

# The Value of Constitution- alism in the European Union



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TANJA  
PORČNIK

**T**he European Union (EU) has been thriving for decades. A subtle yet important factor in its achievement of economic prosperity and further institutional integration has been the agreement on and commitment to upholding common values laid out in Article 2 of the Treaty on European Union (TEU), providing that the EU 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."*<sup>1</sup>

These provisions of the EU legal system are not only fundamental values in a constitutional democracy, but are also the founding values of the European Union. These values form the core of the institutional identity of the EU.

In the last decade, the European Union has seen an increasing number of attacks on, or even rejection of, some of these founding values by none other than democratically elected governments of EU member states. The opposition to these EU constitutional values was most explicitly and systematically formed by political elites in two member states in Eastern Europe (Poland and Hungary).

The recent developments of constitutionalism backsliding pose risks of detrimental institutional effects not only on the political system and constitutional order of respective EU member states but also on the EU itself. Unless each EU member state upholds constitutional democracy in their respective society, the European Union, as it is defined and constituted today, does not have a future.

<sup>1</sup> The Treaty on European Union – Article 2. Available [online]: [https://eur-lex.europa.eu/eli/treaty/teu\\_2012/art\\_2/oj](https://eur-lex.europa.eu/eli/treaty/teu_2012/art_2/oj)

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THE EU NEEDS  
TO ENDORSE  
LIBERAL VALUES  
AND METHODOLOGICAL  
INDIVIDUALISM  
THAT UNDERPIN  
CONSTITUTIONALISM

For the European Union to persevere and keep thriving as a community of liberal societies and democratic political systems, it needs to show unwavering commitment to constitutionalism, which is defined by limited government and the rule of law. In doing that, the EU needs to endorse liberal values and methodological individualism that underpin constitutionalism by reaching out to as many open minds as possible to embrace constitutionalism. Consequently, the European Union, as we know it, will survive or fall depending on the strength and robustness of constitutionalism in its member states.

### **ON CONSTITUTIONALISM**

In the pursuit of better effectuation of the fundamental principles of the political regime, constitutionalism defines and delimits the political ends and means within the realm of politics by imposing constraints on the power of the state and the discretion



# THE RIGHTS AND FREEDOMS OF INDIVIDUALS HAVE NOT ALWAYS BEEN GUARANTEED AND PROTECTED TO THE EXTENT THAT THEY ARE TODAY IN MANY CONSTITUTIONAL STATES AROUND THE WORLD

of its government officials.<sup>2</sup> With the aim to ensure that those who exercise state power in a constitutional state guarantee adequate legal protection and procedural respect of the fundamental principles, and not to infringe upon them, constitutionalism should be distinguished from the mere presence of a constitution. A constitution may, or may not, provide effective constitutional constraints on the people in government. On the other hand, constitutionalism, when embedded into constitutional order and protected by actors in the political system, is an effective constraint on constitutional government.

<sup>2</sup> Whittington, K. E. (2008) "Constitutionalism", [in]: K. E. Whittington, R. D. Kelemen, and G. A. Caldeira (ed.), *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press, pp. 281–299.

Constitutional democracy is grounded in constitutionalism. Thus, like the liberal political thought that is its foundation, it has a negative view of unlimited and arbitrary state power.

The centerpiece of constitutionalism is a constitution, which is defined and supported by constitutional principles of a liberal democracy. Among those are popular sovereignty, consent of the governed, accountability of individuals in power to the people, the rule of law, and limited government<sup>3</sup>.

Today, many constitutional democracies meaningfully limit the power of the state and the discretion of the government officials with the nation's constitutional order. Whereas in the history of politically organized societies, state power has often been limited significantly less, if at all. Consequently, the rights and freedoms of individuals have not always been guaranteed and protected to the extent that they are today in many constitutional states around the world<sup>4</sup>.

Early constitutionalism as a political theory sought to limit the power of the state through constitutional institutions, while its modern form focuses on constitutional institutes that disperse the power of state among state institutions to better protect individual rights against the state<sup>5</sup>.

