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SECOND-GRADE CONSTITUTIONALISM?

THE CASES OF HUNGARY AND POLAND

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The Cases of Hungary and Poland

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

— Mikhail Bulgakov

Abstract

The weakness of the Copenhagen criteria and the lack of their application after accession caused a discrepancy between EU accession conditions and membership obligations, which might be 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.

This paper deals 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.

Keywords: Constitutionalism, Rule of Law, Democracy, Art. 2, Hungary, Poland, European Union

Introduction

This paper deals 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

[†]* Professor and Chair of Comparative Constitutional Law, European University Institute, Florence. A version of this paper is forthcoming in Iulia Motoc, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek (eds.), *Internationalization of Constitutional Law*. Liber Amicorum for András Sajó.

for, and protection, of minorities. This was the main instrument, which governed the largest enlargement in the Union's history: starting in 2004 with ten new Member States, mostly from the former communist countries, followed by the accession of Romania and Bulgaria in 2007, and concluded by the admission of Croatia in 2013*. As Dimitry Kochenov argues, the assessment of democracy and the rule of law criteria during this enlargement was not really full, consistent and impartial, and the threshold to meet the criteria was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowledgement that the Copenhagen political criteria had been met. * It happened only after Croatia's accession that the European Commission suggested various adjustments to the negotiation procedure*. But not only were the conditionality requirements not taken seriously, but their maintenance was also missing after accession.* The only time the EU expressed some doubts and extended the validity of pre-accession values-promotion in the form of a post-accession monitoring was the so-called Cooperation and Verification Mechanism applicable to Bulgaria and Romania, which remained in force even after they became full members.* (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.*)

The weakness of the Copenhagen criteria and the lack of their application after accession caused a discrepancy between EU accession conditions and membership obligations, which might be 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',* as Wojciech Sadurski rightly argues, the Central and

† The Croatian enlargement was somewhat special, as it was part of the EU's Stabilization and Association Policy and the conditionality was different as well. Inter alia it included the collaboration with the ICTY. I am grateful to Elizabeth van Rijckevorsel for pointing this out.

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

† See. C. Hillion, 'Enlarging the European Union and Deepening Its Fundamental Rights Protection', *European Policy Analysis*, June Issue 2013. 6.

† 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.

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

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

† In 2000, the far right Freedom Party headed by Jörg Haider became the coalition partner of the centre-right government, which led to unilateral measures by the Member States against Austria. But this action has left the Member States and the Union institutions extremely reluctant to use similar mechanisms. As the "report of the three wise men" mentions, the measures taken were perceived by the Austrian public as politically motivated sanctions by foreign governments against the Austrian population and therefore fostered nationalist sentiments. For a detailed analysis of the genesis of Article 7 see F. Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far

Eastern European applicants' history was the main reason why Article 7 TEU was revised in the Treaty of Nice. This new provision made 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.*

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

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 case, and thereafter probably a model of reference, of constitutional backsliding from a full-fledged liberal democratic system to an illiberal one with strong authoritarian elements.

The seriousness of the core values of the EU can be examined through Hungary's deliberate non-compliance with the principles of constitutional democracy, because it 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.

are Rome, Budapest and Bucharest from Brussels?', in A. v. Bogdandy and P. Sonnevend, *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Hart Publishing, 2015. 202-205).

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

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

† T. Lálík, 'Constitutional Crisis in Slovakia: Still Far from Resolution, ICONect, August 5, 2016.

<http://www.iconectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution/>

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 October 23, 1990, the anniversary of the 1956 revolution, and which was the basic document of the ‘constitutional revolution’ until 1 January 2012.

Before the 2010 elections, most voters had grown dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.* 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.*

† The terms ‘single’ and ‘dual’ transitions are used by A. Przeworski, 1991. Later, Claus Offe broadened the scope of this debate by arguing that post-communist societies actually faced a triple transition, since many post-communist states were new or renewed nation-states. See C. Offe, *Varieties of Transition: The East European and East German Experience* (New York: MIT Press, 1997).

