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Rule of Law Backsliding in Eastern Europe: A comparative analysis between Hungary and Poland

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Introduction

With the following dissertation, the aim was to analyse the recent dispute over the alleged rule of law backsliding in the Central Eastern European states of Poland and Hungary. The relevance of this clash cannot be underestimated; suffice for example to think about the latest stalemate over the correlation with rule of law standards and the issuing of funds in the context of the Next Generation EU project. Fundamentally, these disputes highlight the level of disagreement existing between certain member states and European Institutions over what exactly is "*The Rule of Law"*, but also more in general, over some of the most fundamental values that should be at the bedrock of the state. This wide scope of disagreement, translating in a concrete gap between the Union and some its components, sparked a personal interest to delve deeper into the matter in order to reach some conclusions over its nature, and its significance as members of the European Community and Western Democracies.

This seemingly simple concept of "*Rule of Law"* is actually one of the oldest and most complicated legal notions that is central to the construction of the state; particularly hard to define, it finds many different interpretations only in the European Continent. Its evolution (which resulted in a more defined set of points and requirements only in the past two centuries) spans millennia, from the classical world to the most recent construction of International Organisations, for which it was a fundamental brick. Legal, historical and linguistic traditions all played a role in the great variety of interpretations describing the presence or lack of Rule of Law.

Therefore, in order to be able to analyse and reach some conclusions over the recent backsliding in the states of Hungary and Poland, the very first objective of this text is to identify and describe in the most accurate way possible the various school of thoughts and definitions of "*Rule of Law"*. Particular focus to be made over its presence in the EU, together with the different instruments created to defend it, fundamental component necessary to have a correct account and description of the events.

The second objective of the dissertation is to document the ongoing discussion, analysing its deeper historical roots and in which way it is relevant for other Union's members and their citizens. The dispute seems to reflect a profound disagreement not only on the purely legal level, but on the whole system of values driving the aims and objectives of society. For this reason analysing the different historical experiences and developments of the two countries is fundamental in order to reach an interpretation of the phenomenon.

In order to reach these premises, the dissertation will be structured in three main chapters. In the first, the concept of Rule of Law shall be explored since its very first, embryonic conception all the way to our present day, with particular focus on the legal requirements given in the most recent legal theory especially in the context of the European Union. Particular attention will be given to the different mechanisms developed in order to guarantee its presence and functioning; another fundamental requirement to analyse and assess the ongoing dispute between the EU and the Polish and Hungarian states.

In the second chapter, the very peculiar historical vicissitudes of the two countries will be analysed in order to understand the reasons behind the political and social discourse of today. For this purpose, particular attention will be put under the historical events of the second half of the last century, but also the process of joining into the different western international organisations, including the EU itself.

In the third chapter the events regarding the dispute over the Rule of Backsliding will be analysed, trying to describe them both at the domestic level but also looking into the response of the Union. This last point is particularly important, due to the fact that it ties the findings of the first chapter with the whole discourse. Generally speaking, it would seem that the Union's capabilities of dealing with the issue have not been very effective. The practical applications of the instruments created to safeguard the rule of law have seemingly been incapable of swaying the public opinion or the local governments in any given direction.

Finally, a comparative review of the events as they happened between the two countries will be carried on, in order to reach some overarching conclusion over the matter, trying to delineate its causes, and the factors that fostered it.

Chapter I

Rule of Law

1. Rule of Law from classical times to modernity

The first step necessary to analyse the recent political and legal developments in Eastern Europe concerning a backsliding of the rule of law, is to define and understand what "*The Rule of Law*" really is[1]. A good starting point could be researching for simple definitions of the concept. Such an example could be found for example in the Oxford Dictionary which defines "Rule of Law" as: "*the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws*"[2]. Another definition could be the one proposed by Geoffrey de Q.Walker who defines it as the mechanism by which "*the people (including, one should add, the government) should be ruled by the law and obey it; and that the law should be such that people will be able to be guided by it.*[3]"

However, relegating the concept to such simple definitions could prove to be insufficient in order to fully understand its implications, both in the legal and philosophical framework. If a general definition of The Rule of Law may refer to what was previously described, it is also true that in many legal systems there is a reference to certain values and ideas, such as liberty and respect for private rights[4], as a direct by-product of the rule of law. Whereas the core idea of rule of law is generally undisputed, the several

[1] Some thinkers draw a distinction between "*Rule of Law"* and "*Rule by Law"*, whereas the first concerns the state where law reigns as the supreme authority; the second instead refers to the use of law as instrument to political power, sometimes carrying a negative connotation. Waldron, Jeremy, (2020)"The Rule of Law*", The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.)*

[2] Kenneth F. Warren, (2019) "Has democratic governance and the rule of law been compromised by the continued growth of the administrative state?", *Journal of Chinese Governance, 4:1, 15-33,* DOI: 10.1080/23812346.2018.1541657

[3] de Q.Walker, Geoffrey, (1988)"The rule of law: foundation of constitutional democracy" , *Melbourne university press1988*

[4] See Kenneth F. Warren (2019)

conceptual and legal by-products that stem from it are more controversial. The point of contention that often arises is how correlated the rule of law is with certain values such as democracy, and whether or not we can affirm that we achieved a state of rule of law in any legal system if we are lacking some of these by-products. There are thinkers and commentators who believe the rule of law is merely a procedural and formal constraint, meaning that we could consider it to be achieved when we have primacy of the law in the system, while others instead attach other concepts to it.

As it often happens the simplified definition that it is possible to give to a concept, can be interpreted in such a way that goes beyond its simple meaning. In the case of the rule of law this is due to a fairly complex and long history of evolution of the idea, starting from the classical era all the way to our contemporary days. In order to understand these modern interpretations and how their concrete applications differ from legal system to legal system, a review of the concept from an historical perspective is in order, together with the study of its main contributors. This is particularly important given the fact that in the scope of this dissertation, it is not only the core concept that is contested to Poland and Hungary, but also some of its different, more controversial by-products.

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1.1 Rule of Law in Classical times: Socrates, Plato and Aristotle

Upon analysing and researching the historical development of the Rule of law, a number of important philosophers are taken into consideration as contributors, and are often instrumentally used by modern commentators to describe one particular aspect they are interested in. However two philosophers in particular seem to be extensively considered in academic literature as the original "*fathers*[5]" of the concept, laying down its foundations which would have later been developed by scholars and thinkers, both contemporary and ancient; these philosophers are Plato and Aristotle. According to Aristotle for example, the state had to be governed by good laws, and a requirement to have a functional state was to have citizens who abided to these laws[6]; this however is only the final, simplified conclusion of his reasoning.

[5] Tamanaha, B. (2004). "On the Rule of Law: History, Politics, Theory". *Cambridge: Cambridge University Press*. doi:10.1017/CBO9780511812378; pp.7
[6] Aristotle, "Politics", *translated by Benjamin Jowett, Batoche Books Kitchener 1999.* pp. 92

Aristotle was only the last and one of the most important among the classical thinkers that dealt with the concept of law, laws, and governance of the state. He lived in a period of difficulty for the Athenian democracy in which different tyrants started to bend the rules of the state in order to provide an advantage for themselves[7]. In this sense, the existence of laws constituted a safeguard against drifts towards authoritarianism. The law can only uphold when it is applicable in the same way to all citizens, and in this way, shielding society from a potential tyranny.

In order to understand the development of the concept in the minds of these classical philosophers, it is useful to take a look into this historical background and the vicissitudes of those who lived in it. Plato's master Socrates[8] was killed in the democratic state of Athens under the accusation of corrupting the youth and trying to introduce new, foreign divinities in the Greek pantheon[9]. What this accusation actually masked though was the desire to get rid of the philosopher, who used to dialogue with citizens in Athens, often debating the efficacy and the righteousness of the democratic state. Socrates found these accusations preposterous and contested them, trying to defend himself in front of a public jury of Athenian citizens, only to be then found guilty and condemned to death[10]. This historical event which represents both the apex and the end of the life of Socrates, was then quoted and used by Plato to draft two of his most relevant texts, *Apology* and *Crito*[11], which delve into the psychology and beliefs of his master.

The main source to unravel the ideas of the philosopher regarding the state of law and the obedience towards it can be found in the text describing his dialogue with his friend

[7] "By the time of Plato and Aristotle, Athens had already declined from its height, having lost the war with neighbouring Sparta at the close of the fifth century BC. Its citizenry were thought to have degenerated, lacking in the self-discipline and orientation to the polis that had made Athenian democracy so superior.";" Under these circumstances, Plato and Aristotle were acutely concerned about the potential for tyranny in a populist democracy; accordingly, they emphasized that the law represented an enduring and unchanging order." See. Tamanaha B.(2004) pp.8

[8] Socrates is one of the most famous classical philosophers, master and teacher of Plato. He is mainly known for developing his own philosophical method which started by an admission of lack of knowledge, and tried to reach the truth by asking several questions that lead to other questions. This method is known as the *Socratic Method*. Encyclopaedia Britannica, "Socrates"

[9] See Tamanaha B.(2004)

[10] *Ibidem.*

[11] These two texts, written by Plato, provide us insight in Socratic thought and values. *Apology* is a rendition of the speech that Socrates gave to defend himself from the public accusation; *Crito* instead is an imaginary dialogue between Socrates and his oldest friend Crito. Crito tries to persuade Socrates into fleeing the city, while the philosopher explains why that is not a desirable outcome. West, Thomas G. ; Starry West, Grace, (1998) "Four Texts on Socrates: Plato's Euthyphro, Apology, and Crito, and Aristophanes' Clouds Plato", *Cornell University Press, 1998*

Crito[12]. In this text he discusses at length about the nature of laws, what is right and just, and how this applied to the situation in which he found himself while imprisoned, waiting for the fulfilment of his judgement. An interesting read of the whole situation is the one offered by Gary Young in his paper about Socrates and Obedience[13], in which he explores and comments on the apparent contradiction contained within the Socratic thought regarding laws and obedience to the state. Between *Crito* and *Apology* Socrates claims that every citizen should abide to any command of the city of Athens, but at the same time as we know for certain, he refused to relinquish his study and teaching of Philosophy, choosing to die instead of obeying the commands of his government. For this apparent contradiction scholarly commentators divide in those who try to justify the reasons of Socrates, and those who instead simply accept it for how it is. It is precisely from this episode that there is an insight regarding the adherence to laws in Socratic thought. The law was considered as such because it was *dikaion*[14] or in other words right and fair. It was not fair, in his opinion, to respond to unfairness with unfairness, and laws that were right had to be upheld and respected, even when they spelled disaster for a potentially innocent person as he considered himself. The reason is that the only way for him to be saved was to do so acting within the framework and borders prescribed by Athenian law. By escaping, he would have defied the jury and the laws, and in doing so he would have paved the way for a series of individuals disrespecting and challenging the rule of law. Inevitably, on the long term, what this would have meant would be the steering of the state towards a lawless society, which in turn would have meant the destruction of the city. For this reason, even though the process was unfair, Socrates was forced by his principles to accept it, because part of his philosophical thought revolved around doing no harm[15], which would have surely followed if he did not accept his fate.

[12] It is important to remember that Socrates never wrote any text. Part of his philosophy included the belief of discussing without leaving written traces of it, and therefore all sources regarding the philosopher's thought are second hand sources. It is therefore quite hard to know how much actual Socratic thought is possible to find in *Crito,* or whether it is just a projection of Platonic thought on his master. Lacey A.R. (1971) "Our Knowledge of Socrates". *In: Vlastos G. (eds) The Philosophy of SOCRATES. Modern Studies in Philosophy. Palgrave Macmillan, London*. https://doi.org/10.1007/978-1-349-86199-6_2

[13] Young, Gary. (1974) "Socrates and Obedience." *Phronesis, vol. 19, no. 1, 1974, pp. 1–29. JSTOR*, www.jstor.org/stable/4181923.

14 *Dikaion* is a term that was used in ancient Greece to describe the law, however this is not sufficient to fully understand its ancient meaning. If on the one hand Dikaion describes the law, on the other the word can also be translated into *lawful, just, right, balanced.* In other words in ancient Greece there was an implicit assumption that law could be considered as such only if it was indeed fair, balanced and righteous. A law that did not possess these characteristics was to be considered imperfect. δίκαιος in Liddell & Scott (1940) *A Greek–English Lexicon, Oxford: Clarendon Press;* also see Young, Gary (1974)

[15] *"Because harming a man in any way is no different from doing an injustice";" One must neither repay an injustice nor cause harm to any man, no matter what one suffers because of him"*; Plato, "Crito" *-49c*

In order for him to be found not guilty, what he had to do was not swaying his accusers, but a public jury of other Athenian citizens instead, and to defy their judgement was to be considered unfair[16].

What we can find here is an ultimate statement of obedience to the rule of law in which there is also an implicit statement on tyranny, which would have later been developed by his students as well. Fleeing away from the city would have meant doing more harm than good, responding to unfairness with unfairness, and this harm would have been directed at those the least deserving: the Athenian citizens. Socrates cannot disobey the laws of the city, even when they are applied against him, because in disobeying the law, he would have destroyed Athens itself. Athens is therefore seen as a set of laws to which the citizens must abide, Socrates escaping and infringing the law would have meant doing harm, which infringed the Socratic principle of not doing harm, even when harm is done to oneself.

According to this reading of the text, the state of law was seen by Socrates above everything else. In order to have a functioning society, it was necessary to have laws, and the defiance of these laws meant the crumbling of society itself. If Socrates was to disrespect the law contesting and defying its application, how could he have prevented other people doing the same in the future, even in the case in which they were actually guilty?

There are also other scholars who decided to read the situation in a different way, some accuse Socrates of holding contradictory views which cannot be reconciled[17], but the development of the situation is not only relevant in the scope of the real thought of the philosopher. Whatever may be the reasons that compelled Socrates to accept his fate and not seek escape in the face of wrongful accusations, the events surely held a significant importance for the thought of his student Plato[18] as well. Following the death of his

[16] In this sense the incapability on his behalf of coming out of the process clean was more to be considered his own failure, than the failure of the legal system. See Young, G (1974)

[17] Woozley A.D. (1971) "Socrates on Disobeying the Law". *In: Vlastos G. (eds) The Philosophy of SOCRATES. Modern Studies in Philosophy. Palgrave Macmillan, London.* https://doi.org/10.1007/978-1-349-86199-6_13

[18] Plato, born in Athenian aristocracy, started to join the Socratic circle around his twenties. The event of the process to his master lead him to write some his most famous dialogues, only to focus later in the development of his own philosophy. In the last stage of his life he managed a philosophical academy in the countryside near Athens, teaching and researching politics among other things. Among his students there was also Aristotle, with whom he worked for about twenty years. Cooper, John M, (1997) "Plato: Complete Works"; *Hackett publishing 1997,*pp. vii

mentor, he concluded that the democratic system was to be considered unjust and corrupted. What followed was the development of his own political ideas leading to a description of the faults of the systems of the time and a suggestion for an ideal state: the Platonic Republic.

In *The Republic*[19] Plato gives us further insight in the concept of laws and the Rule of Law. In his opinion, four different forms of government were possible, and what he presents is a critique of the different reasons why they are to be deemed inefficient and unfair. The most ideal of these four forms of government would have been a *timocracy*: a form of military oligarchy based on the pursuit of honour; an example of this form of state was Sparta. Such as a society was considered to be the best because its citizens would have been selectively rewarded on the basis of how "honourable" their actions were, the natural evolution would have therefore been the one in which the best people would have climbed up the ranks becoming rulers and administrators. However as time passes, the citizens of a *timocracy* will inevitably grow richer and richer starting to disregard rules, making decisions and laws aimed at fulfilling their own personal interest and those of their own group instead of those of the society at large. Inevitably, the *timocracy* will transform in a rule of the rich, or an *oligarchy*, where the most prominent citizens will seek wealth and not honour. An *oligarchy* where the rich detain power will inevitably cause resentment and hate in the hearts of the most poor, and will be ungovernable due to its limitations: its rulers in love with gold will be unable to spend resources for the public good and in doing so the *oligarchy* will be incapable of waging war and defend itself. The natural end of the *oligarchy* is born out of the dissatisfaction of the people, who will overthrow it giving life to the rule of the poor, the people, or in other words a *democracy*. The *democracy* will inevitably start to become corrupt since the people will seek more and more freedom, and in this pursuit they will forget their duties towards the state, starting to back those who will guarantee them the most advantages. This inevitably will lead to the fourth and worst state of government, a *tyranny*. The *Tyrant*[20], who deceived and flattered groups of citizens in order to gain power, is the representation of the worse possible state because he is not governed by reason but by his

[19] *Republic* is a text in which Plato touched several subjects regarding the meaning of justice, analysing different types of government and proposing an ideal state. (2010) "Plato and Aristotle on Tyranny and the Rule of Law", *CONSTITUTIONAL RIGHTS FOUNDATION, Bill of Rights in Action, FALL 2010 (Volume 26, No. 1)*

[20] In The Republic, the *Tyrant* is often given animal epithets in order to match and bring to life the idea of the philosopher regarding this institution. Often compared to a wolf, due to its nature of preying upon people, lying and deceiving. Plato "The Republic", 555-556

instincts, and he is therefore a slave[21], almost an animal, who holding power, condemns the whole society to slavery.

In the ideal state for Plato, the Republic, the different drives of its different citizens are put to use to the service of the state[22]. He divides therefore the ideal city into three classes: the people who are driven by personal appetites and search of wealth, who will make optimal merchants, craftsmen and farmers; the warriors and police, who are driven by the pursuit of honour and glory like in the *timocracy*; and finally rulers, who are driven by the pursuit of wisdom. The ideal ruler setting up laws is therefore found in the figure of the philosopher[23]. The main problem that arises from this is the idealised, compartmentalised view of society that Plato had, on the one hand it could be considered unfair and unrighteous to condemn citizens to a predefined role, and on the other the efficacy of this practice could also be questioned in a more practical sense, since it is so idealistic.

If the ideal republic can be interpreted in a somewhat controversial way, it is also true that the Platonic contribution to the western political heritage doesn't end here. He explored at length also the concept of laws and application of the law[24]. Perhaps thanks to the events surrounding the death of his master Socrates, he developed a natural distrust for the judicial and the legal system, proposing a series of safeguards, anticipating the modern ideas of checks and balances so important in the framework of the rule of law[25]. In his opinion, derived by the word itself for law in ancient Greece *dikaion*, a law necessarily has to correspond with what is right. What is not right cannot be law since it would be a contradiction, and since the human society is constantly in motion and ever-changing,

[21] Considered as a slave because incapable of acting outside of his instincts. The sprouting of the tyrant is directly tied to the degeneration of the citizens of the democracy, who will become drunk with freedom and will end up losing it by asking for more. "*tyranny is probably established out of no other regime than democracy, I suppose—the greatest and most savage slavery out of the extreme of freedom."* Plato "The Republic", 564a

[22] (2010) "Plato and Aristotle on Tyranny and the Rule of Law", *CONSTITUTIONAL RIGHTS FOUNDATION, Bill of Rights in Action, FALL 2010 (Volume 26, No. 1)*

[23] When reading these words and this interpretation of the world, it is no surprise that Plato was often quoted and even used as a source of inspiration by some of the most famous dictatorships of the last century. National Socialism directly mentioned Plato as a source of its inspirations, and the segmentation of society into all these different classes according to innate moral values and capabilities seemed almost to justify modern interpretations of social Darwinism and racism which sadly exploded in the tragedy of the holocaust. Kim, Alan, (2017) "An antique echo: Plato and the Nazis", in *Brill's Companion to the Classics, Fascist Italy and Nazi Germany, pp. 205-237*

[24] Morrow, Glenn R. (1940), "Plato and the Rule of Law." *Proceedings and Addresses of the American Philosophical Association*, vol. 14, 1940, pp. 105–126. *JSTOR*, www.jstor.org/stable/3129168. Accessed 14 Oct. 2020.

[25] *Ibidem*

what was right in one moment might not be in the next. Codifying the law in a set of monolithic statements paves the way to the wrong interpretation and the exploitation of the code itself from Tyrants[26]. The law should be set by the ruler-philosophers and be applied by the judges fluidly.

Regarding the application of the law itself and the role of judges, Plato gives us insight on the matter[27], proposing solutions that would have mimicked modern solutions of review of the judicial powers. The system that existed in the ancient world was a system where the powers of the administrators and the judges were joined; a judge was often coming from the aristocracy and had therefore close ties with the government of the city. If a citizen felt he was being wronged by the judicial class, he could have advanced a request of re-examination of his case, this time by a public jury of citizens who would have determined his fault or not[28]. Even though in his ideal Republic the class of citizens entrusted with the administration of the laws was still the same of the rulers, he proposed a different solution. This is most probably born out of his personal experience, the trial of Socrates was re-examined in front of citizens, but he was still (according to Plato) unjustly found guilty, it was therefore obvious to him that the system was imperfect and needed an overhaul. What he proposed was creating a body of judges and examiners able to scrutiny the judges themselves. In this sense, the solution proposed is one of review of the judicial bodies carried on by a body of judges entirely independent of the political system itself. This concept of review could be put in parallel with the modern system of independent review of constitutionality which is so important for the concept of Rule of Law. Much of what is contested in the modern scenario for example for the case of Poland, has to do with the alleged loss of independence of the constitutional court, with by the government in power, therefore preventing an accurate and fair review of legislation potentially exposing the country towards authoritarian drifts, a problem recognised by Plato himself already 2000 years ago.

[26] This critique in particular is one of those that the most often are made against the rule of law(if we intend it as a series of written laws as some of its formal constraints). The idea is not only found in this philosopher but in many ways it would have also been later developed by Hobbes, who disagreed thought the law was always to be interpreted at least by some human being, finding no value in writing it permanently. See Tamanaha B. (2004) pp.48

[27] See Morrow, Glenn R. (1940)

[28] Another option was the one of trial by fate, a vestige of the past to which Plato pays little homage and attention. *ibidem*

Therefore in the ideal system what sets society in motion and safeguards its existence is the law itself. In this sense, we can gain insight on Plato's ideas of law, and the importance of the supremacy of the law. In his opinion, no state can exist where the law is subject to any authority higher than itself[29]. The situation in which law is subordinated to the will of any person whose pursuit is any different than wisdom and righteousness, is a state destined to fail which will revert to tyranny and start again the cycle of the inefficient forms of government. The core, undisputed interpretation and meaning of the rule of law as intended in modern times is already present in this classical antique times.

Despite all this, and the insight that Plato is able to introduce in his *Republic* and *Laws*, in modern terms there are still a series of considerations and contradictions that betray a rudimentary view of the matter. First of all, a set of laws can be usually considered as such only if it is clearly codified and written, Plato however, refused this idea in fear of exploitation of the system and the risk of laws being applied in the wrong way for being obsolete. Together with this, Plato's ideal republic is also subordinated to the relegation of people to specific social classes that are impossible to interchange[30].

Whatever be the case, what is the most relevant in the scope of this text is the birth of the concept of law and rule of law as necessary to be the supreme authority in any given political organisation. A state that is not subordinate to rules that curtail the drift of authority in the hands of an individual or set of individuals is a state destined to see the arrival of tyranny, and with time, the crumbling of the state itself.

Having now explored the thought of Socrates and Plato and how the two philosophers influenced each other, also through their life experiences, we can finally get to Aristotle. Just like Plato was Socrates' pupil and his thought was heavily influenced by the doctrine and personal vicissitudes of his master, Aristotle was philosophically influenced by Plato, and his philosophy was aimed at correcting, developing and commenting on the ideas of his teacher. Whereas Plato was an idealist and tried to picture the most ideal state of

[29] "*For that state in which the law is subject and has no authority, I perceive to be on the highway to ruin; but I see that the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the Gods can confer.*" Plato, "Laws", *translated by Benjamin Jowett (1871), published in Pantianos classics (2016), pp.87*

[30] It is also interesting to denote how this idea of sectioning of society, can be put in parallel with a general rudimentary Indo-European tradition of segmentation of society, as seen also in societies for example in the Indian continent and its caste system. The division of the population among warrior kings, priests and commoners was potentially something carried over from a more distant past. Fortson, Benjamin W. , (2004) "Indo-European language and culture: an introduction", *Blackwell publishing 2004*

society, represented by the rigid and idealised Republic, he did not consider the practicalities of the matter. In this sense, the objective of Aristotle was to correct these flaws and try to apply the ideas of Plato in a more realistic framework[31]. First of all, Plato committed the error of not considering the conflicts that would arise by compartmentalising society in such a rigid way, relegating many of its citizens to nothing more than grunts and workforce. Also unlike Plato, Aristotle recognised the need for a set of written laws that governed the internal processes of the state, or in other words its *constitution*[32]. The constitutions were different and of different forms, depending on whose rights they were created to protect. The rightful constitutions or *true constitutions* were the ones that safeguarded the many, contrary to the *false constitutions* which safeguarded only the few[33]. Different forms of government were recognised, those with true constitutions: *Polities*, *Aristocracies* and *Monarchies;* compared to those governed by defective constitutions: *Democracies, Oligarchies* and *Tyrannies*. Aristotle agreed with Plato about the dangers and the potential drifts towards unfair and inefficient practices when the society was organised in an *oligarchy*, *democracy* or *tyranny*. However, the great difference here is that Aristotle subordinated these dangers to the backsliding of the Rule of Law[34].

The nation that fostered tyrants was the one where the law was subject to forms of authority higher than itself. In this state the *demagogues*[35], appealing to the raw emotions of the population, would have created nations where rules were subordinated to the desires of a human being. In Aristotelian philosophy the human being itself was considered to be imperfect, the result of laws being subordinated to the human being was such that it would have created an imperfect and unfair state. Where the *demagogue* or *tyrant* makes laws, the authority of the system falls under the imperfect individual, whereas the most favourable situation is where the ruler is merely the person who acts within the framework of laws and behaves according to the Rule of Law. Rules are

[31] (2010) "Plato and Aristotle on Tyranny and the Rule of Law", *CONSTITUTIONAL RIGHTS FOUNDATION, Bill of Rights in Action, FALL 2010 (Volume 26, No. 1)*

[32] "*The government is everywhere sovereign in the state, and the constitution is in fact the government*". Aristotle "politics", pp. 59

[33] "*Similarly, one citizen differs from another, but the salvation of the community is the common business of them all. The community is the constitution; the virtue of the citizen must therefore be relative to the constitution of which he is a member*". Aristotle, "Politics", pp. 55

[34] Jill, Frank, (2007) "Aristotle on constitutionalism and the Rule of Law", *Theoretical Inquiries in Law 8.1 (2007)*

[35]" *For in Democracies which are subject to the law the best citizens hold the first place, and there are no demagogues; but where the laws are not supreme, there demagogues spring up*". Aristotle, "politics", pp. 87

boundaries and order, and order is good. No order can be achieved in a society where law does not reign supreme and is subject to the will of the single individual and set of individuals.

What Aristotle does therefore in his *Politics*, when exploring and describing the concept of law, is trying to correct what was introduced by Plato, trying to apply it in a more realistic fashion, which takes into consideration the flaws of human beings. In this sense, already in the context of classical antiquity, we can find the definition of "Rule of Law" as a necessary requirement for any society which can be deemed as fair and right. Without it there is always a lingering risk of forms of tyranny taking hold, represented by the tyrant itself in an *oligarchy*, or a demagogue in a *democracy*. The best possible solution is to try and create a society that joins the characteristics of the two forms of organisation of the state placing trust in both the people and aristocracy (intended as government), where the most supreme source of authority is a set of rules and laws guaranteeing the functioning of it.

The ideas and considerations of Plato and Aristotle in regards to the rule of law are often considered nowadays as the most basic foundation of the concept, not only for the reason that they were developed in ancient Greece where much of the western concepts of laws and organisation of the state were born, but also because it is precisely on these considerations and ideas that some of the Roman thought and law was built upon[36]. As the Roman Republic grew, so became more refined and complex its system of laws and it is thanks to it that much of the ideas of Plato, and in particular of Aristotle were developed. For example, in his treaty on the laws, Cicero agreed and reinforced much of the framework that was developed by the Greek philosopher. For him as well, the only possible functioning state was the one that placed the highest, utmost authority in the hands of laws. The ruler who did not behave according to them and cheated the legal system was to be considered among the most repellent and foul creatures imaginable[37].

Like Aristotle, Cicero identified the rule of law as being the rule of reason, whereas the rule of the man was the rule of appetite, and therefore imperfect and undesirable. Laws

[36] See Tamanaha B. (2004)

[37] "*For when this king deviates into unjust rule, at once he becomes a tyrant, and an animal more hideous, more destructive, and more odious, in the eyes of gods and men cannot be conceived: surpassing, although in the human form, the most monstrous wild beasts in cruelty. How can he be rightly called a man, who observes no fellowship of humanity with his fellow citizens, no communion of law with the whole race of man?."* Cicero, "De Re Publica", *Book II, XXVI.*

and what is right were for him to be considered synonyms, just like the concept of *dikaion* in ancient Greece. A Law that was unjust could not be considered a law because laws had to be just by definition; the source of what had to be considered just was in the opinion of Cicero the highest source of knowledge, nature itself[38]. However, just like for its Greek counterparts, Cicero attributed a supreme value to Law as a set of rules in its own right. He claimed that obeying to an unfair rule was to be considered preferable to disobeying, because the order brought by law was to be considered as the award in its own right. A stark example of how much relevance the concept held also in the Roman world and its legal system, upon which the civil law system[39] is based.

Both the Roman and the Greek ancient world, which provided the concepts and fundamental institutions upon which our modern western democracies are based, took a fundamental interest in the concept of law and the Rule of Law. The reason why these philosophers are often quoted as being the original contributor to the concept is apparent after having analysed the whole background. They already recognised the need for some form of higher authority to prevent drifts of authoritarianism and unfairness from both the executive and legislative power. Whereas Plato tended to fall into idealism, Aristotle tried instead to keep the whole reasoning more grounded, motivation for which much of the ancient world, like for example Cicero, tended to only expand and further justify the good behind his reasoning instead of contradicting him or presenting formal alternatives.

Alas, the development and application of Rule of Law was not to last forever, as the Roman Empire swallowed the rest Europe and the Mediterranean basin, its political system would have changed with it, placing the law gradually more and more in the hands of rulers, setting up the stage for a backsliding during the Middle Ages, only to be picked up once again in more modern times. The main sources and scholar tradition helping us to codify the rule of law come mainly from this classical antiquity and the republican roman

[38] Cicero believed in the concept of natural law, meaning that the rightful law was a manifestation of the divine, natural world and human reason. As such the research of the right law would have produced rules that were ethically universal. Alonso, Fernando H. Llano. "Cicero and Natural Law." *ARSP: Archiv Für Rechts- Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, vol. 98, no. 2, 2012, pp. 157–168. *JSTOR*, www.jstor.org/stable/24769084.

[39] The civil law system, contra posed to the common law system is one of the two dominant legal systems in the western world. Whereas in the common law system one of the most important sources is represented by legal precedents the main source in civil law is the written body of laws. Its foundation can be found in classical roman right which was carried over through the middle ages only to be then rediscovered and applied more broadly between the 17th and 18th century. Mousourakis G. (2015) "Codification and the Rise of Modern Civil Law. In: Roman Law and the Origins of the Civil Law Tradition." *Springer, Cham.* https://doi.org/10.1007/978-3-319-12268-7_8

period. Together with it also more recent times when the culture of the enlightenment rediscovered the ancient tradition, projecting the concept to modernity and our times, where it was further developed. The reason why these are the main periods in which the concept saw its birth and development is that in the period in-between it saw instead a gradual but inevitable decline in favour of other doctrines of theocratic legal order and organisation of the state[40].