<sup>3</sup> Henkin, L. (1989) "Revolutions and Constitutions", [in]: *Louisiana Law Review*, Vol. 49(5), pp. 1023–1056. Available [online]: <https://digitalcommons.law.lsu.edu/lalrev/vol49/iss5/2/>

<sup>4</sup> Porčnik, T. (2022) *Vloga sistema zavor in ravnovesij v Združenih državah Amerike pri spoštovanju pravic ujetnikov v Guantánamu*, a doctoral dissertation. Available [online]: <https://repozitorij.uni-lj.si/lzpisGradiva.php?id=135357> [in Slovene]

<sup>5</sup> Lane, J.-E. (1996) *Constitutions and Political Theory*, Manchester: Manchester University Press.



## SOCIETIES HAVE DIFFERENT CONSTITUTIONAL VALUE PREFERENCES AND THEREFORE ARE NOT EQUALLY RESISTANT TO THE ATTACKS ON CONSTITUTIONALISM

Crucially, the mere presence of legal restrictions on the power of the state, spelled out in the legal system, is not a guarantee for constitutionalism, as the latter depends on whether these restrictions of a constitutional order are also effective<sup>6</sup>. Effective limitation of power should not only prevent the state from making steps from constitutional democracy toward absolutism, but, more importantly, should ensure that the power of the state in its arbitrariness and tyranny over the people ceased to protect human rights and freedoms and other fundamental principles of a political regime.

Societies have different constitutional value preferences and therefore are not equally resistant to the attacks on constitutionalism. As an example, those with strong commitments to fairness and the rule of law tend to

be better equipped for such events. However, while a constitutional democracy welcomes and even encourages different constitutional interpretations to be eventually settled through institutional process by political actors, the commitment of both political class and citizens at large to common values is a prerequisite for a constitutional state to persevere.

Richard S. Kay argues that consenting to constitutionalism, where life in a liberal society is subject to the constitutional order, is a risk-averse strategy, where the individual prefers strict restrictions on the power and functioning of state rather than the possibility of government unduly interfering with private lives of individuals when new circumstances arise<sup>7</sup>.

Importantly, limited government is the “*ethos* of constitutionalism,” whereas how specifically these legal restraints ought to underpin and define the constitutional order in a modern liberal state remains a challenge<sup>8</sup>. Such a challenge also applies to the drafting and enforcing provisions of the constitutional order defining the political and legal consequences for those in government who act in conflict with provisions of the constitution – for instance, by not protecting constitutional values of a liberal democracy.

In a constitutional democracy, constitutional values are constraints on the people in government. When clearly specified in a constitution, these constitutional constraints are its hard-wired features. On the

<sup>6</sup> Friedrich, C. J. (1974) *Limited Government: A Comparison*, Englewood Cliffs, New Jersey: Prentice-Hall.

<sup>7</sup> Kay, R. (2001) “American Constitutionalism”, [in]: L. Alexander (ed.), *Constitutionalism: Philosophical Foundations*, Cambridge: Cambridge University Press, pp. 16–63.

<sup>8</sup> Vile, M. J. C. (1998) *Constitutionalism and the Separation of Powers*, 2<sup>nd</sup> Edition. Available [online]: <https://oll.libertyfund.org/title/vile-constitutionalism-and-the-separation-of-powers>



## IN A CONSTITUTIONAL DEMOCRACY, CONSTITUTIONAL VALUES ARE CONSTRAINTS ON THE PEOPLE IN GOVERNMENT

other hand, when not defined at a high level of specificity, they might be regarded as soft constraints on a constitutional government.

Richard A. Epstein notes that textual interpretation is only the first step in constitutional interpretation, as “[t]he key questions of constitutional law have to do with the articulations of doctrines that have no particular text origin, but whose inclusion is fairly required by the text itself”<sup>9</sup>. These articulations are in a constitutional state expected from the judicial and legislative branch. The two branches co-build and co-define the nation’s constitutional order with the application of a judicial review and political procedure of legislating.