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

† In an interview on Hungarian public radio on 5 July 2013, elected Prime Minister Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal Constitution. He said: “In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection, more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the

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

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 went into effect. These new laws have been uniformly bad for the political independence of state institutions, for the transparency of lawmaking and for the future of human rights in Hungary.

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

interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason, the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there.” See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, 5 July 2013. Kossuth Rádió. www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedekek-terjeszesek-interjuk/a-tavares-jelentes-egy-baloldali-akcio

† 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.

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 system* secured again two-thirds majority. In early 2015 Fidesz lost its two-thirds majority as a consequence of mid-term elections in two constituencies, but the far-right Jobbik party has received another 20,5 % of the party-list votes. The enemies of liberal democracy still enjoy the support of the overwhelming majority of the voters, who are not concerned about the backsliding of constitutionalism.

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

Poland's 1989 negotiated democratic transition precedes Hungary's, but it followed Hungary's constitutional backsliding after the Law and Justice Party (known as PiS), led by Jarosław Kaczyński, won parliamentary elections in October 2015. The party had already taken over the presidency in May that year. After Solidarity, led by the proletarian leader Lech Wałęsa, won massive electoral support in partially free elections held in June 1989, Poland's last communist president, General Jaruzelski - based on an arrangement known as 'your president, our prime minister' - was forced to appoint Tadeusz Mazowiecki, Wałęsa's former leading adviser, a liberal intellectual nominated by Solidarity as prime minister. Although due to the negotiated compromise, the key 'power ministries' of interior and defence were still run by communist generals, the Mazowiecki government engineered the most important aspects of the transition, namely securing a free-market economy. The economic reforms caused public disillusionment and widespread job losses.

Mazowiecki's administration also removed the reference to the Communist Party's 'leading role' from the constitution. A month later the party was dissolved, and on 31 December 1989 the Polish

⁷ "A number of amendments negatively affected the election process, including important checks and balances... The absence of political advertisements on nationwide commercial television, and a significant amount of government advertisements, undermined the unimpeded and equal access of contestants to the media," – international election monitors of the Organization for Security and Cooperation in Europe (OSCE) said in its report". See Statement of Preliminary Findings and Conclusions, International Election Observation Mission, Hungary – Parliamentary Elections, 6 April 2014.

People's Republic gave way to the Republic of Poland, and a year later Jaruzelski was replaced by the first democratically elected President, Lech Wałęsa, who stood against Mazowiecki, symbolising the first breakdown within Solidarity. At the end of 1990, Jarosław Kaczyński ran Wałęsa's winning campaign and was rewarded with a position as the head of the presidential chancellery, but later accused him of betraying the revolution, and becoming 'the president of the reds'. Kaczyński's conspiracy theory that liberal intellectuals had become allies to former communists led to a final split known as Solidarity's 'war at the top'.* The alleged conspiracy between other dissidents and the governing Polish United Workers party also determined how Kaczyński viewed the 'roundtable' agreement in 1989, which led eventually to the end of the communist regime.* The new government parties both in Hungary and Poland rejected '1989' for the same reasons: namely, absence of radicalism of the democratic transition, and for the alleged liberation of the Communist elites.*

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

In 2005, Law and Justice defeated Civil Platform, and Tusk won both the parliamentary and the presidential elections. Lech Kaczyński became President of the Republic, while Jarosław became head of the coalition government, which consisted of Law and Justice, the agrarian-populist Self Defense Party and the nationalist-religious League of Polish Families. The new government proposed a decommunisation law, which was partly annulled as unconstitutional by the still independent Constitutional Tribunal. The coalition fell apart in 2007, and Civic Platform won the

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

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

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

subsequent elections. Donald Tusk replaced Jarosław Kaczyński as Prime Minister, while Lech remained President until he died after his plane crashed in the the Katyn forest near Smolensk in Western Russia crash in April 2010. Although his support has collapsed by the beginning of 2010, and his chances of re-election at the end of the year were widely assumed to be very low, his death fed the theory of a conspiracy between then Poland's Prime Minister Tusk and Russian President Putin willing to kill the Polish President.*