It is a matter of fact that with the death of the Roman Republic and the birth of the Empire, much of the legal system that was painstakingly crafted to prevent drifts towards authoritarianism came less. With the civil war and the acquisition of life dictatorship from Julius Caesar[41] followed by his murder, another civil war followed which ended with the victory of Augustus, who subsequently introduced the *Principality*[42]. Due to this, the political system was reformed in such a way that enticed a complete different conception of law. Now the prince was not to be considered equal as the other citizens: he held primacy over his colleagues and fellow Romans alike, paving the way to the introduction of the theocratic kingdoms of the Middle Ages, where political, judicial and executive power was in the hands of the king and his helpers, while the religious and moral power was in the hands of the church, firmly centred around Popes, bishops and priests[43].

An example of this change of pace could be found in the creation of the Justinian Code[44] in the period that corresponds to the start of the Middle Ages. Redacted by the emperor it was aimed at creating a basis for legal processes and decisions within the empire. In this set of laws was included a provision called *Lex Regia*[45] which stated the primacy of the

[40] See Tamanaha B. (2004)

[41] Born in 100BC, after his successful military campaign in Gaul and a civil war fought against Pompey and the senate, Caesar would have been appointed *Dictator* for life in 44BC, trying to carry on an ambitious program of reforms. His subsequent assassination would have later brought another civil war that saw his legal heir Octavian Augustus taking power in 27BC. Billows, Richard A. (2009) "Julius Caesar: the colossus of Rome", *Routledge 2009*

[42] The meaning of this expression takes its origin from the Latin locution "*primus inter pares"* or "first among equals". This reflected the newly found role of Augustus as the *Prince* or "*Princeps"* of the senate, stating the primacy of the man over the government. Jellonek, Szymon. "Capricorn and the Star - the Astrological Symbols of Augustus." *Augustus: From Republic to Empire*, edited by Grażyna Bąkowska-Czerner and Jarosław Bodzek, Archaeopress, Oxford, 2017, pp. 74–82. *JSTOR*, www.jstor.org/stable/j.ctvndv6r0.10.

[43] See Tamahana B. (2004)

[44] Or *"Codex Iustinanius"* was redacted by the emperor iustinian in 521 in the byzantine empire. The aim was to correct and organise the many laws and constitutions accumulated until then in order to provide a written basis for law. Ladner, Gerhart B. "Justinian's Theory of Law and the Renewal Ideology of the 'Leges Barbarorum.'" *Proceedings of the American Philosophical Society*, vol. 119, no. 3, 1975, pp. 191–200. *JSTOR*, www.jstor.org/stable/986669.

[45] See Tamahana B. (2004)

Prince's will as source of law, which shows how much the sets of values and sources of law had changed from classical antiquity. The magistrates and law makers did not have any more primacy over the judicial system and the authority passed into the hands of single individuals where different layers of power were centred.

With the expansion of the Germanic people a different system started to take hold. The absolute law was identified in the will of the King, who was such because of divine will and decree, it was expected that only the King could deliver judgement over legal matters. Of course the practicalities of the matter made it so that it was impossible for him to give judgement on all of his land, therefore the administration of the law consisted in different magistrates and lords who could pass judgement in different regions, with the caveat of doing so under the authorisation of the king. In such way, judges were merely applying the law of the king under his name where it was not possible for him to be present.

Even though the legal system during the Middle Ages represents a departure from the concept of Rule of Law, we can still find some events and examples where the extemporary power of Kings was curtailed. Such an example can be for example the institution of the Magna Carta in England during the 1200s[46]. Thanks to this document, a number of absolutist measures came less, for example the king was not allowed anymore to imprison or process his barons and nobles without a trial[47].

However, in order to find thinkers who significantly contributed to the concept of rule of law, it is necessary to go much forward in time. As the economic and political system developed, together with kingdoms also rich duchies and republics started to take life. It was within the borders of these republics that the Renaissance took place, fostering renewed fascination with the ancient world and its more democratic, human right oriented political institutions. As the centuries progressed also came the birth of new social classes. In the Middle Ages, the political and legal system was a reflection of the societal pyramid of power, where rulers and clergy detained all legal means contra posed to the

[46] The Magna Carta was a document signed in 1215 between King John and a group of barons, curtailing the King's authority on several feudal and ecclesiastic juridical matters. Painter, Sidney. "Magna Carta." *The American Historical Review*, vol. 53, no. 1, 1947, pp. 42–49. *JSTOR*, www.jstor.org/stable/1843678.

[47] The significance of the Magna Carta is often disputed, two groups can be recognised, those who consider it a significant change of pace from the older system, and those who instead consider it to be over estimated. However everybody considers it at least somewhat relevant, for example, the principle of impossibility to imprison without due process is quoted in the constitution of the United States. See Tamahana b 2004.

people represented often by poor peasants. As time increased however and trade sprouted together with banks, investments and arts, a new class had its birth: the middle class (or *bourgeois*[48]). With time merchants and *bourgeois* would have gained more and more significance and power, sometimes acquiring more wealth and by reflection, cultural means, compared to nobles and kings. It is precisely within this framework that the figure of the philosophers of the 1600s and 1700s worked, revisiting and breathing more life on the debate of rule of law and rule by law.

1.2 Rule of Law during the enlightenment: Hobbes, Locke, Montesquieu

Compared to the classical thinkers like Plato and Aristotle, the reasoning behind the exploration of law and rule of law was slightly different during this time frame. If the ancient philosophers started from questions of virtue, honour and the different organisations of the state, the new ones asked themselves more about the concept of liberty[49], and how it tied into the different social structure of the time, perhaps a heritage of the rigid classism of the middle ages. The birth of a middle class closing the gap between nobility and peasants was quite often the philosophical framework in which many of these thinkers wrote, discussing at length the nature of society and preservation of said liberty, perhaps precisely because freedom was until then curtailed by the existence of institutions such as the Crown and the Clergy. In this view, the work and exploration of the concepts regarding rule of law can be seen as the desire to obtain and maintain this liberty[50].

The first of the philosophers to be analysed is Hobbes, who is a controversial figure in the framework of the development of the Rule of law, since he proposed a fairly unique view of the world which was quite counterintuitive, and sometimes even critical, of the way we tend to look at the concept with modern eyes. Much of the reason behind this is that he challenged the assumption that a state of law was to be considered achieved only if everyone was treated equally in the eyes of law. Just like Plato, Hobbes held the idea that

[48] "Burgeois" is a word first developed during the middle ages in France, referring to the people inhabiting the city, or *Burg*. These inhabitants were often craftsmen, merchants and so on; as the time progressed they would acquired more and more wealth and relevance within society, constituting the so called "middle class" between peasants and nobility. *Merriam-webster dictionary*
[49] See Tamahana B.(2004)
[50] See Waldron, Jeremy (2016)

the law could not be a set of rules that were written and blindly applied; they had to be embodied by somebody: the *sovereign*[51]. Constraining the sovereign to a set of laws was to be deemed equal as limiting the application of law itself. *The sovereign* had to possess coercive powers and apply them in an asymmetric way upon the rest of the population[52]; without this absolute authority, the structure of the state would have crumbled, together with its properties and freedoms. The philosopher tried therefore to justify and present the ideal state as the one where there is a clear distinction between authority and citizen, or in other words and absolute monarchy.

For this view of the state of law, Hobbes is sometimes considered to be incompatible with constitutionalism and our modern understanding of rule of law: the social contract he proposed was radically different and seemed to mimic the same criticism gave thousands of years before by Plato regarding the right to apply written law in an ever changing world. The natural continuation of Hobbes' arguments was such that he inevitably refused and contested the potential existence of separation of powers. If the law has to be centred in single individuals and it is not desirable to constrain them then no system of checks and balances can exist[53], those holding power will never be put under scrutiny from some other form of authority other than themselves. The commentators on Hobbes divide themselves here because some actually claim that the philosopher was not proposing an unconditional defeat in front of any form of authority for a matter of principle. What he was actually suggesting was that these higher structures keeping in check the people holding government were not necessary since the arrangement of the state of law where only criminals are punished through an absolute authority was simply the most natural and convenient[54]. This is why understanding what *freedom* actually meant in the mind of the philosopher is paramount.

[51] Intended by Hobbes both as the single King, but also potentially as a restricted group of people controlling the state. See Hampton, J (1994)

[52] "*where there is no coercive power erected, that is, where there is no Commonwealth, there is no propriety, all men having right to all things: therefore where there is no Commonwealth, there nothing is unjust. So that the nature of justice consisteth in keeping of valid covenants, but the validity of covenants begins not but with the constitution of a civil power sufficient to compel men to keep them: and then it is also that propriety begins."*Hobbes (1651), "Leviathan", Ch. 15

[53] Vinx, Lars (2012). "Hobbes on civic liberty and the rule of law". In D. Dyzenhaus & T. Poole (Eds.), *Hobbes and the Law* (pp. 145-164). *Cambridge: Cambridge University Press.* doi:10.1017/CBO9781139137034.008

[54] *Ibidem*

In his interpretation, freedom meant being free from obligation or constraint of movement[55], this extended to every object but also to any man and the types of activities he was carrying out. The free men in Hobbes' thought is the man who is not in shackles, intended in their physical sense (and therefore is both free to move and carry on his activities in the form of work), and the man who is not obliged to do something (a decision is always given to him). The lack of freedom meant imprisonment or restriction of movement and it was therefore not possible for a sovereign to realistically threaten every person of imprisonment and curtail their freedom, since this would mean dire inefficiencies in the system which would have also ensured revolts. The natural conclusion of this argument is that the state in which the sovereign targets only criminals with the complacency of the people accepting his higher authority on the matter is the most efficient one, and for this reason nature will reward the state abiding to these concepts. When the government acts in such a way that curtails the personal freedoms of the individual for no reason, the pact between the sovereign, government and people comes less, which will inevitably make everything revert to a more natural state. The nature itself of law is such that it will not be sufficient to keep the peace in the political entity. According to Hobbes, laws will always be impossible to be interpreted beyond shadow of doubt, and the desire to apply it more favourably towards somebody will inevitably generate conflict, which will defeat the purpose itself of the law[56].

It is therefore now possible to see why Hobbes' arguments are considered to be so controversial when dealing with rule of law. We can find distrust in the law intended as instrument to resolve societal conflicts, but also in the idea of separation of powers, preferring to place all the authority into single human entities. However what is clear in the mind of the philosopher is the recurrent thought about the society of rules and authority being the most naturally efficient and therefore convenient, his ideas would have later been commented by Locke and Montesquieu, who focused greatly on the concept of liberty through rule of law and separation of powers.

[55] *Ibidem*

[56] With the purpose of law meaning the instrument by which conflicts within society are addressed and prevented. Hampton, Jean. "Democracy and The Rule of Law." Nomos, vol. 36, 1994, pp. 13–44. JSTOR, www.jstor.org/stable/24219503.

John Locke, father of modern *liberalism*[57], explored the ideas of law and exercise of power at length in his treaties[58]. The importance of law as cornerstone of the state was stressed (on pact that laws were universal and known by all). Laws and constitutions were found to be the foundation itself of the state[59], if created and written by free individuals. The individual is free when he is able to dispose of his wealth as he prefers, and his freedom does not overstep the one of other individuals. The state to which it was necessary to aim was a "*state of nature*"[60], in which no other man may arbitrarily constrain the other or make attempts at his property. The government was seen as having a paradoxical type of relationship with the state of nature. Since the state of nature takes into account all the different possible views of individuals, and limits itself to resolve the conflicts that arise between them, there can be no real right or wrong, no real judgement. In this sense, the only free form of government can be the one created and instituted by free men, who seek to enlarge this freedom, since they will be the only ones protecting this particular interest.

The rationale that was behind the existence of law and its importance in society was different when put in comparison with Hobbes. According to Locke the natural state of mankind was radically more benign. Naturally, men will tend to pursue their activities for their good and negative intervention is represented either by other individuals seeking to limit their liberties or governments enacting laws curtailing them. There is here a formal requirement and distinction between *good laws* and *bad laws*. Good laws are clearly promulgated laws applied by judges while bad laws instead are born out of the arbitrary will of the sovereign who figures them on the way[61]. As it is peculiar for the libertarian thought, much of the effort is aimed at shielding the individual from the desires and unpredictability of other individuals, laws making no exceptions.

In this sense, the ideas of Locke about the nature of humanity and the state can be considered a step forward towards the concept of rule of law that we have today, but they

[57] With liberalism we define a "*bourgeois"* current of thought, representing their long struggle against the authority of the nobles curtailing their agency, championing freedom and protection of rights, especially those of property and contract. See Tamanaha B. (2004) pp. 43

[58] Two treaties of government (1689)

[59] Mattie, S. (2005). "Prerogative and the Rule of Law in John Locke and the Lincoln Presidency." *The Review of Politics, 67*(1), 77-112. doi:10.1017/S0034670500043333

[60] Intended by Locke as a universal standard of justice that imposed everybody to being equal and independent, no one ought to harm another one in his life, health, liberty or possessions. *Ibidem*

[61] "*Secondly, the legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws*" John Locke,(1689) "Two Treaties of Government", CH. IX, 136.

still lack a considerable amount of features. First of all, Locke did not prescribe an entire separation of powers; the legislative and executive branches were separated but not the judiciary[62]. Other thinkers like Marx heavily criticised the thought that only "*free men*" should have been able to participate in the political life of the state and vote[63], since the definition provided by Locke was actually restricting a good portion of the population from participating in the governmental process. It is maybe for this reason and this distinction between men and free men that Locke did not advocate for another essential feature of rule of law as we intend it today: protection of human rights[64]. Whatever be the case, we still have to credit the philosopher for his contribution, found in this concept of freedom that stems from nature in the eyes of the law. Even though in nowadays terms it might be seen as a limited view since it takes into consideration mostly property without delving into its peculiar human component, it still represents a significant addition to the concept. What is interesting to denote here is that even though Locke promotes Rule of Law giving it primacy as the cornerstone of society, he also does not entirely encourages obedience to the law for the sake of it, unlike for example Hobbes or some of the classical philosophers. What he argues is that the judiciary sector could indeed make mistakes; therefore the best possible solution was to avoid placing all the power in the judiciary sector itself. What this betrays is a more rudimentary desire for a system of separation of powers and checks & balances. Elaborating more in detail about these concepts, we can find Montesquieu.

His work focused on the separation of powers, proposing for the first time a division resembling our modern system, where the judiciary was independent from the executive and legislative power[65]. According to the philosopher a state was to be considered free only if its citizens were free, but freedom did not mean being able to do whatever pleases

[62] See Tamanaha, B. (2004)

[63] This actually enabled the capitalist form of the state, since the free man is the man who is able to acquire and dispose of his wealth, land etc. In the ideas of Marx this figure was to be identified with the capitalist, he would have accused Locke of justifying accumulation of capital, private property and the control of the state on behalf of the capitalist. Gronow, Jukka, (2016)"John Locke, Adam Smith and Karl Marx's Critique of Private Property." *On the Formation of Marxism: Karl Kautsky's Theory of Capitalism, the Marxism of the Second International and Karl Marx's Critique of Political Economy*; BOSTON, 2016, pp. 225–251. *JSTOR*, www.jstor.org/stable/10.1163/j.ctt1w8h23p.19.

[64] See Mattie S. (2005)

[65] "*In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state."* Montesquieu, "The spirit of laws", Book 11, Ch.6

the individual. Freedom can be exercised only if our actions do not curtail the freedom enjoyed by others. What this means is that we can find true freedom only in a system where laws are well defined, and where they prevent any individual and institution alike to step over the rights and personal freedoms of others[66]. The main contribution of Montesquieu in the development of the concept of rule of law is a by-product of this reasoning, if it is true that freedom can only exist where law is present preventing the actions of others from curtailing our agency, the same must also be true for institutions. In a system where law is upheld, institutions must have clear and well defined boundaries in which they operate, verifying the legitimacy of their actions by controlling each other, or in other words, a check and balances system. Separating executive, judicial and legislative powers was the only way to achieve this desirable state of freedom[67].

What it also meant was that the best possible form of government did not necessarily exist, a monarchy could have easily been more liberal and better guarantee the rights of its citizens compared to a republic that did not possess instruments in its constitution shielding from potential and dangerous shifts of authority. Democracy was not necessarily by default a state that prevented the insurgence of tyranny, and therefore not necessarily the most free of states[68]. The separation of the judicial power from the executive power was fundamental, this was true not because independent and stronger judges would have upheld better the public moral and virtue, but because it was necessary to prevent the abuse of power and the conflict of interest with the people actually running the government and exercising power[69]. Montesquieu also elaborated on formal aspects of laws and how they represent a shield from unfair authority. The best laws were those that were the most complex, describing with detail any possible situation and therefore pondering carefully what was right and what was not. The relationship with formal

[66] See Tamanaha B. (2004) pp.50

[67] "*When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, Montesquieu, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals*." Montesquieu, "The spirit of laws", Book 11, Ch.6

[68] Stewart, Iain M., (2004) "Men of Class: Aristotle, Montesquieu and Dicey on 'Separation of Powers' and 'The Rule of Law'". Macquarie *Law Journal, Vol. 4, pp. 187-223, 2004*, Available at SSRN: https://ssrn.com/abstract=1098424

[69] *Ibidem*

writing of the law and authoritarian governments was stressed, highlighting how tyrants tended to work on general lines, applying laws in an unfair way.

We can therefore see how in the philosophical thought of this timeframe, freedom is put as the central aim of the individual. And it can be achieved only through a state of law and rules not only constraining the population, but also the government and the different powers that it was representing. Full freedom and therefore the ideal state of society could have been achieved only if both the institutions and the population submitted to a set of constraints and reviews regulating their activities, making sure that the actions of nobody were reaching over the freedom of others.

1.3 Rule of Law in the modern thought: Dicey, Hayek, Fuller, Raz, Bingham

Following the historical period in which philosophers like Locke and Montesquieu worked, with the coming of the 19th century a new world came along. The old institutions of monarchy, nobility and clergy were challenged for the first time[70], and the birth of new entrepreneurs was fostered by the opportunities brought by the industrial revolution. These two phenomena, put in parallel, gave life to the political situation of the 19th century, where European populations and production capabilities increased dramatically. This brought the birth of nation states as we intend them today, and the phenomenon of nationalism itself. The end of the period would have only arrived during the 20th century; nationalism, coupled with the capability of mass production resulted in the first World War, which would have brought to a tragic end this moment of great technological and social advancement defined by relative peace which, for example in France, is still referred to as "*la belle époque*[71]". In the years that followed the world was divided

[70] Suffice to think about the French Revolution, followed then by the Napoleonic wars. The combination of monarchy, clergy and nobility is often referred to as the "*ancien regime"*, which would have gradually been replaced in the 19th and 20th century by a capitalist and democratic/monarchic model, at least in the west. Many scholars link the French revolution and the occupation of the Napoleonic armies with an institutional shock which caused better living and humanitarian conditions. For example, the reason why countries like Russia remained less developed for longer was to be attributed to the fact that the process of change replacing nobility, fostering human rights and capitalism did not arrive, and would have only been substituted one century later with the communist revolution. Acemoglu, Daron & Cantoni, Davide & Johnson, Simon & Robinson, James. (2007) "From Ancien Régime to capitalism: the French Revolution as a natural experiment."

[71] "*The beautiful epoch*" generally used to define the period between the second part of the 19th century and the start of the First World War in 1914, *la belle époque* was defined by the solidity of the republican

between totalitarian states which were defined by *fascist* or *socialist* ideologies and democratic states that were based on the protection of human rights. While the *fascist* type of state came less following the end of the Second World War, the Soviet Union still lingered until the end of the century. In the end though, the democratic organisation of the state characterised by protection of human rights and representative institutions became the most widespread, constituting the majority of nation states in the world[72]. It is within this framework characterised by widespread growth and change in the 19th century, and democratic and totalitarian conflict in the 20th, that this last group of thinkers credited with contributing to the idea of rule of law can be found.

The first thinker to analyse here is Dicey[73]. In Britain during the 19th century there was a significantly different legal tradition compared to the rest of continental Europe. Ever since the civil war of the 17th century and the victory of the parliamentarians, civic liberties, rule of law mechanism and systems of checks and balances were taken for granted[74]. Legal matters were dealt in a more modern way compared for example to France or Belgium which relied on a more central type of government[75]. Even though the rule of law was one cherished legal British tradition, it was never really part of the political and legal discourse, since it was taken for granted and nobody tried to codify it trying to provide a general definition. Dicey's contribution is therefore precisely this: he defined a series of formal constraints that in his opinion constituted the cornerstone of the rule of law. The importance was first of all stressed on the presumption of being equal under the eyes of the law; and that the paramount objective was to guarantee the liberty of citizens. In the case of Dicey what this meant was that a citizen could be free to do what he pleased as long as it was not stated otherwise within the code of law.

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regime, the dynamism of the economy, scientific innovation and techniques of production. Lejeune Dominique, (1991) "La France de la Belle Époque: 1896-1914", *Armand Colin 2011*

[72] Coupled with this it is also clear how as time is progressing, more and more nations are adhering to a democratic model. Desilver, Dres, (2019) "Despite global concerns about democracy, more than half of countries are democratic", *Pew research centre, 2019*, https://pewrsr.ch/2JDxPFv

[73] Born in 1835, Albert Venn Dicey was one of the leading figures in the constitutional and legal field during the Victorian period. His work on rule of law is quite influential, so much so that the popularity of the expression of "*equality before the law"* and "*rule of law"* can be attributed to him. The main text in which also his three principles can be found is "Introduction to the study of law and constitution"(1885). Cosgrove Richard A. , (1980) "The rule of law: Albert Venn Dicey, Victorian Jurist", *The university of North Carolina Press (2012)*

[74] Santoro E., (2007) "The Rule of Law and the "Liberties of the English": The Interpretation of Albert Venn Dicey.", *Costa P., Zolo D. (eds) The Rule of Law History, Theory and Criticism. Law and Philosophy Library, vol 80. Springer, Dordrecht.* https://doi.org/10.1007/978-1-4020-5745-8_3

[75] *Ibidem*

The argument was articulated within three main principles. The first and most important states that "*no man can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint*."[76]

What this means is that first of all, if a law is not written and the infraction is not considered in the code, it should not be possible to punish an individual because it would be a breach of the state of rule of law. However from this also stems another point: judges should not have any discretionary power on how to exact judgement. Courts should only be instruments of law and not arbitrarily choose what to do and who to punish. The second point instead revolves around *equality*[77]: in order for the system to function, no member of the state has to be considered above the law, and this is true both for the citizens and the government officials, including judges and such. In the third point he states that law can be considered the whole of "*judicial decisions determining the rights of private persons in particular cases brought before the Courts*[78]. What this means is that even though the written basis for the legality of the state has to be found in the constitution, the *legal spirit* of the state also has to be found in its conventions, previous judgements and sentences. This last point is particularly referred to England, Dicey thought that in the commonwealth personal liberties were upheld in a better way compared to many states in central Europe, and the reliance on previous cases and legal customs is a feature particularly present in the common law system, upon which Britain was based. In this sense, he explicitly states a preference for this legal system compared to the one present in continental Europe (civil law).

Even though Dicey described and provided a first comprehensive definition in a modern sense of the rule of law and what made a state abide to the rule of law, some

[76] Dicey A.V., (1885) "Introduction to the study of the law of the constitution", Ch. IV

[77] "*It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" (droit administratif) or the "administrative tribunals" (tribunaux administratifs) of France*", Ibidem

[78] *"We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; 17whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general prindples of the constitution."* Ibidem

commentators argue that this is still a too simplistic view[79]. The criticism is mainly aimed at the first point. If we can assume that all citizens should be under the law in a presumption of freedom (meaning that the law only sets the boundaries out of which they cannot act), it is also true that the opposite reasoning could be applied to government officials and judges. In order to truly uphold the rule of law and prevent arbitrary unlawful decisions, these officials should exercise their powers only within the limits set by the law.

Despite these concerns, Dicey can be credited for providing the first scientific definition of rule of law, and not only that, the popularity of the term and its importance in the modern legal discourse can be attributed to him. Part of the reason that drove the jurist to explore the concept was his personal concern about the erosion of rule of law at the turn of the century[80]. According to him, governments and their expansion of the social welfare system constituted an abuse of the rule of law, also their actions started to become so much complicated that effective review of legislation could not be made in normal courts, but only in special tribunals, which violated his first principle. On these last aspects the next thinker, Hayek[81], would have provided his point of view.

Just like Dicey, he thought that there had been an administrative backsliding of the rule of law in Britain. The notion of legal liberty for him was mainly aimed at shielding citizens from potential abuses of the government: the boundaries within which the government could exercise its coercive powers had to be very well defined and known, or in other words predictable. Also, just like Dicey, his contribution in the field of rule of law revolves around the identification of three aspects of law necessary to achieve a state governed by the rule of law: a law has to be *general*, *equal*, and *certain*.[82] What is meant by this is that a law must be applied generally to everybody infringing it, without making distinctions between groups; equality is the same reasoning only related to the individuals

[79] See Waldron J. (2016)
[80] See Tamanaha B. (2004) pp.65
[81] Friederich August von Hayek (1889-1992) was born in Austria. After participating to WWI as an infantryman, he studied and taught between Austria and the US, only to subsequently move permanently in Britain during the 30s. Due to the Nazi regime taking power and the annexation of his home country through the *Anschluss*, he acquired the British citizenship, where he would have published his most influential work "*Road to serfdom" (1944),* in which he described the similarities between the Nazi and Communist regime, describing his view on the nature of the abuses committed by these two totalitarian systems. Von Hayek, F., (1994) "Hayek on Hayek: An autobiographical dialogue", *published by liberty fund 2008*
[82] Ealy, Steven D., (2010) "The evolution of rule of law in Hayek's thought", *Mercatus center, George Mason university, Working paper n°10-38*

and not whole groups; certainty is the requirement that there must be the certainty the law will be applied in a foreseeable, reliable and non arbitrary way. These ideas of generality and equality also developed into controversial views about the organisation of the state, like aforementioned Hayek was against redistributive justice and he considered the welfare state that was starting to be built by more progressive parties a violation of the rule of law[83]. Such a harsh view was motivated by the example acquired from the socialist states in Eastern Europe. Hayek could not avoid noticing how despite the redistributive principles applied under the Soviet Union; the average peasant was much poorer and less protected compared to the poorest community in any western democracy. The idea he developed was therefore the one that by accounting for income and social inequalities what was being actually done was attributing moral components to the population, claiming that some people were more or less deserving of wealth and therefore, making them unequal in the eyes of the law[84]. This inequality in the eyes of law produced the dire inefficiencies of the socialist states, and together with them also the gross violations of human rights. In this sense Hayek puts all of his trust in the three principles of law he identified, which excluded redistributive measures of wealth[85], which put him on one extreme end of the spectrum.

Considering Hayek's national background and the timeframe in which he operated, it is no surprise to realise that both the totalitarian systems and the Second World War had a profound impact on his ideas. He took notice of how during wartime the law was bent in order to concentrate all the efforts and resources of the common goal of achieving victory[86]. By reflection, during peacetime, the goal of the state was not to manage its citizens, forcing them to do anything and intruding in their private life, but only to create a framework, a canvas that defined the maximum scope of the activities that could be undertaken in order to protect and safeguard the general peace and freedom in the state. We can therefore see how in the mind of this thinker the general rules governing society indeed changed drastically depending on the context. The "goal" of society can be different, but the rule of law provides a framework upon which every citizen can act, provided the system possesses a series of constraints of *generality*, *equality* and *certainty*. In this sense, few people placed as much trust in the concept of rule of law as Hayek, the

[83] See Tamanaha B. (2004), pp. 67
[84] *Ibidem*
[85] *Ibidem*
[86] See Waldron J. (2016)

reason why his role is so important and why he defined rule of law as the cornerstone of the state is apparent.

Looking at more recent days, we can finally come to contemporaries like Fuller[87]. According to him, the government and its laws had the unique capability of being able to cover the gap between *positive law* and *natural law*[88]. In his text "*the morality of law"* he explored the relationship that existed between the two concepts reaching some conclusions about the nature of rule of law and its relevance in achieving a morally sound state.

The main point of the argumentation of the philosopher revolved around the fact that the legal system naturally tended to steer towards what was considered to be just, moral and fair[89], on pact that it possessed certain formal constraints. These formal constraints for legality ensured the state of rule of law and its stability, which in turn with time would have resulted in natural or morally fair laws. He articulated therefore his requirements for legality in eight points[90]. He claimed that laws should be *general*: just like Hayek said, however this did not mean that the law could not be applied to some specific groups, if for example a law prescribing military conscription targeted only men, this did not necessarily infringe the *generality* principle. Law should also be *promulgated,* meaning that the access to information regarding it should be readily available; *prospective,* meaning that it should prescribe how to act in the future and not punish for the past, meaning that its main aim should be to guide the behaviour of citizens; *clear,* meaning that people should be able to understand what is legal and what not; *non-contradictory,* laws cannot contradict each other; laws *should not ask the impossible*; and finally law should be *constant* and not change all the time, this is particularly relevant given the fact

[87] Professor Lon L. Fuller was a lecturer and philosopher in Harvard for several years. He is considered one of the most influential legal philosophers of the last century. This is mainly due to the drafting of his text "The morality of law"(1964), in which he exposes his ideas regarding laws and morality, but also his formal constraints for the definition of rule of law. His principles are generally considered as the most accurate formal definition of rule of law. Murphy, Colleen, (2004)"Lon Fuller and the Moral Value of the Rule of Law", *Law and Philosophy, Vol. 24, 2005, Available at SSRN: https://ssrn.com/abstract=1690025*

[88] With *positive law* we refer to a legal term referring to any law that is positive or in other words enforced within the state. The main distinction that exists with *natural law* is mainly a matter of morality and application. The doctrine of natural law prescribes that there are a series of rules that are philosophically right by virtue nature, and the duty of the human being is only to discover these natural laws in order to apply them, which are universally fair and righteous. In this sense Fuller believed that by applying formal constraints to the law and legal processes, *natural law* was processed or in other words, attaching these constraints would have produced morally righteous laws. *Ibidem* & Office of the law revision counsel, United states code

[89] *Ibidem*

[90] Fuller L., (1964)"The morality of law", pp.39

that constant laws are more likely to be natural laws, or in other words abiding to a morally universal code, the reason is that in the eyes of Fuller morally unjust rules will always be hidden from the population since morality is universal and the public once exposed to unfair acts will inevitably ask to change the law. In this sense, the longer a law has remained constant, the more it is likely it is to be right. The final requirement is that *the way laws will be applied by judges and the rest of the system must be congruent with what prescribed in the written statutes*, judges who arbitrarily apply laws how they see fit could singlehandedly make the whole system crumble. The contribution to Rule of Law by Fuller is precisely found in the identification of these characteristics, because they can also be identified as an implicit pact between law makers and citizens.

As explored until now, many philosophers and thinkers explicitly stated how law and the state of law was to be preferable to the one without laws since in that case everyone would start acting according to his or her own right hindering other human beings. Fuller however can be credited for identifying into practical points what will make the legal system stand. Generally speaking, what is relevant for a state in which the Rule of Law reigns supreme is an implicit pact that exists between the citizens, government and lawmakers. If law makers start applying the law in a way that is perceived as unfair (like applying it retroactively or more severely than what prescribed), then the trust of the citizens will come less and they will stop respecting the laws. If members of the government are processed in a different way compared to the citizens, they will start to disregard the law and so the state of rule of law will come less because the principle of *generality* is breached. Not only that, law itself must abide to a series of constraints of clarity in order to be respected by the citizens. If any of the eight points described by Fuller comes less, then we could expect an increased distrust in the legal system which will inevitably lead towards a backsliding of the state of rule of law.

