp. 173-202.

<sup>36</sup> Refer to J. Nergelius, *The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania*, in A. von Bogdandy, P. Sonnevend (Eds.), *Constitutional Crisis in the*

Among the limits of the democratic conditionality process, one can include the lack of clarity in identifying the different values on the basis of abstract categories such as democracy and the rule of law<sup>37</sup>, apparently considering the triad ‘rule of law, democracy and human rights’ as a monolithic notion. In fact, in Hungary and Poland the governments have invoked the democratic principle, which they have made coincide with the majority will of the voters, to challenge a legalistic approach to the rule of law. But the rule of law is a ‘fluid’ notion, as evidenced by the fact that countries which technically respect the (formal) rule of law are not considered to be democratic<sup>38</sup>. Another important limitation is that no particular attention was paid to the dynamics of the form of government and of the party system within the parameters of the democratic ‘certification’. In fact, in both Hungary and Poland, the settlement of a hyper-majority government system has sacrificed institutional balances in the name of governability.

As for the reaction of European institutions, there have been grounds for the application of Article 7 TEU since the very beginning of the constitutional retrogression. However, the approach of the European institutions was initially different in the cases of Hungary<sup>39</sup>, Romania<sup>40</sup> and Poland<sup>41</sup> as a result of purely political considerations. All of this emphasises the weakness of the EU, especially

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*European Constitutional Area*, cit., pp. 291 ss. In this paper, the Author presents a positive picture of follow-up of the opinions issued in the period 2011-2013 regarding Hungary. For an overview of texts governing the relations between the Council of Europe and European Union, please refer to [rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064c45d](http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064c45d).

<sup>37</sup> See, e.g., D. Kochenov, *EU Enlargement and the Failure of Conditionality in the Fields of Democracy and the Rule of Law*, The Hague, 2008. A glaring example of how an instrumental consideration of the rule of law can justify constitutional developments in Poland comes from a long and very well-argued document prepared by a series of constitutional specialists: *Report of the Team of Experts on the Issues Related to the Constitutional Tribunal* of 15 July 2016, available at [www.sejm.gov.pl/media8.nsf/files/ASEA-ADRKC8/%24File/Report%20of%20the%20Team%20of%20Experts%20on%20the%20Issues%20Related%20to%20the%20Constitutional%20Tribunal.pdf](http://www.sejm.gov.pl/media8.nsf/files/ASEA-ADRKC8/%24File/Report%20of%20the%20Team%20of%20Experts%20on%20the%20Issues%20Related%20to%20the%20Constitutional%20Tribunal.pdf). The same came be said for the *White Paper on the Reform of the Polish Judiciary*, published by the Chancellery of the Prime Minister in 2018 available at [www.premier.gov.pl/files/files/white\\_paper\\_en\\_full.pdf](http://www.premier.gov.pl/files/files/white_paper_en_full.pdf). K. Nicolaidis and R. Kleinfeld, *Rethinking Europe’s “Rule of Law” and Enlargement Agenda*, SIGMA Papers, no.49, OECD Publishing, Paris, also complain about the excessive technicality of the European parameters and the relative bureaucracy, obsessed by the measurability of the results with respect to the imposed parameters. As the two authors write ‘the rule of law is distinct from human rights as well as other values, such as democracy, liberty or equality. Elements of these values may be implicit in the rule of law, but lumping them together leads to conceptual confusion and bad practice’ (p. 11).

<sup>38</sup> As D. Kochenov and M. van Wolferen, *The dialogical Rule of Law and the breakdown of dialogue in the EU*, EUI Working papers, LAW 2018/01, p. 4, argue, considering the doctrinal debate and the guidelines of the Venice Commission it is more clear what the rule of law is not (it is not democracy or the protection of human rights nor mere legality) than what it in fact is.

<sup>39</sup> Infringement procedures for individual violations of the EU law. Economic pressures applied in early 2012 by the European Commission suspending some shares owed to Hungary from the European Cohesion Fund.

<sup>40</sup> A strong pressure was applied via the Cooperation and Verification Mechanism, which seems to have worked in the 2012 crisis and in the following years notwithstanding the fact that the situation remains complex and nuanced as far as the pressure of the executive on the judiciary (and prosecutors) and the level of corruption are concerned.

<sup>41</sup> Rule of law mechanism.

when combined with the many legal and political problems that have arisen with Article 7<sup>42</sup>. This is likely to weigh against the EU's credibility in actively protecting and upholding EU values. Although Article 7 was finally activated<sup>43</sup> its implementation process, which is clearly political, is blocked by the absence of consensus in the Council and is currently still at the preliminary investigation stage<sup>44</sup>.