The people in the government may fail to be bound by constitutional constraints because they might be resisting or contesting constitutional constraints, or they might even be unaware of them. In either event, constitutional constraints need to be made known to political actors and

enforced by the institutional ones – in all circumstances and for all political actors – if they are to be effective. Furthermore, no constitutional constraint can be written out of the constitutional order by way that is not constitutionally defined otherwise a society faces the crisis of constitutionalism. Most importantly, it is up to the society to defend it, as constitutionalism is not self-supporting.

### THE BACKSLIDING OF CONSTITUTIONALISM IN THE EU

In the recent decade, the European Union has increasingly witnessed undermining of some of the founding values referred to in the core institutional provisions of the EU, laid out in Article 2 of the TEU:

*“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.”<sup>10</sup>*

The governments of Hungary and Poland, while weakening constitutionalism in their countries, are resisting to adhere to EU constitutional constraints by not upholding the founding values of the EU. The political actors in these two member states do not possess the lack of judgment, but rather reject constitutionalism by undermining their elements of limited government and the rule of law. They have put their electoral or policy needs ahead of their desire to be faithful to constitutionalism.

<sup>9</sup> Epstein, R. A. (2006) *How Progressives Rewrote the Constitution*, Washington, D.C.: Cato Institute, p. 9.

<sup>10</sup> The Treaty on European Union – Article 2. Available [online]: [https://eur-lex.europa.eu/eli/treaty/teu\\_2012/art\\_2/oj](https://eur-lex.europa.eu/eli/treaty/teu_2012/art_2/oj)



## THE CONSTITUTIONAL PRINCIPLE OF JUDICIAL INDEPENDENCE IS NOT ONLY A PRODUCT OF MODERN CONSTITUTIONALISM, BUT ALSO A CORNERSTONE OF CONSTITUTIONAL DEMOCRACY

The current political leaders in Hungary and Poland do not see a problem with the government's rejection of constitutionalism at both levels – of a member state and the European Union. Still, these leaders – for other reasons – wish for their countries to remain EU member states, which includes that they keep contributing to and defining the EU's constitutional order.

### ... THE ROLE OF JUDICIARY

One of the main components of the rejection of constitutionalism in EU member states has been the government's undermining of judicial independence. The constitutional principle of judicial independence is not only a product of modern constitutionalism but also a cornerstone of constitutional democracy. Still, not all societies uphold judicial independence to the same degree. More individualistic societies

and those with higher trust in other members of a society are more likely to have high levels of (perceived) *de facto* judicial independence, whereas their expected level of *de jure* judicial independence is lower than that of collectivistic and low-trust societies<sup>11</sup>.

As a constitutional principle of a constitutional democracy, judicial independence plays an *essential* role in upholding the EU constitutional order by enforcing EU law in member states, as the European Court of Justice (ECJ) concluded<sup>12</sup>. Hence, maintaining and protecting judicial independence is not only necessary for the proper function of this branch of a constitutional government but also a precondition for the robustness, strength, and longevity of constitutionalism in a constitutional democracy.

By upholding its independence, the judiciary can perform three necessary functions. First, the judicial branch upholds the constitutional order. Second, it acts as a check against the political branches of government by interpreting and making constitutional constraints upon them effective. In particular, the presidential system tends to slip into constitutional noncompliance when an independent judiciary is not guaranteed<sup>13</sup>. Third, it protects human rights and freedoms of individuals when they are being violated. Through these three ways, the courts play a meaningful role in maintaining the rule of law and the system of

<sup>11</sup> Gutmann, J. and S. Voigt (2020) "Judicial Independence in the EU: a puzzle", [in]: *European Journal of Law and Economics*, Vol. 49, pp. 83–100.

<sup>12</sup> C-64/16 - Associação Sindical dos Juizes Portugueses v Tribunal de Contas (2018) *ECLI:EU:C:2018:117*. Available [online]: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-64/16>

<sup>13</sup> Gutmann, J. and S. Voigt (2021) "Militant Constitutionalism: A Promising Concept to Make Constitutional Backsliding Less Likely?", [in]: *Public Choice*. Available [online]: <https://link.springer.com/article/10.1007/s11127-021-00874-1>

limited government with the aim of preventing arbitrary exercise of the power of the state.