The moral value of the rule of law was contained precisely in this aspect[91]: if the law is applied in a formally unfair way, the citizens will stop respecting it and become disconnected with the legal system. The ultimate goal is to create this pact between citizens and institutions by abiding to the formal constraints of law, because in doing so, by their own nature the legal system would have naturally pointed towards *natural laws*. The work of Fuller is particularly relevant because just like Hayek he was one of the

[91] See Murphy C. (2004).

thinkers who worked in times more recent to ours, and therefore could provide his view keeping in mind the "*abuse*" of rule by law characterised by dire instances of cruelty. Suffice to think about the totalitarian systems of the 20th century, where the whole legal state justified genocide; or the institution of slavery in the United States or Apartheid in South Africa.

It is perhaps precisely because of these events that we can find also another side of the argument that prefers to not assign any moral value to the rule of law. To this school of thought it is possible to find modern thinkers such as Joseph Raz[92]. Looking at the unfairness of the past, he reckoned that the rule of law was simply like an instrument[93]: the formal constraints only determined whether or not it was *sharp* and functioning, however how it was used was entirely in the hands of the governors. In this view, the law and state of law do not possess any moral characteristic per se, and what it means is that also totalitarian systems could have been deemed to be governed under the rule of law. Raz finds that the rule of law was very well respected in many of these extremes instances, and used it as empirical proof of the lack of moral values correlated with the respect of rule of law.

Delving even more into the present, we can also find one of the most modern conceptions of rule of law that tried to correct and account for the problems raised by Raz. This is the interpretation and definition of rule of law that is given by Lord Bingham. In his 2010 book "The Rule of Law"[94], he articulated the points and constraints necessary for a state to abide to the rule of law. His final conclusion revolves around the fact that a state had to indeed respect certain fundamental representational and humanitarian values, because otherwise, the rule of law could have been considered to be achieved.

Just like the contributors analysed up until now, Lord Bingham identified a core principle around which rule of law was based, followed then by eight principles which he considered to be fundamental. The core assumption states that "*all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in*

[92] Mcilwaine Michael, (2016) "Denying human rights, upholding the rule of law: a critique of Joseph Raz's approach to the rule of law.", *The western Australian jurist, Vol.7*

[93] "*a non-democratic legal system, based on the denial of human rights, or extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies*". Raz Joseph, (1979)"The rule of law and its virtue", pp.211

[94] Bingham Tom, (2010) "The Rule of Law", *Penguin reprint edition 2011*

the courts."[95]; while the eight principles could be summarised as follows: 1)The law must be accessible, intelligible, clear and predictable; 2)Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion; 3)Laws should apply equally to all; 4)Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers; 5)The law must afford adequate protection of fundamental Human Rights; 6)The state must provide a way of resolving disputes which the parties cannot themselves resolve; 7)The adjudicative procedures provided by the state should be fair; 8)The rule of law requires compliance by the state with its obligations in international as well as national laws.

What is probably the most interesting point to denote here, which is contrary to the interpretation given by Raz, is the one stated in the 5th point. According to Bingham, it is not possible to achieve a state of rule of law without the presence of an adequate protection of human rights. In his 2010 book, Bingham also provides a list of the human rights that he considers to be fundamental, including rights such as *life, prohibition of torture, slavery* etc[96]. The reasoning behind the identification of these constraints is of purely moral character that probably puts Bingham in the section of the legal commentators believing in *natural law*. It is possible, according to him, to identify some fundamental laws restricting immoral practices that are universal for all human beings, without regarding to their ethnical or cultural upbringing. These fundamental rights and laws, should be included in a definition of state in which the rule of law is achieved, without them, this is not to be considered possible.

Due to this interpretation and the inclusion of human rights, Bingham can certainly be included among the most modern commentators who attach a *thicker* definition to the concept. These *thicker* definitions include many substantive aspects of moral character that can have concrete repercussions on the adherence to the state of legality itself.

We could therefore claim that especially in the modern debate, there seems to be a distinction between those who attach only a *formal*/*procedural* aspect to the rule of law,

[95] Bingham Tom, (2010) "The Rule of Law", *Penguin reprint edition 2011*, Ch. 1

[96] In detail, he identified the *right to life*; *prohibition of torture*; *prohibition of slavery and forced labour*; *right to liberty and security*; *right to a fair trial*; *no punishment without law*; *right to respect for private and family life*; *freedom of thought, conscience and religion*; *freedom of expression*; *freedom of assembly and association*; *right to marry*; *protection of property*; *right to education*. Ibidem, Ch.7

identifying the requirements it must have in order to function, and those who instead attach *substantive* aspects of morality to it.

2. Aspects of the Rule of Law

Once reviewed the different thinkers and philosophers who contributed to the development of "Rule of Law", it is possible to come to a series of conclusions regarding the nature of the concept.

First of all not everyone identified the state of rule of law (intended as the existence of formal, written constraints) as entirely positive. For example one of the most important and durable critiques was the one advanced by Plato[97], who identified written rules and their blind application as not beneficial. People, times and circumstances changed constantly and therefore constraining the legal system to something abstract such as written laws meant exposing it to exploitation on behalf of individuals who did not necessarily have good intentions. On the same line of thought there is also Hobbes[98]. We could consider his arguments similar to those of Plato; just like the classical philosopher was worried about constraining the legal system, Hobbes thought that morality and law could only be interpreted by other human beings, and constraining them would have meant constraining the administration of law. For this reason he did not identify equality as a positive aspect, on the contrary, limiting the ruler would have meant limiting his capability of giving judgement and promulgating rules, which would have limited therefore his capability of punishing criminals.

Still, the majority of philosophers, jurists and thinkers identified the rule of law as one of the most important requirements to the foundation of the state. There only seems to be a distinction, especially in the more modern definitions of rule of law, between those who attach only purely *formal/procedural* value to the concept, and those who instead attach another layer of morality, or *substantive* aspects to it[99].

[97] See Waldron J.(2016)
[98] *Ibidem*
[99] *"The basic distinction can be summarized thus: formal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice or moral principle)."*See Tamanaha B. (2004), pp.92

2.1 Formal and Procedural aspects

The first layer that is identified is precisely this *formal/procedural* layer, or in other words what are the characteristics and the features to which laws and legal systems must abide in order to be recognised as systems governed by the rule of law. This first layer is generally undisputed and is present in all the thinkers reviewed until now (exception be made for some rare cases already discussed above). The formal and procedural dimensions of law are not only important in determining which state may claim to be governed by laws, but also to assess the stability of the system. We could claim that the rule of law could be self sustaining, meaning that the more procedural and formal requirements it abides to, the less likely it will be a serious backsliding.

Already from Aristotle, the majority of philosophers recognised the need for a body of laws that was clear and constant, trying to attach a series of attributes to it in order to reach a comprehensive definition of when this body of laws could have been considered reliable and durable. If we look for example at Dicey we can find a first modern definition of the idea, consisting in qualities of *supremacy of law, equality, and predominance of legal spirit*. However perhaps the most important definition of legality is the one proposed by Fuller identifying the fundamental eight characteristics that the law and the system should have in order to function properly and remain stable (in the sense that a backslide of the rule of law should not be expected).

Generally speaking, recurring themes regarding requirements for the rule of law can be found in separation of powers and the institution of checks and balances systems, preventing a drift of authority at the legislative, executive and judicial level. Laws and lawmakers also have to abide to a series of constraints when performing their duty, for example already Locke or Aristotle identified a difference between good laws and bad laws, good laws being those that were thought out the most, identified all the different possible cases and provided a clear guideline within which citizens, government and institutions could act. This is also contained in many of the points identified by Fuller, laws should be *clear, promulgated, non contradictory* and *they must not ask the impossible*. One final point is equality, even though here the argumentations become more complicated. For example Dicey was criticised in claiming that everybody should be seen in the same way in the eyes of the law, government officials and judges carry for

example much more responsibility, and therefore cannot be put on the same exact plane as the rest of the citizens. This can also be found in the formal constraint of *generality* proposed by Fuller, even though law should be general and not make distinctions it is still generally accepted that the population might be divided in groups, like for example male and female, young and old, rich and poor etc. Many laws are promulgated under the existence of these differences, it is sufficient to think for example about the aforementioned conscription rules targeting only men, but the same argument could be made about the welfare system and redistribution of wealth, which is precisely what Hayek did.

Generally speaking, the formal and procedural aspects of the rule of law have some wiggle room of interpretation, and therefore are seen in a more or less strict way depending on who analyses them[100]. Some can interpret the application of rule of law as being simply the way with which the government exercises its authority, which sends us back to the concept of *Rule by law* instead of rule of law, while others interpret it as the existence of more and more stringent formal requirements, which inevitably entice a variety of moral constraints as well, such as is the case with the welfare state, once reached a certain point.

2.2 Substantive aspects

More controversial is this second class of aspects since different thinkers, international organisations and legal systems identify a variety of values to be attached to The Rule of Law. The reasons behind this are of two possible natures. Either there is a moral component that makes them claim without these substantive aspects we cannot really talk about states governed by law, or there is a logical assumption that without these values the state of rule of law will cease to exist since the lack thereof would mean the violation of some formal aspect.

Let us for example think again about Fuller, who attaches a moral component to the existence of laws, explaining how with time the system will naturally steer towards what can be considered human and fair. One of the principles of legality is the *generality* principle that describes how the law cannot target specific groups of citizens, the extent

[100] See Tamanaha B. (2004)

however to which this is true is debatable and depends from state to state as previously explored. Similarly, many other rights that do not pertain to the aforementioned formal and procedural constraints are up for debate. We could find values such as the protection of property, contract, privacy all the way to substantive equality, welfare and protection of communities. As it possible to see, it extremely hard to provide a clear, measurable definition of substantive aspects and therefore the extent to which they are relevant is entirely up to the individual or the organisation. Even thinkers who wholeheartedly believed in the importance of rule of law refused the introduction of substantive constraints related for example to social welfare. Raz is found at the extreme of the spectrum, thinking that it is not possible and not even right to attach any substantive component to the rule of law, since it should be considered as a simple instrument. In order to find controversial examples highlighting this problem it is not obligatory to think about totalitarian extremes of the 20th century but just for example about China or Iran. In China there is a lack of democratic values but still the country is clearly governed by a stable system of laws, the same could be said for Iran even though with a disregard for human rights, could we therefore really claim that China or Iran are states governed by the rule of law? According to Raz yes, the protection of these rights is unimportant, however this is not the case for all institutions. What is necessary to do in this case is take a look at all the different global actors, since everyone has a different definition of rule of law. For example the UN defines it as *"a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."*[101] As it is possible to verify, the UN introduces substantive constraints in its definition, requiring the law to be consistent with international human rights and standards.

Another example could be the one provided by the World Justice Project, who divides rule of law into four main aspects of: *accountability, just laws, open government* and

[101] "What is the rule of law?", *United Nations and the Rule of law, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/*, Consulted on October 2020

accessible and impartial dispute resolutions." Pertaining to the second aspect, there is again an explicit reference to laws that *"are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons, contract and property rights, and certain core human rights."*[102] The definition here is even more stringent compared to the UN, including property and contract rights, echoing also the remarks of former chief of justice in south Africa Arthur Chaskalson who claimed how:" *Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is "an empty vessel into which any law could be poured".*

What we can claim in conclusion, is that whereas formal and procedural aspects are undisputed, substantive aspects are much more controversial and vary depending on the personal interpretation of the individual or the institution taken into exam. The difficulty to identify these substantive aspects is precisely why so many international organisations explicitly describe them in their own definition of rule of law. When it is necessary to define whether or not a state has breached the state of rule of law therefore, it is necessary to look also under which specific system it is acting, and what is its definition of rule of law, reason for which in the scope of this dissertation the rule of law framework within the EU will be analysed.

[102]" Rule of law index 2019", *World Justice project, https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019,* Consulted on October 2020

3. Rule of Law in the European Union

The passage that brought the rule of law from the national to international scope has been a gradual one. In the 18th century with the birth of the different republics and democratic states known today, we have also witnessed the progressive introduction of greater rights defending the private citizen and framing national activities in a context of checks and balances. Among the many foundational documents prescribing aspects related to the rule of law we can for example find the aforementioned "Declaration of rights of the man and the citizen (1789)", or the "American Bill of Rights(1791)[103]".

Even though these documents acted exclusively within the borders of the national state they were conceptualised to be universal and with time, more and more treaties would have become binding in the international scenario guaranteeing similar rights. Paradoxically, the most important element driving this process at its very beginning was conflict[104]. Western States starting from the 19th century would have subscribed to international rules governing their conduct in times of war, such as for example the Geneva Convention[105]. This last was a first example of international regulations that would have been upheld by supranational bodies, acting insofar as the authority that was delegated to them.

The natural continuation of this process of delegation was the arrival and expansion of international organisations (*IOs*)[106] reaching unprecedented levels of relevance in the political scenario. The importance of this process is quite tangible considering their

[103] *"The first ten amendments to the US Constitution, which took effect on 15 December 1791, have been known as the American Bill of Rights; The American Bill of Rights was the subject of a protracted struggle,but the rights guaranteed in 1791 are rights which American citizens continue to enjoy"* Bingham Tom, (2010) "The Rule of Law", *Penguin reprint edition 2011*

[104] *Ibidem*

[105] *"For the first time in history, countries agreed to limit their own powers on the international level in favour of the individual and in the name of an altruistic obligation, recognizing an inviolable space into which neither fire nor sword could penetrate. For the first time, war gave way to law. The Geneva Convention, which was revolutionary for its time, is therefore the cornerstone of all humanitarian law, which aims to protect the victims of hostilities. Its principle, at first limited to wounded soldiers, has gradually been extended to the other categories of persons deserving of special attention."*; Pictet Jean(1989)." The First Geneva Convention". *International Review of the Red Cross (1961-1997), 29*(271), 277-281.

[106] We could define IOs as international intergovernmental organizations. This distinction is necessary due to the fact that in the global scenario, also nongovernmental international organizations took life (NGOs). Therefore the core characteristic of this type of institution is the official participation on behalf of governments from national states. Barkin J., (2006) "International Organizations, theories and institutions", *Palgrave Mcmillan US, 1st edition*

primary role in coordinating the activities of states, sometimes even complementing and substituting their authority[107]. Suffice for example to think about the UN and all its different bodies[108], NATO or the WTO; all stark examples of the importance of this new type of actor. All these different structures were born during the course of the last century, achieving primacy after the end of WWII.

The importance of Rule of Law in the context of building these different international associations cannot be understated. What is important to notice is that their own existence was made possible by the gradual and progressive subscribing to supranational rules governing the relationship between their different members. Therefore, together with the already extensive presence of national laws, the last century also witnessed the creation of jurisprudence in the set of global or international laws governing said relationships[109]. The main mechanisms driving this process were represented by the gradual delegation of jurisdiction to international bodies which slowly created a set of precedents clarifying the application of international treaties.

International law, unlike national law, was still being figured out and is in part still in a constant process of evolution and change. What safeguarded the evolution and creation of these organisations was precisely the presence of rule of law in the state, without which it would have not been possible to effectively be members of the global and regional communities. By all means and purposes, the rule of law was necessary as the foundational brick or *primary basis* upon which to build all the different International Organisations[110].

With time, as they expanded their size and scope, the need to be governed by principles such as separation of powers, became primary. IOs created internal bodies such as courts

[107] Dedman, Martin J, (2009)"The Origins and Development of the European Union 1945-2008: A History of European Integration", *Published by Routledge, 2nd edition (1st edition published in 1996)*

[108] Only the UN is constituted by sixteen other specialised agencies such as FAO, UNESCO or the IMF. UN specialised agencies and organisations, https://www.un.org/Depts/los/Links/UN-links.htm#SpecAgencies, Consulted in October 2020.

[109] Muñoz, Jaime. (2017). The principles of the global law of public procurement. A&C - Revista de Direito Administrativo & Constitucional. 16. 10.21056/aec.v16i65.260.

[110] *" In this context, the experiences of Global Administrative Law in different sectors, such as that of human rights, international trade, culture, agriculture, public procurement, sports, among others, all with a universal dimension, show us a set of resolutions of a legal nature and administrative norms and practices that by all means go beyond national frontiers. In fact, from the principle of legality, to the separation of powers, including the predominance of the fundamental rights of people, without losing sight of the importance of pluralism, rationality, transparency, good governance, of accountability, as well as of the establishment of an effective system of checks and balances, we find principles and criteria from Rule of Law that allow us to speak of a Global Administrative Law with a primary basis"* ; Ibidem

and parliaments in order to mimic these premises, creating a situation where the rule of law was the foundation over the interpretation of international treaties. This is possible only through the presence of a state of rule of law in the national country as well, reason for which in the different IOs these concepts have been gradually required and applied as time progressed.

Among all these different IOs it is possible to find also the European Union, which radically changed the political scenario in the old continent by creating a new framework of rules, instruments and institutional bodies to which all its members must abide. Given the fact that both Poland and Hungary belong to the EU, in order to verify and assess the rule of law backsliding that took place in the past years it is necessary to understand the interpretation and requirements that the EU gives to the rule of law, together with the tools and instruments used to monitor and enforce it. As explained in the previous section, despite a general universal definition of rule of law, formal and substantive requirements vary depending on the state or *IO* taken into consideration, therefore an analysis of the history of this value inside of the union is in order, together with the mechanisms regulating it.

3.1 Milestones in the adoption of Rule of Law

The history of rule of law in the framework of the EU is a fairly long one, despite the fact that this value was not explicitly quoted and defined in its treaties up until recent times[111]. This explicit reference was only made in 1986 with the case of *European parliament v. Les Verts*, only to be then enshrined in the Maastricht treaty during the 90s[112]. Looking at the whole history of the union however, we can say that the concept was actually already present before the 80s and 90s, even though in a much vaguer way.

To proceed in order, it is necessary to remind that even though the EU as it stands today was built during the past three decades, the first iteration of the community can be already found with the formation of the "*European Coal and Steel Community* (*ECSC)"* in 1951, followed then by the institution of the "*European Economic Community* (*EEC)"* in

[111] Pech, Laurent, (2020) "The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox*". RECONNECT, Working Paper No. 7 — March 2020, Available at SSRN: https://ssrn.com/abstract=3608661 or http://dx.doi.org/10.2139/ssrn.3608661*
[112] *Ibidem*

1957[113]. In the documents at the foundation of these two embryonic experiments which would have later become the modern EU there was already a first reference to the importance of law as the basis for the interpretation of the charters. In particular in the Paris treaty of 1951 and the treaty of Rome of 1957 the necessity to "*use law as foundation for the interpretation and application of the treaties"* was stressed[114][115]. The review of compliance with the law was delegated to the European Court of Justice[116], identifying therefore for the first time a supranational body capable of review of legislation.

Following the birth of the EEC, a first expansion of the community that could initially count only on Italy, France, Belgium, Luxembourg, Netherlands and West Germany took place; now Denmark, Ireland and the UK[117] joined as well. This expansion posed a variety of matters since up until then there was a disparity of opinions on what the community should look like; for example, some members like De Gaulle thought that the project should have only involved a restricted set of continental European Countries for economic purposes[118]. Due to these differences the need to identify a series of common European objectives and values became paramount to ensure a successful expansion.

The declaration on European Identity of 1973 was redacted and signed in Copenhagen precisely for this reason. Its aims were [119] to "*identify a common heritage, interests and obligations of the nine*;" and to "*take into consideration the dynamic nature of European unification*." Pertaining to this point, when defining the cornerstone of the European identity, there was an intention to ensure that the *"cherished values of their legal,*

[113] In this first embryonic version of the Union, there were only Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. The treaty of Rome on the foundation of the EEC is still relevant and part of the fundamental treaties regulating the contemporary Union. Dedman, Martin J, (2009)"The Origins and Development of the European Union 1945-2008: A History of European Integration", *Published by Routledge, 2nd edition (1st edition published in 1996)*

[114] "*The Court shall ensure that in the interpretation and application of this Treaty, and o£ rules laid down for the implementation thereof, the law is observed."* Art.31 Paris treaty 1951, Ch.4

[115] "*The court of justice shall ensure that the law is observed in the application and interpretation of this treaty"*. Art.164 Treaty of Rome 1957, Section 4

[116] Instituted in 1952 it is still in function today, its main duties are to interpret and enforce the law, annul unlawful EU acts, sanction EU institutions and ensure that the EU will take action. It is divided into the court of justice and general court. European Union official website, "Court of Justice of the EU (CJEU)", *https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en, consulted on October 2020*

[117] The significant amount of time necessary for this first expansion was also due to a different conception of the Union and what it should have looked like back in the day. De Gaulle by his own admission was quite hostile towards the access of the UK inside of the community, thinking that the economic objectives of the different countries were incompatible and therefore impossible to coordinate. See Dedman J. (2009)

[118] *Ibidem*

[119]Declaration on European Identity (14 December 1973); Art.1, Section 1

political and moral order are respected[120]*"*; among the different standards that were listed, there was a reference to the desire to build communities built around "*principles of representative democracy, of rule of law, of social justice"*[121]. The significance of this document is obviously quite relevant given the fact that it represents the first time in which the *rule of law,* intended for its full meaning, is present inside of a text issued by the European community. This is particularly true also in light of the fact that together with democratic and social values also a reference to general *human* rights was made, which would have later been developed and included in the most recent treaties.

We could therefore consider this to be one of the two major steps that ensured the full adoption of the value in the 90s, the second being represented by the aforementioned judicial case of *European Parliament v. Les Verts*.[122] In this legal proceeding the French Green Party (*les verts*), contested the way in which funds were allocated to different political groups in the European parliament[123]. The money came from the same funds utilised for national parties, which gave an unfair advantage to some groups. The relevance in the context of the adoption of rule of law as fundamental value of the EU, stands in the fact that the mechanisms regulating these funds were issued by the enlarged bureau of the European Parliament[124]; however at the time it was not clear how to deal with a potential mistake made by this body.

The issue of funding raised by the green party was reviewed on the ground of article 173 of the EEC which states *"The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.*[125]*"*

Due to what specified under art. 173 it was considered legitimate on behalf of the Green Party to raise questions over the fairness of budgeting, but also that the court had

[120] *Ibidem*
[121] *Ibidem*
[122] Judgment of the Court of 23 April 1986. Parti écologiste "Les Verts" v European Parliament. Action for annulment - Information campaign for the elections to the European Parliament. Case 294/83. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61983CJ0294, consulted on October 2020
[123] *Ibidem*
[124] on the budgeting decision of 12th of October 1982, *Ibidem*
[125] Treaty of Rome (1957), Art.173 section 4

jurisdiction over matters related to decisions regarding the Council and Commission, the Parliament not being included. The court decided that art. 173 was still to be applied due to the fact that: *"It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."*[126] The importance of the judicial case cannot be underestimated due to the fact that it provides the first instance in which in an official EU legal sentence, the primacy of the rule of law is stated and used in order to solve a dispute.

It is thanks to the documents of 1973 and the legal case of 1986 that rule of law would have finally been enshrined within the body of articles and treaties at the foundation of the EU. In 1992 the first version of the Maastricht treaty or Treaty on European Union (TEU) was signed, effectively closing the economic and political ties among the twelve countries creating the first modern iteration of the EU based on its two fundamental treaties (of Rome and on functioning of the European Union). In the first version of the TEU the rule of law was referenced in several articles. In particular, in article 130u[127], the *common objective of developing and consolidating democracy and rule of law* was stated.

It is in this period, with the reform of the TEU of 1997, that the first framework to assess compliance to the rule of law was created, article 7 was also created, which for the first time prescribed a form of sanctioning towards states found in breach of fundamental values of the Union[128].

Just like the document of 1973 was fundamental in achieving a successful expansion of the Union, the same can be said for the new standards introduced in the 90s. The EU defined in 1993 through its *Copenhagen Criteria*[129]the different characteristics that a European country had to possess in order to be found suitable to join the Union. These characteristics were articulated over three points, namely: "*a functioning market economy, stable institutions guaranteeing democracy, the rule of law, human rights and respect of minorities; ability to take on the obligations of membership.*[130]" The

[126] *Ibidem*
[127] Treaty on European Union (TEU), (1992), art.130u, title XVII
[128] See Pech, L. (2020)
[129] Börzel, Tanja & Risse, Thomas. (2004). "One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law".
[130] *Ibidem*

importance of this framework has to be stressed, since it indirectly fostered the adoption of these values, and in particular the rule of law in many Eastern European countries.

The adherence to the Union enticed a series of considerable economic benefits including the belonging to the common market area, and therefore the perspective of joining became very alluring. Official talks between Hungary, Poland and the EU for example started in 1997, only to be concluded in 2004 with the formal expansion of the Union[131]. In this sense, it is possible to claim that the need to meet the standards imposed with the Copenhagen Criteria significantly fostered and ensured the adoption of rule of law in all the countries involved in the expansion. The concept would have finally been perfected in the treaty of Lisbon, which represented a final step in stating the importance of the value as one of the funding principles of the Union. The foundation for the existence of rule of law now stands within art. 2 of the TEU (2007) which states:"*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities* [132]".

Following the introduction and refining of rule of law as fundamental principle of the EU with the Lisbon treaty, a series of instruments would have been subsequently introduced, especially in the past decade, with the aim to address a potential backsliding of the rule of law. These series of measures would have been included in the so called "rule of law toolbox", of which the most important feature is the rule of law framework, thanks to which it is possible to assess and act upon violations of the TEU. The whole of these instruments will be discussed in the next section.

One of the main problems has been precisely the difficulty to pinpoint the meaning of rule of law inside of the union, and the result is that different legal commentators might have different opinions on the matter[133]. Generally speaking, a series of facts could be accepted as true; first of all, no specific definition of Rule of Law is present within national courts or constitutions of the vast majority of member states. This lack of

[131] This wave of expansion targeted specifically Eastern European countries, giving access to Czechia, Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. See Dedman J. (2009)

[132] *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*" TEU (2007), Art.2, Title 1 "common provisions"

[133] Pech Laurent; Grogan Joelle, (2020)"Unity and Diversity in National Understandings of the Rule of Law in the EU"; *Recconect Work Package 7; Deliverable 1*

definition however does not mean that the rule of law is not a principle incorporated and respected within these different systems.

This virtually universal recognition, defined also in all the different languages and political traditions of the states, corresponds to a series of ideas and principles that find a common ground and therefore represent the most basic foundation of the concept at the international level. For these reasons, even though we do not possess an exact definition, we can still draw the main points corresponding to the respect of rule of law as intended in the Union. The legal tradition has been built with time by the different sentences and opinions given by European courts, these points define the rule of law as a legal principle of constitutional value linked with democracy and respect for human rights; an umbrella principle with formal and substantive components; and a primary principle of judicial interpretation and a source from which standards of judicial review may be derived[134].

It is important to understand what defines these concepts. The main source is represented by the whole of legal sentences given in the past, which created a doctrine condensed into the main points previously described. Whereas democratically speaking no consensus has been expressed on the matter, the Court of Justice together with the Commission and the European Court of Human Rights provided over the years several instances in which different areas of the rule of law where gradually specified[135]. In particular for example the Court of Justice, which is tasked with the interpretation and application of the foundational treaties, recognized elements of the rule of law as principles of legality, legal certainty, protection of legitimate expectations, but also principles of proportionality[136]. These points provide us with a formal definition of the rule of law, that coupled with the previously listed areas of interest recognise some basic requirements for its presence.

In conclusion of the argument it is also interesting to understand how exactly the rule of law is interpreted in the scopes relative to the Polish and Hungarian case. In Art.2 we can find the most basic assumption that the Union must be founded on the principle of rule of law, from which different other principles stem as by-products. Precisely in the framework of the legal dispute going on, a document issued by the commission helps

[134] *Ibidem*
[135] Grabowska-Moroz Barbara; Kochenov Dimitry; Closa Carlos, (2020)" Understanding the Best Practices in the Area of the Rule of Law"; *Reconnect work package 8, deliverable 8.1*
[136] *Ibidem*

shedding light on which are these by-products[137]. Specifically *"Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law."*[138]

Going back to the previous chapter, this definition of the rule of law seems to include mainly procedural and formal aspects; however in the eyes of the Union they are simply instrumental in order to achieve more substantial aspects. *"Both the Court of Justice and the European Court of Human Rights confirmed that these principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. The rule of law is therefore a constitutional principle with both formal and substantive components. This means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law, and vice versa."*[139] In this sense we can now come to a conclusion, also thanks to the analysis of the evolution of the adoption of the concept in the treaties of the Union, what is the definition of rule of law in the framework of the EU.

We can verify formal and procedural constraints that directly stem from the modern thinkers who identified them. The state of legality, just like Fuller suggested, must be guaranteed by transparency, non arbitrariness and certainty, coupled with general equality and effective review of legislation. However in the EU, just like for many other IOs, there is also an explicit reference to the existence of substantive aspects. The respect of human rights and democracy is particularly stressed. This was true in the process of expansion of the union but also nowadays with these instances of backsliding. Whereas these substantive aspects are not generally accepted everywhere, they are certainly within the borders of the Union; we can therefore conclude that in order for the commission or the external observer to assess a potential backsliding of the rule of law, the presence of both the formal/procedural and substantive aspects must be verified.

[137] European Commision Fact sheet, (2016) "College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers" , *https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_62, Consulted on October 2020*
[138] *Ibidem*
[139] *Ibidem*

What is also apparent after having analysed the whole history of the introduction of the concept is the apparently great amount of time that was necessary before its full adoption. One of the reasons behind this is without a doubt the problematic definition of the concept itself. On the one hand, as it has been aforementioned several times, on a purely technical point of view defining the rule of law can be fairly hard, this is true due to the presence of *thicker* or *thinner* definitions that include substantive aspects or not. On the other hand though, there was also another layer of difficulty exclusive to the European Union that was a result of its international, multi linguistic character.

Up until now, to express the concept in this dissertation the term of *rule of law* has been used, however, it was also necessary to translate it in such a way that it had the same meaning for all the member states. Rule of law is a terminology that is applicable first and foremost to the Anglo-Saxon constitutional and legal tradition; different states in Europe possess equivalent terms that however reflect their own historical tradition.

For example, in Germany the term that is often used to identify the rule of law is "*rechtstaat*[140]*"* or "state of right". This term was born during the 18th century in order to provide an alternative to a more authoritarian state of police that only limited itself to apply laws, and in which power was centred only on certain individuals[141]. In this original conception of the state of right, the goal was only to subordinate these authorities and the citizens to a series of predefined constraints, since peace was already achieved; in this sense, only the citizens through their participation in the state could have provided the definition of these legal constraints. In the *rechtsstaat* there is not really a moral quality that is attributed to the laws that must be pursued, but more a technical framework regulating national life, putting it close to the more formal definitions of rule of law.

In Italy for example, it is possible to find the analogous term "*stato di diritto"*, which became common in the legal discourse at the end of the 18th century. Unlike Germany, the *stato di diritto* did not have an internal development that signalled a defined constitutional history, but was more an application of a foreign term. In this case, the point was not to assign moral characteristics to the legal system, but to identify its boundaries. It is interesting to see how in Italy for example, the *stato di diritto* was

[140] Bin Roberto, (2017) "Lo stato di diritto", *Enciclopedia del diritto, Annali IV,* Milano 2011, 1149-1162
[141] *Ibidem*

generally considered to be achieved also in the fascist period[142], returning to a definition of rule of law not too dissimilar from the one proposed by Raz, identifying mainly formal constraints.