In 2015, Jarosław Kaczyński's Law and Justice Party returned to power with a vengeance, committed to reshaping the entire constitutional system in order to create a 'new and virtuous Fourth Republic'. This meant a systemic and relentless annihilation of all independent powers that could check the will of the ultimate leader. In that respect, his role model is Viktor Orbán.* In 2011 PiS published a long document, authored largely by Kaczyński himself, on the party's and his leader's vision of the state. The main proposition of this paper is very similar to the one that Orbán described in his Kötöcse speech in 2009: a well-ordered Poland should have a 'centre of political direction', which would enforce the true national interest. This illiberal counter-revolution of both Orbán and Kaczyński is based on a Communist rejection of checks and balances, as well as constitutionally entrenched rights.*

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

In October 2015, before the end of the term of the old Parliament, five judges had been nominated

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

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

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

* About the battle for the Constitutional Tribunal see T.T. Koncewicz, 'Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense', *I•CONnect*, December 6, 2015.

by the outgoing Civil Platform government, even though the nine-year term of two of them would have expired only after the parliamentary elections. Andrzej Duda, the new President of the Republic nominated by PiS, refused to swear in all the five new judges elected by the old Sejm, despite the fact that the term of office of three of them has already started to run. In early December, in accordance with a new amendment to the Law on the Constitutional Tribunal, the new Sejm elected five new judges, who were sworn into office by President Duda in an overnight ceremony. As a reaction to these appointments, the Constitutional Tribunal ruled that the election of two judges whose term were not yet over by the previous Sejm in October 2015, was unconstitutional. The Tribunal also ruled that the election of the other three judges was constitutional, and obliged the President to swear them in. Since President Duda refused to do so, the chief judge of the Tribunal did not allow the five newly elected judges to hear cases.

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

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

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 board of both institutions will be appointed and dismissed by the Minister of Treasury instead of the National Broadcasting Council from among multiple candidates. The new law also terminated the current managers' and board members' contracts with immediate effect, allowing the government to replace them. Since the 'small media law' was about to expire on 30 June 2016, the government in April submitted the 'large media law' to the Sejm. The draft bill planned to turn public broadcasters into 'national media', which would be obliged to spread the views of the Polish parliament, government and president, and have to 'respect Christian values and universal ethical principles'. The national media entities would be supervised by the newly established National Media Council. The Council of Europe published an expert opinion of the draft law on 6 June, calling for a number of changes. The report said that new law should ensure that members of the National Media Council are appointed in a transparent way, for instance after public hearing of the candidates, and that the Council should act independently of political influence. The draft suggested that the Council would consist of six members appointed by the parliament and the president, only one of which upon the recommendation of the largest opposition group in the Sejm. On June 9, the government postponed a draft law that was to enter into force on 1 July in order to notify the EU about the far-reaching changes. In the meanwhile, a bridge law created the New Media Council to supervise public media, with two of five members recommended by the opposition.*

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

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

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

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 have all seen or? The one that's ahead of us."* 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."* These references to a new basic law leave open how the party intends to circumvent the lack of the necessary 2/3 majority in the Sejm for constitution-making. But as critics argue, PiS does not really need a new constitution because what they have been doing since the fall of 2015 is already a *de facto* change of the constitution through sub-constitutional laws. This is what Wojciech Sadurski calls a constitutional coup d'état.*

Possible Explanations of the Backsliding

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

(a) Historically, in the East-Central European countries there were only some unexpected moments of quick flourishing of liberal democracy followed by an equally quick delegitimization of it. For instance shortly after 1945, until the communist parties take over, and also after 1989, when liberal democracy again seemed to be the 'end of history'.* Otherwise, in the national history of the Central and Eastern European countries authoritarianism, such as the pre-1939 authoritarian Polish and Hungarian politics, played a much more important role in the transformation.*

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

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

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

† 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/>

† 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

† See Slomo Avineri, Two Decades After the Fall: Between Utopian Hopes and the Burdens of History, *Dissent*, 30 September 2009.