The judges provide a detailed and lengthy examination of the law, which is often not a skill of other government officials<sup>14</sup>. As such, judges do not evaluate or take into account public opinion when trying to address constitutional neglect by political actors, but rather only speak on behalf of and enforce constitutional principles.

In a historical perspective, between the 1960s and 1990s, judicial review and independent constitutional adjudication were an effective obstacle to the concentration of state power in Europe<sup>15</sup>. However, this trend has been affected in the following period. As an example, Poland's ruling Law and Justice party (Prawo i Sprawiedliwość, PiS) packed the Constitutional Tribunal in Poland, the court vested with the power of judicial review, with party-loyalists to facilitate an additional tool of the governing majority party. Further, PiS imposed the political maneuvering on the Supreme Court with the aim of disciplining the judiciary into submission and non-objection to the removal of constraints on the party's power<sup>16</sup>.

In another case from the EU, between 2017 and 2019, the Romanian government led by the Social Democratic Party (Partidul Social Democrat, PSD) put in place the political control of the content of judicial decisions,

<sup>14</sup> Hamilton, A. (2008) *No. 78: The Judiciary Department*. Available [online]: [https://avalon.law.yale.edu/18th\\_century/fed78.asp](https://avalon.law.yale.edu/18th_century/fed78.asp).

<sup>15</sup> Sajó, A. (1999) *Limiting Government. An Introduction to Constitutionalism*, Budapest and New York, New York: Central European University Press.

<sup>16</sup> Bojarski, Ł. (2021) "Civil Society Organizations for and with the Courts and Judges—Struggle for the Rule of Law and Judicial Independence: The Case of Poland 1976–2020", [in]: *German Law Journal*, 22(7): 1344–1384. DOI:10.1017/glj.2021.72



THE ELECTORAL DEMOCRACY, WHICH REMAINS THE UNCONTESTED SOURCE OF LEGITIMACY IN LIBERAL DEMOCRACIES AROUND THE WORLD, HAS BECOME A CONVENIENT EXCUSE FOR THOSE WHO UNDERMINE CONSTITUTIONALISM IN THE EU

which was implemented by legislative amendments that defined the disciplinary regime applicable to judges and their personal liability for judicial error<sup>17</sup>.

<sup>17</sup> Court of Justice of the European Union (2021, May 18). Press Release No 82/21: The Court of Justice rules on a series of Romanian reforms in the areas of judicial organization, the disciplinary regime applicable to judges, and the financial liability of the State and the personal liability of judges as a result of a judicial error. Available [online]: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210082en.pdf>

The recent weakening of constitutionalism in the EU attests to a known axiom that (aspiring) autocrats attack judicial independency – where judges on independent and impartial courts are able to perform their duties free from interventions, pressures, and inducements that may corrupt or curtail their judgment or decisions by other actors – not overnight, but with a gradual, incremental, long-lasting process of political subordination of the judiciary<sup>18</sup>. Also, their toolbox of interference and attempts to bring judiciary under political control is particularly wide – from politically tailoring or controlling the nomination and appointment process for judges, prosecutors, and notaries, altering the retirement age of judges without an objective and proportionate justification, deploying disciplinary proceedings against them for questioning the ruling party's stand by a chamber that is not independent and impartial, and imposing procedural rules that paralyze courts<sup>19</sup> to spurring a hate campaign<sup>20</sup> and using the national media to undermine credibility of those in the judiciary<sup>21</sup>.

### ... THE ROLE OF DEMOCRACY

The current process of eroding constitutionalism in some of the EU member states occurs under the democracy's watch.

<sup>18</sup> Levitsky, S. and D. Ziblatt (2018) *How Democracies Die*, New York: Crown.