In France instead, the term generally used corresponds to "*Etat de droit*"[143], which again could be literally translated as the state of law or state of right. Unlike the German tradition or the Italian interpretation that identified mainly *positive* aspects of law, the French tradition also identified *natural* aspects of law, which were a direct consequence of the historical development of the country. On the one hand, these rights were considered to be fundamental due to the existence of the declaration of the rights of man and the citizen (*Déclaration des droits de l'homme et du citoyen de 1789*[144]*),* which is still valid today and identified the natural aspects of law necessary to identify a state governed by rules or in other words an *Etat de droit*. On the other hand, the French experience also focused in limiting and defining a framework under which all the public charges of the state were to operate. This was not done as much through public participation as in the German tradition, but more through a separation and limitation of the different branches of authority. This was for example what did not happen during the revolutionary times, in which the judges and courts held an excessive amount of power.

Due to these different translations of rule of law, it is quite apparent why the European Community tried to avoid using the concept too much, at least at first. This is for example why in the 50s instead of an explicit reference to the rule of law, the community only wrote that for "*the interpretation of the treaties law would have been used*".

To this day, these different *souls* that are possible to identify in the different European traditions are a source of controversy in the interpretation of Rule of Law, especially since Eastern European democracies are mainly based on Western systems and do not possess an equivalent constitutional tradition. For this reason, as aforementioned, it has also been necessary in more recent times for the European Union and the Commission to release precise statements on their interpretation, in an attempt to dissipate potential confusion.

[142] *Ibidem*
[143] Grote, Rainer, (2012) "Rule of Law, Rechtsstaat y État de Droit. Pensamiento Constitucional", *v.8, 127-176 (2002). 8.*
[144] *Ibidem*

3.2 Rule of Law safeguard mechanisms (Rule of law toolbox)

Together with the development of the concept as enshrined within the Union's treaties, also the instruments used to defend it from a potential backslide changed and evolved with time. The newest tools at the disposal of the Union are represented by the rule of law framework, which however developed its first iteration only in 2014. Other instruments however can be used in order to reach a successful resolution of a potential backslide by sanctioning the member state or by putting pressure upon it through the existence of communitarian constraints.

First and foremost the most important tool used over disputes regarding the rule of law has been represented by infringement procedures. Its ultimate goal is to punish member states that have been found violating some form of the EU law, by fining them a certain financial amount[145]. The whole process is started by the commission which can then refer the case to the court of justice in case of non compliance over its findings[146]. Here however lies one of the main problems with the use of this instrument: during the legal proceedings against Poland and Hungary, the Court has been quite eager over the possibility to use the infringement procedure, which however has not been equally met with the enthusiasm of the commission, concerned over which cases represented an offence relatable to the charter and appropriately deserved the use of this instrument[147]. The result has been a limited amount of cases in which infringements could be carried on, severely limiting their efficacy. If that wasn't enough, it also provided little effect due to the negligible results that the simple fines represented for the two states.

The rule of law toolbox was instituted following the introduction of the Lisbon treaty in 2007. The crowning provision in case of a potential backsliding was identified in the aforementioned Art.7 and the rule of law framework. In particular, Art.7 was articulated over a series of main points, of which the most relevant is represented by section 7 (3) that states how *"...the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in*

[145] "*If the EU country concerned fails to communicate measures that fully transpose the provisions of directives, or doesn't rectify the suspected violation of EU law, the Commission may launch a formal infringement procedure*"; EU official website "Infringement procedure"; *https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en; consulted in January 2021*

[146] *Ibidem*

[147] Grabowska-Moroz Barbara; Kochenov Dimitry; Closa Carlos, (2020)" Understanding the Best Practices in the Area of the Rule of Law"; *Reconnect work package 8, deliverable 8.1*

question, including the voting rights of the representative of the government of that Member State in the Council.[148]*"* Due to this extreme connotation, Art.7 (3) is often referred as "*the nuclear option*", even though this is a label not all commentators agree upon[149]. In short, due to the fact that the application of the article and the suspension of voting rights are considered to be so intense as to potentially create several secondary unwanted results; Art.7 (3) is only the last step of a series of instruments and measures available in order to safeguard the rule of law.

In particular, referring to the official EU factsheet regarding the rule of law toolbox[150], we can find the aforementioned rule of law framework, but also other instruments such as the EU justice scoreboard, the European Semester; and a variety of softer measures of indirect promotion of rule of law such as funding mechanisms, communication campaigns or technical support to governments [151].

Looking at the "*Justice scoreboard*", we find a measure introduced only in 2013 consisting in a document released by the Union where a series of statistics and indexes[152] are compiled in order to assess the health of a member state's justice system. This data is not only used at face value, but also in order to compile the annual "*Rule of Law report*", which also feeds into the "*European Semester*". This last event takes place every year and provides guidelines and a spending framework for the member states in order to foster the adoption of European values but also to prevent economic imbalances and boost investments.

What is important to denote here is that the only way in which the Commission may act in the framework of the European Semester is through recommendations[153] that are not binding for member states, which in turn means that in case of a serious backsliding of rule of law it is very unlikely these soft measures will yield an appreciable result. It

[148] TEU (2007), Art. 7(3), Title 1, common provisions
[149] Kochenov, Dimitry, (2017). "Busting the Myths Nuclear: A Commentary on Article 7 TEU", *EUI Working Papers. 10.2139/ssrn.2965087.*
[150] EU official website, (2020) "Rule of law report 2020", https://ec.europa.eu/info/sites/info/files/rule_of_law_mechanism_factsheet_en.pdf, consulted on October 2020
[151] *Ibidem*
[152] Such as for example spending in the judicial sector, number of legal litigations processed etc. "The 2020 EU Justice Scoreboard"
[153] In the framework of the EU, "*a recommendation is not binding*", "*A recommendation allows the institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed*." Europa.eu "Regulations, Directives and other Acts". *https://europa.eu/european-union/law/legal-acts_en, consulted in November 2020*

should also be noted that these tools have been instrumentally used by countries accused of infringing fundamental principles of the Union. For example, by quoting one or more particular indexes in which they were performing well as proof of their innocence[154]. For all these reasons and shortcomings, in case of backsliding of rule of law, the main instrument used to restore the state of legality still remains the rule of law framework and the use of Art.7.

The rule of law framework was introduced in 2014 with the aim of providing a multi step approach to potential breaches of the fundamental principle of the union, with the final step represented by the application of sanctions through Art.7-3 (See Figure 1). The whole process starts when doubts about the adherence to the rule of law are raised; this can be done by a variety of actors such as the commission itself, but also the parliament or other member states. This leads to an official assessment done by the commission, coupled with a constant dialogue with the member state and other advisors such as international humanitarian organisations, the Venice Commission[155] and judicial bodies. The assessment of the European Commission might result into the issuing of several opinions[156] and recommendations.

To be remembered here there is the existence of the Annual rule of law dialogue, also instituted in 2014 as a response to the situation that was developing at the time in Hungary. with it, an annual review of rule of law had been instituted[157] in which all the member states were encouraged to participate to reach a common understanding of the concept, respecting the differences among the several interpretations and legal systems[158].

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[154] See Pech L. (2020)

[155] As it is stated in the website of the commision itself: *"The European Commission for Democracy through Law - better known as the Venice Commission as it meets in Venice - is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to* provide legal advice *to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also helps to ensure* the dissemination and consolidation of a common constitutional heritage, *playing a unique role in conflict management, and provides "emergency constitutional aid" to states in transition."; Council of Europe, Venice Commision, https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN*

[156] *"An "opinion" is an instrument that allows the institutions to make a statement in a non-binding fashion, in other words without imposing any legal obligation on those to whom it is addressed. An opinion is not binding. It can be issued by the main EU institutions (Commission, Council, Parliament), the Committee of the Regions and the European Economic and Social Committee.*", "Regulations, Directives and Other Acts", *https://europa.eu/european-union/law/legal-acts_en, consulted in November 2020*

[157] Grabowska-Moroz Barbara; Kochenov Dimitry; Closa Carlos, (2020)" Understanding the Best Practices in the Area of the Rule of Law"; *Reconnect work package 8, deliverable 8.1*

[158] Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law, Brussels, 16 December 2014, 17014/14

All in all, this fed into the new provisions trying to safeguard the rule of law fostering its respect and understanding in a more gentle way[159], instead than the use of tougher measures.

Whatever be the case, if all dialogues fail, it becomes possible to start the application of the most serious parts of Art.7, which is divided in two main paths (See Figure 2): a "*preventive mechanism*" described by Art.7(1)[160] and "*sanctioning mechanisms*" described by Art.7(2-3)[161]. Whereas the preventive mechanism can be seen as a sort of warning given to the member state in the hope that it will revert towards a full adhesion to the rule of law, the sanctioning mechanism comes into play only later, when the breach is quite serious and has been present for a sufficient amount of time.

As explained previously the preventive mechanism is centred on the possibility on behalf of the European Council to issue a series of recommendations to the member state in the hope of re-establishing the rule of law. More in particular, looking at Art.7(1), we can observe how the preventive mechanism might be initiated through a reasoned proposal advanced by 1/3 of the member states; 2/3 of the European Parliament; or by request of the Commission. After the dialogue with the member state and previous authorisation of the parliament, recommendations can be issued containing suggestions and requests on how to solve the situation. Of course though, recommendations in the EU do not have a binding character, and therefore in case Art. 7(1) proves not to be sufficient to deescalate the dispute, it would then be possible to resort to Art.7 (2-3)

Member states or the commission may initiate the procedure prescribed by Art.7 (2). This will start a process within the Union's institutions that culminates with a European

[159] See Grabowska-Moroz Barbara; Kochenov Dimitry; Closa Carlos, (2020)"

[160] "*On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure."* TEU (2007), Art.7(1), Title 1 Common provisions

[161] "*The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations*.";" *Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons."* TEU (2007), Art.7(2-3), Title 1 Common provisions

Parliament vote which might authorise a final vote required to apply sanctions. Due to the severity of the last decision, only a unanimous vote among the members (excluded the country put under scrutiny) might bring the application of sanctions.

It is therefore now possible to arrive to a series of conclusions. As aforementioned, the rule of law toolbox prevents a variety of "soft" measures that might work in case of minor backslidings, but in general, the main mechanism used in serious cases still remains to this day the rule of law framework and Art.7. Despite its importance, it is clear why it cannot be considered to be a perfect instrument. First of all, the sanction prescribed by Art.7 (3) is seen by many commentators as quite extreme, reason for which it is also referred to as the "*the nuclear option"*. The main issue is that if the ultimate goal of the commission consists in the reestablishment of the rule of law, the isolation of the country from the rest of the union might backfire by making it even more entrenched within its positions, deepening the gap between the state and the EU institutions.

Coupled with this, also the need for unanimity has been problematic. First of all, due to the fact that two or more countries violating a fundamental value of the EU might cover each others' back preventing the most serious sanctions; but also because many countries enabled potential backslidings in the context of the rule of law through the existence of several communitarian mechanisms[162]. European parties for example, heightened the sense of legitimacy offered to Hungary during the debate. Notoriously, Orban's party *Fidesz* belongs to the *EPP*[163] group in the European Parliament, entertaining direct relationships with some of the most important parties and political actors in the rest of the continent, being therefore in a privileged position. It would be very important for the different groups to follow on their own standards of respect of rule of law upon acceptance of their members.

If they wished to see a faster resolution of the matter, it could be very important to cut ties with these rogue parties. For example, the Romanian majority party was isolated in 2019 from the socialist group in the European parliament over similar concerns[164], it would be quite possible to imagine a similar situation to happen in the scope of Hungary, while it would be much harder for Poland due to its presence in the ECR group. Isolating rogue

[162] See Grabowska-Moroz Barbara; Kochenov Dimitry; Closa Carlos, (2020)
[163] European People's Party, includes different political groups in the continent adhering to centre right ideologies, including *Fidesz.* Epp.eu
[164] Paun Carmen, Gurzu Anca; (2019) "Romanian ruling party hits back at Socialists for freezing relations" ; *Politico.eu*

members presents its own sets of potential risks and rewards, but enabling them indefinitely providing legitimacy to their own governments is most likely one factor that contributed to the prolonged nature of the matter seen until today.

As if that wasn't enough, often also many other member states enable the position of those infringing the treaties by assuming neutral stances over the dispute[165]. Many states have been reluctant over the prospect of punishing or using Art.7 against the Polish and Hungarian state[166]. This severely limited the possibility of the Union to act within the framework of democratic enforcement, but also strengthened the legitimacy and positions of governments not complying to the treaties.

For all these reasons, as it will be possible to see analysing more in detail the legal proceedings in the framework of Art.7 for Hungary and Poland, there has been a general inefficacy to solve the problem. The systems currently in place have not been enough to guarantee a safeguard to the rule of law. Measures of punishment like the infringement procedures have not been enough to sway governments or the public opinion; harsher measures like the use of Art.7(3) could be met with great hostility, potentially entrenching the problem, and would however need a great amount of cooperative effort which is not guaranteed to be present in all member states.

Other measures aimed at building an increased trust and adherence to the rule of law standards through gentler means have been equally unsuccessful. The other member states are quite divided between those who would like to see a better enforcement of the treaties and those who instead wither do not care enough or would not like to see so much authority invested over the Union. All these problems prompted calls for an overhaul of the system and the need for new sanctioning instruments[167], which translated for the first time with the creation of the rule of law framework in 2014, even though an ideal solution is yet to be seen.

[165] See Grabowska-Moroz Barbara; Kochenov Dimitry; Closa Carlos, (2020)
[166] *Ibidem*
[167] Von Bogdandy Armin, Bogdanowicz Piotr, Canor Iris, Taborowski Maciej and Schmidt Matthias; (2018) "Un possibile "momento costituzionale" per lo Stato di diritto europeo. L'importanza delle linee rosse"; *ForumCostituzionale.it*

Chapter II

Transition to Democracy

The second step necessary to analyse the phenomenon of rule of law backsliding in Eastern Europe is to look into the political and historical context of the two countries. Both are similar in the sense that they could be considered among the group of modern European states which however belonged to the Soviet Block in the second half of the last century. Due to this fact, differences in social and political values can be found compared for example to the rest of the Western states. Whereas in Western Europe the second half of the 20th century can be considered as a period of liberalisation, economic growth, integration, critique and review of many of the social staples that existed up until then; the same cannot be said for the East. For these countries, this time frame was not characterised by a progression in the economic and social sense as much as a continuous, daunting struggle in order to preserve and gain some form of independence from the Soviet Union, which exercised a significant political and social influence over every aspect of life.

This struggle in all of these states (such as Poland and Hungary, but also Czechoslovakia, Estonia, Latvia etc.) often erupted into violence, creating a different set of myths and heroes compared to the West. Understanding and summarising these events is an invaluable help in order to understand the mentality and political discourse that is carried on also today. This is especially true due to the fact that as previously described many of the historical and social events that characterised our society, such as for example the protests of 1968[168], have in this region another entirely different type of relevance.

[168] 1968 was a year in which mass protests were held in several regions in the world. In Particular, in the west they are remembered associated to the Paris' May protests. Organised by students, they were aimed at

Whereas in the West they are immediately associated with the Paris' May protests, in the Eastern Block they are sadly remembered for the Prague Spring[169] and the Soviet invasion of Czechoslovakia.

4. Poland and Hungary in the Second World War and the Eastern Block

Briefly looking at the history of the two countries in the first half of the past century, we can already see some similarities. Like many others in Europe, both were born at the end of the First World War as a result of ethnic recognition's policies promoted among the others also by the American President Woodrow Wilson and his famous 14 points[170]. The desire to promote a peaceful world following the slaughter of the conflict, concretised with the need to destroy the ancient European Empires and to allow the single nation states to self determine and be masters of their own destiny.

The state of Poland for example, did not exist for almost 150 years prior to 1918 due to its partitions between Prussia, Austria and Russia of 1772-1793-1795[171]. Likewise, Hungary was not an independent sovereign state but belonged instead to the renowned Austro

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protesting against capitalism and the old world institution, both in the political and social sense. As time progressed, also factory workers joined the protests causing a small crisis. It is no exaggeration to say that the protests of 1968 mark a stark divide between the old and the modern world, since they highlighted all the dissatisfaction of the youth with the old organisation of society, and would have given birth to a series of movements that brought the world to its current state. Seidman, Michael, (2009) "The Imaginary Revolution: Parisian Students and Workers in 1968", *1st ed., Berghahn Books, 2009.*

[169] Just like in the West, also in the East 1968 was a year in which a desire was expressed for change. In particular, 1968 represents in Czechia and Slovakia the year in which policies of liberalisation and democratisation were undertaken through the work of the newly appointed secretary of the communist party Alexander Dubček. Unlike the West, protests in the eastern block resulted in the opposite: Czechoslovakia was invaded by the Warsaw Pact and the experiment of change was violently repressed. Günter Bischof, Stefan Karner, Peter Ruggenthaler , (2009) "The Prague Spring and the Warsaw Pact invasion of Czechoslovakia" , *2009 Lexington Books*

[170] The "fourteen points" refer to a famous speech given by then President Wilson over a possible peace settlement following the slaughter of WWI. In particular, referring to Poland and Hungary, we can find point X and XIII, which explicitly state "*The peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity to autonomous development*.", "*An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant*.", Wilson Woodrow, (1918) "Fourteen points speech", *http://www.blowthetrumpet.org/documents/FourteenPointSpeech.pdf ; consulted in November 2020*

[171] The state of Poland was "*butchered*" and partitioned over several times during the 18th century. There is no particular reason that lead to this outcome besides a general weakness of the Polish state, which the three bordering superpowers of Austria, Russia and Prussia took advantage of in order to take control of their territories. The final outcome of the partitions would have been the complete disappearance of Poland from the political map of Europe, which saw its territories swallowed among the different invaders. Lukowski Jerzy, (2014) "The Partitions of Poland: 1772-1793-1795", *Routledge 1st edition 2014*

Hungarian Union[172]. Already these distant events posses some significance in order to understand the political and social reality of today, for example, the partitions of Poland created a disparity in terms of infrastructure and economic development between the Western and Eastern part of the country that is still present today, potentially influencing political outcomes[173].

Even though the countries received their sovereignty and independence this was not destined to last, after a mere twenty years Europe was once again entangled in another war which sealed the fate of the two nations. Poland was notoriously the first "casualty" of the war; the borders of 1918[174] provided the perfect *casus belli* for the German state through the acquisition of the corridor of Gdańsk. The result was a 6 years long occupation in which Germans and Soviets had control of the country in alternative moments of time. The situation of Hungary was instead completely different: whereas Poland was a victim of the axis, Hungary joined it, participating also militarily in the war through its presence in the Balkan and Russian campaign.

As the war approached its conclusion in 1945, the new borders were already starting to be drawn by the future winners. The geographical area of Central-Eastern Europe certainly presented its complexities that were discussed in the conference of Yalta[175]. Before the

[172] The "*Austro-Hungarian compromise*" of 1867 was a political agreement under which the states of Hungary and the Empire of Austria formally joined under the Habsburg lead Austro-Hungarian Union. By all means, even though much of the power was centralised under the Austrian part, this guaranteed Hungarians some form of independence, such as their own parliament, citizenship and passport. The Union would have lasted approximately 50 years, ending with WWI. Tihany, L., (1969)"The Austro-Hungarian Compromise, 1867–1918: A Half Century of Diagnosis; Fifty Years of Post-Mortem." *Central European History, 2*(2), 114-138. doi:10.1017/S0008938900000169

[173]The consequences of the partitions have been studied several times. Differences in infrastructure and industrialisation can be easily observed, with the West being richer and more developed compared to the agriculturally based East. What is more controversial but generally accepted are the differences in voters' preferences and societal models. In general, the Western-Northern part tends to vote for more progressive, less collectivist parties while instead the Southern-Eastern part tends to vote for more religiously conservative parties. Grosfeld Irena, Zhuravskaya Ekaterina. (2013) "*Persistent effects of empires: Evidence from the partitions of Poland*", *ffhalshs-00795231*

[174] Among the different points proposed during the peace talks, there was a provision regarding Poland preventing possible problems. Even though the principle of self determination was to be considered paramount, Poland still needed access to the sea. The solution was not to include part of Pomerania in the post bellic borders of the German state. It was done by giving a part of land to Poland and to create a buffer state through the free City of Gdansk. This was particularly relevant due to the fact that 96% of the population of the city of Gdansk was at the time of German ethnicity, pretext used in 1939 to start the Second World War. The situation regarding the city and the region was particularly complicated, during the elections of 1933 the National Socialist party won more than 50% of the votes in Pomerania, in a sense it was the heart of the Nazi support. Perhaps also to the border and ethnic division resulting with the end of WWI. Schenk Dieter, (2013) "Danzig 1930-1945: das Ende einer Freien Stadt", *Ch. Links Verlag; 1., Auflage 2013*

[175] The Yalta conference took place in the February of 1945, and was attended by the leaders of US, Great Britain and URSS to discuss the future common objectives and ideas regarding the post war peace

war, Poland included many areas belonging now to Belarus and Ukraine[176]. The conference of Yalta can be quoted for providing the groundwork for the borders and ethnic composition of the modern Polish state. It did not include the East anymore, which was instead given to Ukraine and Belarus; but gained many richer cities in the west that historically belonged at times to Germans and at times to Poles[177].

Also prior to the war, Poland used to be perhaps the most ethnically diverse country in Europe, with many sizeable minorities, especially Jewish, Ukrainian, Belarusian and German[178]. Whereas the Jewish population was reduced from three and a half million to a staggering 100.000[179] due to the holocaust; often forgotten victims of the closing months of the second world war were also the German civilians, who were ethnically displaced and forced to move within the new borders of Germany. Due to all these events, the newly found Polish state would have become the opposite of its previous counterpart, transforming into an extremely ethnically and culturally homogenous nation, feature present to this day.

Hungary represented a completely different situation. The country had annexed several territories during the war, especially in areas where there was a sizeable ethnic Hungarian minority[180]. However for the allied leaders, the ethnic and border complexities of the

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settlement. Efforts were made to delineate a stable political situation, but it was also an occasion for the different superpowers to delineate their respective areas of influence. *Stettinius Edward R.,* "Roosevelt and the Russians: The Yalta Conference." *Jr*. Edited by *Walter Johnson*. *The American Historical Review*, Volume 55, Issue 4, July 1950, Pages 942-944, https://doi.org/10.1086/ahr/55.4.942

[176] The 1918 borders were far from perfect. Many areas of nowadays western Ukraine, Belarus and Lithuania (especially important cities with polish populations such as Vilnius and Lwów) were included in the Polish state. This more closely resembled the borders of the Polish-Lithuanian commonwealth but ended up including many areas that were for the most part ethnically Belarusians or Ukrainian. Factor that caused later tensions. Piotrowski Tadeusz, (2000) "Genocide and rescue in Wołyń: Recollection of the Ukrainian nationalist Ethnic cleansing campaign against the Poles during World War II", *McFarland Publishing, Annotated edition 2000.*

[177] In Particular, cities such as Wrocław/Breslau and Poznań/Posen. *See Schenk Dieter (2013)*

[178] Looking at the census of 1931, the second polish republic could count on only 68% of its inhabitants being native Poles. 14% were Ukrainians, 10% Jewish, 3% Belarusians and 2,5% Germans. The distribution of the population was not homogenous, Ukrainians and Belarusians were concentrated in the East while Germans in the west. Davies Norman, (1981) "God's playground: A history of Poland", *Columbia University press 1982*

[179] *Ibidem*

[180] To this day the ethnic reality of the Carpathian Mountains and the Balkans is quite complicated for Hungarian people. Between Slovakia, Northern Serbia and Romania several Magyars live isolated from their country. Through the alliance with the Axis during WWII, Hungary gained through the Vienna Awards several territories were these minorities were present, also gaining important cities such as *Novi Sad*. Mace James, Ward, (2015) "The 1938 First Vienna Award and the Holocaust in Slovakia", *Holocaust and Genocide Studies, Volume 29, Issue 1, Spring 2015, Pages 76–108, https://doi.org/10.1093/hgs/dcv004;* Veres, Valér, (2014) "The minority identity and the idea of unity of the nation: the case of Hungarian minorities from Romania, Slovakia, Serbia, and Ukraine", *Identities. 22. 88-108. 10.1080/1070289X.2014.922885.*

Magyars were not as complicated as the Polish ones. The leaders in Yalta generally thought, without too much disagreement, that the *pre-war* borders were to be considered the most suitable ones. The issue of Hungarian minorities is still present to this day, with many living outside the borders of the country, however, unlike in Poland, this did not historically create extreme tensions, like it was for example the case in its southern eastern region known as *Wołyń*[181].

Whereas the new borders of Europe were generally accepted, it was quite harder for the winners to agree on the sphere of influence under which they should have fallen. Great Britain and the US especially had very sympathetic views of the Poles, whom they considered gallant heroes who ended up being victims of the circumstances[182]. Despite their desires to guarantee an independent and free future for the country, the two World leaders were not willing to antagonise the Soviet Union over the independence of these Eastern states. This was true due to the fact that Stalin already had precise plans on the future of the area and what was to be considered his spoils of war.

The situation in Poland during WWII was characterised by a government exiled abroad in the UK, and a parallel state organisation within the country itself represented by the *Home Army*[183]. The Soviet Union's efforts to deprive Poland of its independence already started during the war trying to undermine the legitimacy of their institutions; a famous episode in this framework was the Warsaw Uprising in 1944[184] in which the Soviets did

[181] This bordering region included between South-Eastern Poland and North-Western Ukraine, was once inhabited both by Poles and Ukrainians. Often, due to historic reasons, the administration offices were mainly populated by Poles, which also represented the wealthiest ethnic group due to the diffused possession of land. Towards the end of the Second World War, ethnic tensions between Poles and Ukrainians were fuelled by Ukrainian nationalists, which resulted in a massacre of between 50.000 and 100.000 people. Snyder Tymothy, (2003) "The causes of Ukrainian-Polish ethnic cleansing 1943", *Oxford University Press, Past & Present, No. 179 (May, 2003), pp. 197-234*

[182] Hitchcock William I., (2003) "The Struggle for Europe : the Turbulent History of a Divided Continent, 1945-2002.", *New York :Doubleday, 2003. Pp.17*

[183] The *Armia Krajowa,* translated in English as the Home Army, was a military organisation that was organised in Poland during the WWII occupation. Contrary to many other partisan organisations in Europe, the Home Army was extremely well organised and present in the whole territory, being part of a sort of parallel underground state. The Home Army was also directly connected to the Polish government exiled in London, with which it coordinated its activities. Latawski P., (2010) "The *Armia Krajowa* and Polish Partisan Warfare, 1939–43", *Shepherd B., Pattinson J. (eds) War in a Twilight World. Palgrave Macmillan, London. https://doi.org/10.1057/9780230290488_6*

[184] The Warsaw uprising (Powstanie Warszawskie) of 1944 represented a moment in which the Polish resistance hoped to break the German occupation of the city through arms. A sizeable chunk of the Home Army was mobilised, in the hope also to state the Polish capability to fight and in doing so preventing a Soviet occupation. The events turned sour and the home army was decimated, with the Soviets not intervening despite being very close to the city. The event is still very much remembered in the national conscience, also due to the fact that 90% of the city was razed to the ground, and its population decimated.

not intervene, hoping to kill two birds with one stone: first the elimination of a considerable chunk of the home army; and second to highlight the incompetence of the Polish government in exile.

Whatever be the case, following the end of the war, the Home Army was forced to disband, and the ground was prepared for the 1947 elections, in which the frontrunners were represented by the Communist Party and the *Polish Peasant Party*[185]. In the years preceding the elections, a systematic campaign was carried out by Soviet agents smearing political opponents accusing them of having a "*fascist*" background, coupled with a campaign of intimidation and interference with the democratic process, disrupting opponent's rallies, communications and initiatives. Without great surprise, in the elections of 1947 the communist party won with overwhelmingly good results, which projected the country into the sphere of influence and direct control of the USSR.

Many reasons could be given for this turn of events, on the one hand the imprisonment and intimidation of political opponents had without doubt a strong effect; however it was also true that the Polish people were exhausted and desired above all stability. The war had taken a huge toll; suffice to think the huge loss in terms of population[186], or the complete annihilation of Warsaw. Many events were not even directly tied to the war and are often forgotten, such as for example the aforementioned *Wołyń* massacre. The desire for peace was much greater than sovereignty at the times, which inevitably lead towards the transition in the Eastern Block.

The trajectory that Hungary followed was quite different, Poland was to be the crown jewel of the spoils of war taken by Stalin, however the leader did not draw specific plans regarding this second country, and due to this fact at the end of the war the system that emerged was a simple democracy. It must be kept in mind that Hungary during the war was allied of the axis, for this reason when a permanent military soviet occupation was

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Borodziej, Włodzimierz.(2006) "The Warsaw Uprising of 1944", *Madison, Wis: University of Wisconsin Press, 2006.*

[185] The PSL or Polish Peasants' Party is one of the oldest parties in the political scene of Poland. It was founded right after WWI in order to promote the development of agrarian policies and interests. For this reason it was one of the only parties that was allowed to exist also in the communist era, despite being heavily reformed and forced to adhere programs of collectivisation. Today, it is one minoritarian party that pursues centrist-conservative policies. *See Grosfeld Irena, Zhuravskaya Ekaterina. (2013)*

[186] The Polish Population in 1939 amounted to 34 millions, during the war the victims amounted to around 6 millions, resulting in a whopping population reduction of almost 20%. So much so that Poland is the single country involved in the war that saw the greatest percent reduction in its population. *See Davies Norman (1981)*

discussed, there were not great protests. Similarly to Poland, the allies decided not to antagonise the Soviet Union and allowed them to have free reign in the region[187].

The Soviets however underestimated Hungary, in the sense that they thought it was not necessary to impose communist rule, since it was an actual desire of the population to be part of the Eastern Block. In their initial ideas, the country would have willingly voted its way under the Russian wing. This however was not to be the case, in the 1947 elections the communists did not seize many votes and a government was instead formed by *Imre Nagy*. Stalin was not willing to let the Hungarians so easily off the hook, so with time, the Soviet presence would have become more and more evident and together with the army, other elements started to pour into the state. Soviet agents arrived and what followed was a systematic campaign of elimination of personalities and parties hostile to the Soviet regime through intimidation and smearing, similarly to what happened in Poland. In the end, the Prime Minister Nagy was forced to resign due to the threat represented by his son kept as a hostage[188]. The elections of 1949[189] finally sealed the overwhelming victory of the communists, which similarly to Poland, now gave control of the country to the Soviet overlords trough a multi-party coalition.