Another problem concerning the activities undertaken at European level is that the three main EU institutions (Commission, Parliament, Council) do not show a consistent and commensurate attitude. See for example, the repeated appeals of the European Parliament to the Commission and European Council or the inconsistent behaviour of the Council with its annual Rule of Law Dialogue compared with the Rule of Law Initiative of the Commission with respect to the Hungarian case<sup>45</sup>. This attitude will have a negative impact on their credibility in defending the constitutional values of the new Member States after their admission into the EU and this makes negotiations for the acceptance of additional Members less credible questioning the whole system of democratic conditionality. The fact that the European Commission was satisfied with the Hungary's reaction following the judgments of the CJEU which had more relevance for the rule of law (the early retirement of judges and the removal from office of the ombudsman for data protection, the judges were mainly not reinstated in service having agreed compensation) shows how the concept of the rule of law at European level becomes strongly attested on formal terms. The decision on judges is, although formally respected, in fact without substantive consequences. A great deficiency thus emerges, namely the lack of a systemic view of the rule of law situation in a given country.

Furthermore, the infringement procedure takes a long time and has a set of limitations, given that it was not originally designed for 'systemic' violations of

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<sup>42</sup> Without repeating the criticism of the mechanism which includes the political impossibility of Article 7 enforcement, just note that precisely with reference to Article 7 the Court of Justice has no jurisdiction to check the acts of the Member States which could lead to a serious risk of violation of the Union's values. Member States would have deliberately limited the intervention of the Court to the mere procedural evaluations in order to ensure the defence rights of the State. For this position see L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet WPS, No. 4/2009, p. 65.

<sup>43</sup> On 20 December 2017 the European Commission triggered Article 7 for the first time in relation to Polish judicial reforms because, in the view of the Commission, they remove the separation of powers between the executive and the judiciary; on 12 September 2018, the European Parliament voted for action against Hungary, alleging breaches of core EU values.

<sup>44</sup> COM (2017) 835, *Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, [www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2017/0835/COM\\_COM\(2017\)0835\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0835/COM_COM(2017)0835_EN.pdf).

For an update on the ongoing proceedings, see [oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2017/0360\(OLP\)](http://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2017/0360(OLP)). See also M.A. Orlandi, *La Polonia di Kaczyński: l'approvazione del "pacchetto giustizia" e l'avvio della procedura dell'art. 7 TUE*, in *DPCEonline*, No. 4, 2017; M. Taborowski, *The European Commission Launches Art. 7 TEU Proceedings against Poland for Breach of Rule of Law*, in *Quaderni costituzionali*, No. 1, 2018.

<sup>45</sup> See D. Kochenov, L. Pech, *Monitoring and Enforcement in the Rule of Law in the EU: Rhetoric and Reality*, cit.

EU fundamental values<sup>46</sup>. On the other hand, the rule of law framework, activated for the first time against Poland, has already failed in achieving concrete results in October 2016. Poland was given a three months period to amend specific provisions considered to be in breach of the rule of law, but the deadline expired without any tangible result, and the same can be said of the two further months provided with the new Recommendation of 21 December 2016<sup>47</sup>. On 26 July 2017, the European Commission adopted a new Rule of Law Recommendation threatening to trigger Article 7 TUE against Poland, and so it did in December 2017. The Commission's proposal of 2 May 2018 of a new mechanism to protect the EU budget from financial risks linked to generalised deficiencies regarding the rule of law in the Member States should also be mentioned. The new proposed tools would allow the Union to suspend, reduce or restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the rule of law's deficiencies. Such a decision would be proposed by the Commission and adopted by the Council through reverse qualified majority voting (the proposal was amended by the European Parliament on 17 January 2019)<sup>48</sup>.

1479

The negative assessment of the behavior of EU political bodies, however, must be tempered by two considerations. First, we need to look at the process of democratic conditionality in the long term. In fact, this process had a positive impact in terms of democratization on the new Member States, including Hungary and Poland, for several years. Secondly, some recent EU Court of Justice openings regarding the jurisdictional application of the values of art. 2 TEU, including the rule of law, demonstrate an important jurisprudential evolution that seems to compensate for the shortcomings of political institutions<sup>49</sup>. This recent evolution

<sup>46</sup> Some legal scholars suggest introducing a specific rule of law infringement procedure to be activated before the Court of Justice. Please refer to P. Bárd and A. Śledzińska-Simon, *Rule of law infringement procedures. A proposal to extend the EU's rule of law toolbox*, CEPS Paper in Liberty and Security in Europe No. 2019-09, May 2019.

<sup>47</sup> Even if the Polish parliament repealed some of the most controversial provisions of the Act on the Constitutional Tribunal of 22 July 2016, this latter has been negatively evaluated in the opinion of the Venice Commission of 15 October 2018.

<sup>48</sup> On this issue, see A. Somma, *L'Europa difende lo Stato di diritto per affossare il welfare*, in *Sbilanciamoci.info*, 29 January 2019.