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

cosmopolitanism, autonomy, and rationality.* Even modernization's changes are not irreversible: economic collapse can reverse them, as happened during the early 1990s in most former communist states. These findings were confirmed by another international comparative study conducted by researchers of Jacobs University in Bremen and published by the German Bertelsmann Foundation.* According to the study, which examined 34 countries in the EU and the OECD, Hungary has had a low level of social cohesion ever since the postcommunist transformation, ranked at 27th, between Poland and Slovakia. Social cohesion is defined as the special quality with which members of a community live and work together.

(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.* 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.

Trying to explain the attitudes of voters to support authoritarian pursuit of populist leaders, such as Orbán or Kaczyński, Ronald Inglehart and Pippa Norris suggests that it would be a mistake to attribute the rise of populism directly to economic inequality alone, as psychological factors seem to play an even more important role. Older and less-educated people tend to support populist parties

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

† D. Schiefer, J. van der Noll, J. Delhey, & K. Boehnke, *Cohesion Radar: Measuring Cohesiveness*, Bertelsmann Foundation, 2013, www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_36378_2.pdf

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

and leaders that defend traditional cultural values and emphasize nationalistic and xenophobia appeals, rejecting outsiders, and upholding old-fashioned gender roles.*

(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.* This concept argues that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardizes the development of participatory democracy.* 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.*

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.*

¶ R. Inglehart and P. Norris, ‘Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash’, Faculty Research Working Paper Series, August 2016 RWP16-026.

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

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

¶ Cf. Sadurski, 2005, p. 23.

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

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

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

*

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

† 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.

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

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

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

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

† 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.

and really believe in an ideology of Poland as a proud sovereign state based on Catholic national identity.* In other words, while the Polish system is ideology-driven, the Hungarian only uses ideology.*

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. One can argue that this hypothesis is difficult to reconcile with the Resolutions of the European Parliament of 10 June 2015 and 16 December 2015, especially paragraph 11 of the June resolution states that the EP: "Urges the Commission to activate the first stage of the EU framework to strengthen the rule of law, and therefore to initiate immediately an in-depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary". The fact that this was adopted by the majority in the European Parliament can suggest that the majority of MEP's are no less committed to standing up to Hungary than they are to Poland.* Even though this is a mere speculation, I do not think that the two mentioned parliamentary resolution urging the Commission to start the Article 7 procedure contradict the assumption that it did not happen because of Fidesz' EPP membership. The Commission while deciding to take action or not, has taken into account the said faction membership. Not only the President of the Commission, who himself is a member of the EPP faction, but informally also influential national leaders belonging to the same party group could play an important role to influence the Commission's (non-)action, even despite a resolution of the Parliament.

Present and Future of Constitutionalism in Poland and Hungary

The current Polish and Hungarian constitutional system constitutes a new, hybrid type of regime, between the ideal of a full-fledged democracy and a totalitarian regime*. Even when there is a formal written constitution, an autocracy is not a constitutional system*. Therefore, China, Vietnam,

† See M. Steinbeis, *ibid.*

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

† This point was raised Oliver Garner, during the discussion of an earlier version of this paper at the Faculty Seminar of the Law Department of the European University Institute on 19 October 2016.

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

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

Cuba, Belorussia, the former Soviet Union, and former communist countries cannot be considered to be constitutional systems, even though, as William J. Dobson argues, “today’s dictators and authoritarians are far more sophisticated, savvy, and nimble than they once were.”[†] What happened in Hungary and Poland is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way that liberal constitutional system is functioning. Both Hungary and Poland became an illiberal and undemocratic system^{*}, which was the openly stated intention of PM Orbán,^{*} and also PM Beata Szydło (with Kaczyński, ruling from behind the scenes as he holds no official post), have described its actions as a blitz to install an illiberal state.^{*} Both the Hungarian and the Polish system represents an atypical form of hybrid regimes, because, as opposed to such approaches in Latin-America, the former Soviet republics or Africa, where the basis is a presidential constitution, in Poland and Hungary the formal parliamentary system remained in place with the decisive role of the Prime Minister. In Poland, the formally powerful head of the government leads behind the scenes as the head of the governing party, who has no other official state function besides being an MP of the Sejm.^{*}

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.^{*}

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

[†] 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.