The decades that followed until the 90s and the final independence were represented by different episodes of distancing and revolt against the USSR, alternated by moments of quiet. In the 1950s, with the death of Stalin and the passage of power to Krushev, some first distancing took place. In Poland, Władysław Gomułka[190] was elected leader of the communist party and de facto ruler of Poland, and in 1955 the Warsaw Pact was signed. The significance of the two events can be easily explained. The reason is that they

[187] See Hitchcock W. (2003), pp. 98-126

[188] *Ibidem*

[189] The communist lead alliance in Hungary won a whopping 97% of the votes in 1949. Molnár, M. (2001). "A Concise History of Hungary ", *(Cambridge Concise Histories) (A. Magyar, Trans.). Cambridge: Cambridge University Press.*, pp. 301

[190] Gomułka is surely one of the most relevant Polish political figures of the last century. "*He was the author of an original conception for the gradual and evolutionary introduction of the socialist system, known as "the Polish road to socialism." In 1948, because of the Cold War and Stalin's policy of "uniformization" of the people's democracies, Gomulka's conception fell, the Party was dominated by a dogmatic line, and Gomulka was accused of a rightist-nationalist deviation and imprisoned. He regained freedom and power with the tide of de-Stalinization in October 1956, and introduced in Poland a number of significant reforms whose consequences proved to be stable: he abandoned collectivization, limited industrialization, improved relations with the Church, pursued a pragmatic cultural policy, and eliminated glaring cases of lawlessness. In the domain of foreign policy, he successfully realized his model of a partnership with the Soviet Union, and won full international recognition of the Polish western frontier.* ", Werblan Andrzej, (1988) " Wladyslaw Gomulka and the dilemma of Polish communism", *International political science review, vol.9 issue 2. Pp. 143-158*

represent at the same time a form of distancing and yet closing in the relationships entertained by the country with the rest of the communist world. Gomułka was indeed a communist, but he was also a patriot, and for this reason his leadership was met by doubts in Moscow. The Russians thought that his actual desires were to break away from the Union and subsequently tried to stop him. This did not happen however, what followed was a small crisis[191] which ended in favour of Poland, who was capable of coming out on top. A small victory indeed, but a first example of the rupture between Warsaw and Moscow which would have later widened. In truth, with Gomułka, the soviets had nothing to fear, he would have proven a reliable asset in enforcing the communist rule in the region.

These events were however very significant for Hungary as well, even though their results were much more tragic. Here the 50s remain to this day engraved in the national conscience due to the events of the Budapest uprising of 1956. The victory achieved by the Poles with the nomination of Gomułka gave Hungarians the courage to advance a series of demands. The smell in the air in those days was one of reform; Hungarians thought perhaps too naively, that the days of Soviet repression had ended with the death of Stalin. Following students' protests demands were made, mimicking those obtained by the Poles, consisting in the desire to nominate their own leader and prime minister, the return to a multi party state, and the removal of soviet occupation troops from Hungarian soil. Whereas the Polish gamble was a success, Hungary would have instead lived through a revolt which was quenched in blood and a full blown soviet invasion after only a couple of days[192]. The tragic nature of the events of 56' hold a great significance to this day, also since they played an active part in the rebirth of the national conscience in the end of the 80s.

[191] Following several protests in 1956, polish trade unions and members of the party started to ask the return of Gomulka as leader. After rehabilitating him, Russians were closely monitoring the situation and preparing a potential invasion. Gomulka threatened resistance and in the end, the crisis was resolved by accepting his nomination. He would have stabilised the communist system and not been a threat to it. See Hitchcock W. (2003), pp. 203

[192] Initially started as a student protest, it emboldened the Hungarian opposition represented first and foremost by Nagy, who declared with his colleagues the wish to move to a multi party system and to withdraw from the Warsaw Pact. Between the 28th October and 4th November of 1956, Budapest lived through a short period of self proclaimed independence and revolution. Sadly, it ended with bloodshed once Russian lead troops invaded the country to re-establish the status quo. Hungarians, perhaps naively, hoped in a western intervention which never arrived. Nagy, and many others of his comrades would have been sentenced to death and executed in 1958. See Molnar M. (2001)

Summarising, following the death of Stalin in 1953, the satellite countries saw an opportunity in the early 50s to make a move towards freedom, which ended positively with a first timid step for the Poles but quite poorly for the Hungarians. Despite this difference, the situation at the end of the 50s was quite stable in both countries, their belonging into the Eastern Block and the Warsaw Pact was restated, the first with a new leader and the second with a revolution quenched in blood.

It is however in Poland that many of the strong internal problems that led to the fall of the Soviet Union itself took place. During the 70s, a series of protests broke out due to the harsh economic conditions the country was experiencing. One of such events, in the coastal cities of *Gdańsk* and *Gdynia* was repressed in blood, the regime ordered soldiers to fire over the protesters, which lead to several dead and one thousand wounded. The events inevitably stirred up strong emotions in the general population and eventually lead to the replacement of Gomułka in favour of Edward Gierek. Despite an initial pacification, the worker movements and especially the naval shipyards of the Baltic Sea became a hotbed for political activism, which resulted in the birth of the *Solidarność* (Solidarity) movement in the city of Gdańsk[193]. Officially recognised in 1980, it reunited and directed all the different protest movements that arose in the 70s, and with time, it would have gained a primary importance in the political destiny of the country and the Soviet Union itself. The protests and civil unrest caused by the movement later lead to a state of martial law promulgated in 1981. This move cracked down on the protests but also exacerbated the already terrible economic conditions and general life in the country. Poland officially became a nation hard to rule and to keep stable, an element which would have later contributed to its independence.

The situation in Hungary was much more straightforward: thanks to a management that was not as disastrous as in Poland during the 60s and 70s and the painful memory of the 56' revolution, everything was much calmer. The country had been in the hands of Janos Kadar acting as secretary of the party since 1956, a role which he would have retained almost up until the very end with his death in 1988. Here the communist government did not experience a slow and painful death like in Poland but instead ended its rule very

[193] The movement of *Solidarność* started in the city of Gdańsk due to the presence of a very important naval dockyard, called *Gdańsk Stocznia*. Workers had accommodation in the shipyard, which were often very poor. Repression of dissenting opinions was also quite frequent on the spot. This combination of poor living and work conditions coupled with censorship of thought made factories and the naval shipyard fertile ground for harsh criticism of the system. See Hitchcock W. (2003)

swiftly at the end of the 80s. The desire to break free was really great, but concrete occasions of that happening did not present themselves up until the Gorbachev's era and the *Perestroika*[194]. In a sense, the period of transition Hungary went hand in hand with the Polish one, from which they would have mimicked certain policies.

Going back to this country, matters were still very complicated; despite being outlawed *Solidarność* did not end. The 80s were characterised by widespread poverty, governmental repression and growing civil unrest. The communist regime tried to suppress the movement at the best of its abilities but eventually it was not possible anymore to stop the process of change. The start of the Gorbachev's era in 1985 and his call for reformation and modernisation lead the government to allow talks with representatives of the opposition and *Solidarność,* in what would have been known as the *round table talks*[195]of 1988. The main result was the promise of the first free elections that had to be held in 1989, which however were still very far from free, since they were held as follows: only 100 out of 460[196] seats of the parliament (*Sejm*) were contested; the others were to be assigned to the communist party. It was not possible to achieve a majority but the results would have been enough to guarantee the ultimate independence of the country.

All 100 of the contested seats were won by *Solidarność* representatives, and for this reason the communists knew that forcing another government would only have been met by subsequent protests, violence and civil unrest, in the end they had no other choice but to allow Tadeusz Mazowiecki to form the first non-communist cabinet since the war.

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[194] Or "перестройка" (literally reconstruction), referred to a series of reforms of the social and economic life of the Soviet Union that started with the nomination of Gorbachev as secretary of the communist party in 1985. Economically the country was opened and tried to attract foreign capital, while in the social sense an effort was made to create a free flow of information without censorship, encouraging people to engage in political and activist life. Very appreciated in the West, the perestroika would have ultimately lead to the demise of the socialist system and the Soviet Union in the East. Bahry, D. (1993). "Society Transformed? Rethinking the Social Roots of Perestroika", *Slavic Review, 52(3), 512-556. doi:10.2307/2499722*

[195] Due to the great social unrest of the 80s, in 89' the polish government invited Lech Wałęsa and other members of the opposition to discuss ways with which to solve the tensions. Initially, the aim of the government was to offer positions to the opposition representatives in order to maintain the status quo, however this was not the case in the end and the system was deeply reformed. The unionists were able to make the government officially recognise as legal all the unions; obtained the creation of a second chamber besides the Sejm: the Senate; obtained the new political figure of president which was to substitute secretary of the communist party; obtained the promise for the first political semi-free elections, in which all seats of the senate were to be contested. Krzysztof Brzechczyn, (2010) "The Round Table Agreement in Poland as a Case of Class Compromise: An Attempt at a Model" , *Debatte: Journal of Contemporary Central and Eastern Europe, 18:2, 185-204, DOI: 10.1080/0965156X.2010.509095*

[196] See Hitchcock W (2003). Pp. 359-361

The changes that happened in Poland, Russia and the Eastern Block at the end of the 80s lead the Hungarians as well to seize their freedom; but the transition here was much smoother than in the previous cases, perhaps the smoothest of all the former communist republics. Political activism rose especially through youth movements, and in 1988 (year in which Kadar died) these groups started to take the form of actual parties (including *Fidesz*); gradually but steadily the introduction of new legislation and the awakening of public conscience would have torn down the communist system. The moment that marks the clean cut with the past is usually considered 1989 when a public solemn funeral was kept in honour of Nagy[197]. His figure together with all the other Hungarians who were killed during the regime was rehabilitated, which inevitably prompted a review of the constitution that included the return to a multi party system and the end of the planned economy, ferrying the country to its first free elections that were to be held in 1990.

The extraordinary changes that took place at the end of the 80s were possible thanks to the willingness of these two states to seize a moment of weakness of the Soviet Union, and as it is generally recognised, this was also instrumental in its final demise[198]. Understanding and summarising these vicissitudes in the second half of the 20th century is fundamental in understanding their peculiar characteristics and the reasons for much of the two countries' characters. In many ways, what allowed them to survive the cruel living conditions that were imposed was the retaining of strong nationalistic roots coupled also with the retaining of a strong faith, which was instrumental in the formation of many unions, such is the case for *Solidarność* itself. Whereas in the west decades like the 50s, 70s or 80s are generally considered as very prosperous, and present their unique myths, for Eastern Europe they represent instead a moment of particular misery and martyrdom. The Hungarian revolution of 1956, the political unionism and activism in Poland, the martial state, are all events that Politicians in both countries often quote in order to draw parallels with many of the institutions of today[199]. These characteristics can at least partially explain why to this day the public sentiment and narrative in this region is so different compared to the West.

[197] See Hitchcock William I., (2003); Part 4
[198] *Ibidem*
[199] Stanley, Ben & Czesnik, Mikolaj. (2019). "Populism in Poland: A Comparative Perspective."; *10.1007/978-3-319-96758-5_5.*

5. Political Developments in the 90s: transition to democracy

Both the countries regained their freedom between the years 1989/1990, however the situation in which they were left with was fairly poor. Their economy was in shambles due to decades of programmed production, and so the first free governments were put in the difficult spot of having to rebuild almost from the ground up. The period following the end of the Soviet Union until the first decade of the new millennium is very relevant in the scope of this dissertation, because it allows us to take a look at the political structures put into place (first of all the constitution), together with the rise of the parties and personalities that hold significant relevance to this day.

Besides this, it also helps to understand the way in which it was possible to arrive to the current political and social climate. In many ways, a fundamental problem that concerns the existence of the phenomenon is relative to a form or *resentment* and *distrust*[200] on behalf of the citizens towards the institutions, both on the national and supranational level, that was later exploited in order to achieve a political majority. One first moment was represented by the transition that started in 89'. Citizens had little say in the round talks; and the same was true for the formation of the political structure which would have taken life after the fall of communism. As it will be possible to see, the participation in the process of building of the democratic institutions and European integration was mainly carried out by the political personalities, which only consulted the people through single referendums and general elections[201].

As previously mentioned, Poland called the first of its (semi)free ballots in 1989 which lead to the formation of the first non communist government since the war; however the situation was far from stable. The peculiar composition of the parliament formed by communist and solidarity members meant that the first government was created only to bring the country to its first fully independent elections in 1991. Lech Wałęsa, who was the protagonist of the *Solidarność* movement and the round table talks, was elected as the first president of the republic and had the duty of supervising this first round of

[200] Koncewicz Tomasz Tadeusz, "Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of Heart" (2019*); 26:2 Ind J Global Legal Stud 501.*

[201] Again, fostering this general feeling of perceived elites deciding the political fate of the two countries and not necessarily coinciding with the desires of the people, which concretised with the populist success of the later years. See Stanley, Ben & Czesnik, Mikolaj. (2019).

consultation. These first elections were largely inconclusive however, and represented a moment of political indecision in the country in which everything had to be reorganised but also the relics of the communist past still had to be purged. No single party obtained more than 13% of the popular vote, and the total number of groups who entered the *Sejm* amounted to a staggering 29. In the end the need to start working resulted in the decision to form a minority government sustained also by the opposition.

1992 marks an important year because it is in this case that we can see a first overhaul of the constitution. Similarly to Hungary who already made this change in 1989, the original fundamental law of the country was created in 1952 from the communist government, and therefore it was time to curtail all the articles that referred to Poland as a socialist state and as a system of planned economy. During the life of this first government, also other changes took place: the military contingent of the Warsaw pact left in 1993[202], and thanks to the work of one MP now leader of the *Konfederacja* party Janusz Korwin Mikke[203] the members of parliament that aided the communists were purged as well. The first government was therefore fundamental in erasing all the elements of the communist past, but after that it was time for new elections which could provide a clearer majority with a clearer political goal.

These new elections were held precisely in 1993, and compared to two years before; the political situation had greatly settled and was now manageable. The winners would have been represented by a centre left party called Democratic Left Alliance (*Sojusz Lewicy Demokratycznej)*, which would have controlled the country through most of the 90s. In these elections, we also see one feature that is often recurrent and present in the outcome of most Polish elections. Generally speaking, in the country there is a more progressive, internationally oriented party that goes against a more conservative, catholic and isolationist party. Whereas the progressive party fares better in the western, more industrialised part of Poland that was part of Prussia after the partitions, the more conservative party instead fares better in the more rural areas and in the East[204].

This pattern could be observed in 1993 due to the fact that the second place was won by the Polish Peasant's Party or PSL (*Polskie Stronnictwo Ludowe*), campaigning on a less internationalist and integrationist platform. The political views and the desire for unity

[202] Pomfret John, (1993) "Last russian Troops leave Poland", *The Washington Post*
[203] Prazmowska Anita, (2010) "Poland: a modern history", *I.B. Tauris, first edition 2010,* pp. 225-261
[204] *See Grosfeld Irena, Zhuravskaya Ekaterina. (2013)*

and stability of the time made the two parties govern together. 1995 was the year for new presidential elections in which again, the Democratic Alliance proved victorious. The government started to rebuild the country and the economy, already expressing its desire in this early stage of joining most of the western structures such as NATO and the EU.

One of the most important reforms carried on however, had place in 1997. In this date the constitution was finally completely rewritten, significantly changing the face of the country. The most important differences regarded the now pluralist character of the political scene[205], the opening to new religions[206] and protection of ethnic minorities[207], together with the general provisions needed to guarantee an effective and healthy democratic state[208]. It should be noted how again, the writing of the constitution was something done within the political framework in order to bring the country closer to the rest of the Western European Democracies. The desire on behalf of the political elites to join the Atlantic pact and the Union concretised in a constitution that was very liberal, but at the same time was probably not backed by a solid democratic foundation in the general popular sentiment[209]. This would have later been true also in Hungary, for which the 2011 constitution clearly betrayed strong ties to political values and structures that predated the most modern, secular and liberal democracies.

Going forward, 1997 was also the year of new elections, which represented a change of pace through the victory of the *Solidarity Party*[210] which incorporated several souls belonging to the more religious, conservative character of Poland. This was also

[205] In particular art. 11*:" The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means."*; "The constitution of the Republic of Poland of 2nd April 1997", *Consulted in https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm in December 2020.*

[206] As it states in the preamble: *"We, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources,Equal in rights and obligations towards the common good – Poland"*; Ibidem

[207] In particular art. 35*:" The Republic of Poland shall ensure Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture."; "National and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity"*; Ibidem

[208] In Particular art.10:*" The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers", "Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals."*; Ibidem

[209] Koncewicz, T. T., Strother, L. (2019), "The Role of Citizen Emotions in Constitutional Backsliding", *Mapping Out Frontiers of New Research, Verfassungsblog.*

[210] *See Prazmowska Anita (2010)*

fundamental due to the fact that 1998 marked the year in which the country adhered to NATO, but also because from its splinters and many of its members other parties would be born. In particular, in this time frame towards the end of the mandate we can see the birth of both *PO (Platforma Obywatelska* or Civic Platform) and *PiS (Prawo i Sprawiedliwość* or Law and Justice), the two parties which to this day contend the democratic majority in the Polish parliament.

Similarly to Poland, also Hungary had talks that projected the country into a fully fledged democracy. Unlike their northern counterpart however the transitional period in the first years was fairly more stable, probably due to the fact that the passage of power from communism was much smoother. The first government, formed by the Hungarian Democratic Forum (*Magyar Demokrata Fórum)* and lead by Zoltán Bíró was capable of finishing its full term; with it, for the first time since the war the country had a more conservative, right leaning cabinet in power. Here, the results of the first elections were much clearer compared to the fragmented political reality of Poland[211]. It is also interesting to denote how unlike the Polish case, where the main parties we see today were formed after the rule of the *Solidarity party*, Viktor Orban and *Fidesz* already existed, even though they were relegated to opposition roles, and at least in this very first moment, their platform was quite different compared to today.

Another fundamental difference existing between the Polish and Hungarian case resides in the dissimilarity regarding the amendment and birth of the constitution. As we have seen previously, in Poland it was first changed in 1992, only then to be completely reformed in 1997. Hungary was different in the sense that the first amendment was immediate, in 1989, while for its complete reformation the country would have to wait until two decades later, in 2011. This is a fundamental difference also because as it will be explained in more detail later, in 2011 the country was already in the hands of a *Fidesz* supermajority, who could therefore change the constitution as they saw fit. The 1989 constitution was similar to the Polish 1992 one, guaranteeing the fundamental change that was needed to bring the nation outside of communism and introduce political pluralism,

[211] Compared to the elections of Poland, Hungary only had six parties inside of the parliament, there was a fairly clear direction and mandate given from the people regarding the general direction of the country. *See Molnar M. (2001)*

the end of planned economy and socialist system; without however including some of the most modern, progressive provisions[212].

Whatever be the case in the next Hungarian elections of 1994 the party that emerged as victorious was the Socialist Party (*Magyar Szocialista Párt)*, who decided to ally with others not to cause potential unrest in the population still worried about its communist past. The loss of the center right could have been attributed to poor economic performance and its poor capability to look at the international scene, all points that were promised to be fixed by the socialists. The elections of 1998 provide us instead with another stark difference between the Polish and Hungarian case; we can see how the party winning the most votes was *Fidesz* itself under the command of Viktor Orban. The government that was created in 1998 was mostly moderate and oriented towards center-right; this was due to the fact that *Fidesz* at the time ran on a much more moderate platform than today and also won only 28% of the votes, being forced to enter with the *Hungarian Democratic Forum* and *Small Holders Party*.

[212] The constitution of 1989 was mainly focused on systems of checks and balances but did not possess the most recent international oriented provisions. Besides, whether the constitutional values introduced were indeed absorbed and shared by the general population is up for debate. Halmai, G. (2019). "The Evolution and Gestalt of the Hungarian Constitution."; *Ius Publicum Europaeum,(https://me. eui. eu/gabor-halmai/wp-content/uploads/sites/385/2018/09/IPE_Hungary_English_Halmai. pdf)*.

6. Political developments since the 2000s: EU, *Fidesz*, *PiS*

At the dawn of the new millennium, the political situation of the two countries was quite similar. The process of change and evolution from the communist system was very much under way, mainly fostered by political actors who pushed for constitutional change but also for the integration into the main supranational Western organisations.

In Poland the presidential elections were won once again by the Democratic Left Alliance and its candidate Kwaśniewski. The general elections were also once again won by the Democratic Left Alliance. The Solidarity Party ended up severely underperforming due to internal division with votes divided among its own branches represented by *PiS* and *PO*. This is very relevant since the political reality of today and of the last 15 years is polarised around these two last parties and their respective personalities. Already in this moment, we can see how at the head of *PiS* there were the Kaczyński brothers Jarosław and Lech[213], while instead at the head of *PO* there was Donald Tusk[214]. The platform around which the two parties gathered, changed and polarised as the years passed, however its most fundamental division was already evident in the early 2000s, being represented by a more moderate, centre right and internationalist approach in *PO* compared to a more isolationist, catholic and nationalist one in *PiS*.

The elections of Hungary in 2002 were quite similar. A coalition between centre left and centre right was created in order to beat Orban's *Fidesz*, which still remained the largest single party in the houses. For this reason it is possible to say that things looked quite similar at the time on a political framework. The economic growth achieved in the 90s, together with the political scene that had finally stabilised through the victory of several

[213] Jarosław and Lech Kaczyński were twin brothers, who became already somewhat notorious in the country in the 1960s through their participation in a Polish movie. During the 80s, they were among prominent figures of anti communist activities, being members of solidarity and being also interned. Lech in Particular participated in the round talks agreements and was an advisor to Lech Wałęsa. After being part of the solidarity party during the 90s, the brothers would have consequently founded their party PiS (*Prawo i Sprawiedliwość*), under a more conservative and populist agenda. Both would have covered several public charges included prime minister and president of the republic. Unfortunately, in 2010 Lech would have been victim of the infamous Smolensk air crash. Leaving the brother Jarosław alone as the head of PiS, charge that he covers to this day. Hartliński, M. (2019). Twins In Power. Jarosław Kaczyński and Lech Kaczyński as Leaders of Law and Justice, *Polish Political Science Review*, *7*(1), 96-106. doi: https://doi.org/10.2478/ppsr-2019-0006

[214] Native of Gdańsk, he participated already since an early age to the solidarity movement and anti communist activities, he would have sustained the government of 1997, only to found later the PO (*Platforma Obywatelska*) in 2001. In most recent years, he also covered the charge of president of the European Council. *See Prazmowska Anita (2010)*

movements that were moderate and open towards international integration, made both some of the strongest contenders to join the European Union.

Exploring this argument, we can remember how the criteria that were identified for potential members were contained in the so called "*Copenhagen criteria"* of 1993 that were articulated in three main points: "*a functioning market economy, stable institutions guaranteeing democracy, the rule of law, human rights and respect of minorities; ability to take on the obligations of membership."* The intention on behalf of the Eastern European countries to join the EU and NATO was already expressed way back in the early 90s. In Poland official relationships with the EC started in the late 80s during the process of transition from communism, in 1991 an official document regulating the interaction between the two entities was issued[215]. It entered in full force in 1994, year in which the Republic of Poland officially stated its desire to gain access to the Union in Athens.

Hungary as well started associating with the community already in 1991, and in 1998 commenced official talks to gain access. In 2002 the times were finally mature and the Union invited the two countries among eight others[216] to formally join. In this first phase, the support of the general population and parties was quite high. 2003 marked the year in which the referendums on entrance were held, resulting in an approval rate of about 77%[217] in Poland and 84%[218] in Hungary, who officially joined in 2004.

The access into the EU was met with quite high support, on the one hand surely since it marked a complete change of direction from the communist past, on the other because it represented the possibility to enter into liberal markets, IOs and reap the economic benefits this enticed. It is a matter of fact that during the 90s much of the policies and efforts undertaken by the Polish and Hungarian governments were aimed at imitating

[215] "Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part" (1991); *Consulted in December 2020 on https://op.europa.eu/en/publication-detail/-/publication/83db0eca-ebb4-4409-825b-28cc8d7febc9/language-en*

[216] "Further Expansion"; *EU official website, consulted in December 2020 in https://europa.eu/european-union/about-eu/history/2000-2009_en#:~:text=1%20May%202004,and%20Malta%20also%20become%20members.*

[217] "European Union candidate countries: 2003 Referenda Results" (2003), *Congressional Research Service (CRS), consulted in Decembers 2020 in https://www.everycrsreport.com/files/20030926_RS21624_7b4adfe763b7a99e6d0a9dbc048d8916b20affc2.pdf*

[218] *Ibidem*

western economic and democratic models, also in order to guarantee the full adherence to the Copenhagen criteria[219].

This might provide us with further insight on the current political situation. Commentators might argue how the participation in the Union enticed a variety of duties and benefits that were not fully understood or shared by the general population. One common feature on which both critics and populist parties might agree is how the participation in the European project was carried on mainly by the governments and political elites, while the contribution on behalf of the people was the simple decision on whether to ratify everything or not. The process of joining the Union and the adoption of democratic models was not met with a full understanding of them, or with the creation of any particular democratic spirit. This brought to a desire to re-entrench into national premises in the most recent years when confronted with the different duties of belonging to the community, and the prospect of economic and cultural crises[220].

As aforementioned in this dissertation the Union certainly provided an *anchoring effect*[221] for democratic institutions, fostering and making them grow in the new post communist democracies. The way in which this anchoring effect worked was by adhering to the system of supranational institutions and their foundational treaties, also subscribing to a series of instruments created to safeguard their values in case of breaches. Paradoxically with time, the safeguard offered to the democratic institutions as conceptualised in the Union created a perceived narrative according to which they were not entirely legitimate and did not represent the Polish or Hungarian interests, but those of foreign technocrats instead.

This effect however was not the main point of contention in the public discussion on the matter between the 90s and the early 2000s. Several people were worried about opening the EU borders towards Eastern European democracies, being under the impression that they would have only drained budget and resources. The problem that came up when discussing about the future was mainly economical.

[219] Shevchenko, A., (2018) "From a follower to a trendsetter: Hungary's post-Cold War identity and the West" *Communist and Post-Communist Studies*, https://doi.org/10.1016/j.postcomstud.2018.01.006
[220] *See* Koncewicz T. (2019)
[221] Morlino Leonardo & Sandulli Aldo; "Working Paper on legitimacy and authority regarding the rule of law, democracy, solidarity and justice" (2020); *Reconnect working papers*

Whatever be the case, it is also true that the scope of the EU as an international organisation should go beyond mere economic matters. In particular the goals of promoting peace and democracy in Europe were absolutely compatible with the scenario. The potential reward that was to be gained by joining the common market and gaining development funds was surely very much in the minds of politicians and the electorate. Looking at data, we can see how much EU membership benefited the two countries economically; Poland for example, has been the greatest net recipient of EU cohesion policy ever since its membership in 2004[222].

This first decade of the new millennium was therefore a reflection of this climate. New elections would have been held in 2005 in Poland and 2006 in Hungary. In Poland votes were divided between the more liberal party of *PO* and the slightly more conservative party of *PiS*, the two new protagonists of the scene. At the time the two parties were much closer ideologically speaking compared to today, so much so that talks were undertaken to create a government through a coalition, possibility that did not see the light of day but however shows how much things changed in the past 15 years[223]. In the end a *PiS* minority government was formed.

2005 was also the year of new presidential election, and in this case as well, the two candidates of *PO* and *PiS* battled each other. The winner ended up being Lech Kaczyński, twin brother of Jarosław Kaczyński who became prime minister in 2006. Despite this seemingly strong position, the *PiS* government was not to last. Its weakness in the *Sejm* ended up being fatal making it fall for a lack of numbers, in 2007 the parliament was dissolved and new elections were called, this time the winner would have been *PO*.

In Hungary the 2006 elections saw a narrow win of the socialist coalition, preventing for the next time *Fidesz* to rule the country, which however still remained the second most popular party, especially appreciated in the most rural areas of the country. The turning point only came in 2010, year that marks the first of the many elections that until today have provided *Fidesz* with an absolute majority. The success of *Fidesz* in this moment was not only due to its own merit but also to a general, strong dissatisfaction with the socialists who had been in power since 2002. The elections of 2010 mark a strong change

[222] "Cohesion Policy: EU invests €880 million to improve Poland's railway system", (2019), *https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5969*
[223] *See Prazmowska Anita (2010)*

in the country and its mentality, together with *Fidesz* also far right party *Jobbik*[224] made its entrance in the parliament.

The changes in the political discourse that were going on in Hungary did not yet happen in Poland for several years. 2010 marked a moment that will be long remembered in the country for the Smolensk air disaster[225], in which the president alongside many other political personalities died in an official visit to Russia. The *PiS* candidate of the presidential elections of 2010 was to be Lech, but due to the tragedy it was quickly changed with Jarosław, who despite sympathy on behalf of the electorate did not manage to win. The general elections of 2011 painted a similar picture. They were won by Tusk lead *PO,* considered a more moderate alternative, despite *PiS* being a close second with 30% of the votes.

The year in which things changed in Poland was represented by 2015, where presidential and generally elections coincided. In the year prior, *PO* started to lose ground in the polls, which ultimately lead to the victory of *PiS* through their candidate Andrzej Duda for the presidency, but also with their victory in the *Sejm* and Senate during the general elections. Not only did they win, but their percentage (37,58%)[226] was high enough that for the first time in the history of the third Polish Republic, a single party was able to achieve an absolute majority in both houses and have one of their representatives in the presidential office.

The situation of Poland and Hungary achieved in 2010 and in 2015 was very similar. In both countries a single party belonging to a more conservative school of thought obtained a very strong, even unprecedented popular support, retaining absolute political control over its respective system providing fertile ground for a series of changes and reforms that are the object of the debate on which this dissertation is based.

[224] Varga, M. (2014). "Hungary's "anti-capitalist" far-right: Jobbik and the Hungarian Guard." *Nationalities Papers, 42*(5), 791-807. doi:10.1080/00905992.2014.926316

[225] In this air crash, president of Poland Lech Kaczyński and several other top charges were heading to Russia in order to participate to a commemoration of the Katyń massacre in which thousands of Polish soldiers were killed by the NKVD during WWII. Approaching the final parts of the journey, a malfunction made the airplane crash, causing several deaths including president Kaczyński himself. "Polish President dies in plane crash in Russia" (2010), *NY Times https://www.nytimes.com/2010/04/11/world/europe/11poland.html*

[226] "Wybory do Sejmu i Senatu Rzeczypospolitej Polskiej" (2015), *Państwowa Komisja Wyborcza, https://parlament2015.pkw.gov.pl/*

Generally speaking, a series of important points can be drawn looking at the historical development of the two countries. First of all, it must be acknowledged how tragic the history of the last century was; a history which was characterised by betrayal, genocide and loss of freedom on behalf of foreign superpowers. Whereas many of these aspects can be considered true for several other European countries, the consequences here have been particularly strong due to a variety of factors. First of all, these times ended very recently, with the passage from communism to democracy taking place only thirty years ago. Both Poles and Hungarians were subject to the influence of a foreign superpower, which was most of the times aided by some of their own countrymen; this produced a general distrust for their own institutions and governments, which is a feature present in other countries, like for example Italy[227] but under other premises.

This view held in the hearts of the general population was not significantly changed in the past thirty years. The institutions did not really consult with the citizens upon the rebuilding of the state and the adherence to the Western *IOs*, processes which were mainly driven by the ambitions of the political classes. This was not problematic at the beginning but became more serious in the most recent years. The general mistrust produced an effect of disenfranchisement towards institutions that was only multiplied with the entrance within the EU. All of a sudden, these populations had to abide to a series of values and ideas that were not historically theirs and were pushed by foreign technicians with whom they did not agree. This created a series of novelties that produced a strong resentment which resulted with the arrival of *Fidesz* and *PiS*. This prompted a situation in which peripheral governments backed by a strong popular support openly challenged European institutions[228]. The fundamental values and ideas of the two entities quickly clashed, with fundamentally different conceptions of what can be meant by Rule of Law.