<sup>19</sup> Walsh, A. (2019) "What Are Poland's Controversial Judicial Reforms?", [in]: *DW*, November 5. Available [online]: <https://www.dw.com/en/what-are-polands-controversial-judicial-reforms/a-51121696>

<sup>20</sup> Applebaum, A. (2020) "The Disturbing Campaign Against Poland's Judges", [in]: *The Atlantic*, January 28. Available [online]: <https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/>

<sup>21</sup> Gałczyńska, M. (2019) "Śledztwo Onetu. Farma trolli w Ministerstwie Sprawiedliwości, czyli 'za czynienie dobra nie wsadzamy'", [in]: *Onet.pl*, August 18. Available [online]: <https://wiadomosci.onet.pl/tylko-w-onecie/sledztwo-onetu-farma-trolli-w-ministerstwie-sprawiedliwosci-czyli-za-czynienie-dobra/j6hwp7f>



FOR GENERATIONS,  
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Democracy is not a panacea for all illnesses. Even worse, in the current situation, the electoral democracy, which remains the uncontested source of legitimacy in liberal democracies around the world, has become a convenient excuse for those who undermine constitutionalism in the EU.

For generations, democracy has been a favorite in the politics of Western societies. The perceived supremacy of democracy in relation to other political regimes has resulted in an acceptance and even praise of electoral majoritarianism at all costs. After all, a constituency has spoken.

Just because it is the best-known option, does not mean that democracy does not create perils for a constitutional state. Unbound electoral democracy can not only lead to the demise of constitutionalism, but will also eventually destroy democracy itself.

As Leo Strauss stressed, *"the reason why we cannot allow ourselves to be the bootlikers of democracy is because we are its friends*





# CONSTITUTIONAL-ISM IS NOT DEFINED AND SHAPED ONLY BY LEGAL SCHOLARS AND JUDGES, BUT ALSO BY THE POLITICAL PRISM

and allies.” Hence, constitutionalism is not an opponent of democracy, while it does not put it on a pedestal<sup>22</sup>.

## IT IS THE POLITICS, STUPID!

To fully understand the role of judiciary and the role of democracy in the process of erosion – or possible future strengthening – of constitutionalism, the workings of the latter need to be viewed inside of politics. Constitutionalism is not defined and shaped only by legal scholars and judges but also by the political prism. Its influence is not a *priori* negative. Rather, an all-encompassing analysis of constitutionalism ought to take that vital component into account too.

<sup>22</sup> Rosenfeld, M. and A. Sajó (2013) “Constitutionalism: Foundations for the New Millennium”, [in]: *New Millennium Constitutionalism: Paradigms of Reality and Challenges*, Yerevan: NJHAR. Available [online]: [https://www.venice.coe.int/CoCentre/Harutyunyan\\_newmillenium.pdf](https://www.venice.coe.int/CoCentre/Harutyunyan_newmillenium.pdf)

Politics has direct and indirect influence on constitutionalism. The most noticeable role is where politics shapes the structural, procedural, and substantive features of a constitution. With constitutional order constraining politics in a constitutional democracy, it turns out that politics has a significant say in defining and interpreting its own constitutional constraints.

In terms of interpreting them in the EU legal system, the Hungarian ruling Fidesz party’s membership in the European People’s Party (EPP Group), until it decided to leave its center-right European political family in 2021, critically weakened the European Parliament and European Commission’s exercise of the oversight function over the actions of the Hungarian government that were undermining or even rejecting constitutionalism.

In this case, some political actors at the EU level, who were mindful of votes Fidesz was contributing to the EPP Group, decided to give political considerations priority over the political enforcement of compliance with constitutional constraints<sup>23</sup>. Instead of acting as guardians of the Treaties, the Commission secured its role as the driving force of integration by embracing dialogue with member state governments over robust enforcement of EU law<sup>24</sup>. The constitutional neglect by EU political bodies enabled and contributed to further constitutionalism backsliding in the EU. On the other hand, Poland’s PiS did not find a political savior in its EU political family to pave the same path. A much smaller party group of European

<sup>23</sup> Kelemen, R. D. (2017) “Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union”, [in]: *Government & Opposition*, Vol. 52(2), pp. 211–238.