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

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

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

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

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.

In this illiberal system, the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their power is strongly limited. Also, as in many illiberal regimes, fundamental rights are listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of independent judiciary, and Constitutional Court/Tribunal. To make it clear, competences of the constitutional courts originally very strong in the beginning of the transition can be weakened provided that they still can fulfil their function as checks and balances to the governmental power, or other control mechanisms exist.

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

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

The case of Poland and Hungary proves that democracy and liberalism do not necessarily go hand in hand. Besides liberal democratic (or democratic and rule of law-oriented, ‘rechtsstaatlich’) constitutions and political systems there exist non-liberal democratic ones (radical democracies without a bill of rights, such as most of the Commonwealth constitutions until very recently, or constitutions based on popular sovereignty, but little weight to the people’s interest in the day-to-day politics, such as the constitutions of Latin American countries), also liberal but non-democratic constitutions (such were the ones in France after 1815, or the constitutional system of the Austro-

Rise of Presidential Democracy, Harvard University Press, 2007.

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

Hungarian Monarchy), and finally neither liberal nor democratic socialist constitutions (of the former and current communist countries).*

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

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The described democratic backsliding in Hungary and Poland demonstrates that an institutional framework is a necessary but not sufficient element of a successful democratization. Behavioral elements, among them political and constitutional culture are as important as institutions. The other lesson of these case studies is, on the one hand, that the very definition of democracy is changing, and it is not necessarily liberal. On the other hand, the borders between democratic, authoritarian or dictatorial regimes are blurred, and there are a lot of different hybrid systems, such as the current Hungarian and Polish regimes.* Another important aspect of these developments that emerging democracies are not anymore influenced exclusively by the liberal democratic West, like in the Arab world Tunisia might also be a model.* There are economists claiming that the real question is not

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

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

¶ See R. Youngs, 'Exploring 'Non-Western' Democracy', *Journal of Democracy*, October 2015.

why are there less and less liberal democracies, but why liberal democracies still exist.* Others search for ‘post-liberalism’* 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 the 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 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 Trump presidency in the US.*.The division between the old and the new Member States, and the support of the far right parties has been strengthened even in the old Member States.*

During the fight over the rule of law with the Hungarian and Polish governments the EU institutions so far have proven incapable of enforcing compliance with core European values. After coming to the conclusion that the traditional mechanism of the infringement procedure does not work, and in the fear from the unanimity requirement for sanctioning according to Article 7(2), the Commission duplicated the preventive mechanism of Article 7(1) by introducing the Rule of Law mechanism. Due to political considerations, it was not used against Hungary at all, and in the case of Poland

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

<https://www.project-syndicate.org/commentary/europe-needs-bold-leaders-by-joschka-fischer-2016-08>

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

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

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

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

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

despite the very strongly worded Commission recommendations and their disregard by the Polish government nothing really happened, which considerably undermined not only the legitimacy of the Commission, but also that of the entire rule of oversight. The fear from Hungary's veto in the case of Poland indicates that the desired oversight for the effective use of Article 7 would require Treaty amendment. The broader question, which this paper cannot address, is, if the Union wants to prepare itself for the tensions between its own constitutional order and that of the East Central European Member States, and probably later also of some of the more established liberal democracies it should also deal with the mentioned democratic deficit of the EU as a precondition of any legitimate oversight. Unfortunately, the scenarios of European Commission's White Paper on the Future of Europe* published on 1 March do not aim at Treaty changes and do not seem to provide institutional guarantees against illiberal member states within the EU. We can only hope that the opportunity the opportunity raised by Viktor Orbán that the mainstream in Europe will follow precisely the illiberal course that Hungary has set forth* won't become reality in the future of Europe.

* White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025. European Commission COM (2017) 2025 of 1 March 2017. https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf

* See Viktor Orbán, Hungary and the Crisis of Europe: Unelected Elites versus People, National Review (26 January 2017).