[227] Orsina Giovanni, (2014) "Berlusconism and Italy: a historical interpretation"; *Palgrave macmillan*
[228] See Stanley, Ben & Czesnik, Mikolaj. (2019)

Chapter III

Rule of Law Backsliding

After having looked at the history of Rule of Law as a concept, its interpretations and concrete applications in the framework of the EU, together with the most recent political and social developments in Poland and Hungary; we finally possess all the instruments necessary to approach the events at the centre of the backsliding. This phenomenon could be attributed to a variety of factors, but as previously seen the inception of both cases was the gaining of a very solid, unprecedented popular support on behalf of a single party that allowed it to retain an absolute majority in both houses. This was also coupled with the victory in presidential elections, allowing both *PiS* and *Fidesz* to make a variety of deep reforms which would have not been possible without this key office.

2010 marked the year in which *Fidesz* obtained a majority in the parliament with more than 52% of the votes, corresponding to almost 60% of the seats in the parliament. Ever since 2010, *Fidesz* would have not lost this supermajority, which would have also been coupled with the presence of a representative of the party in the presidential palace through the election of Pál Schmitt[229] in 2010 and János Áder in 2012 and 2017. Conversely, *PiS* would have gained its absolute majority in the chambers in 2015 and 2019, with a total of 38% of the votes in the first consultation and almost 44% in the second. Similarly, in the presidential elections of 2015 and 2020 *PiS* candidate Andrzej Duda would have won in the second turn, both times with about 51% of the votes.

[229] Schmitt term was cut short in 2012 due to a controversy on his alleged plagiarism for his final university work. This moved the date of elections in 2012 and 2017. Kata Janecsko, (2012) "A bolgár után német szál a Schmitt-ügyben"; *Index HU*

The first element that is interesting to denote here, is how both the parties enjoyed a very significant amount of popular support that did not diminish during their respective terms. The disenfranchisement with both the international and national institutions as conceived between the 90s and early 2000s was only heightened and exploded with the different crises of the last decade. Preoccupations represented by the economic emergency, migration and cultural change lead the general public to put themselves in the hands of political parties who proposed to solve these problems by not partaking in the international community. At its heart, this caused a systematic curtailing of the structures supporting the rule of law, which however did not particularly concern the public. As long as the economy and social services went well, no issue was raised, which betrays a general lack of development of democratic values as intended in Western Europe[230].

This absolute majority translated in the possibility to bring significant changes to the structure of the state. The two countries are often paired together, especially in the most recent years; however their policies and the way in which they were implemented present several similarities and differences which are at the heart of this analysis. The different time frame and the different premises make it necessary to look at them separately, at least in the beginning, in order to reach some final conclusion about the phenomenon towards the end. This chapter is therefore dedicated to explore in detail the changes and policies undertaken by Poland and Hungary in the past decade in the framework of Rule of Law backsliding, in order to assess its features also in the context of the EU and its actions to limit the phenomenon.

7. The case of Hungary

As previously explained *Fidesz* would have taken the helm of the country back in 2010, only to be then re-elected in 2014, conserving its supermajority. These first two *Fidesz* governments introduced the bulk of legislations and changes that have been contested by the European institutions. One fundamental difference from the Polish case however is represented by the constitution. As explored in the previous chapter, in the northern country the fundamental law was recreated from scratch in 1997 in order to appease and fit within the framework of Western democracies and international institutions as we

[230] See Koncewicz (2016)

intend them today. In Hungary however, this was not the case. The constitution of 1989 was nothing more than an amended version of the one introduced by the communists back in the 50s. The possibility to rewrite and amend the foundational document was seized by *Fidesz* at the very beginning, and due to thi, the depth of the case is here much greater, not only revolving around the independence of the judiciary but also, among other things, the plurality of medias and information, education, religion and cooperation with European institutions.

7.1 First *Fidesz* government (2010-2014)

The first *Fidesz* government, strong of its supermajority, started right away to introduce deep reforms aimed at changing the functioning of society. Right after the elections, attention was focused over medias and the free flow of information. This area was originally regulated by the 89' constitution as it represents one of the most fundamental elements necessary to guarantee a healthy democratic state; Orban's party however claimed to have received a democratic mandate to reform the Hungarian society also through the amendment of this rights, which resulted in the controversial *media laws*[231]. These laws were profoundly intertwined with each other and were issued in the period of time between July and December 2010, coupled with constitutional amendments aimed at making them functional and possible.

The first article to be amended was Art.61(4)[232] of the constitution, removing the necessity for the Hungarian government to guarantee the plurality of sources of information. This was followed by the institution of new authorities in the field, and by a law package which changed the way in which news sources had to operate. Now, they had to provide information that was to be considered "*balanced"*, and the *National Media and Infocommunications Authority*[233] had to the right to decide whether or not this was

[231] Haraszti Miklós; (2011)"Hungary's media law package"; *Institut für die Wissenschaften vom Menschen (Institute for Human Sciences), publications*

[232] "*A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the supervision of public radio, television and the public news agency, as well as the appointment of the directors thereof, on the licensing of commercial radio and television, and on the prevention of monopolies in the media sector.* "Act XX of 1949: The constitution of the republic of Hungary"; Ch. XII, Art. 61-4

[233] "*regulatory body which was set up by the Act CLXXXV of 2010 on Media Services and on the Mass Media (the Media Act)";" The activities of the National Media and Infocommunications Authority are diverse, while the work of the organisation as a whole is driven by the objective of ensuring that in the*

the case, being capable of suspending the activities of news outlets or severely fine them[234] in the event of breaches.

The opposition to the media law from international authorities was significant, first of all because it threatened the independence of sources of information, but also because of the way with which it was structured. It was not entirely clear for a journalist when he or she was breaking the law; the requirement of "*balance"* was not explicitly specified, paving the way for potential reprisals on behalf of the government towards single individuals or organisations.

In February 2011 an opinion from the OSCE[235] was issued[236], in which the organisation expressed its concerns over the situation and identified potential threats towards plurality of information, issuing a series of recommendations: *"the Hungarian media laws should be changed in many respects so they can implement the commitments on media pluralism and the free flow of information that Hungary has accepted as a participating State of the OSCE."*[237] The findings of the organisation were also echoed by those of the European commissioner for human rights[238].

It was only a matter of time before the European Parliament officially voiced its concerns in March 2011 through an official resolution[239], citing the grounds on which the media

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Hungarian communications and media market, users and service providers are both satisfied. It is the task of the NMHH to monitor whether the organisations, companies and entrepreneurs providing communications services in Hungary perform their activities in compliance with the relevant rules." Central European Regulatory Forum; http://cerfportal.org/tart/farticle/en/7/181; Consulted in December 2020

[234] "*The Media Council and the Agency shall impose the legal consequence — depending on the nature of the infringement — taking into account the gravity of the infringement, whether it was committed on one or more occasions or on an ad-hoc or continuous basis, its duration, the pecuniary benefits earned as a result of the infringement, the harm to interests caused by the infringement, the number of persons aggrieved or jeopardized by the harm to interests, the damage caused by the infringement and the impact of the infringement on the market and other considerations that may be taken into account in the particular case. "Hungarian Media act*"; Art. 187(2), *https://www.ifla.org/files/assets/faife/publications/spotlights/selected-extracts-media-act.pdf; consulted in December 2020*

[235] The OSCE stands for the Organization for Security and Co-operation in Europe. With 57 States from Europe, Central Asia and North America, the OSCE is the world's largest regional security organization, their activities cover a wide range of security issues such as conflict prevention to fostering economic development, ensuring the sustainable use of natural resources & promoting the full respect of human rights and fundamental freedoms. ; *Osce.org, consulted in December 2020*

[236] Nyman-Metcalf Katrin; "Analysis of the Hungarian media legislation" (2011); *Organization for Security and Co-operation in Europe (OSCE); Office of the Representative on Freedom of the Media; https://www.osce.org/files/f/documents/b/3/75990.pdf, consulted in December 2020*

[237] *Ibidem*

[238]" Opinion Of The Commissioner For Human Rights: Hungary's Media Legislation In Light Of Council Of Europe Standards On Freedom Of The Media" (2011); *Commisioner for Human Rights*

[239] "European Parliament resolution of 10 March 2011 on media law in Hungary" (2011); *European Parliament, https://www.europarl.europa.eu/doceo/document/TA-7-2011-0094_EN.html; consulted in December 2020*

law was threatening the fundamental values of the EU, in particular Art.2 of the TEU but also Art.11 of the charter of fundamental rights[240].

What made these initial developments achievable however was first and foremost the possibility on behalf of *Fidesz* to amend constitutional articles. These amendments did not only relate to the plurality of medias, but step by step they were starting to affect several organs of the state. Most importantly, the role of the constitutional tribunal was decreased, being now able to deliberate only on a lessened amount of cases[241]. This pattern of amendments followed then by laws chipping at different parts of the state was typical of 2010. With the turn of 2011 the Hungarian government also started to plan an entire rewriting of the constitution which was forecasted for April. The speed and timely manner with which the new document had to be drafted was source of great concern over its legitimacy. Concerns that were voiced by the Venice Commission[242], who highlighted how the timing did not allow for a generally acceptable dialogue with the opposition and general population.

A subsequent review of the new constitution was issued in June 2011[243]. Generally speaking, the commission welcomed the idea of changing the fundamental law in order to introduce a more modern system, inspiring itself to similar cases such as the Polish constitution of 1997. It should also be remembered how the Hungarian constitution of 1989 started with a preamble claiming its temporality, it *was* to be substituted once a clear mandate was revealed through elections[244]. Due to all these reasons, it was not considered particularly problematic for the country to adopt this course of action; however, some fundamental flaws in the document raised concerns, including its timing.

First of all, the Hungarian constitution of 2011 made an extensive use of *cardinal laws*, or in other words provisions that necessitated a supermajority of more than 2/3 of the

[240] "*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected*"; "Charter Of Fundamental Rights of the European Union" (2000); *Official Journal of the European Community; Art. 11*
[241] "Opinion On Three Legal Questions Arising In The Process Of Drafting The New Constitution Of Hungary"(2011); *Venice Commission; https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)001-e, consulted in December 2020*
[242] *Ibidem*
[243] *Ibidem*
[244] "*In order to facilitate a peaceful political transition to a constitutional state, establish a multi-party system, parliamentary democracy and a social market economy, the Parliament of the Republic of Hungary hereby establishes the following text as the Constitution of the Republic of Hungary, until the country's new Constitution is adopted*"; "The constitution of the republic of Hungary 1989, Preamble"

parliament to be changed, the Commission criticised this choice, reminding how the ability of a country to be considered an efficient and functioning democracy depended also on its ability to change in front of a public will, which was made much harder by the extensive use of these cardinal laws.

The different sections of the constitution were also taken into scrutiny, the preamble was considered to be somewhat problematic since it made several references to values which in the opinion of the commission were not compatible with plurality principles and therefore had to be discussed. References were made to the Christian heritage of the country[245], its values founded on faith and fidelity[246], and the safeguard of Hungarian identity[247]. Regret was also expressed towards the fact that the new Hungarian constitution completely repealed the older one, considering it to be illegitimate[248]. The reasoning behind this was that everything done in the communist period was considered imposed by foreign powers acting against the interests of the Hungarian people[249]. With this provision effectively everything done under the guidance of the old constitution could be potentially invalid. In the opinion of the commission, this could be source of problems since it could have retroactively invalidated several laws on discretion of the government[250].

The main body of the text presented other critical points, first of all a reference was made towards the role in protecting Hungarian minorities abroad: "*Hungary shall bear responsibility for the fate of Hungarians living beyond its borders, and shall facilitate the survival and development of their communities; it shall support their efforts to preserve*

[245] "*We recognise the role of Christianity in preserving nationhood*"; "Hungary's constitution of 2011"; Preamble

[246]" *our fundamental cohesive values are fidelity, faith and love*"; Ibidem

[247] "*We commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary*"; Ibidem

[248] "*We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid; We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected body of popular representation was formed. We shall consider this date to be the beginning of our country's new democracy and constitutional order*"; Ibidem

[249]See Halmai, G. (2019)

[250] Kim Lane Scheppele, (2015) "Understanding Hungary's Constitutional Revolution"; *Armin von Bogdandy, Pál Sonnevend (Ed.) Constitutional Crisis in the European Constitutional Area, page 124 – 137; Theory, Law and Politics in Hungary and Romania; 1. Edition 2015, ISBN print: 978-3-8487-1996-9, ISBN online: 978-3-8452-6138-6, https://doi.org/10.5771/9783845261386-124*

their Hungarian identity, the assertion of their individual and collective rights"[251]. This problem touched on the situation already explained in the previous chapter, several Hungarian communities live outside the country's borders, and the constitution effectively legitimised the possibility of interference over other nations' decisions, which set a dangerous precedent.

Art.N was also critical. It claimed how the constitutional court rulings had to be tied to proper budget management[252], or in other words it was a subordination of review of constitutionality to monetary concerns, which effectively started a series of interferences with bodies of review of legislation and constitutionality; feature which would have later been developed in the next years, and is also at the centre of the Polish case of backsliding. Drawing a comparison here, the situation developing in Hungary was much mellower at the very beginning, the polish situation involved first and foremost the independence of courts, however the controversy started much faster and with stronger premises[253]. Whereas the court independence in Hungary was limited in a very small way due to the aforementioned budgetary constraints, in Poland instead nomination and substitution of judges would have been the centre of the discussion within the first month of the new government.

The subsequent section of the constitution presented other problems. In Art.IX[254] the freedom of the press was presented as a fundamental value to be upheld by the state, and not a fundamental value of the individual. Considered the existence of the media laws, this statement was deemed to be deeply problematic. This article effectively legitimised

[251] "*Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond its borders, and shall facilitate the survival and development of their communities; it shall support their efforts to preserve their Hungarian identity, the assertion of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary*"; "Hungary's constitution of 2011"; Foundation (Art. D)

[252] "1. *Hungary shall enforce the principle of balanced, transparent and sustainable budget management.* • *Balanced budget 2. Parliament and the Government shall have primary responsibility for the enforcement of the principle set out in Paragraph (1). 3. In the course of performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle set out in Paragraph (1*)."; Ibidem; (Art.N)

[253] See Shevchenko, A., (2018)

[254] *" 2. Hungary shall recognise and defend the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion. 3. The detailed rules for the freedom of the press and the organ supervising media services, press products and the info communications market shall be regulated by a cardinal Act.*" "Hungary's constitution of 2011"; Freedom and Responsibility, (Art. IX)

an interference with the sources of information, who had to deal with governmental scrutiny as it was described in the media law package.

Other changes were made in particular regarding the structure of the judiciary. The number of constitutional court judges was increased, together with the duration of their term. Conversely, the duration of terms for judges of the Supreme Court was lowered, causing a potential early retirement and their subsequent substitution in the next years. This initial tampering with judicial institutions, and in particular the age of retirement, seems to be a recurring theme in the Polish and Hungarian cases[255]. Justices in the constitutional court for example, are to be nominated by the parliament previous scrutiny of a multilateral committee; therefore threatening different judges with a potential early retirement was a way to ensure a swifter change of pace in these bodies, which would have prevented an effective review of constitutionality.

All in all however, the new constitution represented a mixed bag in the eyes of the community; many references were also made to the respect of rule of law, freedom of thought, religion and human rights. Even though these steps were commended[256], at the same time questions were raised, mainly over three points of contention: the new constitution seemed to justify an ideological entrenchment over nationalist policies and ideas; the new constitution also seemed to be tampering with the independence of courts and their correct functioning (as it was the case with the constitutional court); and finally the new constitution made an extensive, excessive use of *cardinal laws* cementing this new view of the state, making it much harder to change in the future.

More in general, it can be said that the new constitution reflected the party's view on what the upcoming of Hungary should have looked like[257], providing the foundation for the subsequent laws and policies which would have been introduced in the next 9 years up until today. As a matter of fact, the constitution was met with hostility from the opposition and distrust from international organisations, but was quite popular inside of the country, and did not really represent a matter of contention for the public opinion.

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[255] Bard, Petra and Pech, Laurent. (2019)"How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The 'Hungarian Model'*." Reconnect Working Papers (Leuven) No. 4, 2019, Available at SSRN: https://ssrn.com/abstract=3608784 or http://dx.doi.org/10.2139/ssrn.3608784*

[256] Uitz, R. (2015). "Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary". *International Journal of Constitutional Law, 13*, 279-300.

[257] See Scheppele Kim Lane, (2015)

Probably, the most important difference between the Polish and Hungarian case is precisely represented by this presence. Whereas in Hungary the change in society was cemented and accelerated by the presence of the foundational document, the same cannot be said for Poland. How it will be possible to see, the Hungarian backsliding of rule of law is much more extensive, whereas the Polish case mainly relates to the independence of the judiciary[258].

What we can draw from here is how the legal culture in the country clearly did not develop as we intend it in the rest of Western democracies (the same can be true for Poland as well since the presence of a much more modern constitution did not shield public institutions). The rewriting of 2011 only highlights this profound wedge that existed between cultural and political elites who guided the countries in the 90s and early 2000s compared to the general people[259].

Thanks to this new document, several new changes were carried out in the rest of 2011 that further preoccupied the Union's authorities. A reform of the National Bank was undertaken, which consisted in the possibility for the government to sit in its meetings through the presence of its minister, the monetary council also had to disclose to the government the arguments of said meetings, effectively preventing confidential discussions. Members of the monetary council were also now potentially being subject to tampering, since they could be nominated by the parliament. Among the other things, this loss of independence of the monetary authorities prompted a decrease in the country's financial ratings, highlighting the decreased level of trust held by the rest of the world.

These events prompted in early 2012 an official response on behalf of the European Commission, finding how the situation in Hungary had considerably worsened in respect to the fundamental rights of the Union. In January an accelerated infringement procedure[260] was carried out, over the ground of three violations that were considered to be fundamental: the independence of the national bank; the independence of the judiciary; and the independence of the data protection supervising authority. As previously described, the independence of the bank was threatened by the new laws; the independence of the judiciary mainly referred to the implementation of the constitution in

[258] See Bard, Petra and Pech, Laurent. (2019)
[259] *See Koncewicz (2019)*
[260] "European Commission launches accelerated infringement proceedings against Hungary"(2012); *European Commission's Press Release; https://ec.europa.eu/commission/presscorner/detail/en/IP_12_24; Consulted in December 2020*

early 2012, together with the creation of a new judicial institution (NJO). The loss of data independence instead referred to the institution of the *National Agency for Data Protection*; the new representatives of this body had to substitute the *Data protection commissioner's office*, again, forcing these people to an earlier retirement and giving the possibility for the government to place their own nominees[261].

The declarations of the commission were then followed by a European Parliament resolution[262], voicing increasing concerns over the rule of law situation in Hungary. In particular, the parliament asked the commission to closely monitor the developments and to ensure, among the other things, *"the full independence of the judiciary, in particular ensuring that the National Judicial Authority, the Prosecutor's Office and the courts in general are governed free from political influence, and that the mandate of independently-appointed judges cannot be arbitrarily shortened; that the institutional independence of data protection and freedom of information is restored and guaranteed; that the right of the Constitutional Court to review any legislation is fully restored, including the right to review budgetary and tax laws; that the right to exercise political opposition in a democratic way is ensured both within and outside institutions[263]".*

This was followed by several other minor concerns, such a smaller law requiring parliamentarian approval through a supermajority to register a church[264], or a new electoral law[265]which harmed minority voters. More in detail, the independence of the judiciary did not now concern only a limitation on the scope of constitutional court's activities, but it included the creation of a new institution, the *national office for the judiciary* (NJO)[266], and its president, tasked with the administration of courts. This was problematic on the eyes of the European Authorities since too much power was centred

[261] **"**Scope of authority of the President of NOJ and the central administrative supervision of the National Judicial Council (NJC)"; *Courts of Hungary; https://birosag.hu/en/national-office-judiciary**; Consulted in December 2020*
[262] "European Parliament resolution of 16 February 2012 on the recent political developments in Hungary" (2012); *European Parliament; https://www.europarl.europa.eu/doceo/document/TA-7-2012-0053_EN.html; Consulted on December 2020*
[263] *Ibidem*
[264] "Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary" (2012); *Venice Commision; https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)004-e; Consulted on December 2020*
[265] "Joint Opinion on the Act on the Elections of Members of Parliament of Hungary" (2012); *Venice Commision, OSCE; https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)012-e; Consulted on December 2020*
[266] **"**Scope of authority of the President of NOJ and the central administrative supervision of the National Judicial Council (NJC)"; *Courts of Hungary; https://birosag.hu/en/national-office-judiciary**; Consulted in December 2020*

on this figure. Among its several duties and privileges, there was the one of promoting other judges' careers, which effectively could give preference to nominees ideologically closer to the party, therefore tampering with the correct functioning of the judiciary. The new president of the NJO was Mrs. Tünde Handó, who was heavily criticised due to her connection to *Fidesz*[267]. This created problems also in connection to the lowered retirement age for judges, since now with the possibility on behalf of the NJO president to shortlist nominations, the whole process of replacement and ideological hegemony could be achieved at a very fast rate[268].

The rest of the time leading to 2013 was followed by a series of amendments to the constitution. The most important referred to the constitutional court, further limiting its scope, considering null all the deliberations made prior to the adoption of the new constitution in 2012[269]. This unprecedented decision effectively showed how the Constitutional Court could not relied upon to effectively review cases. This disregard for its decisions is an element common to the polish case, which effectively shows a pattern of attack to the institution, on the one hand the invalidation of its decisions, and on the other laws aimed at ensuring a faster substitution of its members, ensuring a change of pace.

All the efforts of the EU sorted very limited effects. In a 2012 bill the powers of the president of the NJO were slightly curtailed, but nothing substantial changed. This prompted in 2013 another intervention[270] urging the Hungarian government to take actions in order to correct all the breaches of fundamental treaties and values of the Union. The situation in the eyes of the international authority was quite dramatic, a systematic and continuous erosion of the rule of law as intended in all its forms had been taking place ever since 2010. The Independence of the judiciary and the constitutional court was being tampered through lowered retirement age and nominations shortlisted by the party; a limitation was also put on the scope of courts, subordinating it to monetary

[267] Szabo Daniel G.; "A Hungarian Judge Seeks Protection from the CJEU – Part I" (2019); *Verfassungsblog; https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-parti/#:~:text=Domestic%20actors%2C%20the%20European%20Parliament,the%20President%20of%20the%20National; Consulted in December 2020*

[268] "IBAHRI Hungary Report October 2015: Still under threat: the independence of the judiciary and the rule of law in Hungary" (2015); *International Bar Association's Human Rights Institute* (*IBAHRI*) *Report*

[269] *Ibidem*

[270] "European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary" (2013); *European Parliament; https://www.europarl.europa.eu/doceo/document/TA-7-2013-0315_EN.html; Consulted in December 2020*

concerns or other times entirely disregarding its decisions. Media plurality and freedom of information was attacked through media laws and data protection. Pluralism was starting to be eroded through favouritism towards certain churches and religions; and all these laws were backed by the joint existence of the new constitution accompanied by an extensive and excessive use of *cardinal laws* which would have made extremely hard for a new government to change them.

Despite all this, the Hungarian government and *Fidesz* were not seen unfavourably from the Hungarian population at large, but quite the opposite all the changes were generally quite welcomed. The political rhetoric of the party and its leader was and still is to this day extremely popular, which makes and made the work of the European Authorities very hard. A political, democratic will to change was not really present, but on the contrary, in the political elections of 2014 *Fidesz* performed once again splendidly, and thanks to its new electoral law, was capable of maintaining its super majority in the parliament.

7.2 Second *Fidesz* Government (2014-2018)

Following the victory of April 2014, *Fidesz* maintained its two thirds majority which made possible to unilaterally change the constitution as it was the case up until then. This however was not destined to last, in late 2014 a series of protests following a proposal to tax internet traffic took place[271]. The protests were so widespread that this forced the majority to drop the law, but also ensured a loss of consensus and parliament members which ultimately also caused the loss of the supermajority in the parliament.

Probably also due to this reason, the second term was not as eventful as the first, even though the situation continued to evolve. In these next years, much of the political structure in the minds of the majority was already put into place, which resulted in open challenges towards European decisions backed by all the country's institutions. This is no surprise, suffice to think for example that by 2016, nine out of ten judges of the

[271] Than Krizstina & Dunai Marton; "Hungary's Orban puts internet tax on hold after huge protests" (2014); *Reuters*

constitutional court had been nominated by *Fidesz*[272], which was made possible by the reforms and laws introduced in the first term as previously described. In an attempt to solve the situation more effectively, it is precisely in this time frame that the European Authorities issued the renovated framework for the rule of law.

2015 was the year in which the migration emergency reached its peak in western Europe. The Hungarian authorities decided to not comply with European Directives[273], and also, there were talks about possibly reintroducing death penalty in the country. The deterioration of the fundamental EU values was now starting to relate also to human rights and in this framework the European Parliament issued a statement[274] urging the commission to activate the new first step (Art.7(1)) of the framework against Hungary, prospect which would have not materialised however until several years later. As it is possible to see from this example, the situation continued for a fairly long time not only over a lack of instruments to solve it, but also over a general unwillingness to do so, in the hope that the backsliding would have stopped with other means.

For example, infringement procedures already started in December 2015. The motivations resided in the controversial introduction of a more stringent asylum law, which allowed among the other things also the possibility to detain asylum applicants[275]. The law was considered to be a direct answer towards EU policies in matters of migration and in particular the Dublin system, which prescribed the redistribution of asylum seekers in the territory of the different countries, policies against which the Hungarian government was and is to this day very critical. More than that, it was also an open challenge towards Union's values, recognising primacy over national citizens.

The 2015 procedure was also justified on the grounds that the asylum laws were *"forcing applicants to leave their territory before the time limit for lodging an appeal expires, or before an appeal has been heard*"[276]; in other words preventing a possibility of appeal in case of rejection, which represented the end of the process for the vast majority of cases.

[272] Kelemen Katalin; (2017); "The Hungarian Constitutional Court enters the dialogue on national constitutional identity"; *Diritti Comparati working papers*
[273] "European Parliament resolution of 10 June 2015 on the situation in Hungary" (2015); *European Parliament; https://www.europarl.europa.eu/doceo/document/TA-8-2015-0227_EN.html; Consulted in December 2020*
[274] *Ibidem*
[275] "Description of the Hungarian Asylum System" (2015); *European Asylum support Office*
[276] Commission opens infringement procedure against Hungary concerning its asylum law"(2015); *European Commission press release; https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6228; Consulted in December 2020*

The commission also criticised the fact that legal processes could be carried out without a clear translation ensuring that the accused person could understand. Finally, due to the situation regarding the independence of the judiciary, the rulings over this matter were not considered to be necessarily impartial. This is an important example, since it shows in concrete how the erosion of courts' independence reflects in a general mistrust in their work, always opening for the possibility of an impartial judgement.

Despite the complaints of the European authorities the efforts of the Hungarians to stop the migrants' inflow continued, constructing also a wall stretching all over their borders between Croatia and Serbia. The government accused the European authorities of not dealing with the problem of migration; the construction of the wall was seen as another challenge to the European policies taking the matter into national hands unilaterally. Despite all, the wall proved itself to be very successful, reducing the migrant influx almost completely[277]. In matters of migration and challenge to the European Authorities, also a referendum was planned, which would have been held in October 2016 asking the controversial question *"Do you want to allow the European Union to mandate the resettlement of non-Hungarian citizens to Hungary without the approval of the National Assembly?"*. The results would have been overwhelmingly against the Union, however also thanks to the input of the opposition, the quorum necessary to consider them valid was not reached. Still, it was considered to be a victory for *Fidesz* who used it to as legitimisation in its battle against European laws.

2017 was a year that was marked by another case, represented by the adoption of a law on higher education which curtailed foreign influence in the country. In particular, in Hungary there is the presence of a university called *Central European University* (CEU), which was economically financed by American magnate George Soros. The Hungarian government adopted a piece of legislation which was directed at all Universities having a foreign legal address. The CEU was the only Hungarian university that corresponded to these terms, and therefore the legislation was seen as been created *ad hoc* to curtail its operations. The legislation decreed the possibility for teaching only if the activities were also offered in the home country where the legal address was present, and if there was an agreement between the Hungarian government and the home country's government; due to this, the CEU was and is up to this day incapacitated from carrying out its activities.

[277] Tamas Fleischer; "Migration and its socio-economic relations: seminar of the MTA KRTK" (2017); *Scientific Life, Tudomanyos Elet*

On this matter, the European commission initiated yet another infringement procedure against, claiming *"the new rules to be not only a restriction of freedom to provide services, but in particular an infringement of academic freedom, as enshrined in the Charter of Fundamental Rights of the European Union."*[278]

Following these events, another resolution of the European Parliament was issued, warranting once again the use of Art.7(1) against Hungary, in light of the huge breach of Art.2 of the TEU that the situation represented[279]. Again though, this would have been met with delay, a long time would have passed before the official procedure in the sense of Art.7 was launched. Generally speaking, the Hungarian position was not really threatened during this second term, and the government was allowed free reign in carrying out its activities contradicting EU's fundamental values.

What perhaps is the most relevant thing to denote here again, is that the Hungarian government enjoyed great popularity. Presidential and parliamentarian elections were scheduled in 2017 and late 2018. In both *Fidesz* obtained once again an overwhelming success which saw the reconfirmation of János Áder as head of the state, but also the gaining of a supermajority in the parliament on behalf of *Fidesz*. This is a very important indication of how, as a matter of fact, the wedge between International institutions and the Hungarian population had not been shortened, but on the contrary was once again exploited in order to create a perceived battle between political elites and the people, where *Fidesz* painted itself as a strong defender of the latter.

[278] "Opinion of Advocate General Kokott delivered on March 2020" (2020); *European Commission v Hungary;CaseC-66/18 http://curia.europa.eu/juris/document/document.jsf?text=&docid=224125&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=15433962; Consulted in December 2020*

[279] "European Parliament resolution of 17 May 2017 on the situation in Hungary" (2017); *European Parliament; https://www.europarl.europa.eu/doceo/document/TA-8-2017-0216_EN.html; Consulted on December 2020*

8. The case of Poland

As previously discussed, the Polish and Hungarian cases present some fundamental differences and similarities. Among the most important differences there is probably the rewriting of the constitution, but also the different timeframe in which the two countries introduced their reforms.

Whereas *Fidesz* started its process of national reshaping already in 2010, *PiS* only obtained this possibility in late 2015. The first, strong of its supermajority and the possibility to amend the fundamental law of the country was able to very quickly change the composition and functioning of the courts, introducing laws that profoundly remodelled the state. Information, religion, privacy or education are only some among the different areas in which this change has been taking place. Important international consequences, such as litigations with foreign organisations or the European Union have been the direct result of this process.

The Polish case instead, in many ways, is much more concentrated over a principal matter: the independence of courts and the judiciary sector. As it will be possible to see, much of the efforts here during the past five years have been aimed at changing and reforming the Constitutional and Supreme Court, as it was the case with Hungary in the beginning. In general, it could be said that this process precedes the introduction of the most controversial laws, and for these reasons the situation in Poland has not yet reached the extent seen in Hungary.

8.1 The first years: Constitutional Court Crisis (2015-2017)

Analysing the process of reform of the judicial sector in Poland, early chronology is very much important; since it is thanks to it that many misunderstandings were born which would have ultimately resulted in the crisis. The *PiS* government officially started in late 2015; or to be more precise, the Polish elections took place the 25th of October. Due to the unprecedented positive result for Kaczyński's party, a government could be formed right away by candidate Beata Szydło, who did not need to enter talks with the opposition; this happened in November 2015.