<sup>49</sup> We refer to the well known CJEU decision of 27 February 2018 C-64/16 (*Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* case) in which the Court, referring to general and value-related clauses of EU primary law such as Arts 2 and 19 TEU, particularly emphasized the necessity for Member States to respect values such as rule of law (whose essence is 'the very existence of effective judicial review designed to ensure compliance with EU law') and the principle of sincere cooperation. As commentators underlined, this was an occasion for the Court to send a message to the Polish authorities and to anticipate its later decisions on the matter, as was the case in *Commission/Poland C-619/18 R* (and just before summer 2018 also in *Case C-216/18 PPU*). In the order of the vice president of the CJEU of 19 October 2018, which forced Poland to adopt interim measures to avoid severe consequences on judicial independence, it is clearly stated that judicial independence is part of the essence of the fundamental right to a fair trial, guaranteeing that the values common to the Member States set out in Article 2 TUE, in particular the value of the rule of law, will be safeguarded. For comments see M. Coli, *The Associação Sindical dos Juizes Portugueses judgment: what role for the Court of Justice in the protection of EU values?*, in [www.diritticomparati.it/associaac%cc%a7a%cc%83o-sindical-dos-juizes-portugueses-judgment-role-court-justice-protection-eu-values](http://www.diritticomparati.it/associaac%cc%a7a%cc%83o-sindical-dos-juizes-portugueses-judgment-role-court-justice-protection-eu-values); M. Krajewski, *Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges*, in

of CJEU jurisprudence testifies that the rule of law principle is justiciable at the European level, albeit with difficulty<sup>50</sup>.

In conclusion, we may outline four major observations:

1. An out-of-context analysis may not show all aspects of the ‘rule of law violation in new EU Member States’. It is necessary to analyse the historical development of the most problematic countries and to make a comparison with other countries in the region, combined with the inconsistencies and limits of European conditionality.
2. The inconsistencies in the constitutional text must be distinguished from those of the political system (including the electoral system) and the ‘resilience’ of the constitutional culture that has so far arisen<sup>51</sup>.
3. There are numerous problems caused by the limits of post-communist constitutional engineering especially for the ‘first-in-class’ countries i.e., Poland and Hungary. This includes electoral legislation; the mistakes caused by hastily written constitutions, which were then subsequently repeated (see cardinal laws in Hungary); the (negative) communist heritage, especially the central role of parliaments. Also, the clauses for the protection of democracy and the rules on anti-constitutional parties: post-communist framers took into account a way of precluding a return to the past, but such remedies, although strong, remain in the hands of constitutional courts. If these courts are ‘domesticated’ they become effectively toothless.
4. If there is a crisis of constitutional democracy in the new EU Member States, this is also due to the shortcomings of the criteria for admission into the Union and of course to the current inability of the EU institution to deal with the rule of law crises. At the same time, the constitutional crisis in Poland and Hungary, but also the rise of populism and nationalism in almost all European countries – not only as a result of the wave of migrants and refugees – highlights the close link that exists between economic, social, security (fear of diversity) and constitutional (identity, sovereignty) crisis. The regression to a defensive attitude towards national sovereignty is a recurrent phenomenon which shows how some fundamental faults of European integration have never been addressed.

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*European Constitutional Law Review*, Vol. 14, no. 4, 2018; D. Sarmiento, *Interim Revolutions*, in *VerfBlog*, 22 October 2018; L. Pech, S. Platon, *Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in Associação Sindical dos Juízes Portugueses*, in *EU Law Analysis*, 13 March 2018, available at [eulawanalysis.blogspot.com](http://eulawanalysis.blogspot.com).

<sup>50</sup> With regard to principles such as the rule of law, which are vague and subject to the assessment of national legal orders, the Court of Justice had traditionally followed a rigid self-restraint. This is evident, e.g., in the decisions on infringement proceedings against Hungary, where the reasoning was highly technical and did not encourage the discovery of values, although all the debate around the proceedings was rich in disquisitions of a highly constitutional level. The Court of Justice’s approach to the rule of law at the European level is therefore necessarily different from that of the national constitutional courts. Please refer also to A. Di Gregorio, *Constitutional Courts and the Rule of Law in the New EU Member States*, in *Review of Central and East European Law*, Vol. 44 (2019), pp. 202-231.

<sup>51</sup> L. Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, in A. von Bogdandy, P. Sonnevend (Eds.), *Constitutional Crisis in the European Constitutional Area*, cit., pp. 5-31.

The role of international organizations, mainly the Council of Europe and the European Union, has been ambivalent. On one side, as already said, such institutions favoured, up to a certain moment, important reforms. On the other, the failure of democratic conditionality in the aftermath of the accession to the European Union is blatant, as is the inadequacy of the integration model privileged by the EU. This latter neglected social profiles which were vital for countries who had experienced the communist ‘solidarity’, and which were not ready for a pure liberalist model<sup>52</sup>.

What is happening in Hungary and Poland represents a real danger for European constitutionalism. It is not a coincidence that Poland and Hungary are the most examined cases (through a multidisciplinary approach). They not only present a concrete risk of imitation, but they also pose a real threat to the credibility of the entire European Union. Both the ability of the EU to defend itself from attacks on its core values, and the complex mechanisms set out for the enlargement process and the integration of ‘young’ democracies have been questioned. The paradigm of ‘successful’ transition from socialist system to constitutional democracy is undermined, even though it is not correct to assert that a democratic system failed to be consolidated in the twenty years after 1989. Yet, despite the constitutional crisis and the limits of democratic conditionality, the transformations made by these countries thanks to the path of European integration are epochal.

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<sup>52</sup> It is not a coincidence that both Fidesz and PiS resorted to public subsidies (especially for families) in order to strengthen their electoral support.