<sup>24</sup> Kelemen, R. D. and T. Pavone (2022) *Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union*, APSA Preprints. DOI: 10.33774/apsa-2022-c0qjl



## FIDESZ AND PIŠ SHARE A COMMON INTEREST IN IMPEDING THE EU INSTITUTIONS FROM ACTING AGAINST THE POL- ISH AND HUNGAR- IAN GOVERNMENT ENGAGED IN CON- STITUTIONALISM BACKSLIDING

Conservatives and Reformists (ECR), with marginal influence in the EU institutions, did not have a chance to instigate a bleak EU response to member state's rejection of constitutionalism.

Further to the direct role of politics defining and interpreting its own constitutional constraints on the EU level, though they belong to different EU party groups, Fidesz and PiS share a common interest in impeding the EU institutions from acting against the Polish and Hungarian government engaged in constitutionalism backsliding. In 2020, these two governments jointly invoked a veto to block the EU budget and the recovery fund on the grounds of an

objection to making the EU funds conditional on respect for the rule of law and democratic norms<sup>25</sup>.

Less obvious influence is the indirect role of a political context in cases when the judiciary is unwilling to exercise its power of judicial review by which it would perform its own role of an enforcer of the constitutional constraints on power and functioning of state actors. Such passivity or even apathy on the part of judicial behavior could be based on their political bias. It could also result from political intervention or pressure on the judges – in the case of Romania, a judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors was designed as such an instrument – which is yet another reason for it being essential to provide guarantees of the independence of the judiciary and to maintain the independence of the judges. Unless the judiciary has an interest in being an effective check on the political branches, it can not only be the *least dangerous* branch<sup>26</sup> but also the element that contributes to the demise of constitutionalism.

### STRENGTHENING CONSTITUTIONALISM IN THE EU

With the process of eroding constitutionalism in the European Union in the last decade, which has been driven by leaders from a handful of EU member states who have found support in significant segments of the general public, it is essential that the remaining member states, as well as the EU institutions, are not only constitutionally

<sup>25</sup> Reuters (2020) *Hungary and Poland Stick to EU Budget Veto, Hungarian Minister Says*. Available [online]: <https://www.reuters.com/article/eu-budget-hungary-poland-idUSKBN28H1TI>

<sup>26</sup> Hamilton, A. (2008) No. 78: *The Judiciary Department*. Available [online]: [https://avalon.law.yale.edu/18th\\_century/fed78.asp](https://avalon.law.yale.edu/18th_century/fed78.asp)

faithful but also committed to constitutionalism. Constitutional pluralism in the EU requires that this commitment applies to both the EU and the member states' constitutional orders.

However, such commitment does not come without challenges. As such, the courts are in a possession of "weak judicial review," as defined by Jeremy Waldron<sup>27</sup>, which authorizes the EU judges to opine on the government actions, whereas they may not invalidate them when in violation of constitutional constraints. Cancellation and possible replacement of such government policies need to come from political actors.

Concurrently to judicial scrutiny, other political actors need to remain committed to the principles of constitutionalism and constitutional implementation by marshaling political resources to promptly, well-thought through, and fiercely react to these developments by mobilizing political opposition in defense of the constitutional standards and call those that have committed constitutional violations to accountability. Often, their first move, as a damaged party, should be to appeal to the courts for a judicial review to trigger judicial scrutiny of a governmental action. In the meantime, the political actors may organize their own oversight efforts in the form of legislative hearings and investigations to monitor constitutional violations<sup>28</sup>.

<sup>27</sup> Waldron, J. (2006) "The Core of the Case Against Judicial Review", [in]: *Yale Law Journal*, Vol. 115, pp. 1355–1356. Available [online]: <https://www.jstor.org/stable/20455656>

<sup>28</sup> McCubbins, M. D. and T. Schwartz (1984) "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms", [in]: *American Journal of Political Science*, Vol. 28, pp. 165–179. Available [online]: [https://fbaum.unc.edu/teaching/PLSC541\\_Fall08/mcubbins\\_schwartz\\_1984.pdf](https://fbaum.unc.edu/teaching/PLSC541_Fall08/mcubbins_schwartz_1984.pdf)

The call to adhere to constitutional constraints may be issued to individual politicians, political parties, or even member states. Currently, among legal and political procedures on the table in relation to government actions by the Hungarian and Polish governments are the Court of Justice



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of the European Union (CJEU) judgements and several measures by the European Commission<sup>29</sup>.