It might be useful at this point to take a look at the functioning of the Constitutional Court in Poland. This body did not exist until very recent memory; the Second Polish Republic did not possess instruments of constitutional review of legislation, it was only introduced in 1982 during the martial law state, in order to try and appease to the general population, in this time frame the constitutional court would have been divided in two pieces, a *Constitutional* and *Impeachment* court[280]. At the time, due to its birth during the communist era, the court scope was fairly limited, and its decisions could be easily overthrown by the *Sejm*, which at the time was the only chamber of the state. These initial limitations would have only been lifted after the round table talks, but would have not been radically reformed until the new constitution of 1997.

It is precisely in this date with the new foundational document of the state, that we can find the groundwork for the functioning of the Constitutional Court and the appointment of judges. In particular, in art.79 we find the basis for the scope of the tribunal: *"In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.[281]"*

Also, in art.188 the matters over which the constitutional tribunal may deliberate are listed, in particular: *"The Constitutional Tribunal shall adjudicate regarding the following matters:1) the conformity of statutes and international agreements to the Constitution; 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; 3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes; 4) the conformity to the Constitution of the purposes or*

[280] Smilov, Daniel; "Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective" (2004); *International Journal of Constitutional Law. 2. 10.1093/icon/2.1.177.*

[281] "The Constitution of the Republic of Poland of 2nd April 1997 (As published min *Dziennik Ustaw* No. 78, item 483)"; *Means for the defense of freedom and rights; Art. 79*

activities of political parties; 5) complaints concerning constitutional infringements, as specified in Article 79[282]*, para. 1.*[283]*"*

Other article of interest in the crisis is Art. 194, which regulates the composition of the court, as well as the process for nomination of judges: *"The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office." "The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal."*[284]

Therefore, matters of review of constitutionality in the republic of Poland are subordinated to the Constitutional Tribunal. An independent and correct functioning of this body is fundamental in order to achieve and maintain a minimum standard of democracy. Despite this, the nomination of judges is responsibility of the *Sejm*, which makes it directly tied to the political climate of the country at the time of the nomination. This rule was for long source of debate, for example, in 2013 a law was in the making which would have subordinated judges' nominations to the opinion of legal professionals and the general public (possibly avoiding the crisis to come), this law however would have not come to life due to rejection from the *PO* majority itself[285]. The nomination is however counteracted by the fact that the judges' terms are nine years long, or in other words more than the duration of two government terms. It is important to keep in mind these aspects since they are the basis upon which the constitutional court crisis kindled in late 2015.

As aforementioned in May that year, presidential elections took place; Mr. Duda won against *PO* candidate Bronisław Komorowski, who would have however still retained the office until the 6th of August. In this buffer period, between the elections' date and the

[282] *Ibidem*
[283] "The Constitution of the Republic of Poland of 2nd April 1997 (As published min *Dziennik Ustaw* No. 78, item 483)"; *The constitutional Tribunal, Art. 188*
[284] "The Constitution of the Republic of Poland of 2nd April 1997 (As published min *Dziennik Ustaw* No. 78, item 483)"; *The constitutional Tribunal, Art. 194*
[285] Tomasz Tadeusz Koncewicz, 'Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond', (2016*), 53, Common Market Law Review, Issue 6, pp. 1753-1792, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/53.6/COLA2016149*

actual expire of Komorowski's term, the *PO* dominated *Sejm* would have issued an important piece of legislation in preparation for the general elections forecasted for the end of the year. In this bill[286], provisions were made regarding the nomination of Constitutional Court judges, in particular: "*In the case of judges of the Tribunal whose term of office expires in 2015, the deadline for lodging the application referred to in Article 19(2) shall be 30 days from the day on which this Act enters into force."*

This last piece of legislation was considered to be partially unconstitutional by the constitutional tribunal itself, but despite this, President Komorowski decided to sign it and make it effective a mere one month before his leave. Thanks to the bill, it was now possible for *PO* to nominate 5 of the 15 judges of the court before the expiring of the term. This however happened in the timeframe before the general elections, which took place on the 25th of October. In the very last session before the withdrawal of the *Sejm* 5 new judges were elected by *PO*. These 5 judges would have replaced *PiS* nominated judges who took office many years before during the Kaczyński government, making the tribunal tilt significantly. Since already 9 out of 5 judges had been nominated during the previous years by *PO*, the nomination of the other 5 would have meant that the constitutional tribunal would have reached a total of 14 out of 15 *PO* nominations. 3 of these judges would have substituted members whose term already expired, while other 2 would have substituted members' whose term had to expire in December.

According to Polish law however, judges in the constitutional tribunal cannot be only decided by the *Sejm*, their nomination must be accepted by the President of the Republic who takes their oaths. For this reason, the official start of the argument took place when President Duda refused to take the oath of the 5 *PO* nominations, officially giving life to the set of events that we can define as the Polish constitutional court crisis. The new *PiS* government would have not lost time: in November 2015 a new piece of legislation was passed by the *Sejm* and signed by President Duda which prescribed the nomination of 5 new judges. These five new *PiS* nominated judges would have consequently being sworn in by the President on the 2nd December.

[286] "Act of 25th June 2015 on Consular Law (Text No. 1274)." (2015); *https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=101451; Consulted on December 2020*

In this period two rulings would have been provided by the constitutional court on the 3rd and 9th of December[287]. What transpired over these rulings was the capability of the court to still provide a fair and impartial judgement, due to the fact that the constitutionality of the matter was by all means and purposes found half way between *PO* and *PiS* positions. The law promulgated in summer was deemed partially unconstitutional and so was the substitution of the two *PiS* judges whose term would have expired in December. The instruments for a peaceful resolution of the matter were given, however the events would have turned for the worse as the month progressed.

The situation became more complicated due to the fact that in December, the *PO* nominated president of the constitutional court allowed the new judges to take office, but told that until the situation was not solved, the tribunal would have not included them into their rulings. This was possible due to the fact that the number of judges necessary to deliberate was set to 9 out of 15, which meant the presence of the new judges was not necessary in order to reach a legal number. This in turn prompted the response of *PiS*, which on the 22nd of December passed a new law regulating the activities of the constitutional tribunal, with the most important reform consisting in the minimum number of judges necessary to deliberate being raised to 13, effectively rendering now impossible to exclude the *PiS* nominations out of rulings.

These events sparked internal debates that heightened the confusion; strong arguments were voiced between those who claimed *PiS* actions were unconstitutional and those who instead criticised the nominations made by *PO* in October. Effectively, at the time there was a risk of loss of independence of the judiciary represented by the meddling of national parties with the nominations of judges. The situation hindered the capability for the constitutional tribunal to act in good faith, and in turn, to guarantee a correct review of legislation compatible with principles of democracy as they stand in the EU. For this reason, it would have been only a matter of time until the Union would have become interested in the case.

Promptly, the 13th of January the EU Commission started a dialogue with the Polish authorities according to the methods prescribed by the Rule of Law framework approved

[287] Tomasz Tadeusz Koncewicz, 'Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond', (2016*), 53, Common Market Law Review, Issue 6, pp. 1753-1792, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/53.6/COLA2016149*

in 2014. In this initial phase, the dialogue was carried out simply through an exchange of communications between the government and the Union's bodies, which also operated through the help of several advisors such as the Venice Commission, just like in the Hungarian case. In particular, the first documents issued on the matter corresponded to an opinion in March 2016, followed then by an EU parliament resolution in April 2016.

In the commission's opinion[288], references were made at the bill passed on the 22nd December regulating the functioning of the constitutional tribunal, in particular by introducing two changes: the aforementioned increased legal number from 9 to 13 judges, and the need for the tribunal to deal with cases in the order in which they are presented from the government. The commission found that the chronological order, despite being present in some countries, was incompatible with the state of Poland and represented a threat to the European standards[289]. The need for having such a high majority of judges in order for deliberations to be considered valid was found to be unusually high. The Commission therefore ended its opinion by stating that an effective constitutional review was under threat, and called on both the government and opposition to try and find a potential solution[290].

The final piece of the initial part of the crisis was represented by the constitutional court ruling of 9 March 2016[291]. Here, the battered down institution proclaimed the unconstitutionality of the December law, asking the government to stand down and reinstate the situation as before of the crisis. This was corroborated by yet another opinion of the Venice commission, restating the need to follow through the instructions of the tribunal in order to re-establish the rule of law. These instructions and recommendations would have not been followed however, on the contrary, the judgements of 9th March together with those delivered since have not been published in the official journal[292].

[288] "Opinion on Amendments to the Act of 25 June 2015 of the Constitutional Tribunal of Poland" (2016); *Venice Commission; https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e; Consulted in December 2020*

[289] *"...any imposition of an obligation to hold a hearing and to decide - in a strict chronological order risks not being in compliance with European standards. There must be room for the Constitutional Tribunal to continue and finish deliberations in certain types of cases earlier than in others*."; Ibidem

[290] *Ibidem*

[291] See Koncewicz (2016)

[292]"Commission adopts Rule of Law Opinion on the situation in Poland" (2016); *European Commission Press release; https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2015; Consulted in December 2020*

The European Parliament deliberated on the matter on the 13th of April[293], sharing the concerns expressed during the assessment made by the Venice commission. In particular the Parliament claimed how it was *"seriously concerned that the effective paralysis of the Constitutional Tribunal in Poland poses a danger to democracy, human rights and the rule of law"*; *"Urges the Polish Government to respect, publish and fully implement without further delay the Constitutional Tribunal's judgment of 9 March 2016 and to implement the judgments of 3 and 9 December 2015"*

Following these initial events, a solution was not yet to be seen. On the contrary, Polish authorities simply disregarded the recommendations issued by the Union. For this reason in June 2016 the European Commission would have sent a first opinion[294] directed at Poland in the rule of law framework. The document restated the wish to see the Rule of Law being re-established by accepting the constitutional court ruling of March and asking further review of all the rulings made since that period.

Not seeing any progress, in July the Commission sent its first recommendation[295], which would have later been followed by a second[296] in December. Concerns regarding a withdrawal from a state of rule of law were stated once again, the argumentations always rotated around concerns regarding the appointment of judges in December 2015 and the missed introduction of the March 2016 ruling.

Besides this, also another point was raised; on the 22nd of July 2016: another law was passed by the *Sejm*, which stated how *"With effect from this Act's entry into force, the President of the Tribunal shall include on panels ruling on cases, and assign cases to, judges of the Tribunal who have taken the oath before the President of the Republic but,*

[293] " European Parliament resolution of 13 April 2016 on the situation in Poland " (2016); *European Parliament; https://www.europarl.europa.eu/doceo/document/TA-8-2016-0123_EN.html; Consulted in December 2020*
[294] "Commission adopts Rule of Law Opinion on the situation in Poland" (2016); *European Commission Press release; https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2015; Consulted in December 2020*
[295] "Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland" (2016); *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016H1374; Consulted in December 2020*
[296] "Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374" (2017); *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2017.022.01.0065.01.ENG&toc=OJ%3AL%3A2017%3A022%3ATOC; Consulted in December 2020*

by the date of this Act's entry into force, had yet to take up their duties as judges.[297]*"*. Obviously, this law was tailored to apply to the situation of the judges nominated in December; the commission found that this law was problematic since it disregarded the debate on nominations by forcing the tribunal to accept the *PiS* nominations.

The arguments of the commission were therefore always the same: to allow the 3 judges nominated by the previous administration to take their place in the Constitutional Tribunal; that the ruling of March 2016 was implemented; and that the July 2016 law was put under scrutiny from the Constitutional Tribunal.

At the turn of the year, with 2017, the situation reached a stalemate. The EU issued a series of recommendations, strengthened also by official parliament resolutions and several opinions given by the Venice commission. All of these bodies expressed their concerns over a potential breach of fundamental values of the EU and standards of legality. Despite this, the Polish government did not take any step to solve the situation, but on the contrary, rejected all the accusations moved by the Union. It is quite telling for example when in 2016 Prime Minister Szydło claimed how: *"we will not introduce into the Polish legal system any recommendations that are incompatible with the interests of the Polish state, which are not compatible with the interests of Polish citizens*[298]*"*. There was, by all means and purposes, a substantial difference between the views of the Polish government and the Union, the Polish government rejected the recommendations, and instead decided to introduce other laws in the subsequent years which would have further complicated the situation.

First of all, on December 2016 Mr. Mariusz Muszyński, one of the three judges appointed from *PiS* and rejected in the March ruling, was selected to substitute the president of the tribunal in case of her absence, which was taking place at that moment. In 2017, the vice president was forced to prolong his remaining leave, causing President Duda to officially appoint Muszyński as vice president of the tribunal. Together with this, also a deep reform of the judiciary was announced in early 2017, which would have later developed in a second class of issues in the Republic: if up until then the main point of contention

[297] "Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland" (2016) ; *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016H1374; Consulted on December 2020*

[298] Goulard Hortense;"Poland rejects Commission's rule of law request"(2016); *Politico; https://www.politico.eu/article/beate-szydlo-eu-law-and-justice-poland-rejects-commissions-rule-of-law-request/; Consulted in December 2020*

was represented by the alleged meddling of the state with the Constitutional Tribunal and its independence; a second point would have risen in 2017 regarding the independence and meddling with the supreme court.

Wishing to make a comment on these first years of the second *PiS* government, it is possible to find a situation that was mostly unique, but also mimicked some features of the Hungarian case. As it was true in the latter, at the very beginning much of the government's efforts were aimed at striking the constitutional court and an effective review of legislation. This was also made easier due to the fact that there was some shadiness over the whole matter. By own admission of the Union and tribunal themselves, part of the nominations made by *PO* in 2015 were not to be considered legitimate, sentiment which was surely present in the population as well. The decision to not include courts' rulings in the official journal, just like tampering with judges nominations is a recurring theme.

8.2 Further complications: Supreme Court Independence (2018-2019)

Just like the Constitutional Court, the Supreme Court as it stands today was founded with the constitution of 1997, which defined its objectives together with the rules regulating its composition and operations. Among the other things, the Polish Supreme Court adjudicates the validity of the elections and referendums, as described by the Art.101[299], Art.129[300], Art.125[301]; but also serves a role of supervision in the legal activity of the state as described by Art.183[302] and 175[303]. Therefore, just like the Constitutional Court, a functioning and independent Supreme Court would be fundamental in ensuring the

[299] "*The Supreme Court shall adjudicate upon the validity of the elections to the Sejm and the Senate." "A voter shall have the right to submit a complaint to the Supreme Court against the validity of the elections in accordance with principles specified by statute*."; "The Constitution of the Republic of Poland of 2nd April 1997 (As published min *Dziennik Ustaw* No. 78, item 483)"; *The Sejm and the Senate; Art. 101*

[300]"*The Supreme Court shall adjudicate upon the validity of the election of the President of the Republic.*" Ibidem; *The President of the Republic of Poland; Art. 129*

[301] "*The validity of a nationwide referendum and the referendum referred to in Article 235, para. 6, shall be determined by the Supreme Court*."; Ibidem; *The Sejm and the Senate Art. 125*

[302]" *The Supreme Court shall exercise supervision over common and military courts regarding judgments*"; Ibidem; *Courts and Tribunals; Art. 183*

[303] "*The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts*".; Ibidem; *Courts and Tribunals, Art. 175*

separation of powers and the system of checks and balances necessary for the existence of a state of rule of law.

The way in which the government majority meddled with the institution echoed the same practice used in Hungary years before. A law was introduced lowering judges' retirement age to 60 years for women and 65 for men, whereas previously the previous age was set at 67 for everybody[304]. Effectively, this created the risk for up to 27 judges to be forced to an early retirement, which could have therefore later been substituted according to the Polish laws; due to the possibility of advancing careers of judges ideologically closer to the party, this further raised concerns over the independence of the judiciary.

Following these events, the EU would have continued issuing statements, represented by a parliament's resolution followed then by a 4th Commission's recommendation in December 2017. In particular, the desire was to activate the process in the framework of Art.7 (1) of the TEU (it is in this timeframe that the Polish and Hungarian cases started to develop side to side). This final recommendation set a series of objectives for the Polish government to follow in order to solve the situation, in particular: to amend the law relative to the Supreme Court[305]; and to restore the independence and functionality of the Constitutional Tribunal[306].

About this time, between November and December the Szydło government would have fallen[307], replaced by the first cabinet lead by Mateusz Morawiecki, current Prime minister of Poland. However, the new government was not willing to comply to the Union's requests

The stalemate and the lack of desire to find a compromise on behalf of the Polish government prompted on the 1st March of 2018 the decision on behalf of the commission to officially activate art.7(1)[308]. After this activation, the Polish authorities were been

[304] "Judgment of the Court (Grand Chamber) of 24 June 2019" (2019); *European Commision; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2019%3A531; Consulted in December 2020*
[305] "Rule of Law: European Commission acts to defend judicial independence in Poland" (2017); *European Commission press release;*
https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367; Consulted in December 2020
[306] *Ibidem*
[307] „Postanowienie Prezydenta Rzeczypospolitej Polskiej z dnia 8 grudnia 2017 r. nr 1131.16.2017 o przyjęciu dymisji Rady Ministrów"(2017);
http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20170001143; Consulted in December 2020
[308] "*Whereas its resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland states that the current situation in Poland represents a clear risk of a serious breach of the values*

given the possibility to defend themselves in front of the commission in the summer of 2018[309]. In these occasions, the country's delegation tried to explain its point of view in front of the community. In particular, the changes in the judiciary were justified in the interest of increasing the efficiency of the legal state, which was in the ultimate best interest of Poland. The new retirement age was not considered to be discriminatory since it was aimed at every judge without targeting any political group in particular. Besides that, judges were not being forced to retire, but could make present to the President their will to continue their work.

Regarding the constitutional tribunal, the Polish delegation pointed out how the appointments made by the previous parliament were illegitimate, since they did not reflect the composition of the political reality of the time. Even though the Constitutional court could have been considered to be dysfunctional at the beginning, by the time of the proceeding (June 2018), the situation was already stable and the court already operated in an efficient, independent and timely manner.

If anything, the declarations of the Polish delegations are capable of showing the nature of the debate according to a different narrative, which was indeed quite popular in the country. It is possible to notice a generally different view about the legitimacy of political institutions and their role. Still, thanks to the dialogue started between the commission and the polish delegation some progress was reached and some compromises were finally made. In October 2018, the European Court of Justice issued an official statement in which it intimated the Republic of Poland to revoke the law concerning the retirement age of judges[310], due to this, in December, President Duda ended up signing a decree revoking the law and reinstating those threatened of retirement.

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referred to in Article 2 TEU; 1. Welcomes the Commission's decision of 20 December 2017 to activate Article 7(1) TEU as regards the situation in Poland and supports the Commission's call on the Polish authorities to address the problems; 2. Calls on the Council to take swift action in accordance with the provisions set out in Article 7(1) TEU; 3. Calls on the Commission and the Council to keep Parliament fully and regularly informed of progress made and action taken at every step of the procedure; "; "European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland " (2018); *European Parliament; https://www.europarl.europa.eu/doceo/document/TA-8-2018-0055_EN.html; Consulted on December 2020*

[309] "Rule of Law in Poland / Article 7(1) TEU Reasoned Proposal - Report of the hearing held by the Council on 26 June 2018 " (2018); *European Union's Council; https://data.consilium.europa.eu/doc/document/ST-10906-2018-INIT/en/pdf; Consulted on December 2020*

[310] *"(1) suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges; (2) take all necessary measures to ensure that the Supreme Court judges concerned by the provisions at issue may continue to perform their duties in the same post, while continuing to enjoy the same status and the same rights and working conditions as they did before the Law*

9. Latest Developments (2018-Today)

As demonstrated by the chronology of the two cases, the situation in Poland and Hungary is in reality quite different, concerning Poland mainly through the independence and correct functioning of courts, while in Hungary instead a deeper change that involved all the different areas of the state. Whereas for the northern country the activation of the infringement procedure in virtue of Art.7(1) happened in March, in Hungary this would have happened only in autumn[311]. The list of grievances was quite extensive, what was quoted in particular were the following issues: *"The functioning of the constitutional and electoral system; the independence of the judiciary; corruption and conflict of interest; privacy and data protection; freedom of expression; academic freedom; freedom of religion; freedom of association; right to equal treatment; rights of minorities; rights of migrants; economic and social rights[312]".*

This prompted the start of a series of hearings that are to this day inconclusive and did not give an appreciable result in any sense. It did not mean however that the last two years have been uneventful in the scope of the debate, which on the contrary saw an evolution and could also provide insight on the potential future of the matter. First of all, just like *Fidesz* confirmed its role in 2018; 2019 saw the victory of *PiS* during the general and European elections, gaining an absolute majority of seats in the *Sejm* and even increasing its electoral success achieved in 2015. This would have been replicated in the summer of 2020 with the reconfirmation of Duda during the presidential elections; by all means and purposes the activation of Art.7 did not influence quite extensively the general opinion in any of the two countries. On the contrary *PiS* ran a campaign of open challenge towards the European Union and its values, proposing an alternative represented by its purely Polish vision of state.

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on the Supreme Court entered into force; (3) refrain from adopting any measure concerning the appointment of judges to the Supreme Court to replace the Supreme Court judges concerned by those provisions, or any measure concerning the appointment of a new First President of the Supreme Court or indicating the person tasked with leading the Supreme Court in its First President's stead pending the appointment of a new First President"

[311] "European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded" (2018); *European Parliament; https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html; Consulted in December 2020*

[312] *Ibidem*

The great feature of the year 2020 has been the complications resulted by the COVID-19 epidemic, which inevitably impacted and slowed considerably, among the other things, also these legal proceedings. In early 2020 the European Parliament[313] expressed its regret on the fact that the legal process was not yielding any result. Besides that, it was also noted the difference existing between the two situations and how the backsliding in Poland was much less extensive, wondering if Art.7 was the best instrument to use. The evolution of the instruments safeguarding the rule of law is one important point of the current debate. Generally speaking, it seems that appealing to the democratic principles of the population would not yield appreciable results as long as other areas, such as the economy for example, perform well.

For this reason during the past year one of the most recent developments regarded the debate over the correlation of funds to the respect of Rule of Law principles, in the framework of the Next Generation EU project. With it, the aim has been to grant aid in the form of exceptional funds to distribute among the different state members in order to fight against the adverse consequences of the pandemic[314]. The proposal to bind respect of the Rule of Law to the possibility of withdrawing funds was met with hostility from the Hungarian and Polish government.

The whole situation created a stalemate in which the two countries vetoed the budget effectively risking preventing the issuing of the relief funds. Despite this, in the end, the EU partially caved in to the veto of the two countries reaching a compromise. Generally speaking, this can be seen as a great example of how at the current state of things the Union is an organisation that often chooses to prioritise economical matters over social principles[315], an element which surely played a part in the incapability to solve these issues in the past years and fostered the rule of law backsliding.

[313] "European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary" (2020); *European Parliament; https://www.europarl.europa.eu/doceo/document/TA-9-2020-0014_EN.html; Consulted in December 2020*

[314] *"At the request of the Heads of State or Government, the Commission presented at the end of May a very wide-ranging package combining the future Multiannual Financial Framework (MFF) and a specific Recovery effort under Next Generation EU (NGEU)."* Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020); *https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf*

[315] Piana Daniela & Nato Alessandro; (2020) "Strengthening legitimacy and authority in the EU: a new model based on democratic rule of law"; *Reconnect Work Package 4, Deliverable 4*

10. Comparative Perspective over the two cases

Drawing onto the similarities and differences in the two cases of rule of law backsliding, some conclusions and comments can be made regarding the phenomenon. First of all, if we were to try and find some motivations behind the whole process, it would be quite easy to attack the two ruling parties by providing them all the responsibility. This however would be excessively simplistic. As several cycles of elections showed, *PiS* and *Fidesz* policies have proved to be very popular, encountering a high level of approval that has resulted with several reconfirmations and even in an increased amount of voters as time passed. It must be acknowledged how both cases were made possible by fertile ground represented by a general lack of trust towards the democratic institutions built after the end of communism[316]. This lack of trust could surely be the result of historical developments, where institutions were not perceived as representative of the popular will, but on the contrary subservient to foreign interests standing in the way of economic and social security.

Another element to be considered in both cases, is the relative speed with which they adhered into the different international organisations created in the west during the past century[317], such as NATO, but most importantly, the EU. If on the one hand this could be considered commendable, on the other changes were brought at a very fast pace in order to adhere to the standards set by the Union for entrance of new members. This speed coupled with the very short democratic history of the two countries[318], probably prevented a strong internalisation of democratic systems and institutions. These institutions were in place, especially in Poland thanks to a fully fledged modern constitution, however time was not sufficient in order to entirely anchor them to the public conscience as it is the case of many other western states.

[316] Shevchenko, A., (2018) "From a follower to a trendsetter: Hungary's post-Cold War identity and the West" *Communist and Post-Communist Studies*, https://doi.org/10.1016/j.postcomstud.2018.01.006
[317] See Koncewicz (2016)
[318] Factoring in also the occupation during wwii, we could tell that Poland and Hungary did not live in a democratic regime in the whole period that goes between 1939 and 1989, a full fifty years. Factoring in also the years of rule of law backsliding, we are looking at a mere twenty years of time in order to digest and internalise these democratic values and institutions.

It should be noted how in several other countries there is a diffused distrust towards political elites and supranational institutions (for example in Italy[319]), however this did not result in the existence of serious cases of backsliding. The processes of integration into the Union here are much older, taking roots back to the 50s, and the democratic history is more fleshed out, having more than 70 years at its back. This factor alone created a considerable difference that is observable in the Polish and Hungarian reality.

The past decade has been a particularly hard one; the economic and migrant crisis, coupled with the deep societal and cultural changes left many citizens deeply unsatisfied all over the continent, but also fearful for their future. This factor, coupled with those previously described, made the two countries steer towards the election of these two parties, which on the one hand executed their popular mandate by maintaining the status quo, but on the other did so through a progressive and systematic dismantling of the typical democratic institutions associated with the respect of the rule of law. The mind goes to the original explanation of the phenomenon proposed by the ancient philosophers. The lack of rule of law or *Tyranny*, is born out of democracy when individuals exploit the desires of the people in order to gain more power[320], taking leverage upon their fears and resentment.

Looking on the more practical side, we can see differences and similarities of the phenomenon over the two countries; it must be acknowledged for example how the backsliding in Hungary is much deeper compared to the events happened in Poland. This has been made possible by a variety of factors. First of all, that a constitution was not yet created to replace the one written during the communist era; and that the elections' results provided *Fidesz* enough numbers to amend and create a new one. This new foundational document would have provided the basis for all the changes introduced during the past ten years. Looking for example at the media laws (which were the first piece of legislation introduced in the context of this analysis), they would have not been possible without constitutional amendments made by a supermajority in the parliament.

Looking at the similarities instead, we can notice how the process of backsliding was characterised by the general dismantling of constitutional rules especially through the

[319]Rye Lise, Tomasz Koncewicz Tadeusz, Fasone Cristina "Ideas of democracy and the rule of law across time and space: Developments in the EU, Poland and Italy" (2019); *Recconect Work package 4, deliverable 1*

[320] Plato "The Republic", 564a

dismantling of courts and making them subservient to the party's desires[321]. This is one of the most important points that can be drawn. Court rulings, especially those of the Constitutional Court, have been openly disregarded by the two governments, and in the meanwhile the nomination of new court members has been tampered with. On the one hand judges who were ideologically closer to the parties could be proposed, while on the other the older judges nominated by older governments were being substituted through various means, the most important of which represented by the lowering of the retirement age.

One of the important lessons over the phenomenon is precisely the importance of independent courts capable of constitutional review of legislation as foundation for the system of checks and balances which is fundamental for a state of rule of law. When this comes less, it is possible for the government to introduce measures and laws that openly defy minorities and other groups, waging war the state itself of legality[322]. The case of the March 2016 ruling in Poland or the decision in Hungary to disregard all rulings prior to 2012 is just an example. This was possible thanks to the fact that the general population did not care, or at the very least not cared enough about the situation, which highlights the lack of internalisation of values at the heart of the EU discussed before.

Speaking about the Union, the lesson that can be generally drawn is its inefficacy in dealing with the situation, being incapable in the entire decade to put a stop to it. This was not only through a lack of will but also in hope to avoid the adverse consequences of a potential use of Art.7. What the past decade has shown more in general is how the European Project itself is probably not yet mature enough in matters of solidarity and respect of its fundamental values. When confronted with difficult choices, it has often chosen the path safeguarding economic matters or the status quo. The most recent example of this has been the dispute over funds in the context of Next Generation EU. Put under pressure the Union caved in reaching a compromise quite far from the most desirable outcome.

More in general, the Union is confronted with the difficult choice of deciding towards which direction to go in the future. What the two cases of Hungary and Poland show is

[321] Bard, Petra and Pech, Laurent. (2019)"How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The 'Hungarian Model'." *Reconnect Working Papers (Leuven) No. 4, 2019, Available at SSRN*: https://ssrn.com/abstract=3608784 or http://dx.doi.org/10.2139/ssrn.3608784

[322] Wyrzykowski, M. (2019)"Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland." *Hague J Rule Law 11, 417–422 (2019).* https://doi.org/10.1007/s40803-019-00124-z

the difficulty in acting upon instances of fundamental breaches of the treaties; and nothing as it stands now prevents a similar situation from happening again in the future. Besides this, what can be observed is a generally completely different conception of rule of law incompatible with the ideas held in the rest of the continent[323]. What is being seen now in the East is the rise of a new type of government which could be defined as a sort of illiberal democracy[324]. Strong peripheral countries, with the support of their own population openly challenge the order imposed by the Union and the rest of western IOs, doing so through the dismantling of democratic institutions. If the Union wants to solve these issues, it must therefore try to take a stand accepting the potential risks[325] of its most serious instruments.

[323] Pech Laurent; Grogan Joelle, (2020)"Unity and Diversity in National Understandings of the Rule of Law in the EU"; *Recconect Work Package 7; Deliverable 1*

[324] Zakaria, Fareed.(1997) "The Rise of Illiberal Democracy." *Foreign Affairs, vol. 76, no. 6, 1997, pp. 22–43.*, www.jstor.org/stable/20048274.

[325] Kochenov, Dimitry and Bard, Petra. (2018)" Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement". *Reconnect Working Papers (Leuven) No. 1, 2018*, Available at SSRN: https://ssrn.com/abstract=3221240

Conclusion

After having explored the whole matter, some final conclusions can be reached. First and foremost as introduced at the very beginning of the dissertation, the importance of these series of events cannot be underestimated. Their relevance is quite significant since they represent a noteworthy crack in the solidity of the Union, but also because in their generality, they highlight a profound gap in terms of values and political objectives between the community and some of its member states.

As it was possible to verify in the first chapter, the "*Rule of Law*" is a particularly complicated legal concept that has been several millennia in the making; the first, most precise requirements to verify its presence or lack thereof were only identified in the last two centuries. Definitions such as the one provided by Fuller, Dicey, Bingham etc. all played a role in the adoption of the concept as a foundational element in the overwhelming majority of the modern democratic states, but also in the construction of the different international organisations that permeate the modern political scene.

This richness and diversity of interpretation however also translated in a difficulty in finding its different needs. Different thinkers and legal commentators all provided different ideas on what exactly the rule of law is, dividing themselves between those who mainly identified formal and procedural requirements, and those who instead preferred to attach also substantive requirements of humanitarian obligations. In the scope of this dissertation the attention has been aimed primarily at the interpretation in the European Union. In this case, an added layer of difficulty, represented by the linguistic barrier should be also specified, different declinations of the concept depended also on the language reflecting historical and legal tradition of many of the member states.