Perhaps these measures will change the incentive matrix for the political leaders of the Hungarian and Polish governments in order for them to change their due course of government actions that have so far not been faithful to constitutionalism. Consequently, upon such and other political, judicial, and diplomatic response rests the further strength and existence of the European Union as the supranational political entity as we know it.

Beyond the implementation of the current legal system in the EU, measures at the institutional level should be reassessed and possibly redesigned to make constitutionalism more resilient to the attacks on constitutional democracies. There are elements in the current constitutional structures at both the member states and EU level that can be used to hinder or even prevent the further drift towards an autocracy.

Shortcomings are common heritage of constitutional structures in all democracies. Hence, a rethink about the constitutional democracy in the EU would be an endeavor with the aim to strengthen its constitutionalism. Economic prosperity and further institutional integration of the EU in the last few decades should not be mistaken for the robustness and strength of constitutionalism in the EU.

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<sup>29</sup> These include launching infringement procedure, triggering Article 7 TEU procedure for a “*clear risk of serious breach*” of EU values, using the European Rule of Law mechanism based on the Rule of Law reports, and using a general regime of conditionality for the protection of the EU’s budget, also known as a “*conditionality regulation*” that allows the EU to take measures to protect the EU budget.



## SHORTCOMINGS ARE COMMON HERITAGE OF CONSTITUTION- AL STRUCTURES IN ALL DEMOCRA- CIES

Notably, when the EU started observing the constitutionalism backsliding in Hungary a decade ago, the EU institutions were barely responding to the developments. Furthermore, at that time, the EU’s enforcement capacity was not just very weak, but also might have been on questionable ground due to a democratic deficit and legitimacy problems in the EU<sup>30</sup>.

In recent years – even though the EU legal system has remained more or less unchanged – the political, legal, and diplomatic response to the weakening of constitutionalism by the governments of Hungary and Poland has strengthened. Among major institutional developments were the triggering of the procedure laid down in Article 7 TEU after the European Parliament called on the Council to determine the existence of a clear risk of a serious breach by Hungary of

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<sup>30</sup> Weiler, J. H. H. (2014) “Living in a Glass House: Europe, Democracy and the Rule of Law”, [in]: C. Closa, D. Kochenov and J. H. H. Weiler (eds.), *Reinforcing the Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press. Available [online]: [https://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS\\_2014\\_25\\_FINAL.pdf](https://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf)



## THE POLITICAL, LEGAL, AND DIPLOMATIC RESPONSE TO THE WEAKENING OF CONSTITUTIONALISM BY THE GOVERNMENTS OF HUNGARY AND POLAND HAS STRENGTHENED

the EU's founding values<sup>31</sup>, and the European Court of Justice (ECJ) ruling that Poland had violated the principles of the irremovability of judges and judicial independence when it passed the law lowering the age of retirement for Supreme Court judges<sup>32</sup>.

Still, it is unclear whether institutional safeguards can lead to the enforcement of constitutionalism in these two EU member states, which needs to be accepted and carried out by the governments of these countries. Political nudges and even institutional

checks from the EU institutions may eventually prove to be ineffective in returning these two member states to the upholding of constitutionalism. However, at that point the European Union will at least be at a point to find a way to resolve a question of what type of political union it wants to be. One where all member states uphold constitutionalism, which means that on the EU level it also endures, or one where constitutionalism is not its foundation.

The question also is about the strength and robustness of constitutionalism in the EU before or in the absence of the developments that were ignited by the Hungarian and Polish government.

Crucially, a major shortcoming of the EU legal structure is that while it clearly states its founding values, it is poorly equipped to withstand challenges to these values. What the European Union could do going forward is to reinforce the substantive principles of constitutionalism in its legal order – such as a presumption of liberty, respect for private property rights and human dignity. To guarantee that constitutionalism in the EU is not merely a package in a shiny wrapping paper into which any legal provision could be squeezed in, the legal system requires – along with formal and procedural principles – substantive principles that will define and protect limited government and the rule of law in the EU.

Finally, the European Union is a political experiment. Not only because it brings together more than two dozen member states with prior diverse political history, but also because its institutional structure and legal system have evolved since signing the Maastricht Treaty three decades ago. Debates on EU identity, structures, sovereignty, and legitimacy are still ongoing. This does not come as a surprise, considering that any constitutional democracy evolves

<sup>31</sup> European Parliament (2018) *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 (2017/2131(INL))*. Available [online]: [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html)

<sup>32</sup> C-192/18 – Commission v. Poland (2019) *ECLI:EU:C:2019:529*. Available [online]: <https://curia.europa.eu/juris/liste.jsf?num=C-192/18>

throughout time. Such constitutional development may be the consequence of shortcomings of the original design or the fundamental changes in a society. Either way, it is a part of strengthening constitutionalism.

### THE ROLE OF THE WIDER POLITY

Importantly, the defense of constitutionalism does not depend only on the action of political actors but also on the support for it in the wider polity. When voters expect their politicians to adhere to constitutional principles, the chances for political actors to risk reelection by staying on the set course of constitutionalism undercutting decrease.



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The opinion of the voters is a key component in the political calculation.

When two or more sides to the political question of constitutional values are presented in a constitutional democracy, the political class and citizens at large have the right to decide which one they accept and wish to see as a foundation of the political regime and legal system. This may also mean that if their values have changed and are no longer in alignment with those that were passed on to them by previous generations, the people may wish to see redefinition of constitutional values.

However, to keep upholding constitutionalism, all sovereign power in a society needs to be limited, including the one of people. The tyranny of the majority is no more acceptable than the tyranny of an autocrat. Crucially, commitment to constitutionalism is echoed in constitutional principles of representative government, separation of powers, constitutional rights, and the rule of law.

Finally, the defense of constitutionalism is conditioned also on the informed polity. For societies that were under repressive political regimes not that long ago, it is essential to put considerable emphasis on civic education and create space for civil society. By exercising their freedoms of speech, association, and assembly, people in an open society may freely share ideas and information on constitutional values and other constitutional constraints on the political actors.

### CONCLUSIONS

Constitutional constraints have been contested in the European Union in the recent decade. These actions by political actors in member states were not a mistake rooted in the lack of understanding of constitutional values, but rather a deliberate, methodical



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attack on constitutionalism for political gains.

The current constitutionalism backsliding in the EU underlines two essential challenges. First, the European Union is faced with a disagreement of competing visions of a constitutional future. While the contest to constitutional meaning by political actors is not shocking, it is the first time in the history of the European project that we are witnessing an open clash on competing visions of the constitutional values.

The European Union should welcome these diverse arguments being put on the table. After they are evaluated and tested against the constitutional framework, the decision

on the future constitutional provisions of the EU should entrench preferred constitutional understandings. Legal realism would assume that under the same constitutional order multiple interpretations of the constitution may cohabit, as long as they agree on common parameters. Such an understanding may only be reached within politics.

Second, the EU law proclaims constitutional values; however, the substantive EU law is yet to emerge. The current disagreements on the constitutional values and constitutional interpretation may – if allowed to be settled through an institutional process within politics in the EU – lead to the development of the substantive principles of EU law.

Constitutionalism is a process of developing and acquiring constitutional values, text, structure, order, interpretation, and application. The constitutional development means an original conception that is in the later stage most likely reexamined and adjusted with the intent for constitutional order to better reflect people's evolving views on the nature, structure, boundaries, and purpose of the constitutional government. Three decades of such a process in the European Union may seem a long time for some observers, whereas we find this period as only the infant stage of EU constitutionalism, whose future rests on the shoulders of the people.



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PORČNIK

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President of the Visio Institute in Slovenia