All these factors produced a particularly difficult situation where the Union was built upon principles of rule of law safeguarding its institutions and its values, but could not provide a specific, clear definition on what exactly it was and what were the requirements verifying its presence. This however does not mean that the Rule of Law is an entirely fuzzy concept: legal doctrine given by the whole of rulings issued by the different bodies of the international organisation identified many different areas of interest. In this sense, it is possible to verify how in the Union the legal concept of Rule of Law is indeed

described by a series of requirements of democratic quality, respect for human rights and principles of legal certainty and predictability.

Turning the attention towards the specific cases of Poland and Hungary, a series of facts can also be verified. First of all, their uniquely tragic and sad history; this was characterised by loss of freedom towards different foreign superpowers, genocide and betrayal. These events created some long term consequences that can still be felt to this day and surely fostered the conditions that allowed the rule of law backsliding to take place. The nature of the political situation and the isolation from the rest of the west prevented some of the past century's processes of change to take root, being instead replaced by others. The reality of life during the communist rule, together with the democratic transition carried on mainly by political elites detached from the most common citizens, created a widespread distrust towards the ruling classes, which would have later been ultimately represented by the European institutions.

The democratic history of the two countries is particularly short, and it could be argued how many of the principles enshrined in the EU treaties were not really internalised in the past decades. The access into the Union was something that happened primarily out of convenience and necessity, and not due to some burning internal adherence to its principles. When the duties of membership clashed with the public opinion, the two parties of *PiS* and *Fidesz* managed to represent the dissatisfaction of their citizens and take the fight against the Union. However, during this period they also consolidated their power over their respective systems through practices that by all means and purposes violated the standards of rule of law described by the EU.

Turning the attention on the way with which this was possible, some other conclusions can be reached. First of all, a significant difference between the two countries can be identified represented by the supermajority obtained by *Fidesz* in Hungary compared to the simple majority obtained by *PiS* in Poland. What this meant, is that the Hungarian backsliding is much more extensive than the Polish one, due to the fact that Orban's party was capable of drafting a new constitution and set its vision of the state in stone.

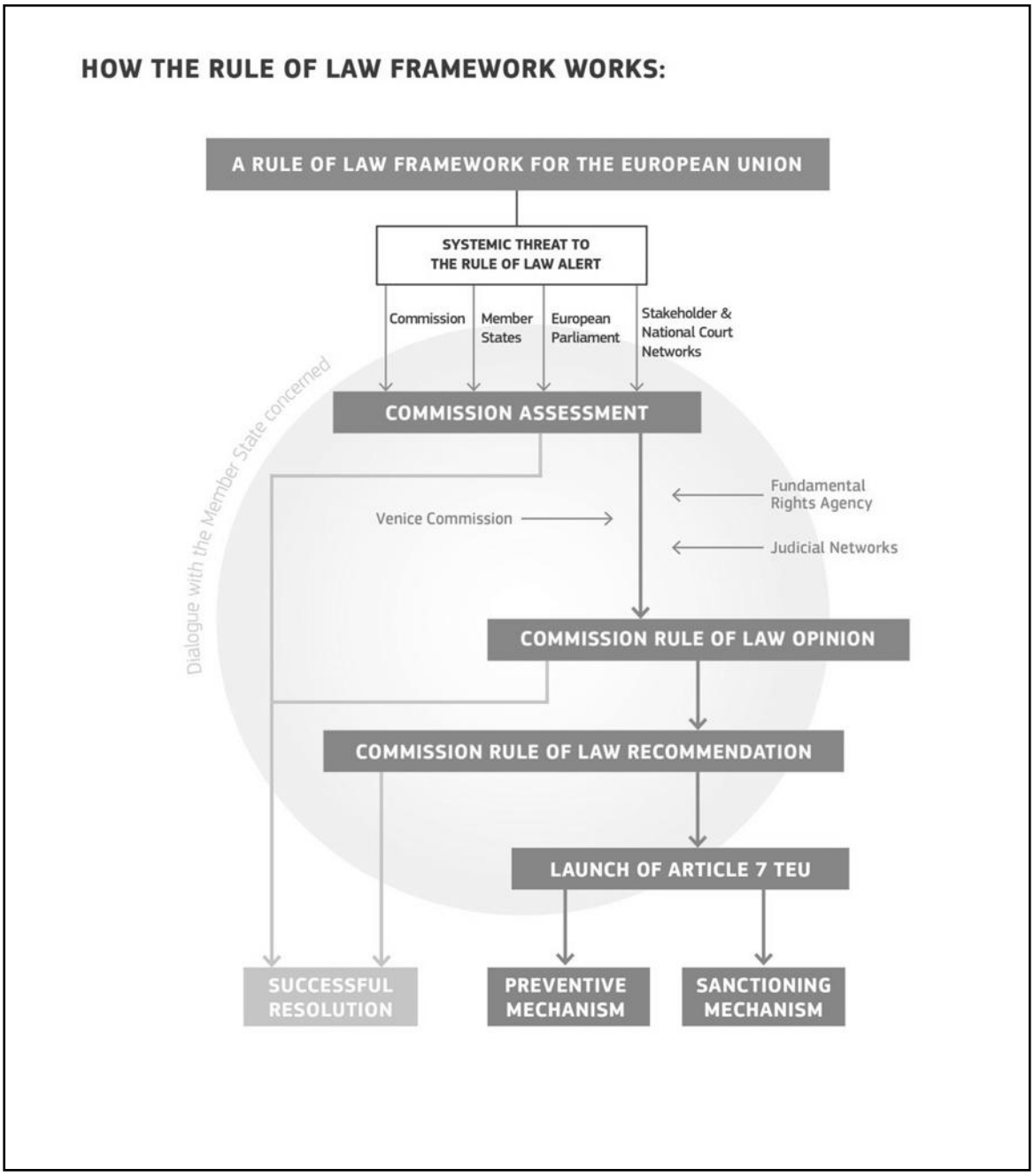
Whereas this was not possible in Poland, some common points can also be identified. In both the countries the attention was particularly focused on limiting and tampering with the normal functioning of courts guaranteeing a formal review of constitutionality and legislation. Over time, this translated in the issuing of more and more laws violating

fundamental principles of the Union and cementing a vision of the state profoundly different than the one found in most other western democracies.

Looking at the reaction of the Union, this has been particularly meagre, not being capable in the many years that characterised the debate to find a satisfying solution. This has been not only been due to a lack of instruments, but most importantly due to a lack of will to use them. More in general, it seems like the whole situation has been an example highlighting some of the Union's identity problems, or in other words, it has highlighted how the Union tends to privilege matters of economic nature and is not really mature enough to deal with such differences in political values and breaches over fundamental treaties.

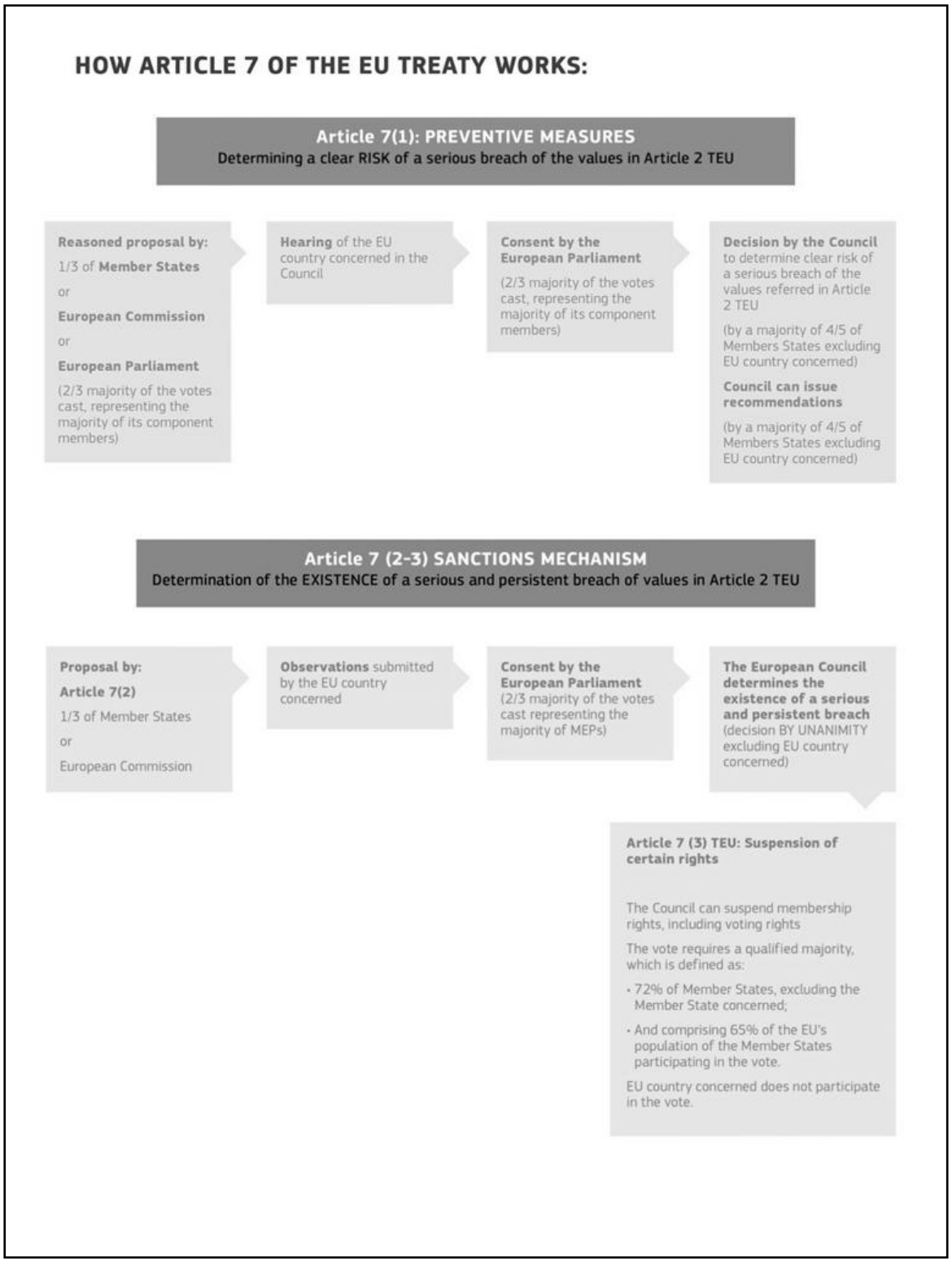
Speaking in absolute terms, as European citizens, the whole matter puts the accent on how important it is to understand and internalise the different values at the inception of the Union, because their presence or lack thereof *does* make a difference. Let us for example think about the most recent developments in Poland over abortion rights, this was made possible by a decision undertaken by the Constitutional Court, the very same whose judges had been subject to debate. It is important to understand how these foundational treaties and values *do* have an effect and for this reason, it would be fundamental for everybody to know them better, regardless of their opinion about them. The Union could maybe try to foster the respect of rule of law through initiatives aimed precisely at this if it wanted to see a resolution of the problem. In a similar way however, every single one of us should make a decision and understand if these values do indeed represent our ideas and hopes for the future, how to defend them in case of a positive answer, or if it is worth still following them when this is not the case.

APPENDIX



(Figure 1)[326]

[326] "Rule of law report 2020" (2020), *European Commision Factsheet, consulted in November 2020 in https://ec.europa.eu/info/sites/info/files/rule_of_law_mechanism_factsheet_en.pdf*



(Figure 2)[327]

[327] "Rule of law report 2020" (2020), *European Commision Factsheet, consulted in November 2020 in https://ec.europa.eu/info/sites/info/files/rule_of_law_mechanism_factsheet_en.pdf*

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Summary

Introduction

With this dissertation, the aim was to analyse the recent dispute over the alleged rule of law backsliding in the Central Eastern European states of Poland and Hungary. The dispute highlights the level of disagreement existing between certain member states and European Institutions over what exactly is "*The Rule of Law"*, but also more in general, over some of the most fundamental values that should be at the bedrock of the state. This wide scope of disagreement, translating in a concrete gap between the Union and some its components, sparked a personal interest to delve deeper into the matter.

Chapter I: Rule of Law

The dissertation has been therefore divided into three main chapters; in the very first the objective is to identify and describe in the most accurate way possible the various school of thoughts and definitions of "*Rule of Law".* A good starting point could be researching for simple definitions of the concept. Such examples could define the "Rule of Law" as restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws, or mechanisms by which everyone should be ruled by the law and obey it.

However, relegating the concept to such simple definitions could prove to be insufficient in order to fully understand its implications. If a general definition of The Rule of Law may refer to what was previously described, it is also true that in many legal systems there is a reference to certain values and ideas, such as liberty and respect for private rights. Whereas the core idea of rule of law is generally undisputed, the several conceptual and legal by-products that stem from it are more controversial. In order to understand these modern interpretations and how their concrete applications differ from legal system to legal system, a review of the concept from an historical perspective is in order, together with the study of its main contributors

Upon analysing and researching the historical development of the Rule of law, a number of important philosophers are taken into consideration as contributors, and are often instrumentally used by modern commentators to describe one particular aspect they are

interested in. However two philosophers in particular seem to be extensively considered in academic literature as the original "*fathers*" of the concept; these philosophers are Plato and Aristotle.

According to Plato's ideas of rule of law, no state can exist where the law is subject to any authority higher than itself. The situation in which law is subordinated to the will of any person whose pursuit is any different than wisdom and righteousness, is a state destined to fail which will revert to tyranny. According to Aristotle, the most favourable situation is where the ruler is merely the person who acts within the framework of laws and behaves according to the Rule of Law. Rules are boundaries and order, and order is good. No order can be achieved in a society where law does not reign supreme and is subject to the will of the single individual and set of individuals.

With the arrival of the middle ages, these concepts were lost, only to be rediscovered later by philosophy placing emphasis upon them once again. If the ancient philosophers started from questions of virtue, honour and the different organisations of the state, the new ones asked themselves more about the concept of liberty, and how it tied into the different social structure of the time. The birth of a middle class closing the gap between nobility and peasants was quite often the philosophical framework in which many thinkers wrote. In this view, the work and exploration of the concepts regarding rule of law can be seen as the desire to obtain and maintain this liberty.

Just like Plato, Hobbes held the idea that the law could not be a set of rules that were written and blindly applied; they had to be embodied by somebody: the *sovereign*. *The sovereign* had to possess coercive powers and apply them in an asymmetric way upon the rest of the population; without this absolute authority, the structure of the state would have crumbled, together with its properties and freedoms. The philosopher tried therefore to justify and present the ideal state as the one where there is a clear distinction between authority and citizen, or in other words and absolute monarchy.

John Locke explored the ideas of law and exercise of power at length in his treaties. The importance of law as cornerstone of the state was stressed and laws and constitutions were found to be the foundation itself of the state, if created and written by free individuals. The individual is free when he is able to dispose of his wealth as he prefers, and his freedom does not overstep the one of other individuals. The state to which it was necessary to aim was a "*state of nature*" in which no other man may arbitrarily constrain

the other or make attempts at his property. The government was seen as having a paradoxical type of relationship with the state of nature. The only free form of government can be the one created and instituted by free men, who seek to enlarge their freedom, since they will be the only ones protecting this particular interest.

The main contribution of Montesquieu in the development of the concept of rule of law is an application of freedom over institutions: if it is true that freedom can only exist where law is present preventing the actions of others from curtailing our agency, the same must also be true for institutions. In a system where law is upheld, institutions must have clear and well defined boundaries in which they operate, verifying the legitimacy of their actions by controlling each other, or in other words, a check and balances system. Separating executive, judicial and legislative powers was the only way to achieve this desirable state of freedom.

Looking at the most recent centuries, precise requirements were identified. Dicey defined a series of formal constraints that in his opinion constituted the cornerstone of the rule of law. The same was later done by Hayek, but perhaps the most comprehensive and famous definition is the one provided by Fuller and his eight points. He claimed that laws should be *general*, *promulgated (*readily available); *prospective (*prescribe how to act in the future and not punish for the past), *clear, non-contradictory, should not ask the impossible*; *should be constant*; *the way laws will be applied by judges and the rest of the system must be congruent with what prescribed in the written statutes*. The contribution to Rule of Law by Fuller is precisely found in the identification of these characteristics, because they can also be identified as an implicit pact between law makers and citizens. Rule of law was finally identified by precise procedural constraints of predictability and form capable of driving the actions of individuals and institutions within a stable legal framework.

Some thinkers like Bingham attached more stringent humanitarian requirements to rule of law, while others like Raz defined rule of law as a tool and nothing more, devoid of any moral requirement to be functioning. There is a distinction between those who attach only purely *formal/procedural* value to the concept, and those who instead attach another layer of morality, or *substantive* aspects to it. Whereas formal and procedural aspects are undisputed, substantive aspects are much more controversial and vary depending on the

personal interpretation of the individual or the institution taken into exam, reason for which an analysis of the EU and its instruments is in order.

The importance of Rule of Law in the context of building international organisations cannot be understated. Their own existence was made possible by the gradual and progressive subscribing to supranational rules and structures governing relationships between all the different members. Therefore, together with the already extensive presence of national laws, the last century also witnessed the creation of jurisprudence in the set of global or international laws governing these relationships. The main mechanisms driving this process were represented by the gradual delegation of jurisdiction to international bodies which slowly created a set of precedents clarifying application of said international treaties; the same is true for the EU.

Explicit reference to the rule of law was only made for the first time in 1986 with the case of *European parliament v. Les Verts*, only to be then enshrined in the Maastricht treaty during the 90s. No specific definition of Rule of Law is present within national courts or constitutions of the vast majority of member states. This lack of definition however does not mean that the rule of law is not a principle incorporated and respected within these different systems. EU legal doctrine defines the rule of law as a legal principle of constitutional value linked with democracy and respect for human rights, a primary principle of judicial interpretation and a source from which standards of judicial review may be derived, defining principles of legality and legal certainty.

Together with its definition, also the instruments to defend the rule of law grew with the Union. The newest set of instruments at its disposal is represented by the rule of law framework, which however developed its first iteration only in 2014. Other tools can be used to sanction the member state or to put pressure through the existence of communitarian constraints. The most important instrument used over disputes regarding the rule of law has been represented by infringement procedures punishing member states that have been found violating some form of the EU law by fining them a certain financial amount.

The crowning provision in case of a potential backsliding is also identified in Art.7 and the aforementioned rule of law framework. The application of Art.7 can have particularly harsh consequences resulting in the loss of voting rights for the member state, reason for which it is often considered extreme and has earned the nickname of "*nuclear option*".

For this reason also other instruments such as the EU justice scoreboard, the European Semester; and a variety of softer measures of indirect promotion of rule of law such as funding mechanisms, communication campaigns or technical support to governments were created. Together with the problems of the toolbox, also many member states enable the position of those infringing the treaties by assuming neutral stances over the dispute and are reluctant over the prospect of using Art.7.

Chapter II: Democratic Transition

The second step necessary to analyse the phenomenon of rule of law backsliding in Eastern Europe is to analyse the political and historical context of the two countries. Both are similar in the sense that they could be considered among the group of modern European states which belonged to the Soviet Block in the second half of the last century. Due to this fact, differences in social and political values can be found compared to the rest of the West. Whereas in Western Europe the second half of the 20th century can be considered as a period of liberalisation, economic growth, integration, critique and review of many of the social staples that existed up until then; the same cannot be said for the East. For these countries, this time frame was not characterised by a progression in the economic and social sense as much as a continuous, daunting struggle in order to preserve and gain some form of independence from the Soviet Union, which exercised a significant political and social influence over every aspect of life. This struggle often erupted into violence, creating a different set of myths and heroes compared to other European Counterparts.

In many ways, a fundamental problem that concerns the existence of rule of law backsliding is relative to a form of resentment and distrust on behalf of the citizens towards institutions, both on the national and supranational level, that was later exploited in order to achieve a political majority. One first moment was represented by the transition that started in 89'. Citizens had little say in the round talks were foundations were placed for the shift from the communist to democratic system, and the same was true for the formation of the political structure which would have later taken life. The participation in the process of building of the democratic institutions and European integration was mainly carried out by the political personalities, which only consulted the people through single referendums and general elections.

The access into the EU was met with quite high support, on the one hand since it marked a complete change of direction from the communist past, on the other because it represented the possibility to enter into liberal markets, IOs and reap the economic benefits this enticed. During the 90s much of the policies and efforts undertaken by the Polish and Hungarian governments were aimed at imitating western economic and democratic models, also in order to guarantee the full adherence to the Copenhagen criteria necessary to gain entrance into the EU.

Commentators might argue how the participation in the Union enticed a variety of duties and benefits that were not fully understood or shared by the general population. One common feature on which both critics and populist parties might agree is how the participation in the European project was carried on mainly by governments and political elites, while the contribution on behalf of the people was the simple decision on whether to ratify everything or not. The process of joining the Union and the adoption of democratic models was not met with a full understanding of them, or with the creation of any particular democratic spirit. This brought to a desire to re-entrench into national premises in the most recent years when confronted with the different duties of belonging to the community, and the prospect of economic and cultural crises.

The general mistrust produced an effect of disenfranchisement towards institutions that was only multiplied with the entrance within the EU. All of a sudden, these populations had to abide to a series of values and ideas that were not historically theirs and were pushed by foreign technicians with whom they did not agree. This created a series of impositions and novelties that produced a strong resentment which resulted in the arrival of the two parties of *Fidesz* and *PiS*. This prompted a situation in which peripheral governments backed by a strong popular support openly challenged European institutions. The fundamental values and ideas of the two entities quickly clashed, with fundamentally different conceptions of what can be meant by Rule of Law.

2010 marked the year in which *Fidesz* in Hungary obtained a majority in the parliament with more than 52% of the votes, translating with almost 60% of the seats, enough to rewrite and change the constitution. Ever since 2010, *Fidesz* would have not lost this supermajority, which would have also been coupled with the presence of a representative of the party in the presidential palace through the election of Pál Schmitt in 2010 and János Áder in 2012 and 2017. Conversely, *PiS* in Poland would have gained its absolute

majority in the chambers in 2015 and 2019, with a total of 38% votes in the first time and almost 44% in the second. Similarly, in the presidential elections of 2015 and 2020 *PiS* candidate Andrzej Duda would have won in the second turn, both times with about 51% of the votes.

Chapter III

The two countries are often paired together, especially in the most recent years; however their policies and the way in which they were implemented present several similarities and differences which are at the heart of this dissertation. The third chapter is therefore dedicated to explore in detail the changes and policies undertaken by Poland and Hungary in the past decade in the framework of Rule of Law backsliding, in order to assess its features also in the context of the EU and its actions to limit the phenomenon.

One fundamental difference the Polish and Hungarian case is represented by the Constitution. In the northern country the fundamental law was recreated from scratch in 1997 in order to fit within the framework of Western democracies and international institutions as we intend them today with the final objective of joining the EU. In Hungary however, this was not the case. The possibility to rewrite and amend the foundational document was seized by *Fidesz* at the very beginning, and thanks to this reason, the depth of the case is here much greater compared to Poland, not only revolving around the independence of the judiciary but also, among other things, the plurality of medias and information, education, religion and cooperation with European institutions.

The first *Fidesz* government, strong of its supermajority, started right away to introduce deep reforms aimed at changing the functioning of society. Right after the elections, attention was focused over medias and the free flow of information; this resulted in the controversial *media laws*. These laws were profoundly intertwined with each other and were coupled with constitutional amendments aimed at making them functional and possible. These amendments did not only relate to the plurality of media, but step by step they were starting to affect several organs of the state. Most importantly, the role of the constitutional tribunal was decreased, being now able to deliberate only on a lessened amount of cases. With the turn of 2011 the Hungarian government also started to plan an entire rewriting of the constitution which was forecasted for April.

The new constitution represented a mixed bag in the eyes of the community; many references were made to the respect of rule of law, freedom of thought and religion and human rights. Even though these steps were commended, at the same time questions were raised, mainly over three points of contention, first of all the new constitution seemed to justify an ideological entrenchment over nationalist policies and ideas; it was tampering with the independence of courts and their correct functioning (as it was the case with the constitutional court); and finally the new constitution made an extensive, excessive use of *cardinal laws* cementing this new view of the state, making it much harder to change in the future.

Thanks to this new document, several new changes were carried out that further preoccupied the Union's authorities. A reform of the National Bank was undertaken, which consisted in the possibility for the government to sit in its meetings through the presence of its minister, the monetary council also had to disclose to the government the arguments of said meetings, effectively preventing confidential discussions. This was followed by several other minor reforms, such a smaller law requiring parliamentarian approval through a supermajority to register a church, or a new electoral law which harmed minority voters. Also, the independence of the judiciary did not now concern only a limitation on the scope of constitutional court's activities, but it included the creation of a new institution, the *national office for the judiciary* (NJO), and its president, tasked with the administration of courts. The new president of the NJO was Mrs. Tünde Handó, who was heavily criticised due to her connection to *Fidesz*. This created problems also in connection to the lowered retirement age for judges, since now with the possibility on behalf of the NJO president to shortlist nominations, the whole process of replacement and ideological hegemony could be achieved at a very fast rate.

During the migration crisis, the Hungarian authorities decided to not comply with European Directives. This was followed by the controversial introduction of a more stringent asylum law, which allowed among the other things also the possibility to detain asylum applicants. The law was considered to be a direct answer towards EU policies in matters of migration and in particular the Dublin system, which prescribed the redistribution of asylum seekers in the territory of the different countries, policies against which the Hungarian government was and is to this day very critical. More than that, it was also an open challenge towards Union's values.

A law on higher education was also adopted which curtailed foreign influence in the country. In particular, in Hungary there is a university called *Central European University* (CEU), which was economically financed by American magnate George Soros. The Hungarian government adopted a piece of legislation which was directed at all these institutions having a foreign legal address. The CEU was the only Hungarian university that corresponded to these terms, and therefore the legislation was created *ad hoc* to curtail its operations.

All of these events prompted the EU response through several infringement procedures, opinion and recommendations which however produced no result. On the contrary, *Fidesz* performed splendidly in two re-elections conserving its ample margin. The insertion of the discussion within the framework of Art.7 arrived only after eight years in 2018.

Turning the attention to Poland it is possible to see how this case is concentrated over a single matter: the independence of courts and the judiciary sector. Much of the efforts here have been aimed at the Constitutional and Supreme court, as it was the case with Hungary at the beginning. The situation in Poland has not yet reached the extent seen in Hungary.

Analysing the process of reform of the judicial sector in Poland, early chronology is very much important; since it is thanks to it that many misunderstandings were born which would have ultimately resulted in the crisis. The *PiS* government officially started in late 2015; or to be more precise, the Polish elections took place the 25th of October. Due to the unprecedented positive result for Kaczyński's party, a government could be formed right away by candidate Beata Szydło, who did not need to enter talks with the opposition; this happened in November 2015.

In Summer President Komorowski decided to sign a bill thanks to which it was now possible for *PO* to nominate 5 of the 15 judges of the constitutional ourt before the expiring of the term. In the very last session before the withdrawal of the chambers 5 new judges were elected. These 5 judges would have replaced *PiS* nominated judges who took office many years before during the Kaczyński government, making the tribunal tilt significantly. Since already 9 out of 5 judges had been nominated during the previous years by *PO*, the nomination of the other 5 meant that the constitutional tribunal would have reached a total of 14 out of 15 *PO* nominations. 3 of these judges would have

substituted members whose term already expired, while other 2 would have substituted members' whose term had to expire in December.

President Duda refused to take the oath of the 5 *PO* nominations, officially giving life to the set of events that we can define as the Polish constitutional court crisis. The new *PiS* government later introduced a piece of legislation which prescribed the nomination of 5 new judges. These five new *PiS* nominated judges would have consequently being sworn in December. Despite the efforts of both the EU authorities and the constitutional tribunal itself, all the recommendations and legal sentences were ignored by the Polish government.

Attention was later turned towards the Supreme Court. The way in which the government meddled with the institution echoed the same practice used in Hungary years before. A law was introduced lowering judges' retirement age to 60 years for women and 65 for men, whereas previously the previous age was set at 67 for everybody. Effectively, this created the risk for up to 27 judges to be forced to an early retirement, which could have therefore later been substituted by others more ideologically closer to the party. This was stopped by the EU only under threat of serious sanctions, which later concretised also in the decision to activate Art.7 against the country, three years after the constitutional court crisis.

Analysing the past year for Hungary and Poland together, it would be possible to see how 2020 was characterised by the complications resulting from the COVID-19 epidemic, which inevitably impacted and slowed considerably also these legal proceedings. In early 2020 the European Parliament expressed its regret on the fact that the legal process was not yielding any result. Besides that, it was also noted the difference existing between the two situations and how the backsliding in Poland was much less extensive, wondering if Art.7 was the best instrument to use.

One of the most recent developments regarded the debate over the correlation of funds with the respect of Rule of Law principles in the framework of the Next Generation EU project. With it, the aim has been to grant aid in the form of exceptional funds to distribute among the different members in order to fight against the adverse consequences of the pandemic. The proposal to bind respect of Rule of Law to the possibility of withdrawing funds was met with hostility from the Hungarian and Polish government.

The whole situation created a stalemate in which the two countries vetoed the budget. In the end, the EU partially caved in to the veto reaching a compromise.

Drawing onto the similarities and differences in the two cases, some conclusions and comments can be made regarding the phenomenon. First of all, if we were to try and find some motivations behind the whole process, it would be quite easy to attack the two ruling parties by providing them all the responsibility. This however would be excessively simplistic. As several cycles of elections showed, *PiS* and *Fidesz* policies have proved to be very popular, encountering a high level of approval that has resulted with several reconfirmations and even in an increased amount of voters as time passed. It must be acknowledged how this was made possible by fertile ground represented by a general lack of trust towards the democratic institutions built after the end of communism. This lack of trust could surely be the result of historical developments, where institutions were not perceived as representative of the popular will, but on the contrary subservient to foreign interests standing in the way of economic and social security.

Looking on the more practical side, we can see differences and similarities of the phenomenon over the two countries; it must be acknowledged for example how the backsliding in Hungary is much deeper compared to the events happened in Poland. This was mainly made possible by the constitutional reform which also allowed the introduction of harsher laws. Looking at the similarities instead, we can notice how the process of backsliding was characterised by the general dismantling of constitutional rules especially through the dismantling of courts. This is one of the most important points that can be drawn. Court rulings, especially those of the Constitutional Court, have been openly disregarded by the two governments, and in the meanwhile the nomination of new judges has been tampered with.

Speaking about the Union, the lesson that can be generally drawn is its inefficacy in dealing with the situation, being incapable in the entire decade to put a stop to it. This was not only through a lack of will but also in hope to avoid the adverse consequences of a potential use of Art.7. What the past decade has shown more in general is how the European Project itself is probably not yet mature enough in these matters. When confronted with difficult choices, it has often chosen the path safeguarding economic safety. The most recent example of this has been the dispute over funds in the context of

Next Generation EU. Put under pressure the Union caved in, reaching a compromise quite far from its most desirable outcome.

Conclusion

After having explored the whole matter, some final conclusions can be reached. First and foremost, as introduced at the very beginning of the dissertation, the importance of these series of events cannot be underestimated. Their relevance is not only important since they represent a significant crack in the solidity of the Union, but also because in their generality, they highlight a profound gap in terms of values and political objectives between the community and some of its member states.

Perhaps the best thing that we could do as members of the European Community is to ask ourselves in which direction we want to go forward, if the values of the Union are actually ours and how much we can tolerate or agree with members not following them.